

Louisiana Law Review

Volume 1 | Number 3
March 1939

Federal Removal Jurisdiction

Ira S. Flory Jr.

Repository Citation

Ira S. Flory Jr., *Federal Removal Jurisdiction*, 1 La. L. Rev. (1939)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol1/iss3/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Federal Removal Jurisdiction

IRA S. FLORY, JR.*

The purpose of this article is to outline the conditions under which a suit originally commenced in a state court may be removed to a federal tribunal. It is no exaggeration to say that this is the most complicated and needlessly detailed aspect of federal procedure. At the same time, its importance to a practitioner faced with the necessity of deciding when and under what circumstances to remove a suit to the federal courts is undeniable. Therefore, the inquiry is well worth undertaking, even though the price to be paid by both author and reader alike is an excursion into a limitless jungle of constitutional provisions, statutory enactments, and a vast body of case law. The present article is in no sense intended as a definitive work. Yet, it is hoped that the abundant references to supporting authorities, both doctrinal and decisional, will clear the way to an adequate understanding of the difficult subject of removal jurisdiction.

At the outset, it is very important to note that the effect of the new Federal Rules of Civil Procedure upon removal is not within the scope of this study. It is true that the Federal Rules apply to actions removed to the federal courts and "govern all procedure *after removal*."¹ However, this work is restricted to a consideration of jurisdiction to remove. Consequently, the new rules, which operate upon removal proceedings only after removal is actually effected, will not be dealt with here.

STATUTES

The original jurisdiction of the lower federal courts is purely statutory in nature.² The only court to draw part of its powers directly from the Constitution itself is the Supreme Court, which

* Member of the Shreveport Bar.

1. Rule 81 (c), Federal Rules of Civil Procedure, 28 U.S.C.A. following § 723 (c) (Supp. 1938). *Borton v. Conn. Gen. Life Ins. Co.*, 25 F. Supp. 579 (D.C. Nev. 1938); *Shell Petroleum Corp. v. Stueve*, 25 F. Supp. 879 (D.C. Minn. 1938). See Flory and McMahon, *The New Federal Rules and Louisiana Practice* (1938) 1 LOUISIANA LAW REVIEW 45.

2. *Turner v. Bank of North America*, 4 U.S. 7, 1 L. Ed. 718 (1799); *U.S. v. Hudson and Goodwin*, 11 U.S. 32, 3 L. Ed. 259 (1812); *M'Intire v. Wood*, 11 U.S. 504, 3 L. Ed. 420 (1813); *Sheldon v. Sill*, 49 U.S. 441, 12 L. Ed. 1147 (1850).

was given original jurisdiction of "all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party."³ Hence, it can be said that for all practical purposes federal removal jurisdiction is entirely a matter of statutory law.

Removal jurisdiction was provided for in section 12 of the Judiciary Act of 1789,⁴ but it was not until after the Civil War that removal attained the considerable importance it has today. The bitterness aroused by that conflict caused Congress to allow more frequent resort to the federal courts by widening greatly the scope of cases removable. In 1866 there was passed what is often called the Separable Controversy Act.⁵ The act specially provided that the removal by the nonresident of his separable controversy did not prejudice the right of the plaintiff to continue in the state court against the other defendants.⁶

The Prejudice or Local Influence Act of 1867,⁷ amending the 1866 act, likewise did much to increase the number of cases removable. This act permitted removal under circumstances where diversity of citizenship existed and where a party, whether plaintiff or defendant, filed an affidavit that he had reason to and did believe that he could not obtain justice in the state court.

Section 639 of the United States Revised Statutes, taking effect June 22, 1874, codified the prior removal statutes, including the essentials of each. The next step was the Judiciary Act of 1875,⁸ which marks the high point of removal jurisdiction. Section 2 declared removable by either party any suit pending in a state court, (1) involving the jurisdictional sum of five hundred dollars, and (2) arising under the Constitution, laws, or treaties of the United States, or in which (3) there is a controversy between citizens of different states, or (4) in which the United States is plaintiff, or (5) a controversy between citizens of the same state claiming under land grants of different states, or (6) between citizens of a state and a foreign state, citizen, or subject. Also, (7) when in such a suit a separable controversy exists between citi-

3. U.S. Const. Art. III, § 2, cl. 2.

4. 1 Stat. 73 (1789).

5. 14 Stat. 306 (1866).

6. This is not the existing rule, for, as will be seen under the present statute, the removal of the separable controversy to the federal court takes with it the entire case, on the theory that a single court ought to pass on every phase of the case. *City of Gainesville v. Brown-Crummer Inv. Co.*, 277 U.S. 54, 48 S.Ct. 454, 72 L.Ed. 781 (1928).

7. 14 Stat. 558 (1867).

8. 18 Stat. 470 (1875).

zens of different states which could be fully settled as between them, either one or more of the plaintiffs or defendants actually interested in the controversy may remove into the circuit court (district court since Judicial Code of 1912) of the United States for the proper district. The procedure of removal is outlined in section 3, which provides (8) that the petition of removal be filed in the state court before or at the term at which the cause could be first tried and before the trial, and (9) that the bond with surety be likewise filed for entering in the circuit court a copy of the record and for the payment of costs of removal, should the case be declared improperly removed, and be remanded.

So great was the number of cases removed under the acts of the sixties and seventies, that certain limitations were deemed advisable in the Judiciary Act of 1887-88.⁹ Only the defendant—and only a nonresident one in many cases—was thereafter permitted to remove; the jurisdictional amount went up to two thousand dollars; an order remanding a case to a state court could not be reviewed on appeal; application for removal had to be made before the defendant was by state law required to file his first pleadings; and in removals for prejudice or local influence, application could no longer be made at any time before the “final” trial as under the 1867 Act, but must be made “before the trial thereof.”

These changes were carried over into the Judicial Code of 1912 (§ 28)¹⁰ which also raised the federal jurisdictional amount to a sum exceeding three thousand dollars. Sentence 1 declares that any suit of a civil nature, at law or in equity, arising under the Constitution, laws, or treaties of the United States, may be removed by the defendant or defendants to the proper district court of the United States if the case was one of which the district court had original jurisdiction. The second “carry-all” sentence provides that any other suit of a civil nature, at law or in equity, of which the United States district courts have jurisdiction, may be removed from a state court into the proper federal district court by the defendant or defendants, who must be nonresidents of that state. In the third sentence there is provision for separable controversies. Sentence 4 permits a defendant, who is a citizen of a state other than that in which suit is brought, to apply for removal at any time before trial by showing to the federal district judge that because of prejudice and local influence he will not be able

9. 24 Stat. 552 (1887); 25 Stat. 433 (1888).

10. 28 U.S.C.A. § 71 (1926).

to obtain justice in any state court in which he could have the case tried. The proviso is added that if it appears to the district judge that the state court can continue with the case as to the other defendants without prejudicing anyone's rights, the federal judge may remand that part of the suit for further proceedings in the state court; while the district court can at any time before trial—the affidavit of the removing party being opposed by the other party—inquire into whether such prejudice exists, and remand the case if satisfied that it does not. When a cause has been improperly removed, the district court may order its remand, from which decision there is no appeal. The last sentence forbids removal of suits brought in state courts of competent jurisdiction under the Federal Employers' Liability Act.

Constitutionality

The statutes of removal have had many attacks made upon them, but the grant of constitutional authority to Congress to pass acts in regard to federal jurisdiction is so wide that the federal courts have uniformly upheld such legislation,¹¹ even though some of the provisions objected to have since been changed by Congress itself. In the state courts there were early cases¹² which denied the validity of the removal statutes, but ever since the United States Supreme Court settled the question by upholding their constitutionality the state courts have submitted to that controlling decision.¹³

One more limited assault was made on that part of the 1867 Act which provided that a citizen of one state, who has started suit in a court of another state against one of its citizens, might remove to a federal court. A state court had held this invalid on the ground that by choosing the state court as his battleground a plaintiff waives the right to litigate in a federal court, which cannot divest the state court of its already-attached authority at the instance of the plaintiff.¹⁴ There was a reversal by the United States Supreme Court, however, on the ground that the statute

11. *Mayor v. Cooper*, 73 U.S. 247, 18 L.Ed. 851 (1867).

12. *Johnson v. Gordon*, 4 Cal. 368 (1854), overruled by *Greely v. Townsend*, 25 Cal. 605, 613 (1864); *Moseley v. Chamberlain*, 18 Wis. 700 (1861).

13. *Goodman v. City of Oshkosh*, 45 Wis. 355 (1878); *People ex rel. Mabley v. Judge of Superior Court*, 41 Mich. 31, 1 N.W. 985 (1879). On the other hand, even a proper case of removal does not require the state court to dismiss the case entirely, but only to permit its jurisdiction to pass to the federal court of that district when certain statutory requirements are met. *Webre v. Duroc*, 15 La. Ann. 65 (1860).

14. *Whitton v. Chicago and N. W. Ry. Co.*, 25 Wis. 424, 3 Am. Rep. 101 (1870).

was within the constitutional power of Congress to direct the federal courts to try cases on diversity of citizenship and federal questions, with nothing being said of waiver by the plaintiff of his right to litigate in federal courts by entering suit in the state court.¹⁵

Another point of disagreement between state and federal courts was the provision under the Prejudice or Local Influence Act of 1867 that removal might be made by either party to a controversy between citizens of different states on a proper showing of local prejudice, by application at any time "before final hearing or trial of the suit." A New York case declared the provision void as divesting a state court of concurrent jurisdiction after it has once attached, even though a conclusive trial has not yet been had.¹⁶ The contrary view was taken by the United States Supreme Court in *Home Life Ins. Co. v. Dunn*,¹⁷ where the plaintiff had secured a judgment acting as a lien on defendant's property, but the defendant secured the award of a new trial. The defendant then asked for removal, which was granted, on the theory that application is made before "final trial" so long as any further trial yet remained in the lower court. The judgment is final until that new trial is obtained, however, and until the application for it has been passed on, final trial is deemed to have been held, necessitating the denial of removal.¹⁸ Furthermore, after an appeal has been taken to the state supreme court, a final trial has been held below, and the case is no longer removable under this clause.¹⁹ As to what constitutes a "final trial," it has been held that a report of commissioners on a claim submitted by the state probate court is not such a trial as to prevent removal to the federal circuit court of that district.²⁰

The Act of 1887-88, as has been mentioned, set the time of removal for cases of prejudice or local influence at "any time before the trial thereof," and this has been interpreted as meaning before the *first* trial, so that application is too late after three trials

15. *Railway Co. v. Whitton*, 80 U.S. 270, 20 L.Ed. 571 (1871). Accord: *Meadow Valley Min. Co. v. Dodds*, 7 Nev. 143, 8 Am. Rep. 709 (1871); *Burson v. National Park Bank*, 40 Ind. 173, 13 Am. Rep. 285 (1872).

16. *Stephens v. Howe*, 43 How. Prac. 134 (N.Y. 1872). Accord, *Galpin v. Critchlow*, 112 Mass. 339, 17 Am. Rep. 176 (1875).

17. 86 U.S. 214, 22 L.Ed. 68 (1874).

18. *Vannevar v. Bryant*, 88 U.S. 41, 22 L.Ed. 476 (1874).

19. *Stevenson v. Williams*, 86 U.S. 572, 22 L.Ed. 162 (1873).

20. *Hess v. Reynolds*, 113 U.S. 73, 5 S.Ct. 377, 28 L.Ed. 927 (1885). Though the case arose after the Judiciary Act of 1875 was passed, that statute did not mention removal for prejudice or local influence, and so did not impliedly repeal the provision in the Act of 1867 which was still in effect.

have been held and new ones awarded.²¹ The present policy of limiting the power of removal to cases clearly within statutory bounds is shown in the refusal to allow removal for prejudice or local influence existing as between the defendants.²² Moreover, though the Judicial Code (section 28, sentence 4) does not specifically require all the conditions of original jurisdiction for the removal of such cases, these conditions are considered as implied because prejudice or local influence is merely a special ground of removal.²³

In *Tennessee v. Davis*,²⁴ the question arose as to whether a criminal case was included in the words of the Constitution: "all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority."²⁵ The Judiciary Act of 1789 had provided only for removal of civil cases, but the act of 1833 added that a prosecution against a federal revenue officer for an act committed while carrying out his duties could be removed. As a necessary precaution to protect federal authority, the majority of the Court interpreted this to mean crimes punishable by the state alone.²⁶ Since the act of 1833 included the charge of murder, it was then necessary to see whether it was constitutional and permitted under the above words. The Court held that both civil and criminal cases were included and that each type of case could constitutionally be removed if statutory authorization existed.

Another constitutional question was whether quo warranto proceedings by a state against a corporation created under its own laws could be removed.²⁷ The Constitution gives to the Supreme Court original jurisdiction in cases in which a state is a party, and also in cases involving ambassadors and ministers of other countries,²⁸ but the Court declared those provisions to have been for the protection of the states and the diplomatic officers, to prevent the consequences of suit against them in a court of lesser dignity. When the state or minister is the plaintiff, the reason for exclusive jurisdiction in the Supreme Court does not apply, and when a

21. *Fisk v. Henarie*, 142 U.S. 459, 12 S.Ct. 207, 36 L.Ed. 1080 (1892).

22. *Hanrick v. Hanrick*, 153 U.S. 192, 14 S.Ct. 835, 38 L.Ed. 685 (1894).

23. *In re Pennsylvania Co.*, 137 U.S. 451, 11 S.Ct. 141, 34 L.Ed. 738 (1890) (jurisdictional amount of \$2,000 was needed).

24. 100 U.S. 257, 25 L.Ed. 648 (1880).

25. U.S. Const. Art. III, § 2.

26. The dissent presented the idea that the only crimes triable in federal courts are those made such by act of Congress.

27. *Ames v. Kansas*, 111 U.S. 449, 4 S.Ct. 437, 28 L.Ed. 482 (1884).

28. U.S. Const. Art. III, § 1.

federal question is raised by the state's inquiry in its own courts as to a corporation's authority to do business there, removal is allowed to the federal circuit court.²⁹

In performing its duty of determining whether a case is properly removed, the federal district court must, under the present trend,³⁰ decide whether the strict requirements of the applicable statute are met; and if not, the usual procedure is to remand to the state court—an action which cannot be reviewed on appeal.^{30a} If there are two plaintiffs who are citizens of different states, and the defendant is a citizen of still a third, suit in the district where one plaintiff resides does not satisfy the requirement that suit be in the home district of either plaintiff or defendant.³¹ This venue provision applies to corporations as well as to natural persons, to protect them from suit at any place other than the home district of plaintiff or defendant.³² An action against a receiver of a state corporation is not such a suit under the federal constitution or laws as to allow the receiver to remove because of his appointment by a federal court, though he might also have been sued in the court selecting him.³³

This, then, is the importance of the removal statutes: the entire right to take a case from a competent state court to the federal tribunal of concurrent jurisdiction rests on bringing the case within the terms of an act of Congress which does not exceed the limits set forth in the Constitution. The state court judges only the question of law, that is, whether the petition and bond of removal conform to these statutes, and if it decides this question affirmatively, the state court is immediately divested of control over the case, leaving to the federal courts any issues of fact that might arise.³⁴ The statutory requirements must be strictly met before

29. The quo warrant proceeding, while somewhat penal in nature, was declared sufficiently a civil suit to come under the removal acts; and the defendant, though a resident, was allowed to remove since the removal on the ground of a federal question does not even now require nonresidence of the removing party. Judicial Code, § 28, sentence 1, 28 U.S.C.A. § 71 (1926); and so held in *General Inv. Co. v. Lake Shore and M.S. Ry. Co.*, 260 U.S. 261, 43 S.Ct. 106, 67 L.Ed. 244 (1922).

