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The Immunity of Federal Officers from State Prosecutions

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THE IMMUNITY OF FEDERAL OFFICERS FROM STATE PROSECUTIONS*

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I

In the American constitutional system there has always been the difficult problem of drawing the delicate line that must be drawn wherever there is an apparent conflict between the agencies of the state and those of the nation. One phase of this "state's rights" problem is the question as to how far the states' criminal laws can function against the individuals who carry on the business of the general government.

This problem was more acute in the early years of the nation, when the states blazed with righteous indignation at the interference of federal officers and took retaliatory measures.[1] It has tended to decline in violence as time has gone by, because, perhaps, of the changed attitude toward the nature of the central government. But the problem must still be considered because of the recent increase in federal legislation and taxation. The advent of nation-wide prohibition has given opportunity for a revival of the local antagonism that in times past has been centered on unpopular wars, the tariff, and internal revenue laws.

National prohibition has furnished the country with a new kind of federal activity, very unpopular in some parts, with a separate group of men for its enforcement. The men composing this group have demonstrated a willingness to use violent methods in accomplishing their ends, and have shown a tendency to disregard individual rights in favor of the enforcement of the Volstead Act.[2] Such

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[1] The opposition to the War of 1812, with its Embargo and Non-Intercourse Acts, in New England, and the Nullification Ordinance and Laws of South Carolina, in 1832, are examples.

[2] *Literary Digest*, October 8, 1927, Volume 95, No. 12, an article entitled "Prohibition Killings" brings out the fact that the incomplete records of the Prohibition Unit at Washington show 113 homicides by prohibition enforcement officers in the seven years and a half which elapsed between the beginning of Volsteadism and September 16, 1927. These records do not show the homicides by officers in other branches of government service, nor do they include the uses of violence by the officers which did not result in death to the addressees. The article mentions an interesting plan, sponsored by Senator

a group can easily be picked out as targets for official persecution by the local government agencies.

This sort of persecution has been attempted in the past in many ways, occasionally by specific state statutes[3] aimed directly at the enforcement of federal laws, but far more often by the deliberate and prejudiced application to federal officers of general state laws, intended to apply to all persons. This latter form has been by far the more popular and has been used frequently in such a manner as to give evidence of a deliberate attempt to thwart the enforcement of the federal law. The power to punish for contempt, after violation of a state injunction, writ of habeas corpus, or other decree, has also been used by the states to deter federal agents from the proper performance of their duties.[4]

The problem then arises, as to how much protection a federal officer should have against this hostile interference by the state officials. It cannot be doubted that he should have some protection, in order that he may perform his duties with reasonable freedom. But, on the other hand, he should not be allowed to claim a "diplomatic immunity" from all supervision while he is within the state on official business. His acts, as private individual, when not connected with those done in line of duty, should be made to conform to the standards set by the state for the protection of its interests.[5]

It can reasonably be said that those acts done under color of office, or in line of duty, should not be subject to final review within the

Dill, of Washington, to require prohibition enforcement officers to give bonds to protect those whom they might injure by unwarranted violence. Could such a plan pass Congress, the practice of employing undesirable persons as enforcement officers might cease.

[3] Laws of South Carolina, 1832, Chapters 3 and 4.

After the decision by the Supreme Court in *Chisholm v. Georgia* (1793), 2 Dallas 419, 1 L. E. 440, the court awarded a writ of inquiry of damages at the February term in 1794. This writ was never issued, but the lower house of the Georgia legislature passed a bill—which did not become law—providing that any federal marshal or other person who executed any process issued by the court in this case should be hanged. Long, *Cases on Constitutional Law,* page 5, footnote 2. Guthrie, "The Eleventh Article of Amendment to the Constitution of the United States," 8 Col. L. Rev. 183, 185, states that no record of such statute can be found, but agrees that it was probably proposed legislation of the lower house which never became law.

[4] *In re Hirsch* (1896), 74 Fed. 928; *Ex parte Turner* (1879), Fed. Cas. 14246; *Ex parte Robinson* (1855), Fed. Cas. 11935; *In re Neill* (1871), Fed. Cas. 10089; *In re Farrand* (1867), Fed. Cas. 4678; *Case of Electoral College* (1876), Fed. Cas. 4336; *Boske v. Comingore* (1900), 177 U. S. 459, 44 L. E. 846, 20 S. C. 976; *McCullough v. Large* (1889), 20 Fed. 309.

