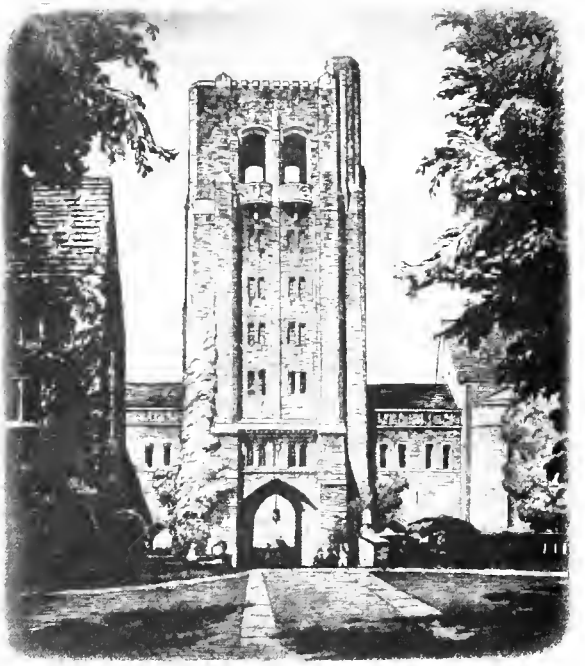

REMOVAL OF CAUSES

FROM

STATE COURTS TO FEDERAL COURTS,

WITH FORMS

ADAPTED TO THE SEVERAL ACTS OF CONGRESS ON THE SUBJECT.

Third Edition, Revised and Enlarged.

BY JOHN F. DILLON,

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PREFATORY NOTE.

The first edition of this work, which appeared in 1875, was speedily exhausted. A second edition was printed in 1877, but is now out of print. At the request of its present publisher, the author of this Tract has again revised and enlarged it, bringing into view more fully the State court decisions, including the decisions of the Federal courts, down to the date of its publication, a Table of Cases and of Contents, a very full Index, and an Appendix of Forms. When considering the disposition of the Federal courts to strongly assert their own jurisdiction, the very high character which the Federal judiciary has always sustained, the great variety of questions coming before these courts even for final determination, the great favor in which they are held by litigants, and the enhanced importance they have acquired through Congressional legislation extending their jurisdiction, both original and appellate, the profession will hardly require an apology of the author of this Tract for endeavoring to lay before them, in well digested form and logical arrangement, all that is valuable on the subject of which he treats.

COLUMBIA COLLEGE LAW SCHOOL, New York, January, 1881.

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REMOVAL OF CAUSES

FROM STATE TO FEDERAL COURTS.

CHAPTER I.

THE FEDERAL JUDICIAL SYSTEM—ITS GROWTH AND IMPORTANCE.

§ 1. The Act of September 24, 1789 (1 Stats. at Large, 79), styled by way of eminence the JUDICIARY ACT, was passed the same year in which the Constitution went into effect, and organized the National or Federal Judicial System, substantially as it exists to-day. No structural changes have since been made in that system, and considering the complex and highly artificial nature of the Federal jurisdiction, the Judiciary Act is justly to be regarded as one of the most remarkable instances of wise, sagacious, thoroughly considered legislative enactments in the history of the law. But while the National Judicial System as established by that Act remains without organic changes, yet changes of a minor, though important, character have been made from

time to time. This has been done, however, without disturbing the nice adjustments and skillful arrangements of the original plan. The system of 1789 is, in form and essence, the system of 1880. If we consider the intricate nature of the relations of the Federal and State governments; that each has a judicial system of its own; that the two classes of courts sit in the same territory, and exercise day by day jurisdiction over the same subjects and the same persons; that the judicial system provided by the Judiciary Act was untried and experimental; that serious conflicts between the State and Federal Courts have been almost wholly avoided; that the Judiciary Act remains, after the lapse of nearly a century, almost intact,—it will appear that the admiration with which it has been regarded by statesmen, lawyers and judges, is not undeserved. And the changes which have been made are those which have been demanded by convenience, by the increase of the population and business of the country, and, during and since the War of the Rebellion, by circumstances brought about by that unanticipated event, and they are not changes made necessary by want of foresight in the great minds which devised and enacted the original scheme. The altered condition of the country has made still further changes, or rather *enlargements*, of the plan necessary, such as, for example, an intermediate court of appeals, for the relief of the Supreme Court and the convenience of suitors, and more judicial force in the districts, etc.; but it is not our present purpose to enter upon this topic.

§ 2. The *Amendments to the Judiciary Act* made from time to time by Congress concerning the Federal Courts, and notably those made during and since the Rebellion, *have tended uniformly in one direction, namely, an enlargement of their jurisdiction.* And the recent Act of March 3, 1875, in connection with the legislation then existing, has amplified the Federal judicial power almost to the full limits of the Constitution. The history of the Federal jurisdiction is one of constant growth; slow, indeed, during the

first half-century and more, but very rapid within the last few years. From various causes, which we need not stop to trace, the small tide of litigation that formerly flowed in Federal channels has swollen into a mighty stream. Certain it is that of late years the importance of the Federal courts has rapidly increased, and that much, perhaps most, of the great litigations of the country is now conducted in them. This is noticeably so in the Western States. These observations have been made, because they are a fitting introduction to the special subject under consideration,—*Removal of Causes from the State Courts to Federal Courts*. They have, indeed, been suggested by that subject; for, as will be seen as we proceed, the limited right in this regard given by the Judiciary Act has been enlarged from time to time, until a very considerable portion of the contested cases in the Federal courts now reach them through this channel.

§ 3. The Prefatory Note briefly recites the origin of this *Monograph*. The article in the Southern Law Review, there referred to, was prepared by the author at the request of its editor. In view of the many recent changes in the legislation on this important subject, and of the uncertainty which many lawyers suppose to surround it in consequence of those changes, the present Publisher has suggested the desirableness of enlarging the scope of the Tract, by the addition of Practical Forms, and of such new matter as the judicial decisions down to date supply. This has accordingly been done.

§ 4. The *Cognizance over Cases removed to the Federal Court* has sometimes been referred to the *appellate* jurisdiction, on the ground that, as the suit is not instituted in the Federal court by original process, the jurisdiction of that court must be appellate;[1] but Mr. Justice NELSON accurately characterized the jurisdiction in such cases "*original juris-*

[1] Martin v. Hunter's Lessee, 1 Wheat. 304, 349, 350.

diction, acquired indirectly by a removal from the State court." [1]

CHAPTER II.

THE PRINCIPAL STATUTES ON THE SUBJECT OF REMOVALS — ACTS OF 1789, 1866, 1867 AND 1875.

§ 5. There are some statutes giving the right of removal in special cases which we shall only mention generally, such as the right to remove causes, civil and criminal, in any State court, against persons denied *Civil Rights;* [2] and suits, civil and criminal, against *Revenue Officers* of the United States, and against officers and other persons acting under the *Registration Laws;* [3] and suits by *Aliens* against *Civil*

[1] Dennistoun v. Draper, 5 Blatchf. 336; Fisk v. U. P. R. R. Co., 6 Blatchf. 362, 367.

[2] U. S. Rev. Stats., §§ 641, 642, construed. State v. Gaines, 2 Woods C. C. 342, (1874); Gaughan v. N. W. Fertilizing Co., 3 Bissell, 485, (1873); Fowlkes v. Fowlkes, 8 Chicago Legal News, 41; Commonwealth v. Artman, 3 Grant (Pa.), 436; Hodgson v. Milward, 3 Grant (Pa.), 418.

[3] Rev. Stats., title XXVI, "The Elective Franchise." Rev. Stats., § 643.

ACT OF MARCH 2, 1833 (4 Stats. at Large, 633), known as the "*Force Act.* "This Act provided for the removal of suits and prosecutions commenced in a court of any State, against any officer of the United States, for any act done under the *revenue* laws of the United States, or under color thereof. See Rev. Stats., § 643. This statute, as re-enacted, applies to the removal of *revenue cases* under "*any* revenue law of the United States." Rev. Stats., § 643. It was previously held to be in force as to removal of revenue cases, except those arising under the internal revenue system. Peyton v. Bliss, 1 Woolw. 170 (1868), Miller, J.; Stevens v. Mack, 5 Blatchf. 514 (1867), Benedict, J.

Construction of Act of 1833, see Dennistoun v. Draper, 5 Blatchf. 336, Nelson, J.; Abranches v. Schell, 4 Blatchf. 256; Wood v. Matthews, 2 Blatchf. 370. The removal may be had without regard to the *amount* in controversy. Wood v. Matthews, 2 Blatchf. 370.

A suit against an officer of the United States is not removable under the Act of 1833 on the ground that the act complained of was done under the *instructions of the treasury department.* Vietor v. Cisco, 5 Blatchf.

128—but see Rev. Stats., § 643. See Benchley v. Gilbert (Act of July 13, 1866, § 67), 8 Blatchf. 147; Salt Co. v. Wilkinson, 8 Blatchf. 30.

Cases arising under *direct tax* law are removable under Act of 1833. Peyton v. Bliss, 1 Woolw. 170, Miller, J.

What are "*revenue laws*" under the Act of March 2, 1833? That Act extends to an action in the State court against a postmaster for a wrongful refusal to deliver a letter to the plaintiff, and such an action was held to be removable into the Federal court. Warner v. Fowler, 4 Blatchf. 311 (1859), Ingersoll, J.

An *action of slander* begun in a State court against a *collector of customs*, for words spoken while in the discharge of his official duty and explanatory of it, may be transferred to the Federal court under the "Force Act" of March 2, 1833 (4 Stats. at Large, 633), which provides "that any case where suit or prosecution shall be commenced in a court of any State against any officer of the United States, for, or on account of any act done under the revenue laws of the United States, or under color thereof," may be removed by the defendant to the Federal court. The question arose on a motion to remand; and as it appeared from the petition for the removal that the words complained of were spoken by the defendant, while in the discharge of his official duties as collector, and in connection with a seizure of goods for an alleged violation of the revenue laws (which fact the motion to remand necessarily admitted to be true), the court held that words thus spoken were to be considered, under this statute, *as an act done under the revenue laws* of the United States. Woods, Circuit Judge, says: "Words spoken in connection with the act of seizure, and in explanation or justification thereof, become part of the act, and together with the seizure form one transaction." Buttner v. Miller, 1 Woods C. C. 620 (1871).

Act of March 3, 1863 (12 Stats. at Large, 757), and Act of March 2, 1867, as to removability of suits for acts done *during the late rebellion* under Federal authority. See Milligan v. Hovey, 3 Bissell, 13; *s. c.*, 3 Ch. Leg. News, 321; Clark v. Dick (limitation), 1 Dill. C. C. 8; Woodson v. Fleet, 2 Abb. U. S. 15; Bigelow v. Forrest (ejectment suit not removable), 9 Wall. 339 (1869); Murray v. Patrie (removal after judgment), 5 Blatchf. 343 (1866), reversed in The Justices v. Murray, 9 Wall. 274 (1869). This last case holds that so much of the 5th section of the Act of March 3 (1863), as provides for the *removal of a judgment* in a State court, *where the cause was tried by a jury*, for re-trial on the facts and law in the Circuit court, is in conflict with the seventh amendment of the Constitution, and void. McKee v. Rains, 10 Wall. 22; Galpin v. Critchlow, 112 Mass. 341 (1873); Wetherbee v. Johnson, 14 Mass. 412; The Mayor v. Cooper, 6 Wall. 247; Lamar v. Dana, 10 Blatchf. 34; Bell v. Dix, 49 N. Y. 232; Anthon v. Morton, 15 Am. Law Reg. (N. S.), 556; Hodgson v. Milward, 3 Grant (Pa.), 418. Criminal case can not be removed before indictment found in the State court. Commonwealth v. Artman, 3 Grant (Pa.), 436.

Officers of the United States under specified circumstances ;[1] and suits against certain *Federal Corporations*, or their members as such members, may be removed upon verified petition, "stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States."[2]

This Act is not repealed by the Act of March 3, 1875.[3]

It applies, in its true construction, only to corporations organized under a law of Congress, and does not include national banks, which are expressly excepted, nor corporations created by foreign governments or by the several States.[4]

§ 6. Under this Act, Mr. Justice NELSON decided at the circuit *two important points, which we notice, as they illustrate* more or less questions which arise under other Removal Acts, and particularly the Act of March 3, 1875. He held: 1st. Where one or more of the defendants have presented a petition for removal conforming to the Act, and thus initiated the removal, it is not competent for the State court to take any proceedings in the cause, other than to perfect the

[1] Rev. Stats., § 644.

[2] Act of July 27, 1868. (15 Stats. at Large, 227; Rev. Stats., § 640). This statute, as found in section 640 of the Revised Statutes, is as follows: "Any suit commenced in any court other than a Circuit or District court of the United States, against any corporation other than a banking corporation organized under a law of the United States, or against any member thereof as such member, for any alleged liability of such corporation, or of such member as a member thereof, may be removed, for trial, in the Circuit court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section." Under the Act of July 27, 1868, a corporation seeking the removal of a cause, must show that it was organized under the laws of the United States, or that there is a defense arising under the Federal Constitution, or some treaty or law of the United States. Northern Line Packet Co. v. Binninger, 70 Ill. 571, (1873).

[3] Kain v. Texas Pacific R. R. Co., 3 Cent. L. J. 12, Duval, J.

[4] Jones v. Oceanic Steam Nav. Co., 11 Blatchf. 406 (1873).

removal, as the other defendants may appear and present their petitions, which they may do at different times. 2d. That the joining of defendants in a suit, not within the limitations of the Act, with those who are, cannot have the effect to defeat the Federal jurisdiction. He adds: "If this were permitted, the privilege extended to parties setting up a right under the Constitution and Laws of the United States, would, in most, if not in every instance, be defeated," and "most of these Removal Acts, depending principally upon the *subject-matter*, and intended to secure the interpretation of the Constitution and Laws of the United States, at the original hearing, to its own judiciary, would be futile and worthless." In such cases, "if these outside parties are deemed material, or are really material, to a complete remedy in behalf of the plaintiff, they must be regarded as subordinate and incidental to the principal litigation in respect to which the Act of Congress has interposed the remedy of removal. In this way the right of the parties to have their defense, under the Constitution or Laws of the United States, tried in the Federal courts, is secured; and, at the same time, the remedy of the plaintiff is unimpaired."[1]

§ 7. A *Petition for Removal under this Act must state* that the corporation or member thereof applying for removal has "a defense arising under or by virtue of the Constitution of the United States or some treaty or law of the United States;" but it need not state what the defense is, nor the facts constituting it;—this is a matter for determination in the Federal court, not on motion to remand, but on formal pleadings, or pleadings and proof.[2]

[1] Fisk v. Union Pacific R. R. Co., 8 Blatchf. 243, 248 (1871). The Act of July 27, 1868 (Rev. Stats. 640), held to provide only for a case in which the federal corporation or member thereof was the *sole defendant*. Hazard v. Durant *et al.*, 9 R. I. 602, 609 (1868), by Potter, J. But it was decided otherwise in Fisk v. Union Pacific Railroad Co., 6 Blatchf. 362; *s. c.*, 8 *ib.* 243, 299; and this latter is, undoubtedly, the true construction of the Act on this point. Further, as to construction of this Act, see Gard v. Durant, 4 Clifford C. C. 113 (1879).

[2] Jones v. Oceanic Steam Nav. Co., 11 Blatchf. 406. See on this point The Mayor v. Cooper, 6 Wall. 247; Dennistoun v. Draper. 5 Blatchf. 336,

§ 8. The *Important Acts of General Operation as to Removals*, and which relate to cases that daily arise, are what is known as the 12th section of the Judiciary Act; the Act of July 27, 1866,[1] the Act of March 2, 1867,[2] known as the "Prejudice or Local Influence Act," and lastly the Act of March 3, 1875.[3] This last-named Act was passed since the Revised Statutes The 12th section of the Judiciary Act, the Acts of July 27, 1866, and of March 2, 1867,

Nelson, J.; Turton v. Union Pacific R. R. Co., 3 Dillon C. C. 366, Miller, J. Compare Magee v. U. P. R. R. Co., 2 Sawyer, 447, Hillyer, J.; Hazard v. Durant *et al.*, 9 R. I. 602, before Potter, J.; Kain v. Texas Pacific R. R. Co. (East. Dist. Texas, Duval, J.), 3 Cent. L. J. 12 (1875); Fisk v. U. P. R. R. Co., 8 Blatchf. 243; *Ib.* 299. Under this Act, Hillyer, J., decided that the fact, that the corporation (the Union Pacific Railroad Co.) was one organized under a law of the United States, is not enough to authorize the transfer of a cause to the Circuit court of the United States. The action was one for a personal injury to the plaintiff; and it appearing that the only defense made by the answer was in denial of the imputed negligence, the decision of which depended entirely upon common-law principles, and not upon the construction of any Act of Congress, the cause was, on motion, remanded to the State court. Magee v. U. P. R. R. Co., 2 Sawyer, C. C. 447 (1873). Under the same state of facts, Mr. Justice Miller has held precisely the other way. Turton v. U. P. R. R. Co., 3 Dillon, C. C. 366 (1875). The question is a close one; and the suggestion presents itself, if in every suit against a federal corporation, such a corporation necessarily has a defense under a law of the United States, because it is a corporation organized under a law of the United States, why did Congress not unconditionally provide for the transfer of all suits, without requiring a verified statement that they have "a defense arising under or by virtue of the Constitution or a treaty or a law of the United States?" As bearing on this subject, see Osborn v. U. S. Bank, 9 Wheat. 738; Cohens v. Virginia, 6 Wheat. 264; Hazard v. Durant *et al.*, 9 R. I. 602; Kain v. Texas Pacific R. R. Co., 3 Cent. L. J. 12 (1875); Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362; *s. c.*, 8 *id.* 243, 299. The view of Mr. Justice Miller in the case of Turton, *supra*, derives strong support from the consideration that, under its charter, this corporation may sue and be sued originally in the Circuit court, without reference to citizenship or other ground of jurisdiction (Banman v. Union Pacific R. R. Co., 3 Dillon, 367), and jurisdiction by removal is but the exercise of original jurisdiction acquired in this manner. *Ante*, § 4.

[1] 14 Stats. at Large, 306.

[2] 14 Stats. at Large, 558.

[3] 18 Stats. at Large, 470.

above mentioned, although technically repealed by the Revised Statutes of the United States, are substantially re-enacted in the 639th section thereof. These statutes are the foundation of the law on the subject of removals on the grounds therein provided for, and the principal purpose of this Tract is to give a *reading* on those statutes, or, in other words, an exposition of their meaning in the light of the adjudications which have been made under them.

The *Text of these Statutes* is so essential to an understanding of the subject, that we reproduce, for convenience, the more material portions of them in a note.[1]

[1] Section 639 of the Revised Statutes is as follows: "Any suit commenced in any State court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the Circuit court for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section.

"*First.* When the suit is against an alien, or is by a citizen of the State wherein it is brought, and against a citizen of another State, it may be removed on the petition of such defendant, filed in said state court at the time of entering his appearance in said State court." [This is, substantially, section 12 of the Judiciary Act.]

"*Second.* When the suit is against an alien and a citizen of the State wherein it is brought, or is by a citizen of such State against a citizen of the same and a citizen of another State, it may be so removed, as against said alien or citizen of another State, upon the petition of such defendant, filed at any time before the trial or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy so far as concerns him, without the presence of the other defendants as parties in the cause. But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the State court, as against the other defendants." [This is, substantially, the Act of July 27, 1866.]

"*Third.* When a suit is between a citizen of the State in which it is brought, and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said State court an affidavit stating that he has reason to believe, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State

CHAPTER III.

VALIDITY OF THE REMOVAL ACTS—RIGHTS PROTECTED FROM INVASION OR DENIAL BY THE STATES.

§ 9. The *Power of Congress* to authorize the transfer of cases, to which the Federal judicial power conferred by the Constitution extends, from the State courts to the Federal courts, has been frequently declared by the Supreme Court, and the constitutionality of the Removal Acts of 1789, 1833, 1863, 1866 and 1867, is established beyond question. "The validity of this legislation," says Mr. Justice FIELD, "is not open to serious question, and the provisions adopted

court." [This is, substantially, the Act of March 2, 1867.]

Section 639 of the Revised Statutes continues as follows: "In order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said State court good and sufficient surety for his entering in such Circuit court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony and other proceedings in the cause, or, in said cases where a citizen of the State in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. It shall thereupon be the duty of the State court to accept the surety and to proceed no further in the cause against the petitioner, and any bail that may have been originally taken shall be discharged. When the said copies are entered as aforesaid in the Circuit court, the cause shall there proceed in the same manner as if it had been brought there by original process, and the copies of pleadings shall have the same force and effect, in every respect and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such State if the cause had remained in the State court."

Act of March 3, 1875. The second and third sections of this Act in relation to the removal of actions are as follows: "§ 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between

have been recognized and followed, with scarcely an exception, by the Federal and State courts since the establishment of the government."[1]

§ 10. In this connection, it may also be observed that the right to remove cases into the Federal court, when the

citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, either party may remove said suit into the Circuit court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the Circuit court of the United States for the proper district."

"§ 3. *Removal—Proceedings.*—That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suits mentioned in the next preceding section, shall desire to remove such suit from a State court to the Circuit court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried and before the trial thereof, for the removal of such suit into the Circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said Circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit court," etc., etc.

[1] Gaines v. Fuentes, *et al.*, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. L. J. 371; *s. c.* 92 U. S. 10; Tennessee v. Davis, 100 U. S. 257; *s. c.*, 10 Cent. L. J. 251; State v. Hoskins, 77 N. C. 530; State v. Deaver, 77 N. C. 555. See also Sewing Machine Companies' Case, 18 Wall. 553; Johnson v. Monell, I Woolw. 394; Meadow Valley Co. v. Dodds, 7 Nev. 143; Chicago, etc. Railway Co. v. Whitton's Admr., 13 Wall. 270; The Mayor v. Cooper, 6 Wall. 247; Strauder v. West Virginia, 100 U. S. 303; *s. c.*, 10 Cent. L. J. 225; Barrow v. Huntoon, 99 U. S. 80 (1878); Baltimore R. R. Co. v. Cary, 28 Ohio St. 208 (1877); Owen v. New York Life Ins. Co., 1 Hughes, 322 (1877); Assurance Co. v. Pierce, 27 Ohio St. 155. *Contra*, Continental Ins. Co. v. Kasey, 27 Gratt. (Va.) 216 (1876).

terms upon which the right is given by the Acts of Congress in that behalf are complied with, *can not be defeated by State legislation.* Therefore, a State statute which allows a foreign corporation to do business in the State only on condition that it will agree not to remove suits against it to the Federal courts, is unconstitutional, and such an agreement, though entered into by the company, is void.[1] But provisions of such a statute, authorizing and requiring the Secretary of State to revoke the license of any corporation which shall ask a removal of a cause in violation of its provisions, are not inoperative, but may be carried out by the Secretary of State, or enforced by the State judiciary. The effect of the statute is that foreign corporations must forego the right to remove causes to Federal courts, or cease to do business within the State. As the State Legislature has the right to exclude foreign corporations, the means of enforcing such exclusion, or the motives of such action, will not be inquired into by a court of the United States.[2]

CHAPTER IV.

MATERIAL ELEMENTS OF THE RIGHT, AS GIVEN BY THE PRINCIPAL STATUTES.

§ 11. The *Material Elements of the Statutes* on this subject, it will be perceived, are the *nature of the suits* which may be removed; the *amount* or *value* in dispute; the *parties*

[1] Insurance Co. v. Morse, 20 Wall. 445. See also Insurance Co. v. Dunn, 19 Wall. 214; Gordon v. Longest, 16 Pet. 97; Kanouse v. Martin, 14 How. 23; *s. c.*, 15 How. 198; Stevens v. Phœnix Insurance Co., 41 N. Y. 149; Holden v. Putnam Insurance Co., 46 N. Y. 1; Hadley v. Dunlap, 10 Ohio St. 1. Home Insurance Co. v. Davis, 29 Mich. 238, is inconsistent with Insurance Co. v. Morse, *supra.* In Hartford Fire Ins. Co. v. Doyle (West. Dist. Wis., Hopkins, J.), 3 Cent. L. J. 41, an act of the legislature of the State, making it the duty of the Secretary of State to revoke licenses of companies for removing suits to Federal courts, was held void, and such revocation restrained by injunction. But see Doyle v. Continental Ins. Co., 94 U. S. 535, referred to *infra.*

[2] Doyle v. Continental Ins. Co., 94 U. S. 535; State v. Doyle 40 Wis. 220.

to the suit, and in this connection the *party entitled* to the removal; the *time* when the application must be made; the *mode* of making the application, and herein of the *surety* or *bond*, etc., required, and the *effect on the jurisdiction* of the State court and of the Federal court of a proper application to remove a cause which is removable.

CHAPTER V.

THE 12TH SECTION OF THE JUDICIARY ACT.

§ 12. Before entering in detail upon the several elements of the removal enactments, it is advisable to advert to some general considerations touching these several statutes.

We commence with *Section 12 of the Judiciary Act.* The reader may recur to its language as re-enacted in substance in the Revised Statutes, given in a note to a preceding section; and it is important to remember that from 1789 until the Act of July 27, 1866, above mentioned, the 12th section of the Judiciary Act was the only statute authorizing the removal of causes from the State courts to the Circuit court of the United States, on the ground of *citizenship* of the parties.

§ 13. Section 12 of the Judiciary Act, omitting the case of aliens, authorized the removal by the *defendant* (under limitations therein mentioned), where the suit is commenced in the State court "*by a citizen of the State in which the suit is brought, against a citizen of another State.*" That is, if the suit is by a resident plaintiff, the *non-resident* defendant may have it removed; but the resident plaintiff could not. Under section 11 of the Judiciary Act as to *original* suits in the Circuit court, a *non-resident* plaintiff might sue in the Circuit court a *resident defendant*; but if the non-resident plaintiff elected to sue in a State court, section 12 of that Act gave *neither* party the right to remove the cause from the State court to a court of the United States. The

plaintiff was not given the right, because he had voluntarily selected the State court in which to bring his action; the defendant was not given the right, because it was not supposed that *he* would have any grounds to object that he was sued in the courts of his own State. So that the right of removal by the 12th section of the Judiciary Act is limited to the non-resident citizen when sued by a resident plaintiff in the courts of the State. By section 11 of the Judiciary Act, the Circuit court has jurisdiction when the suit is between a citizen of the State in which it is brought and a citizen of another State. This was construed by the courts to mean that, if there were several plaintiffs and several defendants, *each one of each class* must possess the requisite character as to citizenship.[1] For example, a citizen of New York and a citizen of Georgia could not join as plaintiffs in suing in New York a citizen of Massachusetts, if found in New York, because the plaintiffs were not each competent to sue; for the citizen of Georgia could not, under section 11 of the Judiciary Act, sue a citizen of Massachusetts in New York.[2] Some of the more important cases touching the jurisdiction of the Circuit court under the 11th section of the Judiciary Act, and concerning the effect of the Act of 1839 (5 Stats. at Large, 321), which relates to suits commenced in the Circuit court, are referred to in the note, as they have a bearing on the construction of the 12th section.[3]

[1] Strawbridge v. Curtiss, 3 Cranch, 267; Coal Co. v. Blatchford, 11 Wall. 172.

[2] Moffat v. Soley, 2 Paine, C. C. 103. This restriction on the jurisdiction of the Federal courts is removed by the Act of March 3, 1875, and now these courts would have jurisdiction of such a suit as that mentioned in the text.

[3] The case of the Commercial Bank v. Slocomb, 14 Pet. 60 (except so far as it has been since overruled as to the suability of corporations in the Federal courts), holds, and only holds, that under the Judiciary Act the jurisdiction of the Circuit court is defeated if some of the defendants are citizens of the *same State with the plaintiff*; and that this principle was not changed by the Act of February 28, 1839. Same principle affirmed, at the same term, in a case rightly decided, Irvine v. Lowry, 14 Pet.

§ 14. But it should be borne in mind that in cases removed from the State courts the *jurisdiction of the Circuit court is dependent upon the act under which the suit is removed*, and not upon the legislation which confers jurisdiction upon that court in cases originally brought therein; and therefore the restrictions on the jurisdiction in the 11th section of the Judiciary Act have no application to cases removed under the 12th section of that Act.[1]

§ 15. Under section 12 of the Judiciary Act regulating removals, it is settled that a cause can not be removed thereunder unless *all the defendants* ask for it; that to

293. See, also, Clearwater v. Meredith, 21 How. 489. In Taylor v. Cook *et al.*, 2 McLean, 516, the plaintiffs were citizens of *New York*, and brought suit in the Circuit court of the United States in *Illinois* against Cook, a citizen of *Illinois*, and Spaulding, a citizen of *Missouri*, who entered a voluntary appearance, and the question was, whether the court had jurisdiction, and, aided by the Act of 1839, it was held that it had. Judge McLean, in delivering his opinion says, *arguendo*, that prior to the Act of 1839, and under the 11th section of the Judiciary Act limiting the jurisdiction to suits between "a citizen of the State where the suit is brought and a citizen of another State," as construed, "the court could not take jurisdiction of the case; for as between the plaintiffs who are citizens of New York, and the defendant, Spaulding, who is a citizen of Missouri, the court could exercise no jurisdiction in the State of Illinois; because in that case neither party would reside in the State where suit is brought." But see *contra*, the observations, *arguendo*, of Wayne, J., in Louisville Railroad Company v. Letson, 2 Howard, on pp. 553, 554, in which he concludes that it is not necessary under the Judiciary Act that all of the defendants should be citizens of the same State, provided none of them are citizens of the same State with the plaintiff. (See *infra*, Chapter 10.) The joinder of a defendant not served, and who does not appear, who is a citizen of the *same State* with the plaintiff, does not defeat the jurisdiction of the Circuit court; at all events, it does not since the Act of 1839. Doremas v. Bennett, 4 McLean, 224. But the joinder of *such* a defendant who is served, if he be not a mere nominal defendant, does defeat the jurisdiction; at all events, it did prior to the Act of March 3, 1875. Ketchum v. Farmers' etc. Co., 4 McLean, 1; Coal Co. v. Blatchford, 11 Wall. 172; Sewing Machine Cos.' Case, 18 Wall. 553.

[1] Green v. Custard, 23 How. 484; Barclay v. Levee Commissioners, 1 Woods, C. C. 254; Bushnell v. Kennedy, 9 Wall. 387; Sands v. Smith, 1 Dillon, 293, 297; Sayles v. N. W. Ins. Co., 2 Curtis, C. C. 212; Gaines v. Fuentes, U. S. Sup. Court, Oct. Term, 1875, 2 Otto, 10, 3 Cent. L. J. 271; Winans v. McKean, etc. Nav. Co., 6 Blatchf. 215.

bring the case within the Act, *all* the plaintiffs must be citizens of the State in which suit is brought, and *all* of the defendants must be *citizens* of some other *State* or *States*.[1] But this rule, we may remark in passing, does not apply to persons who are mere nominal or formal parties.[2]

[2] Beardsley v. Torrey, 4 Wash. 286, (1822); Ward v. Arredondo, 1 Paine, 410, (1825); Hubbard v. R. R. Co., 3 Blatchf. 84; *s. c.*, 25 Vt. 715, (1853); Beery v. Irick, 22 Gratt. 484; *Ex parte* Girard, 3 Wall. Jr. 263; Smith v. Rines, 2 Sumn. 330; Hazard v. Durant, 9 R. I. 602; *In re* Turner, 3 Wall. Jr. 260; *Ib.* 263; Perkins v. Morgan, 27 La. Ann. 229, (1875). Goodrich v. Hunton, 29 La. Ann. 372.

[3] Browne v. Strode, 5 Cranch, 303; Wormley v. Wormley, 8 Wheat. 421; Ward v. Arredondo, *supra*; Wood v. Davis, 18 How. 467. *Who are nominal parties and who are not*, see also Bixby v. Couse, 8 Blatchf. 73; Coal Co. v. Blatchford, 11 Wall. 172; Davis v. Gray, 16 Wall. 220; Weed Sewing Machine Co. v. Wicks, 3 Dillon, 261, 266; Knapp v. Troy & Boston R. R. Co., Sup. Court, Oct. Term, 1873, 20 Wall. 117; where the cases are cited by Mr. Justice Davis. In this last case, the learned judge speaking of the Removal Act of 1867, says: "It does not change the settled rule that determines who are to be regarded as the plaintiff and the defendant; and as the plaintiff and defendant in this action were both citizens of New York, the Circuit court has no jurisdiction to entertain it." 20 Wall. 124. The fact that defendants are named who have not been served, or have not appeared, and who are citizens of the same State with the plaintiff, will not defeat the right of removal. *Ex parte* Girard, 3 Wall. Jr. 263, (1858), Grier, J.

Nominal parties, or persons made parties who are not necessary to a determination of the real controversy, will not defeat the right to a removal. Mayor etc. v. Cummins, 47 Ga. 321 (1872); Wood v. Davis, 18 How. 467 (1855); Ward v. Arredondo, 1 Paine, 410 (1825), Mr. Justice Thompson; Arrapahoe Co. v. K. P. R. R. Co., 4 Dill. 277, (1877); *s. c.*, 5 Cent. L. J. 102; Calloway v. Ore Knob Co., 74 N. C. 200; Edgerton v. Gilpin, 3 Woods C. C. 277. *Infra* § 25, note. *Garnishees are not parties* to suits; the fact that the plaintiff and garnishee are citizens of the same State is no obstacle to removal. Cook v. Whitney, 3 Woods C. C. 715.

Fraudulent or improper joinder of parties to prevent removal. See Smith v. Rines, 5 Sumner, 338; *Ex parte* Girard, 3 Wall. Jr. 253. *Improper joinder of causes of action.* Cook v. State Nat. Bank, 52 N. Y. 96 (1873).

Officers of a corporation, joined with it as defendants to a bill in equity, but as to whom no relief was prayed in their individual capacity, and no relief which was not asked as against the corporation, are *nominal parties* in such a sense, as not to defeat the right of removal, if the right otherwise exists. Hatch v. Ch. R. I. & P. R. R. Co., 6 Blatchf. 105 (1868). *Infra* § 25, note.

Omitting the case of aliens, it will be perceived that *the 12th section of the Judiciary Act* (now Rev. Stats., section 639, sub-division 1), *gave the power of removal* only under the following circumstances:

1. The plaintiff, or if more than one, then all of the plaintiffs must be citizens of the State in which the suit is brought;

2. The defendant, or if more than one, then *all* of the defendants must be citizens of another State or States;

3. It is limited to *civil* suits, involving, besides costs, a sum or value exceeding $500;

4. The right of removal is limited to the *defendant* or *defendants*, and must be exercised or applied for by *all* of the defendants.[1]

As to effect, under the Act of July 27, 1868, as to removal of cases by *Federal corporations*, or the joinder of defendants who do not possess the right of removal, see *ante*, chapter 2, and notes.

[1] Smith v. Rines, 2 Sumner, 338; Beardsley v. Torrey, 4 Wash. C. C. 286; Ward v. Arredondo, 1 Paine, 410; *In re* Turner, 3 Wall. Jr. 260, Grier, J.; *In re* Girard, *Ib.*, 263; Field v. Lownsdale, 1 Deady, 288; Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362; *s. c.*, 8 Blatchf. 243. 299; Paterson v. Chapman, 13 Blatchf. 395 (1876); Carswell v. Schley, 59 Ga. 17; Girardey v. Moore, 3 Woods, C. C. 397; *s. c.*, 5 Cent. L. J., 78; Sawyer v. Switzerland Ins. Co., 14 Blatchf. 451; Taylor v. Rockefeller, W. D. Pa., June 1878, Strong, J., 7 Cent. L. J. 349; Dart v. Walker, 4 Daly (N. Y.) 188; Merwin v. Wexel, 49 How. (Pr.) Rep. (N. Y.) 115. The above cases discuss the *right to and effect of successive removals* by different defendants under various Removal Acts.

In Fallis v. McArthur, 1 Bond, 100 (1856), it was held that, where *one joint defendant* removed the suit (the other not being served), the plaintiff was entitled to process in the Federal court against the defendant who was not served with process in the State court at the time the cause was removed. In Field v. Lownsdale, *supra*, Deady, J., seems to be of a different opinion. See opinion of Mr. Justice Nelson in Fisk v. Union Pacific R. R. Co., 8 Blatchf. 243 (1871); *s. c.*, *Ib.* 299; 6 *Id.* 362.

If a suit be brought by a citizen against several non-resident *joint debtors* in a State where the statute authorizes the plaintiff to proceed against the defendants served, and if he recover judgment, it may be enforced against the joint property of all, or the separate property of the defendants served; and if the only defendants served are citizens of another State, such defendants are entitled to remove the cause, under the Judiciary Act, though the co-defendant not served does not join in the application. Davis v. Cook, 9 Nev. 134 (1874).

5. The *Petition* for the removal must be filed *at the time* the defendant or defendants *enter their appearance* in the State court.[1] Hence, if some of the plaintiffs were not citizens of the State in which the suit was brought; or if some of the defendants were citizens of the same State with plaintiff; or if the defendants answered or submitted to the jurisdiction of the State court before applying for the removal; or if all the defendants (other than formal or nominal parties) did not apply for the transfer; or if the amount in dispute did not exceed $500—then, and in each of these cases, there could be no removal under the Judiciary Act.[2]

In an action for *joint indebtedness*, all the joint defendants, both under the Act of July 27, 1866, and under that of March 2, 1867, must apply for the removal; — no one can remove under the Act of 1866, unless a separate judgment can be rendered against him without the presence of the other defendants. Merwin v. Wexel, 49 How. (Pr.) Rep. 115.