30. *Clinger's Adm'x v. Chesapeake & Ohio Ry. Co.*, 138 Ky. 615, 128 S.W. 1065 (1910).

30a. *Pabst v. Roxana Petroleum Co.*, 30 F. (2d) 953 (D.C.S.D. Tex. 1929).

31. *Smith v. Lyon*, 133 U.S. 315, 10 S.Ct. 303, 33 L.Ed. 635 (1890).

32. *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 12 S.Ct. 935, 36 L.Ed. 768 (1892).

33. *Gableman v. Peoria, Decatur, and Evansville R. Co.*, 179 U.S. 335, 21 S.Ct. 171, 45 L.Ed. 220 (1900).

34. *Kern v. Huidekoper*, 103 U.S. 485, 26 L.Ed. 354 (1880); *Manning v. Amy*, 140 U.S. 137, 11 S.Ct. 707, 35 L.Ed. 386 (1891); *Madisonville Traction Co.*

the state court loses control of the case. Legislative policy has frequently prompted changes in the statutes themselves, and the courts have followed their lead, mostly toward the restriction of federal jurisdiction on removal.³⁵ So well have the courts done their work in this no-man's-land of jurisdiction that from the badly-drawn statute passed in 1887-88 and from such pre-existing principles as were still applicable, there has emerged a certain degree of order. What that order consists in will be considered at some length in the remaining sections of this article.

WAIVER AND STATE STATUTES

Non-interference by States

Since federal jurisdiction is governed by federal statute, the states cannot interfere with the privilege of its exercise.³⁶ The right of removal likewise exists independently of state action, which cannot be used directly or indirectly to limit or defeat it.³⁷ At times, the states use ingenious devices to prevent removal, but usually they fail. For example, the provision in a state wrongful death statute, that such a suit could be brought only in its courts, was declared void, and removal could be secured on a showing of federal jurisdiction.³⁸

A federal court will decide for itself whether it has jurisdiction over the subject-matter of a case,³⁹ and it makes this decision as to probate matters, unaffected by limitations of state statute⁴⁰ or order of the state court.⁴¹ A state statute cannot call unnecessary parties indispensable so as to forestall removal,⁴² nor can it prevent a party from removing by calling him a plaintiff when he

v. St. Bernard Min. Co., 196 U.S. 239, 25 S.Ct. 251, 49 L.Ed. 462 (1905). However, on occasion there has been an appeal to the state supreme court from an order of removal, instead of a motion to remand. *Fournet v. De Vilbiss*, 187 La. 191, 174 So. 259 (1937), and cases therein cited (under par. [1]).

35. *Golden v. Sixth Judicial Dist. Ct.*, 58 P. (2d) 1042 (1936).

36. *Reagan v. Farmers' Loan Co.*, 154 U.S. 362, 14 S.Ct. 1047, 38 L.Ed. 1014 (1894); *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U.S. 239, 26 S.Ct. 251, 49 L.Ed. 462 (1905); *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A. (N.S.) 932, 14 Ann. Cas. 764 (1908).

37. *Hess v. Reynolds*, 113 U.S. 73, 5 S.Ct. 377, 28 L.Ed. 927 (1885); *Goldey v. Morning News*, 156 U.S. 518, 15 S.Ct. 559, 39 L.Ed. 517 (1895); *Southern R. Co. v. Allison*, 190 U.S. 326, 23 S.Ct. 713, 47 L.Ed. 1078 (1903); *Courtney v. Pradt*, 196 U.S. 89, 25 S.Ct. 208, 49 L.Ed. 398 (1905).

38. *Railroad Company v. Whitton's Admr.*, 80 U.S. 270, 20 L.Ed. 571 (1872).

39. *Barrow v. Hunton*, 99 U.S. 80, 25 L.Ed. 407 (1879).

40. *Hess v. Reynolds*, 113 U.S. 73, 5 S.Ct. 377, 28 L.Ed. 927 (1885); *Franz v. Wahl*, 81 Fed. 9 (D.C.E.D. Ark. 1897).

41. *Gaines v. Fuentes*, 92 U.S. 10, 23 L.Ed. 524 (1875).

42. *Webb v. Southern Ry. Co.*, 235 Fed. 578 (D.C.S.D. Ala. 1916), reversed on other grounds 248 Fed. 618 (C.C.A. 5th, 1918), cert. denied 247 U.S. 518, 38 S.Ct. 582, 62 L.Ed. 1245 (1918).

is really a defendant.⁴³ The requirements of federal jurisdiction being present and available to the petitioning party, it has been held that removal could not be prevented by state statutes which fix the form of judicial review;⁴⁴ which provide that proceedings of a party failing to pay the costs of a motion should halt until payment;⁴⁵ which restrict the method of condemnation under eminent domain;⁴⁶ or which call for trial without jury in workmen's compensation cases, when the Seventh Amendment would require a jury in the federal court.⁴⁷

State Statutes Obstructing Removal by Foreign Corporations

One of the chief attacks on the right of removal has been the enactment by a few states of statutes contemplating a denial of that privilege to a foreign corporation doing business within the state. The first method, declared invalid in *Home Insurance Co. v. Morse*,⁴⁸ was to require that as a prerequisite to doing business in the state, the foreign corporation must sign an agreement not to remove any action into the federal court when sued in the state courts. On error to the highest state court, the United States Supreme Court declared this act unconstitutional as taking from the nonresident person a right conferred by a valid act of Congress, namely, his right to sue in the federal court in a proper case of diversity of citizenship. A state statute cannot thus limit the powers of the federal courts by requiring in advance a waiver of the right to remove, though it was left open whether it could keep the corporation out of the state altogether, or make other reasonable regulations respecting it. Every subsequent case has recognized this principle of the *Morse* decision, that a state cannot require an advance waiver of the entire right of removal, however much these

43. *Chicago, M. and St. P. Ry. Co. v. Drainage Dist. No. 8*, 253 Fed. 491 (D.C.S.D. Iowa 1917).

44. *Iowa Loan and Trust Co. v. Fairweather*, 252 Fed. 605 (D.C.S.D. Iowa 1918).

45. *Hulbert v. Russo*, 64 Fed. 8 (C.C.S.D. N.Y. 1894).

46. *Warren v. Wisconsin Valley R. Co.*, Fed. Cas. No. 17,204 (C.C.W.D. Wis. 1875).

47. *McLaughlin v. Western Union Tel. Co.*, 7 F. (2d) 177 (D.C.E.D. La. 1925).

48. 87 U.S. 445, 22 L.Ed. 365 (1874). Other state acts concerned chiefly with the regulation of service on foreign corporations doing business in the state, and not with preventing removal, were upheld in state courts; these decisions would probably be approved by the federal Supreme Court. *Herryford v. Aetna Ins. Co.*, 42 Mo. 148 (1868); submission by a nonresident insurance corporation to the state statute on service of process on a local agent, does not impair its right of removal under federal acts. Accord, *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417, 96 Am. Dec. 472 (1869); *Western Union Tel. Co. v. Dickinson*, 40 Ind. 444, 13 Am. Rep. 295 (1872).

cases might differ on the validity of a statute which revoked the corporation's license for effecting a removal.

A view which received some support for a number of years, was first presented in *Doyle v. Continental Insurance Co.*⁴⁹ Here the Court pointed out that the states were recognized as being able to impose reasonable terms and conditions preliminary to granting permission to corporations to do business within their borders,⁵⁰ and then the Court attempted to confine the *Morse* case to its own facts by declaring that it did not cover the question of a state's power to revoke a license already granted. Considering the revocation of the license as a mere correlative of the acknowledged right of complete exclusion or the imposition of such conditions as the state may wish, the majority pronounced valid the act calling for revocation of the license because of the removal. That permission was given to do indirectly what the *Morse* case forbade the states to do directly (i.e., to prevent removal) was denied on the ground that the corporation was not forced to give up its remedy of removal, but was simply given the option of either remaining in the state court or ceasing to do business in the state. The dissent considered the *Morse* case as governing, and felt that the reasoning of the prevailing opinion made a distinction without a difference.

The *Doyle* case was in its turn limited to its facts by *Barron v. Burnside*.⁵¹ This case lines up with the *Morse* case on the proposition that a state cannot limit federal jurisdiction by forcing a corporation to agree in advance to forego removal in order to do business there, leaving the rule of the *Doyle* case as permitting the state to revoke its license when removal was made, with no advance waiver required. In *Southern Pac. R. Co. v. Denton*⁵² there was a further whittling down of the *Doyle* case, with an affirmation of the principle that a state cannot by legislative declaration force a foreign corporation to become a local one by merely conforming to local registration statutes. Then came *Security Mut.*

49. 94 U.S. 535, 24 L.Ed. 148 (1877).

50. *Lafayette Insurance Co. v. Franch*, 59 U.S. 404, 15 L.Ed. 451 (1855); *Paul v. Virginia*, 75 U.S. 168, 19 L.Ed. 357 (1868); *Ducat v. Chicago*, 77 U.S. 410, 19 L.Ed. 972 (1870).

51. 121 U.S. 186, 7 S.Ct. 931, 30 L.Ed. 915 (1887).

52. 146 U.S. 202, 13 S.Ct. 44, 36 L.Ed. 943 (1892). *St. Louis and San Francisco Ry. Co. v. James*, 161 U.S. 545, 16 S.Ct. 621, 40 L.Ed. 802 (1896); *Rece v. Newport and Miss. Valley News Co.*, 32 W. Va. 164, 9 S.E. 212, 3 L.R.A. 572 (1889). Distinguish actual local reincorporation: *Memphis and Charleston R. Co. v. Alabama*, 107 U.S. 581, 2 S.Ct. 432, 27 L.Ed. 711 (1882).

*Life Ins. Co. v. Prewitt*⁵³ which affirmed the rule of the *Doyle* case that although a state statute cannot exact from a foreign corporation entering the state the promise not to remove to the federal courts, it can provide for revocation of the license to do business in the state when such removal is made.⁵⁴ To the same effect was *National Council v. State Council*.⁵⁵

A series of cases followed, hedging in the *Doyle* and *Prewitt* rule and culminating in its overruling in *Terral v. Burke Const. Co.*⁵⁶ First, *Southern R. Co. v. Allison*⁵⁷ held that compliance by a foreign corporation with the state's regulations for doing business does not make it a citizen thereof for purposes of federal jurisdiction. Next, *Western Union Tel. Co. v. Kansas*⁵⁸ distinguished the *Prewitt* case on the ground that the business of the insurance company there involved was not interstate commerce, thus bringing in the many cases which forbid the states to lay an unreasonable burden on interstate commerce. This was a violation of the Constitution, and came within the statement of the *Prewitt* case that in imposing conditions on the incoming corporation, the state may not effect any regulation which violates the federal Constitution. *Herndon v. Chicago, R. I. & P. R. Co.*⁵⁹ contributed the idea that the revocation statute did not regulate or exclude a foreign corporation, but actually banished a corporation already doing a lawful business, simply because it had exercised its legal privilege to resort to a federal court to pass on a case having the proper requirements. There was no such penalty imposed on a domestic corporation suing in the federal courts, and such discrimination invalidated the statute.⁶⁰ In *Harrison v. St. Louis, & S. F. R. Co.*⁶¹ the principle was affirmed that the determination of federal jurisdiction belongs to the federal courts, and that the imposition of heavy penalties on the foreign corporation for submitting the petition of removal is inoperative to prevent the exercise of a constitutional privilege.⁶²

53. 202 U.S. 246, 26 S.Ct. 619, 50 L.Ed. 1013, 6 Ann. Cas. 317 (1906).

54. Followed in *State v. Hodges*, 114 Ark. 155, 169 S.W. 942, L.R.A. 1916F 122 (1914).

55. 203 U.S. 151, 27 S.Ct. 46, 51 L.Ed. 132 (1906).

56. 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352, 21 A.L.R. 186 (1922).

57. 190 U.S. 326, 23 S.Ct. 713, 47 L.Ed. 1078 (1903).

58. 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355 (1910).

59. 218 U.S. 135, 30 S.Ct. 633, 54 L.Ed. 970 (1910).

60. To the same effect, see *Swanger v. Atchison, T. and S. F. Ry. Co.*, 218 U.S. 159, 30 S.Ct. 639, 54 L.Ed. 978 (1910); *Western Union Tel. Co. v. Julian*, 169 Fed. 166 (C.C.N.D. Ala. 1909).

61. 232 U.S. 318, 34 S.Ct. 333, 58 L.Ed. 621, L.R.A. 1915F 1187 (1914).

62. Followed in *Donald v. Philadelphia and Reading Coal & Iron Co.*, 241 U.S. 329, 36 S.Ct. 563, 60 L.Ed. 1027 (1916).

Finally, *Terral v. Burke Const. Co.* put a *quietus* upon such state statutes. The court upheld the granting of an injunction against the threatened revocation under state statute of the license of a corporation to do business in Arkansas, finding in a review of the cases that the more recent ones forbade state interference with removal rights, whether by requiring an advance waiver of the right, or by threatening withdrawal of the license to do business for making a removal.

“. . . [the principle of these cases] rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law.”⁶³

The *Doyle* and *Prewitt* cases were then expressly overruled, and the long conflict settled, with earlier cases on both sides retaining only historical significance.

The outcome of a recent case⁶⁴ makes it at least possible that the power of taxation may in the future be used as a weapon to force alien corporations to reincorporate within the state, and so to lose the power to remove. If the license tax for doing business in a state can be figured on the basis of all the units possessed by the foreign corporation in the entire country, it will not be difficult for officials of large corporations to decide whether to reincorporate those units within the state, so as to reduce the number of units by which the tax is measured. If this scheme were successful, it would probably have the incidental effect of preventing the local company from removing an action commenced by a resident of that state.

Individual Waiver

It has already been pointed out that advance waiver of removal in all future cases cannot be extorted from a corporation as a condition for the grant of a license to do business in a state.⁶⁵ The rule is equally unquestioned that after suit has been started

63. *Terral v. Burke Const. Co.*, 257 U.S. 529, 532-533, 42 S.Ct. 188, 66 L.Ed. 352, 21 A.L.R. 186 (1922).

64. *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293 (1937).

65. *Home. Ins. Co. v. Morse*, 87 U.S. 445, 22 L.Ed. 365 (1874), and cases endorsing that principle cited above.

in the state court, the right of removal may be waived by one of the parties, the right being a personal privilege and not a matter of public policy.⁶⁶ Such waiver may be either express,⁶⁷ or implied from failure to ask for removal properly.⁶⁸ It has even been held that the defendant can withdraw his removal petition and bond inadvertently filed, if the transcript has not been sent to the federal court.⁶⁹

In each case, then, we have the question of whether the party attempting to remove is prevented from so doing by previous waiver. If a removable case is presented only after the parties have stipulated the time of trial in the state court, that does not prevent removal by the defendant.⁷⁰ However, the defendant must ask for this removal at once, otherwise he impliedly waives that right by proceeding to trial.⁷¹ An outright waiver of removal by the defendant still binds him after an amendment of the original petition.⁷² Also, when a case becomes removable for the first time as a result of evidence showing that a resident defendant was fraudulently joined by the plaintiff, the nonresident defendant must again tender its motion and bond of removal, and failure to do so acts as a waiver.⁷³

The right of removal is lost by a motion to discharge an arrest, which serves as a general appearance,⁷⁴ but is not lost by the defendant's appearance and admission of service without personal summons given him,⁷⁵ or a stipulation between parties by which the defendant agrees to the state court's having jurisdiction over

66. *Wadleigh v. Standard Life & Accident Ins. Co.*, 76 Wis. 439, 45 N.W. 109 (1890).