[5] *Johnson v. Maryland* (1920), 254 U. S. 51, 65 L. E. 126, 41 S. C. 16, "An employee of the United States does not secure a general immunity from state law while acting in the course of his employment."

state. While such acts may be properly amenable to local supervision and correction, yet it should be for the tribunals of the nation, rather than for those of the state, to have the final word as to whether the federal agent is right or wrong. Such is the situation at the present time. A federal officer is entitled to have the legal consequences of his official acts decided by the nation's courts. There are several methods by which he can secure this result.

Under the earliest one provided he can stand trial in the state court, plead his defense based on the federal law as the supreme law of the land,[6] go to the highest court of the state, and, if necessary, to the Supreme Court of the United States, claiming a federal question.[7]

But this method is slow, for it does not help one who is in custody for a non-bailable offense, or one who is committed to jail until he shall purge himself of contempt. This procedure will not avoid the hostile attitude of a prejudiced trial court, or of a jury box filled with men who think it contrary to natural law to enforce the prohibition statute.

If the only thing to be considered were an abstract point of federal law, this normal procedure of taking the case to the Supreme Court might do well enough. But it has shown itself to be unsatisfactory. Other means of escape, more swift, and more complete, are available. There are two of these modes of escape from state prosecution open to the federal officer.

The one is by the use of the writ of habeas corpus, issued by a federal District Court under United States Code, Title 28, Section 453, formerly Section 753 of the Revised Statutes, and the other is by a removal of the cause from the state to the federal court under United States Code, Title 28, Section 76, formerly Section 33 of the Judicial Code.[8] Since the history behind these two modes of procedure, and the incidents of their use are rather separate, their separate treatment will be necessary.

II

The provisions of Title 28, Sec. 453,[9] granting to federal officers the privilege of the writ of habeas corpus, date back to the Force Bill

[6] Constitution of the United States, Article VI, Section 2.
[7] United States Code, Title 28, Section 344.
[8] Act of March 3, 1911. Chapter 231. 36 Stat. 1087, 1097.
[9] "The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody . . . for an act done or omitted in pursuance of

of 1833,[10] an act which is also the origin of part of the removal clause of Title 28, Section 76. Under Title 28, Section 453, the writ of habeas corpus can be issued whenever a federal officer is in state custody for an act done in his official capacity. The essential difference between the use of the writ, and the right to remove the cause is that when the writ is used, the federal court summarily determines the guilt or innocence of the accused, and if convinced of the justification for his act, orders his discharge forthwith. Where a removal is had, the guilt or innocence of the accused must be tried before a jury in the usual course of court procedure.

While the habeas corpus is much more summary and effective than the removal, the propriety of its use is left to the discretion of the trial court. It has been the policy of the federal courts to use it only in cases of urgent necessity, where the slower removal or writ of error could not efficiently serve their purpose.[11]

Title 28, Section 453 includes not only federal officers in the scope of its words, but also applies to other individuals who can show the justification of a federal law for such of their acts which serve as the basis of a state prosecution.[12] The section extends a protection to federal officers against prosecutions based on any of their official acts, but by its tacit elimination of their unofficial activities it precludes any possibility of the officer claiming through it a "diplomatic immunity" from supervision over such non-official acts.

The leading case on the use of the habeas corpus, *In re Neagle*,[13] furnishes an interesting example of its practical operation. In that

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a law of the United States, or of an order, process, or decree of a court or judge thereof."

[10] Act of March 2, 1833. Chapter 57. Section 7. 4 Stat. 632.

[11] Rose, *Jurisdiction and Procedure of the Federal Courts*, third edition, Section 482. *Drury v. Lewis* (1906), 200 U. S. 1, 50 L. E. 343, 26 S. C. 229. *Boske v. Comingore* (1900), 177 U. S. 459, 44 L. E. 846, 20 S. C. 976.

[12] Leading cases in this regard are: *Hunter v. Wood* (1908), 209 U. S. 205, 52 L. E. 747, 28 S. C. 472, where Hunter, a ticket agent in South Carolina sold railroad tickets at a rate fixed by the order of the federal court, but at a higher figure than the one set by the state authority. He was prosecuted for this under a state statute, sought habeas corpus under Title 28, Section 453, and was ordered discharged by the trial court. *Ex parte Wood* (1907), 155 Fed. 190. This decision was affirmed by the Supreme Court on the ground that the petitioner was being prosecuted for an act done "under an order, process, or decree of a court of the United States."

Another case was *In re Loney* (1890), 134 U. S. 372, 33 L. E. 949, 10 S. C. 584, where Loney was prosecuted by the State of Virginia for perjury committed in the course of a congressional investigation. He was held to be entitled to a discharge on writ of habeas corpus by the federal court as he was being prosecuted for an act done under a law of the United States, and so could claim the benefit of Title 28, Section 453. See Rose, *op. cit.*, Sec. 480.