[1] *Entering an appearance;* meaning of, construed and applied. Chatham Nat. Bank v. Merchants' Nat. Bank, 1 Hun (N. Y.), 702 (Sup. Court, Special Term, 1874); Dart v. Cook, 8 Nev. 134 (1874); Hazard v. Durant *et al.*, 9 R. I. 602, 606; Hough v. West. Transp. Co., 1 Biss. 425 (1864); Sweeney v. Coffin, 1 Dill, C. C. 73, Treat, J.; McBratney v. Usher, 1 Dill. C. C. 367; Webster v. Crothers, 1 Dill. C. C. 301; Pugsley v. Freedmen's Sav. Bank, 2 Tenn. Ch. 130. Other cases cited *infra*, chap. 15.

Under section 12 of the Judiciary Act the petition need *not be verified*. Sweeney v. Coffin, 1 Dill. C. C. 73.

As to *verification and mode of removal* under other Removal Acts, *Ib. Infra*, chaps. 14, 15, 17.

[2] See *Infra*, chaps. 8, 11, 15, 17, and cases cited.

There can be no removal under the Judiciary Act (Rev. Stats., sec. 640, sub-division 1), if the *plaintiff is an* ALIEN. Galvin v. Boutwell, 9 Blatchf. C. C. 470.

FEDERAL JURISDICTION *dependent on* ALIENAGE. *Infra*, sec. 19, *note;* Hinckley v. Byrne, 1 Deady, 224; Breedlove v. Nicolet, 7 Pet. 413; Wilson v. City Bank, 3 Sumner, 422; Montalet v. Murray, 4 Cranch, 46; Jackson v. Twentyman, 2 Pet. 136; *Infra*, chap. 14, *note. Resident unnaturalized foreigners are deemed aliens.* Baird v. Byrne, 3 Wall. Jr. 1; Lanz v. Randall, 3 Cent. L. J. 688; *s. c.*, 4 Dillon C. C. 425. *Indians* are not aliens. Karrahoo v. Adams, 1 Dill. C. C. 344. When a suit is removed on account of *alienage*, it will not be remanded if the alien subsequently becomes a citizen. Houser v. Clayton, 3 Woods C. C. 273.

CHAPTER VI.

ACT OF JULY 27, 1866.

§ 16. The Act of July 27, 1866 (now Rev. Stat., § 639, sub-division 2), is the first Act which allowed *part* of the defendants to remove a cause; but this right is given by the Act only under specified and limited circumstances. Omitting the case of aliens, which is of unfrequent occurrence and presents little that is peculiar, the following conditions must co-exist to authorize a removal under this Act:

1. The suit in the State court must be by a plaintiff who is a citizen of the State in which the suit is brought.

2. It must be against a citizen of the same State *and* a citizen of *another* State as defendants.

3. The *amount* in dispute must exceed the sum or value of $500, besides costs.

4. The removal must be applied for "before the trial or final hearing of the cause" in the State court.

These elements concurring, then the non-resident defendant (not the resident defendant), may have the cause removed, (not wholly), but only so far as relates to himself, provided also, it is a suit "brought for the purpose of restraining or enjoining him, or is a suit in which there can be a *final determination* of the controversy, *so far as concerns him*, without the presence of the other defendants as parties to the cause.[1]

[1] *Construction and extent of application of the Act of* 1866. Hodgkins v. Hayes, 9 Abb. N. Y. Pr. (N. S.), 87; Darst v. Bates, 51 Ill. 439; Stewart v. Mordecai, 40 Ga. 1.

In Cape Girardeau and State Line R. R. Co. v. Winston *et al.*, 4 Cent. L. J. 127 (1877), before Dillon and Treat, JJ., the last-named Judge was strongly inclined to regard the Act of 1866 as unconstitutional, and as repealed by implication by the Act of March 3, 1875,—the Circuit Judge giving no opinion on these points, and both judges concurring in holding that, where in a suit brought in a State court by the plaintiff corporation *to set aside a deed of trust*, made by its officers and another corporation of *the same State*, a removal of the cause to the United States court was sought by the surviving trustee in the deed of trust and one of the

§ 17. The *Express Provision* is that the suit as between the plaintiff (a citizen of the State), and the other defendant (also a citizen of the same State with the plaintiff), shall proceed in the State court notwithstanding such removal to the Federal court. As between the plaintiff and the non-resident defendant (citizen of another State), the cause proceeds in the Federal court. It must be admitted that this is a singular result. The plaintiff's single action is thus split into two — one of which remains in the State court to be adjudged by it; the other goes to the Federal court to be adjudged by it. This Act, it will be perceived, has no reference to cases in which *all* of the defendants are

bondholders under it, the latter corporation being a necessary party, and no final or effectual determination of the case made by the bill being possible without its presence, the petitioners could not have the cause removed under the Act of 1866 (Rev. Stat., § 639, clause 2), as to them. See similar case, Gardner v. Brown, 21 Wall. 36, cited *infra*, chap. 11, note.

Construction of the Act of 1866, as to cases in which there can be a *final determination of the controversy* as to the portion of the defendants removing the cause, without the presence of the other defendants. See Bixby v. Couse, 8 Blatchf. 73; Peters v. Peters, 41 Ga. 242; Allen v. Ryerson, 2 Dillon C. C. 501; Case of Sewing Machine Cos., 18 Wall. 583; s. c., below, 110 Mass. 70; Field v. Lamb, 1 Deady, 430; Field v. Lownsdale, 1 Deady, 288 (1867). This last case holds that in a suit to quiet title against *tenants in common*, one of the defendants, as such tenant, may remove the case to the Federal court, under the Act of 1866, if he is otherwise within its provisions.

In McGinnity v. White, 3 Dillon C. C. 350, it was held, under the circumstances, that one *copartner* might remove the cause as to himself under the Act of 1866.

The Act of 1866 has no application to a case where one of the defendants is *an alien*, and the other defendants are citizens of *another State*, and none of the defendants, or none who are served, are citizens of the State in which the suit is brought. Davis v. Cook, 9 Nev. 134 (1874).

Under a *joint application* by two defendants, the removal may, under the Act of 1866, be granted to one and refused to the other. Dart v. Walker, 4 Daly (N. Y.), 188.

Under the Act of 1866, NO AFFIDAVIT *of local prejudice* is necessary, such as is required by the Act of 1867. Allen v. Ryerson, 2 Dillon C. C. 501.

As to TIME AND MODE of applying for removal under the Act of 1866, see *infra*, chapters 15, 17.

citizens of another State (that being then provided for by section 12 of the Judiciary Act), nor any reference to the cases in which the plaintiffs are citizens of any other State than that in which the suit is brought. Its obvious purpose was to give a right of removal, in the cases and on the terms prescribed, to the non-resident citizen who was joined as a defendant with a resident citizen, when sued by a resident plaintiff.[1] It may be inferred that Congress doubted the power under the Constitution (art. 3, sec. 2), to authorize the removal of the *whole* case, since part of the case provided for would be between citizens of the *same* State. We say this may be inferred, since otherwise we can scarcely conceive why it is that Congress would divide one case into two, and embarrass the parties with the inconvenience and additional expense resulting therefrom. Speaking of this Act, Mr. Justice CLIFFORD observes: "Considering the stringent conditions which are embodied therein, it is doubtful whether it will prove to be one of much practical value.[2] The necessity for this Act grew out of the narrow construction early placed on the Judiciary Act, the embarrassments arising from which had been so long felt, and have finally led to the Act of March 3, 1875. The experience of the past should induce great caution in the courts in applying to that Act the rigid principles of the early adjudications on the subject of Federal jurisdiction.[3]

CHAPTER VII.

ACT OF MARCH 2, 1867—"PREJUDICE OR LOCAL INFLUENCE."

§ 18. *We now come to the Act of March 2, 1867.*[4] It purports to be an *amendment* to the Act of July 27, 1866,

[1] Bixby v. Couse, 8 Blatchf. 73; Allen v. Ryerson, 2 Dillon, 501; Field v. Lownsdale, 1 Deady, 288 (1867); Field v. Lamb, *Ib.* 430.

[2] Case of Sewing Machine Companies, 18 Wall. 553; *s. c.*, below, 110 Mass. 70.

[3] See *infra*, chap. 11 and note, and chaps. 14 and 15.

[4] 14 Stats. at Large, 558; quoted *ante*, chap. 2, note.

last noticed, and it extends the right, in the cases therein provided for, as well to *plaintiffs* as to defendants, but confines it to such as are *non-residents* of the State in which the suit is brought, and makes the ground of removal, not alone the citizenship of the parties, but also prejudice or local influence. The Act provides, "That where a suit is now pending or may hereafter be brought in any State court in which there is a controversy between *a citizen of the State in which the suit is brought* and a citizen of another State, * * * such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such State court," may have the cause removed to the Circuit court of the United States. It will be seen that, as to the plaintiff, this Act follows the language of section 11 of the Judiciary Act, and not of section 12 of that Act; the plaintiff may or may not be a resident of the State where the suit is brought; and the right of removal is given to the non-resident party, be he the plaintiff or defendant.

§ 19. Construing this Act, Mr. Justice MILLER, in *Johnson* v. *Monell*,[1] says:

"*The only conditions necessary to the exercise of the right of removal* under it are:

"1. That the controversy shall be between a citizen of the State in which the suit is brought and a citizen of another State.

"2. That the matter in dispute shall exceed the sum of five hundred dollars, exclusive of costs.

"3. That the party citizen of such other State shall file the required affidavit, stating, etc., the local prejudice.

"4. Giving the requisite surety for appearing in the Federal court." * * * "Congress," adds this able judge, "intended to give the right in every case where the four requisites we have mentioned exist."

[1] 1 Woolw. 390.

In the case just cited, the plaintiff was a citizen of Iowa, one defendant was a citizen of Nebraska, and the other of New York; but the last was not served with process and did not appear; and it was held that the plaintiff was entitled, under the Act of March 2, 1867, to have the case transferred from the State court to the United States court, after a verdict of the jury in the State court in his favor had been set aside by the court. This Act, let it be noted, only applies where one of the parties is a citizen of the State in which the suit is brought, and the adverse party is a citizen of another State — in this respect conforming to the previous legislation on the subject.[1] This Act undoubt-

[1] *Construction and extent of application of the Act of* 1867.—*Policy and purpose* of the Acts of 1866 and 1867, stated by Graves, C. J., in Crane v. Reeder, 28 Mich. 527 (1874); by Potter, J., in Hazard v. Durant *et al.*, 9 R. I. 602 (1868); by Blatchford, J., in Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362; by Gray, C. J., in Galpin v. Critchlow, 112 Mass. 339 (1873).

Under this Act, a suit pending in a State court between a citizen of the State in which the suit was brought and a citizen of another State, could not, on the application of the former, be removed. Hurst v. Western, etc. R. R. Co., 93 U. S. 71 (1876).

The Act of 1867 (Rev. Stats., § 639, cl. 3) does not apply where the cause of removal is *alienage*, but is *limited to citizens*. Crane v. Reeder, 28 Mich. 527 (1874); Davis v. Cook, 9 Nev. 134 (1874).

Under Act of 1867 the *whole suit* is to be removed. Sewing Machine Cos'. Case, 18 Wall. 553; *s. c.*, below, 110 Mass. 81; Cooke v. State Nat. Bank, 52 N. Y. 96 (1873); *s. c.*, below, 1 Lans. 494. And *all the defendants*, not nominal or merely formal parties, must apply for the removal. Bixby v. Couse (Blatchford, J.), 8 Blatchf. 73 (1870); Cooke v. State Nat. Bank, 1 Lans. (N. Y.) 494; *s. c.*, 52 N. Y. 96 (1873). As to who are nominal or formal parties, see *ante*, § 15, note.

Suits cannot be removed from the State courts on account of "prejudice or local influence," *unless the party opposed to him who petitions for the removal is a citizen of the State in which suit is brought.* American Bible Society v. Grove, 101 U. S. 610 (1879); *s. c.*, 21 Alb. L. J. 155.

Parties — Citizenship under Act of 1867. In the leading case on this statute, entitled in the report the Sewing Machine Companies' Case, it was decided that an action *ex contractu*, by a plaintiff who was a citizen of the State in which the suit was brought, against two defendants, citizens of other States, *and* a third defendant, a citizen of the *same State as the plaintiff*, was not removable under the Act of 1867, upon the petition of the two non-resident defendants (18 Wall. 553); and the same principle was re-asserted in a subsequent case, where the removal of the

edly grew out of the condition of affairs in the Southern States after the War of the Rebellion, and was intended to afford to plaintiffs who had resorted to the State court the

whole suit, under the Act of 1867, was sought, and not of the suit as to the non-resident defendants under the Act of 1866. Vannevar v. Bryant, 21 Wall. 41; Case v. Douglas, 1 Dillon, 209; Johnson v. Monell (change of residence), 1 Woolw. 390; Bixby v. Couse, 8 Blatchf. 73 (1870); Florence, etc. Co. v. Grover & Baker, etc. Co. 110 Mass. 70, affirmed 18 Wall. 553.

In the case of Burnham v. Chicago, Dubuque & Minnesota Railroad Co. *et al.*, 4 Dillon C. C. Rep. 503, the Circuit Court of the United States for the District of Iowa, May term, 1876 (Miller and Dillon, JJ.), decided the following: A foreclosure suit by trustees in a railway mortgage, who are citizens of *Massachusetts*, was commenced in one of the State courts in Iowa, against the debtor company (which is an *Iowa* corporation), making an *Illinois* and an *Indiana* corporation, each of which claimed liens upon the property, also defendants to the bill; this suit, after all of the defendants had answered, was removed, in 1876, to the Circuit Court of the United States for the district of Iowa, upon the petition of the *plaintiffs* under the Act of 1867. Rev. Stat., § 639, subdivision 3. The debtor corporation moved to remand the same to the State court, because *all* of the defendants were not citizens of *the State in which the suit was brought*. *Held*, inasmuch as the case was one clearly within section 2, of the Act of March 3, 1875, in respect of removals, and the controversy, one in relation to the priority of liens between citizens of different States, that the circuit court had jurisdiction, and that it should not be remanded. See, Beery v. Irick, 22 Gratt. (Va.) 484.

It is not necessary that the *petition or affidavit should be signed by the petitioner in person; it may be signed by his attorney in fact*. Dennis v. Alachua Co., 3 Woods, 683.

UNDER THE ACT OF 1867, where *non-resident and resident plaintiffs* are joined, the non-resident plaintiffs cannot remove the case wholly or as to themselves. All the plaintiffs must be citizens of the State in which the suit is brought. Bliss v. Kawson, 43 Ga. 181 (1871). See Stewart v. Mordecai, 40 Ga. 1; Bryant v. Scott, 67 N. C. 391 (1872); Case v. Douglas, 1 Dillon C. C. 299; George v. Pilcher, 28 Gratt. 299 (1877); Burch v. Daveuport, etc. R. R., 46 Iowa, 449.

In Sands v. Smith, 1 Abb. U. S. 368, *s. c.*, 1 Dillon, 290, it was held that, under the Act of 1867, a non-resident plaintiff might remove a suit against a citizen of the State in which it was brought *and* a citizen of a third State who had voluntarily appeared, as to all the defendants. This seems to be right in view of the Act of 1839; but some doubt is thrown upon the case by the reference to it in the Sewing Machine Cos.' Case, 18 Wall. 553.

right to transfer their suits to the Federal courts.[1] This is the first Act that in any event extended the right to a *plaintiff* to leave the forum he had voluntarily chosen, and in this respect was an entire departure from all the previous legislation. It is not so difficult to justify the Act in this respect, even if it was intended to be permanent, as it is to sustain the provision that this removal may be had, on filing the general affidavit of prejudice or local influence, the truth of which can not be contested or inquired into, "at *any time* before trial or final hearing of the suit." This provision occasions delay, and is often resorted to for that purpose. But the Act of 1867 has been expressly adjudged by the Supreme Court to be constitutional,[2] and Congress has not, in our judgment, repealed or modified it. There is no express repeal, and it is not, according to the better view, repealed by implication by the Act of March 3, 1875, next to be noticed.[3]

In passing for the present from this Act, we direct attention to Mr. Justice MILLER's vindication of it. He says: "I do not join in the condemnation of the Act of 1867. It does not allow the removal solely on the ground of citizenship. It requires the requisite citizenship to exist, and in addition thereto requires the existence of prejudice or local influence to be shown by affidavit. In this respect the policy of that Act is not unlike that which prevails in perhaps all the States in regard to the change of venue from

Case v. Douglas (citizenship of plaintiffs who are copartners), 1 Dill. C. C. 299; Cooke v. State Nat. Bank (all the defendants must unite), I Lansing, N. Y. 494.; *s. c.*, 52 N. Y. 96 (1873); Washington, etc. R. R. Co. v. Alexandria, etc. R. R. Co., (Act of 1867 does not repeal Act of 1866), 19 Gratt. (Va.), 562 (1870); Fields v. Lamb (as to repeal, etc.), 1 Deady, 430; Beecher v. Gillett (removal by substituted defendant), 1 Dillon C. C. 308; Johnson v. Monell (time of removal—change of residence), 1 Woolw. 390.

Decisions concerning the *affidavit* required by this Act, see *infra*, chapter 16; *supra*, § 18.

[1] Gaines v. Fuentes, 92 U. S. 10 (1875), 3 Cent. L. J. 371.

[2] Chicago & N. W. Railway Co. v. Whitton's Admr., 13 Wall. 270.

[3] *Infra*, chapter 8.

one county, or one judicial district, to another. *Johnson* v. *Monell*, 1 Woodw. 390. The object in each case is to secure an impartial tribunal, and the Federal courts are not courts for non-residents more than for residents, and no injustice is done to the latter to be compelled there to litigate controversies which they may have with citizens of other States."[1]

CHAPTER VIII.

ACT OF MARCH 3, 1875.

§ 20. *We now reach the Act of March 3, 1875* (18 Stats. at Large, 470), entitled "an Act to determine the jurisdiction of the Circuit courts of the United States, and to regulate the Removal of Causes from State courts, and for other purposes."[2]

The *first section* of the Act relates to the *original jurisdiction* of the Circuit court, civil and criminal, greatly enlarging the jurisdiction in civil cases, and conferring a jurisdiction concurrent with the courts of the several States, using for this purpose the language of the article of the Constitution (art. 3, sec. 2), which defines and limits the judicial power of the general government. The civil jurisdiction, as there conferred, is given in certain specified cases by reason of the *subject-matter*, irrespective of the citizenship of the parties, and in other cases by reason of *citizenship*, irrespective of the subject-matter. It is material to notice the clause giving jurisdiction on the ground of citizenship. It removes the limitation prescribed by the Judiciary Act and by the prior Removal Acts, requiring one of the parties to the suit, that is, either the plaintiffs or the

[1] Farmers' etc. Trust Co. v. Maquillan, 3 Dillon, 379, 381.

[2] *The Act of March* 3, 1875, *relating to the removal of causes, is still in force.* American Bible Society v. Grove, 101, U. S. 610 (1879); *s. c.* 21 Alb. L. J. 155.

defendants, to be citizens of the State where the suit is brought. On the contrary, the Act of March 3, 1875, confers jurisdiction of all suits of a civil nature, over $500, in which there shall be a controversy between citizens of different States, without requiring any of the parties to be citizens of the State in which the suit is brought. The second section of the Act relates to removals (note to chap. 2, *ante*); and as to the suits which may be removed, it follows the language of the first section. So that it is true, in general, that any cause may, at the proper time and in the prescribed mode, be removed from the State court to the Circuit court of the United States, which, by reason of either its subject-matter or the citizenship of the parties, might have been instituted originally in the Federal court.

§ 21. The Act of 1875 on the one hand adds to *or enlarges the classes of cases* that may be removed, and on the other hand *restricts the time* in which the removal must be applied for within narrower limits than the Acts of 1866 and 1867. The required *amount or value* is the same as before, *i. e.*, it must exceed $500 exclusive of costs. In all previous legislation, the right of removal, where citizenship is the ground, is limited to the non-resident citizen, whereas in the Act of 1875 it is given to "*either party*," and in certain circumstances to either one or more of the plaintiffs or defendants. This is a radical change of policy.

§ 22. An *Analysis of the second section* of the Act shows that in respect of *subject-matter*, without reference to citizenship, it gives the right of removal of "any suit of a civil nature at law or in equity," involving over $500, (1) arising under the Constitution, or laws or treaties of the United States; or (2) in which the United States shall be plaintiff or petitioner. And in respect of *citizenship*, without regard to subject-matter, it gives the right of removal (1) in any suit "*in which there shall be a controversy between citizens of different States;* or (2) a controversy between citizens of the same State claiming lands under grants of different

States; or (3) a controversy between citizens of a State and foreign States, citizens, or subjects."

§ 23. A suit cannot be removed from a State court under section 2 of the Act of March 3, 1875, simply because, *in its progress*, a construction of the Constitution or a law of the United States may be necessary. Where the ground of removal is the subject matter, and not citizenship, the suit must arise, in part at least, out of a controversy in regard to the operation and effect of some provision in the Constitution or laws of Congress upon the facts involved.[1]

In respect of the *time* in which the removal must be applied for, the provision is that the petition therefor must be filed in the State court "before or at the term at which the cause *could first be tried*, and before the trial thereof." The decisions under the Acts of 1866 and 1867 as to removals after one trial had and a new trial granted, which will be alluded to hereafter, may not be and probably are not applicable under the Act of 1875.[2]

§ 24. Many questions of great importance arise under this Act, among which we may mention in this place the question *how far it repeals, if at all*, the 12th section of the Judiciary Act, the Act of 1866 and the Act of 1867, or rather these several Acts as substantially embodied in the 639th section of the Revised Statutes. There is no express repeal in the Act of 1875 (see § 8, *supra*), of any specified previous Acts, the repeal being only of "all Acts and parts of Acts in conflict with the provisions of this Act." It would seem that subdivision one of section 639, Revised Statutes, (12th sec. of the Judiciary Act), is practically repealed by reason of being merged in the more enlarged right given by the Act of 1875.[3]

[1] Gold Washing, etc. Co. v. Keyes, 96 U. S. 199. (1877).

[2] See *infra*, chap. 15, as to *time* of applying for the removal under the Act of 1875; *infra*, chap. 16, as to *mode* of effecting the removal.

[3] Of this opinion is Ballard, J., in Cooke v. Ford, 4 Cent. L. J. 560; La Motte Manf. Co. v. National Tube Works, 15 Blatchf. 432; Girardey v. Moore, 3 Woods, C. C. 397; *s. c.*, 5 Cent. L. J. 78; Zinc Co. v. Trotter, 17 Am. Law Rep. (N. S.) 376; Whitehouse v. Ins. Companies, 2 Fed. Rep. 498, May 18, 1880, E. D. Pa., Butler, J.; Sims v. Sims, N. D. N. Y., Blatchford, J., Dec. 23, 1879.

If, however, a case should arise which could be removed under this provision, but which could not be removed under the Act of 1875, the former would be held to be still subsisting. If a liberal construction shall be, and can constitutionally be, given to the latter portion of section 2 of the Act of 1875, the above remark as to repeal may possibly apply, except as to time, to subdivision *second* of section 639 of the Revised Statutes, corresponding to the Act of 1866.[1] But the better view, probably, is that the Act of 1866 is not repealed by the Act of 1875; that is to say, if a case is brought within its provisions, it may still be removed thereunder, and cases may arise of such a nature, that they would fall within the Act of 1866, and not within that of 1875; in which event the latter Act should not be held to repeal by implication the former. The *third* subdivision of that section (corresponding to the Act of 1867) is broader than the Act of 1875, provides for a class of cases not provided for by that Act, and while the point is not free of doubt, the true view seems to be that at all events this portion of the 639th section remains unrepealed. This has been decided to be so in the 8th circuit by Mr. Justice MILLER, and generally in the courts of that circuit, and, so far as we are advised, by the Circuit courts elsewhere.[2]

[1] In Wormser v. Dahlman *et al.*, U. S. Cir. Ct., South. Dist. N.Y., 1869, 16 Blatchf. 319, Blatchford, J., held that subdivision 2 of § 639, Rev. Stats. (Act 1866), is not repealed by the Act of March 3, 1875, and the learned judge approves the views expressed in the text. Mr. Justice Bradley decided the same point in the same way in Girardey v. Moore, 3 Woods, 397; 5 Cent. L. J., 78. In the case above cited (Wormser v. Dahlman), Blatchford, J., thus states the ground of his judgment: "The Act of 1875 does not expressly repeal said subdivision 2 of said § 639; and as the Act of 1875 in § 2, only relates to the removal of the whole suit, while the other relates to the removal of the suit as against one of two or more defendants, * * * I concur with Mr. Justice Bradley that there is no conflict between the provisions, and no reason why both should not stand, and that subdivision 2, § 639, so far as it authorizes a defendant to remove a cause as to him, is not repealed by the Act of 1875."

"There is much ground for the position that the second subdivision of § 639 is superseded by the provisions of the Act of 1875." Ballard, J., in Cooke v. Ford, 4 Cent. L. J. 560.

[2] This point has been so expressly ruled in an able and well-reasoned

§ 25. *Concerning the nature of suits* that may be removed under the Act of 1875, perhaps the true view is, that it contemplates the removal of the *whole suit*, and not, like the Act of 1866, a part of the suit. This has been thus held in the 7th circuit.[1] If, therefore, the main and essential controversy is between citizens of the same State a non-resident defendant interested in a collateral branch of the case can not remove it under the Act of March 3, 1875.[2]

opinion by Ballard, J., in the U. S. Circuit court for Kentucky, in the case of Cooke v. Ford (May, 1877), 4 Cent. L. J. 560.

[1] Burch v. Davenport, etc. R. Co., 46 Iowa, 449; Chicago v. Gage (Blodgett, J.), 8 Chicago Legal News, 49 (1875); *s. c.*, 6 Bissell, 467; Osgood v. Chicago, etc. R. Co. (Drummond, J.), 7 Ch. Legal News, 241; *s. c.*, 6 Bissell, 330; Ruckman v. Ruckman, 1 Fed. Rep. 587, (Nixon, J.). In Ellerman v. New Orleans, etc. R. R. Co., 2 Woods, C. C. 120 (1875), Mr. Circuit Judge Woods held that, under the Act of 1875, there may be a removal of that part of a cause which concerns the original parties, notwithstanding a statute of the State may declare that the trial as to certain other parties can not be separated from the trial of the main cause,—leaving the latter issue in the State court. But the point did not require much consideration, for the reason that the latter parties had disclaimed and had no such interest in the suit or relative to it, as to defeat the right of removal.

[2] Chicago v. Gage, (Blodgett, J.), 8 Chi. L. News, 49, (1875); *s. c.*, 6 Biss. 467. In Wormser v. Dahlman *et al.*, U. S. Circuit court for the Southern District of New York, 1879, 16 Blatchf. 319, the plaintiff, a citizen of New York, sued three defendants upon a promissory note made by them as copartners. The defendant who was served was a citizen of California. The other defendants, one of whom was a citizen of New York and the other of California, were not served and did not appear. The defendant who was served filed a petition in due form under the second subdivision of § 639 of the Revised Statutes (Act of July 27, 1866; 14 Statutes at Large, 306) to remove the case, so far as concerned himself, to the United States Circuit court, in which latter court the plaintiff moved to remand the cause to the State court. Blatchford, Circuit Judge, held: 1st, that the Act of 1866 was not repealed by the Act of March 3, 1875; and, 2d, that the case was one in which there could be no final determination of the controversy, so far as concerned the defendant who was served without the presence of the other defendants. It was, furthermore, observed by Judge Blatchford, *arguendo*, that as this was a suit at law, the plaintiff was entitled to the same kind of a judgment in the Federal court, as that to which he would have been entitled if the cause had remained in the State court and had been tried on the present pleadings, viz., a judgment against the joint property of all of the defendants and against the separate property of the defendant who was served. All of the mate-

A removal, under the Act of 1875, is only allowable when the whole suit can be removed, and when the real controversy is so completely between citizens of different States, as opposing parties, that, when the questions on which they are opposed are decided, the whole of the controversy between the real adversary parties will be thereby determined.[1]

§ 26. One of the most important questions which arises under the Act of 1875 is, *whether the Federal judicial power as conferred and limited by the Constitution can*, by reason of *citizenship*, extend to a case in which some of the necessary defendants are citizens of the *same State* with the plaintiffs or some of the plaintiffs. Expressions may, perhaps, be found in opinions of the Supreme court, construing the 11th and 12th sections of the Judiciary Act and the Removal Acts of 1866 and 1867, which deny, or would seem to deny, that under the Constitution the Federal judicial power extends on the ground of citizenship to cases where any of the defendants in interest are citizens of the same State with the plaintiffs, although some of the defendants may be citizens

rial defendants must have the necessary citizenship. Smith v. St. Louis Mut. Life Ins. Co., 2 Tenn. Ch. 656, (1876); *s. c.*, 4 Cent. L. J. 563. See the Removal Cases 100, U. S. 457, printed in full in the Appendix hereto.

[1] Canahar v. Brennan, 7 Biss. 497 (1877); *s. c.*, 5 Cent. L. J. 114; Hervey v. Ills. etc., R. Co., 7 Biss. 103 (1877); Girardey v. Moore, 3 Woods C. C. 397 (1877); *s. c.*, 5 Cent. L. J. 78. See and compare Removal Cases, 100 U. S. 457. *S. C.* printed in the Appendix hereto. Citizenship of nominal parties, or of aliens who do not constitute the entire party on one or the other side, will not give a right to a removal of a cause. Hervey v. Ill., etc. R. Co., 7 Biss. 103 (1877); Arrapahoe Co. v. K. P. Ry. Co., 4 Dill. 277 (1877); *s. c.*, 5 Cent. L. J. 102. *Supra*, § 15, note. In a suit by stockholders to compel an accounting in favor of their company by another corporation, the company in which the plaintiffs are stockholders is a necessary party defendant; but the interests of the stockholders and the company are identical, and they represent one side of the controversy, and the company against whom the accounting and relief are sought represent the other, for purposes of a motion to remove the cause. Arrapahoe Co. v. K. P. Ry. Co., *supra*, decided by Mr. Justice MILLER. This case anticipated, in its reasoning and result, the decision of the Supreme Court in the Removal Cases, 100 U. S. 457, which is stated at large below, and printed in full in the Appendix.

of other States than the one of which the plaintiff is a citizen.[1]

§ 27. But all the legislation previous to the Act of 1875 was such, that the Supreme Court was not necessarily obliged to decide this question. It will be extremely embarrassing and unfortunate, if the Supreme Court shall feel constrained to assign such narrow limits to the Constitution. Looking at the purpose in the grant of the Federal judicial power in the Constitution, and the benefits which are felt to flow from the exercise of this jurisdiction, and the embarrassments which would result from a close and rigid construction of the Constitution in this regard, we think the Supreme Court would be justified in holding that a case does not cease to be one between citizens of different States, because one or some of the defendants are citizens of the same State with the plaintiffs or some of the plaintiffs, provided the other defendants are citizens of another or other States. If the substantial controversy is wholly between citizens of the same State, it is not, and can not become, one of Federal cognizance; but if the real litigation is between citizens of different States, the case is within the constitutional grant of Federal judicial power, notwithstanding some of the adversary parties may happen to be citizens of the same State with some of the plaintiffs.[2]

§ 28. *The case of Lockhart v. Horn*,[3] arising under a former Act, contains an expression of the opinion of Mr. Justice BRADLEY concerning the constitutional question above mentioned. In conformity with the accepted con-

[1] The text in this section and in next few following sections, is left as it stood in the previous edition, although it was written prior to the recent decision of the Supreme Court in the Removal Cases, 100 U. S. 457 (1879), referred to below more at large, and printed in full in the Appendix. This decision, so far as it goes, is believed to be in accord with the views previously expressed herein, and we allow them to stand for the present without modification.

[2] See note to last preceding section.

[3] Lockhart v. Horn, 1 Woods C. C. 628, 634, (1871). See also Sheldon v. Keokuk N. L. P. Co., 1 Fed. Rep. 789, W. D. Wis., 1880, Bunn, J.; Taylor v. Rockefeller, 7 Cent. L. J. 349.

struction prior to that Act he held, that the Circuit court has no jurisdiction of a cause in which the plaintiff and part only of the defendants were citizens of the *same* State, although they answer without objecting to the jurisdiction. He says: "Were this an original question, I should say that the fact of a common State citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper State, would not oust the court of jurisdiction. *It certainly would not under the Constitution. The case would still be a controversy between citizens of different States.*[1] [The Act of 1875 uses the language of the Consti-

[1] See, on this subject, case of Sewing Machine Cos., 18 Wall. 553, affirming *s. c.*, 110 Mass. 70, 80; 1 Holmes, 235; New Orleans v. Winter, 1 Wheat. 91 (1816); Woods v. Davis, 18 How. 467; Hepburn v. Ellzey, 2 Cranch, 445; Strawbridge v. Curtiss, 3 Cranch, 267.

In the case of Bryant v. Rich, 106 Mass. 192, (*s. c.* in U. S. Sup. Court, under name of Vannevar v. Bryant, 21 Wall. 41), Chief Justice Gray says *arguendo:* "Five of the nine defendants in this case, as well as the plaintiff, are citizens of this commonwealth; and the *courts of the United States are not authorized by the Constitution* to take jurisdiction, so far as it depends upon the citizenship of the parties, of suits between citizens of the same State, but only of suits between citizens of different States, or between a citizen and an alien, and can therefore have no jurisdiction (except when it grows out of the subject-matter) of an action in which any of the plaintiffs and of the defendants, who are real parties in interest, by or against whom relief is sought, are citizens of the same State. Const. of U. S., art. 3, §2; Strawbridge v. Curtiss, 3 Cranch, 267; New Orleans v. Winter, 1 Wheat. 91; Wood v. Davis, 18 How. 467; Tuckerman v. Bigelow, 21 Law Reporter, 208; Wilson v. Blodgett, 4 McLean, 363."

An examination of the cases here cited will show that they turn upon the language of the Judiciary Act, and not on the Constitution. So, in the very recent case of Ober v. Gallagher, 93 U. S. 99 (1876), Chief Justice Waite says, *arguendo*, that if "an *indispensable party* was a citizen of the *same State with the plaintiff*, the jurisdiction would be defeated, because the controversy would not be between citizens of different States, and thus *not within the judicial power of the United States, as defined by the Constitution.* The decisions to this effect are numerous: Hagan v. Walker, 14 How. 36; Shields v. Barrow, 17 How. 141; Clearwater v. Meredith, 21 How. 492; Insbuch v. Farwell, 1 Blatchf. 571; Barnes v. Baltimore City, 6 Wall. 286; Jones v. Andrews, 10 Wall. 332; Commercial and R. R. Bank of Vicksburg v. Slocomb, 14 Pet. 65. In

tution, it will be remembered.] "But the strict construction put by the courts upon the Judiciary Act," he continues, "is conclusive against the jurisdiction; and I am bound by it. Nevertheless, the case is such that the complainant may dismiss his bill as to the obnoxious defendants and hold it as to the others. I will permit him to do so. This should be allowed in all cases where the objection is not made *in limine*." This was the state of the adjudications at the time of the publication of the second edition.

§ 29. But in late cases in the Supreme Court, known as "*The Removal Cases*," that court has given its judgment upon several important questions under the Act of March 3, 1875. The provision in the first clause of the second section of that Act, "that in any suit of a civil nature at law or in equity now pending * * * * * in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * * * in which there shall be a controversy between citizens of different States, * * * * either party may remove said suit into the Circuit Court of the United States for the proper district," was *held* to mean, that when the controversy about which a suit in the State court is brought is between citizens of one or more States on one side and citizens of other States on the other side, either party to the controversy may remove the suit to the Circuit Court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal the matter in

Louisville R. R. Co. v. Letsou, 2 How. 497, it is also distinctly stated (p. 556), that the Act of 1839 was passed exclusively with an intent to rid the courts of the decision in the case of Strawbridge v. Curtiss, 3 Cranch, 267, which, with that of the Bank v. Deveaux, 5 Cranch, 84, had 'never been satisfactory to the bar.'" But the case here cited did not *necessarily* involve an inquiry or decision as to the extent of the constitutional grant of judicial power as respects controversies between *citizens of different States*.

The foregoing, in the last edition, was written prior to the decision of the U. S. Sup. Court in the Removal Cases, 100 U. S. 457 (§ 29, *infra*), and to which the reader is referred.

dispute may be ascertained, and, according to the facts, the parties to the suit arranged on opposite sides of that dispute. If, in such an arrangement, it appears that those on one side, being all citizens of different States from those on the other, desire a removal, the suit may be removed.

The court said that, until a case requiring it arises, it would give no opinion upon the second clause of said section. The court also held that the *petition and bond* for removal were sufficient in form. The text of these is given in the note (1). Also that an application made before trial for the removal to the Circuit court, of a cause pending in a State court at the passage of said Act of March 3, 1875, was *in time*, if *made at the first term* of the court thereafter. That, in order to bar the right of removal upon the ground that the trial in the State court had commenced, it must appear that the trial in the State court was actually in progress in the orderly course of proceeding, when the application was made. The ruling in *Insurance Company* v. *Dunn* (19 Wall. 214), that a party who, failing in his efforts to obtain a removal of a suit, is forced to trial, loses none of his rights by defending against the action, was re-affirmed.[1]

[1] Removal Cases, 100 U. S. Rep. 457; approved in Ayers v. Chicago, 101 U. S. 184; Railroad Co. v. Ketchum, 101 U. S. 289; Bible Society v. Grove, 101 U. S. 610; Burke v. Flovet, 1 Fed. Rep. 541. The following is a copy of the petition and bond in the Removal Cases:

"In the Circuit Court of Delaware County, Iowa.