67. *Smithson v. Chicago G. W. Ry. Co.*, 71 Minn. 216, 73 N.W. 853 (1898), *aff'd* *Whitcomb v. Smithson*, 175 U.S. 635, 20 S.Ct. 248, 44 L.Ed. 303 (1900).

68. *Lesh v. Bailey*, 49 Ind. App. 254, 95 N.E. 341 (1911).

69. *Texas and Pac. Ry. Co. v. Davis*, 93 Tex. 378, 55 S.W. 562 (1900).

70. *Murphy v. Stone and Webster Engineering Corp.*, 44 Mont. 146, 119 Pac. 717, Ann. Cas. 1913A 1334 (1911). See also *Remington v. Central Pac. R. Co.*, 198 U.S. 95, 25 S.Ct. 577, 49 L.Ed. 959 (1905), where a petition of removal was held to be timely when filed as soon as the case became removable by the plaintiff's amended statement of the amount involved, even if the time for answer under state practice had passed.

71. *Northern Pac. R. Co. v. Austin*, 135 U.S. 315, 10 S.Ct. 758, 34 L.Ed. 218 (1890); *Lesh v. Bailey*, 49 Ind. App. 254, 95 N.E. 341 (1911); *Golden v. Northern Pac. Ry. Co.*, 39 Mont. 435, 104 Pac. 549, 34 L.R.A. (N.S.) 1154, 18 Ann. Cas. 886 (1909).

72. *Texas and Pac. R. Co. v. Matkin*, 142 S.W. 604 (1912), *aff'd* 107 Tex. 125, 174 S.W. 1098 (1915).

73. *Broadway Coal Mining Co. v. Robinson*, 150 Ky. 707, 150 S.W. 1000 (1912).

74. *Dart v. Arnis*, 19 How. Prac. 429 (N.Y. 1860).

75. *Judson v. Knights of the Maccabees*, 220 Fed. 1004 (D.C.W.D. N.Y. 1914).

his person, the latter position not being inconsistent with removal.⁷⁶ There is, however, an inconsistency between a motion for removal and a plea in abatement. The former looks to state court's surrender of its jurisdiction, and the latter to its retaining the case to determine the plea. Removal cannot be asked in the event that a plea in abatement is overruled.⁷⁷ Likewise, the demurrer of a defendant presents the merits of the case to the state court, and removal should not be allowed after the demurrer is overruled there. To do so would cause a federal court to pass on those same issues.⁷⁸ The mere filing of a demurrer does not, however, prevent removal when no hearing is had on it sufficient to constitute a passing on the merits of the case.⁷⁹

Removal is waived when application is made after the time named in the statute.⁸⁰ This requirement of filing before the time for first pleadings under state law is not violated by application after a condemnation proceeding, since such action is not a trial in a court of record.⁸¹ Similarly, participation in certain other hearings on preliminary motions does not prevent removal, such as the taking of depositions,⁸² reference to arbitrators,⁸³ consent to the appointment of an auditor,⁸⁴ motion for adjournment,⁸⁵ a special appearance to make a motion in abatement of an attachment,⁸⁶ a motion in opposition to the appointment of a receiver⁸⁷ or favoring his discharge,⁸⁸ or a motion for dissolution of an injunction.⁸⁹

76. *Southern Pac. Co. v. Stewart*, 88 Ga. 13, 13 S.E. 824 (1891).

77. *Amy v. Manning*, 144 Mass. 153, 10 N.E. 737 (1887), *aff'd* 140 U.S. 137, 11 S.Ct. 707, 35 L.Ed. 386 (1891).

78. *Alley v. Nott*, 111 U.S. 472, 4 S.Ct. 495, 28 L.Ed. 491 (1884); *Scharff v. Levy*, 112 U.S. 711, 5 S.Ct. 360, 28 L.Ed. 825 (1884).

79. *Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co.*, 83 Fed. 853 (C.C. Ind. 1897); *Duncan v. Associated Press*, 81 Fed. 417 (C.C.S.D. Cal. 1897).

80. *Rosenthal v. Coates*, 148 U.S. 142, 13 S.Ct. 576, 37 L.Ed. 399 (1893).

81. *Town of Waynesville v. Smathers*, 194 N.C. 131, 138 S.E. 613 (1927).

82. *McMillen v. Indemnity Ins. Co. of N.A.*, 8 F. (2d) 881 (D.C.W.D. Mo. 1925); *Scott v. Hull*, 14 Ind. 136 (1860).

83. *Thorne v. Towanda Tanning Co.*, 15 Fed. 289 (C.C.W.D. Pa. 1882).

84. *Stone v. Sargent*, 129 Mass. 503 (1880).

85. *Fogarty v. Southern Pac. Co.*, 121 Fed. 941 (C.C.S.D. Cal. 1903).

86. *Calderhead v. Downing*, 103 Fed. 27 (C.C.N.D. Wash. 1900); *Purdy v. Wallace Muller and Co.*, 81 Fed. 513 (C.C. Mass. 1897); *Whiteley Malleable Castings Co. v. Sterlingworth Railway Supply Co.*, 83 Fed. 853 (C.C. Ind. 1897); *Southern Pac. Co. v. Stewart*, 88 Ga. 13, 13 S.E. 824 (1891). On the other hand, a state decision in *Bell v. Bell*, 3 W. Va. 183 (1869) held that the defendant's appearance to bond an attachment served as consent to the jurisdiction and waiver of removal.

87. *Sidway v. Missouri Land & Live Stock Co., Ltd.*, 116 Fed. 381 (C.C. Mo. 1902).

88. *Franklin v. Wolf*, 78 Ga. 446, 3 S.E. 696 (1887).

89. *Garrard v. Silver Peak Mines*, 76 Fed. 1 (C.C. Nev. 1896); *Atlanta, K. and N. Ry. Co. v. Southern R. Co.*, 131 Fed. 657 (C.C.A. 6th, 1904), *cert. denied* 195 U.S. 634, 25 S.Ct. 791, 49 L.Ed. 354 (1904).

The defendant must except to an order of court extending the time for pleading. Otherwise he waives the right to remove.⁹⁰ As for such an extension by consent of parties, authority is divided, with no Supreme Court decision on the point. One view is that removal can be had only within the time for defendant's first pleading under state law, and the parties cannot agree to extend this period;⁹¹ while the other view allows such a stipulation to extend the time for removing.⁹²

The right of removal is lost by making a defense in the state court before filing the petition and bond of removal,⁹³ by an application for a change of venue,⁹⁴ by a delay in filing the removal petition and bond until after the time for the defendant's pleading under state law,⁹⁵ and by proceeding to trial without calling the state court's attention to the filing of a petition and bond of removal.⁹⁶ Removal of a separable controversy is waived when the defendant does not object to the introduction of evidence concerning it in the state court.⁹⁷ On the other hand, failure to file the record in the federal court within the specified time does not automatically divest its jurisdiction, and that court has the discretion to keep or remand the case.⁹⁸

After the defendant has filed a sufficient petition and bond of removal, which the state court improperly overrules, he can except and proceed to present the merits of the case in the state court without waiving the right of removal.⁹⁹ He must be careful not to ask affirmative relief by a counterclaim, whether set-off or recoupment, since the act of invoking such aid of the state court

90. *Rock Island Nat. Bank v. Keator Lumber Co.*, 52 Fed. 897 (C.C.N.D. Ill. 1892); *Wilcox and Gibbs Guano Co. v. Phoenix Ins. Co.*, 60 Fed. 929 (C.C. S.C. 1894); *Schipper v. Consumer Cordage Co.*, 72 Fed. 803 (C.C.S.D. N.Y. 1895).

91. *Howard v. Southern Ry. Co.*, 122 N.C. 944, 29 S.E. 778 (1898); *Bryson v. Southern Ry. Co.*, 141 N.C. 594, 54 S.E. 434 (1906); *Dills v. Champion Fiber Co.*, 175 N.C. 49, 94 S.E. 694 (1917).

92. *Groton Bridge and Mfg. Co. v. Amer. Bridge Co.*, 137 Fed. 284 (C.C.N.D. N.Y. 1905).

93. *Hudson River Ry. and Terminal Co. v. Day*, 54 Fed. 545 (C.C. N.J. 1893); *Daugherty v. Sharp*, 171 Fed. 466 (C.C.E.D. Mich. 1905).

94. *First Nat. Bank of Wausau v. Conway*, 67 Wis. 210, 30 N.W. 215 (1886).

95. *Rosenthal v. Coates*, 148 U.S. 142, 13 S.Ct. 576, 37 L.Ed. 399 (1893); *Choctaw, O. and G. Ry. Co. v. Burgess*, 21 Okl. 110, 95 Pac. 606 (1908).

96. *Home Ins. Co. v. Curtis*, 32 Mich. 402 (1875).

97. *St. Louis-San Francisco Ry. Co. v. Simmons*, 116 Okl. 126, 242 Pac. 151 (1926).

98. *Steamship Co. v. Tugman*, 106 U.S. 118, 1 S.Ct. 58, 27 L.Ed. 87 (1882).

99. *Removal Cases*, 100 U.S. 457, 25 L.Ed. 593 (1879); *Railroad Co. v. Miss.*, 102 U.S. 135, 26 L.Ed. 96 (1880); *Kern v. Huidekoper*, 103 U.S. 485, 26 L.Ed. 354 (1881); *Powers v. Chesapeake and Ohio Ry. Co.*, 169 U.S. 92, 18 S.Ct. 264, 42 L.Ed. 673 (1898).

serves as consent to its jurisdiction over the case.¹⁰⁰ Presenting his claims for removal to the state appellate court, however, does not act as a waiver of the right of removal.¹⁰¹

GENERAL PRINCIPLES OF REMOVAL

What is a "Suit"?

Inasmuch as federal original and removal jurisdiction extends only to "suits at law and in equity,"¹⁰² it is necessary to discover whether a proceeding in the state court qualifies as a suit in the federal sense before a removal can be made. The test laid down by Chief Justice Marshall in *Weston v. Charleston* is as follows:

"Is a writ of prohibition a suit? The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a Court of Justice, by which an individual pursues that remedy in a Court of Justice which the law affords him. The modes of proceedings may be various, but if a right is litigated between parties in a Court of Justice, the proceeding by which the decision of the Court is sought is a suit."¹⁰³

An application for a writ of mandamus to force an executive department head to do the merely ministerial duty of paying money authorized by Congress was held to be a suit within the jurisdiction of a federal court.¹⁰⁴ The highest state court's decision on a writ of habeas corpus was held to be a final judgment in a "suit," so as to give jurisdiction to the Supreme Court on writ of error.¹⁰⁵ As for a condemnation proceeding, a hearing before the mayor of a city and a jury to settle the value of land seized for a street is not a "suit" so as to be removable, but it becomes so when appealed to the state circuit court.¹⁰⁶

A probate proceeding is not ordinarily a "suit," but can be-

100. *Merchant's Heat and Light Co. v. Clow and Sons*, 204 U.S. 286, 27 S.Ct. 265, 51 L.Ed. 488 (1907); *Texas and Pac. Ry. Co. v. Eastin and Knox*, 214 U.S. 153, 29 S.Ct. 564, 53 L.Ed. 946 (1909).

101. *Meecke v. Valley Town Mineral Co.*, 89 Fed. 209 (C.C.W.D. N.C. 1898); *Texas and P. Ry. Co. v. Davis*, 93 Tex. 378, 55 S.W. 562 (1900).

102. U.S. Const. Art. III, § 2.

103. 27 U.S. 449, 464, 7 L.Ed. 481 (1829).

104. *Kendall v. U.S.*, 37 U.S. 524, 9 L.Ed. 1181 (1838).

105. *Holmes v. Jennison*, 39 U.S. 540, 10 L.Ed. 579 (1840); *Ex parte Milligan*, 71 U.S. 2, 18 L.Ed. 281 (1866).

106. *Pacific R. Removal Cases (Union Pac. R. Co. v. Kansas)*, 115 U.S. 1, 5 S.Ct. 1113, 29 L.Ed. 319 (1884). See also *Kohl v. U.S.*, 91 U.S. 367, 23 L.Ed. 449 (1875); *Mississippi and Rum River Boom Co. v. Patterson*, 98 U.S. 403, 25 L.Ed. 206 (1878); *Searl v. School Dist. No. 2*, 124 U.S. 197, 8 S.Ct. 460, 31 L.Ed. 415 (1888); *Delaware County v. Diebold Safe and Lock Co.*, 133 U.S. 473, 10 S.Ct. 399, 33 L.Ed. 674 (1890); *Mason City and Fort Dodge Ry. Co. v. Boynton*, 204 U.S. 570, 27 S.Ct. 321, 51 L.Ed. 629 (1907).

come one if a contestation arises and is carried on between the parties; and when the state law authorizes a suit to annul a will, the proceeding is a "suit" removable to the federal court if there is diversity of citizenship between the parties and the requisite jurisdictional amount is involved.¹⁰⁷ The same is true of a proceeding begun in a state probate court by a creditor against his debtor's estate, and then removed to a federal court.¹⁰⁸

An action for a declaratory judgment, to restrain the sale of a new prior preference stock under an amendment to the certificate of incorporation which displaced the right of the holder of the old preferred stock to cumulative dividends, was held a "suit" and therefore removable.¹⁰⁹ A quo warranto proceeding by a state against a corporation, when in the form of a civil action, is such a suit as to be removable, on the ground that the state is a party.¹¹⁰ However, when a hearing in a state county court is had simply to assess the value of property for taxation purposes, with no adverse issue between the parties, there is no case or controversy and the proceeding is not removable.¹¹¹

The federal court will decide for itself whether a suit is presented or not;¹¹² and though a federal court cannot review a state court's decision that a contract is void on grounds of public policy, it can pass on whether a state statute violates the federal Constitution when it is claimed that the obligation of an existing contract is impaired.¹¹³ An ever-present limitation is that only a suit between two parties can be removed, at present only by the defendant¹¹⁴—in many cases only by a nonresident defendant. A state court has held that a claim against an insolvent estate is not such a suit.¹¹⁵

107. *Ellis v. Davis*, 109 U.S. 485, 3 S.Ct. 327, 27 L.Ed. 1006 (1883). Accord: *Gaines v. Fuentes*, 92 U.S. 10, 23 L.Ed. 524 (1875); *Dallas Bank and Trust Co. v. Holloway*, 50 F. (2d) 197 (D.C.N.D. Tex. 1931).

108. *Hess v. Reynolds*, 113 U.S. 73, 5 S.Ct. 377, 28 L.Ed. 927 (1885).

109. *Harr v. Pioneer Mechanical Corporation*, 1 F. Supp. 294 (D.C.S.D. N.Y. 1932).

110. *Ames v. Kansas*, 111 U.S. 449, 4 S.Ct. 437, 28 L.Ed. 927 (1884).