[13] (1890) 135 U. S. 1, 34 L. E. 55, 10 S. C. 658.

case one Neagle had been detailed as deputy United States marshal to protect the life of Mr. Justice Field, who was then riding the circuit. An attack was made on the Justice while he was on a railroad train. Neagle, in the course of his duty in protecting the Justice, committed a homicide. He was arrested for this by the state authorities, and sought a writ of habeas corpus under Title 28, Section 453, which was granted.[14] On appeal the Supreme Court, with Mr. Justice Miller writing the opinion, affirmed the judgment of the lower court. The court held that petitioner was clearly acting within the scope of his authority as a federal officer, and hence was entitled to the writ. In the course of his opinion Mr. Justice Miller said:

"If the prisoner is held in a state court to answer for an act which he was authorized to do by the laws of the United States . . . he cannot be guilty of a crime under the law of the state."

This would seem to enunciate the true principle behind the use of the writ of habeas corpus to release federal officers when prosecuted for official acts by state authorities. The federal law is the supreme law of the land. If it authorizes an act normally prohibited by state law, it abrogates the state law to the extent that the accused is guilty of no crime. His release would be eventual if the case went to trial in the state court and thence to the Supreme Court of the United States, and it is made immediate by the use of the writ of habeas corpus.

To be sure, the summary nature of the habeas corpus could be used to disrupt the course of the administration of justice by the state. But this is offset by its cautious use by the federal courts, and by the fact that a removal of the entire cause can also be secured to effect a result equally just, but less disastrous to the dignity of the state.

But few cases in which a construction of the habeas corpus provision has been necessary, have gone to the Supreme Court. The court has upheld the use of the writ in discharging from state custody a collector of the internal revenue who had been committed for contempt by the state court for his refusal to produce the official records of his office, when justified for his refusal by a valid federal law.[15]

In another case the writ was used to free a governor of a United States soldier's home, who had been indicted under a state law for

[14] *In re Neagle* (1889), 39 Fed. 833.
[15] *Boske v. Comingore* (1900), 177 U. S. 459, 44 L. E. 1150, 20 S. C. 976.

serving oleomargarine to the inmates of the home. The court held that these acts done in conducting the home did not come under the state supervision in this regard, and affirmed his discharge on habeas corpus.[16]

This provision of federal law played its part in the now historical situation created by the Fugitive Slave Laws. Quite frequently the state courts would attempt to free the escaped slaves from the custody of United States marshals by the use of a state writ of habeas corpus, and upon its disobedience would commit the federal officer to jail for contempt. He, in turn, would have to seek a federal writ under Title 28, Section 453 in order to be released.[17] A like situation has come up, where state courts have demanded the custody of enlisted men of the army from their commanding officers, and have committed the officers for contempt for their refusal to deliver up the men. Here too, the use of the federal writ has been valuable in protecting the officer from persecution by the state authorities.[18]

The military authorities make a more normal use of the writ when a soldier is arrested by the civil authorities for offenses committed in line of duty. The writ has been used a great deal to secure the custody of these enlisted men from state courts. The military authorities have never doubted their power to use either this remedy or the one provided by Article of War 117,[19] but their policy has been not to invite a clash with the civil authorities unless it is felt that the interests of maintaining the power and dignity of the federal government make it necessary to do so.[20]

The use of the writ has been efficacious, along with the removal clause, for the protection of revenue officers.[21] United States marshals found it a convenient mode of release in the days when service

[16] *Ohio v. Thomas* (1899), 173 U. S. 276, 43 L. E. 699, 19 S. C. 453. Same case in lower courts (1898), 87 Fed. 453, in Circuit Court of Appeals and (1897), 82 Fed. 304, in the circuit court.

[17] *Ex parte Jenkins* (1853), Fed. Cas. 7259; *Ex parte Robinson* (1856), Fed. Cas. 11934; *Ex parte Robinson* (1855), Fed. Cas. 11935; *Ex parte Sifford* (1857), Fed. Cas. 12848; *U. S. v Morris* (1854), Fed. Cas. 15811; all are cases of this sort.

[18] *Re Farrand* (1867), Fed. Cas. 4678; *In re Neill* (1871), Fed. Cas. 10089; *In re Fair* (1900), 100 Fed. 149; *In re Turner* (1902), 119 Fed. 231.

[19] United States Code Title 10, Section 1589. Extended provisions of Title 28, Section 76 to military forces.

[20] The attitude of the military authorities can be gathered from: Digest Ops. JAG., 1918, page 285; and Ops. JAG. 014.14, October 1, 1925. These opinions of the Judge Advocate General of the Army throw some light on the subject.