"The Delaware Railroad Construction Co.
vs.
Lewis H. Meyer and Wm. Dennison, Trustees.

"Now comes your petitioners, Lewis H. Meyer and Wm. Dennison, trustees, and state:

"That the Delaware Railroad Construction Company and all persons who have come in as intervenors in the above-entitled cause are citizens of the State of Iowa; that Lewis H. Meyer is a citizen of the State of New York, and William Dennison a citizen of the State of Ohio.

"That they have reason to believe, and do believe, that from prejudice or local influence they will not be able to secure justice, by reason of such prejudice or local influence.

"That said cause can be fully and finally determined in the United States Circuit Court for the District of Iowa.

"That the amount in controversy in said cause amounts to more than

The opinion of the court by the Chief Justice will be found in the Appendix "*A*." [1]

the sum of five hundred dollars, exclusive of costs, and they make and file in this court a bond, with good and sufficient security, for their entering in such Circuit court, on the first day of its next session, a copy of the records in said suit and for paying all costs that may be awarded by said Circuit court, if said court shall hold that said suit shall be wrongfully or improperly transferred thereto, and also for the appearing and entering special bail in such suit, if special bail was originally requisite therein, and they pray of said court to accept said petition and bond, and order the transfer of the said cause to the said Circuit Court of the United States."

This *petition was not signed or sworn to, but was accompanied by a bond*, as follows:

"In the Circuit Court of Delaware County, Iowa.

"Know all men by these presents that we, Lewis H. Meyer and Wm. Dennison, principals, and John E. Henry and Charles Whitaker, as sureties, are held and firmly bound unto the Delaware Railroad Construction Company, and all other persons whom it may concern, in the penal sum of one thousand dollars, to which payment we bind ourselves and each of us by these presents. Given under our hands this 15th day of May, 1875.

"The conditions of this obligation are these: the said Lewis H. Meyer and Wm. Dennison have applied to the Circuit court of said county to remove a certain cause pending in said court, wherein the Delaware Railroad Construction Company are plaintiffs, and the said Lewis H. Meyer, trustee, successor to John Edgar Thompson, and William Dennison, trustees, and many others are defendants, from the said Circuit court to the Circuit Court of the United States for the District of Iowa:

"Now, if said Meyer and Dennison shall enter in the said Circuit Court of the United States for the District of Iowa, on the first day of the next term thereof, a copy of the record of said suit, and shall pay all the costs that may accrue or be awarded by said Circuit court if it shall hold that the said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said Circuit court in said suit, if special bail was originally required therein, then this obligation shall be void; otherwise in full force.

"WM. DENNISON and L. H. MEYER, *Trustees*.

"By GRANT and SMITH, *Their Att'ys*.

"C. WHITAKER,

"JOHN E. HENRY, *Sureties*."

[1] We are indebted to Judge Blatchford for the following points, recently ruled by him under the Act of 1875. In Cooke v. Seligman, before Blatchford, Circuit Judge, U. S. Circuit Court, Southern District N. Y., 1880, it was ruled as follows:

1. Where one of the defendants in a suit is, on the averments in the

§ 30. The judicial power of the United States, as conferred by the Constitution, extends "*to all cases arising under the Constitution and Laws of the United States*," whether they are pending in the State or Federal tribunals. The Act of March 3, 1875, both in prescribing the original jurisdiction of the Circuit courts of the United States, and

complaint in the State court, an unnecessary and improper party, and no real and actual party, and *the plaintiff is an alien, and the other defendants are all citizens of various States* of the United States, the case is one removable into this court under the first clause of § 2 of the Act of March 3, 1875 (18 U. S. Stat. at Large, 470), where all such other defendants apply for the removal, and where there is a controversy between the alien and such citizens, which is the only controversy in the suit.

2. Some of the *petitioners for removal signed the petition by an attorney;* but the order of the State court for the removal stated that the petition was duly made and filed by the petitioners, and that petitioners appeared by counsel and moved for such order. On the contents of the petition and the bond, and the action of the petitioners, by their counsel in moving for such order, and the contents of such order: *Held*, that the petition must be regarded as the petition of the petitioners.

3. The averment in the petition, that certain of the petitioners, "*as they are the qualified executors* of the last will and testament of J. B., deceased," were and are citizens of the State of New York, was held, in this case to mean, that they were sued as such qualified executors, and to be an averment of their *personal* citizenship.

4. The absence of any *acknowledgment or proof of the execution of the bond* was held to be a matter of *practice for the State court* to pass upon, and *not reviewable* by this court after the State court had accepted the bond.

5. The *bond contained in its condition* a clause providing that the defendants should do, or cause to be done, such other and appropriate acts as, by said Act of 1875, and other Acts of Congress, are required to be done on the removal of a suit: *Held*, that such clause was a sufficient compliance with any requirement in § 3 of the Act of 1875, that the bond should be one for appearing in the Federal court.

In the Chicago, St. Louis and New Orleans Railroad Company v. S. McComb and the Southern Railroad Association, before Blatchford, Circuit Judge (S. D. N. Y., Dec. 1879), it was held,

1. That in determining under the first clause of § 2 of the Act of March 3, 1875 (18 U. S. Stat. at Large, 470), whether a suit is one in which there is a controversy *between citizens of different States*, the *condition of the controversy when the petition for removal is filed* is what is to be considered, and not its condition at a subsequent time. There *must be a controversy* between citizens of different States *when the petition is filed*, and all the parties on one side of such controversy must unite in the petition for removal, and they must all then be of different State citizenship from any

in describing the class of cases which may be removed into the Circuit courts from the State courts, follows the language of the Constitution. It is therefore important to know, *what is a case arising under the Constitution or Laws of the United States.* The question has been frequently before the Supreme Court of the United States, and some of the leading judgments are cited in the note.[1] "A case

of the parties on the other side of such controversy. (See The Removal Cases, 100 U. S. 467; *supra*, § 29.)

2. A corporation defendant which is not a real or actual or necessary party, but is a merely *formal party* to the controversy in the suit, as such controversy stands when the petition for removal is filed, is to be considered as not a party.

3. The *controversy is to be judged of in part by the pleadings*, if any, which had been put in, in the State Court, before the filing of the petition for removal.

4. In a suit by a *corporation* of one State against a citizen of another State, it is sufficient in a petition for removal by the defendant under the first clause of said § 2, to state that the defendant is a citizen of such other State, and it is *not necessary to state that he was such citizen when the suit was commenced.*

5. Nothing had transpired in pleading or evidence, since the case came into this court, to show that said *formal defendant* ought now to be held to be an actual, real and necessary defendant, and a motion to remand the cause was denied.

[1] Martin v. Hunter's Lessees, 1 Wheat. 314; Cohens v. Virginia, 6 Wheat. 264; Osborn v. Bank of U. S., 9 Wheat. 821; United States v. Peters, 5 Cranch, 115; Ableman v. Booth, 21 How. 506; Meserole v. Union Paper Collar Co., 6 Blatchf. 356; Freeman v. Howe, 24 How. 450; Murdock v. Memphis (full discussion), 20 Wall. 591; The Mayor v. Cooper, 6 Wall. 247; Murray v. Patrie, 5 Blatchf. 343; Claflin v, Houseman (U. S. Sup. Court, Oct. Term, 1876), 9 Ch. Legal News, 105; *s. c.*, 3 Cent. L. J. 803; N. Y. Life Ins. Co. v. Hendren (U. S. Sup. Court, Oct. Term, 1875), 8 Ch. Legal News, 385; Ames v. Colorado Central R. R. Co., 9 Ch. Legal News, 132; *s. c.*, 3 Cent. L. J. 815. See *ante*, chap. 2 and note, and cases cited under the Acts of 1833 and July 27, 1868 (Rev. Stats., § 640). Where, in an action of trespass brought in a State court, the defendant justifies the alleged trespass under the authority of a court and the laws of the United States, the cause is removable under § 2 of the Act of March 3, 1875, as a case arising under the Constitution and Laws of the United States (Houser v. Clayton, 3 Wood C. C. 273), and the court will confine the defendant to the defense set up in the petition for removal. *Ib.* A suit by a corporation created by Act of Congress is a suit arising under the laws of the United States. U. P. R. R. Co. v.

in law or equity consists of the right of one party, as well as the other, and may be truly said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon a right construction of either."[1] "Nor is it," says Mr. Justice SWAYNE, "any objection, that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction,"[2] whether it exists in favor of the plaintiff or the defendant.

McComb, 1 Fed. Rep. 799, Blatchford, J., following Osborn v. Bank of U. S., 9 Wheat. 738; Gold Washing Co. v. Keyes, 96 U. S., distinguished.

[1] The Mayor v. Cooper, 6 Wall. 252; Connor v. Scott, 4 Dill. 242, (1876); 3 Cent. L. J. 305.

[2] Per Marshall, C. J., in Cohens v. Virginia, 6 Wheat. 379.

When a case involves the construction of the *Bankrupt Act*, it may be removed to the Federal court, under the Act of March 3, 1875. Connor v. Scott (West. Dist. Ark., Parker, J.), 3 Cent. L. J. 305 (1876); Payson v. Dietz (removal by assignee in bankruptcy, on the ground of citizenship), 5 Ch. Legal News, 434; Trafton v. Nougues, 4 Sawyer, 178, (as to removal of suits in relation to mining claims), *s. c.*, 13 Pacific Law Rep. 49; 4 Cent. L. J. 228, cited *infra*.

In the yet unreported case of Julius Wehl, assignee of the estate of Gabriel Netter and Albert Netter, v. Gustavus H. Wald, as assignee in bankruptcy of Gabriel Netter and Albert Netter and Netter & Co., in the Circuit Court of the United States for the Southern District of New York, before Blatchford, Circuit Judge, A. D., 1879, it appeared that W., a citizen of New York, brought a suit in the State court of New York against S., a citizen of New York, to recover money alleged to have been due by S. to N., a voluntary assignor to W. By an order of the State court, G., a citizen of Ohio, who claimed the money as assignee in bankruptcy of W., was made defendant in the suit in the place of S., S. having paid the money into court. W. then filed an amended complaint in the suit in the State court, treating G. as the sole defendant, and asking judgment against him. G. answered the amended complaint. G. then removed the case into the Federal court, without giving notice to the plaintiff of the application for the removal. The petition for removal set forth that the controversy is between W., as assignee of the estate of N., who was at the commencement of this action, and now is, a citizen of the State of New York, and G., as assignee in bankruptcy of N., who is, and was at the commencement of this action, a citizen of the State of Ohio. On a motion of the plaintiff to remand the cause, *Held* (1), That the *petition alleged the personal citizenship* of the parties, and was not defective; (2), That *no notice of the applica-*

§ 31. *There must be some question actually involved in the case, depending for its determination upon the correct construction of the Constitution, or some Law of Congress, or some Treaty of the United States*, in order to sustain the Federal jurisdiction under the clause under consideration, namely, "suits arising under the Constitution, or laws or treaties of the United States." Accordingly, a case relating to the title to land is not one of Federal jurisdiction, although the title may be originally derived under an Act of Congress, if no question arises, or is raised, as to the validity or operative effect of the Act of Congress, and the rights of the parties depend upon State statutes or the general principles of law.[1]

tion for the removal was necessary, and the State court could, in practice, require or dispense with it; (3), That it is *not* necessary, under §§ 2 and 3 of the Act of March 3, 1875 (18 U. S. Stat. at Large, 470), in order to the removal of a suit, that it should appear that the parties were *citizens of different States at the time the suit was commenced*; (4), That the suit, as between W. and G., must be regarded as having been *commenced* when G. was substituted for S. as defendant.

[1] McStay v. Friedman, 92 U. S. R. (2 Otto), 723; Romie v. Cassanova, 91 U. S. R. (1 Otto), 380: Trafton v. Nougues, 4 Sawyer, 178; 13 Pacific Law Rep. 49 (1877); *s. c.*, 4 Cent. L. J. 228. The learned circuit judge, in the case last cited, upon a review of certain decisions of the Supreme Court of the United States, arrives at the following conclusions: 1. Only suits involving rights depending upon a disputed construction of the Constitution and Laws of the United States can be transferred from the State to the National courts, under the clause "arising under the Constitution and Laws of the United States," of section 2 of the Act to determine the jurisdiction of the United States courts, passed March 3d, 1875. 2. Where the only questions to be litigated in suits to determine the right to mining claims are, as to what are the local laws, rules, regulations and customs by which the rights of the parties are governed, and whether the parties have in fact conformed to such local laws and customs, the courts of the United States have no jurisdiction of the cases under the provisions of the Act giving jurisdiction in suits "arising under the Constitution and Laws of the United States."

A party who has a suit in a State court in which there is a controversy between him and a citizen of the same State, touching the title to a tract of land, cannot remove the case to the Federal court merely because he claims title under a sale made by a U. S. marshal upon a *fieri facias* issued from the Federal Court. Such a case cannot be removed unless the validity or effect of the judgment, or the proceedings and

CHAPTER IX.

SECTION 641 CONSTRUED BY THE UNITED STATES SUPREME COURT.

§ 32. Section 641, of the Revised Statutes, which declares that "when any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against

sale under which the plaintiff claims title, are brought in question. Gay v. Lyons, 3 Woods C. C. 56.

In an action against a non-resident to recover land, his co-defendants, alleged to hold the legal estate for the plaintiff's use, *held* to be substantially plaintiffs, and the action removable on the defendant's motion. Swan v. Myers, 79 N. C. 101 (1878).

REQUISITES OF PETITIONS to transfer causes from State to Federal court under the above clause of section 3 of the Act of March 3, 1875, see *post*, chap. 16.

Under section 2 of the Act of March 3, 1875 (18 U. S. Stat. 470), a civil suit brought in a State court, where the matter in dispute exceeds, exclusive of costs, $500, and in which there is a controversy between citizens of different States, may be removed into the Circuit court of the United States, even though the case is not one arising under the Constitution, laws, or treaties of the United States. Low v. Wayne Bank, 14 Blatchf. 449.

Two interesting points under the Act of 1875 were ruled by Mr. Justice Davis and Judge Treat at the July Term, 1876, of the Circuit Court of the United States for the Southern District of Illinois. Mr. Robert E. Williams, of Bloomington, Illinois, of counsel in the causes, has thus stated the facts and substance of the decisions:

Turner Bros., citizens of New York, filed a bill against the Indianapolis, Bloomington & Western R. R. Co., the Farmers' Loan and Trust Co. *et. al.*, in the State court, and a receiver was appointed. There were three mortgages on the road—in the first two, the Farmers' Loan and Trust Co. is trustee—in the other, an individual is trustee. Turner Bros. claimed to be bondholders of bonds under each of the mortgages, and also to be floating or unsecured creditors to a large amount. The receiver, it was claimed, was appointed by collusion between the parties. As soon as the Farmers' Loan and Trust Co. learned of the appointment of the receiver, it appeared in the State court, answered the bill, and filed a cross-bill to foreclose the two mortgages, and then filed a petition and bond to remove the case to the Federal court under the Act of 1875. Turner Bros., the complainants in the bill, are citizens of New York, and he F. L. & T. Co. is a citizen of New York; but Turner Bros. were not,

any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, * * * such suit or prosecution may, upon the petition of such defendant, filed in said State

it was claimed, necessary parties to the litigation. A motion was made to remand to the State court for want of jurisdiction in the Federal court, as Turner Bros. and the F. L. & T. Co. were all citizens of New York. After full argument and consideration, Mr. Justice Davis announced the opinion both of himself and Judge Treat, in which he said that there was not a doubt that the case was properly transferred, and that the Federal court had jurisdiction. In substance he remarked: They, Turner Bros., sued in a double aspect, as bondholders and unsecured creditors. As bondholders their bill did not in any way charge on the trustee in either of the mortgages an inability or unwillingness to act, and all of the trustees were in fact parties and trying to enforce the trust; therefore, as bond creditors, they, Turner Bros., were not necessary parties. As floating-debt creditors there was no controversy between the Turner Bros. and the trustee in the mortgages—as, of course, the mortgage took precedence of the floating debts; that as to the floating debts the only controversy was between the creditors and the debtor, the Railroad Co.; that, therefore, the principal controversy was between the trustees in the mortgages (the F. L. & T. Co.) and the corporation, and that the claim of Turner Bros. for their unsecured debt was improperly introduced into the case, and could not oust the Federal court of its rightful jurisdiction over the main controversy between the mortgagor and the mortgagees; but even if Turner Bros. as unsecured creditors had a right to be parties at all, their right was only to the surplus after payment of all mortgages, and their controversy was merely an incident to the main controversy about the mortgages, and that the intention of Congress, as plainly expressed in the Act of March 3, 1875, was that, where the main controversy in a case was between citizens of different States, it was removable and carried with it all the incidents, and that a mere incident would not prevent the case from being removed.

The other case was this: A road in the southern part of the State had made a mortgage to the Farmers' Loan and Trust Co. A judgment creditor, by collusion with the Railroad Co., filed a bill and got a receiver appointed by the State court, making no defendant to the bill but the Railroad Co. It was claimed that this was done with the intent to obtain an undue advantage over the bondholders. As soon as the F. L. & T. Co. learned of it, it applied to the State court to be permitted to become a party defendant. It presented a sworn petition setting up its rights as trustee, and asking leave to be made a defendant, and with it filed an answer to the bill and a cross-bill to foreclose the mortgage.

court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next Circuit court to be held in the district where it is pending," considered and *held* not to be in conflict with the Constitution of the United States.[1]

This section was examined in connection with sections 1977 and 1978, and it was held that the object of these statutes, as of the Constitution which authorized them, was to place, in respect to civil rights, the colored race upon a level with the white. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.[2]

§ 33. The prohibitions of the Fourteenth Amendment have exclusive reference to State action. It is the State

The State court refused to admit the F. L. & T. Co. as a defendant, saying it could not make such an order in vacation. The F. L. & T. Co. at once filed in the State court its papers—that is, its petition, answer and cross-bill, and a petition and bond to remove the case to the Federal court, and brought the record to the Federal court. There was no question about the citizenship of the parties; but the question was, as the F. L. & T. Co. was not made a defendant by the bill, and the State court had refused to make an order admitting it as a party, was it, the F. L. & T. Co., such a party within the meaning of the Act of Congress as could file the petition and bond for removal? The F. L. & T. Co. contended that it was, as it was absolutely a necessary party to the litigation, and had done all it could to become a party; and if the State court could refuse to admit it as a party, it could nullify the Act of Congress and leave the mortgagee without remedy. Mr. Justice Davis decided that it was an absolutely necessary party, and that, as it had done all it could to become a party and had been wrongfully refused the right by the State court, it was a party for the purpose of removing the case, and that the case was rightfully removed. In a late case, where a New York bank having money of an estate was a citizen of the same State as the plaintiff who brought suit in the State court for the money, and the bank answered averring its readiness to pay to the party entitled thereto, and asked that the personal representative, a citizen of Connecticut, be made a party, which was done, it was held that, as the plaintiff and bank were necessary parties and citizens of the same State, the suit was not removable. Bailey v. N. Y. Sav. Bank, 2 Fed. Rep. 14; Blatchford, J., S. D. N. Y., April 24, 1880.

[1] Strauder v. West Virginia, 100 U. S. Rep. 303; *s. c.*, 10 Cent. L. J. 225; S. P. Fitzgerald v. Allman, 22 Alb. L. J. 218; State v. Dunlap, 65 N. C. 491; Capehart v. Stewart, 80 N. C. 101.

[2] Virginia v. Rives, 100 U. S. Rep. 313; *s. c.*, 10 Cent. L. J. 229.

which is prohibited from denying to any person within its jurisdiction the equal protection of the laws; and, consequently, the statutes founded upon this Amendment, and partially enumerating what civil rights the colored man shall enjoy equally with the white, are intended for the protection against State infringement of those rights. Section 641 was also intended to protect them against State action, and against that alone.[1]

§ 34. A State may exert her authority through different agencies, and those prohibitions extend to her action denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court, in which it is denied, into a Federal court where it will be acknowledged.[2]

§ 35. The Fourteenth Amendment is broader than section 641, as the latter does not apply to *all* cases in which the equal protection of the laws may be denied to a defendant. The removal thereby authorized is before trial or final hearing. But the violation of the constitutional prohibitions, when committed by the judicial action of a State, may be, and generally will be, after the trial or final hearing has commenced. It is during the trial or final hearing the defendant is denied equality of legal protection, and not until then. Nor can he know until then that the equal protection of the laws will not be extended to him. Certainly not until then can he affirm that it is denied. To such a case — that is, to judicial infractions of the constitutional amendment after the trial has commenced — section 641 has no applica-

[1] Virginia v. Rives, 100 U. S. Rep. 313; *s. c.*, 10 Cent. L. J. 229.
[2] Virginia v. Rives, 100 U. S. Rep. 313; *s. c.*, 10 Cent. L. J. 229.

bility. It is not intended to reach such cases. They were left to the revisory power of this court.[1]

Therefore, the denial or inability to enforce, in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons, citizens of the United States, of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. By express requirement of the statute, the party must set forth, under oath, the facts upon which he bases his claim to have his case removed, — not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. But in the absence of constitutional or legislative impediment, he cannot swear, before his case comes to trial, that his enjoyment of his civil rights is denied to him.

The Constitution and laws of Virginia do not exclude colored citizens from service on juries. The petition for removal in the case cited in the note was held not to present a case for removal under section 641.[2]

[1] Virginia v. Rives, 100 U. S. Rep. 313; *s. c.*, 10 Cent. L.J. 229.

[2] Virginia v. Rives, 100 U. S. Rep. 313, 1879; *s. c.* 10 Cent. L. J. 229; S. P. Thomas v. State, 58 Ala. 365; State v. Strauder, 11 W. Va. 745, 1877.

When a petition is presented to a State court under this section for the removal of a prosecution, pending in that court, to the Federal court, the State court has a right to examine its sufficiency. But the Federal court, by virtue of its superior right to try the case if subject to removal, is entitled to assert its jurisdiction by proper process directed to the State court. Where this is done by the Federal court, it will be the duty of the State court, and its officers, to yield obedience to the writs issued from the Federal court to effect such removal. Wells, *in re*, 3 Woods C. C. 128.

The petition of a party against whom a prosecution has been instituted in a State court, to remove said prosecution to the Federal court, on the ground that the same is on account of an act done under some of the provisions of the United States Revised Statutes, should state such fact as show to the court that the case falls within the category of removables causes. Anderson, *in re*, 3 Woods C. C. 124.

CHAPTER X.

CONSTRUCTION OF SECTION 643, BY THE SUPREME COURT OF THE UNITED STATES.

§ 36. Section 643, Revised Statutes of the United States, which declares that "when any civil suit or criminal prosecution is commenced in any court of a State, against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law, * * * * * * the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit court, next to be holden in the district where the same is pending, upon the petition of such defendant to said Circuit court" etc., is not in conflict with the Constitution of the United States.[1]

§ 37. Thus the defendant was in a State court of Tennessee indicted for murder. In his petition, duly verified, for removal of the prosecution to the Circuit Court of the United

A petition for the removal of a cause under this section, which alleges that the law for the selection of jurors which is constitutional and on its face fair will be so administered as to secure a jury inimical to the petitioner, and which alleges the existence of a general prejudice against him in the minds of the court, jurors, officers and people, does not state facts sufficient to authorize the removal. It is only when some State law, statute, ordinance, regulation or custom, hostile to the rights of the petitioner and their enforcement, is alleged to exist, that the petitioner can have his case removed under that clause of said section. Wells, *in re*, 3 Woods C. C. 128.

[1] Tennessee v. Davis, 100 U. S. Rep. 257; *s. c.*, 10 Cent. L. J. 251: State v. Hoskins, 77 N. C. 530; State v. Deaver, 77 N. C. 555; Venable v. Richards, 1 Hughes, 326. This section applies to every case where the offense alleged is done under color of office. Findley v. Satterfield, 3 Woods C. C. 504; *s. c.*, 7 Cent. L. J., 365; Venable v. Richards, 1 Hughes, 326.

States, he stated, that although indicted for murder, no murder was committed; that the killing was done in necessary self-defense to save his own life; that at the time the alleged act, for which he was indicted, was committed, he was, and still is an officer of the United States, to wit, a deputy collector of internal revenue; that the act, for which he was indicted, was performed in his own necessary self-defense, while engaged in the discharge of his duties as deputy collector, and while acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his said office; that it was his duty to seize illicit distilleries, and the apparatus used for the illicit and unlawful distillation of spirits; and that, while so attempting to enforce said laws, as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men; and that, in defense of his life, he returned the fire, which is the killing mentioned in the indictment. It was held that the petition was in conformity with the statute, and, upon being filed, the prosecution was removed to the Circuit Court of the United States for that district.[1]

§ 38. The provision of the Constitution declaring that the Judicial power of the United States extends "to *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," embraces alike civil and criminal cases. Both are equally within that power.[2]

§ 39. A case arises under that Constitution, not merely where a party comes into court to demand something conferred upon him by the Constitution, a law of the United States, or a treaty, but wherever its correct decision as to the right, privilege, claim, protection or defense of a party, in whole or in part, depends upon the construction of either. It is in the power of Congress to give the Circuit courts of

[1] Tennessee v. Davis, 100 U. S. Rep. 257; *s. c.*, 10 Cent. L. J. 251.
[2] Tennessee v. Davis, 100 U. S. Rep. 257; *s. c.*, 10 Cent. L. J. 251.

the United States jurisdiction of such a case, although it may involve other questions of fact or law.[1]

§ 40. If the case, whether civil or criminal, be one to which the judicial power of the United States extends, its removal to the Federal court does not invade State jurisdiction. On the contrary, a denial of the right of the general government to remove, take charge of, and try any case arising under the Constitution and laws of the United States, is a denial of its conceded sovereignty over a subject expressly committed to it. It is a denial of a doctrine necessary for the preservation of the acknowledged powers of government. The exercise of the power to remove criminal prosecutions is seen in the Act of February 4, 1815, (3 Stat. 198); again in the third section of the Act of March 2, 1833, (4 Stat. 633); and more recently in the Act of July 13, 1866, (14 Stat. 171).[2]

CHAPTER XI.

NATURE OF CIVIL SUITS THAT MAY BE REMOVED UNDER THE SEVERAL REMOVAL ACTS—PRACTICE AS TO REPLEADER.

§ 41. We are prepared after this general survey of the subject to consider in detail other important topics belonging to it.

As to Nature of Civil Suits that may be removed under the Acts we have been reviewing. The language of section 639 of the Revised Statutes is "any suit * * * wherein the amount in dispute, * * * exceeds the sum or value of five hundred dollars." The language of the Act of 1875

[1] Tennessee v. Davis, 100 U. S. Rep. 257; *s. c.*, 10 Cent. L. J. 251.

[2] Tennessee v. Davis, 100 U. S. Rep. 257; *s. c.*, 10 Cent. L. J. 251. The prosecution is not commenced until the finding of an indictment, and on the trial of an indictment for murder, the accused is called to answer to the offense, as defined by the laws of the State, from whose court the cause was removed. Georgia v. O'Grady, 3 Woods C. C. 496; *s. c.*, 5 Cent. L. J. 465.

(§ 2), is "any suit of a civil nature at law or in equity." Although the language is different, the meaning is doubtless the same. It does not extend to *criminal* prosecutions, being limited to suits of a *civil* nature.[1] All cases which fall within the ordinary notion of an action at law on contract or for tort, or of a suit in equity, are undoubtedly embraced by the language. Speaking of the nature of suits which may be removed under the 12th section of the Judiciary Act (Revised Statutes, § 639, subdivision 1), Mr. Chief Justice CHASE, in *West* v. *Aurora*,[2] said: "A suit removable from a State court must be a suit regularly commenced by a citizen of the State in which the suit is brought, by process served upon the defendant who is a citizen of another State, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the State court." This language is, perhaps, too broad to be strictly applicable to all cases, since suits have been held removable, and properly so we think, which were not "regularly commenced" in the State court on process issued from it.[3]

[1] See Rison v. Cribbs, 1 Dillon, 181, 184; Green v. United States, 9 Wall. 655.

[2] 6 Wall. 139 (1867).

[3] Patterson v. Boom Co., 3 Dillon, 465 (affirmed 98 U. S. 403). In the case last cited it was held that *a suit pending in a State court, between a land owner and an incorporated company seeking to appropriate his private property under the right of eminent domain*, where the question to be tried is the *value* of such land, is *a suit of such a nature as may be removed* to the Federal court, although the proceeding in its inception was an appraisement by commissioners appointed under the charter of the company. In affirming this case, the Supreme Court of the United States say: "The position of the company on this head of jurisdiction is this: that the proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain; and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the constitutions of the several States, providing for just com-

A *motion* under a State statute as to corporations, for execution against a stockholder, cannot be removed to the

pensation for property taken, is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an Act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. *If that inquiry take the form of a proceeding before the courts between parties — the owners of the land on the one side and the company seeking the appropriation on the other — there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.* The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land, in other words, the value of the property taken. No other question was open to contestation in the District court. The case could have been in no essential particular different, had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal court, if the controversy were between the company and a citizen of another State, cannot be doubted. And we perceive no reason against the transfer of the pending case, that might not be offered against the transfer of the case supposed.

"The Act of March 3d, 1875, provides that any suit of *a civil nature, at law or in equity*, pending or brought in a State court, in which there is a controversy between citizens of different States, may be removed by either party into the Circuit Court of the United States for the proper district; and it has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the State under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. And in Gaines v. Fuentes, 92 U. S. 510, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. Within the

Federal court. It is not a "suit at law or in equity," within the meaning of these words as used in the statutes giving the right of removal of causes from State to Federal courts.[1]

§ 42. The case of *West* v. *Aurora*, *supra*, is interesting as illustrating a class of questions which arise in respect to removals in consequence of the *practice*, *in the code States*, of mingling, or rather uniting legal and equitable relief in the *same* suit. In brief the case was this: The plaintiff sued the city of Aurora in the State court on coupons. The city made certain defenses, and by an additional answer prayed an injunction to restrain plaintiff from proceeding in any suit on the coupons, and from transferring them, and for a decree that the same be cancelled and delivered up. Upon the filing of this additional answer the plaintiff discontinued his suit, and assuming that he was a defendant to the case made in the additional answer, and that this was

meaning of these decisions, we think the case at bar was properly transferred to the Circuit court, and that it had jurisdiction to determine the controversy."

What is an *original suit* which may be removed, and what is a mere supplement or sequence of a former suit and decree in the State court, is illustrated by the case of Hatch v. Preston, 1 Biss. 19 (1853), Drummond, J. See West v. Aurora, *supra*.

Plaintiff *sued at law in the State court on a policy*, and while it was pending, filed *a bill in equity to reform it*. Held, that the defendant might remove the equity suit — that being an *original suit* within the meaning of section 12 of the Judiciary Act, and not simply a suit ancillary to or in aid of the suit at law. Charter Oak Fire Ins. Co. v. Star Ins. Co. (Nelson, J.), 6 Blatchf. 208 (1868).

A *garnishee or trustee*, holding property or credits of the principal defendant and joined as defendant for that purpose, was held by the Superior Court of Judicature of New Hampshire not to be within the Removal Act of 1866, and hence could not have a transfer of the case as to himself, leaving the cause as between the principal parties in the State court. Weeks v. Billings, 55 N. H. 371 (1875).

[1] Webber v. Humphreys, 5 Dillon, 223 (1879); see, also, Smith v. St. Louis Mut. Life Ins. Co., 3 Tenn. Ch. 350; *s. c.*, 4 Cent. L. J. 563. The Act of 1789 does not entitle a non-resident creditor to an order to remove to the Circuit Court of the United States an action brought by his judgment debtor in a State court to annul a judgment of the State court. Ranlett v. Collier White Lead Co., 30 La. An. Part 1, 56.

a new suit against him, applied to remove the cause into the Federal court, under section 12 of the Judiciary Act. The Supreme Court held the case not removable and observed: "The filing of the additional paragraphs did not make a new suit within the meaning of the Judiciary Act. They were in the nature of defensive pleas, coupled with a prayer for injunction and general relief. This, if allowed by the code of Indiana (as it was), might give them, in some sense, the character of an original suit, but not such as could be removed from the jurisdiction of the State court," under the Judiciary Act which gives the right "only to a defendant who promptly avails himself of it at the time of appearance;" but here the plaintiffs had "submitted themselves, by voluntarily resorting to the State court, to its jurisdiction in its whole extent."[1] Some of the cases, illustrative

[1] See *infra*, chap. 15. A party brought into a State court by an *order to interplead*, made on the motion of the original defendant, will not be regarded as voluntarily before the court and waiving his right of removal, and, if otherwise qualified, may remove the cause into which he he has been brought into the Federal court. Healy v. Prevost, East. Dist. of Pa., April, 1879, 8 L. R. 103; *s. c.*, 8 Cent. L. J. 445; Postmaster Gen'l v. Cross, 4 Wash. C. C. 326; Martin v. Taylor, *Ib.* 1.

Equitable defenses set up by defendants between themselves will not prevent the removal of a cause from a State to a Federal court, the complainant being a resident of another State. Tarver v. Ficklin, 60 Ga. 373.

An action by attorneys to recover fees, and have the amount declared a lien upon property sold in the original action, may be removed. Pettus v. Georgia R. R. Co., 3 Woods C. C. 620.

A proceeding by *mandamus* in the State court, under the statutes of Kansas (Gen. Stats. 1868, p. 766), *to compel the defendant company to register the transfer of certificates of stock* held by the plaintiff, is a "suit of a civil nature at law" within the meaning of the Removal Act of March 3d, 1875, and, upon proper application, may be transferred to the Circuit Court of the United States. Washington Improvement Co. v. Kansas Pacific Ry. Co., 5 Dillon, 489, (1879.)

A *mandamus* suit in a State court is not removable on a plea or allegation which raises the issue of *title to an office*. State v. Johnson, 29 La. Ann. 399.

An action in the nature of a *quo warranto* to *determine the title to offices* of the electors of President and Vice-President of the United States, is not removable. State v. Bowen, 8 S. C. 382, (1873).

of the nature of suits that may be removed, are cited in a note.[1]

[1] *Suits by attachment* may be removed. Barney v. Globe Bank, 5 Blatchf. 107; Sayles v. N. W. Ins. Co., 2 Curtis C. C. 212. And *ejectment* actions. *Ex parte* Turner, 3 Wall. Jr. 258; Torrey v. Beardsley, 4 Wash. C. C. R. 242; Allin v. Robinson, 1 Dillon, 119; *Ex parte* Girard, 3 Wall. Jr. 263 (1868), Grier, J. A controversy as to the *validity* of an attachment may be removed, if the amount involved be sufficient to give the Circuit court jurisdiction. Keith v. Levi, West. Dist. Mo., 2 Fed. Rep. 743, McCrary, J. And in *replevin*. Beecher v. Gillett, 1 Dillon, 308; Dennistoun v. Draper, 5 Blatchf. 336. And a *bill in equity* to reform an insurance policy. Charter Oak Co. v. Star Ins. Co., 6 Blatchf. 208. And a *special statutory proceeding* in the nature of a *chancery remedy* to confirm a tax title. Parker v. Overman, 18 How. 137; *s. c.*, Hempstead, 692.

A proceeding to appropriate private property for public use, which at the time the removal was applied for had assumed the shape of an action at law regularly docketed in the State court, to be tried and determined as other cases, and judgment entered accordingly, is such a *suit* as may be removed. Patterson v. Boom Co., 3 Dillon, 465; *s. c.*, affirmed, Boom Co. v. Patterson, 98 U. S. 403; *ante*, § 41, note.

Suit in a State court by strangers, the object of which is *to annul a will* and to recall the decree by which it was allowed to probate, is in effect a suit in equity, and may be removed to the Circuit court under the Act of March 2, 1867. Gaines v. Fuentes, (Oct. Term, 1875, U. S. Sup. Court, 3 Cent. L. J. 371; *s. c.*, 2 Otto, 10, overruling *s. c.*, 25 La. An. 85), distinguished from Broderick's Will Case, 21 Wall. 503, and proceedings to probate wills. Fouvergne v. New Orleans, 18 How. 470.

A petition merely *ancillary to an ejectment suit* already passed to judgment, to have an unsuccessful defendant's improvements valued and allowed to him, under the Occupying Claimants' Law, is not removable, because a mere incident to the original action. Chapman v. Barger, 4 Dillon, 557, (1877).