111. *Upshur County v. Rich*, 135 U.S. 467, 10 S.Ct. 651, 34 L.Ed. 196 (1890).

112. *Commissioners of Road Improv. Dist. No. 2 v. St. Louis Southwestern Ry. Co.*, 257 U.S. 547, 42 S.Ct. 250, 66 L.Ed. 364 (1922); *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U.S. 239, 25 S.Ct. 251, 49 L.Ed. 462 (1905); *Mason City and Ft. D. R. Co. v. Boynton*, 204 U.S. 570, 27 S.Ct. 321, 51 L.Ed. 629 (1907).

113. *Delmas v. Merchants' Mut. Ins. Co.*, 81 U.S. 661, 20 L.Ed. 757 (1872);

Northwestern University v. Illinois, 99 U.S. 309, 25 L.Ed. 387 (1879).

114. *West v. Aurora City*, 73 U.S. 139, 18 L.Ed. 819 (1868).

115. *Jacobs v. Jacobs*, 110 Mass. 229 (1872).

Potentiality of Originality

Prior to the Act of 1887-88, there was no express provision of law limiting removal to cases of which a federal court had original jurisdiction, but such a requirement was held to be implied under the Judiciary Act of 1789.¹¹⁶ However, no such necessity was found under the Act of 1867. The question is now settled by that section of the Act of 1887-88 which provides that removal is allowed in cases ". . . of which the district courts of the United States are given original jurisdiction."¹¹⁷ A variety of cases have since been examined to discover if all essentials of original federal jurisdiction are present.¹¹⁸

The district in which removal is had—venue—does not at present come under this rule. The venue provision is that

" . . . no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."¹¹⁹

The first group of cases (until 1906) held this statement not to apply to removal; and, if any federal court had jurisdiction over the subject-matter of the case, the defendant could waive either his right to object to lack of service on himself¹²⁰ or to suit being in a district other than the residence of one of the parties,¹²¹ and this waiver was made when the defendant removed the action.¹²² State decisions of that period likewise recognized such a waiver by defendant of objections to venue.¹²³

116. *Smith v. Rines*, 22 Fed. Cas. No. 13,100 (C.C. Mass. 1836); *Beardsley v. Torrey*, 2 Fed. Cas. No. 1,190 (C.C. Pa. 1822); *Ward v. Arredondo*, 29 Fed. Cas. No. 17,148 (C.C. N.Y. 1825).

117. Judicial Code, § 28, 28 U.S.C.A. § 71 (1926).

118. *Mexican Nat. R. Co. v. Davidson*, 157 U.S. 201, 15 S.Ct. 563, 39 L.Ed. 672 (1895); *Arkansas v. Kansas and T. Coal Co.*, 183 U.S. 185, 22 S.Ct. 47, 46 L.Ed. 144 (1901); *Boston and Mont. Consol. Copper Min. Co. v. Montana Ore Purchasing Co.*, 188 U.S. 632, 23 S.Ct. 434, 47 L.Ed. 626 (1903); *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 24 S.Ct. 598, 42 L.Ed. 870 (1904); *In re Dunn*, 212 U.S. 374, 29 S.Ct. 299, 53 L.Ed. 558 (1909).

119. Judicial Code, § 51, 28 U.S.C.A. § 112 (Supp. 1938).

120. *Pollard v. Dwight*, 8 U.S. 421, 2 L.Ed. 666 (1808).

121. *Ex parte Schollenberger*, 96 U.S. 369, 24 L.Ed. 853 (1877).

122. *Gracie v. Palmer*, 21 U.S. 699, 5 L.Ed. 719 (1823); *Interior Constr. and Improvement Co. v. Gibney*, 160 U.S. 217, 16 S.Ct. 272, 40 L.Ed. 401 (1895).

123. *American Finance Co. v. Bostwick*, 151 Mass. 19, 23 N.E. 656 (1890); *Craven v. Turner*, 82 Me. 383, 19 Atl. 864 (1890); *Koshland v. National Fire Ins. Co.*, 31 Ore. 205, 49 Pac. 845 (1897); *Duff v. Hildreth*, 183 Mass. 440, 87 N.E. 356 (1903).

Then, in 1906, *Ex parte Wisner*¹²⁴ held that a suit in a state court in a district other than the residence of one party could not be removed for diversity of citizenship, *at least when the plaintiff objected*. These last words pointed the way for the partial overruling of the *Wisner* decision two years later by *In re Moore*, which held that the objection to venue could be waived by the parties: the defendant by removing, and the plaintiff by express waiver or an act amounting to waiver.¹²⁵ With the limitation that venue could be waived by both parties, the *Wisner* rule was generally applied by the lower federal courts,¹²⁶ and by the state courts,¹²⁷ with some exceptions.¹²⁸ However, this rule was not destined to last.

The overruling of the *Wisner* case was foreshadowed in *General Investment Co. v. Lake Shore and Mich. So. Ry. Co.*,¹²⁹ which criticized the application of the venue provision to removal cases possessing jurisdictional requirements. Finally *Lee v. Chesapeake and Ohio Ry. Co.* removed the last vestige of the *Wisner* rule.

"It will be perceived that the right of removal under § 28 arises whenever a suit within the general jurisdiction of the District Courts is begun in 'any' state court, and also that the party to whom the right is given is designated in direct and unequivocal terms. Where the suit arises under the Constitution, or a law or treaty, of the United States the right is given to 'the defendant or defendants' without any qualifications; and as to 'any other suit' it is given to 'the defendant or defendants', if he or they be 'non-residents of that State.' In neither instance is the plaintiff's assent essential in any sense to the exercise of the right. Nor is it admissible for him to urge that the removal be into the District Court for some other district,

124. 203 U.S. 449, 27 S.Ct. 150, 51 L.Ed. 264 (1906).

125. 209 U.S. 490, 28 S.Ct. 585, 52 L.Ed. 904, 14 Ann. Cas. 1164 (1908). The same waiver by both parties was announced in *In re Winn*, 213 U.S. 458, 29 S.Ct. 515, 53 L.Ed. 873 (1909).

126. *Foulk v. Gray*, 120 Fed. 156 (C.C.S.D. W. Va. 1902); *Isaac Kubie Co. v. Lehigh Valley R. Co.*, 261 Fed. 806 (D.C. N.J. 1919); *Nickels v. Pullman Co.*, 268 Fed. 610 (D.C.W.D. Va. 1920).

127. *Louisville and N. R. Co. v. Garnett*, 129 Miss. 795, 93 So. 241 (1922); *Ft. Smith and W. R. Co. v. Knott*, 60 Okla. 175, 159 Pac. 847 (1916); *Riter-Conley Mfg. Co. v. O'Donnell*, 64 Okla. 229, 168 Pac. 49 (1917); *Powell v. So. Ry. Co.*, 110 S.C. 70, 96 S.E. 292 (1918); *Gist v. Equitable Surety Co.*, 161 Wis. 79, 151 S.W. 382 (1915).

128. *Louisville and N. R. R. Co. v. Western Union Tel. Co.*, 218 Fed. 91 (D.C.E.D. Ky. 1914); *Hohenburg v. Mobile Liners, Inc.*, 245 Fed. 169 (D.C.S.D. Ala. 1917); *Earles v. Germain Co.*, 265 Fed. 715 (D.C.S.D. Ala. 1920).

129. 260 U.S. 261, 43 S.Ct. 106, 67 L.Ed. 244 (1922).

for it is his act in bringing the suit in a state court within the particular district which fixes the venue on removal."¹³⁰

This decision has since been followed.¹³¹

Service by Attachment and Substituted Service under State Process

There is no statutory provision for beginning an action in the federal court by attachment of the defendant's property without personal service also on defendant. However, when jurisdiction by attachment is once secured by the state court in accordance with state laws, a removal can be had to the federal court with this control retained—another example of removal jurisdiction being wider than original jurisdiction.¹³² Such removal can be made even though the garnishment proceeding in the state court was equitable in form.¹³³ Removal can be made by either the defendant or a garnishee.¹³⁴

If personal service was not had on the defendant in the state court, but only service by publication, the attachment cannot be dissolved because federal practice makes no provision for it. The case stands as if it were still in the state court whose rule is applied as to attachments without personal service.¹³⁵ A state court has recognized that a removal based on attachment under state laws is valid.¹³⁶

The test of whether jurisdiction, secured by substituted service only in the state court, can be retained on removal, is not whether it conforms to federal practice provisions but whether it can be called reasonable and in accordance with due process under the United States Constitution. For example, where the defendant was given two months in which to file pleadings, with

130. 260 U.S. 653, 658, 43 S.Ct. 230, 67 L.Ed. 443 (1923). See Notes (1923) 9 Va. L. Rev. 552; (1923) 32 Yale L. J. 747; (1923) 8 St. Louis L. Rev. 194; (1923) 71 U. Pa. L. Rev. 242; Bryan, Two Important Reversals (1923) 8 Va. L. Reg. (N.S.) 901.

131. *Great Northern Ry. Co. v. Galbreath Cattle Co.*, 271 U.S. 99, 46 S.Ct. 439, 70 L.Ed. 854 (1926) (suit is removable when at least one of the two alleged grounds of diversity of citizenship and federal question is well-founded, although neither party resides in the district of removal). Accord: *Louisville and N. R. Co. v. Garnett*, 132 Miss. 468, 96 So. 519 (1923).

132. *Clark v. Wells*, 203 U.S. 164, 27 S.Ct. 43, 51 L.Ed. 138 (1906); *Craddock v. Fulton*, 140 Fed. 426 (C.C.N.D. W. Va. 1905); *Missouri Valley Bridge and Iron Co. v. Blake*, 231 Fed. 417 (C.C.A. 4th, 1916); *Alabama Power Co. v. Gregory Hill Gold Mining Co.*, 5 F. (2d) 705 (D.C.M.D. Ala. 1925).

133. *Courtney v. Pradt*, 196 U.S. 89, 25 S.Ct. 208, 49 L.Ed. 398 (1905).

134. *Greevy v. Jacob Tome Institute*, 132 Fed. 408 (C.C.W.D. Pa. 1904).

135. *Blumberg v. A. B. and E.L. Shaw Co.*, 131 Fed. 608 (C.C.S.D. N.Y. 1904).

136. *Coffin v. Harris*, 141 N.C. 707, 54 S.E. 437, 6 L.R.A. (N.S.) 624 (1906).

provision for notice to him of the pendency of the suit, the proceeding was declared reasonable and in accordance with due process, and jurisdiction so secured was retained on removal.¹³⁷ On the other hand, it has been ruled that where state law is so unreasonable as to require the nonresident defendant to answer within five days of the order, the federal court will not recognize jurisdiction acquired under it, and removal cannot be made.¹³⁸

Venue of Federal Question Cases, Railroad Corporation Cases, and Local Actions

It will be recalled that prior to the decision of *Lee v. Chesapeake and Ohio Ry.*, the rule respecting venue in diversity of citizenship cases prevented removal to a district not the residence of one of the parties. Analogously, some lower federal courts in that period declared that where the defendant in a case involving a federal question was a citizen of a state other than that in which suit was brought, an otherwise removable case could not be removed against the plaintiff's objection, since suit could not have originally been brought in that district.¹³⁹ The prevailing opinion is now different on this point also; and when the action pending in a state court involves the federal Constitution or a federal statute, the fact that the defendant is a nonresident of that state and could not have been sued there originally does not prevent him from waiving his benefit under the venue section,¹⁴⁰ which he does by his petition for removal.¹⁴¹

As for the venue of a suit involving a railroad corporation created under the laws of a state, original suit in a federal court on diversity of citizenship by a citizen of another state must be in the home district of one party and cannot be in a third state where the defendant corporation merely does business.¹⁴² The opinions of

137. *Hudson Nav. Co. v. Murray*, 236 Fed. 419 (D.C. N.J. 1916), in which the court placed great reliance on *Clark v. Wells*, 203 U.S. 164, 27 S.Ct. 43, 51 L.Ed. 138 (1906).

138. *Roller v. Holly*, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520 (1900).

139. *Canary Oil Co. v. Standard Asphalt & Rubber Co.*, 182 Fed. 663 (C.C.D. Kan. 1909); *Orr v. Baltimore & O. R. Co.*, 242 Fed. 608 (D.C.S.D. N.Y. 1914); *Boise Commercial Club v. Oregon Short Line R. Co.*, 260 Fed. 769 (C.C.A. 9th, 1919), writ of error dismissed 255 U.S. 578, 41 S.Ct. 322, 65 L.Ed. 795 (1921).

140. Judicial Code, § 51, 28 U.S.C.A. § 112 (Supp. 1938).

141. *General Inv. Co. v. Lake Shore and M. S. Ry. Co.*, 260 U.S. 261, 43 S.Ct. 106, 67 L.Ed. 244 (1922); *Rubber & Celluloid Harness Trimming Co. v. John L. Whiting-J. J. Adams Co.*, 210 Fed. 393 (D.C.D. Mass. 1913); *Atlantic Corporation v. U.S. Shipping Board Emergency Fleet Corporation*, 286 Fed. 222 D.C.D. N.H. 1923).

142. *Southern Pac. R. Co. v. Denton*, 146 U.S. 202, 13 S.Ct. 44, 36 L.Ed. 942 (1892); *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 12 S.Ct. 935, 36 L.Ed. 768 (1892); *In re Keasbey and Mattison Company*, 160 U.S. 221, 16 S.Ct. 273, 40 L.Ed. 402 (1895).

the lower federal courts are divided on the question of the removal of such a case. One view maintains that the venue provision requires the suit to be brought in the home district of one of the parties, which in the case of the corporation is the state in which it was incorporated, and not merely where business is done.¹⁴³ The other view, and the one probably to be followed now that the *Lee* case has shown the way, is that the doing of business in a state constitutes such residence as to allow suit in the state court, after which defendant can as a nonresident secure a removal without consent of the plaintiff, thereby waiving his objections to suit in a district where neither party resides.¹⁴⁴

Another case of proper venue in a district where neither party lives is the suit to remove a cloud on the title of land, with provision for the securing of jurisdiction over a nonresident defendant's interest in the land.¹⁴⁵ Thus, even though neither party resides where such a suit is brought, removal to a federal court may be had.¹⁴⁶ To sustain this jurisdiction, the court must be able to grant full relief *in rem*, considering the bill as a whole.¹⁴⁷ A suit by stockholders to set aside an election of officers claimed to be void, and to have a receiver appointed for property in the state of a mining company created elsewhere, was held removable as a local action to enforce a claim to property situated within the district, under the above-mentioned local action statute.¹⁴⁸

Effect of Change in Circumstances

It has been pointed out that the removability of a case arising under a federal law is determined from the plaintiff's petition, and the defendant cannot in his removal petition supply a deficiency therein.¹⁴⁹ Furthermore, the plaintiff has considerable latitude in deciding whether he will sue the defendants jointly or separately, and in the absence of fraud a nonresident defendant cannot have the action against him separated from that against a

143. *Stone v. Chicago, B. & Q. R. Co.*, 195 Fed. 832 (D.C.W.D. Mo. 1912).

144. *Bogue v. Chicago, B. & Q. R. Co.*, 193 Fed. 728 (D.C.S.D. Iowa 1912).

145. Judicial Code, § 57, 28 U.S.C.A. § 118 (1926).

146. *Gillespie v. Pocahontas Coal & Coke Co.*, 162 Fed. 742 (C.C.S.D. W. Va. 1907), reversed on other grounds 163 Fed. 992 (C.C.A. 4th, 1908), certiorari denied 214 U.S. 519, 29 S.Ct. 700, 53 L.Ed. 1065 (1909).

