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## Removal of Cause: Decline of the Presumption that State Courts Will Correct Racial Abuses

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It is commendable that this result, desirable in itself, was achieved by a rule extending a right to a jury trial where the penalty is to be more severe. As long as the judiciary does not seriously abuse its contempt discretion, the trend in both the courts and the legislature of providing limited safeguards in this area should continue.

JOHN D. MCKEY, JR.

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#### REMOVAL OF CAUSE: DECLINE OF THE PRESUMPTION THAT STATE COURTS WILL CORRECT RACIAL ABUSES

*Georgia v. Rachel*, 86 Sup. Ct. 1783 (1966)

The defendants, Negro and white civil rights workers, attempted to obtain service at a privately owned restaurant in Atlanta, Georgia. When ordered to leave by the management, the defendants refused and were subsequently arrested. They were then indicted under a Georgia trespass statute<sup>1</sup> that makes it a misdemeanor to refuse to leave the premises of another when so requested. The defendants petitioned for removal to the United States District Court for the Northern District of Georgia alleging that the racial discrimination practiced by the State of Georgia would result in the denial of their constitutional rights. The federal district court found that the petition did not allege facts sufficient to sustain removal under the applicable federal statute<sup>2</sup> and remanded the case to the state court. The circuit court of appeals reversed the district court<sup>3</sup> and on appeal by the State of Georgia, the United States Supreme Court HELD, the defendant's allegations, if true, required that the case be removed to the federal district court. Judgment affirmed.

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1. GA. CODE ANN. §26-3005 (1965).

2. 28 U.S.C. §1443 (1) (1964).

3. *Rachel v. Georgia*, 342 F.2d 336 (1965).

The Federal Removal Statute,<sup>4</sup> under which this case arose, is a direct descendant of a provision of the Civil Rights Act of 1866.<sup>5</sup> That provision, and the present removal statute, authorize the removal of a case from a state court to a federal district court when the defendants are able to show that they will be denied in the state courts a right specifically guaranteed by federal law.<sup>6</sup> The United States Supreme Court, in a series of decisions from 1880 to 1906, interpreted this provision to mean that the right, allegedly denied, must be a right within the context of racial equality.<sup>7</sup> In addition, the Court required conclusive evidence that the right in question would be denied in the state courts. Because of a presumption that any discrimination would be corrected by the state courts,<sup>8</sup> the defendant had to prove that the state would not or could not correct the alleged discrimination. And because removal was sought before trial, the presumption in favor of the state could be overcome only by indicating that the state court would be bound by a statute or constitutional provision purporting to deny the defendant a right guaranteed by federal law.<sup>9</sup> If the defendant could not show that there was a state law that violated his rights, he could not have his case removed to a federal court.<sup>10</sup> The clear violation of a defendant's rights by administrative or enforcement officials did not aid him because of the presumption that the state courts would correct such discrimination, in the absence of discriminatory state law.<sup>11</sup>

Prior to the instant case, the Supreme Court adhered strictly to this presumption in favor of the state courts. In one case, removal was denied on the ground that the state statute in question had recently been declared unconstitutional by the state court of appeals and that this decision would be binding on the state court that was trying the defendant's case.<sup>12</sup> Another case that adhered even more strictly to the presumption concerned a state constitutional provision that violated the rights of the defendant.<sup>13</sup> The Supreme Court denied removal on the ground that the provision had been voided by passage of the fourteenth and fifteenth amendments to the United States Constitution and, therefore, was not binding on the state court.

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4. 28 U.S.C. §1443 (1964).

5. 14 Stat. 27.

6. 28 U.S.C. §1443 (1) (1964).

7. See, e.g., *Kentucky v. Powers*, 201 U.S. 1 (1906); *Bush v. Kentucky*, 107 U.S. 110 (1882); *Neal v. Delaware*, 103 U.S. 370 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

8. *Virginia v. Rives*, note 7 *supra*.

9. *Ibid.*

10. *Neal v. Delaware*, 103 U.S. 370 (1880).

11. *Virginia v. Rives*, 100 U.S. 313 (1880).

12. *Bush v. Kentucky*, 107 U.S. 110 (1882).

13. *Neal v. Delaware*, 103 U.S. 370 (1880).

This narrow construction of the removal provision of the 1866 Civil Rights Act is applied to the present removal statute.<sup>14</sup> In order to have his case removed from a state court to a federal court a defendant must prove, first, that he has a right which is specifically guaranteed to him by federal law; second, that the state court in which he is being prosecuted will not or cannot recognize his federal right because of a binding and discriminatory state law; and third, that the alleged denial of his federal right is within a racial context.<sup>15</sup>

When the instant case arose, the defendants could not meet the necessary requirements to have their case removed to a federal court. They could point to no specific federal law that gave them the right to refuse to leave a privately owned restaurant. While the case was pending on appeal to the circuit court of appeals, the 1964 Civil Rights Act<sup>16</sup> was passed. Shortly thereafter, the Supreme Court handed down a decision holding that the 1964 Civil Rights Act precluded state trespass prosecutions for peaceful attempts to be served upon an equal basis in establishments covered by that act.<sup>17</sup> The result of the decision was that the defendants could now point to a federal right not to leave the restaurant and a federal right not to be prosecuted for refusing to leave. In addition, the defendants were being prosecuted under a state statute that violated the federal statute. Because the prosecution itself showed that the defendants were being denied a federal right by a state court, which was bound by statute to deny that right, and the denial was in the context of racial discrimination, removal of the case to a federal court was authorized.

The Supreme Court therefore authorized removal to a federal court only after ascertaining that all the requirements for removal had been met. A federal right was involved, a state statute was invoked to deny that right, and the entire prosecution was within a racial context. In applying those requirements, however, the Court apparently ignored the reason that the requirements had been first enunciated. The Supreme Court had, in the last century, developed those criteria for removal because, if met, they would overcome the presumption that the state courts would correct any racial discrimination. In Georgia that presumption was apparently valid. A year before the principal case was decided the Georgia Supreme Court decided a case in which the facts were almost identical.<sup>18</sup> The Georgia court held that the charges had to be dismissed for the same reasons that the United States Supreme Court had authorized removal in

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14. *Georgia v. Rachel*, 86 Sup. Ct. 1783, 1786 (1966).

15. *Ibid.*

16. Civil Rights Act of 1964, 42 U.S.C. §2000 (a) (1964).

17. *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

18. *Bolton v. State*, 140 S.E.2d 866 (Ga. 1965).

the present case. The decision of the Georgia court would have been binding on a lower state court trying the defendants in the principal case so that the charges against them would had to have been dismissed.

The instant decision appears to undermine the presumption that state courts will correct racial discrimination. The traditional requirements for removal, however, still exist as evidenced by both the present case and another case decided the same day.<sup>19</sup> The latter case involved prosecutions stemming from civil rights demonstrations. The Supreme Court remanded that case to the state courts because the defendants could show no specific federal right to demonstrate.

Therefore, although the traditional requirements for removal still must be met, removal will be granted without consideration whether it was necessary as a measure to insure eventual protection of the defendant's civil rights. The apparent result of this decision is that state courts will be afforded less opportunity to consider civil rights abuses.

On the other hand, federal removal as expanded by the principal decision provides an effective means of protecting civil rights that may be denied by state law. In addition, the possibility of lengthy and expensive litigation in the state courts has been reduced. Federal district courts are able to make initial determinations as to the validity of civil rights prosecutions when federal law clearly controls.

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19. *City of Greenwood v. Peacock*, 86 Sup. Ct. 1800 (1966).