[21] *Ex parte Beach* (1919), 259 Fed. 956; *Carico v. Wilmore* (1892), 51 Fed. 196; Idem (1892), 51 Fed. 200; *Castle v. Lewis* (1918), 254 Fed. 917; *In re Hirsch* (1896), 74 Fed. 928, *refused.*

of federal process was a dangerous occupation, and the exercise of the privilege of self-defense not unusual.[22] Use has been made of it by those in other branches of the government service, in which cases the writ has generally been allowed.[23]

The right to a writ of habeas corpus is extended to all classes of federal officials, and for that matter, to all persons, while the right to a removal is given only to certain enumerated classes of government officials.

III

It seems hard to explain why all classes of government officials should be entitled to the writ of habeas corpus, and only certain enumerated ones to the privilege of removing criminal prosecutions. It must be remembered, however, that the right to a writ of habeas corpus comes under a general statute, extending to all persons, whether government officials or not, while the right to remove under Title 28, Section 76 is the outgrowth of many different statutes, passed at various times.

The right to remove has been granted sparingly, and only after the need for its use by a certain class has been shown to exist. Congress has been careful not to interfere with the rights of the states, except along the lines where past experience has pointed out the necessity.

This right to remove, now incorporated in Title 28, Sec. 76 was first granted to revenue officers and persons acting under the revenue

[22] *Ramsey v. Jailer* (1879), Fed. Cas. 11547; *U. S. ex rel Weeden* (1877), Fed. Cas. 14412; *U. S. v. Jailer* (1867), Fed. Cas. 15463; *U. S. v. Fullhart* (1891), 47 Fed. 802.

[23] *Case of Electoral College* (1876), Fed. Cas. 4336, where the State court attempted to influence the Federal Presidential electors. *Ex parte Turner* (1879), Fed. Cas. 14246, where state court attempted to secure possession of ballot boxes from federal authorities. *Campbell v. Waite* (1898), 88 Fed. 102, affirming *In re Waite* (1897), 81 Fed. 359, prosecution of one who had been appointed by federal authority to investigate the Van Leuven pension frauds, and who was apprehended by state authority for the offense of "threatening a criminal prosecution." *In re Hurst* (1879), Fed. Cas. 6926, prosecution by state of a Federal soldier for having killed a Confederate "bushwhacker" in a Civil War battle. *U. S. v. Fuellhart* (1901), 106 Fed. 911, counterfeiting laws. *In re Lewis* (1897), 83 Fed. 159, special agent of the Treasury Department. *Ex parte Morrill* (1888), 35 Fed. 261, Marshal enforcing the election laws.

Ex parte Shockley (1926), 17 Fed. (2) 133—Director of naturalization was ordered by State court to sign a "certificate of arrival." He refused and was committed by the State court for contempt, and was released under Federal writ of habeas corpus.

Refused in: *In re Marsh* (1892), 51 Fed. 277, and *Pales v. Paoli* (1925), 5 Fed. (2) 280, on ground that officers had exceeded their authority in making illegal arrests, and could be prosecuted by the state, in one case for kidnapping, and in the other for assault.

laws. The Force Bill[24] established it for customs officers in 1832, and later acts[25] extended it to internal revenue officers during and after the Civil War period. The right also extends to officers of either house of Congress,[26] to officers of the United States courts,[27] to soldiers in the military service,[28] and to those engaged in the enforcement of the National Prohibition Act.[29]

Prior to the time of the Force Bill, during the years 1815-1821, there had been in force several successive laws[30] which gave to various classes of government officials the right to remove criminal prosecutions brought against them in state courts because of their official activities. These statutes were occasioned by the opposition shown in some of the New England states to the conduct of the War of 1812.[31]

In addition to these short-lived statutes produced by the War of 1812, the conduct of the Civil War brought forth a crop of removal statutes that are no longer significant.[32]

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[24] Act of March 2, 1833, *supra*, Section 3.

[25] Act of March 7, 1864, Chapter 20, Section 9, 13 Stat. 14, 17, was the first act extending the right to internal revenue officers, and later the Act of June 30, 1864, Chapter 173, Sections 50 and 173, 13 Stat. 223, 241, 303, repealed and re-enacted the prior act; and the present law is an outgrowth of the Act of July 13, 1866, Chapter 184, Section 67, 14 Stat. 98, 171.

[26] Act of March 3, 1875. Chapter 130, Section 8, 18 Stat. 371, 401.

[27] Act of August 23, 1916, Chapter 399, 39 Stat. 532.

[28] Act of August 29, 1916, Chapter 418, Section 3, Article of War 117, 39 Stat. 619, 650, 669. Re-enacted by Act of June 4, 1920, Chapter 227, Chapter 2, Article of War 117, 41 Stat. 759, 787, 811. Now United States code, Title 10, Section 1589.