147. *O'Neil v. Birdseye*, 244 Fed. 254 (D.C.S.D. N.Y. 1917).

148. *Consolidated Interstate Callahan Mining Co. v. Callahan Mining Co.*, 228 Fed. 528 (D.C.D. Idaho 1915).

149. *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654, 38 L. Ed. 511 (1894); *Taylor v. Anderson*, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914). However, defendant is not bound by plaintiff's allegation of defendant's citizenship: *Texas & Pac. Ry. Co. v. Cody*, 166 U.S. 606, 17 S.Ct. 703, 41 L.Ed. 1132 (1897).

resident so as to secure a removal.¹⁵⁰ Even if the evidence has shown no case against the resident defendant who was joined in good faith, and the court has dismissed the case against the plaintiff's will, the nonresident defendant still cannot remove, although he could have done so but for the joinder;¹⁵¹ nor does an involuntary nonsuit eliminate the resident defendant sufficiently to permit the nonresident to remove.¹⁵²

In state decisions, it has been held that affirmation by the appellate court of a judgment against the resident defendant, and the granting of a new trial to the nonresident, does not create a separable controversy allowing removal on his new trial.¹⁵³ It has also been held that a temporary injunction (an ancillary remedy) in the state court does not produce a change which would permit removal of a case not originally removable,¹⁵⁴ and that the removability of the case is determined from the record at the time of application, with the state court having no discretion to deny removal if the facts justify it.¹⁵⁵ As if to emphasize the fact that only the plaintiff's voluntary action makes the case removable when it is not so originally, an amendment or a supplementing of plaintiff's pleadings may effect removability even when federal jurisdiction did not at first exist.¹⁵⁶

When Is a Case in a Condition to Be Removed?

Until there is a suit pending in the state court, there can be no removal. Thus, no suit arising under the Constitution or laws of the United States was shown when the issue was whether the person served by plaintiff was really an agent of the defendant corporation so that service could be made on him. No case was "brought" until that question was settled, and no removal could be had.¹⁵⁷ On the other hand, a suit was "brought" when a petition

150. *Kansas City Suburban Belt Railway Company v. Herman*, 187 U.S. 63, 23 S.Ct. 24, 47 L.Ed. 76 (1902); *Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206, 26 S.Ct. 161, 50 L.Ed. 441, 4 Ann. Cas. 1147 (1906); *Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918), dismissing writ of error to review 51 Mont. 565, 154 Pac. 914 (1916).

151. *Lathrop, Shea & Henwood Co. v. Interior Const. & Imp. Co.*, 215 U.S. 246, 30 S.Ct. 76, 54 L.Ed. 177 (1909).

152. *American Car & Foundry Co. v. Kettelhake*, 236 U.S. 311, 35 S.Ct. 355, 59 L.Ed. 594 (1915).

153. *Gurley v. Southern Power Co.*, 173 N.C. 447, 92 S.E. 262 (1917).

154. *North Carolina Public Service Co. v. Southern Power Co.*, 181 N.C. 356, 107 S.E. 226 (1921).

155. *Texarkana Telephone Co. v. Bridges*, 75 Ark. 116, 86 S.W. 841 (1905).

156. *Allen v. New York, P. & N. R. Co.*, 15 F. (2d) 532 (C.C.A. 4th, 1926), certiorari denied 273 U.S. 756, 47 S.Ct. 459, 71 L.Ed. 876 (1927).

157. *Germania Insurance Co. v. Wisconsin*, 119 U.S. 473, 7 S.Ct. 260, 30 L.Ed. 461 (1886); *People's Ins. Co. v. Wisconsin*, 119 U.S. 477, 7 S.Ct. 262, 30 L.Ed. 462 (1886).

for a preliminary injunction could be had, with the parties subjected to judicial order.¹⁵⁸ A suit against an infant was not removable when attempted by the father as next friend before there had been service in the state court on the infant personally or by substitution, since there is no provision in federal law for service on an infant by substitution or publication, and such failure to serve the infant by state process cannot be waived by him or his guardian.¹⁵⁹ A removal made by defendants who have been served is valid, despite the fact that the summons is not served on all defendants;¹⁶⁰ but it has been held that where two corporations are parties on the same side, the federal court cannot take jurisdiction of the case until both have been served.¹⁶¹ However, when diversity of citizenship exists between parties, and the plaintiff asks for a removal as allowed by the 1875 Act, it cannot be prevented by equities and contentions existing between the defendants.¹⁶² The time for determining removability is when the petition for removal is filed, which can be done at any time after plaintiff's petition is filed with the intention that process be issued on it immediately.¹⁶³

The filing of a petition of intervention does not start a suit that can be removed until some service of process is made;¹⁶⁴ and not until the complainant in an interpleader suit in a state court has been dismissed can the diversity of citizenship existing between the defendants be used as a ground of removal because the complainant who has the same citizenship as some defendants is more than a nominal party.¹⁶⁵ The fact that a state court has seized the *res* does not prevent removal,¹⁶⁶ nor does an injunction by the state court against further infringements of plaintiff's patent have this effect since future applications for injunctions can be made to the federal court.¹⁶⁷

Only an actual controversy can be removed from the state court. Thus, it has been held that there was a controversy where

158. *English v. Supreme Conclave Improved Order of Heptasophs*, 235 Fed. 630 (D.C.D. N.J. 1916).

159. *Woolridge v. McKenna*, 8 Fed. 650 (C.C.W.D. Tenn. 1881).

160. *Parkinson v. Barr*, 105 Fed. 81 (C.C.D. Nev. 1900); *Walker v. Richards*, 55 Fed. 129 (C.C.D. Minn. 1893).

161. *Pond v. Sibley*, 7 Fed. 129 (C.C.S.D. N.Y. 1881).

162. *Tarver v. Ficklin*, 60 Ga. 373 (1878).

163. *Rodgers v. Gaines Bros. Co.*, 295 S.W. 492 (Mo. App. 1927).

164. *In re Receivership of Iowa and Minnesota Construction Co.*, 6 Fed. 799 (C.C.D. Iowa 1881).

165. *Leonard v. Jamison*, 2 Edw. Ch. 136 (N.Y. 1831).

166. *Osgood v. Chicago, D. & V. R. Co.*, 18 Fed. Cas. No. 10,604 (C.C.N.D. Ill. 1875).

167. *Byan v. Stevens*, 4 Edw. Ch. 119 (N.Y. 1842).

the parties had filed a stipulation admitting the claim sued on,¹⁶⁸ where the plaintiff had dismissed his action without prejudice,¹⁶⁹ where a summons was issued to a nonresident defendant for an examination to secure facts from which to frame a complaint,¹⁷⁰ and where the defendant's failure to answer in time has put him in default.¹⁷¹ Under the 1875 Act, the Iowa court held there was no controversy between citizens of different states until the defendant filed an answer or demurrer to the complaint, and no removal could be made until that time.¹⁷² On the other hand, the federal courts have held that a controversy is presumed from the mere filing of the petition, and that an answer need not be made in order to render the case removable.¹⁷³ A controversy concerning the state court's jurisdiction over the subject-matter of the case is enough to permit removal.¹⁷⁴

Procedure, Actions by a State, and Equity Suits

A case having all the requisites of original federal jurisdiction can be removed in spite of procedure that would have prevented an original suit in a federal court,¹⁷⁵ especially if the federal court has the power to follow the procedure prescribed by state law.¹⁷⁶ When a case is otherwise removable, removal is not prevented by the awkward form of the case in the state court, as where the plaintiff's assessment book was filed in a way that would not have been allowed on original suit in a federal court.¹⁷⁷ The fact that the action must be begun in a state court does not preclude a later removal,¹⁷⁸ nor does the fact that state procedure under the Workmen's Compensation Act calls for trial without a jury, whereas this would be necessary in a federal court.¹⁷⁹

Even when a state, acting in its sovereign capacity, could not

168. *Keith v. Levi*, 2 Fed. 743, 1 McCrary 343 (C.C.W.D. Mo. 1880).

169. *New England Mortg. Sec. Co. v. Aughe*, 12 Neb. 504, 11 N.W. 753 (1882).

170. *Shepard v. Conrad*, 4 Abb. N.C. 254 (N.Y. 1878).

171. *Berrian v. Chetwood*, 9 Fed. 678 (C.C.S.D. N.Y. 1881).

172. *Stanbrough v. Griffin*, 52 Iowa 112, 2 N.W. 1011 (1879); *Bosler v. Booge*, 54 Iowa 251, 6 N.W. 301 (1880); *Flynn v. Des Moines & St. L. Ry. Co.*, 63 Iowa 490, 19 N.W. 312 (1884).

173. *Memphis Sav. Bank v. Houchens*, 115 Fed. 96 (C.C.A. 8th, 1902); *Hodson v. Lake Shore & M. R. Co.*, 12 Fed. Cas. No. 6,571a (C.C.N.D. Ohio 1881); *Egan v. Chicago, M. & St. P. Ry. Co.*, 53 Fed. 675 (C.C.N.D. Iowa 1893).

174. *Auracher v. Omaha & St. L. R. Co.*, 102 Fed. 1 (C.C.S.D. Iowa 1900).

175. *In re Stutsman County*, 88 Fed. 337 (C.C.D.N.D.S.E.D. 1898).

176. *Colorado Midland Ry. Co. v. Jones*, 29 Fed. 193 (C.C.D. Col. 1886); *Banigan v. City of Worcester*, 30 Fed. 392 (C.C.D. Mass. 1887).

177. *Commissioners of Road Imp. Dist. No. 2 of Lafayette County, Ark. v. St. Louis Southwestern Ry. Co.*, 257 U.S. 547, 47 S.Ct. 250, 66 L.Ed. 364 (1922).

178. *Myers v. Chicago N. W. Ry. Co.*, 118 Iowa 312, 91 N.W. 1076 (1902).

179. *McLaughlin v. Western Union Tel. Co.*, 7 F. (2d) 177 (D.C.E.D. La. 1925).

have been sued originally in the federal court, its action against a corporation to question the right to do business in the state can be removed.¹⁸⁰ There can be no removal of a state's suit for diversity of citizenship, however, since a state has no citizenship, but if a federal question is presented by the petition, the defendant can remove.¹⁸¹

A federal court sitting in equity lacks jurisdiction over the subject-matter of a suit by a simple contract creditor to vacate a fraudulent conveyance of the debtor, and such a suit in a state court cannot be removed by the plaintiff on objection of defendant.¹⁸² Yet, it has been held that the defendant may waive the objection to a suit by a simple contract creditor for the appointment of a receiver, and does so by removing.¹⁸³ When a defendant has removed a suit wherein the state equity court had full power under state law to grant an attachment on real estate to satisfy a judgment, the federal court would not dismiss the case on the ground of lack of equity in a federal court to give such relief.¹⁸⁴ In other equity cases, removal has been permitted where state practice authorized suit on a contract of one defendant to assume the liability of the other defendant to the plaintiff;¹⁸⁵ where the plaintiff alleged that the defendants were in possession of his ancestor's deed, but did not allege facts as a basis for asking its delivery to him, nor did he ask such relief;¹⁸⁶ where the suit was to enforce a lien previously acquired by legal proceedings;¹⁸⁷ where a trustee in bankruptcy sued to recover a sum paid in preference;¹⁸⁸ and where the defendant presented a legal rather than an equitable claim.¹⁸⁹ As for procedure, *Marshall v. Holmes*¹⁹⁰ held that if the case is in its nature removable, the state court must permit it to be taken to the federal court. The latter court then decides whether the equity powers should be exercised to enjoin the defendant from enforcing judgments obtained by fraud,

180. *Ames v. Kansas*, 111 U.S. 449, 4 S.Ct. 437, 26 L.Ed. 482 (1884).

181. *State v. Frost*, 113 Wis. 623, 89 N.W. 915 (1902).

182. *Cates v. Allen*, 149 U.S. 451, 13 S.Ct. 883, 37 L.Ed. 804 (1893); *First Nat. Bank of Parkersburg v. Prager*, 91 Fed. 689 (C.C.A. 4th, 1899).

183. *Finney v. Continental Baking & Milling Corporation*, 17 F. (2d) 107 (D.C.D. Ind. 1927).

184. *Miller v. Williams*, 258 Fed. 216 (C.C.A. 4th, 1919).

185. *Collins Mfg. Co. v. Wickwire Spencer Steel Co.*, 14 F. (2d) 871 (D.C.D. Mass. 1926).

186. *Kellog v. Schaeuble*, 273 Fed. 1012 (D.C.S.D. Miss. 1921).

187. *Craddock v. Fulton*, 140 Fed. 426 (C.C. W. Va. 1905).

188. *Corbitt v. President, etc., of Farmers' Bank of Delaware*, 113 Fed. 417 (C.C.E.D. Va. 1902).

189. *Filer v. Levy*, 17 Fed. 609 (C.C.W.D. La. 1883).

190. 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891).

the evidence of which could not be discovered by the petitioner in time to prevent the taking of the judgment.

From and to What Court Removable

Since the statutes provide for the removal of a suit pending "in any state court," it is important to determine what is meant by these words. There is a split of opinion as to whether a justice of the peace holds such a "court" as to allow removal from it.¹⁹¹ If removal from this tribunal is refused, it can be had on an appeal to the circuit court.¹⁹² The fact that a federal statute gives certain jurisdiction to state courts precludes a case pending therein from being a suit in a "state court" so as to be removable.¹⁹³ The opposite view was taken, however, of a suit brought in a territorial court, though the case passed into the control of the state courts when the territory became a state.¹⁹⁴ After a case has been tried in the state court of original jurisdiction, from which removal could have been obtained on proper application, it sometimes happens that the motion for removal is made in the appellate court. This is too late. A case can be removed only from a state court of original jurisdiction. Authority is practically unanimous on this point,¹⁹⁵ although one state appellate court considered itself bound under the statute to permit removal when all the requirements were presented, while expressing an opinion that the federal court would not take the case.¹⁹⁶

The Judicial Code (§ 28) provides for removal to the federal court "for the proper district." The next section calls for the removal to the district court to be held in the district "where such suit is pending,"¹⁹⁷ and there is the further provision that it be removed to the district court "in the division in which the county is situated from which removal is made."¹⁹⁸ Now that the *Wisner* rule is no longer in effect to require residence of one party in the

191. Removal from justice's court denied: *New York I. & P. Co. v. Milburn Gin & Machine Co.*, 35 Fed. 225 (C.C.W.D. Tenn. 1888), relying on the state decision of *Rathbone Oil Tract Co. v. Ranch*, 5 W. Va. 79 (1871). Contra, allowing removal: *Katz v. Herschel Mfg. Co.*, 150 Fed. 684 (C.C.D. Neb. 1906).

192. *New York I. & P. Co. v. Milburn Gin & Machine Co.*, 35 Fed. 225 (C.C.W.D. Tenn. 1888).

193. *New Orleans Nat. Bank v. Merchant*, 18 Fed. 841 (C.C.E.D. La. 1884).

194. *Ames v. Colorado Cent. R. Co.*, 1 Fed. Cas. No. 325 (C.C.D. Colo. 1877).