Under the legislation of Massachusetts in respect to the *establishment of claims against the estates of deceased persons*, which provides for the examination, by commissioners of the Probate court, of all claims of creditors against the estate, and for the allowance or rejection by the commissioners of each claim, and which requires a statement of the amount allowed on each claim and a list of claims finally allowed, with a provision for an appeal by either party to a Superior court, which shall be tried as in an action at law prosecuted in the usual manner, except that no execution shall be awarded, it was held that such a claim, pending on appeal in the Superior court from the decision of commissioners appointed by the Probate court, could not be removed to the Circuit Court of the United States under the Act of 1867. Du Vivier v. Hopkins, 116 Mass., 125 (1874). This decision was rested upon two general

§ 43. Where the case made by the pleadings in the State court is in its nature a *law action*, it must, when removed to

grounds: 1. The claim against an estate is not such a *suit* as is contemplated by the Removal Acts of Congress; the Supreme Judicial court of Massachusetts being of opinion that the jurisdiction of the State courts over the entire proceedings for the settlement of the estate is exclusive of the Federal courts; [but see Craigie v. McArthur, 9 Ch. Legal News, 156; *s. c.*, 4 Cent. L. J. 237; *s. c.*, 15 Alb. L. J. 121; *s. c.*, 4 Dillon, C. C. 474; Payne v. Hook, 7 Wall. 425; *s. c.*, 14 Wall. 252]; that nothing less than the whole cause can be removed, while here was an attempt, in the opinion of the court, to remove part of the proceeding; that on the removal of a cause, where the right exists, the jurisdiction of the State court ceases, and the Federal court must execute its own judgment, and can not after judgment remand the cause for any purpose, or transmit a certificate of its judgment to the State court, it not being an appellate tribunal, but a court of co-ordinate and independent jurisdiction; and here the Federal court could not issue execution on its judgment or certify the same to the State court. 2. The application could not be made in the Appellate court, but under the Act of Congress must be made in the court of original jurisdiction before final judgment; and here the decision of the Commissioners of the Probate court would be final, unless modified by the State Appellate court. The view of the Supreme Judicial Court of Massachusetts that a claim against the estate of a deceased person is not, under the statute of that State, such a *suit* as falls within the provisions of the Removal Acts of Congress, is doubtless correct, at least while the proceeding is in the Probate court; but on the appeal of the creditor or executor the statute provided, that the supposed creditor shall file a written statement of his claim, in the nature of a declaration, "and like proceedings shall thereupon be had in the pleadings, trial and determination of the case as in an action at law prosecuted in the usual manner, except that no execution shall be awarded." This would seem to assimilate the case in the Appellate court to an ordinary suit; but if so, the difficulty was that the application for the removal was not made before the final trial in the court of original jurisdiction, as required by the Act. Further, as to the Federal jurisdiction in respect to suits concerning the settlement of estates of deceased persons, the probate of wills, etc., see Mallett v. Dexter, 1 Curtis C. C. R. 178. Compare with Payne v. Hook, 7 Wall. 425; Williams v. Benedict, 8 How. 107; Vaughan v. Northup, 15 Pet. 1; Pratt v. Northam, 5 Mason C. C. 95; Gaines v. Fuentes, 2 Otto, 10, 3 Cent. L. J. 371, overruling *s. c.*, 25 La. Ann. 85; Tarver v. Tarver, 9 Pet. 174; Gaines v. Chew, 2 How. 619, 650; Gaines v. New Orleans, 6 Wall. 642; Gaines v. Hennen, 24 How. 553; Fuentes v. Gaines, 1 Woods C. C. 112, where Mr. Justice Bradley reviews previous cases of Mrs. Gaines in the Supreme Court; Case of Broderick's Will, 21 Wall. 503; Burts v. Loyd, 45 Ga, 104; Hargroves v. Redd, 43 Ga. 143; Craigie v. McArthur, 4 Dillon, 474; 9 Ch.

the Federal court, proceed as such, and may do so (where the action is a purely legal one), although it is brought in

Legal News, 156; *s. c.*, 4 Cent. L. J. 237; *s. c.*, 15 Alb. L. J. 121. *Application for probate of a will* is an action that is not removable. Frazer, *in re*, 6 Cir. Mich., 1878; 18 Alb. L. J. 353; *s. c.*, 7 Cent. L. J. 227.

An action brought by a *resident of the District of Columbia against a British subject cannot be removed* from a State court into the Federal courts. The plaintiff is not a "citizen of a State." Cissel v. McDonald, 57 How. (N. Y.) Pr. 175. See *s. c.*, 16 Blatchford, 150, and cases cited.

A suit in a *State* court, *to restrain or stay execution of a judgment of the State court* by a seizure and sale of the complainant's lands, may be removed, under the Act of 1875, although such an injunction has been allowed by the State court, if the requisites as to citizenship and amount exist, notwithstanding the Federal courts are prohibited, by the Revised Statutes (sec. 720), from granting an injunction to stay proceedings in a State court; and the Federal court has power, under the Act of March 3, 1875 (sec. 4), to continue, modify or dissolve the injunction allowed by the State court. Watson v. Bondurant, 2 Woods C. C. 166 (1875), Woods, Circuit Judge; *s. c.*, 3 Cent. L. J. 398. In this case the Supreme Court of Louisiana say: "A *merely auxiliary proceeding* by a third person, to enjoin a seizure and sale of his property under a judgment to which he was not a party, is not transferable, under the Removal Act of 1875, from a State court to a Federal court. It *seems* that no suit is thus transferable which could not have been brought in the Circuit court by original process." Watson v. Bondurant, 30 La. An. 1; Goodrich v. Hunton, 29 La. Ann. 372.

The fact that one accepts and exercises offices and trusts which require actual residence in one State, incompatible with a claim of citizenship in another. So held, as to the domicile of one qualifying in Louisiana as natural tutrix, or as testamentary executrix, without giving bond. *Ib.*

Right of removal, under Act of 1875, of a *railway foreclosure suit* held not affected by the *pendency of another suit* in the State court by stockholders against the company, in which certain orders had been made as to a *receiver;* the right of removal was sustained. Scott *et al.*, Trustees, v. Clinton & Springfield R. R. Co., (Drummond, J.), 8 Ch. Legal News, 210; *s. c.*, 6 Bissell, 529.

FORECLOSURE OF MORTGAGE.—Where D., a citizen of California, filed a bill to foreclose a mortgage against M., the morgagor, also a citizen of California, and F., a subsequent incumbrancer and a citizen of New York, there can be no final determination of the controversy between D. and F., without the presence of M., and the suit is not removable by F. to the Circuit Court of the United States under Section 639 of the Revised Statutes. Neither in such case, where the only controversy is as to the validity of the mortgage, and whether there is anything due on it, is there "a controversy which is *wholly* between citizens of different States," or "which can be *fully* determined as between them," within

the meaning of Section 2 of the Act of March 3, 1875 (18 Stat. 470), and the case can not be removed to the National courts under the provisions of that Act. Where a cross-bill filed by one defendant against complainant, and its co-defendant only sets up the same matter as that set up in the respective answers of the defendants to the original bill, it is merely matter of defense, and in no way affects the right of removal under the statutes cited. Donohoe v. Mariposa Land and Mining Co., 9 Dist., 6 Cent. L. J. 487. Sawyer, J., said: "A cross-bill is a defense." Gallatin v. Irwin, Hop. Ch. R. 58-9. "The original bill and the cross-bill are but one cause." 3 Dan. Ch. Pr. 1743, Ed. 1851. "Both the original and cross-bill constitute but one suit." Ayer v. Carver, 17 How. 595. "It should not introduce any distinct matter. It is auxiliary to the original suit, and a *graft and dependency on it.*" Rubber Co. v. Goodyear, 9 Wall. 809; Cross v. De Valle, 1 Wall. 5; Field v. Schieffelin, 7 Johns. Ch. 252. The dismissal of the original bill before a hearing would doubtless carry the cross-bill with it as a part of the suit. Slason v. Wright, 14 Vt. 209–10. The fact, therefore, that a cross-bill has been filed, setting up the same matters put in issue by the original bill and answers, can not change the character of the case, or affect the question of jurisdiction. The original bill is still the suit, the cross-bill being but an appendage constituting a part of it." See Clarkson v. Manson, *infra*, ch. 13.

As to the removal of TORTS by one defendant under Act of 1866, *quære* in Vannevar v. Bryant, 21 Wall. 41, 43; *s. c.*, below, Bryant v. Rich, 106 Mass. 180. An action of *tort* against several defendants, for a *conspiracy*, can not be removed by part of them under the Act of 1866, the court being of opinion that there could not be a final determination of the *controversy* without the presence of all of the defendants. *Ex parte* Andrews and Mott, 40 Ala. 639 (1867)—Byrd, J., dissenting. The opinion discusses quite fully the construction of the Acts of 1866 and 1867. The suit was brought in Alabama by citizens of the State against a citizen of that State and two citizens of another State; and it was held that the Act of 1867 did not authorize its removal at the instance of the non-resident defendants. *Ib.* A suit in which the plaintiff is a citizen of one State, and three of the defendants are citizens of that State, one a citizen of another State, and one a citizen of a third State, and none of the parties are nominal parties, cannot be removed into a Circuit Court of the United States from a court of the first-named State, under the Act of March 3, 1875 (18 U. S. Stat. 470). Van Brunt v. Corbin, 14 Blatchf. 496. See *Ante*, § 29.

Definition of "suit," "action," "case," "cases in law and equity," see Story Com. on Const., secs. 1645, 1647. Weston v. City of Charleston, 2 Pet. 449; Holmes v. Jennison, 14 Pet. 540; *Ex parte* Milligan, 4 Wall. 2; Phillips' Pr. (2d Ed.) 13, 55; West v. Aurora, 6 Wall. 139.

What is a suit or defense *arising under a law* of the United States, Turton v. Union Pacific R. R. Co., 3 Dillon, 366; Orner v. Saunders, *Ib.* 284; People v. Chicago & Alton R. R. Co., (construction of Act of Congress of April 20, 1871), 6 Ch. Legal News, 316; Osborn v. Bank of U. S., 9 Wheat, 738. Other cases cited *ante*, chap. 10.

the name of the real party in interest (as authorized by the State codes), instead of the person holding the bare legal title.[1]

§ 44. Where the suit in the State court is in its nature a *suit in equity*, it must proceed as an equity cause on its removal into the Federal court. The pleadings and practice in law actions, except where otherwise specially provided by Act of Congress, are to be conformed, as nearly as may be, to the pleadings and practice in the State court of the particular State. But in equity it is otherwise. The pleadings and practice in equity causes in the Federal courts are uniform throughout the United States, and are governed by the Equity Rules prescribed by the Supreme Court of the United States, and by the practice of the Court of Chancery in Great Britain as it existed before the recent changes in the judicial system of that country. The Federal courts have the same chancery jurisdiction in every State; and equity causes must be kept separate and distinct, from their inception to the end, from law actions, and are to be decided by principles of equity of uniform and general application.[2]

Acts of 1866—*Removal by part of defendants.* The grantor in a deed of trust, conveying the legal title in fee to a trustee to secure the payment of a debt to a third person, can not, under the Act of 1866, remove a suit to foreclose such deed of trust in which he and the said trustee are defendants, leaving the trustee in the State court; and the reason is that the foreclosure by sale of land requires the presence of the party holding the legal title; and since, under the Act of 1866, the cause was not removable as to the trustee, it could not be removed by the mortgagor. Gardner v. Brown, U. S. Sup. Court, Oct. Term, 1874, 21 Wall. 36; Coal Co. v. Blatchford, 11 Wall. 172; *supra*, chap. 6; *infra*, chap. 15.

[1] Thompson v. Railroad Companies, 6 Wall. 134; Weed Sewing Machine Co. v. Wicks *et al.*, 3 Dillon, 261; Bushnell v. Kennedy, 9 Wall. 391; Act June 1, 1872, 17 Stats. at Large, 197, sec. 5; Rev. Stats., sec. 914; Wood v. Davis, 18 How. 467; Knapp v. Railroad Co., 20 Wall. 117. Compare Suydam v. Ewing, 2 Blatchf. 359, as to which *quære*.

[2] Neves v. Scott, 13 How. 268. See also Green v. Custard, 23 How. 484, where the reader will find, and perhaps be amused by, the Philippic of Mr. Justice Grier against the code system of pleadings and practice. His remarks are unjust to that system properly understood, but they are too often deserved by the loose practice which has grown up under it.

§ 45. Where the suit in the State court *unites legal and equitable grounds of relief or of defense* as authorized by the codes, and it is removed, as it may be if the causes for removal exist, what is to be done with it in the Federal court, where law and equity suits and issues must be kept separate and distinct? In such a case *a repleader is necessary*, and the case must be cast in a legal mold, or in the equity mold, or be recast into two cases, one at law and one in equity, and the Federal court is undoubtedly competent to make all orders necessary to this end.[1]

§ 46. In the Courts of the United States, the union of equitable and legal causes of action in one suit is forbidden by the second section of the Process Act of May 8, 1792 (1 Stat. 276), which is substantially re-enacted in Section 913, of the Revised Statutes. It was so held in a case removed under the Act of Congress to the Circuit court from a court of Texas, where such a union is, by the laws of that State, allowed.[2]

§ 47. In *law cases*, pure and simple, *no repleader* in the Federal courts is necessary, especially since the Practice Act of June 1, 1872.[3] Nor is a repleader necessary *in equity*

[1] Sands v. Smith, I Dillon, 290, note; Fisk v. Union Pacific R. R. Co., 8 Blatchf. 299; Partridge v. Ins. Co. (set-off), 15 Wall. 573; La Mothe Manufacturing Co. v. National Tube Works, 15 Blatchf. 432.

The text states the practice which has been pursued in the 8th Circuit; and the case of Akerly v. Vilas, 3 Bissell, 332, is not to be understood, we think, as authorizing legal and equitable grounds of relief or defense to be tried in one and the same suit after the removal to the Federal court, nor necessarily to confine the Federal court to the trial of the issues as made up on the pleadings in the State court. The practice in the Federal courts is quite general, to allow amendments after the removal, in furtherance of justice and within the scope of the original cause of complaint. Toucey v. Bowen, 1 Bissell, 81 (1855), Huntington, J.; Suydam v. Ewing (practice after removal), 2 Blatchf. 359 (1852), Betts, J.; Barclay v. Levee Commissioners, 1 Woods C. C., 254; Dart v. McKinney, 9 Blatchf. 359 (1872).

[2] Hurt v. Hollingsworth, 100 U. S. Rep. 100.

[3] Rev. Stats. sec, 914; Merchants' etc. Nat. Bank v. Wheeler (South. Dist. N. Y.; Johnson, Circuit J.), 3 Cent. L. J. 13 (1875); Dart v. McKinney, 9 Blatchf. 359 (1872), Blatchford, J., under Act of 1866. For-

causes, where the complaint or petition in the State court contains the substance of a bill in equity adapted to present the plaintiff's case. But although a repleader in such case be not indispensable, it may often be advisable. In cases, however, where legal and equitable matters are united or mingled, it is necessary, as above stated, to frame the pleadings anew after the cause reaches the Federal court, so as to make it distinctively one at law or one in equity, or by a division into two, the one a law, the other an equity suit.[1]

merly, in cases removed under the Judiciary Act, and where the pleadings in the Federal court were different from those in the State courts, the practice in some of the courts was to require the plaintiff after the removal to file a *new declaration*, the same as if the suit had originally been commenced in the Federal court. Martin v. Kanouse, 1 Blatchf. C. C. 149; *s. c.*, 15 How. 198.

Under the Revised Statutes, sec. 639, the party removing the cause is required to file in the Federal court "*copies of the said process against him, and of all pleadings*, depositions, testimony or other proceedings in the cause;" and "when the said copies are entered as aforesaid in the Circuit court, the cause shall there proceed in the same manner, as if it had been brought there by original process, and the *copies* of pleadings shall have the same force and effect, *in every respect and for every purpose*, as the original pleadings would have had by the laws and practice of the courts of such State, if the cause had remained in the State court." This clearly dispenses with the necessity of new pleadings in the Federal court, where the original pleadings are adapted to the separate law and equity jurisdiction of that court,—the obvious purpose of this legislation being, that the Federal court shall take up the cause where it was when it left the State court, and proceed with it as if it had been originally brought in the Federal court. And, in substance, the same provisions are made in the Act of March 3, 1875. See chaps. 3, 4, 6, 7.

Costs *in suits removed* from the State court held to be governed, not by the Revised Statutes, sec. 968, but by the statute of the State; hence where, in an action of trespass on the case removed from the State court, the plaintiff recovered less than $100, it was held that under the statute of Michigan (Comp. Laws, sec. 7290) the defendant was entitled to costs as a matter of right. Scupps v. Campbell (East. Dist. Mich., Brown, J), 3 Cent. L. J. 521 (1876).

[1] See Dart v. McKinney, 9 Blatchf. 359; Akerly v. Vilas, 2 Bissell, 110; Green v. Custard, 23 How. 484; Fisk v. Union Pacific R. R. Co., 8 Blatchf. 299; Partridge v. Ins. Co., 15 Wall. 573; Sands v. Smith, 1 Dillon, 290; Thompson v. Railroad Cos., 6 Wall, 134; Rev. Stats., secs. 639, 914.

CHAPTER XII.

FROM WHAT COURT THE REMOVAL MAY BE MADE—REMOVAL HOW ENFORCED—CERTIORARI.

§ 48. The language of the Revised Statutes, sec. 639, and of the Act of March 3, 1875, is: "Any suit in *any State Court*," etc. In *Gaines* v. *Fuentes*, the Supreme Court of the United States held that an action, in form and purpose to annul a will and to recall the decree by which it was probated, brought in a State court without separate equity jurisdiction, and which is invested with jurisdiction over the estates of deceased persons, might be removed under the Act of 1867 to the Federal court. Speaking of the case before the Court and the Act of 1867, Mr. Justice FIELD observed: "This Act covered every possible case involving controversies between citizens of the State where the suit was brought and citizens of other States, if the matter in dispute, exclusive of costs, exceeded the sum of $500. *It mattered not whether the suit was brought in a State court of limited or general jurisdiction* The only test was, did it involve a controversy between citizens of the State and citizens of other States, and did the amount in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of litigation, and was presented by the pleadings for judicial determination.[1]

§ 49. Under the Act of March 3, 1875 (sec. 7), the Circuit Court of the United States, to which any cause shall be

[1] Gaines v. Fuentes *et al.*, 3 Cent. L. J., 371; *s. c.*, 8 Ch. Legal News, 225; *s. c.*, 2 Otto, 10. In The Rathbone Oil Co. v. Rauch, 5 West Va. 79 (1871), referred to *infra*, it was held that no motion to remove a cause can be made before a justice of the peace, that not being a "State court" within the meaning of the Act of Congress,—but the Act of Congress is, "*any* State court," whether of general or limited jurisdiction.

removable, under its provisions has power to issue a writ of *certiorari* to the State court, commanding that court to make return of the record in the cause; and the clerk of the State court is subjected to criminal punishment who refuses, after tender of fees, to the party applying for the removal a copy of the record.[1]

[1] *Certiorari—Copies of Record—Mandamus to enforce Removal, etc.*—The only object of a *certiorari* is to bring the record from the State court into the Federal Court; but the writ is unnecessary, when the record of the State court is already before the Federal court. Scott *et al.*, Trustees, v. Clinton and Springfield R. R. Co., 8 Ch. Legal News, 210, *per* Drummond, J.; *s. c.*, 6 Bissell, 529; Wells, *in re*, 3 Woods C. C. 128; *s. c.*, 17 Alb. L. J. 111.

The writ of *certiorari* is often resorted to as the means of effecting, pursuant to law, the removal of the record of a proceeding or cause from one court to another. In England and in some of the States in this country, indictments and other proceedings are removed for trial from the lower to the higher court. Bacon's Abridg., title *Certiorari*; 1 Bl. Com. 320, 321; 1 Chitty Cr. Law, 334, 571 *et seq.*, 387; State v. Gibbons, 1 South. (N. J.), 40, 44; United States v. McKee, 4 Dillon C. C. 1; *s. c.*, 3 Cent. L. J., 292, on motion in arrest of judgment.

Section 7 of the Act of March 3, 1875, authorizing the Circuit court to issue the writ of *certiorari*, provides that it shall "command the State court to make return of the record" of the cause removed, which means an exemplified copy of the record. United States v. McKee, *supra*. And express power is given to the Circuit court "to enforce the said writ according to law."

The provision in the Act of March 3, 1875, sec. 7, in respect to *certiorari*, only extends to "causes which shall be removable under *this Act*." There is no similar provision as to cases removable under sec. 639 of the Revised Statutes; but there is a provision (Rev. Stats. sec 645), allowing copies of the record in the State court to be supplied by affidavit or otherwise, on proof that the clerk of the State court, after demand and payment or tender of his legal fees, refuses or neglects to deliver certified copies of the records and proceedings of the State court in the cause. As to provisions in special cases, see Revised Statutes, secs. 641, 643; Benchley v. Gilbert (suit held not removable by *certiorari* under sec. 67, Act of July 13, 1866), 8 Blatchf. 147.

Certiorari and habeas corpus under Act of 1833, "Force Act," in respect to removal of causes. Abranches v. Schell, 4 Blatchf. 256.

A defect or omission in the transcript may be cured by certiorari; if it can be cured, it is no ground for remanding the cause to the State court. Dennis v. Alachua Co., 3 Woods C. C. 683; Cook v. Whitney, 3 Woods C. C. 715.

As to *order allowing copies* of the papers, etc., in the State court to be

CHAPTER XIII.

AS TO VALUE.

§ 50. In the REMOVAL ACTS to which we have referred, namely, the Revised Statutes, section 639, and the Act of March 3, 1875, it is made an indispensable element of removability, that the *amount in dispute*, exclusive of costs, shall "exceed the sum or value of five hundred dollars." This language, as well as that which precedes it, is descriptive of the nature of *suits* that may be removed. The subject-matter of the dispute or of the suit must be property, or money, or some right, the value of which in money is susceptible of judicial ascertainment. The language descriptive of *suits that may be removed* excludes criminal cases, and controversies relating to the custody of a child, or the right to personal freedom.[1]

filed in the Federal court, where the clerk refuses to certify such copies: Akerly v. Vilas, 1 Abb. U. S. Rep. 284; *s. c.*, 2 Bissell, 110 (1869); 24 Wis. 165; Hatch v. C., R. I. & P. R. R. Co., 6 Blatchf. 105.

Without express authority from Congress, the *Federal court can not issue a writ of mandamus to the State court*, to require it to proceed no further in the case, and to certify the case to the Federal court. It was admitted that Congress could confer such a power, but denied that it had done so by the Judiciary Act. *Per* Drummond, J., Hough v. West. Transp. Co., 1 Bissell, 425 (1864). Or by the Act of July 27, 1866; *In re* Cromie, 2 Bissell, 160 (1869). Or by the Act of July 27, 1868 (Rev. Stats., sec. 640); Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362 (1869).

See on subject of mandamus and process to enforce removal of cause from State to Federal court, Spraggins v. County Court, Cooke's Rep. 160; *Ex parte* Turner, 3 Wall. Jr. 258, Grier, J.

Proceedings in the State court after the removal of the cause will NOT BE STAYED by writ from the Federal court; if the removal was not lawfully effected, such writ is improper; if effected, it is unnecessary. Bell v. Dix, 49 N. Y. 232 (1872); Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362. See further on this point, *post*, chap. 19 and note.

[1] Phillips' Pr. (2d Ed.), 82; Lee v. Lee, 8 Pet. 44; Barry v. Mercien, 5 How. 103; Pratt v. Fitzhugh, 1 Black, 271; De Krafft v. Barney, 2 Black, 704; Sparrow v. Strong, 3 Wall. 97; Gaines v. Fuentes, Sup. Court, Oct. Term, 1875, 3 Cent. L. J. 371; *s. c.*, 2 Otto, 10. The suits must relate to claims or property capable of *pecuniary* estimation. *Ib.*

It is not sufficient that the value in dispute *precisely equals* $500; it must *exceed* that sum or amount.[1]

§ 51. *The value of the matter in dispute*, for the purposes of removal, is to be determined by reference to the amount claimed in the declaration, petition or bill of complaint.[2] In actions on a *money demand*, the value in dispute is the debt and damages claimed as stated in the petition or declaration, and in the prayer for judgment. For example, if the action be on a note for a fixed sum, and the principal and interest and damages do not all together exceed $500, it is not removable, although the prayer for judgment may be for an amount greater than $500. On the other hand, in the case supposed, though the plaintiff might have been entitled to a recovery for more than $500, yet, if the prayer for judgment be for *less* than that amount, the case could not be removed.[3]

It is sufficient that the amount in dispute exceeds $500 *at the time* when the right to a removal accrues and is applied for — and *interest*, when the right thereto exists and it is claimed, may be regarded in determining the amount or value in controversy.[4] The State court decisions, proceeding on a different principle, are probably unsound.

[1] Walker v. United States, 4 Wall. 163; W. U. Tel. Co. v. Levi, 47 Ind. 552.

[2] Gordon v. Longest, 16 Pet. 97; Kanouse v. Martin, 15 How. 198, 207; Ladd v. Tudor, 5 Woodb. & Minot. 325; Muns v. Dupont, 2 Wash. C. C. 463; Bennett v. Butterworth (detinue), 8 How. 124; Peyton v. Robertson (replevin), 9 Wheat. 527; United States v. McDowell (penal bonds), 4 Cranch, 316; Martin v. Taylor (penalty), 1 Wash. C. C. 1; Postmaster-General v. Cross (penal bond), 4 Wash. C. C. 326; King v. Wilson (illegal taxes), 1 Dillon, 555; Hartshorn v. Wright (ejectment), 1 Pet. C. C. 64; Crawford v. Burnham (ejectment), 4 Am. Law Times, 228; W. U. Tel. Co. v. Levi, 47 Ind. 552; Sherman v. Clark, 3 McLean, 91. The amount in controversy must be affirmatively shown. Keith v. Levi, West. Dist. of Mo., 2 Fed. Rep. 743, McCrary, J.

[3] See Lee v. Watson, 1 Wall. 337.

[4] McGinnity v. White, 3 Dillon, 350; Bank, etc. v. Daniel, 12 Pet. 32; Merrill v. Petty, 16 Wall. 338.

In actions *sounding in tort*, the damages laid by the plaintiff are the amount of the matter in dispute.[1]

A new and interesting point, under the second section of the Act of March 3, 1875, was recently (Nov. 1880) decided in *Clarkson* v. *Manson*, by Mr. Circuit Judge BLATCHFORD, who held that, where an action is brought in a State court for an amount less than $500, and the defendant in his answer pleads a counterclaim exceeding the sum of $500, which is replied to by the plaintiffs,—on an application by the defendant for removal from the State to a Federal court, the counterclaim must be considered, and that the matter in dispute exceeds $500, and that the defendant was entitled to remove the *whole* suit.[2]

[1] Hulsecamp v. Teel, 2 Dallas, 358; Gordon v. Longest, 16 Pet. 97; West. Union Tel. Co. v. Levi, 47 Ind. 552.

[2] The learned judge thus states the facts and legislation applicable to the question presented:

BLATCHFORD, J.—The plaintiff brought this suit against the defendant in the Marine Court of the City of New York, to recover the sum of $195 as the balance unpaid on a sale of the fixtures of a store and bake-house. The answer put in, in the State court, sets up that the plaintiffs, with intent to defraud, falsely represented to the defendants that the bake-house was a profitable business place, and that one Ott, a former proprietor of it, had done a profitable business at it, and thus induced the defendant to hire the store; that the plaintiffs also represented that they owned the store and the bakery fixtures in it, and offered to sell them to him; that he, to secure for one day the right to purchase them, paid to plaintiffs $5, as a deposit, on the agreement that if he was not satisfied with the fixtures, the $5 should be forfeited; that the defendant, not being satisfied with the store and fixtures, immediately notified the plaintiffs thereof; that the place had never been a profitable business place for a bakery; that Ott closed it because he could not make it pay the expense of keeping it; that the fixtures were mortgaged and were owned by Ott, and not by the plaintiffs; that the plaintiffs knew this; that the defendant, relying on said representations and believing them to be true, rented the store and furnished it with new fixtures, and made repairs in it, and fitted it up at great expense, and hired help to conduct the business of the bakery; and that he has not realized any moneys from the business carried on at the place, and was unable to make the business pay expenses, but was obliged to close it, to his damage $750, which he sets up as a counterclaim against the plaintiffs. The answer denies all the allegations of the complaint not thus admitted or denied,

§ 52. Where the *right to a removal has become perfect* and complete, it is not in the power of the other party to

and demands judgment against the plaintiffs, that the complaint be dismissed with costs, and that he have judgment against the plaintiffs for $750. This answer was put in September 13, 1880. A reply, sworn to September 15, 1880, was put in by the plaintiff, replying "to the allegations of counterclaim contained in the answer," and denying each and every of said allegations.

A petition was duly presented by the defendant to the State court, praying "that the said suit may be removed" to the Federal court. The question was whether the cause was removable. The 2d section of the Act of 1875 provides that "any suit * * * where the matter in dispute exceeds, exclusive of costs, the sum or value of '$500,' in which there shall be a controversy between citizens of different States * * * either party may remove said suit." The defendant here contends that the matter in dispute, on the issue raised by the counterclaim in the answer, and the reply thereto, *exceeds* $500, exclusive of costs; that there is a controversy in regard to such matter, made a controversy exclusively by the plaintiff, by his reply to the counterclaim; and that on this ground the defendant can remove the *whole suit* into this court.

Under the New York Code of Civil Procedure (sec. 500) an answer may contain a counterclaim, that is, a statement of new matter constituting a counterclaim. Such counterclaim (sec. 501) must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of certain specified causes of action. A plaintiff may (sec. 494, 495, 496) demur to a counterclaim, distinctly specifying the objections, one of which may be that the counterclaim is not of the character specified in section 501. Where a counterclaim is established which equals the plaintiff's demand, judgment goes for the defendant. Where it is less than the plaintiff's demand, the plaintiff has judgment for the residue. Where it exceeds the plaintiff's demand, the defendant has judgment for the excess, or so much thereof as is due from the plaintiff (sec. 503). The plaintiff, if he does not demur, may reply to the counterclaim, denying what he controverts (sec. 514).

The statutes of New York use the word "action," and discard all other terms. The proceeding by the defendant against the plaintiffs, being a civil action, is a suit of a civil nature, and the matter in dispute in it exceeds, exclusive of costs, the sum or value of $500. It is brought in the State court, under the authority of the statute of New York, in the form in which it is brought, although the defendant is turned into a plaintiff and the plaintiff into a defendant, and jurisdiction of the person of the plaintiff is obtained by the fact that the plaintiff came into court and brought the defendant in first, in the action brought by the plaintiff. It clearly makes a case for removal. But what is to be removed? The Act of 1875 says that "said suit" is to be removed. Is the proceed-

defeat it in either court *by release or by amendment of petition* and declaring for less than five hundred dollars.[1]

It is made a condition of the right to an appeal or writ of error to the Supreme Court, that the "matter in dispute exceeds the sum or value of two (now five) thousand dollars, exclusive of costs." The cases arising under this clause are collected and accurately stated by Mr. Phillips,[2] and will be found, in many instances, applicable to questions arising in this regard under the Removal Acts.

In leaving this point, we may be permitted to observe that in our judgment the most serious objection to the Removal Acts, as they now exist, is the small amount required to authorize a removal. In view of the inconvenience and expense of litigating in the Federal courts, held often more than one hundred miles distant from the residence of the parties; the crowded state of their dockets; and considering that removals, especially by foreign insuranee and rail way corporations, often have the effect to delay, if not to oppress, those having claims against them, it is quite clear that the amount to justify a removal should be enlarged, or the Federal courts multiplied, or at all events their judicial force increased.

ing or action by the defendant, his affirmative claim, the only thing that is to be removed, leaving the claim of the plaintiffs to be litigated in the State court, the former claim being $750, and the latter $195. In view of the facts, that the suit is in form one brought by the plaintiffs against the defendant, and includes the plaintiffs' claim, by the voluntary act of the plaintiffs, and is made to include the defendant's claim by the operation of the statute of New York; and that thus there is but one suit, though there are two controversies in it, and that the whole suit is to be removed, and that either party may remove it, and that the counterclaim necessarily "must tend in some way to diminish or defeat the plaintiffs' recovery," it follows that the whole suit is removed, including all the issues, by the complaint, the answer and counterclaim and the reply.

The motion of the plaintiff to remand is denied.

As to removal of CROSS-BILLS IN EQUITY suits, see *supra*, section 42, note.

[1] Kanouse v. Martin, 15 How. 198; Wright v. Wells, 1 Pet. C. C. 220; Green v. Custard, 23 How. 468; Roberts v. Nelson, 8 Blatchf. 74.

Practice of the Supreme Court, chap. VIII.

CHAPTER XIV.

PARTY ENTITLED TO A REMOVAL — CITIZENSHIP — CORPORATIONS — ALIENS.

§ 53. Under the 12th section of the Judiciary Act, omitting the case of aliens, the right of removal is limited, as we have shown, to the non-resident defendant, when sued by a resident plaintiff. Under the Act of 1866 it is limited, as we have seen, under the restrictions therein imposed, to the non-resident defendant, and it is not given either to the resident defendant or to the resident plaintiff. Under the Act of 1867 the right is given, as above shown, under the enumerated conditions, to the plaintiff *or* defendant; but in either case it is only the non-resident citizen who can remove the case.[1]

[1] *Citizenship of a State, for the purpose of conferring Federal jurisdiction, has reference to domicile and residence, not the right of suffrage.* D'Wolf v. Rabaud, 1 Pet. 476; *s. c.*, Paine C. C. 580; Case v. Clarke, 5 Mason C. C. 70; Cooper v. Galbraith, 3 Wash. C. C. 546; Shelton v. Tiffin, 6 How. 163; Lanz v. Randall (Dist. Minn., Miller, J), 3 Cent. L. J. 688; 4 Dillon, 425 (1876). Effect of *bona fide change of domicile.* Jones v. League, 18 How. 76; Morgan's Heirs v. Morgan, 2 Wheat. 290; United States v. Myers, 2 Brock. 516.

Under the Act of Congress of 1875, providing for the removal of causes into the United States Circuit Court, a defendant may remove a suit brought against him in a State court by an *assignee of the claim sued on, the assignee being a citizen of another State, though the assignor*, in whose favor the debt was contracted, belonged to the same State as the defendant. Waterbury v. City of Laredo, 3 Woods C. C. 371; Leutze v. Butterfield, 7 Daly (N. Y.) 24, (1877).

A *State* can not make the *subject of a foreign government* a citizen of the United States; and *resident unnaturalized foreigners* may remove causes to the Federal court on the ground that they are aliens, although by State laws they may vote at elections or hold office under the State government. Lanz v. Randall (Dist. Minn., Mr. Justice Miller), 4 Dillon, 425; *s. c.*, 3 Cent. L. J., 688 (1876); *ante*, chap. 6, *note.*

When the *landlord or real owner* assumes the defense, he makes himself a party, and, being the real defendant, has the right under the Act of 1875 to remove the cause to the Federal court, if he be a citizen of a State other than that of the plaintiff. Greene v. Klinger, W. D. Tex., Duval, J.,

§ 54. Where the jurisdiction of the Federal court depends on *citizenship*, it is the citizenship of the parties to the record that is alone considered, and not of those who, although not parties, may be beneficially interested in the litigation. This rule applies to executors and administrators and trustees.[1]

§ 55. *Corporations*, created by the States, are within all the Removal Acts under consideration; and after much uncertainty and fluctuation of opinion in the Supreme Court of the United States, the settled rule now is that a corpora-

(1879), 10 Cent. L. J., 47. Such application to remove is in time, if made on the day after he becomes a defendant, though this be not the first term to which the suit was brought, provided the cause had not been previously at issue or ready for trial. *Ib.*

[1] If the *administrator or executor* and the defendant are citizens of the *same State*, the Federal court has no jurisdiction, although the intestate or testator was a citizen of a different State. Coal Co. v. Blatchford, 11 Wall. 172; Dodge v. Perkins, 4 Mason C. C. 435; Childress v. Emory, 8 Wheat. 642; Carter v. Treadwell, 3 Story C. C. 25; Green's Administratrix v. Creighton, 23 How. 90. If the action is by or against the deceased, the executor or administrator may prosecute or defend it without reference to his own citizenship. Clarke v. Mathewson, 12 Pet. 164; *s. c.*, below, 2 Sumner C. C. 262. *The citizenship of executors* is determined by the State of which they are citizens; and the circumstance that they have taken out letters in another State does not make them citizens of such State. Amory v. Amory, 36 N. Y. Superior Court Rep. (4 Jones & Spencer), 520 (1874); Geyer v. Life Ins. Co., 50 N. H. 224 (1870). The right to remove a cause, if founded on the citizenship of parties, depends upon their citizenship *as persons*. A petition in a suit brought *by executors*, which alleged that the plaintiffs, as such executors, etc., are citizens, etc., is insufficient. Armory v. Armory, 95 U. S. 186 (1877). If he remove to another State and become, in respect of jurisdiction, a citizen thereof, he may sue in the Circuit court of the State in which his letters were granted. Rice v. Houston, 13 Wall. 66.

Citizenship of trustees. Bonnafee v. Williams, 3 How. 574; Coal Co. v. Blatchford, 11 Wall. 172; Gardner v. Brown, 21 Wall. 36; Thompson v. Railroad Companies, 6 Wall. 134; Weed Sewing Machine Co. v. Wicks *et al.*, 3 Dillon, 261; Bushnell v. Kennedy, 9 Wall. 391; Act June 1, 1872, 17 Stats. at Large, 197, § 5; Rev. Stats., § 914; Wood v. Davis, 18 How. 467; Knapp v. Railroad Co., 20 Wall. 117. Compare Suydam v. Ewing, 2 Blatchf. 359, as to which *quære*.