[29] Act of October 28, 1919, Chapter 85, Title II, Section 28, 41 Stat. 305, 307, 316. United States Code. Title 27, Section 45.

[30] Act of February 4, 1815, Chapter 31, Section 8, 3 Stat. 195, 198 was the first act of this kind, but it never had any effect, as it was by its own terms to expire with the War of 1812. That war had terminated, unknown to Congress, before the passage of the act. Act of March 3, 1815, Chapter 94, Section 6, 3 Stat. 231, 233, contained the same language as the prior act and was to continue in force for one year. This latter act was continued until March 4, 1817 by the Act of April 27, 1816, Chapter 110, Section 3, 3 Stat. 315. The Act of March 3, 1817, Chapter 109, Section 2, 3 Stat. 396 provided a right of removal much like that of the previous three, and it expired by its own limitation in 1821, and after that there was no such right of removal until the time of the Force Bill.

[31] Charles Warren, Federal Criminal Laws and the State Courts, 38 Harvard Law Review 545, 584.

[32] Act of March 3, 1863, Chapter 81, Section 5, 12 Stat. 755, 756 allowed removal of prosecutions resulting from official activity of any government official in carrying out the suppression of the rebellion of the Southern States. Procedural amendments to it were affected by the Acts of May 11, 1866, Chapter 80, Section 3, 14 Stat. 86; and of February 5, 1867, Chapter 27, 14 Stat. 385. The Act of 1863 was extended to cases arising under the Civil Rights Law, Act of April 9, 1866, Chapter 31, Section 3. 14 Stat. 27, and under the Freedmen's Act, Act of March 3, 1865, Chapter 90, 13 Stat. 507. Still later the Act of

For a long time after the passage of the early statutes allowing the removal of criminal causes brought against federal officers in state courts there was no case in which the privilege was sought. There is no reported instance of any criminal removal under the statutes passed shortly after the War of 1812.[33] The earliest case of a criminal removal under the terms of the Force Bill occurred in 1833, but it is not reported.[34] It was not until 1863 that there occurred a reported case involving the use of the privilege,[35] while the first reported case of an actually removed cause of this kind was in 1877.[36]

The language of Title 28, Section 76, as now constituted, allows the removal of civil causes as well as criminal ones against the designated officers. The problem behind the removal of the civil causes more closely resembles that of the removal of any civil suits, either for diversity of citizenship or for a federal question, and leaves that of the removal of criminal causes on a different plane.

This right to remove criminal causes under Title 28, Section 76 has been chiefly availed of by revenue officers in times past,[37] and

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1863 was adopted by the Elective Franchise Act, Act of May 31, 1870, Chapter 114, Section 18, 16 Stat. 140, 144, for the enforcement of the two preceding sections.

An Act of July 28, 1866, Chapter 298, Section 8, 14 Stat. 328, 329, had extended the provisions of the Force Bill to acts done under the statutes providing for the collection of abandoned property; (Act of March 12, 1863, Chapter 120, 12 Stat. 820 and of July 2, 1864, Chapter 225, 13 Stat. 375). A further extension occurred in 1868, when the privilege was granted to all officers of the United States when prosecuted for acts arising out of the then late rebellion—Act of July 27, 1868, Chapter 276, Section 1, 15 Stat. 243.

In 1871 the privilege was granted to officers of the United States when acting under the laws intended to guarantee the elective franchise, Act of February 28, 1871, Chapter 99, Section 16, 16 Stat. 433, 438, and this latter Act was repealed by the Act of February 8, 1894, Chapter 25, 28 Stat. 36.

[33] *Wetherbee v. Johnson* (1817), 14 Mass. 412, involves the removal of a civil cause under the Act of March 3, 1815.

[34] Mentioned in Charles Warren, article cited, page 590,—a case occurring in Alabama, where a deputy United States marshal killed an Alabama citizen and was prosecuted for murder.

[35] *Commonwealth of Pennsylvania v. Artman* (1863), Fed. Cas. 10952, removal not allowed because attempted before indictment in the state court.

[36] *Findley v. Satterfield* (1877), Fed. Cas. 4792.