195. *Stevenson v. Williams*, 86 U.S. 572, 22 L.Ed. 162 (1874); *Lowe v. Williams*, 94 U.S. 650, 24 L.Ed. 216 (1877); *Craigie v. McArthur*, 6 Fed. Cas. No. 3,341 (C.C.D. Minn. 1877); *Berry v. Irick*, 22 Grat. (Va.) 484, 12 Am. Rep. 539 (1872).

196. *Sneed v. Brownlow*, 44 Tenn. 209 (1867).

197. Judicial Code, § 29, 28 U.S.C.A. § 72 (1926).

198. Judicial Code, § 53, 28 U.S.C.A. § 114 (1926).

district of removal, these sections are construed to require removal to the federal court of the district wherein is located the state court from which removal is made.¹⁹⁹ Any other federal court lacks jurisdiction,²⁰⁰ but if there has been a previous change of venue in the state courts, the district where the suit is pending at the time of removal is controlling, regardless of where the suit originated.²⁰¹ The division of removal must be the one for the county in which the state court holding the case is located. This rule is grounded on the policy of convenience to litigants by not having removal to a remote division.²⁰² Thus a case was remanded to the state court where removal was made to the wrong division, though the objection could have been waived if not raised.²⁰³

AMOUNT IN CONTROVERSY

The Judiciary Act of 1789 (§ 12) provided expressly for the jurisdictional value of the suit in these words: ". . . and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court." Similar provisions were found in other removal acts until that of 1887-88, where the same result was reached by the "potentiality of originality" provision, allowing removal only when the suit could have been brought in a federal court originally, which automatically made the jurisdictional requirement \$3,000. This value must be involved not only in cases removed for diversity of citizenship and for a federal question,²⁰⁴ but also in cases of prejudice or local influence.²⁰⁵ There need be no specific sum in issue, on the other hand, for the removal of a case arising under federal revenue laws;²⁰⁶ while by an amendment of January 20, 1914, the Judicial Code was made to read as follows:

199. *General Investment Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 43 S.Ct. 106, 67 L.Ed. 244 (1922); *Lee v. Chesapeake & O. R. Co.*, 260 U.S. 653, 43 S.Ct. 230, 67 L.Ed. 443 (1923); *Great Northern Ry. Co. v. Galbreath Cattle Co.*, 271 U.S. 99, 46 S.Ct. 439, 70 L.Ed. 854 (1926); *In re Vadner*, 259 Fed. 614 (D.C.D. Nev. 1918).

200. *Stewart v. Cybur Lumber Co.*, 111 Miss. 844, 72 So. 276 (1916): under Judicial Code, § 29 (28 U.S.C.A. § 72), removal must be to the federal court in whose district the case is pending in the state court.

201. *Hess v. Reynolds*, 113 U.S. 73, 5 S.Ct. 377, 28 L.Ed. 927 (1885); *Pavick v. Chicago, M. & St. P. Ry. Co.*, 225 Fed. 395 (D.C.E.D. Miss. 1914).

202. *Copcevic v. Cal. Packing Corp.*, 272 Fed. 994 (D.C.N.D. Cal. 1921).

203. *Copcevic v. Cal. Packing Corp.*, *supra*. Objection to wrong division waived by defendant in removing; *O'Donnell v. Atchison, T. & S. F. R. Co.*, 49 Fed. 689 (C.D.S.D. Iowa 1892).

204. *Ross v. Pacific S. S. Co.*, 272 Fed. 538 (D.C.D. Ore. 1921).

205. *Ex parte Pennsylvania Co.* 137 U.S. 451, 11 S.Ct. 141, 34 L.Ed. 738 (1890).

206. Before the Judicial Code of 1912, it was held that \$2,000 had to be involved for removal of a case arising under the revenue laws, *Johnson v.*

Sec. 28 (last sentence). "No suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section 20 of Title 49, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000."²⁰⁷

This limited the previous rule excluding from the requirement as to sum in controversy any suits under commerce laws,²⁰⁸ though a suit under an act to regulate commerce can still be removed regardless of the sum disputed, if it does not come within the exception quoted above.²⁰⁹

In order to satisfy the monetary requirement, therefore, the issue of a case must have a value in money.²¹⁰ This requirement rules out a habeas corpus proceeding,²¹¹ an action to set aside a divorce,²¹² and an inquisition of lunacy.²¹³ The amount is measured as of the time suit is commenced in the state court, excluding interest accruing thereafter,²¹⁴ and the sum in dispute must exceed that named in the statute, exclusive of interest and costs.²¹⁵ The phrase "exclusive of interest" is part of the section on original jurisdiction, but it is equally applicable to removals and prevents interest from being counted in determining the amount in controversy.²¹⁶ However, matured coupons of bonds can be counted in

Wells-Fargo & Co., 91 Fed. 1 (C.C.N.D. Cal. 1899). In section 24 of that Code (28 U.S.C.A. § 41), dealing with original jurisdiction, paragraph (1) states: "The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section." Paragraph (5) deals with cases under internal revenue, of which the federal courts thus acquire jurisdiction regardless of amount involved, and so also removal jurisdiction under the "potentiality of originality."

207. 28 U.S.C.A. § 71 (1926).

208. *Missouri, K. & T. Ry. Co. of Texas v. Smith*, 164 S.W. 885 (Tex. Civ. App. 1914).

209. *Allen v. New York P. & N. R. Co.*, 15 F. (2d) 532 (C.C.A. 4th, 1926), certiorari denied 273 U.S. 756, 47 S.Ct. 459, 71 L.Ed. 876 (1927).

210. *Washington & Georgetown Railroad Company v. District of Columbia*, 146 U.S. 227, 13 S.Ct. 64, 36 L.Ed. 951 (1892).

211. *Kurtz v. Moffitt*, 115 U.S. 487, 6 S.Ct. 148, 29 L.Ed. 458 (1885).

212. *Caswell v. Caswell*, 120 Ill. 377, 11 N.E. 342 (1887).

213. *U.S. v. Haviland*, 297 Fed. 431 (C.C.A. 2nd, 1924).

214. *Roberts v. Nelson*, 11 Fed. Cas. No. 11,907 (C.C.S.D. N.Y. 1870); *Car- rick v. Landman*, 20 Fed. 209 (C.D.N.D. Ala. 1884).

215. *Kaufman v. Rheinstrom Sons Co.*, 188 Fed. 544 (C.C.S.D. N.Y. 1911).

216. *Lazensky v. Supreme Lodge Knights of Honor*, 32 Fed. 417 (C.C.S.D. N.Y. 1887).

figuring the jurisdictional amount, since they are not ordinary interest so as to be excluded but separate instruments with an obligation apart from the bond.²¹⁷ As for attorney fees, their inclusion seems to depend on the relevant state statute, and they cannot be counted where the act calls for a reasonable attorney fee being included in a recovery as part of the costs,²¹⁸ though if the local statute does not forbid it, the parties may agree that such fees are not costs so as to be excluded.²¹⁹ Dependence on local law was pointed out in *Conner v. Connecticut Fire Ins. Co.*,²²⁰ where, since the state law did not expressly declare an attorney's fee to be part of the costs taxed, it was declared a penalty and as such was to be considered in determining the sum in issue.

Determination of Amount Involved

Somewhere in the plaintiff's pleading or in the petition of removal, it should be shown that the required amount is in controversy.²²¹ When, however, the plaintiff claimed only \$1,990, the defendant could not assert that the damages to the plaintiff were \$10,000, and so secure removal by making that amount the sum in issue.²²² While the entire record is examined to see if the money damages claimed are really involved,²²³ still the court looks for only the apparent sum in issue, and does not enter into an exhaustive collateral search as to the amount which may be affected by the decision.²²⁴ Any disputed question of fact must be decided by the federal court after the state court permits removal on a prima facie showing of a proper case.²²⁵

The mere consolidation of two actions between the same parties to take proof, when each involves less than \$2,000, does not make them one action so as to become removable;²²⁶ and two defendants against whom no joint liability is alleged cannot be

217. *Edwards v. Bates County*, 163 U.S. 269, 16 S.Ct. 967, 41 L.Ed. 155 (1896).

218. *Swofford v. Cornucopia Mines of Oregon*, 140 Fed. 957 (C.C.D. Ore. 1905).

219. *Rogers v. Riley*, 80 Fed. 759 (C.C.D. Ky. 1896).

220. 292 Fed. 767 (D.C.S.D. Fla. 1923).

221. *Egan v. Chicago M. & St. P. Ry. Co.*, 53 Fed. 675 (C.C.N.D. Iowa 1893); *Reed v. Hardeman County*, 77 Tex. 165, 13 S.W. 1024 (1890).

222. *Iowa Cent. R. Co. v. Bacon*, 236 U.S. 305, 35 S.Ct. 357, 59 L.Ed. 591 (1915).

223. *Lee v. Watson*, 68 U.S. 337, 17 L.Ed. 557 (1864).

224. *Elgin v. Marshal*, 106 U.S. 578, 1 S.Ct. 484, 27 L.Ed. 249 (1882); *New England Mortgage Security Co. v. Gay*, 145 U.S. 123, 12 S.Ct. 815, 36 L.Ed. 646 (1892).

225. *Follett v. Waterworks Co. of Seneca Falls*, 123 Misc. 825, 206 N.Y. Supp. 464 (1924).

226. *E.A. Holmes & Co. v. U.S. Fire Ins. Co.*, 142 Fed. 863 (C.C.W.D. Tenn. 1906).

sued together to bring the amount over \$2,000.²²⁷ The prima facie amount in issue is that claimed in good faith by the plaintiff,²²⁸ and remains so until found to be not the real amount disputed,²²⁹ regardless of the indirect monetary effects of the judgment.²³⁰ An apparent exception was found in determining the federal jurisdiction of a removed attachment suit, in which the defendant had not been served and had not appeared generally, where the amount in dispute was not the damages claimed in the plaintiff's petition, but the sum named in the affidavit for attachment.²³¹ So much does plaintiff's claim carry weight, however, that even where he has probably grossly exaggerated his damages, the court would not venture to say that less than the jurisdictional sum was involved, and that a remand to the state court was proper.²³² Further, the fact that the plaintiffs could have sued jointly for a sum within federal jurisdiction does not prevent their suing separately, causing their individual claims to be too low for removal.²³³ After a case, with sufficient amount shown in plaintiff's pleadings, has been removed and disposed of in the federal courts otherwise than on its merits, the plaintiff can bring a new action in the state court with the claim reduced so as to prevent removal.²³⁴

It is permissible for a plaintiff, who has alleged facts which pile up damages far in excess of the statutory jurisdictional amount, to fix his *ad damnum* clause below that mark and so prevent removal, his purpose in naming the sum sued for being unimportant.²³⁵ When, on the other hand, the plaintiff has asked for more damages than could reasonably be supported by the substantial averments in the body of his petition, the jurisdictional sum is governed by the facts alleged and not by the damages demanded, causing removal to be refused if the facts do not justify the

227. *Texas & P. Ry. Co. v. Dishman & Tribble*, 38 Tex. Civ. App. 277, 85 S.W. 319 (1905).

228. *Postal Tel. Cable Co. v. Southern Ry. Co.*, 88 Fed. 803 (C.C.W.D. N.C. 1898), writ of error dismissed 93 Fed. 393 (C.C.A. 4th, 1899); *Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.*, 89 Fed. 113 (C.C.W.D. Mich 1899); *Roessler-Hasslacher Chem. Co. v. Doyle*, 142 Fed. 118 (C.C.A. 3rd, 1905).

229. *Kanouse v. Martin*, 56 U.S. 198, 14 L.Ed. 660 (1853).

230. See citations in note 224, *supra*.

231. *Starke v. Hoerning*, 206 Fed. 1006 (D.C.E.D. Mich. 1913).

232. *Smith v. Greenhow*, 109 U.S. 669, 3 S.Ct. 421, 27 L.Ed. 1080 (1884).

233. *Southern Ry. Co. v. Clarke*, 203 Ala. 248, 82 So. 516 (1919).

234. *Holbrook v. J. J. Quinlan & Co.*, 84 Vt. 411, 80 Atl. 339 (1911).

235. *Iowa Cent. R. Co. v. Bacon*, 236 U.S. 305, 35 S.Ct. 357, 59 L.Ed. 591 (1915); *Barber v. Atlantic Coast Line R. Co.*, 21 Ga. App. 257, 94 S.E. 280 (1917); *Lake Erie & W. R. Co. v. Juday*, 19 Ind. App. 436, 49 N.E. 843 (1898); *Springer v. Bricker*, 165 Ind. 532, 76 N.E. 114 (1905); *Stark v. Port Blakely Mill Co.*, 44 Wash. 309, 87 Pac. 339 (1906).

claim.²³⁶ For instance, though plaintiff asked for judgment on two unmatured notes (not containing an acceleration clause) as well as interest and attorneys' fees, the value of the unmatured notes was not in controversy,²³⁷ nor was the balance of the claim for \$10,000, over and above the sole count of plaintiff's petition asking for the license tax for 509 telegraph poles at two dollars each, putting the maximum recovery based on facts at \$1,018.²³⁸ Also, claims in more than one paragraph, each for less than the needed \$2,000 and based on the same occurrence, cannot be added to secure removal jurisdiction.²³⁹ Some leeway in pleading is allowed, however, and on a suit to recover certain land and \$500 damages (when an amount over \$500 was needed for removal), the court was willing to assume the land was worth something, so as to satisfy that requirement.²⁴⁰

Ordinarily the plaintiff's claim determines the amount in dispute, and not a counterclaim of the defendant.²⁴¹ An exception exists when the state law would bar a defendant's right to assert his claim in another action if he failed to present it as a counterclaim. Under such circumstances it is a necessary part of the suit and can be counted.²⁴² Application of the rule is found in one case which refused to allow a small counterclaim to combine with plaintiff's action for \$2,950, to take the amount in controversy over \$3,000.²⁴³ In another case the court refused to add defendant's counterclaim of \$3,500 to plaintiff's demand for \$1,022.61, on the ground that the procedure was doubtful, and in such cases remand should be made to the state court.²⁴⁴ On a procedural point, an allegation in the petition of removal that the defendant expects

236. *North American Transportation & Trading Co. v. Morrison*, 178 U.S. 262, 20 S.Ct. 869, 44 L.Ed. 1061 (1900), where the plaintiff had ballooned his claim for damages by asking the wages he would have earned if not injured by defendant while on the way to hunt for a job, the court refused to consider this claim, as too speculative when no job was promised.

237. *Parlin & Ordendorff Implement Co. v. Frey*, 200 S.W. 1143 (Tex. Civ. App. 1918), certiorari denied 250 U.S. 640, 39 S.Ct. 491, 63 L.Ed. 1184 (1919).

238. *Mayor, etc., of Baltimore v. Postal Tel. Cable Co.*, 62 Fed. 500 (C.C.D. Md. 1894).

239. *Nashville C. & St. L. Ry. Co. v. Hill*, 146 Ala. 240, 40 So. 612 (1906); *Baltimore & O. R. Co. v. Ryan*, 31 Ind. App. 597, 68 N.E. 923 (1903).

240. *Ayers v. Watson*, 113 U.S. 594, 5 S.Ct. 641, 28 L.Ed. 1093 (1885). And see *Barry v. Edmunds*, 116 U.S. 550, 6 S.Ct. 501, 29 L.Ed. 729 (1886); *Western & Atlantic Railroad v. Railroad Commission of Georgia*, 261 U.S. 264, 43 S.Ct. 252, 67 L.Ed. 645 (1923).