Who are to be regarded as parties to a bill in equity, filed by the complainant in behalf of himself and *such others as might come in and become parties*, see Hazard v. Durant, 9 R. I. 602 (1868).

tion, for all purposes of Federal jurisdiction, is conclusively considered as if it were a citizen of the State which created it, and no averment or proof as to citizenship of its members elsewhere is competent or material.[1]

[1] Railroad Co. v. Harris, 12 Wall. 65, 81; Railroad Co. v. Whitton, 13 Wall. 270, 285; Louisville, etc. R. R. Co. v. Letson, 2 How. 497; Marshall v. The Baltimore & Ohio Railroad Co., 16 How. 314; The Covington Drawbridge Company v. Shepherd *et al.*, 20 How. 232; Ohio & Mississippi Railroad Company v. Wheeler, 1 Black, 286; Trust Company v. Maquillan (Act of 1867) 3 Dillon, 379; Minnett v. Milwaukee & St. Paul Railway Co. (Act of 1867), 3 Dillon, 460; Baltimore & Ohio R. R. Co. v. Cary, 28 Ohio St., 208; Shaft v. Phoenix Life Ins. Co., 67 N. Y. 544; Quigley v. Central, etc. R. R. Co., 11 Nev. 350 (1876). It can also be "a citizen of another State" within the meaning of the Act of March 2, 1867. Quigley v. Central, etc. R. R. Co., 11 Nev. 350 (1876). As to the effect on Federal jurisdiction (where it is dependent upon the citizenship of the parties), *of charters granted by different States to the same company* or to companies constructing the same line of road, and as to the *effect of consolidation* on the jurisdiction of the Federal courts, the following are the principal cases: Ohio & Mississippi R. R. Co. v. Wheeler, 1 Black, 286; Baltimore & Ohio R. R. Co. v. Harris, 12 Wall, 65; Ch. & N. W. R. R. Co. v. Whitton, 13 Wall, 270; Williams v. M. K. & T. Railway Co., 3 Dillon, 267. See also, Marshall v. B. & O. R. R. Co., 16 How. 314; B. & O. R. R. Co. v. Gallahue's Administrator, 12 Grattan, 658; Goshorn v. Supervisors, 1 West Va., 308; Minot v. Phila., Wil. & B. R. R. Co., 2 Abb. U. S. R. 323. See Chicago & Northwestern Railroad Co. v. Chicago & Pacific Railroad Co., 8 Chicago Legal News (Nov. 14, 1874), 57, (*s. c.*, 6 Bissell, 219), decided by Circuit Judge Drummond, as to the effect of consolidation under charters of different States and the citizenship of the consolidated company.

In Virginia, it is held that a *railroad company, operating a road in that State as lessee*, has no right to remove an action brought by representatives of a passenger killed, merely because the company is chartered by another State. Baltimore, etc. R. R. Co. v. Wightman, 29 Gratt. 431 (1877). Compare with cases above cited. *In Ohio*, it is held, that under the clause of the Constitution of the United States, extending the judicial power of the United States to controversies between citizens of different States, a corporation, in respect to the jurisdiction of the Federal courts, is to be regarded as a citizen of the State where it was created; and that a *foreign railroad corporation, by merely leasing*, possessing and operating in this State, the property of a domestic railroad corporation, does not thereby become an Ohio corporation, nor such citizen of the State. Hence, when a corporation of another State, not being a citizen of Ohio, is sued by a citizen of the State, in the State court, it is entitled to have the case, under the 12th sec-

The same principle applies to *public and municipal corporations*—they are for jurisdictional purposes, necessarily, citizens of the State under whose laws they are created and organized.[1]

tion of the Judiciary Act of Congress of 1789, removed from the State court to a United States court. B. & O. R. R. Co v. Cary, 28 Ohio St., 208.

The right of one of the class of corporations mentioned in section 640 of the Revised Statutes, when sued in a State court, to remove the cause to the Federal court, does not depend upon the citizenship of the parties. Under said section, the defendant may remove the cause, nothwithstanding the State is the plaintiff in the action. Texas v. Texas & Pacific R. R. Co., 3 Woods C. C., 308.

What is a sufficient statement and averment of the *citizenship of corporations to sustain Federal jurisdiction*: Express Company v. Kountze, 8 Wall. 342; Ins. Co. v. Francis, 11 Wall. 210; Manuf. Bank v. Baack, 8 Blatchf. 137; *s. c.*, 2 Abb. U. S. Rep., 232; Covington Drawbridge Co. v. Shepherd, 20 How. 227; Piquignot v. Pa. R. R. Co., 16 How. 104; Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 286.

As to the right of *joint stock companies, partly but not fully endowed with the attributes of corporations*, to sue in the Federal court, or remove cases to the Federal court on the ground of citizenship or alienage, there is some diversity of judicial decision. The leading cases on this point are: Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; Penn. v. Quicksilver Mining Co., 10 Wall. 553; Dinsmore v. Phila. etc. R. R. Co., (McKennan, Circuit Judge), 3 Cent. L. J. 157; Maltz v. Am. Express Co. (Brown, J.), 3 Cent. L. J. 784.

[1] Cowles v. Mercer County, 7 Wall, 118; Barclay v. Levee Commrs., 1 Woods C. C., 254. In McCoy v. Washington County, 3 Wall. Jr. C. C. 381, it was contended "that the County of Washington, merely a subordinate political division of the State of Pennsylvania, is not a citizen of this State, within the meaning of the Constitution or the Act of Congress, and therefore not suable in this court." "To this we answer," says Grier, J., "that, though the metaphysical entity called a corporation may not be physically a citizen, yet the law is well settled, that it may sue and be sued in the courts of the United States, because it is but the name under which a number of persons, corporators and citizens, may sue and be sued. In deciding the question of jurisdiction, the court look behind the name, to find who are the parties really in interest. In this case, the parties to be affected by the judgment are the people of Washington County. That the defendant is a municipal corporation and not a private one, furnishes a stronger reason why a citizen of another State should have his remedy in this court, and not in a county where the parties, against whom the remedy is sought, would compose the court and jury to decide their own case. This point is therefore overruled." A State statute can not limit the liability of a municipal corporation to

§ 56. A *corporation of another State* may remove a cause commenced by attachment of property, although the action could not, by reason of a citizenship in a legal sense out of the district, and inability to serve it within the district, be commenced by original process in the Circuit court of the United States;[1] and the right to a removal in such a case is not lost by reason of such corporation having an office for the transaction of business in the State in which the suit is brought.[2] Nor can such a corporation be deprived of the right of removal by State legislation.[3]

Incorporated bodies, chartered by *foreign* countries, may remove cases under the provisions as to *aliens*.[4]

§ 57. For jurisdictional purposes, *national banks* are

be sued in the courts of a State, so as to affect the Federal jurisdiction. Cowles v. Mercer County, 7 Wall. 118; Railway Co. v. Whitton, 13 Wall. 270.

[1] Bliven v. New England Screw Co., 3 Blatchf. 111; Barney v. Globe Bank, 5 *Id.* 107; Sayles v. N. W. Ins. Co., 2 Curtis, 212.

A suit, in which a citizen of this State is plaintiff, and a domestic corporation and two citizens of Missouri are joint defendants—the corporation being a citizen of this State—is not between citizens of different States, and is not removable upon the petition of the foreign defendant. Howland, etc. Works v. Brown, 13 Bush, 681. See opinion of the Supreme Court of the United States on "The Removal Cases," *ante*, sec. 29, and printed in full in the Appendix.

[2] Hatch v. Chicago etc. R. R. Co., 6 Blatchf., 105. The right of a foreign corporation to remove a cause is not affected by the legislature of the State authorizing *service of process on its agent* in the State. W. U. Tel Co. v. Dickinson, 40 Ind. 444 (1872); Hobbs v. Manhattan Ins. Co., 56 Maine, 417; Morton v. Mutual Life Ins. Co., 105 Mass. 141 (1870). A foreign corporation, sued by its own assent in another State, is notwithstanding a foreign corporation, and for all purposes of Federal jurisdiction a citizen of the State which created it. Pomeroy v. N. Y. & N. H. R. R. Co., 5 Blatchf. C. C. 120; Hatch v. Ch., R. I. & P. R. R. Co., 6 Blatchf. 105.

[3] Chicago, etc. Railway Co. v. Whitton's Admrs., 13 Wall. 270; *ante*, chap. 3, and cases cited.

[4] Terry v. Ins. Co., 3 Dillon, 408; 1 Kent's Com. 348: see also Angell & Ames on Corporations, §§ 377, 378, and 1 Abbott's U. S. Practice, 216; Fisk v. Ch., etc. R. Co., 53 Barb. 472; 3 Abb. Pr. Rep. (N. S.) 453; King of Spain v. Oliver, 2 Washington C. C. 429.

deemed citizens of the State in which they are located,[1] and they may sue in the Circuit court, although the defendants are citizens of the same State in which the bank is established.[2] The Act of July 27, 1868 (Revised Statutes, sec. 640, *ante*, chap. 2, note), expressly excludes national banks from its provisions; but this has been considered not to prevent the right of removal in their favor, if their case is within any of the other Removal Acts.[3]

But there is a distinction between National Banking Associations and the *Receivers* of such associations; neither under the Revised Statutes (sec. 640), nor under the National Banking Act (sec. 57), have such receivers as such the right to remove cases from the State courts into the Federal courts.[4]

[1] Chatham Nat. Bank v. Mer. Nat. Bank, 1 Hun, (N. Y.), 702. See, also, to the effect that for jurisdictional purposes national banks are citizens of the State where they are located: Davis v. Cook, 9 Nev. 134 (1874), following Manuf. Nat. Bank v. Baack, 2 Abb. U. S. Rep. 232; *s. c.*, 8 Blatchf. 137, and approving of the reasoning of Blatchford, J. Same point, Cook v. State National Bank, 52 N. Y. 96 (1873); *s. c.* below, 50 Barb. 339; 1 Lans. 494, holding that national banks are citizens of the State in which they are located, and may apply as such for the removal of causes.

[2] Union Nat. Bank v. Chicago, 3 Ch. Legal News, 369; Bank of Omaha v. Douglas County, 3 Dillon C. C. 298; Com. Bank v. Simmons, 6 Ch. Legal News, 344.

[3] In the Chatham Nat. Bank of New York v. Mer. Nat. Bank of West Va., 1 Hun (N. Y.), 702, a national bank was regarded as a citizen of the State in which it is located and does business, and the national bank of another State may remove a suit in which it is a defendant, if the case is otherwise within the 12th section of the Judiciary Act, and the application is made in time, *i. e.*, at the time of "entering its appearance;" and this, notwithstanding the Act of July 27, 1868 (15 Stats. at Large, 226; Rev. Stats., sec. 640) excludes national banking associations from its provisions — the latter being considered as providing for a new class of cases, and not affecting the right of removal given by preceding legislation.

[4] Bird's Executors v. Cockrem, Receiver, 2 Woods C. C. 32, Bradley, J.

CHAPTER XV.

THE TIME WHEN THE APPLICATION MUST BE MADE.

§ 58. Under the 12th section of the Judiciary Act (now Revised Statutes, sec. 639, sub-division 1), the application must be made by the defendant "at the *time* of *entering his appearance* in the State court." Under this provision the defendant must promptly avail himself of this right; and he waives it if he demurs, or pleads, or answers, or otherwise submits himself to the jurisdiction of the State court.[1]

§ 59. Under the Acts of 1866 and 1867 (now Revised Statutes, sec. 639, sub-divisions 2 and 3), the time is enlarged, and the petition for the removal may be made "at *any time before* the trial or final hearing of the suit" in the State court. The word "trial" refers to cases at law—"hearing," to suits in equity.[2] Under this language the petition for the removal *may*, it is certain, be made at any

[1] West v. Aurora City, 6 Wall. 139; Sweeney v. Coffin, 1 Dillon, 73; Webster v. Crothers, 1 Dillon, 301; Johnson v. Monell, 1 Woolw. 390; McBratney v. Usher, 1 Dillon, 367, 369; Robinson v. Potter (too late after reference and continuance), 43 N.H. 188; Savings Bank v. Benton, 2 Metc. (Ky.) 240. See *supra*, chap. 5, and cases cited.

The *filing of a pleading or agreement by the defendant*, duly signed by his solicitor, and making an application thereon, is *the entering of an appearance* within the Act of Congress of 1879. Pugsley v. Freedman's Sav. Bank, 2 Tenn. Ch. 130.

The right of defendants, under sec. 639, sub-division 1, Rev. Stats. U. S., to remove is gone, after one of the material defendants has taken the opinion of the State court upon a question which goes to the merits of the litigation. *Ib.*

As to the right of *different* defendants to remove at *different times*, see Smith v. Rines, 2 Sumn. 338; Ward v. Arredondo, 1 Paine, 410; Beardsley v. Torrey, 4 Wash. C. C. 286; Field v. Lownsdale, 1 Deady, 288; Fisk v. Union Pacific R. R. Co., 8 Blatchf. 243, 299; *supra*, chap. 5, and cases cited.

The State court cannot restore the right of removal by allowing an appearance to be entered *nunc pro tunc*. Ward v. Arredondo, 1 Paine, 410; Gibson v. Johnson, Pet. C. C. 44.

[2] Vannevar v. Bryant, 21 Wall. 41, 43, *per* Waite, C. J.; *s. c.* below, Bryant v. Rich, 106 Mass., 180.

time before entering upon the final trial, or the hearing on the merits; and it *must* be made before *final judgment in the court of original jurisdiction*, and it is too late to make it after the cause has reached, and is pending in the State appellate court.[1] But where a judgment against a maker and indorser of a promissory note is affirmed as to the maker, and reversed as to the indorser, granting him a new trial, he may cause a removal of the case to the Federal court, under the Act of July 27, 1866.[2]

"Before final hearing or trial clearly means," says Mr. Justice FIELD, "before final judgment in the court of original jurisdiction, where the suit is brought. Whether it may not mean still more—before the hearing or trial of the

[1] Stevenson v. Williams, 19 Wall. 572; Vannevar v. Bryant, 21 Wall. 41, 43; Waggener v. Cheek, 2 Dillon, 560; Kellogg v. Hughes, 3 Dillon, 357; Dart v. McKinney, 9 Blatchf. 359; Johnson v. Monell (change of residence pending suit), 1 Woolw., 390; Minnett v. Milwaukee & St. Paul Railway Company, 3 Dillon, 460, denying Galpin v. Critchlow, 13 Am. Law Reg. (N. S.), 137; *s. c.*, 112 Mass. 339, and Whittier v. Hartford Ins. Co., 14 Am. Law Reg. (N. S.), 121; *s. c.*, 55 N. H. 141; see Ins. Co. v. Dunn, 19 Wall. 214, 225; Akerly v. Vilas, 1 Abb. U. S. Rep., 284; *s. c.*, 2 Bissell, 110; Murray v. Justices, 9 Wall. 274; Miller v. Finn, 1 Neb. 254 (1867); Price v. Sommers (N. D. Ohio, Welker, J.), 8 Ch. Legal News, 290 (1876); Fasnacht v. Frank (U. S. Sup. Court, Oct., 1874), 23 Wall. 416; Craigie v. McArthur, 4 Dill., 474; 9 Ch. Legal News, 156; Lowe v. Williams, 94 U. S. 650; *s. c.*, 4 Cent. L. J. 482; Fraser, *in re*, 18 Alb. L. J. 353; *s. c.*, 7 Cent. L. J. 227.

What was a "final trial" within the meaning of the Act of 1867 (Rev. Stats. sec. 639, cl. 3), was considered in West Virginia in a case of unlawful detainer, commenced before a justice of the peace, where judgment went against a citizen of another State, who appealed to the Circuit court, and then applied to remove the case to the Federal court under the Act of 1867. The lower court denied the application, and rendered judgment against the defendant; and, on appeal, the Court of Appeals reversed the judgment, resting its decision upon two grounds: 1. No motion to remove could have been made before the justice, that not being a "State court" within the meaning of the Act of Congress. 2. The case, on appeal from a justice, is to be tried *de novo* in the Circuit court, the same as if never tried, and hence there was no "final trial" within the intent of the Act of Congress. Rathbone Oil Co. v. Rauch, 5 West Va. 79 (1871).

[2] Yulee v. Vose, 99 U. S. Rep. 539, (1878).

suit has commenced, which is followed by such judgment—may be questioned; but it is unnecessary to determine that question in this case."[1] It would seem, however, that it would be too late to defer the application, until the trial was actually entered on.[2]

§ 60. Although there is some conflict between the State and Federal courts on the point, yet the weight of the cases and the authoritative view is, that if the trial court has wholly *set aside a verdict and granted a new trial*, or if the State appellate court has *wholly reversed the judgment* and remanded the case to the court of original jurisdiction for a trial *de novo*; then, in either event, it is not too late under the Act of 1866 or 1867, to apply to remove the cause, as it is in the same posture as before the first trial or hearing was had.[3] So a trial in a State court, after a jury has dis-

[1] Stevenson v. Williams, *supra*; Beery v. Irick, 22 Gratt. (Va.), 487 (1872); Williams v. Williams, 24 La. Ann. 55; Douglas v. Caldwell ("final hearing" what?), 65 N. C. 248 (1871).

[2] Application for removal, under the Acts of 1866 and 1867, must be made *before trial or hearing commences*; it is too late if made during the progress of the trial, and this principle is not varied by the fact, that during the trial an amendment of the declaration was allowed on which issue was not joined at the time the petition to remove the case was filed. Adams Express Co. v. Trego, 35 Md. 47 (1871); see also Lewis v. Smythe (Woods, Circuit Judge), 2 Woods C. C. 117 (1875), referred to *infra*.

[3] Barber v. St. Louis, etc. R. R. Co., 43 Iowa, 223; Vannevar v. Bryant, 21 Wall. 41, 43, *per* Waite, C. J.; *s. c.*, 106 Mass. 180; Stevenson v. Williams, 19 Wall. 572; Waggener v. Cheek, 2 Dillon, 560; Sims v. Sims (North. Dist. New York), Blatchford, J., December, 1879; Kellogg v. Hughes, 3 Dillon, 357; Dart v. McKinney, 9 Blatchf. 359; Johnson v. Monell (change of residence pending suit), 1 Woolw. 390; Minnett v. Milwaukee & St. Paul Railway Co., 3 Dillon, 460, denying Galpin v. Critchlow, 13 Am. Law Reg. (N. S.) 137; *s. c.*, 112 Mass. 339 and Whittier v. Hartford Ins. Co., 14 Am. Law Reg. (N. S.) 121; *s. c.*, 55 N. H. 141. See Insurance Co. v. Dunn, 19 Wall. 214, 225; Akerly v. Vilas, 1 Abb. U. S. Rep. 284; *s. c.*, 2 Bissell, 110; Murray v. Justices, 9 Wall. 274; Fasnacht v. Frank, U. S. Sup. Court, Oct. 1874, *supra*; Dart v. Walker, 4 Daly (N. Y.), 188 (1871), also holding that under Act of 1866 or 1867 removal may be had after a reversal and order for a new trial; and this principle held applicable to Act of 1875, as to causes pending when the Act was passed. Hoadley v. San Francisco, 3 Sawyer, 553 (1875).

agreed, does not preclude a removal under the Acts last named.[1]

§ 61. The case of the *Insurance Co.* v. *Dunn* (19 Wall. 214), affords a striking illustration of the meaning of the phrase "*final* judgment" in the Acts of 1867. The plain-

[1] The cases in the State courts, holding a different doctrine from that stated in the text, are not sound expositions of the statute. The following are some of the more important of these: Hall v. Ricketts, 9 Bush (Ky.), 366 (1872); Akerly v. Vilas, 24 Wis. 165; Home Life Ins. Co. v. Dunn, 20 Ohio St. 175; Crane v. Reeder, 28 Mich. 527 (1874); Galpin v. Critchlow, 112 Mass. 339 (1873); Chandler v. Coe, 56 N. H. 184; Continental Ins. Co. v. Kasey, 27 Gratt. 216 (1876).

Where the Supreme Court of a State has reversed the decree of the lower court, and remanded the cause *with instructions to dismiss the bill*, it is too late to apply for a removal to the Federal court under the Act of March 2, 1867. Boggs v. Willard, 3 Bissell, 256 (1872), Blodgett J.; *s. c.*, 70 Ill. 315. But where the State Supreme Court has ordered a new trial, the plaintiff may dismiss and commence in the Federal court. Hazard v. Chicago, etc. R. R. Co., 4 Bissell, 453. Effect of the decision of the State Supreme Court in such a case considered. *Ib.*

The case of McKinley v. Chicago & N. W. Railway Co., now in the Supreme Court of the United States on a writ of error to the Supreme Court of Iowa (44 Iowa, 314), presents a new and interesting point. The case in the State court was for personal injury. The plaintiff had a verdict and judgment below. The railway company appealed to the Supreme Court of the State, which reversed the judgment and ordered a new trial, and issued its *procedendo*, which was filed within sixty days in the lower court. Thereupon the railway company in due form made and filed its petition and bond for removal of the cause to the Federal court under the Acts of 1867 and 1875. This was in vacation, and there was no order upon it. By the law of the State, causes in the Supreme Court are to be remanded for a new trial, if a new trial be ordered (Code, sec. 3206), and there is a provision for recalling a *procedendo*, if a petition for rehearing be filed in sixty days (Code, sec. 3201). *After* the petition and bond for removal had been filed as above, but *within* the sixty days, a petition for rehearing was filed in the Supreme Court of the State, and the *procedendo* was recalled. The railway company moved the State Supreme Court to dismiss the petition for rehearing, because the court had no further jurisdiction of the cause, inasmuch as the same was duly removed to the Federal court, after the *procedendo* was filed and before it was recalled. The State Supreme Court overruled the motion, and subsequently granted the rehearing and rendered judgment against the railway company, which has sued out a writ of error, which is now pending in the Supreme Court of the United States. Clark v. Delaware, etc. Canal Co., 11 Rho. Is. 36.

tiff in that case had a verdict and judgment thereon in one of the courts of Ohio. The defendant (the Insurance Company), under the statute of the State, applied for a new trial, and gave bond in that behalf. This had the effect, under the statute of the State, *to vacate the verdict and judgment* as if a new trial had been granted, except that *lien of the judgment remained as security for the plaintiff.* When the case was in this *status*, the company applied to remove the cause under the Act of 1867, and it was held that there had been no *final* trial, that the application was in time, and that the suit was removable; and the subsequent judgment in the State court was reversed by the Supreme Court of the United States.[1]

§ 62. A cause cannot be removed where a verdict has been rendered, and a motion is *pending* to set the verdict aside.

[1] In Ohio, where a case is commenced in the Court of Common Pleas, where a trial is had, and an appeal taken to the District court of the State, it is too late, *under the Act of* 1875, to apply to remove the case to the Federal court. Welker, J., distinguishes this case from Ins. Co. v. Dunn, 19 Wall. 214, and applies the doctrine of Stevenson v. Williams, 19 Wall. 572, and regards the hearing in the Common Pleas as "final" within the meaning of the Removal Act, although the effect of the appeal is to vacate the decree and entitle the party to a trial *de novo*. Price v. Sommers, (North. Dist. Ohio), 8 Ch. Legal News, 290 (1876). Similar principle in respect to attempt to remove from an appellate court a case which originated in the Probate court, after a decision and appeal; it was held not removable. Craigie v. McArthur, 4 Dillon, 474; *s. c.*, 9 Ch. Legal News, 156 (1876); *s. c.*, 4 Cent. L. J. 237; *s. c.*, 15 Alb. L. J. 121. The plaintiff had a judgment on a verdict; the defendants sued out a writ of review and then applied, the judgment remaining unreversed, to remove the cause under the Revised Statutes, sec. 639, cl. 3; *held*, under the legislation of the State as to effect of the first judgment and of the proceeding for review, and distinguishing the case from Ins. Co. v. Dunn (19 Wall. 214), that the cause was not removable at that stage. Whittier v. Hartford Fire Ins. Co., 55 N. H. 141 (1875), commented on, and its principle applied to a case where the application for removal was made after verdict set aside and a new trial granted. Chandler v. Coe, 56 N. H. 184. *Contra*, Minnett v, Mil. & St. Paul Railroad Co., 3 Cent. L. J. 281; *s. c.*, 3 Dillon, 460, and see cases cited *ante*. The doctrine of Ins. Co. v. Dunn, 19 Wall. 214, re-affirmed and applied in Railroad Co. v. State of Mississippi by the Supreme Court, October Term, 1880. This case is printed at large in the Appendix to this Tract.

Such a motion must be disposed of, and be granted, so that the right to a second trial is complete, before the cause can be transferred; since, says the Chief Justice, "every trial of a cause is *final* until, in some form, it has been vacated. Causes cannot be removed to the Circuit court for a review of the action of the State court, but only for trial. The Circuit court can not, after a trial in a State court, determine whether there shall be another. That is for the State court. To authorize the removal, the action must, at the time of the application, be actually pending for trial.[1]

§ 63. Under the Acts of 1866 and 1867, it is sufficient, *it seems*, as respects citizenship, that the defendant applying for the removal is, *at the time* of filing his petition therefor, a citizen of another State, and the plaintiff a citizen of the State in which the suit is brought.[2]

One of several defendants sued as *copartners* may, if the other requisites exist, have the cause removed into the Federal court, so far as concerns himself, under the Act of 1866.[3]

§ 64. Under the Act of March 3, 1875 (sec. 3), the time for the removal is greater than under the Judiciary Act, but not so great as under the Acts of 1866 and 1867 last noticed. The Act of 1875 requires the petition in the State court to be made and filed therein "before or at the term at which such cause *could be first tried*, and before the trial thereof." The word term as here used means, according to the construction which it has received in the 8th Judicial Circuit, the term at which, under the legislation of the State and the rules of practice pursuant thereto, the cause is first triable, *i. e.*, subject to be tried on its merits; not necessarily the term when, owing to press of busi-

[1] Vannevar v. Bryant, 21 Wall. 41, 43; *s. c.*, 106 Mass., 180; see Whittier v. Hartford Ins. Co., 55 N. H. 141.

[2] McGinnity v. White, 3 Dillon, 350. *Contra*, Dart v. Walker, 4 Daly (N. Y.) 188 (1871). See *infra*, chap. 16.

[3] *Ib.*; and see *supra* chap. 6 and chap. 11, note; Wormser v. Dahlman, 57 How Pr. 286.

ness or arrearages, it may be first reached, in its order, for actual trial. The Act gives the right of removal to either party — the resident as well as the non-resident party — and no affidavit of prejudice is required; and it was the obvious purpose of Congress by the use of the words "*before* or at, etc., the term at which the cause *could* be *first* tried," etc., to require the election to be taken at the first term at which, under the law, the cause was triable on its merits. The judicial construction elsewhere of the Act of 1875 is in accordance with these views.[1]

[1] Ames v. Colorado Central R. R. Co. (Hallett. J., February, 1877), 4 Dillon C. C. 260; *s. c.*, 4 Cent. L. J. 199; Fulton v. Golden, 20 Alb. L. Journal (August, 1879, Nixon, J.), 229; *s. c.*, 9 Cent. L. J. 286; McLean v. Chicago & St. Paul R. W. Co., South. Dist. N. Y. (Blatchford, J.), 16 Blatchf. 319; *s. c.*, 21 Alb. L. J. 47 (December, 1879); 10 Cent. L. J. 94; American Bible Society v. Grove, 101 U. S. 610 (1879); *s. c.*, 10 Cent. L. J. 175; 21 Alb. L. J. 155; Huddy v. Havens, 3 Week. N. C. 432; *s. c.*, 5 Cent. L. J. 66; Taylor v. Rockefeller, W. D. Pa. (1878), Strong, J.; *s. c.*, 7 Cent. L. J. 349; Murray v. Holden, 2 Fed. Rep. 740, McCrary, J. See also on this point, Blackwell v. Braun, 1 Fed. Rep. 351 (Dist. of Md., January 16th, 1880); Whitehouse v. Ins. Cos. (E. D. Pa., 1880), 2 Fed. Rep. 498. Gurnee v. County of Brunswick, 1 Hughes, 270, followed Forrest v. Edwin Forrest Home, 1 Fed. Rep., March, 1880 (S. Dist. N. Y., Blatchford, J.)

In an action in a State court *to foreclose a mortgage*, only two of the defendants appeared. At the time of their appearance they filed a bond and petition for removal on the ground that they were residents of Iowa, and plaintiff a resident of New York. The petition set forth that the controversy was only between plaintiff and petitioners. *Held*, that a removal was not authorized. The effect of a removal would be to divide the suit into two parts, one to be determined in the State, and the other in the Federal court; and further, under the Act of March 3, 1875, which provides for a removal "in any suit of a civil nature in which there shall be a controversy between citizens of different States," it should appear that there is a *controversy*. The defendants in this case, who sought a removal, did not answer a petition or demur thereto, and the record does not show that there is any controversy between the parties. The statute contemplates a *controversy* in a suit, and not a mere suit in which there is no defense. Stanbrough v. Griffin, 47 Iowa (1879); but *quære*?

"We understand that Judge Davis, when sitting as circuit justice for the District of Indiana, held that the application for removal must be made at the first term at which the cause could be put at issue, and before the trial thereof." Buskirk's Indiana Practice, 459.

§ 65. The decisions under the Acts of 1866 and 1867, that a removal may be applied for after a verdict has been set aside and a new trial granted, or the judgment of the

A cause was at issue and could have been tried, but *by consent was continued.* Judge Drummond held, under the Act of 1875, that it was too late to remove the case at a subsequent term, as the continuance was neither the act of the law nor of the court. Scott *et al.*, Trustees, v. Clinton & Springfield R. R. Co., 8 Chicago Legal News, 210; *s. c.*, Bissell, 529, where the case thus decided is referred to and distinguished.

A *chancery cause* can not be tried until the issues are made up; — if there is no delay in completing the issues on the part of the applicant for the removal, the application is in time, if made before the lapse of a term at which the cause could have been tried. Whether laches in making up issues will defeat right of removal, if removal be applied for before the issues are completed, *quære?* Scott *et al.*, Trustees, v. Clinton & Springfield R. R. Co., 8 Chicago Legal News, 210; *s. c.*, 6 Bissell, 529, Drummond, J.

For the removal of an *equity* cause, it is held in *New Jersey*, that application must be made *at or before the first term* at which the cause could, on due notice, be regularly set down for hearing. The petition can not be filed afterwards, although the cause is not in fact heard at that term. Wanner v. Sisson, 28 N. J. Eq. 117 (1877).

Removal of *chancery cases* under *Iowa* statute and practice, see 4 Dillon C. C. Rep. 559, 563, 566.

Where a replication under the local law and practice is necessary to complete the issue, and where there is no default in making up the issues by the party who applies for a removal of the cause, no term has passed at which the cause could have been tried within the meaning of the Act of March 3, 1875, sec. 3. Mich. Central R. R. Co. v. Andes Ins. Co. (S. D. Ohio, Swing, J.), 9 Ch. Legal News, 34. In this case, Swing, J., approves of the construction of the Act of 1875, in respect to the time of removals given by Drummond, Circuit Judge, in Scott *et al.*, Trustees, v. Clinton, etc. R. R. Co., *supra.*

The requirement of the statute must be complied with before the trial in the State court is commenced. The calling of a jury to try a cause is, in Minnesota, part of the trial; producing the security after a jury is called is too late. St. Anthony's Falls Water Power Co. v. King, etc. Bridge Co., 23 Minn. 186 (1876). A State court is under no obligation to delay a trial, in order to give the applicant time to prepare for a removal. U. S. Savings Bank v. Brockschmidt, 72 Ill. 370 (1874).

WHAT IS A CASE IN LAW OR EQUITY ARISING UNDER THE CONSTITUTION OR LAW OF THE UNITED STATES, see the opinion of the Supreme Court, October, 1880, in New Orleans, etc. R. R. Co. v. State of Mississippi, printed in full in the Appendix, where the doctrines of the court are succinctly stated by Mr. Justice Harlan.

trial court has been wholly reversed and a trial *de novo* awarded, are, it is supposed, inapplicable under the Act of 1875, which requires the petition for the removal to be made "*before or at* etc., *the term* at which the cause could be *first tried* and before the trial thereof. It is clearly too late to apply for the removal after a trial has once begun, although it may result in a mistrial, or in a verdict or judgment that may be set aside with an order for a new trial.[1] Accordingly it has been held, under the Act of March 3, 1875, that the application for removal must be made, before the trial on its merits, *or on a question which results in a final judgment or decree*, commences. It is therefore too late to apply for the removal after the pleadings have been read and the evidence submitted, and before the argument has begun.[2]

[1] A party entitled to a removal of a cause, who proceeds to trial without applying for a transfer to the Federal court, is not, under the Act of 1875, entitled to a removal at a subsequent term, although a new trial may have been granted him; in this respect the Act of 1875 is different from the Acts of 1866 and 1867. Young v. Andes Ins. Co. (S. D. Ohio, Swing, J.), 3 Cent. L. J. 719 (1876). An application filed, after a cause is called for trial and the plaintiff has announced himself ready, and time is granted defendant to apply for continuance, is too late. Watt v. White, 46 Tex. 338. See, on this point, the following decisions: Gurnee v. County of Brunswick, 1 Hughes, 270; followed Blackwell v. Braun, 1 Fed. Rep. 351 (Dist. of Md., January 16th, 1880); Whitehouse v. Ins. Companies (E. D. Pa. 1880) 2 Fed. Rep. 498; Chicago, etc. R. R. Co. v. Welch, 44 Iowa, 665 (1876); Baker v. St. Louis, etc. R. R. Co., 43 Iowa, 223; Phœnix Life Ins. Co. v. Saettel, 33 Ohio St. 278.

[2] Lewis v. Smythe (Woods, Circuit Judge), 2 Woods C. C. 177 (1875). Construing the word "trial," as used in section 3 of the Act of 1875, in reference to the time when the removal must be applied for, Woods, Circuit Judge, in Lewis v. Smythe, 2 Woods C. C. 117, 118, 119, says: "By the word 'trial,' as used in the statute, I do not understand the argument, investigation or decision of a question of law merely, unless it is decisive of the case, and the question results in a final judgment or decree. The decision of the court on a demurrer, for instance, or on exceptions to the sufficiency of a plea, which is followed by amendments or new pleadings, and which does not end the case, is not the trial meant by the statute." The trial meant is one which "involves the facts of the case; and whenever the investigation of the facts of a case simply, or the facts in connection with the law, is entered upon by the court alone, or by

So, under the Act of 1875, a cause can not be removed after a default has been entered and before the default has been set aside, even though the service was by publication, and the default has not been made absolute.[1] Under the practice in New York, where a cause is noticed for trial in a State court, and is on the calendar, but is not tried, an application to remove the cause to the Federal court is made too late.[2] If the term at which the cause could otherwise be first tried, is one which occurs during the time a trial of the

the court and jury, the trial may be said to have begun." The petition must be filed not only before "the trial is completed and ended, but before it commences."

Construing the word "trial" in the Act of 1875, sec. 3, see Price v. Sommers (North. Dist. Ohio), cited *supra*, 8 Ch. Legal News, 290.

In Ames v. Colorado Central R. R. Co. (Dist. Col.; Dillon & Hallett, JJ.), 4 Cent. L. J. 199, 4 Dill. 251, it was ruled, under the Act of 1875, that the application to remove a cause must be made to the State court at or before the term in which, according to the local law and practice of the court, the cause could have been finally heard. Accordingly where issue was joined nearly one month before the end of a term of the State court, and it does not appear but that a final hearing could have been had at that term, an application thereafter made to remove the cause under the Act of 1875 is too late. It was also decided that the Act of 1875, which provides that any suit "now pending or hereafter brought in any State court," of the description therein specified, may be removed into a Federal court, is not applicable to a suit brought in a *Territorial* court, although on the admission of the Territory as a State such suit passed into the jurisdiction of a State court. *Ib.*

Further, as to the time in which application for removal must be made under the Act of March 3, 1875: see the Removal Cases, 100 U. S. 457; *ante*, sec. 29; *post*, Appendix, A; and New Orleans, etc. R. Co. v. State of Mississippi, decided by the Supreme Court of the United States, October 1880, and printed in full in the Appendix hereto.

[1] McCallon v. Waterman (East. Dist. Mich.), Brown J., 4 Cent. L. J. 413; S. P. Bright v. Milwaukee R. R. Co., 1 Abb. New Cases, 14 (1876). For a criticism on this decision, and a discussion of the question whether a default is a "trial" within the meaning of the Act of 1875, see 4 Cent. L. J. 592. No right of removal after a stipulation filed admitting the claim sued on. Keith v. Levi, 2 Fed. Rep. (West. Dist. Mo.) 743, McCrary, J.

[2] Stough v. Hatch, N. Y. Southern District, 1879, Benedict J., 8 Reporter, 7.

cause is stayed by an order from the State court, that is not such a term as is meant by the statute.[1]

§ 66. Where the only objection in the Federal court to the removal is *that the application was not made in the State court in time*, this objection may undoubtedly be *waived* by acquiescence, or even the failure of the other party to make it the ground of an objection to the jurisdiction of the Federal court in proper time; and it will be waived, we think, unless the objection be made by the party entitled to make it, before he takes any affirmative action in the Federal court, or voluntarily submits himself to its action.[2] In one case, the mere failure to move to remand at the same term at which the record was filed, the party making the motion not having taken any steps in the cause after its removal, was held not to preclude making the objection at the next term.[3]

§ 67. The Act of March 3, 1875, sec. 2, extends, *inter alia*, to "*any suit * * now pending*;" and by section 3, the petition for removal must be filed in the State court "before or at the term at which said cause could be first tried, and before the trial thereof." It has been contended that the general language of the Act "now pending," does not include cases where, prior to the passage of the Act a term of the State court had passed, at which the cause

[1] Warren v. Pennsylvania R. R. Co., 13 Blatchf. 231 (1876). See Bright v. Milwaukee, etc. R. R. Co., 1 Abb. New Cas. 14 (1876); Forrest v. Edwin Forrest Home, 1 Fed. Rep. 489 (S. D. N. Y.), Blatchford, J.