[37] *Virginia v. Bingham* (1898), 88 Fed. 561; *Findley v. Satterfield* (1877), Fed. Cas. 4792; *Georgia v. O'Grady* (1876), Fed. Cas. 5352; *In re Higgins* (1921), 273 Fed. 832; *Ex parte Huston* (1922), 282 Fed. 723; *McCullough v. Large* (1884), 20 Fed. 309, contempt proceeding; *Massachusetts v. Bogan* (1923), 285 Fed. 668; *North Carolina v. Kirkpatrick* (1890), 42 Fed. 689; *State v. Davis* (1879), 12 So. Car. 528; *State v. Deaver* (1877), 77 N. C. 555; *State v. Hoskins* (1877), 77 N. C. 530; *State v. Port* (1880), 3 Fed. 117; *State v. Port* (1880), 3 Fed. 124; *State v. Sullivan* (1892), 110 N. C. 513 (14 S. E. 796); *State v. Sullivan* (1892), 50 Fed. 593; *Alabama v. Peak* (1918), 252 Fed. 306; *Florida v. Huston* (1922), 283 Fed. 687; *Florida v. Peters* (1922), 284

since the Volstead Act by those engaged in its enforcement.[38] At one time saloon-keepers who possessed a federal license claimed to be "acting under the revenue laws" and hence to be entitled to remove to the federal courts prosecutions against them by the states for violation of the state liquor laws. These claims have been uniformly denied.[39]

Prior to the Act of 1916[40] United States marshals could not remove prosecutions against them, unless arising from acts done under the revenue laws or laws for the enforcement of the elective franchise. Several cases had come up in this way.[41] Since 1916 they have been entitled to remove prosecutions based on any of their official acts, but the reports show but few instances of the exercise of this privilege.[42]

Officers of Congress seem not to have found it necessary to use the privilege which was extended to them, and the military forces have not used the privilege of the 117th Article of War to any great extent.[43]

The wording of Title 28, Section 76[44] contains a rather full description of the procedure incidental to its use and of the circum-

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Fed. 612; *Georgia v. Bolton* (1882), 11 Fed. 217; *Oregon v. Wood* (1920), 268 Fed. 975; *U. S. ex rel Asher v. Pennsylvania* (1923), 293 Fed. 931; *Virginia v. DeHart* (1902), 119 Fed. 626; *Virginia v. Felts* (1904), 133 Fed. 85. *Ex parte Dickson* (1926), 14 Fed. (2) 609.

[38] *Hayes v. Smith* (1925), 5 Fed. (2) 684; *U. S. ex rel Asher v. Pennsylvania* (1923), 293 Fed. 931; *Oregon v. Wood* (1920), 268 Fed. 975; *Massachusetts v. Bogan* (1923), 285 Fed. 668; *In re Higgins* (1921), 273 Fed. 832; *Illinois v. Moody* (1925), 9 Fed. (2) 628.

[39] *Commonwealth v. Casey* (1866), 12 Allen (Mass.) 214; *State v. Elder* (1867), 54 Maine 381; *Application of Shumpka* (1920), 268 Fed. 686.

[40] Act of August 23, 1916, *supra.*

[41] *Davis v. South Carolina* (1883), 107 U. S. 597, 27 L. E. 574, 2 S. C. 636; *Ex parte Anderson* (1878), Fed. Cas. 349; *Delaware v. Emerson* (1881), 8 Fed. 411; *Illinois v. Fletcher* (1884), 22 Fed. 776.

[42] *In re Duane* (1919), 261 Fed. 242; *Matarazzo v. Hustis* (1919), 256 Fed. 882, was a civil case. *Illinois v. Moody* (1925), 9 Fed. (2) 628.

[43] *Funk v. State* (1919), 84 Tex. Crim. 402, 208 S. W. 509; *State of Florida v. Tooher* (1922), 283 Fed. 845. It is the present policy of the military authorities to use habeas corpus under Title 28, Section 453, whenever they wish to take a soldier out of State custody. Article of War 117 is very little used.

[44] United States Code, Title 28, Section 76. (Judicial Code, section 33, amended.) Same; suits and prosecutions against revenue officers.—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, 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, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United

stances under which it may be called into action. In construction of its provisions it has been held[45] that the removal cannot be had until the cause is "commenced" in the state court. Whether or not this has happened depends on the nature of the state criminal procedure. If the law of the state requires an indictment, the removal must await the indictment, but if the law of the state allows a criminal prosecution to be commenced by information or proceeding before a

States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the state where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. When the suit is commenced in the state court by summons, subpoena, petition, or any other process except capias, the clerk of the district court shall issue a writ of *certiorari* to the state court requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus *cum causa,* a duplicate of which shall be delivered to the clerk of the state court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the state court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus *cum causa,* to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein the state court can be obtained, the district court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant. (R. S. 643; Mar. 3, 1875, c. 130, Sec. 8, 18 Stat. 401; Feb. 8, 1894, c. 25, Sec. 1, 28 Stat. 36; Mar. 3, 1911, c. 231, Sec. 33, 36 Stat. 1097; Aug. 23, 1916, c. 399, 39 Stat. 532.)