241. *Bennett v. Devine*, 45 Fed. 705 (C.C.S.D. Iowa 1891); *McKown v. Kansas & T. Coal Co.*, 105 Fed. 657 (C.C.W.D. Ark. 1901). But see *Mackay v. Uinta Development Co.*, 229 U.S. 173, 33 S.Ct. 638, 57 L.Ed. 1138 (1913).

242. *Fearon Lumber Co. v. Lawson*, 166 Ky. 123, 178 S.W. 1121 (1915).

243. *Harley v. Firemen's Fund Ins. Co.*, 245 Fed. 471 (D.C.W.D. Wash. 1913).

244. *Crane Co. v. Guanica Centrale*, 132 Fed. 713 (C.C.S.D. N.Y. 1904).

to plead a counterclaim of sufficient size to take the amount in dispute over the necessary \$2,000, does not justify removal. The court declared that the right to remove must appear in the pleadings at the time of removal, and the petition of removal cannot supply any deficiencies therein.²⁴⁵

One of the earlier cases on equitable relief to abate a nuisance contained statements to the effect that the sum in controversy was not the amount or object sought by the plaintiff, but rather the loss caused defendant by a judgment.²⁴⁶ However, opinion has since swung towards the "plaintiff viewpoint."²⁴⁷

Whether the jurisdictional amount is had usually depends on the facts of the particular case. In *Marshall v. Holmes*,²⁴⁸ several judgments were held in the same right, and their validity depended on the same facts. The sum in controversy was held to be their aggregate amount, thus satisfying federal jurisdiction. Another case of proper joinder was *Brown v. Trousdale*,²⁴⁹ where the validity of an entire issue of tax bonds was involved and not a single year's taxes. Joinder of all the bondholders under a single interest was allowed in the case and the federal jurisdictional sum was obtained, though lack of complete diversity of citizenship caused a remand. In *Berryman v. Board of Trustees of Whitman College*,²⁵⁰ a college tried to enforce a contract with the state exempting its property from taxation, and the amount in dispute was declared to be the value of that exemption, worth over \$2,000, and not the single element of the tax for one year, an amount less than that sum. When several plaintiffs sought to enforce a vendor's lien, which was a single and undivided right that neither could enforce alone, the amount in controversy was their collective interest.²⁵¹ On the other hand, when a plaintiff was found to be only the assignee for collection and not the owner of claims aggregating over the jurisdictional amount, but no one

245. *Sturgeon River Boom Co. v. W. H. Sawyer Co.*, 89 Fed. 113 (C.C.W.D. Mich. 1898).

246. *Mississippi & Missouri R. Co. v. Ward*, 67 U.S. 485, 17 L.Ed. 311 (1863).

247. *Washington Market Co. v. Hoffman*, 101 U.S. 112, 25 L.Ed. 782 (1879); *Hunt v. New York Cotton Exchange*, 205 U.S. 322, 27 S.Ct. 529, 51 L.Ed. 821 (1907); *Duff v. Hildreth*, 183 Mass. 440, 67 N.E. 356 (1903). For a discussion of the "plaintiff viewpoint," see *Doble, Jurisdictional Amount in the United States District Court* (1925) 38 Harv. L. Rev. 733, (1925) 59 Am. L. Rev. 707, (1926) 11 Va. L. Reg. (N.S.) 513.

248. 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891).

249. 138 U.S. 389, 11 S.Ct. 308, 34 L.Ed. 987 (1891).

250. 222 U.S. 334, 32 S.Ct. 147, 56 L.Ed. 225 (1912).

251. *Troy Bank v. G. A. Whitehead and Co.*, 222 U.S. 39, 32 S.Ct. 9, 56 L.Ed. 81 (1911).

claim alone exceeding it, jurisdiction was denied.²⁵² Similarly, where a state sued as a mere nominal party, removal could not be had when no one of the claims sued on was for a sufficiently large amount to satisfy federal jurisdiction.²⁵³ A common situation is illustrated in *Rogers v. Hennepin County*,²⁵⁴ where it was declared that when a tax was on each of the plaintiffs separately, they could not join their suits restraining the tax, in order to bring the sum in dispute within the jurisdictional amount.

Effect of Plaintiff's Amendment Changing the Amount Claimed

If, before removal has been effected, the plaintiff reduces the amount of his claim below the jurisdictional limit, or even makes a motion to do so, the amendment is effective to prevent the removal from being made later.²⁵⁵ Plaintiff's intent to defeat removal by the reduction is not important.²⁵⁶ For instance, after the defendant had served notice on the plaintiff that he intended asking for removal, the state court could still allow an amendment of the claim downward to defeat removal, since the plaintiff retained the right to control his case until something occurred to take it out of the state court's power to permit amendment, namely, the removal itself.²⁵⁷ An amendment filed in vacation without notice to the defendant makes the case nonremovable if not forbidden by state law,²⁵⁸ but not if the state law requires notice, which is not given.²⁵⁹

If the defendant has filed his petition of removal before the motion to amend is made, one view maintains that the amendment may still be granted;²⁶⁰ the other, that it is too late.²⁶¹ The

252. *Woodside v. Beckham*, 216 U.S. 117, 30 S.Ct. 367, 54 L.Ed. 408 (1910).

253. *Title Guaranty and Surety Co. v. Idaho*, 240 U.S. 136 S.Ct. 345, 60 L.Ed. 566 (1916).

254. 239 U.S. 621, 36 S.Ct. 217, 60 L.Ed. 469 (1916).

255. *Blair v. Chicago*, 201 U.S. 400, 26 S.Ct. 427, 50 L.Ed. 801 (1906); *Wheeler v. Denver*, 229 U.S. 342, 33 S.Ct. 842, 57 L.Ed. 1219 (1913); *Maine v. Gilman*, 11 Fed. 214 (C.C.D. Me. 1882); *Lake Erie and W. R. Co. v. Huffman*, 177 Ind. 126, 97 N.E. 434, Ann. Cas. 1914C, 1272 (1912).

256. *Munnss v. American Agricultural Chemical Co.*, 216 Mass. 423, 103 N.E. 859 (1914).

257. *Anderson v. Western Union Telegraph Co.*, 218 Fed. 78 (D.C.E.D. Ark. 1914).

258. *Western Union Tel. Co. v. Campbell*, 41 Tex. Civ. App. 204, 91 S.W. 312 (1905).

259. *Peterson v. Chicago, M. and St. P. Ry. Co.*, 108 Fed. 561 (C.C.W.D. Mo. 1901).

260. *Spiers v. Halsted*, 74 N.C. 620 (1876); *People v. Judges of N. Y. Common Pleas*, 2 Denio 197 (N.Y. 1846).

261. *Kanouse v. Martin*, 56 U.S. 198, 14 L.Ed. 660 (1853); *Cumberland Gap Building and Loan Ass'n v. Wells*, 99 Ga. 228, 25 S.E. 246 (1896); *Chicago, R. I. and P. Ry. Co. v. Stone and Bronnenberg*, 70 Kan. 708, 79 Pac. 655 (1905); *Ray v. So. Ry. Co.*, 77 S.C. 103, 57 S.E. 636 (1907).

latter is more in accord with the theory of an instantaneous passing of the case out of the state court's hands when the petition and bond of removal are properly filed.²⁶² The question whether the amendment downward of the *ad damnum* of plaintiff's writ or the defendant's petition of removal was filed first, must be determined by the state court from the face of the record,²⁶³ and if there are disputed issues of fact as to which came first, these issues must be tried by the federal court before it considers the motion to remand.²⁶⁴

If a claim not originally removable is raised in amount by amendment of the plaintiff so as to become removable, the defendant can then remove by proper application.²⁶⁵ The case becomes removable as soon as the plaintiff raises the ante of his claim over the jurisdictional limit.²⁶⁶

After a removal has been effected, an amendment in the federal court, taking the sum in issue below the mark set for federal jurisdiction, does not divest the control already obtained, if control is based on a sufficient showing in the state court of the jurisdictional amount on the record.²⁶⁷

CITIZENSHIP

Provision for federal jurisdiction based on citizenship is to the effect that any suit in law and equity which involves over \$3,000 and "(b) is between citizens of different states, or (c) is between citizens of a State and foreign States, citizens, or subjects," may be brought originally in the federal district court.²⁶⁸ Either state citizenship or citizenship in a foreign country must be specifically alleged to obtain removal.²⁶⁹ Because of the requirement of citizenship in a particular state, a citizen of the United States having

262. *Kanouse v. Martin*, 56 U.S. 198, 14 L.Ed. 660 (1853). For the point that federal jurisdiction, once attached, is not lost by later changes in the situation of the parties, see *Morgan v. Morgan*, 15 U.S. 290, 4 L.Ed. 242 (1817); *Clarke v. Mathewson*, 37 U.S. 164, 9 L.Ed. 1041 (1838).

263. *Munnss v. American Agricultural Chemical Co.*, 216 Mass. 423, 103 N.E. 859 (1914).

264. *Waite v. Phoenix Ins. Co.*, 62 Fed. 769 (C.C.M.D. Tenn. 1894).

265. *Ft. Smith and W. R. Co. v. Blevins*, 35 Okla. 378, 130 Pac. 525 (1913).

266. *McCulloch v. Southern Ry. Co.*, 149 N.C. 305, 62 S.E. 1096 (1908).

267. *Hayward v. Nordberg Mfg. Co.*, 85 Fed. 4 (C.C.A. 6th, 1898); *Twin Hills Gasoline Co. v. Bradford Oil Corp.*, 264 Fed. 440 (D.C.E.D. Okla. 1919).

268. Judicial Code, § 24, 28 U.S.C.A. § 41 (Supp. 1938). Though dealing with original jurisdiction, this limitation to suits between citizens of different states, and between a citizen of a state and a foreign country or alien, is equally applicable to removals, because of the "potentiality of originality" requirement.

269. *Grace v. American Cent. Ins. Co.*, 109 U.S. 278, 3 S.Ct. 207, 27 L.Ed. 932 (1883).

no state citizenship could not remove a suit brought by a citizen of the state,²⁷⁰ and neither can citizens of the District of Columbia or of some territory.²⁷¹ An unnaturalized member of an Indian tribe is not a citizen of a foreign country or of a state for removal purposes,²⁷² and consequently removal can be had only if plaintiff's petition shows that a federal question is involved.²⁷³

A state is a sovereignty, and not a "citizen" in the removal sense, and it follows that removal cannot be had of a suit between a state as a substantial party and a citizen of another state on the ground of diversity of citizenship; a federal question is needed to remove an action between such parties.²⁷⁴ Sometimes it is doubtful whether the state is joined as a real or merely nominal party,²⁷⁵ and if it is clear that the state has no real interest in the suit, and diverse citizenship is had between the real party in interest and the opposing party, removal is allowed.²⁷⁶ A direct action by the state to recover unpaid taxes from a nonresident is clearly nonremovable because the state is here a real party,²⁷⁷ but it is more doubtful when someone else sues on behalf of the state for a legal penalty.²⁷⁸ Incapacity for state citizenship does not extend to the subdivisions of the state, such as a municipal corporation, which is a citizen of the state; and when it sues a citizen of another state to settle title to tidewater land in which it has a

270. *Hough v. Société Electrique Westinghouse de Russie*, 231 Fed. 341 (D.C.S.D. N.Y. 1916).

271. *Barney v. Baltimore*, 73 U.S. 280, 18 L.Ed. 325 (1868); *Cameron v. Hodges*, 127 U.S. 322, 8 S.Ct. 1154, 32 L.Ed. 132 (1888); *Healy v. McCormick*, 157 Fed. 318 (C.C.S.D. N.Y. 1907); *Anaconda Copper Mining Co. v. Butte-Balaklava Copper Co.*, 200 Fed. 308 (D.C.D. Mont. 1912).

272. *Paul v. Chilsoquie*, 70 Fed. 401 (C.C.D. Ind. 1895).

273. *Tennessee v. Union and Planters Bank*, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511 (1894).

274. *Stone v. South Carolina*, 117 U.S. 430, 6 S.Ct. 799, 29 L.Ed. 962 (1886); *Postal Telegraph-Cable Co. v. Alabama*, 155 U.S. 482, 15 S.Ct. 192, 39 L.Ed. 231 (1894); *Upshur County v. Rich*, 135 U.S. 467, 10 S.Ct. 651, 34 L.Ed. 196 (1890).

275. *Title Guarantee and Surety Co. of Sacramto v. Idaho*, 240 U.S. 136, 36 S.Ct. 345, 60 L.Ed. 566 (1916).

276. *Missouri, Kansas and Texas R. Co. v. Hickman*, 183 U.S. 53, 22 S.Ct. 18, 46 L.Ed. 78 (1901); *Ex parte Nebraska*, 209 U.S. 436, 28 S.Ct. 581, 52 L.Ed. 876 (1908).

277. *Darnell v. State*, 174 Ind. 143, 90 N.E. 769 (1910), affirmed 226 U.S. 390, 33 S.Ct. 120, 57 L.Ed. 267 (1912); *Nevada-California Power Co. v. Hamilton*, 235 Fed. 317 (D.C.D. Nev. 1916); *Commonwealth v. Norman*, 249 Mass. 123, 144 N.E. 66 (1924).

278. The state was declared a real party so as to prevent removal: in a suit by the revenue agent to recover land on the claim of title in the state, *Robertson v. Jordan River Lumber Co.*, 269 Fed. 606 (C.C.A. 5th, 1921); and in an action to recover a penalty for violation of a statute, though half would go to the prosecuting attorney, *Southern R. Co. v. State*, 165 Ind. 613, 75 N.E. 272 (1905). On the other hand, the fact of being beneficiary to recovery did not make a school district a party to the record so as to block removal: *Parks v. Carriere Consol. School Dist.*, 12 F. (2d) 37 (C.C.A. 5th, 1926).

direct monetary interest as a real party along with the state, removal can be had.²⁷⁹ Suit by a citizen of another state against a county may also be removed.²⁸⁰

Partnerships, Joint Stock Companies, and Corporations

A partnership has no state citizenship as an entity, and removal may be had only when complete diversity of citizenship exists between each individual member of the partnership and the opposing party.²⁸¹ Citizenship of the partnership cannot be the basis for removal, even when the law of the place where the action arose recognizes it as an entity capable of suing and being sued.²⁸² Thus, it was held that the act of alleging the state citizenship of each partner in the removal petition did not effect removability, when the action was against the group in the firm name, and not against the individuals.²⁸³ The same is true of the joint stock company; federal jurisdiction is controlled by the citizenship of its individual members,²⁸⁴ even though the entity is authorized by law of the state in which it is organized to sue in the name of its president.²⁸⁵

Although the situation is now different as to a corporation, the first decision on corporate citizenship was that a corporation could sue and be sued in a federal court only when each of its members was a citizen of a different state from the other party—the logical result of small companies doing a predominantly intra-state business, and having stockholders who might be expected to reside within the state of their creation.²⁸⁶ As corporations crossed state lines more often, the rule became so inconvenient as to be abandoned, and the conclusive presumption was indulged that all

279. *Seattle v. Oregon and W. R. Co.*, 255 U.S. 56, 41 S.Ct. 237, 65 L.Ed. 500 (1921).

280. *Board of Commissioners of Floyd County v. Hurd*, 49 Ga. 462, 15 Am. Rep. 682 (1873).