[2] The objection that the application to remove the cause was not made in time may be *conclusively waived* by submitting to the jurisdiction of the Circuit court by taking testimony and by delaying the objection for an unreasonable time. French v. Hay, 22 Wall. 244; Ames v. Colorado Central R. R. Co. (Dist. Col.), 9 Ch. Legal News, 132, (1876); *s. c.*, 4 Cent. L. J. 199; Young v. Andes Ins. Co., (S. D. Ohio; Swing J.), 3 Cent. L. J. 719 (1876).

[3] See opinion of Yaple, J., in Kaufman v. McNutt (Sup. Court of Cin.), 3 Cent. L. J. 408; Kain v. Texas Pacific R. R. Co. (under Act of July 27, 1868, East. Dist. Texas, Duval, J.), 3 Cent. L. J. 12 (1875); Carrington v. Florida R. R. Co. (Benedict, J.), 9 Blatchf. 467 (1872).

might have been tried, though it was not; nor to cases where there had been a trial prior to the passage of that Act, and a new trial had been ordered, and the cause was pending for such retrial when the Act took effect. But the Federal Circuit courts have uniformly, and we think, properly decided otherwise, and have held that causes which might have been tried before the passage of the Act of March 3, 1875, but were not, and which were pending for trial when that Act went into operation, as well as causes once tried, but in which a new trial had been ordered, and which were pending, ready for retrial when the Act took effect, are removable,[1] if the application therefor be made after the passage of the Act and within the time therein required.[2]

CHAPTER XVI.

MODE OF MAKING APPLICATION FOR REMOVAL—BOND, ETC.

§ 68. Under the Revised Statutes, sec. 639, the applicant for the removal must *file his petition therefor*, stating the grounds for the removal, and *offer* in the State court *good and sufficient surety* for his entering in the Circuit court, on the first day of its next session, copies of the process [pro-

[1] Crane v. Reeder (Emmons, Circuit Judge), 15 Albany L. J. 103, denying correctness of the contrary decision of the Supreme Court of Michigan, 28 Mich. 527; Andrews, Exec., v. Garrett (Swing, Dist. Judge), 3 Cent. L. J. 797; *s. c.*, Ch. Legal News (January 8, 1876), p. 132; Mer. & Manuf. Bank v. Wheeler (Johnson, Circuit Judge), 3 Cent. L. J. 13; Hoadley v. San Francisco (Sawyer, Circuit Judge), 8 Chicago Legal News, 134. The decisions in the 8th judicial circuit have always been in accordance with this view. See Sims v. Sims (N. D. N. Y.), Dec. 1879, Blatchford, J.

As to right to a SECOND REMOVAL of the same cause, after it once has been remanded, see McLean v. Chicago & St. Paul R. R. Co., *infra*, sec. 89.

[2] Ames v. Colorado Central R. R. Co. (Dillon & Hallett, JJ.), Feb., 1877, cited *supra*.

ceedings] against him, and of all pleadings, depositions and other proceedings in the cause, etc. This petition is not required to be verified.

§ 69. Under the Act of 1867 (Revised Statutes, sec. 639, subdivision 3), there is required in addition to the petition for removal an *affidavit of prejudice or local influence*, which, wherever possible, should be made by the party himself; or, if the petition is on behalf of a corporation, by the president or managing or other proper officer, or by some person authorized to control the case.[1] The decisions upon

[1] See Anon., 1 Dillon 298, note; Trust Co. v. Maquillan, 3 Dillon, 379, 380, where Mr. Justice Miller is reported as saying: "I am not impressed with the soundness of the argument that, because corporations can not make an affidavit, except through the proper officers, they were not within the contemplation of Congress. I think that the proper officers of corporations may make the necessary affidavit to procure the removal."

The *president, and perhaps the general manager of a railway company, is prima facie* authorized to make the required affidavit in such a case. Minnett v. Milwaukee, etc. Railway Co., 3 Dillon C. C. 460 (1875), Nelson, J.; *s. c.*, 13 Alb. Law J. 254. In Kain v. Texas Pacific R. R. Co., 3 Cent. L. J. 12, the petition for removal was verified by the solicitor of the corporation defendant, authorized to appear and conduct suits for it in the State of Texas; no question was made as to his authority or right to file and verify the petition, which was under the Act of July 27, 1868 (Revised Statutes, sec. 640).

The *superintendent of a railroad company* having, as incident to his office as such, no authority to represent the company in judicial proceedings, the Supreme Court of Massachusetts decided that such an officer, unless specially authorized by the corporation, has no power to make the affidavit of local influence or prejudice required by the Act of 1867, and on this ground held, that the State Court rightfully refused to transfer the cause. Gray, C. J., observed: "The petition may doubtless be signed, and the affidavit made, by some person authorized to represent the corporation. But the authority of any person assuming to represent it must appear. No officer of a corporation, unless specially authorized, has power to bind the corporation, except in the discharge of his ordinary duties." Mahone v. Manchester, etc. R. R. Corp., 111 Mass. 72 (1872).

The affidavit must be in substantial accordance with the words of the statute. An omission of the words *and does* is fatal, from an affidavit for the removal of a cause on account of local prejudice, as that he has reason to *and does believe* that, etc., and renders it insufficient. Baltimore, etc. R. R. Co. v. New Albany R. R. Co., 53 Ind. 597.

the point whether an attorney may make the affidavit in any case, or what officers of a corporation may make it, are few.[1]

It is not necessary to state in the affidavit the reasons or facts showing *the local influence or prejudice*; for this is not a traversable matter either in the State or Federal Court.[2]

As the party himself is a non-resident, and may not be as well advised as his local agent or attorney as to the exist-

The *affidavit of local prejudice or influence* under the Act of 1867, *may be taken and certified in conformity with the laws of the State*, as there is no Act of Congress regulating this subject. Bowen v. Chase, 7 Blatchf. 255.

[1] An application under the Act of Congress of 1867, for the removal of a cause into the United States Circuit court, may be made by *a corporation of another State, through its authorized agent or attorney*. Mix v. Andes Ins. Co., 74 N. Y. 53; Shaft v. Phoenix Life Ins. Co., 67 N. Y. 544. In the case of Mix. v. Andes Insurance Co., the court say, by Earl, J.: "It is true that, literally speaking, a corporation can not believe nor have motives or knowledge. Yet a corporation can legally entertain malice, be guilty of fraud, libel, and other torts. Notice to its managing agents is notice to it; and their motives and knowledge and belief may be attributed to it. We do not think there was any purpose in the phraseology used to exclude corporations from the benefit of the Act. A corporation could make the required affidavit, as it would do any other Act, by its authorized agent, and this view is sanctioned by respectable authority. Ins. Co. v. Dunn, 19 Wall. 214; Loan Co. v. McQuillan, 3 Dill. 379; Minnett v. R. R. Co., 3 Dill. 460; Shaft v. Ins. Co., 67 N. Y. 544. The decision in Cook v. Bank, 52 N. Y. 96, that a corporation could not make the affidavit, was merely *pro forma* to facilitate the final disposition of the cause. In this case the bond was sufficient in form and substance. The court to which it was presented could not arbitrarily reject it without specifying a cause. An orderly administration of justice requires that the defects should be pointed out, so that they can be remedied. Taylor v. Shew, 54 N. Y. 75; Fisk v. R. R. Co., 6 Blatchf. 362, 380; Bowen v. Chase, 7 Ib. 255. The petition and affidavit contain all the facts which the statute requires to be stated therein. But it is objected that the affidavit, which was made in Ohio, was not properly certified as required by c. 133, LL. 1869, so as to authorize it to be read on the motion at special term. It was not properly certified; but the objection should have been taken when the affidavit was read; and, not having been taken then, it was waived. The cause having been removed, the court had no jurisdiction thereafter to proceed in the action.

[2] Anon., 1 Dillon, 298, note; Meadow Valley Mine Co. v. Dodds, 7 Nev. 143; Quigley v. Central, etc. R. R. Co., 11 Nev. 350 (1876); Loffler v. Ins. Co., 1 Weekly Notes, 346.

ence of local influence or prejudice, there would seem to be no reason for requiring the affidavit in all cases to be made by the party; and some parties, as infants or persons *non compos mentis*, could not make it. If an attorney or agent makes the affidavit, it is good practice to state why it is not made by the party himself.[1]

§ 70. Under the Act of March 3, 1875, the removal is effected by the proper party making and filing, in the State court, a petition in the suit to be removed, setting forth therein the grounds for the removal. This petition is not required to be verified.[2] Petitions for removal usually state not only the grounds for the removal arising from the citizenship or the nature of the subject-matter, but also that the amount in dispute exceeds $500. Where, however, the amount is shown by the pleadiugs in the case to exceed this sum, it is not necessary, although it is not improper, to make a statement in the petition for the removal as to the sum or value in dispute.[3] The petition for removal should be carefully framed, and in removals under the Revised Statutes, sec. 639, the prudent practitioner will follow the exact language of the statute in stating the grounds for the removal.[4]

§ 71. It has been decided by some of the State courts, that the petition for the removal must expressly state that the parties were citizens of the respective States *at the time the*

[1] The *party* seeking to remove the cause must "make and file" the affidavit; if *he* does not, and there is no reason given therefor, an affidavit by his *agent or attorney* is insufficient. Where the agent and attorney swears that "*he* has reason to and does believe," it was held not to be sufficient. Cooper v. Condon, 15 Kas. 572.

[2] Connor v. Scott, 4 Dillon, 242 (1877), 3 Cent. L. J. 305; Merchants', etc. Bank v. Wheeler, 3 Cent. L. J. 13, *per* Johnson, Circuit Judge; Houser v. Clayton, 3 Woods C. C. 373.

[3] Abranches v. Schell, 4 Blatchf. 256; Turton v. U. P. R. R. Co., 3 Dillon, 366.

[4] Railway Co. v. Ramsey, 22 Wall. 328, where the requisites, function and effect of the petition for removal are tersely stated by the Chief Justice. Amory v. Amory, 36 N. Y. Sup. Ct. Rep. 520. See also the Removal Cases Appendix.

suit was commenced, and that it is not sufficient to state it in the present tense, or as of the time when the petition for removal was made or filed.[1] It has been expressly held by the Supreme Court of the United States, that, *where the removal is under sec. 12 of the Judiciary Act*, the petition for removal must, in connection with the record, *affirmatively* show that the plaintiff was, at the commencement of the suit, a citizen of the State in which the suit is brought.[2] This view is open to some doubt. It overlooks the purpose of the Constitution and of Congress in providing for removals, which was to give a resort by the non-resident party to a tribunal in which the citizen of the State should have no advantage over him. It is inconsistent with several adjudications under the latter Acts.[3] Whatever may be the law on the point, the careful attorney will state in his petition for removal that the plaintiff, when the suit in the State court was commenced, was and still is a citizen of the State in which the suit is brought, etc., etc.

§ 72. Under the Act of March 3, 1875, it is sufficient, to entitle a party to a removal of the cause, if the requisite citizenship exists at the date of the timely filing of the petition, for removal; and hence it need not be stated in such petition that the plaintiff was, at the date of the commencement of the suit in the State court, a citizen of a State other than that of which the defendant is a citizen.[4] In this respect

[1] Pechner v. Phœnix Ins. Co., N. Y. Court of Appeals, May 1875; *s. c.*, 6 Lans. 411; Holden v. Putnam Fire Ins. Co., 46 N. Y. 1; Indianapolis, etc. R. R. Co. v. Risley, 59 Ind. 60; Savings Bank v. Benton, 2 Metc. (Ky.) 240; People v. Superior Court, 34 Ill. 356; Tapley v. Martin, 116 Mass. 275 (1874); Rawle v. Phelps, E. Dist. Mich. (1879), 8 L. Rep. 356; Weed Sewing Machine Co. v. Smith, 71 Ill. 204 (1873).

[2] Ins. Co. v. Pechner, 95 U. S. 183 (1877), affirming on this point the judgment of the Court of Appeals of New York; whether the same construction is applicable to the Acts of 1866, 1867 and 1875, the court say that it gives no opinion.

[3] Johnson v. Monell, 1 Woolw. 390; McGinnity v. White, 3 Dillon, 350.

[4] McLean v. St. Paul, etc. Railway Co., U. S. Cir. Ct., South. Dist. N. Y. (1879), 20 Alb. L. Jour. 78 (before Blatchford, Circuit Judge); *s. c.*,

the Act of 1875 differs from sec. 12 of the Judiciary Act.[1]

§ 73. Where it is sought to remove a suit on the ground that it is one "arising under the Constitution, or laws or treaties of the United States (Act of March 3, 1875, sec. 2), it should appear from the pleadings or the petition for the removal, or both, that the case is one of this character.[2] If this does not appear from the pleadings, that is, from the averments of facts therein or the nature of the case made thereby, then it must be made to appear by the petition for the removal; and the Circuit Judge for the Ninth Circuit, in a recent opinion where the point is carefully examined, has reached the conclusion, and enforced it by very persuasive arguments arising from the delay, inconvenience and abuse which would follow from a different practice, that the petition for the removal must state the *facts* (unless they appear in the pleadings) which show the case to be one of Federal cognizance, and that it is not sufficient to state generally that the case is one arising under the Constitution or laws of the United States.[3]

16 Blatchf. 309; S. P. Jackson v. Mutual Ins. Co., 3 Woods C. C. 413; *s. c.*, 60 Ga. 423.

[1] McLean v. St. Paul. etc. Railway Co., *supra*, approving Johnson v. Monell, Woolw. 390, and McGinnity v. White, 3 Dillon, 350.

[2] Construction of this clause in Act of 1875, see *ante*, chap. 8.

WHAT IS A CASE "*arising under the Constitution or laws of the United States*" is succinctly and clearly stated in an opinion of the Supreme Court delivered at the October term, 1880, and printed at large in the Appendix, to which the reader is referred. New Orleans, etc. R. R. Co. v. State of Mississippi.

[3] Trafton v. Nougues, 4 Sawyer, 178 (1877); 13 Pacific Law Rep. 49; *s. c.*, 4 Cent. L. J. 228. After stating the delay and obstruction to the administration of justice, which would result from allowing the petitioner for the removal to effect it on his mere statement that the case was one arising under the Constitution or laws of the United States, — the duty of the Federal court to remand the cause at any stage when its non-federal character appears — the territorial extent of the Federal jurisdiction — the increased cost of litigation in the Federal courts — the abuse of the right by unscrupulous persons, to obtain delay or to harass their adversary, — Mr. Circuit Judge Sawyer concludes his opinion, in the case just cited, as follows: "In view of these, in my judgment, weighty considerations, therefore, I think it of the highest importance to the rights

§ 74. *Surety — Bond.* — Under section 639 of the Revised Statutes, good and sufficient surety is to be offered in the State court, at the time of filing the petition for the removal, for the petitioner's "entering in the Circuit court on the first day of its next session copies of the process," etc. This is substantially the requirement in this regard of the Act of March 3, 1875 (sec. 3), except that the surety is to be given by a "bond" which is conditioned, not only for the entering of a copy of the record of the State court in the suit, but for "paying all costs that may be awarded by said Circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto." But if the Circuit court should hold that the suit was removable, it would not, probably, dismiss or remand it, because the bond did not contain this condition as to costs, or was otherwise informal.[1] This section has been construed by the

of honest litigants, and to the due and speedy administration of justice, that a petition for transfer should state the *exact facts*, and distinctly point out what the question is, and how and where it will arise, which gives jurisdiction to the court, so that the court can determine for itself from the facts, whether the suit does really and substantially involve a dispute or controversy within its jurisdiction. Whenever, therefore, the record fails to distinctly show such facts in a case transferred to this court, it will be returned to the State court, and under the authority given by section 5, at the cost of the party transferring it. If I am wrong in my construction of the Act and the recent decisions of the Supreme Court, the statute, section 5, happily affords a speedy remedy by writ of error, upon which this decision and the order remanding the case may be reviewed without waiting for a trial, and the question may as well be set at rest in this case as in any other. It is of the utmost importance that a final decision of the question be had as soon as possible. If counsel so desire, I will order the clerk to delay returning the case till they have an opportunity to sue out and perfect a writ of error."

[1] Section 5 of the Act of March 3, 1875. The defendants, under the Act of 1789, must give several, or joint and several bonds, and not joint bonds, — so held by Potter, J., in Hazard v. Durant, 9 R. I. 602; but *quaere? Sufficiency of bond under Act of March* 3, 1875, see The Removal Cases, *ante*, sec. 29; *post*, Appendix "A."

A case was remanded by Gresham, J., because the bond did not comply with the Act of 1867, the penal sum being left blank, and because it did not contain the conditions required by the Act of 1875. Burdeck v. Hale, 8 Ch. L. N. 192, 7 Biss. 96 (1876).

learned Circuit Judge of the 7th Circuit, who holds that "it did not intend that the suit should be dismissed or remanded on account of irregularities, provided it satisfactorily appears that the Circuit court has jurisdiction of the case."[1] But if the removal was not applied for in time, this is not treated as an unimportant irregularity, and the uniform practice is to remand the case. This objection must, however, be made seasonably, or it will be deemed waived.[2]

CHAPTER XVII.

EFFECT OF PETITION AND BOND FOR REMOVAL ON THE JURISDICTION OF THE STATE COURT.

§ 75. The Removal Acts provide that, upon the filing of the proper petition and the offer of good and sufficient surety or bond, "it shall be the duty of the State court to accept the surety," [under Act of March 3, 1875, "to ac-

A suit was brought in a State court, in August, 1875, and proceedings for its removal into the Circuit Court of the United States were taken under subdiv. 3 of sec. 639 of the Revised Statutes of the United States. The bond given was such a bond as is provided for by said section, and not such a bond as is provided for by sec. 3 of the Act of March 3, 1875 (18 U. S. Stat. 470). It contained no provision for costs. *Held*, that the suit was not properly removed. Torrey v. Grant Works, 14 Blatchf. 269.

Where the party seeking a removal presents a bond apparently ample, the *State court* (assuming that that court may insist upon "a good and sufficient bond) cannot arbitrarily refuse to receive the bond, and refuse to remove the case without giving the party an opportunity to correct the bond or make it ample. In an action where the claim was less than $600, and where a bond for $2000, in due form, with two sureties who justified in the sum of $4000 each, was presented, which the court refused to accept, without stating any reasons, the appellate court reversed the judgment, and held that it could not assume, under the circumstances, that the lower court refused the bond, because not satisfied with the sureties. Taylor v. Shaw, 54 N. Y. 75 (1873.)

[1] Osgood v. Chicago, etc. R. R. Co., 7 Ch. Legal News, 241; *s. c.*, 2 Cent. L. J. 275, and, on re-argument, 2 Cent. L. J. 283. See also Parker v. Overman, 18 How. 137, 141; *infra*, chap. 17.

[2] French v. Hay, 22 Wall. 244; *supra*, chap. 15.

cept said petition and bond''] "and to proceed no further in the suit," [under the Act of 1866, "no farther in the cause''] "against the petitioner for removal."[1] If the case be within the Act of Congress, and the petition is in due form, accompanied with the offer of the required surety or bond, the statute is that the State court *must* accept the surety or the petition and bond, and proceed no further in the case. Under such circumstances the State court has no power to refuse the removal, and can do nothing to affect the right, and its *rightful* jurisdiction ceases *eo instanti;* no order for the removal is necessary, and every subsequent exercise of jurisdiction by the State court, including its judgment, if one is rendered, is erroneous.[3] And if the

[1] Rev. Stats., sec. 639. It is doubtful whether parties can *remove a cause by a stipulation* of the jurisdictional facts. At all events, the practice should not be encouraged; and where a minor was a party, it was held he was incapable of consenting to the removal, and the cause was remanded. Kingsbury v. Kingsbury, 3 Bissell, 60 (1871), Davis, Drummond and Blodgett, JJ., concurring. Further as to *effect of filing a sufficient petition and bond on the jurisdiction of the State court*, see The Removal Cases, 100 U. S. 457; *ante*, sec. 29; *post*, Appendix.

[2] Taylor v. Rockefeller, 6 Rep. 226; 18 Am. L. Reg. (N. S.) 298; McMundry v. Ins. Co., 4 W. N. C. 18; Picklin v. Tarver, 59 Ga. 263 (1879); Fulton v. Golden, U. S. C. C., N. J. (1879); 8 Rep. 517; 20 A. L. J. 229; Bery v. Chicago, etc. R. R. Co., 64 Mo. 533 (1877); Durham v. Southern Life Ins. Co., 46 Tex. 182 (1876); Blair v. West Point, etc. Co., 7 Neb. 146; Shaft v. Phoenix Life Ins. Co., 67 N. Y. 544; St. Anthony's Falls Water Power Co. v. King, etc. Bridge Co., 23 Minn. 186 (1876); Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362; *s. c.*, *ib.* 243, 299; Hatch v. Chicago, Rock Island & Pacific R. R. Co., 6 *ib.* 105; Matthews v. Lyall, 6 McLean, 13. The petition or application "for removal is *ex parte*, and depends upon the papers on which it is founded, and if they are regular and conform to the requirements of the statute, the [State] court has no discretion"—and the adverse party is not entitled to notice of the time and place of presenting the petition. Fisk v. Union Pacific R. R. Co. (Nelson, J.), 8 Blatchf. 243, 247 (1871); Ficklin v. Tarver, 59 Ga. 263 (1877). When a removal is granted, the cause is to be removed as of the date when the motion is made, and the papers should be certified as of that date. Clark v. Delaware, etc. Canal Co., 11 R. I. 36.

"In cases where the proceedings are in conformity with the Act, the removal is imperative, both upon the State and Circuit court; and if the facts [upon which the removal is based] are seriously contested, it must

right of removal has once become perfect, it cannot be taken away by subsequent amendment in the State court,

be done in a formal manner, by pleadings and proofs, in the latter court. The question of jurisdiction [in such a case] belongs to the Federal court, and must be heard and determined there." Nelson, J., in Dennistoun v. Draper, 5 Blatchf. 336, 338 (1866); Taylor v. Rockefeller, 7 Cent. L. J. 349; Cobb v. Globe Mut. Life Ins. Co., 3 Hughes, 452.

No ORDER *of removal necessary.* Hatch v. C., R. I. & P. R. R. Co., 6 Blatchf. 105 (1868).

Petition for removal was founded *on the Act of* 1867. It did *not* show a right under *this Act*, but *did state a case within the Act of* 1866, and it was held sufficient to require a removal so far as authorized by the last-named Act. Dart v. Walker, 4 Daly (N. Y.), 188 (1871).

"*Where a suit is legally removed*," says Gray, C. J., "into the Circuit Court of the United States, *the jurisdiction of the State courts over it ceases*, and the suit is thenceforth to proceed to trial, judgment and execution in the Federal courts, and can not be remanded to the State courts for any purpose. Kanouse v. Martin, 15 How. 198; Ins. Co. v. Dunn, 19 Wall. 214; Mahone v. Manchester etc. R. R. Co., 111 Mass. 72. Such removal of a case from the State to the Federal courts for trial does not change the nature of the issue to be tried or the judgment to be rendered. West v. Aurora, 6 Wall. 139; Partridge v. Ins. Co., 15 Wall. 573." Du Vivier v. Hopkins, 116 Mass. 125, 128.

In the text we purposely use the phrase "the *rightful* jurisdiction ceases *eo instanti*," and a subsequent judgment of the State court "is erroneous,"—we do not say null and void. Such a judgment is perhaps valid, unless reversed or set aside; but in many of the cases every subsequent exercise of jurisdiction is said to be null and void, and every step *coram non judice*. How far the subsequent proceedings in the State court have any validity, if a proper application for removal be refused, see Herryford v. Ætna Ins. Co., 42 Mo. 151, 153, where it is said "they are *corom non judice;*" S. P. Akerly v. Vilas, 1 Abb. U. S. 284; *s. c.*, 2 Bissell, 110; Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362; *s. c.*, 8 *ib.* 243, 299; Stevens v. Phœnix Ins. Co., 41 N. Y. 149; and compare with Kanouse v. Martin, 15 How. 198; Gordon v. Longest, 16 Pet. 97; Ins. Co. v. Dunn, 19 Wall. 214; French v. Hay, 22 Wall. 250; Amory v. Amory, 36 N. Y. Superior Ct. R. 520; Bell v. Dix, 49 N. Y. 232; Stanley v. Ch., R. I. & P. R. R. Co. (Sup, Ct. of Mo.), 3 Cent. L. J. 430 (1876); Hadley v. Dunlap, 10 Ohio St. 1, 8, where the matter is discussed by Scott, J.; Du Vivier v. Hopkins, 116 Mass. 125, 126; The Removal Cases, 100 U. S. 457, *ante*, sec. 29.

The doctrine of the text to the effect that, if the petition for the removal presents a case within the Removal Acts, and is made in due time and accompanied with the proper surety, *no order for the removal is necessary*, is very strongly combated by Chancellor Cooper in the Southern Law Review for April, 1877. This learned writer contends that under

or Federal court, or by a release of part of the debt or damages claimed, or otherwise;[1] nor can the State court stay proceedings for the removal until the costs are paid, or award costs, or issue execution for costs.[2]

§ 76. If the petition in connection *with the pleadings does not show that the case is removable*, the jurisdiction of the State court is not ousted, and its subsequent proceedings, if it refused to order the removal, would not, it is supposed, be void or erroneous.[3]

such circumstances the jurisdiction of the State court continues, "until it has finally parted with it by the necessary order," and per consequence, that the Circuit court can in no case acquire jurisdiction, unless the State court has ordered the removal. No authority is cited for this position, except the case of the Railway Co. v. Ramsey, 22 Wall. 328, which it is a mistake to suppose *decided* any such proposition; and the Chief Justice, in the language referred to, probably had no such thought in his mind. The doctrine that an *order* of removal in such a case is not necessary to the jurisdiction of the Circuit court is universally accepted in those courts, and is constantly acted on. The Acts of Congress speak of no order of removal being necessary; some of the Acts distinctly provide for the cases proceeding in the Federal court, notwithstanding the State court or clerk may refuse to send or furnish copies of the record; and the Act of 1875 (sec. 7) provides for a writ of *certiorari* to enforce, not only the removal of a cause which the State court has ordered to be removed, but of any cause "removable under the Act," where the parties entitled to a removal "have complied with the provisions of this Act for the removal of the same." It would contravene the plain purpose of this provision to hold that a *certiorari* could rightfully issue only in cases where the State court had ordered the removal, or that it would be an answer to the writ for the State court to return that it had refused to order the removal.

[1] Kanouse v. Martin (amendment), 15 How. 198; *s. c.*, 1 Blatchf. 149; Ladd v. Tudor, 3 Woodb. & Minot, 325; Muns v. Dupont, 2 Wash. C. C. 463; Akerly v. Vilas, 1 Abb. U. S. 284; *s. c.*, 2 Bissell, 110; Hatch v. Rock Island, etc. R. R. Co., 6 Blatchf. 105; Fisk v. Union Pacific R. R. Co., 6 *ib.* 362; *s. c.*, 8 *ib.* 243; Roberts v. Nelson (amount), 8 *ib.* 74; Gordon v. Longest, 16 Pet. 97; Matthews v. Lyall (as to right to dismiss), 6 McLean, 13; Wright v. Wells, Pet. C. C. 220; Stanley v. C., R. I. & P. R. R. Co., 3 Cent. L. J. 430.

[2] Mayor v. Cooper, 6 Wall. 250; Penrose v. Penrose, 1 Fed. Rep. 479 (S. D. of N. Y., 1880), Benedict, J.

[3] Gordon v. Longest, 16 Pet. 97; Ins. Co. v. Dunn, 19 Wall. 214; Kanouse v. Martin, 14 How. 23; *s. c.*, 15 How. 198; Stevens v. Phœnix Ins.

And the same principle would apply, probably, if *no* security or bond whatever was offered and no removal ordered, since in that event the prescribed conditions for the removal have not been complied with; but it is doubtful, especially under the Act of 1875, whether it belongs to the State court to judge of the sufficiency of the surety offered, and to refuse a removal because the surety or bond is not sufficient, and exercise jurisdiction subsequently on that ground alone.[1]

Co., 41 N. Y. 149; Holden v. Putnam Fire Ins. Co., 46 N. Y. 1; Savings Bank v. Benton, 2 Metc. (Ky.) 240; Blair v. West Point etc. Co., 7 Neb. 146.

[1] See *nisi prius* opinion of Morton, J., in Bank v. King Wrought Iron Bridge Co., 2 Cent. L. J. 505, denying Osgood v. Chicago, etc. R. R. Co., *infra; s. c.*, in U. S. Circuit Court, 2 Cent. L. J. 616. See *Ib.*, 679, 730. The ruling of Drummond, J., in Osgood's case, approved Jones v. Amazon Ins. Co., 9 Ch. Legal News, 68, and Ruckman v. Ruckman, U. S. Circuit Court, N. J., Nixon J., dissented from in Mayo v. Taylor, 8 Ch. Legal News, 11. The mere filing of a petition and bond, unverified and unaccompanied by any proof of the facts of citizenship relied upon, does not oust the State court of jurisdiction. Delaware, etc. Co. v. Davenport, etc. Co., 46 Iowa, 406; see same case on error, "The Removal Cases," 100 U. S. 457. See also *dictum* of the Chief Justice in Railway Co. v. Ramsey, 22 Wal. 328, that "if, upon *the hearing* of the petition, it is sustained by the proof, the State court can proceed no further,"—but *quære*, whether the State court can hear and determine whether the proofs sustain the petition.

Mr. Chancellor Cooper, in the Southern Law Review for April, 1877, combats the doctrine of Judge Drummond in the Osgood case and the other cases that follow it, namely, that the State court has no right to pass upon the sufficiency of the bond. The point is by no means clear, and there is reason (looking at the object of the bond and the language of the Act of Congress) for the opinion, that it was contemplated that the State court might reject a bond distinctly on the ground that it was not sufficient; and several State courts have accordingly held that they have the right to judicially pass, for some purposes at least, upon the sufficiency of an application to remove a cause pending therein to a United States court, and of the bond accompanying the same. McWhimey v. Brinker, 64 Ind. 360; Blair v. West Point, etc. Co., 7 Neb. 146 (1878); and see Wells, *in re*, 3 Woods C. C. 128; Anderson, *in re*, 3 Woods C. C. 124; Ind. etc. R. R. Co. v. Risley, 50 Ind. 60; Baltimore, etc. Co. v. New Albany, etc. Co., 53 Ind. 597; Carswell v. Schley, 59 Ga. 17; Birch v. Davenport R. R. Co., 46 Iowa, 449; State v. Johnson, 29 La. Ann. 399 (1877). In Carswell v. Schley, *supra*, the court ex-

presses the view, which has been generally held by the State courts, in the following language:

"In Amory v. Amory, 95 U. S. 186, the Supreme Court of the United States distinctly recognizes the right of the State court to look into the petition for removal, and compare it with the statute. Such a right must exist of necessity. When the court in which a case is pending is called on to yield its jurisdiction on statutory conditions said to appear on the face of certain documents presented to it, it must inspect the documents and determine whether the conditions appear or not. How else is it to know whether to retain the case or part with it? Whether to grant the application or refuse it? Whether to treat the case as still pending or out of court? The scheme of removal ordained by Act of Congress is open and public. It is by petition. It contemplates a taking with leave, and not furtively by a sort of statutory larceny. The State court is to know of the proceedings for removal, and to see that they are such as the Act prescribes. When they conform to the Act, the court has no right or power to retain the case; and when they fail to conform in any essential particular, it has no right or power to send the case away or order it removed. Until there is a sufficient petition, there can be no transfer; and whether or not the petition, reading it in connection with the record, is sufficient, can and ought to be decided, in the first instance, by the court whose duty it is to accept it. The acceptance or rejection of the petition involves a decision upon its sufficiency. The laws of the United States are the laws of every State, and are to be administered by State courts no less faithfully than their own local enactments. All Acts of Congress that speak constitutionally should be obeyed without hesitation or reluctance; they are a part of our supreme law. As ultimate questions, what they mean and how they are to be administered are for decision by the Federal judiciary; but this does not relieve the State tribunals from taking their due part in construction and administration. Conflicting constructions need not be anticipated. On the contrary, the presumption is that statutes which are common to two governments will be understood by the tribunals of both to utter the same voice."

"The petition alleges that complainants in the bill are all citizens of Texas, but contains no express averment as to the citizenship of the defendant. Neither does the bill itself, nor any other part of the record. In the prayer of the bill for subpœna, he is described as "of said county of Burke." In the petition for removal, the description is substantially the same. Such terms are insufficient to ground jurisdiction upon, where citizenship is a requisite condition. Brown v. Keene, 8 Pet. 112, and cases cited; 1 Brock. 389. In Amory v. Amory, Waite, C. J., says, 'The right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, en-

§ 77. In the case of *Osgood* v. *Chicago, etc. R. R. Co.*,[1] the petition and bond for the removal of the cause were filed in the vacation of the State court with the clerk, and it was held that this, without any action of the court as to the sufficiency of the petition or bond, *ipso facto*, deprived the State court of jurisdiction—the sufficiency of these (under the Act of 1875) being for the Circuit court. Judge Drummond says: "It is true that under the statute the bond must be good and sufficient security; but it does not declare that it shall be approved by the judge. It requires the State court to accept the petition and bond, and proceed no further in the case.[2] The fifth section of the Act of March 3, 1875, tends to confirm the view that the State court is not authorized to make a judicial inquiry into and decision on the sufficiency of the *bond*. Its determination, however, that a *sufficient petition* is not sufficient, can not deprive the Federal court of jurisdiction. So, its determination that an *insufficient petition* is sufficient, while it is not immaterial, especially if accompanied with an order for removal, will not conclude that question, and it will be the duty of the Federal court, on motion, to remand the cause.[3]

title him to the transfer. If he fails in this, he has not in law shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended.'" The true doctrine on the subject here discussed is stated in the text. See also New Orleans, etc. R. R. Co. v. State of Mississippi, Sup. Ct. U. S. Oct. 1880, printed in full in the Appendix.

Whatever may be the right of the State court to pass upon the sufficiency of the *bond*, its action in this regard cannot, in the author's judgment, be admitted to be conclusive, *in all cases*, on the Federal courts.

[1] 2 Cent. L. J. 275; *s. c.*, 7 Ch. Legal News, 241.

[2] See 2 Cent. L. J. 616. On a petition for removal of a cause from a State court to a Federal court, accompanied by a bond, the *sureties are not bound to justify*, until a rule to do so is laid upon them. Empire Transp. Co. v. Richards, 88 Ill. 404.

[3] Urtetiqui v. D'Arcy, 9 Pet. 692. The court receiving an application for the removal of a cause into the United States Circuit court *cannot arbitrarily reject the bond tendered, if sufficient in form;* the cause of rejection must be specified. Upon appeal, therefore, such a bond must be

CHAPTER XVIII.

EFFECT OF THE JURISDICTION OF THE FEDERAL COURT.

§ 78. "Upon the copy of the record of the suit being entered as aforesaid in the Circuit Court of the United States," the provision is, "that the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit court." "And the copies of the pleadings shall have the same force and effect, in every respect and for every purpose, as the *original pleadings* would have had by the laws and practice of the courts of the State, if the cause had remained in the State court.[1]

§ 79. The courts of the United States are not required to take any suit, until in some form their jurisdiction

assumed to have been sufficient, if not otherwise stated. Mix v. Andes Ins. Co., 74 N. Y. 53.

When a defendant has filed the proper application and bond for the removal of the suit to the Federal court, in a case where he had the legal right to the removal, *the jurisdiction of the Federal court will not be affected by the subsequent death* of the defendant, and the execution of the appeal bond by his executor. Garrett v. Bonner, 30 La. Ann. 1305.

Where the petition for removal in connection with the pleadings fails to show that the case is removable, the court should deny the application. Blair v. West Point, etc. Co. 7 Neb. 146 (1878); New Orleans, etc. Co. v. Recorder, etc., 27 La. Ann. 291 (1875); Weed Sewing Machine Co. v. Smith, 71 Ill. 204 (1873); U. S. Law Inst. v. Brocksmidt, 73 Ill. 370 (1874); Liverpool Ins. Co. v. McGuire, 52 Miss. 227; Hartford Fire Ins. Co. v. Green, 52 Miss. 332; McWhinney v. Brinker, 64 Ind. 360.

The petition should state such facts as show to the court the case falls within the category of removable causes. Anderson, *in re*, 3 Woods C. C. 124; Lalor v. Dunning, 56 How. Pr. 209; Tunstall v. Madison Parish, 30 La. Ann. 471; McMurdy v. Ins. Co. 4 W. N. C. 18.

A citizen of the *District of Columbia* cannot remove a suit to the Federal court under Act of March 3, 1875, as he is not a citizen of a State. Cissel v. McDonald, 16 Blatchf. 150; Hepburn v. Ellzey, 2 Cranch, 445; Westcott v. Fairfield, Pe. C. C. 45; N. O. v. Winter, 1 Wheat. 91; Vasse v. Mifflin, 4 Wash. C. C. 519; Picquet v. Swan, 5 Mason, 35; Barney v. Baltimore, 6 Wall. 280.

[1] Rev. Stats., sec. 639. And see Act March 3, 1875, secs. 3, 6.

is made to appear of record. This rule applies to suits coming to them by removal, as well as to those in which they issue the original process.[1]

No *new pleadings* are in general necessary in the cause after its removal to the Federal court,[2] though it may often be advisable, especially in equity cases, to file new pleadings. We have before referred to this subject.[3] The *practice* after removal is to be the same, as if the cause had been originally brought in the Federal court, including the power to allow amendments.[4] *Amendments* in respect to jurisdictional facts have sometimes been allowed.[5]

§ 80. The jurisdiction of the Circuit court does not, probably, attach until the record of the State court is entered therein. If it be entered *before* the time, it has been made a question whether it will *then* attach. For some purposes it would seem that it might; as, for example, if it became necessary meanwhile to issue an injunction or appoint a re-

[1] American Bible Society v. Grove, 101 U. S. 610; *s. c.*, 21 Alb. L. J. 155.