[45] *Georgia v. O'Grady* (1876), Fed. Cas. 5352.

Justice of the Peace, the removal can be had directly after such point in the proceedings.

The petition for removal may be presented at any time before final hearing in the state court. If there has been a mistrial there, it may be presented before the new trial.[46] When the cause has been removed, it goes ahead in the same manner as if it were still being tried in the state court; the only apparent change is the change of tribunal. The District Attorney of the United States is required to act as counsel for the defendant[47] and the prosecuting officers of the state take care of the prosecution.

If, after removal, the state refuses to prosecute, the usual practice is to empanel a jury and direct a verdict of not-guilty, on the theory that the accused cannot be deprived of his jury trial and vindication by any non-action on the part of the state prosecutor.

Among the interesting problems presented by the use of the privilege of removal are two, first, what acts are or are not done under color of office, and next, what facts must be stated in the petition for removal in order to justify the granting of it. These problems were present in the recent cases of *Maryland v. Soper.*[48]

The situation in these cases arose from a raid made by the accused prohibition officers on a still in Harford county, Maryland. During the course of the raid a man was killed. As a result of this homicide the prosecutions in question arose. The accused officers, while denying knowledge of how the man met his death, were arrested for the homicide by the state authorities when they reported his death at the nearby county seat. The officers claimed to have found the man dying as they returned from demolishing the still which they were raiding.

They were held in jail overnight, and while there—so it is alleged—they conspired that one of them was to testify falsely before the coroner's inquest so that they could all go free. This alleged false testimony was given, but not believed. As a result of it, the officers were indicted for murder, for conspiracy to obstruct justice, and the one testifying falsely was indicted for perjury.

The accused men presented a petition for removal under Title 28, Section 76 to the District Court of the United States for the Dis-

[46] Rose, *op. cit.*, Section 442.
[47] United States Code, Title 28, Section 485.
[48] No. 23 (1926), 270 U. S. 9, 70 L. E. 449, 46 S. C. 185; No. 24 (1926), 270 U. S. 36, 70 L. E. 459, 46 S. C. 192; No. 25 (1926), 270 U. S. 44, 70 L. E. 462, 46 S. C. 194.

trict of Maryland. Judge Soper directed the writs of *habeas corpus cum causa* and *certiorari* to issue under the statute. On motion, by the State of Maryland to rescind the order, remand the indictments, and quash the writs, Judge Soper allowed an amended petition, which was the subject of another motion to remand and quash. This was denied.

The State of Maryland, through the Governor and Attorney General, applied to the Supreme Court of the United States,—in the exercise of its original jurisdiction—for a rule to show cause why a mandamus should not issue against Judge Soper and the District Court for the District of Maryland, to compel the remand of the indictments to the state court for trial. Judge Soper answered. After the briefs were filed and the argument presented, the Supreme Court handed down its opinions in the three cases, the one[49] involving the murder indictments, the second[50] covering the indictments for conspiracy to obstruct justice, and the last,[51] the case of the prosecution of the single officer for perjury.

The court, with Mr. Chief Justice Taft writing the opinions, granted the mandamus to direct the remand of the indictments in the murder cases but qualified its decision by giving leave to the District Judge to allow a further amended petition so as to bring the case within Title 28, Section 76 as construed further in the opinion.[52] In reaching this conclusion the court overruled the contention of the United States that mandamus was not the proper remedy to secure a reversal of the action of the trial court. The court held that the propriety of the removal order could be tested by mandamus in a case of this kind.

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[49] No. 23, *supra.*

[50] No. 24, *supra.*

[51] No. 25, *supra.*

[52] Judge Soper afterward allowed an amended petition in the murder case and denied the motion of the state to remand. The cases were tried in March, 1927, and the men were acquitted by the Federal court of the charge of murder. A more recent case from the same jurisdiction occurred in the fall of 1927 in St. Mary's county, Maryland, where four prohibition agents killed a farmer named Gundlach, while making a raid on his farm without a warrant. They were indicted for murder by the Grand Jury of St. Mary's county, and the cases were promptly removed into the Federal court for the District of Maryland, under United States Code Title 28, Section 76. This case is styled *State of Maryland v. Brewer, Jackley, Cornett, and Fisher.* This case is now pending—October, 1927.