281. *Grace v. American Cent. Ins. Co.*, 109 U.S. 278, 3 S.Ct. 207, 27 L.Ed. 932 (1883); *Adams v. May*, 27 Fed. 907 (C.C.S.D. Iowa 1886); *H. L. Bruett and Co. v. F. C. Austin Drainage Excavator Co.*, 174 Fed. 668 (C.C.N.D. Iowa 1909).

282. *People of Porto Rico v. Fortuna Estates*, 279 Fed. 500 (C.C.A. 1st, 1922), cert. denied 259 U.S. 587, 42 S.Ct. 590, 66 L.Ed. 1077 (1922).

283. *Ralya Market Co. v. Armour and Co.*, 102 Fed. 530 (C.C.N.D. Iowa 1900).

284. *Chapman v. Barney*, 129 U.S. 677, 9 S.Ct. 426, 32 L.Ed. 800 (1889); *Texas and Pacific Co. v. Knox*, 214 U.S. 153, 29 S.Ct. 564, 53 L.Ed. 946 (1909).

285. *Taylor v. Weir*, 171 Fed. 636 (C.C.A. 3rd, 1909). Cf. *Boatner v. American Exp. Co.*, 122 Fed. 714 (C.C.W.D. Ky. 1903), where state law also allowed the officer to represent the large group in a suit, and he was able to secure removal based on diverse citizenship existing between himself and the plaintiff.

286. *Bank of the United States v. Deveaux*, 9 U.S. 61, 3 L.Ed. 38 (1809).

incorporators are citizens of the state under whose laws it is formed, which amounts to calling it a citizen of that state for removal purposes.²⁸⁷ The rule of practical citizenship in the state of incorporation, giving the corporation a right to remove a suit instituted in another state by a citizen of that state, has since been consistently followed in both federal courts²⁸⁸ and state courts.²⁸⁹

After becoming a citizen of one state by creation under its laws, the corporation may extend operations by doing business in another state in one of two ways: first, by incorporation there also, which—if real and not simply colorable reincorporation—domesticates the corporation and prevents it from removing a suit by a citizen of the state;²⁹⁰ and second, by obtaining a license to do business in the second state, which still leaves it a citizen only of the state of incorporation, and thus able to remove an action by a citizen of the second state.²⁹¹ The first method is recognized when the reincorporation is real, as in the above-cited *Memphis R. Co. v. Alabama*, where the company was forced by state statute to open its books for the sale of stock in the state and to hold a meeting of stockholders there. When merely a device for preventing removal, a line of cases declares the act void, and the attempt unavailing.²⁹²

A distinction has been drawn between the requirement of an actual "incorporation" in the second state, and an attempt to "domesticate" the foreign corporation, the first preventing removal, and the second failing to do so, though perhaps making the corporation a citizen of the state for purposes other than removal.²⁹³ On the other hand, the corporation may originally incor-

287. *Louisville, Cincinnati, and Charleston R. Co. v. Letson*, 43 U.S. 497, 11 L.Ed. 353 (1844).

288. *Paul v. Virginia*, 75 U.S. 168, 19 L.Ed. 357 (1869); *Railway Company v. Whitton's Adm'r*, 80 U.S. 270, 20 L.Ed. 571 (1872); *Southern R. Co. v. Allison*, 190 U.S. 326, 23 S.Ct. 713, 47 L.Ed. 1078 (1903); *Thomas v. South Butte Mining Co.*, 230 Fed. 968 (C.C.A. 9th, 1916).

289. *Rosenfield v. Adams Express Co.*, 21 La. Ann. 233 (1869); *Gist v. Johnson Carey Co.*, 161 Wis. 79, 151 N.W. 382 (1915).

290. *Memphis and Charleston R. Co. v. Alabama*, 107 U.S. 581, 2 S.Ct. 432, 27 L.Ed. 518 (1882); *Graham v. Boston, Hartford and Erie R. Co.*, 118 U.S. 161, 6 S.Ct. 1009, 30 L.Ed. 196 (1886).

291. *Railroad Co. v. Koontz*, 104 U.S. 5, 26 L.Ed. 643 (1881); *Marye v. Baltimore and Ohio R. Co.*, 127 U.S. 117, 8 S.Ct. 1037, 32 L.Ed. 94 (1888); *Gerling v. Baltimore and Ohio R. Co.*, 151 U.S. 673, 14 S.Ct. 533, 38 L.Ed. 311 (1894); *Knorr v. Home Ins. Co. of N.Y.*, 25 Wis. 143, 3 Am. Rep. 26 (1869).

292. *Southern R. Co. v. Allison*, 190 U.S. 326, 23 S.Ct. 713, 47 L.Ed. 1078 (1903), and cases cited therein. See discussion on statutory interference (by states) with removal by foreign corporations, *supra* p. 507.

293. *Foy and Shemwell v. Georgia-Alabama Power Co.*, 298 Fed. 643 (D.C. S.D. Ga. 1924).

porate in a number of states, preventing a removal from the state court of any one of them;²⁹⁴ while a corporation, formed by the consolidation of two or more corporations created in different states, is domestic to each of those states, and unable to remove a suit in the courts of any one.²⁹⁵ A state court has held that when a corporation has agreed to a private act permitting it to consolidate with foreign corporations on condition that the state court should not lose jurisdiction over the corporation, it could not remove a case for diversity of citizenship.²⁹⁶

Representative Parties

Jurisdiction is generally governed by the citizenship of the parties on the record.²⁹⁷ Thus, when a representative party holds title to the property or cause of action and is the party of record in a suit, his personal citizenship in most cases governs removability, regardless of the citizenship of the one he represents or of the deceased whose estate he administers.²⁹⁸ The citizenship of the trustee who possesses as owner becomes a governing factor of jurisdiction,²⁹⁹ and it continues to be such until the purpose of his trusteeship is satisfied.³⁰⁰ Where, however, the trustee holds the property as a mere agent for the beneficial use of another, his citizenship no longer controls and that of the beneficiary is the deciding factor of jurisdiction.³⁰¹ A trustee in a bankruptcy action in the state court to recover property fraudulently transferred was allowed to remove, upon the ground of diverse citizenship between defendant and trustee.³⁰²

Citizenship of an administrator is likewise a controlling factor of jurisdiction, and must be specifically alleged to present a removable case.³⁰³ In determining what is the administrator's citi-

294. *Patch v. Wabash R. Co.*, 207 U.S. 277, 28 S.Ct. 80, 52 L.Ed. 204 (1907).

295. *Johnson v. Philadelphia, W. and B. R. Co.*, 9 Fed. 6 (C.C.E.D. Penn. 1181); *Case v. Atlanta, C. A. L. Ry. Co.*, 225 Fed. 862 (D.C.W.D. S. C. 1915).

296. *Mizell v. Atlantic Coast Line R. Co.*, 181 N.C. 36, 106 S.E. 133 (1921).

297. *Bonnafee v. Williams*, 44 U.S. 574, 11 L.Ed. 732 (1845).

298. *Rolfe v. Rundle*, 103 U.S. 222, 26 L.Ed. 337 (1881); *Southern Ry. Co. v. Barrett, Denton and Lynn Co.*, 141 Ga. 584, 81 S.E. 863 (1914).

299. *Thayer v. Life Association of America*, 112 U.S. 717, 5 S.Ct. 355, 28 L.Ed. 864 (1885); *Vimont v. Chicago and N. W. Ry. Co.*, 64 Iowa 513, 21 N.W. 9 (1884); *Mead v. Walker*, 15 Wis. 553 (1862).

300. *Knapp v. Troy and Boston R. R. Co.*, 87 U.S. 117, 22 L.Ed. 328 (1874).

301. *Bogue v. Chicago B. & Q. R. Co.*, 193 Fed. 728 (D.C.S.D. Iowa 1912).

302. *Ewing v. S.L. Leszynsky and Co.*, 236 Fed. 811 (D.C.W.D. Wash. 1916).

303. *Bondurant v. Watson*, 103 U.S. 278, 26 L.Ed. 447 (1881); *Railroad Co. v. Koontz*, 104 U.S. 5, 26 L.Ed. 643 (1881); *Hess v. Reynolds*, 113 U.S. 73, 5 S.Ct. 377, 26 L.Ed. 927 (1885); *Continental Life Ins. Co. v. Rhoads*, 119 U.S. 237, 7 S.Ct. 193, 30 L.Ed. 380 (1886); *Roach's Adm'r v. Ohio Nat. Life Ins. Co. of Cincinnati*, 201 Ky. 713, 258 S.W. 300 (1924).

zanship, a single state decision has held that one who qualified as administrator in another state was a citizen of that state for the purpose of the suit.³⁰⁴ However, the contrary of this proposition is undoubtedly the general rule³⁰⁵—the administrator's personal citizenship is controlling. A receiver's personal citizenship governs jurisdiction in like manner, so as to permit removal for diverse citizenship.³⁰⁶

A different situation exists as to a guardian or next friend of an infant. The citizenship of the infant governs jurisdiction.³⁰⁷ Similarly, the citizenship of a married woman as plaintiff controls jurisdiction, and not that of a guardian.³⁰⁸ Another situation where the representative's personal citizenship had no effect on jurisdiction was a suit against the Director General of Railroads, growing out of claims arising while the United States operated all railroads during the World War. Removability was governed by the citizenship of the railroad corporation on whose road the accident or claim arose.³⁰⁹

Assignments, and Colorable Transfers

The section on original jurisdiction of federal courts, section 24 of the Judicial Code, contains the limitation that,

"No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."³¹⁰

304. *Lemon's Adm'r v. Louisville and N. R. Co.*, 137 Ky. 276, 125 S.W. 701 (1910).

305. *Amory v. Amory*, 95 U.S. 186, 24 L.Ed. 428 (1877); *Miler v. Sunde*, 1 N.D. 1, 44 N.W. 301 (1890).

306. *Davies v. Lathrop*, 12 Fed. 353 (C.C.S.D. N.Y. 1882); *Brisenden v. Chamberlain*, 53 Fed. 307 (C.C.D. S. C. 1892); *Pepper v. Rogers*, 128 Fed. 987 (C.C.D. Mass. 1904).

307. *Matter of Moore*, 209 U.S. 490, 28 S.Ct. 585, 52 L.Ed. 904, 14 Ann. Cas. 1164 (1908); *Woolridge v. McKenna*, 8 Fed. 650 (C.C.W.D. Tenn. 1881); *Voss v. Neineber*, 68 Fed. 947 (C.C.S.D. Ohio 1895).

308. *Wormley v. Wormley*, 21 U.S. 421, 5 L.Ed. 651 (1823); *Ruckman v. Fallsade Land Co.*, 1 Fed. 367 (C.C.D. N.J. 1880).

309. *Porsmer v. Davis*, 152 Minn. 181, 188 N.W. 279 (1922). *Accord*, *Payne v. Southern Cotton Oil Co.*, 27 Ga. App. 233, 108 S.E. 71 (1921); *Davis v. Hawkins*, 28 Ga. App. 203, 110 S.E. 500 (1922); *Mizell v. Atlantic Coast Line R. Co.*, 181 N.C. 36, 106 S.E. 133 (1921).

310. 28 U.S.C.A. § 41 (1926).

Before the Act of 1887-88, however, this "assignment provision," found in the section on original jurisdiction and not referred to in the removal section, did not apply to removals, and suit by the assignee of a note obtained from a person unable to sue originally in a federal court, could be removed by the defendant under the Acts of 1789,³¹¹ and of 1875.³¹²

A vital change occurred when provision was inserted in the removal section that jurisdiction on removal should be had only when it would be had on original suit in the federal court: "potentiality of originality." This now prevents removal—as well as original federal suit—of an action by an assignee of a promissory note or other like chose in action, when the assignor could not have sued in the federal court, under the restrictive policy of the 1887-88 Act.³¹³ When the instrument is a chose in action within the meaning of this provision, the citizenship of the assignor governs jurisdiction so as to rule out removal if the assignor could not have sued before assigning;³¹⁴ but it has been held that the defendant may waive the objection that the suit was not brought in the assignor's district of residence, by removing such a suit to the federal court of the district in which is located the state court originally seised of the case.³¹⁵

The "assignment provision" takes care of transfers made to confer federal jurisdiction based on citizenship, but what of colorable transfers made to prevent removal from the state court, by passing the claim to a citizen of the same state as the defendant? Here the transferee's petition shows a suit between citizens of the same state, and removal cannot be made on the claim of a colorable transfer. This claim must be set up as a defense in the state court, which may grant relief by setting aside the transfer and allowing removal based on the citizenship of the original parties.³¹⁶ As to what makes the transfer "colorable," it has been held that when partners actually conveyed all the firm's property

311. *Bushnell v. Kennedy*, 76 U.S. 387, 19 L.Ed. 736 (1870).

312. *Clafin v. Commonwealth Ins. Co. of Boston, Mass.*, 110 U.S. 81, 3 S.Ct. 507, 28 L.Ed. 76 (1884).

313. *Mexican Nat. R. Co. v. Davidson*, 157 U.S. 201, 15 S.Ct. 563, 39 L.Ed. 672 (1895).

314. *Guaranty Trust Co. of N. Y. v. McCabe*, 250 Fed. 699 (C.C.A. 2nd, 1918), cert. denied 247 U.S. 505, 38 S.Ct. 427, 62 L.Ed. 1240 (1918); *State Bank of Swea City, Iowa v. Chicago and N. W. Ry. Co.*, 281 Fed. 345 (D.C.N.D. Iowa 1922).

315. *Cincinnati, H. and D. Ry. Co. v. Orr*, 215 Fed. 261 (D.C.E.D. N.Y. 1914).

316. *Provident Sav. Life Assurance Society of N. Y. v. Ford*, 114 U.S. 635, 5 S.Ct. 1104, 29 L.Ed. 261 (1885); *Leather Manufacturers' Nat. Bank v. Cooper*, 120 U.S. 778, 7 S.Ct. 777, 30 L.Ed. 816 (1887).

to a newly-created corporation, receiving its stock in return without contemplation of a reconveyance, such action was not a sham or simulated transfer, even though made for the purpose of invoking federal jurisdiction for the corporation.³¹⁷ Neither was the transfer merely colorable and fictitious where the assignee paid a consideration of \$3,000 for a claim of \$8,972 against the defendant telegraph company, though a transfer without consideration might be subject to that objection.³¹⁸ In order to avoid being regarded as simulated, a transfer must be made before the action begins.³¹⁹

The federal district court has jurisdiction of a suit in which the United States or an officer thereof is a real party in interest,³²⁰ but it has been held that the joinder of the United States as a merely nominal party does not make a suit removable when the real controversy is between the state treasurer and sureties on the bond of a receiver appointed by a federal court.³²¹ Here the construction of the bond did not involve a "federal question" and removal could not have been permitted on that ground.

[*To be concluded*]

317. *Slaughter v. Mallett Land and Cattle Co.*, 141 Fed. 282 (C.C.A. 5th, 1905), cert. denied 201 U.S. 646, 26 S.Ct. 761, 50 L.Ed. 903 (1906).

318. *Wells v. Western Union Tel. Co.*, 144 Iowa 605, 123 N.W. 371, 24 L.R.A. (N.S.) 1045, 138 Am. St. Rep. 317 (1909).

319. *City of N.Y. v. Sage*, 239 U.S. 57, 36 S.Ct. 25, 60 L.Ed. 143 (1915).

320. Judicial Code, § 24, 28 U.S.C.A. § 41.

321. *U. S. v. Douglas*, 113 N.C. 190, 18 S.E. 202 (1893).