[2] Dart v. McKinney (Act of 1866), 9 Blatchf. 359 (1872), Blatchford, J.; Merchants' Nat. Bank v. Wheeler, 13 Blatchf. 218 (1875); Bills v. New Orleans, etc. R. R. Co., 13 Blatchf. 227 (1875); *supra*, chap. 11, and cases cited. In removals under the Judiciary Act, the defendant is not in default for not pleading in the State court, and he may plead in the Circuit court. Webster v. Crothers, 1 Dillon C. C. 301 (1870).

[3] *Supra*, chap. 11, and cases there cited.

[4] Suydam v. Ewing, 2 Blatchf. 359 (1852), Betts, J.; Akerly v. Vilas, 5 Ch. Legal News, 73; *supra*, chap. 11, and cases cited.

[5] In the original petition the plaintiff, by mistake of his attorney, described himself as a citizen of the State where the suit was brought; he obtained a removal of the case on the ground that he was a citizen of another State, and in the Federal court he was permitted by Mr. Justice Bradley to amend his petition and state his true citizenship, both then, and when the suit was commenced, and to make new parties defendant with respect to matters properly pertaining to the original cause of action. Barclay v. Levee Commissioners, 1 Woods C. C. 254; Houser v. Clayton, 3 Woods C. C. 373. In Hodgson v. Bowerbank, 5 Cranch, 303, the court having decided that the objection to the jurisdiction (the defendant being described in the record as "late of the District of Maryland," instead of a *citizen* of Maryland) was fatal, the "record was afterwards amended by consent." Parker v. Overman, 18 How. 137, cited *infra*, chap. 19, note.

ceiver (which should be done, however, only upon notice), in order to protect the rights of the parties, or to preserve the property in litigation. After a cause is duly removed, the jurisdiction of the Federal court is not lost for want of an averment of citizenship in the bill of complaint originally filed, or in the amendments thereto, which were made in the Circuit court.[1]

§ 81. By express provisions of *existing statutes*, *attachments* of property hold, *bonds* of indemnity remain valid, and writs of *injunction* continue in force, notwithstanding the removal, until dissolved or modified by the Circuit court.[2] This provision was, doubtless, enacted to obviate a different judicial construction which has been placed upon previous Removal Acts.[3]

[1] Briges v. Sperry, 95 U. S. 401.

[2] Rev. Stats., sec. 646; Act of March 3, 1875, sec. 4.

[3] See New England Screw Co. v. Bliven, 3 Blatchf. 240, but *qaære?* Barney v. Globe Bank (*attachment* holds the property after removal under the Judiciary Act, sec. 12), 5 Blatchf. 107 (1862).

Attachment—Motion to Dissolve.—A motion to dissolve an attachment, when authorized by the local laws, may be made in the Circuit court after the removal; and in the discretion of the court it may be renewed, although it was once argued and denied in the State court. Garden City Manuf. Co. v. Smith, 1 Dillon C. C. 305 (1870). As to custody and disposition of property attached, Dennistoun v. Draper, 5 Blatchf. 336.

Injunction—Motion to Dissolve.—Under the Act of July 13, 1866 (14 Stats. at Large, 171, sec. 67), Drummond, Circuit Judge, following the decision of McLean, J., in McLeod v. Duncan, 5 McLean, 342, held that an injunction issued by the State court was *ipso facto* dissolved by the removal of the cause into the Federal court—that Act making provision that "all attachments made, and all bail and security given upon such suit or prosecution, shall continue in force," and saying nothing as to injunctions. See Hatch v. Chicago, R. I. & P. R. R. Co., 6 Blatchf. 105, holding same doctrine as to cases removed under sec. 12 of the Judiciary Act. But these decisions are no longer applicable, where there is an express statute provision, that injunctions granted by the State court continue in force after the removal of the cause, until dissolved or modified by the Federal court. Where an injunction has been allowed by the State court upon a full hearing, and the cause is afterwards removed,—while the Federal court may, under the Act of 1866, dissolve the injunction, yet, where the *motion to dissolve is upon the same papers* on which the writ was granted (this being in effect an application for re-argument

The proceedings had in a State court are not vacated by its removal.[1]

CHAPTER XIX.

REMANDING OF CAUSE TO THE STATE COURT.

§ 82. *If the petition for the removal and the copy of the pleadings or record in the State court, taken together,* do not show that the case was removable under the legislation of Congress; or if they show that the removal was not applied for in time; or that any other substantial condition of the right of removal, such as value, has not been met or complied with, but the removal has, nevertheless, been ordered, the other party may move to remand the cause to the State court, and it ought to be remanded accordingly. This was the uniform practice before the Act of 1875; but under the 5th section of that Act, while it is clear that a cause ought to be remanded which is not removable, or in which the right to a removal has been waived because not applied for in time, and the like, it is doubtful whether, if the record was in fact filed in the Federal court in time, defects connected with the giving of the surety or bond, or other irregularities which have not worked any prejudice, will be ground for dismissing or remanding the case.[2]

of the motion made in the State court), leave to make such motion should first be applied for and obtained, before it can be made. Carrington v. Florida R. R. Co., 9 Blatchf. 468 (1872), Benedict, J. Orders made in State court, but not yet complied with, for production of books, etc., should be recognized and enforced after removal, *unless modified or set aside* by the Federal court. Williams Mower, etc. Co. v. Raynor, 7 Biss. 245.

[1] Duncan v. Gegan, 101 U. S. 810.

[2] See *supra*, chap 11, as to *time* of applying for removal. When the case is one of Federal cognizance, the right to have the cause remanded, because of defects in mode of removal, etc., may be waived. But there is no waiver of the right, where the case is not really and substantially one of Federal jurisdiction. Price v. Sommers, 8 Ch. Legal News, 290.

§ 83. The section last referred to makes it *the duty of the Circuit court to dismiss or remand the case*, whenever it appears, to its satisfaction, that the "suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit court." In our judgment this is the test of Federal jurisdiction, and the one which ought to be applied to the complex and diversified cases which will arise under the Act of 1875, namely, if the *real and substantial* controversy is one between citizens of different States, although incidentally and collaterally there may be a controversy between some parties who may be citizens of the same State; or if the case is one which arises under the Constitution or laws of the United States, although not wholly depending thereon as before explained, the case is one of Federal cognizance, and should be retained; otherwise, dismissed or remanded.[1] When a cause is once removed, and there are no jurisdictional objections to its remaining, it will not be remanded for defects or irregularities that can be remedied, or have not worked any prejudice to the opposite party.[2]

§ 84. A party entitled to a removal may estop himself to apply for it,[3] or, having applied, may waive the right to a removal by his subsequent conduct in the State court;[4] but

[1] Ryan v. Young, U. S. C. C., N. D. Ind. (1879), 8 L. Rep. 229; 20 Alb. L. J. 79; 11 Ch. Legal News, 358. See the decision of the U. S. Supreme Court in New Orleans, etc. R. R. Co. v. State of Mississippi, Oct. Term, 1880, printed in full in the Appendix. Failing to file record on or before the first day of next term of the Federal court, does not deprive the court of jurisdiction. Jackson v. Mutual Ins. Co., 3 Woods C. C. 413 (1878); Hyde v. Phoenix Ins. Co., 2 Dill. 525. In such case the court has discretion to remand or not, as to it shall seem most conducive. For a contrary doctrine, see Bright v. Milwaukee R. R. Co., 14 Blatchf. 214.

[2] Dennis v. Alachua Co., 3 Woods C. C., 683.

[3] Executing bond to procure discharge from a writ of *ne exeat*, held to *estop*, by its condition "to abide the decree of the State court"—the defendant who executed it, to remove the cause to the Federal court. Hazard v. Durant *et al.* (Potter J.), 9 Rhode Island, 602, 606 (1868).

[4] A petition and bond for removal were filed in the State court;—no motion was made or entered, nor the attention of the court called to the

contesting the case in the State court, after it has erroneously refused to grant the application for a removal, is no waiver of the party's right.[1] A party to a suit may, in that particular suit, *waive his right to remove* the suit to the Federal court; and he may make such waiver after the suit is brought, not only by stipulation or agreement, but by conduct which is equivalent to a waiver.[2]

§ 85. Under sec. 639 of the Revised Statutes, and under the Act of 1875, the defendant must give surety for his *entering copies of the record* on "the first day of the next session" of the Federal court—the latter Act providing further (sec. 7), that if the next term shall commence within twenty days after the application for removal, the party shall have twenty days, from the time of the application, to file in the Federal court the copy of the record and enter his appearance therein. If this condition of the undertaking and bond is not complied with, the obligors would doubtless be liable on the bond; and there may be such unexcused laches in

fact, and the parties nearly a year afterwards went to trial on the merits. On appeal the court held, that *the right to a removal could be waived*, and under the circumstances must be considered waived; though it was admitted that it would have been otherwise, if the court had been cognizant of the petition, and that the party insisted on it, and had nevertheless ordered the trial to proceed. Home Ins. Co. v. Curtis, 32 Mich. 402; *s. c.*, 3 Cent. L. J. 27 (1875).

[1] Insurance Co. v. Dunn. 19 Wall. 214; Gordon v. Longest, 16 Pet. 98; Kanouse v. Martin, 15 How. 198; Stevens v. Phoenix Ins. Co., 41 N. Y. 149; Hadley v. Dunlap, 10 Ohio St. 1; Stanley v. R. R. Co., 62 Mo. 508. Thus an action at law, at issue in a State court, was called for trial, and might in the ordinary course have been tried. The defendant applied for a postponement. This was refused by the court, except upon terms of the defendant's consenting to a reference. This he refused to do; but afterwards, and before the trial was actually commenced, he consented to a reference of the same for trial, to a person named. The order was made accordingly; and the immediate trial, which otherwise must have taken place, was thus avoided. The defendant then took proceedings to remove the cause, under Rev. Stats., § 639, subdivision 3, on the ground of prejudice and local influence. On a motion to remand, held that the defendant had waived his right to remove, under the section above named. Hanover Bank v. Smith, 13 Blatchf. 224 (1876).

[2] Hanover Nat. Bank v. Smith, 13 Blatchf. 224 (1875).

the filing of the copy of the record of the State court—as where, without necessity or good reason, a term lapses, or the other party is prejudiced by the delay,—that the Federal court will for this reason remand the case, even though it be one of Federal cognizance. Such is the practice of the Federal courts, so far as we are acquainted with it.[1]

Time of Filing Record—Effect of Delay.—As in previous Acts, so under the Act of 1875, the party removing a cause must file the record on the first day of the next term of the Federal court, when the petition and bond for the removal were filed in the State court, more than twenty days before the commencement of the next ensuing term of the Federal court; and where it was filed on the fourth day of the term, instead of on the first day, and no sufficient reason for the delay is shown, and the delay has not been waived, the practice prevails in Judge Blatchford's circuit, to remand the cause.[2] It is believed that so strict a view is not held in all the circuits.

§ 86. The *motion to remand must be based* upon the pe-

[1] *Supra*, chap. 16. *Time of filing copies of papers.* Where the petition for removal was filed in February, 1874, and the next term of the Federal court was in April, 1874, and copies of the proper papers were not filed until August, 1875, the delay was such that the Federal court remanded the case, and held that the delay was not excused by the action of the State court in denying the petition, and the petitioner's action in the meantime in securing, by appeal to the State appellate tribunal, a reversal of the order denying the removal. Clippinger v. Mo. Valley Life Ins. Co. (North Dist. Ohio), 8 Ch. Legal News, 115 (1875); but *quære*, whether under the circumstances the delay was not sufficiently excused. If the record is not filed within the required time, the Federal court can not cure the defect. Cobb v. Globe, etc. Insurance Co., 3 Hughes, 452, *supra*; Bright v. Milwaukee R. R. Co., 14 Blatchf. 214; Broadway v. Eisner, 13 Blatchf. 366; McLean v. St. Paul & Chicago R. R. Co., S. D. N. Y., 20 Alb. L. J. 78.

[2] McLean v. St. Paul, etc. Railway Co., U. S. Circuit Court, Southern District, N. Y., 16 Blatchf. 369 (1879), before Blatchford, J. See Kidder v. Featteau, 2 Fed. Rep. 616, where Judge McCrary states that delay creates a liability on the bond, but does not entitle the party as a matter of right to have the cause remanded. In this case the delay was forty-three days.

tition for removal, and the record as it is sent up from the State court. If the petition, in connection with the record, is sufficient on its face, but states as ground of removal facts which are not true, as, for example, in regard to citizenship, or value, where the value does not appear in the pleadings, issue may be taken thereon in the Circuit court *by a plea in the nature of a plea in abatement*;[1] but such an inquiry cannot be gone into in the State court.[2] The principle that a suit in a State court, which falls within the description

[1] Coal Co. v. Blatchford, 11 Wall. 172; Heath v. Austin, 12 *ib.* 320. "The motion to remand admits the facts set out in the petition for removal, and proceeds upon the ground that under the state of facts [presented in the record] the case was improperly removed, and this court is without jurisdiction over it." Buttner v. Miller, 1 Woods C. C. 620 (1871). When motion to remand is proper, and when not. Heath v. Austin, 12 Blatchf. 320; Dennistoun v. Draper, 5 *ib.* 336; Galvin v. Boutwell, 9 *ib.* 470.

If the case is *not one of Federal cognizance*, it must be dismissed or remanded at any stage when the fact appears or is duly established. Dennistoun v. Draper, 5 Blatchf. 336 (1856), Nelson J.; Pollard v. Dwight, 4 Cranch, 421; Wood v. Matthews, 2 Blatchf. 370.

The Act of March 3, 1875, section 5, provides that, if "at any time" after the removal the non-Federal character of the case shall appear, "the Circuit court *shall* proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

[2] Fisk v. Union Pacific R. R., 8 Blatchf. 243 (1871), Nelson, J.; Stewart v. Mordecai, 40 Ga. 1. It is settled law that the facts stated as the ground of the removal cannot be contested or inquired into in the State court. That inquiry belongs exclusively to the Federal court. The order of removal cannot be reviewed by a State court. The remedy is in the Federal court on a motion to remand. Chamberlain v. Am. Life, etc. Co., 18 N. Y. Supreme Court, 370 (1877).

In Knickerbocker Life Ins. Co. v. Gorbach, 70 Pa. St. 150 (1871), both parties seemed to concede the right of the State court to determine whether the facts stated in the petition for removal were true, and that question was tried and decided against the party applying for the removal, and the decision reversed by the Supreme Court of the State; but this practice is in direct conflict with the Acts of Congress in this behalf.

Burden of proof as to jurisdictional facts, where contest is made in the Federal court after the removal. Heath v. Austin, 12 Blatchf. 320; Copeland v. Memphis, etc. R. R. Co., 3 Woods C. C. 651.

of suits removable to the Circuit Court of the United States, may be removed, although it could not be originally brought there, is not affected by section 5 of the Act of March 3, 1875, which provides for the dismissal or remanding of suits not really and substantially involving a dispute or controversy within the jurisdiction of the United States Circuit Court.[1]

§ 87. Where the *State court has ordered the removal improperly*, the Circuit court should remand the suit.[2] If the State court has ordered the removal, although erroneously, its jurisdiction is at an end until it is restored by the action of the Federal courts.[3] If the Circuit court erroneously refuses to remand such a case, the proper remedy of the party is not by proceeding in the State court at the same time the cause is in the Circuit court, but is alone in the Federal

[1] Warner v. Pennsylvania R. R. Co., 13 Blatchf. 231 (1876). The *truth of averments* made in the petition for removal cannot be inquired into on a *motion* to remand. Texas v. Texas & Pacific R. R., 3 Woods, 308.

[2] Act of March 3, 1875, sec. 5, referred to *supra*. Although the State court has ordered the removal, yet, if such order was improperly made, the Circuit court should remand the cause, as it must determine for itself the question of jurisdiction. Field v. Lownsdale, 1 Deady, 288, Deady, J. Where the Federal court orders a cause remanded to the State court, the *Supreme Court of the State* will not issue a writ of *mandamus* or *other process to restrain the State court from proceeding with the cause*, until the party who attempted to transfer the cause to the Federal court can invoke the revisory power of the Supreme Court of the United States to compel such transfer. *Ex parte* State Ins. Co. of Ala., 50 Ala. 464 (1874).

[3] On the order of the Circuit court remanding a cause which the State court had previously ordered to be transferred, the *jurisdiction of the latter court re-attaches*, and it may proceed therewith. Thacher v. McWilliams, 47 Ga. 306 (1872). But under the Act of March 3, 1875, (sec. 5), such an order of the Circuit court is reviewable by the Supreme Court of the United States on appeal or writ of error; and if the order be superseded, a question may arise as to the power of the State court pending the appeal or writ of error, to proceed with the cause under or in consequence of the order remanding it. Where the *Federal court* declines to take jurisdiction and *remands* the cause, *this does not operate as a discontinuance*, but it will be deemed to have been pending in the State court. Germania Fire Ins. Co. v. Francis, 52 Miss. 457.

court; the action of the Circuit court in remanding, or refusing to remand, a cause being reviewable on error or appeal by the Supreme Court.[1]

§ 88. Where the *State court asserts jurisdiction after a proper application for removal*, the question of *jurisdiction is not waived* by the party entitled to the removal, by reason of his appearing and contesting in the State court the claim or matter in dispute.[2] If in such case the judgment of the State court be against him on the trial or hearing, he may appeal to the highest court of the State; and if the decision below is there affirmed, he may sue out a writ of error from the Supreme Court of the United States; and if the record shows that the removal of the suit was improperly

[1] Ins. Co. v. Dunn, 19 Wall. 214, 223; Gordon v. Longest, 16 Pet. 97; Act of March 3. 1875, sec. 5; Green v. Custard, 23 How. 484; Fasnacht v. Frank (effect of appeal), 23 Wall. 416 (1874). See 2 Cent. L. J. 290; Syers v. Chicago, 101 U. S. 184. See also New Orleans, etc., R. R. Co. v. State of Mississippi, U. S. Sup. Court, Oct. Term, 1880, printed in full in the Appendix.

Where in a suit removed into the Circuit court the papers were afterwards destroyed by fire, and the parties *stipulated in writing* that the cause was transferred *in accordance with the statute in such case provided*, the Supreme court will presume, in the absence of proof to the contrary, that the citizenship requisite to give jurisdiction was shown in some proper manner, though it did not appear on the face of the pleadings. R. R. Co. v. Ramsey, 22 Wall. 322. In a petition for removal it was stated that the parties "resided" in such and such States. The Supreme Court said: "'Citizenship' and 'residence' are not synonymous terms; but as the record [in the Circuit court] was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this court have, undoubted jurisdiction of the case." Parker v. Overman, 18 How. 137, 141. Amendments, see *supra*, chap. 18, and cases cited.

An averment that the party defendant is a *citizen of the Southern District of Alabama, is a sufficient averment that he is a citizen of Alabama.* Berlin v. Jones, 1 Woods C. C. 638.

[2] Ins. Co. v. Dunn, 19 Wall. 214; Gordon v. Longest, 16 Pet. 98; Kanouse v. Martin, 15 How. 198; Stevens v. Phœnix Ins. Co., 41 N. Y. 149; Hadley v. Dunlap, 10 Ohio St. 1; Stanley v. C., R. I. & P. R. R. Co., 3 Cent. L. J. 430; The Removal Cases, 100 U. S. 475; *supra*, § 29; Goodrich v. Huntoon, 29 La. Ann. 372 (1877); Erie R. R. Co. v. Stringer, 32 Ohio St. 468; New Orleans, etc. R. R. Co. v. State of Mississippi, U. S. Sup. Court, Oct. Term, 1880, printed in full in the Appendix.

denied, that court will not examine into the merits of the case or generally into the record, but will reverse the judgment of the highest court of the State, with directions to reverse the judgment of the lower State court and to order a transfer of the cause from that court to the Circuit Court of the United States, pursuant to the petition for the removal originally filed in such State court.[1] The Circuit

[1] State v. Johnson, 29 La. Ann. 399; Gaines v. Fuentes, Sup. Court U. S., Oct. Term, 1875, 2 Otto, 10; *s. c.*, 3 Cent. L. J. 371, and see cases last cited. In the Atlas Ins. Co. v. Byrus, 45 Ind. 133 (1873), the State court of original jurisdiction improperly refused to transfer the cause to the Federal court, and rendered judgment against the party entitled to the removal;—on appeal, the Supreme Court of the State reversed the judgment and remanded the cause to the court below, with directions to sustain the application to remove the cause to the Circuit Court of the United States.

The State courts have generally held, that AN APPEAL *lies to the Appellate court of the State* from an order for the removal of a cause to a Federal court, or from an order referring such removal. State v. The Judge, 23 La. Ann. 29 (1871); Bryant v. Rich, 106 Mass. 180; Crane v. Reeder, 28 Mich. 527 (1874); Whiton v. Chicago & N. W. R. R. Co., 25 Wis. 424; *s. c.*, 13 Wall. 270; Darst v. Bates, 51 Ill. 439. See opinion of Gray, C. J., in Mahone v. Manchester etc. R. R. Co., 111 Mass. 74; Hough v. West. Transp. Co., 1 Bissell, 425. *But the courts in New York have decided otherwise.* Stevens v. Phœnix Ins. Co., 41 N. Y. 149; Bell v. Dix, 49 N. Y. 232. See on this subject Ellerman v. New Orleans etc. R. R. Co., 2 Woods C. C. 120 (1875), (Woods, Circuit Judge); Ins. Co. v. Dunn, 19 Wall. 214; Ins. Co. v. Morse, 20 Wall. 445, and cases cited *infra*.

But whatever may be the true view on this point, it is plain that, if the case is removable, and the application is in due form and in time, the Act of Congress gives "an unqualified and unrestrained right to a removal," and declares that the *State court* shall "*proceed no further in the suit;*" and in such a case the State court, it seems plain, can not, after such application, allow an appeal to the Appellate court of the State, and accept a *supersedeas* bond, which shall have the effect to prevent a removal to the Federal court pending such appeal. See Akerly v. Vilas, 1 Abb. U. S. Rep. 284. This is undoubtedly the law under the Act of 1875, which authorizes the Federal court to issue a *certiorari* to the State court, to which it would not be sufficient for the State court to return that an appeal had been taken to the Appellate court of the State. Ellerman v. New Orleans R. R. Co., (Woods, Circuit Judge), 2 Woods C. C. 120 (1875); Ins. Co. v. Morse, 20 Wall. 445.

If a removal has been applied for and denied, and the party persists in proceeding in the State court, Allen, J., in Bell v. Dix, 49 N. Y. 232

(1872), conceding that the question of jurisdiction must be decided by the Federal Circuit court, said, *arguendo*, that the remedy of the party, who sought the removal which the State court denied, was to apply to the Circuit Court of the United States for the *proper mandate staying proceedings in the State court*, and to compel a transcript of the record to be certified to the Federal court. If the other party claims that the cause has not, for any reason, been effectually removed, he should apply to the Federal court to remand the cause; but the majority of the court concurred in affirming the order of the special term denying the motion of the party who sought the removal, to stay in the State court further proceedings in the action. In Fisk v. Union Pacific R. R. Co., 6 Blatchf. 362, it was held that the *Federal court would not*, after the removal of the cause into it, *stay proceedings in the State court*, these being null and void. The ground of these determinations evidently is, that if the removal was properly applied for, it was useless to stay the proceedings in the State court, as it was deprived of jurisdiction—that is, of rightful jurisdiction; on the other hand, if the removal was not authorized, it would be improper to interfere with the jurisdiction of the State court. This conclusion largely rests upon the delicacy with which one court interferes with the proceedings of another, and leads to no little confusion, expense and embarrassment in its practical effect. For example, recently, in a case in Iowa, a removal of a cause was sought in the State court. The State court denied it. A copy of the record in the cause was filed in the United States Circuit Court for Iowa. That court held that the removal was effectual; the other party appeared, and, on the final hearing, a decree was rendered against him. The State court proceeded with the cause and, on final hearing, rendered a decree in favor of the other party. On appeal to the Supreme Court of the State, it affirmed the judgment below, so that there are two opposite final decrees, one in the State court, and the other in the Federal court—the result of the one court not interferring with the other. The final judgments in both the State and Federal courts, just mentioned, came before the United States Supreme Court in the cases reported under the name of The Removal Cases, 100 U. S. 457. *Ante*, sec. 29, and Appendix "A." The case of French v. Hay, 22 Wall. 250, shows that the Federal court may protect a party by injunction against a judgment in the State court rendered therein after a proper application to remove the cause.

As to APPEALS from the decision of the *nisi prius* State court granting or refusing the petition for removal to *the Appellate court of the State*, and the effect thereof, see, Kanouse v. Martin, 15 How. 198, *s. c.*, 14 How. 23; *s. c.*, 1 Blatchf. 149; Burson v. Park Bank, 40 Ind. 173; Western Union Telegraph Co. v. Dickinson, 40 Ind. 444; Indianapolis, etc. R. R. Co. v. Risley, 50 Ind. 60; Whiton v. R. R. Co., 25 Wis., 424; Railroad Co. v. Whiton, 13 Wall. 270; Akerly v. Vilas, 24 Wis. 165; *s. c.*, 2 Bissell, 110; Home Ins. Co. v. Dunn, 20 Ohio St. 175; Ins. Co. v. Dunn, 19 Wall. 214; Atlas Ins. Co. v. Byrus, 45 Ind. 133; Gordon v. Longest, 16 Pet. 97; Hadley v. Dunlap, 10 Ohio St. 1; Stevens v. Phœnix Ins. Co., 41 N. Y. 149;

court has the power to protect its suitors by injunction against a judgment in the State court rendered subsequent to a proper application to remove the cause.[1]

§ 89. If a cause be *improperly removed* into the Circuit court, and it entertains jurisdiction in a case in which by law it can have none, its judgment will be reversed by the Supreme Court, with directions to the Circuit court to remand the same to the State court whence it was improperly taken.[2]

Holden v. Putnam Ins. Co., 46 N. Y. 1; People v. Sup. Court, 34 Ill. 356; Savings Bank v. Benton, 2 Metc. (Ky.) 240; Taylor v. Shaw, 54 N. Y. 75 (1873); Bell v. Dix (interesting case), 49 N. Y. 232 (1872); Goodrich v. Huntoon, 29 La. Ann. 372 (1877). In case of removal from State to United States court, when the proceedings for removal are regular, the jurisdiction of the State court is *ipso facto* ousted by virtue of such proceedings. The allegation as to jurisdiction can be proven on the trial, and the proper judgment asked for. Shaft v. Phœnix Mut. Life Ins. Co., 67 N. Y. 544 (1876).

[1] French v. Hay, 22 Wall. 250. The Acts of Congress contemplate the issue of *ex parte* orders from a Federal court, *to restrain the trial in a State court* of a cause that is entitled to removal, only when it appears that there is danger of irreparable injury from delay. People v. Detroit Superior Court Judge, 41 Mich. 31.

Trover against persons seizing property under Federal process can be brought in a State court, and if any question arises under the laws of the United States, the Supreme Court of the United States can review any final decision of the State courts against the defendants. People v. Detroit Superior Court Judge, 41 Mich. 31.

[2] Knapp v. Railroad Co., 20 Wall. 117.

Second Removal after Cause Remanded to State Court.—In an action brought in a State court, a petition and bond, under the Act of 1875, was filed by the defendant March 17th. The State court, thereupon, made an order for the removal. The record was not filed in time, but was filed three days after the time had expired, on the 10th of April. May 24th the cause was remanded. June 2d, defendant again filed a petition and bond in the State court, and it was again removed. The record was on file in due time. On motion to remand, held, first, that it not being possible to try the case in the State court on account of the first order of removal before the first term of the court after it was remanded (which was the June Term), the second petition for removal was in time under the Act of 1875; (2) but that, defendant having failed by neglect to perfect the first order of removal, to allow the subsequent one would result in delay of the cause to the presumed prejudice of the plaintiff, and on

that account defendant would be considered to have waived his right of removal.

In opposing the motion for remanding the case after the first removal, defendant's attorney made affidavit that the failure to file the record in time had occurred through his inadvertence, but did not state the facts from which the court could see that there was inadvertence or accident. *Held*, (1) that the affidavit was insufficient to excuse the defendant and authorize the court to retain jurisdiction; (2) that the order of the court on that motion would not be reviewed. McLean v. Chicago & St. Paul Ry. Co., South. Dist. of N. Y., Blatchford, J., 16 Blatchf. 369 (1879); *s. c.*, 21 Alb. L. J. 47.

APPENDIX A.

THE REMOVAL CASES, 100 U. S. 457.*

MEYER *v.* CONSTRUCTION COMPANY; CONSTRUCTION COMPANY *v.* MEYER; RAILROAD COMPANY *v.* MEYER.

1. The provision in the first clause of the second section of the Act entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3, 1875 (18 Stat., 470), "that any suit of a civil nature, at law or in equity, now pending * * * * * in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * * * in which there shall be a controversy between citizens of different States, * * * * * either party may remove said suit into the Circuit Court of the United States for the proper district," construed, and *held* to mean that when the controversy about which a suit in the State court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the Circuit Court without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal, the matter in dispute may be ascertained, and according to the facts the parties to the suit arranged on opposite sides of that dispute. If in such an arrangement it appears that those on one side, being all

* Under this title is reported the judgment of the Supreme Court of the United States in the case of Meyer v. Construction Company (100 U. S. 457). As this is the leading case under the Act of March, 3, 1875, the opinion of the court is inserted at large, for the convenience of the reader.

citizens of different States from those on the other, desire a removal, the suit may be removed.

2. Until a case requiring it arises, the court refrains from expressing an opinion upon the second clause of said section.
3. The petition for removal (*ante*, p. 35), *held* to be sufficient in form.
4. An application made before trial, for the removal to the Circuit Court of a cause pending in a State court at the passage of said Act of March 3, 1875, was in time if made at the first term of the court thereafter.
5. In order to bar the right of removal, it must appear that the trial in the State court was actually in progress in the ordinary course of proceeding when the application was made.
6. The ruling in *Insurance Company* v. *Dunn*, 19 Wall. 214, that a party who failing in his efforts to obtain a removal of a suit is forced to trial loses none of his rights by defending against the action, reaffirmed.
7. Under the laws of Iowa, a mechanic's lien for work done under a contract takes precedence of all incumbrances put on the property by mortgage or otherwise, after the work was commenced.
8. A statement in a contract between a railroad company and a construction company that the former would pay the latter out of a certain fund,—the subscription of a particular county along the road—is not such a taking by the latter company of a collateral security as to vitiate its lien.

Mr. Chief Justice WAITE delivered the opinion of the court.

Three principal questions are presented by these cases. They are—

1. Was the suit pending in the State court one which could by law be removed to the Circuit Court of the United States?

2. If it could, was the application for removal made in time, and was it sufficient in form to effect a transfer? and,

3. If the transfer was lawfully made, are the decrees of the Circuit court, giving the mortgage priority over the mechanic's lien and the title of the Delaware County Railroad Company, right?

These will be considered in their order.

1. As to the right of removal.

The Act of March 3, 1875, (18 Stat., 470), was in force when the application for removal was made, but not when

the new trial was granted to Dennison. The second section of that Act contains, among others, the following provision:

"That any suit of a civil nature, at law or in equity, now pending * * in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * in which there shall be a controversy between citizens of different States, * * either party may remove said suit into the Circuit court of the United States for the proper district."

This we understand to mean that when the controversy about which a suit in the State court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the Circuit court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal, the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all citizens of different States from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit.—(*Coal Company* v. *Blatchford*, 11 Wall., 174). Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts. This being done, when all those on one side desire a removal, it may be had, if the necessary citizenship exists.

In the present case it appears that the suit was originally brought by a citizen of Iowa against another citizen of Iowa and citizens of Pennsylvania and Ohio. There were then, according to the pleadings, two matters about which there might be dispute—one between the construction company and the railroad company, both citizens of Iowa, as to the amount due the construction company and the actual exist-

ence of a mechanic's lien, and the other between the construction company and the trustees of the mortgage, citizens of different States, as to the priority of the mortgage over the mechanic's lien. But before the trustees of the mortgage were actually brought into court by service of process, the dispute between the construction company and the railroad company had been finally disposed of. The amount due the construction company had been ascertained so far as that company and the railroad were concerned, the mechanic's lien established, and the property sold under the lien to pay the debt. There was after that nothing left of the suit except that part which related solely and exclusively to the priority of the mortgage lien, and as to this the controversy was between the construction company on the one side, and the mortgage trustees on the other. If the railroad company still continued a party to the suit, it was a nominal party only, and its interests were in no way whatever connected with those of the trustees. It did not, therefore, occupy a position in the controversy on the same side with them. This being the case, it is apparent that in the then condition of the suit the only controversy to be settled was between the mortgage trustees, citizens of Pennsylvania and Ohio, on one side, and the construction company and railroad company, citizens of Iowa, on the other. As such, under the construction we have given this provision of the statute, the suit was removable by reason of that provision. This makes it unnecessary to give an interpretation to that part of the same section of the Act of 1875, which, for the purposes of statement, may be read as follows:

"That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * in which there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may re-

move said suit into the Circuit Court of the United States for the proper district."

We reserve the consideration of this provision until a case requiring it arises. This suit, when the petition for removal was filed, was one in which the only controversy to be decided was between citizens of different States, and, therefore, provided for in the first clause. Necessarily a removal would take the whole suit to the Circuit court, because in its then condition the suit related to a single controversy only. Whether, as argued, a removal could also have been had under the last clause, we do not decide.

2. As to the removal.

The third section of the Act of 1875, so far as it is applicable to this case, reads as follows:

"That whenever either party, * * * entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried, and before the trial thereof for the removal of such suit into the Circuit Court, to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit, if special bail was originally requisite therein; it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in said Circuit court."

The petition filed in this case was sufficient in form. (*See ante, sec. 29, note, where the petition is set out in full.*) Enough appeared on its face to entitle the petitioner to his removal. While it included a statement of belief that from prejudice or local influence justice could not be secured by a trial in the State court, no affidavit to that effect was filed, and this statement could be rejected as surplusage, leaving still good cause for the removal on account of the citizenship of the parties. Although Meyer's name was included as a petitioner, that of Dennison was included also, and as Meyer was not a party to the suit, his name could be rejected as surplusage and the petition left to stand as that of Dennison alone. The paper was evidently drafted and put on file under the belief that Meyer would be substituted for Thompson as a party to the suit. This having been unexpectedly refused, it was presented to the court by the counsel of Dennison, without amendment, as in legal effect the petition of Dennison alone. This, we think, might lawfully be done. Under the circumstances it was the duty of the court to treat the application as coming from Dennison only.

The petition was not signed. No objection was made on this account in the State court, and it came too late in the Circuit court. If it had been made in the State court, the defect, if in fact there was one, would no doubt have been cured at once by the signature of counsel. The petition was in writing. On its face it purported to be the petition of Meyer and Dennison, and it was in fact the petition of Dennison. This the court knew, because it was actually presented by the counsel of Dennison, and was accompanied by a bond purporting also to be signed in the name of Meyer and Dennison. In short, everything in the whole proceeding showed that it was in fact what, under the circumstances, it purported to be, the application of Dennison made in good faith for the removal of the cause.

The bond was sufficient in form. (*The bond is set out at large in the note to sec. 29, ante.*) The condition was such

as the statute required. There was no special bail in the case. Nothing was, therefore, to be secured by the bond but the filing of the transcript in the Circuit court on the first day of its then next term, and the payment of any costs that might be awarded by that court in case it should hold that the suit had been wrongfully or improperly removed. No objection was made to the sufficiency of the surety. The only complaint seems to have been that one of the persons who signed the bond as a surety was an attorney of the court, which was forbidden by the laws of Iowa and the practice of the State court. Without determining whether this would have justified the court in not accepting the bond if he had been the only surety, it is sufficient to say that the Act of Congress does not make it necessary that two persons should sign the bond as sureties. "Good and sufficient surety" is all that is required, and this is satisfied if there is one surety able to respond to the condition of the bond. The question here is not whether the court below had the right to pass upon the sufficiency of the surety, but whether upon the facts as they appear in this record it was justified in refusing to accept this bond. We are now examining the case after judgment below in reference to errors which are alleged to have occurred in the progress of the cause. If the State court refuses to accept a bond offered by a petitioner for removal which has "good and sufficient surety" in law, it is error that may be reviewed here. The court has no discretion in such a matter. Its action is governed by fixed rules. Here, as no objection was made to the pecuniary responsibility of the one person who signed as surety, and was competent under the laws of Iowa to do so, it was clearly error for the court to refuse to accept the bond because a second surety was an attorney of the court. Such being the case, we are clearly of opinion that, so far as the form of the application was concerned, the State court was not justified in refusing to accept the petition and bond, and in proceeding further in the cause.

We think, also, the application was made in time. It is

conceded that the petition was filed during the first term of the court at which the suit could be tried after the Act of 1875 went into operation. It has, so far as we know, been uniformly held on the circuit, and to our minds correctly, that in suits pending when the Act was passed, the application was in time if made at the first term of the court thereafter. (*Baker* v. *Peterson*, 4 Dill. 562; *Hoadly* v. *San Francisco*, 3 Saw. 553; *Andrews* v. *Garrett*, 2 Cent. Law Jour. 797; *M. & M. National Bank* v. *Wheeler*, 13 Blatchf. 218; *Crane* v. *Reeder*, 15 Alb. Law Jour. 103.) This disposes of one objection made to the time when the petition was filed.

It has, however, been argued with great earnestness that the petition for removal was not actually presented to the court "before trial." We agree that, as a general rule, the petition must be filed in a way that it may be said to have been in law presented to the court before the trial is in good faith entered upon. There may be exceptions to this rule, but we think it clear that Congress did not intend by the expression "before trial," to allow a party to experiment on his case in the State court, and if he met with unexpected difficulties, stop the proceedings and take his suit to another tribunal. But to bar the right of removal, it must appear that the trial had actually begun and was in progress in the orderly course of proceeding when the application was made. No mere attempt of one party to get himself on the record as having begun the trial will be enough. The case must be actually on trial by the court, all parties acting in good faith, before the right of removal is gone.

Upon the facts in this case it is apparent to our minds that the trial had in no sense begun when Dennison presented his petition formally to the court for a removal. It is equally apparent that the counsel for the construction company attempted to get up a race of diligence with his adversary in which he should come out ahead. As soon as the court decided not to admit Meyer as a party to the suit, he seems to have offered the contract sued on in evidence, but, unfortu-

nately for him, in so doing he did not keep himself inside the orderly course of proceedings. It is evident that at that time the cause was not up for hearing on its merits, and it nowhere appears that the court accepted then the offer of the counsel to put in his evidence. Before any action was taken by the court on that subject, Dennison presented his petition, which had been on file ready to be presented as soon as the motion of Meyer was decided. Immediately after the application of Dennison was disposed of, the court adjourned until the next day, and when it again met, Dennison renewed his application. This being refused, the construction company asked leave to file a reply, which, up to that time, had not been done, and which was necessary to complete the pleadings and make up the issues for trial. That being done, and a motion by Dennison for leave to amend his answer overruled, the court proceeded "with the trial of said cause on the issues joined therein." A statement of these facts is sufficient to show that, when Dennison presented his petition in form to the court, the trial had, in no just sense, begun. As in the case of *Yulee* v. *Vose*, 99 U. S. 539, "the most that can be said is that preparations were being made for trial."

It is further claimed that *the citizenship of Dennison in Ohio was not proved.* As in the case of the sufficiency of the bond, the question here is not whether, if the statements of the petitioner in that particular had been denied, it would have been competent for the State court to institute an inquiry on that subject, but whether, on the facts as they appear on the face of this record, which also shows how they should have appeared to the court below, that court was justified in proceeding further in the suit. We fully recognize the principle heretofore asserted in many cases that the State court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right. But here, to say nothing of the statements in the petition which were not disputed, the record is full of evidence that Dennison was a

citizen of Ohio. In the mortgage, Thompson is described as of Pennsylvania, and Dennison as of Ohio. In addition to this, in order to bring them into court, the affidavit of the counsel for the construction company was put on file, in which it is directly stated, under date of April 6th, 1874, that personal service of process could not be made on them within the State, and that they were non-residents. Under these circumstances it was certainly error for the State court to retain the cause because it was not shown that the citizenship of the adverse parties was in different States. The citizenship of the two corporations in Iowa is averred by the construction company in its own pleadings.

It is still further claimed that, even though the lower court ought to have accepted the petition and bond, and withheld all further proceedings in the suit, *that error was waived by the subsequent appearance of Dennison and going to a hearing*, and that for this reason it was right for the Supreme Court not to reverse the judgment because of the original fault. This question is settled by the case of *Insurance Company* v. *Dunn*, 19 Wall. 214, where it is distinctly held that if a party failed in his efforts to obtain a removal and was forced to trial, he lost none of his rights by defending against the action. This record is full of protests on the part of Dennison against going on with the suit, and of exceptions to the ruling which kept him in court. Indeed, it is difficult to see what more he could have done than he did do to get out of court and take his suit with him. He remained simply because he was forced to remain, and is certainly now in a condition to have the original error of which he complained corrected in any court having jurisdiction for that purpose. In addition to this, we now know that he did take his suit to the Circuit court and carried his adversaries with him. It is true, by reason of the fault of the clerk of the State court, he was unable to file his transcript of the record in the Circuit court on the first day of the term, but he did so on the second, and had the cause regularly docketed, after which a trial was had, all parties ap-

pearing. It is also true that the construction company objected to the delay, but that objection was, we think, properly overruled. While the Act of Congress requires security that the transcript shall be filed on the first day, it nowhere appears that the Circuit court is to be deprived of its jurisdiction, if, by accident, the party is delayed until a later day in the term. If the Circuit court for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete and the removal properly effected.

We must, therefore, hold that the Supreme Court of the State erred in not reversing the judgment of the Circuit court of the county and sending the cause back with instructions to that court to proceed no further with the suit.

3. As to the priority of liens.

It is conceded that by the laws of Iowa a mechanic's lien for work done under a contract takes precedence of all incumbrances put on the property by mortgage or otherwise after the work was commenced. Such has been the uniform course of decisions by the highest court of the State.

It is also conceded that by a statute of the State (Code 1874, sec. 385) there can be no mechanic's lien in favor of one who takes collateral security on the contract under which he does his work.

Such being the law, it is clear that as the mortgage was not recorded until June 4, 1872, and work under the contract of the construction company was commenced September 29, 1870, the mechanic's lien must have precedence, unless the construction company took collateral security on their contract, or something equivalent was done.

It is contended that the words, "all the money for the work hereinbefore specified to be paid by the citizens of Delaware county," which appear above the signature of the president of the railroad company to the contract, give the construction company collateral security, and thus vitiate the lien. We cannot so interpret the contract. In the body of the instrument the obligation of the railroad company to

pay is absolute and unconditional. The additional clause does not purport to transfer to the construction company the moneys that are due or that may become due from the citizens of Delaware county. No control is given the construction company over these moneys. The most that can be said of the clause is, that it contains an implied obligation on the part of the railroad company to use the money which came into its hands from the citizens of Delaware county to discharge its obligations under the contract, and a corresponding obligation on the part of the construction company to wait a reasonable time for the collection of these moneys before putting the railroad company in default for non-payment.

In *Christmas* v. *Russell*, 14 Wall. 69, we said: "An agreement to pay out of a particular fund, however clear its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. * * * The assignor must not retain any control over the fund, any power to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee." It seems to us that this is conclusive of the present case. The railroad company has nowhere, by its agreement, given the construction company any power to collect. The amount due is nowhere specified, neither does it appear from the instrument itself what was the nature of the obligations the citizens of Delaware county were under to make the payment. It is not even said that the payments thus to be made grew out of any obligations of the citizens of Delaware county to the railroad company. According to the construction claimed, the addition of these somewhat indefinite words at the end of the contract, and after a part of the signatures had been affixed, must have the effect of changing the whole tenor of the contract as set out in the body of the instrument, and substituting the citizens of Delaware county as obligors and bound absolutely for the payment of the work to be performed, instead of the railroad company. Such, we cannot believe, was the intention of the parties, and everything

which occurred afterwards is entirely inconsistent with any such idea. It now appears from the evidence that there had been very considerable subscriptions to the capital stock of the railroad company, by the citizens of Delaware county, and that taxes had been levied by the county, or some of the townships in the county, to aid in the construction of the railroad. It also appears that all of this money was collected by, and paid to the railroad company. In no single instance, so far as we can discover, was it paid to the construction company. The full amount subscribed and levied was not sufficient to pay all that was due that company. Much of it was paid over, but all of it was not. Of the amount paid the construction company by the railroad company, a very considerable portion was collected from other sources.

Without pursuing the subject further, it is sufficient to say that, in our opinion, the construction company has done nothing to waive or deprive it of the right to assert a mechanic's lien, and that the decrees of the Circuit court establishing the superiority of the lien of the mortgage were wrong and must be reversed. As the sale under the execution from the State court, by which the Delaware County Railroad Company now holds and claims title, was made in a suit to which the trustees of the mortgage were not at the time parties served with process, the sale did not cut off their interest as mortgagees of the property sold. Neither are they bound by the decree in the State court finding the amount due the construction company. The Delaware County Railroad Company took by its purchase only such title as the construction company had to convey, and as the interest of the mortgagees was not cut off by the sale to the construction company, it is not cut off by the transfer to the Delaware County Company.

We, therefore, order and adjudge as follows:

1. That the judgment of the Supreme Court of Iowa be reversed with costs, and that the cause be remanded, with instructions to reverse the decree of the Circuit Court of Del-

aware County, and direct that court to proceed no further with the suit.

2. That the decree of the Circuit Court of the United States in the second of these cases be reversed with costs, and that the cause be remanded with instructions to ascertain the amount due the construction company under its contract, and to enter a decree establishing the lien of that company as prior in right to that of the mortgage, and in default of payment of the amount due by a day to be named, directing the sale of that part of the railroad company which lies in Delaware county, to pay the debt. Such provision for redemption is to be made as is allowed in such cases by the laws of Iowa.

3. The decree of the Circuit court in the remaining case is also reversed with costs, and the cause remanded with instructions to enter a decree establishing the lien of the construction company as superior to that of the mortgage, and declaring the title of the Delaware County Railroad Company, by reason of the sheriff's sale in the State court, to be invalid and not sufficient to pass title as against the lien of the mortgage, and for such other proceedings as justice requires.

Mr. Justice STRONG concurred in the judgment, but not in the construction given by the majority of the court to the second section of the Act of 1875, respecting removals from State courts.

Mr. Justice BRADLEY concurred in the judgment, and delivered the following opinion in which Mr. Justice SWAYNE concurred:

I concur in the judgment in these cases, but dissent from so much of the opinion as seems to assume that one condition of Federal jurisdiction, in the removal of a cause from a State court, under the first clause of sec. 2, Act of 1875, is, that each party on one side of the controversy must be a citizen of a different State from that of which either of the parties on the other side is a citizen. This portion of the Act gives the right of removal to either party, in any suit in

which there is "a controversy between citizens of different States." In my judgment a controversy is such, as that expression is used in the Constitution, and in the law, when any of the parties on one side thereof are citizens of a different State, or States, from that of which any of the parties on the other side are citizens. It is true, if there are other parties on opposite sides of the controversy who are citizens of a common State, it may also be a controversy between citizens of the same State. In other words, a controversy may be, at the same time, both a controversy between citizens of the same State and between citizens of different States. But the fact that it is both, does not take away the Federal jurisdiction. Neither the Constitution, nor the law, declares that there shall not be such jurisdiction if any of the contestants on opposite sides of the controversy are citizens of the same State; but they do declare that there shall be such jurisdiction if the controversy is between citizens of different States. The gift of judicial power by the Constitution, and the gift of jurisdiction by the law, are in affirmative terms; and those terms include as well the case when only part of the contestants opposed to each other are citizens of different States, as that in which they are all of different States. And I see no good reason why both the Constitution and the law should not receive a construction as broad as that of the terms which they employ. On the contrary, I think there is just reason for giving to these terms their full effect. The object of extending the judicial power to controversies between citizens of different States was, to establish a common and impartial tribunal, equally related to both parties, for the purpose of deciding between them. This object would be defeated in many cases if the fact that a single one of many contestants on one side of a controversy being a citizen of the same State with one or more of the contestants on the other side, should have the effect of depriving the Federal courts of jurisdiction. This absurdity became so glaring under the construction formerly given by this court to the Judiciary Act of 1789, in the case

of corporations, when every stockholder was held to be a party, that the court was at length impelled to regard a corporation as a citizen of the State which created it, without regard to the citizenship of its members; — thus getting rid of the troublesome stockholder who happened to be a citizen of the same State with the opposite party, and who almost always appeared in the case.

If we give the same construction to the present law which was given to the Judiciary Act, we shall certainly meet with like embarrassment and difficulty in exercising the fair and proper jurisdiction of the Federal courts. No cases are more appropriate to this jurisdiction, or more urgently call for its exercise, than those which relate to the foreclosure and sale of railroads extending into two or more States, and winding up the affairs of the companies that own them; since, in addition to the convenience of a single jurisdiction having cognizance of the whole matter (which could readily be conferred, if it is not so), the local tribunals in such cases, however upright and pure, are naturally more or less favorably affected towards the interests of their own citizens; and yet, it is almost always essential, in order to do complete justice in these cases, to call before the court some parties on opposite sides of the controversy who are citizens of the same State. If this fact is to deprive the Federal courts of jurisdiction, without regard to the numerous and important contestants on opposite sides who are citizens of different States, the value of the institution of national courts, for taking cognizance of controversies between citizens of different States, will be greatly impaired.

But it seems to me clear that, in construing the present law, we are not bound by the construction given to the old Judiciary Act. The words of that Act, conferring jurisdiction upon the Circuit courts in respect of citizenship, were not the same as those used by the present law or by the Constitution. It only conferred jurisdiction when "the suit is between a citizen of the State where the suit is brought and a citizen of another State." The singular number only

was used; and the courts, in applying the law to cases in which there was a plurality of plaintiffs or defendants, construed it (perhaps justly) as requiring that each plaintiff and each defendant should have the citizenship required by the law. But, now, it is not so. The present law follows the words of the Constitution, and gives jurisdiction to the Circuit courts in the broadest terms, namely, whenever, in any suit, there is "a controversy between citizens of different States;" and this broad and general expression, as I think I have shown, gives jurisdiction where any of the contestants on opposite sides of the controversy are citizens of different States.

The only objection to this construction which has been seriously pressed, is drawn from the argument *ab inconvenienti;* namely, that if in a controversy where the contestants are numerous, a single case of diverse citizenship between opposite parties should give Federal jurisdiction, the courts of the United States would be overwhelmed with business, litigants would be unnecessarily drawn away from the domestic tribunals, and the intent of the Constitution would be subverted. Now, whilst I am satisfied that the apprehended inconveniences are greatly exaggerated, the inconveniences which would result from a contrary interpretation to that contended for would be at least equally great in depriving the Federal courts of jurisdiction by a single case of common citizenship between opposite parties, though a large majority of the opposing litigants are citizens of different States; and, thus, one inconvenience would balance the other, and we should still be left to seek the true construction of the Constitution and the law from the words which they use. But the inconveniences would not be equal. To deprive the Federal courts of jurisdiction by a partial community of citizenship between the opposite parties would, in many instances, actually defeat the very object which the Constitution and the law have in view.

Even if it should happen that, upon the construction contended for, many cases might be brought into the Fed-

eral courts in which a partial community of citizenship did exist between the opposing parties, what harm would ensue? Ought it not to be presumed that the courts, which are courts of the common country of all the parties, will as well do equal and exact justice between them as the State courts could do? If the judicial force is not sufficient to meet the exigency, let it be increased. If the courts are not held at sufficiently convenient places, that difficulty can easily be removed. The phrase in question, "controversies between citizens of different States," is a constitutional one; and the construction which we may give to it will affect the judicial powers of the Federal government for all time; and any temporary inconvenience arising from existing arrangements, which can be remedied by legislation, ought not to stand in the way of a fair construction of the organic law.

But it is not necessary to pass upon this question in this case. The present controversy is wholly between citizens of different States, and we are all agreed as to the decision that ought to be made. When the question does come squarely before us, and it becomes necessary to decide it, it is to be hoped that it may receive the fullest consideration.

SUPREME COURT OF THE UNITED STATES.

No. 32—October Term, 1880.

The New Orleans, Mobile and Texas Railroad Company, Plaintiff in Error, vs. The State of Mississippi. } In error to the Supreme Court of the State of Mississippi.

"Upon the authority of Cohens v. Virginia, 6 Wheat. 375; Osborne v. Bank of United States, 9 Wheat. 816; Mayor v. Cooper, 6 Wall. 250; Gold-washing and Water Co. v. Keyes, 96 U. S. 201. and Davis v. Tennessee, 100 U. S. 264, holds the following to be settled law:

1. That while the 11th amendment of the National Constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, such power is extended by the Constitution to suits commenced or prosecuted by *a State against an individual* in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State.
2. That a *case in law or equity consists* of the right of one party, as well as of the other, and *may, properly, be said to arise under the Constitution or a law of the United States*, whenever its correct decision depends on the *construction* of either.
3. That cases arising under the *laws of the United States* are such as *grow out of the legislation of Congress*, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted.
4. That except in the cases of which this court is given, by the Constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and, lastly,
5. That it is *not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend* on the Constitution or laws of the United States; but when *a* question, to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

"These propositions," he adds, "are now too firmly established to admit of, or to require, further discussion, embrace the present case, and show that the inferior State court erred, as well in not accepting the petition and bond for the removal of the suit to the Circuit Court of the United States, as in thereafter proceeding to hear the cause. It was entirely without *jurisdiction to proceed after the presentation of the petition and bond for removal.*"

Mr. Justice HARLAN delivered the opinion of the Court.

The plaintiff in error, defendant below, filed a petition in the State court of original jurisdiction for the removal of his suit into the Circuit Court of the United States for the Southern District of Mississippi. The petition was accompanied by a bond, with good and sufficient surety, conditioned as required by the statute. The application for removal was denied, and the court, against the protest of

the company, proceeded with the trial of the suit. A demurrer to the answer was sustained and judgment was entered in behalf of the State. Upon writ of error, sued out by the company, the Supreme Court of Mississippi gave its sanction to the action of the inferior court upon the petition for removal, and affirmed, in all respects, its judgment upon the merits.

The first assignment of error relates to the action of the State court in proceeding with the trial after the filing of the petition and bond for removal of the suit. If the suit was one which the company was entitled, under the statute, to have removed into the Circuit Court of the United States, then all that occurred in the State court, after the filing of the petition and bond, was in the face of the Act of Congress.—(*Gordon* v. *Longest*, 16 Pet. 104; *Kanouse* v. *Martin*, 15 How. 208; *Dunn* v. *Ins Co.*, 19 Wall. 223–4.) Its duty, by the express command of the statute, was, the suit being removable, to accept the petition and bond and proceed no further.

Among the cases to which the National Constitution extends the judicial power of the United States are those arising under the Constitution or laws of the Union. The first section of the Act of March 3d, 1875, determining the jurisdiction of Circuit Courts of the United States, and regulating the removal of causes from State courts, invests such Circuit courts with original jurisdiction, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500 and "arising under the Constitution or laws of the United States." Under the second section of that Act either party to a suit of the character just described may remove it into the Circuit Court of the United States for the proper district. The only inquiry, therefore, upon this branch of the case is, whether the present suit, looking to its nature and object as disclosed by the record, is, in the sense of the Constitution, or within the meaning of the Act

of 1875, one "arising under the Constitution or laws of the United States."

The action was commenced by a petition filed, in behalf of the State, against the New Orleans, Mobile and Chattanooga Railroad Company, (now known as the New Orleans, Mobile and Texas Railroad Company,) — a corporation created, in the year 1866, under the laws of Alabama, and, by an Act of the Legislature of Mississippi, passed February 7, 1867, recognized and approved as a body politic and corporate in that State, with authority to exercise therein the rights, powers, privileges, and franchises granted to it by the State of Alabama.

The object of the action was to obtain a peremptory writ of mandamus, requiring the company to remove a stationary bridge, which it had erected across Pearl River, on the line between Louisiana and Mississippi, and construct and maintain, in the central portion of the channel of that river, where the railroad crosses, a draw-bridge which, when open, will give a clear space, for the passage of vessels, of not less than sixty feet in width, and provide, after its construction, for the opening of the draw-bridge, without unnecessary delay, for any and all vessels seeking to pass through it.

The claim of the State is:

1. That the construction and maintenance of a stationary bridge across Pearl River is in violation of the company's charter, an obstruction to the navigation of the river, and a public nuisance, resulting in great and irreparable damage to the people of Mississippi.

2. That Pearl River, by the common law and the law of nations, is a navigable river, in which the tide ebbs and flows above said bridge, is navigable for steamboats for more than two hundred miles, and has been so navigated from time immemorial; that the river is the boundary between Mississippi and Louisiana, neither of those States having power to authorize any obstruction to its free navigation; that by an Act of Congress, entitled "An Act to

enable the people of the western part of Mississippi Territory to form a Constitution and State government, and for the admission of said State into the Union on an equal footing with the original States," passed March 1, 1817, it was, among other things, provided "that the Mississippi River and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways and forever free, as well to the inhabitants of said State as to other citizens of the United States;" that these provisions constituted a condition on which the State of Mississippi was admitted into the Union, and an engagement on the part of the United States that all navigable rivers and waters emptying into the Gulf of Mexico should forever be free to all the inhabitants of the State of Mississippi; that Pearl River does lead and empty into the Gulf of Mexico; that the bridge is such an obstruction to the navigation of Pearl River as to cause permanent injury, as well to the State of Mississippi and its inhabitants, as to the commerce of the United States and of the world, and consequently, was in violation of the law.

The company resists the application for a mandamus upon several grounds.

It affirms that the bridge in question had been constructed and is maintained in accordance with its charter and conformably to the power and authority conferred by the States of Alabama, Mississippi and Louisiana.

It further avers, in its answer, that the railroad is a great public highway through those States, connecting them with other portions of the United States; that Congress, in view of the magnitude and cost of the work, and to expedite its construction, by an Act entitled "An Act to establish and declare the railroad and bridges of the New Orleans, Mobile and Chattanooga Railroad, as hereafter constructed, a post-road, and for other purposes," approved March 2, 1868, authorized and empowered that corporation to construct, build and maintain bridges over and across the navigable waters of the United States on the route of said railroad, between

New Orleans and Mobile, for the use of the company and the passage of its engines, cars, trains of cars, mails, passengers and merchandise, and that the railroad and its bridges, when complete and in use, were to be held and deemed lawful structures and a post-road; that the Act of Congress required draw-bridges on the Pascagoula, the Bay of Biloxi, the Bay of St. Louis, and the Great Rigolet, but none on Pearl River, power being reserved by Congress to amend or alter the Act so as to prevent or remove material obstructions; that the company is authorized to maintain the bridge in question under that Act of Congress; that the same is a lawful structure and a post-road, which no court can, consistently with the Act of Congress, overturn or abate as illegal or as a nuisance.

On the day succeeding that on which its answer was filed, the company presented the petition for removal, to which reference has already been made, accompanied by a bond in proper form. The petition sets out the nature and object of the action, and claims that the right to erect and to maintain the present bridge for the conveyance of the cars, trains, passengers, mails and merchandise, vested in the company, "on a contract with the State of Mississippi in the enactment aforesaid; that the State of Mississippi has no power to repudiate that contract or to impair its obligations; that it is a vested right resting on a contract and supported and sustained by the Constitution of the United States, and that this cause is one arising under the Constitution of the United States."

It then proceeds:

"'And your petitioner further represents that the bridge aforesaid, and its maintenance over the said river in the manner in which it exists, is authorized by the Act of Congress approved March 2d, 1868, which authorized and empowered the said company to construct, build and maintain bridges over and across the navigable waters of the United States on the route of the said railroad between Mobile and New Orleans, and that when constructed they should be

recognized as lawful structures and a post-road, and were declared to be such; and the Congress reserved the power to alter the same when they become an obstruction to the navigable waters.

"Your petitioner says that the railroad and bridges are and have been for three or more years a post-road, over which the mails of the United States have been carried and are now being carried; and as the bridge referred to is a lawful structure under the laws of the United States, this suit impugns the rights, privileges and franchises granted by the Act of Congress aforesaid of the 2d March, 1868."

From this analysis of the pleadings, and of the petition for removal, it will be observed that the contention of the State rests, in part, upon the ground that the construction and maintenance of the bridge in question is in violation of the condition on which Mississippi was admitted into the Union, and inconsistent with the engagement, on the part of the United States, as expressed in the Act of March 1, 1817. On the other hand, the railroad company, in support of its right to construct and maintain the present bridge across Pearl River, invokes the protection of the Act of Congress passed March 2d, 1868. While the case raises questions which may involve the construction of State enactments, and also, perhaps, general principles of law, not necessarily connected with any Federal question, the suit otherwise presents a real or substantial dispute or controversy which depends altogether upon the construction and effect of an Act of Congress. If it be insisted that the claim of the State, as set out in its petition, might, possibly, be determined by reference alone to State enactments, and without any construction of the Act of 1817, the provisions of which are invoked by the State in support of its application for mandamus, the important, and, so far as the defense is concerned, the fundamental question would still remain, as to the construction of the Act of Congress of March 2, 1868. That Act, the company contends, protects the present stationary bridge against all in-

terference whatever, upon the part either of the State or of the courts. In other words, should the court be of opinion that the law is for the State, if the rights of parties were tested simply by the statutes of Alabama and Mississippi, it could not evade, but must meet and determine the question distinctly raised by the answer, as to the operation and effect of the Act of Congress of 1868.

Is it not, then, plainly, a case which, in the sense of the Constitution, and of the statute of 1875, *arises* under the laws of the United States?

If regard be had to the former adjudications of this court, this question must be answered in the affirmative.

It is settled law, as established by well-considered decis ions of this court, pronounced upon full argument and after mature deliberation, notably in *Cohens* v. *Virginia*, 6 Wheat. 375; *Osborne* v. *Bank of United States*, 9 Wheat. 816; *Mayor* v. *Cooper*, 6 Wall. 250; *Gold-Washing and Water Co.* v. *Keyes*, 96 U. S. 201; and *Davis* v. *Tennessee*, 100 U. S. 264:

That while the 11th amendment of the National Constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, such power is extended by the Constitution to suits commenced or prosecuted by a State against an individual, in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State.

That a case in law or equity consists of the right of one party, as well as of the other, and may, properly, be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.

That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protec-

tion, or defense of the party, in whole or in part, by whom they are asserted.

That, except in the cases of which this court is given, by the Constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and, lastly,

That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when *a* question, to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

These propositions, now too firmly established to admit of, or to require, further discussion, embrace the present case, and show that, whether we look to the Federal question raised by the State in its original petition, or to the Federal question raised by the company in its answer, the inferior State court erred, as well in not accepting the petition and bond for the removal of the suit to the Circuit Court of the United States, as in thereafter proceeding to hear the cause. It was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal.

In view of our decisions in *Ins. Co.* v. *Dunn*, 19 Wall. 214, in *Removal Cases*, 100 U. S. 475, and in other cases, it is scarcely necessary to say that the railroad company did not lose its right to raise this question of jurisdiction by contesting the case, upon the merits, in the State courts after its application for the removal of the suit had been disregarded. It remained in the State court under protest as to the right of that court to proceed further in the suit, and there is nothing in the record to show that it waived its right to have the case removed to the Federal court, and

consented to proceed in the State court, as if there had been no petition and bond for the removal.

The judgment of the Supreme Court of Mississippi is, therefore, reversed, and the cause remanded for such orders as may be consistent with this opinion, and with directions that the court of original jurisdiction be required to set aside all judgments and orders made in this suit after the presentation of the petition and bond for its removal into the Circuit Court of the United States, and proceed no further in the suit.

Mr. Justice FIELD did not hear the argument of this case, and, therefore, did not participate in its decision.

[The foregoing opinion was delivered after that part of the text was in press, relating to what is *a case in law or equity, arising under the Constitution or a law of the United States.* This opinion is printed in full, as containing the most recent statement of the established doctrines of the Supreme Court, on the subject of Federal jurisdiction in respect of *subject matter.* The REMOVAL CASES printed *ante*, pp. 113–130, embodies the leading judgment of the court, as respects jurisdiction on the *ground of citizenship*, under the Act of 1875. For these reasons these judgments are re-printed here for the convenience of the reader.]

APPENDIX B.

Forms of PETITIONS FOR REMOVAL and BONDS under the Revised Statutes, Sec. 639, and the Act of March 3, 1875. Form of Writ of CERTIORARI authorized by Sec. 7 of the last-named Statute.

The following Forms, with slight alterations, are those in common use in the Eighth Judicial Circuit. By reference to the text it will be seen that they are in some respects unnecessarily full; but they are, perhaps, safer than others would be, which should be reduced to the supposed exact requirements of the Act in the particular case.

Form of PETITION *for the transfer of a cause from the State to the Federal court under the act of March, 2, 1867, as revised and embodied in the Revised Statutes of the United States, sec. 639, sub-division 3.*

In the ——— Court of ——— County, State of———.

vs. } Petition for Transfer of Suit to Federal Court.

To the Honorable, the ——— Court of ——— County, State of ———:

Your petitioner [here insert the plaintiff's name], respectfully shows that he is plaintiff in the foregoing entitled suit, and that the same was by him commenced on or about the —— day of ——, 18 , in said ——— Court; that your petitioner was at the time of bringing said suit, and still is, a citizen of the State of ——, and a resident thereof.

Your petitioner further shows that there is, and was at the time said suit was brought, a controversy therein between your petitioner and the said defendant, ————, who is a citizen of the State of ——, and

resident thereof; that said action was brought by your petitioner, for the purpose of [here briefly state the nature of the suit and the relief asked], and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs. Your petitioner further represents, that this suit has not been tried, but is now pending for trial in the District court of the State of ——, for said County of ——, and that your petitioner desires to remove the same into the Circuit Court of the United States for the District of ——, in pursuance of the Act of Congress in that behalf provided, to wit, the Revised Statutes of the United States, section 639, sub-division 3.

Your petitioner further says, that he has filed the affidavit required by the statute in such cases, and offers herewith his bond executed by ————, of ——, as surety, in the penal sum of two hundred and fifty dollars, conditioned as by said Act of Congress required.

Your petitioner therefore prays, that the said bond may be accepted as good and sufficient, according to the said Act of Congress, and that the said suit may be removed into the next Circuit Court of the United States, in and for said District of ——, pursuant to the aforesaid Act of Congress, in such case made and provided; and that no further proceeding may be had therein in this court.

And your petitioner will ever pray, etc.,

Attorney for Plaintiff.

Form of AFFIDAVIT OF PREJUDICE *or local influence to accompany the preceding petition.*

IN THE —— COURT OF —— COUNTY, STATE OF——.

vs. Plaintiffs, Defendants. } Affidavit.

State of ——, County of ——, ss.

I, ————, being duly sworn, do say that I am one of the —— in the above entitled cause; that I have reason to believe, and do believe, that from prejudice and local influence, —— will not be able to obtain justice in said State court.

Subscribed by the said —— in my presence, and by him sworn to before me at ——, this —— day of ——, A. D. 188 .

Notary Public in and for —— County.

Who may make this affidavit. See *ante*, chap. 16. How to be taken and certified. See *ante*, chap. 16.

Form of BOND *to accompany the Preceding Petition for Removal of a Cause, under the Act of March 2, 1867, as Revised and Embodied in the Revised Statutes of the United States.*

KNOW ALL MEN BY THESE PRESENTS:

That we ———— as principal, and ———— of —— as surety, are hereby held and firmly bound unto ———— in the penal sum of ———— Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

The condition of this obligation is such, that if ———— shall enter and file, or cause to be entered and filed, in the next Circuit of the United States, in and for the —— District of ——, on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in a certain suit or action now pending in the District court of the County of —— and State of ——, in which ———— is plaintiff, and ———— defendant; and shall do such other appropriate acts as, by the Act of Congress in that behalf, are required to be done upon the removal of such suit from said State court into the said United States court, then this obligation to be void, otherwise of force.

Dated ——, A. D. 188 .

STATE OF ——, }
—— County. } *ss.*

I, ———— of said County, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of ——, and a property-holder therein; that I am worth the sum of five hundred dollars, over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of ——, liable to execution, of the value of more than five hundred dollars.

Subscribed in my presence by ————, and by him sworn to before me this —— day of ——, A. D. 188 .

The above form of bond is applicable, also, to removals under section 633, sub-division 1, of the Revised Statutes, formerly section 12 of the Judiciary Act. If the removal is under sub-division 2 of said section 639, by the non-resident

defendant, the *condition* of the bond may be modified, as prescribed by this section, to enter and file in etc., on etc., "copies of all process, pleadings, depositions, testimony, and all other proceedings in the cause concerning or affecting the petitioner for the removal in a certain suit or action now pending," etc., as in the preceding form.

PETITION FOR REMOVAL BY THE NON-RESIDENT DEFENDANT UNDER THE REVISED STATUTES, SEC. 639, SUBDIVISION 2, FORMERLY THE ACT OF JULY 27, 1866.

Describe the parties, the State court in which the suit is pending, as in the preceding petition, stating particularly the citizenship of each of the plaintiffs and each of the defendants—the amount or value in dispute, as in the preceding form. Then insert in the petition for removal a statement that the said suit in the said State court is one in which there can be a final determination of the controversy, so far as concerns the petitioner, without the presence of the other defendants as parties in the cause. [No affidavit of prejudice or local influence is required.] Then offer surety as in preceding petition, and pray removal of the cause, so far as concerns ths petitioner for the removal, as in the foregoing form.

Form of PETITION *for Removal on the ground of* CITIZENSHIP, *under the Act of March 3, 1875, where the Adversary Parties are all Citizens of different States, and all the Plaintiffs or all the Defendants unite in the Petition for Removal.*

IN THE ——— COURT OF ——— COUNTY, STATE OF ———.

Plaintiff, vs. Defendant. } Petition for removal to the Circuit Court of the United States. District of ———.

To Said ——— Court:

Your Petitioner respectfully shows to this Honorable Court that the

matter and amount in dispute in the above entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the Petitioner was, at the time of the commencement of this suit, and still is, a citizen of the State of ——; and that ———— was then, and still is, a citizen of the State of ——; and that ——— was then, and still is, a citizen of the State of ——. [Here give in like manner the citizenship of each of the several plaintiffs and defendants in the cause.]*

And your petitioner offers herewith a bond with good and sufficient surety for his entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the District of ——, and he will ever pray.

Attorneys for Petitioner.

The Act of 1875 does not require the petition for the removal to be verified; but, as affording an assurance that the application is made in good faith, a verification may very properly be added, which may be in the following form:

STATE OF——, } ss.
—— County. }

I, ————, being duly sworn, do say that I am a member of the firm of ————, the attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition, and know the contents thereof; and that the statements and allegations therein contained are true, as I verily believe.

Subscribed by the said ———— in my presence, and by him sworn to before me, this the —— day of ——, A. D., 188 .

If, however, all the parties plaintiff or defendant do not join in the application for the removal, and the application is made under the latter clause of sec. 2 of the Act of March 3, 1875, by part of the plaintiffs or part of the defendants actually interested in the controversy, follow the preceding

form down to the star (*), giving the citizenship of each of the plaintiffs and defendants, and then add the following:

Your Petitioner states that, in the said suit above mentioned, there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between the said petitioner and the said ————, the said ———— and the said ————, [naming the parties actually interested in the said controversy].

If the nature of the controversy does not fully appear in the pleadings, it may be advisable to add a statement of the facts showing the case to be one within the latter clause of sec. 2 of the Act of March 3, 1875. After which let the petition follow the form above given.

If the PETITION FOR REMOVAL is on the ground that the suit is one "*arising under the Constitution or Laws of the United States, or treaties made under their authority*," it is not necessary to state the citizenship of the parties. It is, however, proper to do so; and if there are several parties, and the transaction in controversy is complex, it may be advisable to state the citizenship of each. The preceding form can, therefore, be followed down to the star (*), and then there may be added the following:

Your Petitioner states that the said suit is one arising under the laws of the United States, in this, to wit: [Here state the facts which show the Federal character of the case; see *ante*, chapters 2 and 8.]

After which let the petition continue as in the form above given.

Form of BOND *for the removal of a cause under the Act of March 3, 1875.*

KNOW ALL MEN BY THESE PRESENTS:

That I, ————, as principal, and ————, as sureties, are held and firmly bound unto ——— in the penal sum of —— dollars the pay-

ment whereof well and truly to be made unto the said ————, heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet, upon these conditions: The said———— having petitioned the ——— Court of ——— County, State of ——, for the removal of a certain cause therein pending, wherein ———— plaintiff, and ———— defendant, to the Circuit Court of the United States in and for the District of ————.

Now, if the said ————, your petitioner, shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto [*if special bail was originally requisite in said cause, then add* "and shall then and there appear and enter special bail in said suit"] then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals, this —— day of ——, A. D. 188 .

————————————[L. S.]

————————————[L. S.]

————————————[L. S.]

It is advisable that the sureties justify, but it is not absolutely necessary. Form of justification, see *supra*, at the end of the form of bond under the Act of March 2, 1867.

Form of Writ of CERTIORARI, *under Section 7 of the Act of March 3, 1875.*

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE JUDGE OF THE COURT OF [here describe the State court by name.]

Whereas it hath been represented to the Circuit Court of the United States for the District of ——, that a certain suit was commenced in the —— court of [here name the State court] wherein —— ——, a citizen of the State of ——, was plaintiff and —— ———, a citizen of the State of ——, was defendant, and that the said —— ——— duly filed in the said State court his petition for the removal of said cause into the said Circuit Court of the United States, and filed with said petition the bond with surety required by the Act of Congress of March 3, 1875, entitled an Act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State courts and for

other purposes," and that the clerk of the said State court above-named has refused to the said petitioner for the removal of said cause a copy of the record therein, though his legal fees therefor were tendered by the said petitioner:

YOU, THEREFORE, ARE HEREBY COMMANDED that you forthwith certify, or cause to be certified, to the said Circuit Court of the United States for the District of ——, a full, true and complete copy of the record and proceedings in the said cause, in which the said petition for removal was filed as aforesaid, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ; so that the said Circuit Court may be able to proceed thereon and do what shall appear to them of right ought to be done. Herein fail not.

[SEAL.] Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court, and the seal of the said Circuit Court hereto affixed this the —— day of ——, A. D. 188 .

Clerk of said Circuit Court.

The writ of *certiorari* should be directed to the judge or judges of the State court, but a return to the writ duly certified may be made, it is supposed, by the clerk of the said court. Stewart v. Engle, 9 Wheat. 426. See Bacon's Abridg., title *Certiorari; ante*, chap. 12.

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