In the cases of the indictments for conspiracy to obstruct justice and for perjury, the court made the mandamus absolute and thus directed the remand to the state court.[53]

Looking at the cases more in detail, it is apparent that in the murder case the court was faced with two problems besides the one regarding the propriety of mandamus. The first was a statutory one, as to whether or not the benefits of Title 28, Section 76 had ever been extended to prohibition officers. The court worked out such an extension, justifying its result on the ground that the accused officers held commissions from the Commissioner of Internal Revenue, which would bring them under the "by authority of any revenue law," part of Title 28, Section 76. The court further stated that the "protection" of existing laws granted to the officers by a part of the Volstead Act[54] was meant to carry the benefits of the section to this group.

The major point in the case, and the most material here, involves the sufficiency of the petition for removal. The state had objected that the petition for removal to the federal court did not state sufficient facts to warrant the removal. The state had claimed that the accused must admit the commission of the acts charged in order to secure the removal.

The court refused to go this far; but did hold that the accused must waive his privilege against self-incrimination, and must tell the whole truth as to the facts of the case. This would seem to mean that he must admit the act if he did the act. The deciding factor would seem to be his sense of truth. He need not formally admit the acts charged in order to get a removal, if as a fact he did not do them; but, having done them, he must tell all if he wishes a removal.

Thus, he is entitled to a removal even though he did not do the act charged. But there must be some causal connection between the state prosecution and the official act of the defendant. It is sufficient that the prosecution, which may be on a trumped up charge, possibly involves some act done by the accused in his official capacity.

The requirement of the waiver of the privilege against self-incrimination would seem to be very just. If the accused wishes to hide the truth of the situation, he should be left to the mercy of an

[53] These indictments were to have been tried at the May, 1926 term of the Circuit Court for Harford county, Maryland. They were not then tried, and after the acquittal of the men on the murder charge, the state's attorney for Harford county abandoned the prosecutions for perjury and conspiracy to obstruct justice.

[54] United States Code, Title 27, Section 45.

unfriendly state court. If he wishes to get into the friendly federal court, he should be required to tell the whole truth. The rule laid down by this case would seem to put a sensible limitation on the use of these removals.

The petition here, which the court held insufficient, had failed to state whether the officers had done any shooting in the course of the raid, or whether they had any knowledge of how the deceased came to be shot. It failed to state whether they had seen the deceased among the men who fled from the still at their approach, and it failed to negative the possibility of the petitioners having been engaged in other than official activities at the time the homicide occurred. All these things could and should have been stated had the accused officers been willing to tell the truth about the situation.

In the other cases, involving the indictments for conspiracy to obstruct justice and for perjury, the court held in very brief opinions that the mandamus should be made absolute to remand the indictments to the state court. The court said that when the officers conspired to falsely assert ignorance of the true facts as to the death of the deceased, and when one of them perjured himself therefor, they acted as individuals, not in the course of their official duty, and consequently were not entitled to remove state prosecutions for such activities.

It was the contention of the United States that the officers were acting in the course of their official duties at such time, because they were arrested at a time when they were on their way to report to their superiors the result of their official activity. To this the court would not listen, and answered in the following words:

"The defendants when called upon to testify before the coroner were not obliged by federal law to do so. Indeed under state law they might have stood mute, because the proceeding was one in which they were accused of crime. . . . Their evidence was not in the performance of their duties as officers of the United States."

The court said that as the removal statute then stood, such prosecutions could not be removed, and that it was for Congress to make an attempted extension of Title 28, Section 76 if it should consider it necessary also to remove prosecutions like these.

The United States had argued that there should be no distinction drawn between the murder case and the conspiracy and perjury cases, because federal officers were no more called upon to commit murder

than they were to commit perjury or conspiracy to obstruct justice. This argument loses sight of the pertinent distinction between the two situations. An officer is never called upon to commit murder, but his duties occasionally require him to commit a justifiable homicide, consequently it is for the court, state or federal, to determine whether his act was justified or criminal. But he is neither entitled to commit the crime of perjury nor the act of lying under oath. His official duties do not include acts which amount to a conspiracy to obstruct justice. The true distinction is between justifiable and non-justifiable acts, and not between the named crimes which the acts may amount to.

Whether or not the homicide is murder is just what we wish to give the accused an unprejudiced court to determine, but in so far as his official duties are concerned, perjury and conspiracy are what they are as soon as the facts have been determined.

It is hard to draw the line between removable and non-removable offences. There are very few offences which might not be based on acts that could be done in the course of official duty. Suppose an officer, on his way to report his official activities, stops by the wayside to beat his wife. Can he remove a prosecution therefor? Suppose an investigator, busy in securing evidence against a prominent bootlegger, seduces the bootlegger's daughter. Can he remove a prosecution for that? Suppose that his amorous ability had enabled him to secure a greater amount of evidence. These are examples of the peculiar situations that can and may arise.[55]

IV

Where is the constitutional warrant for the action of the federal government in seeming to snatch away from the state courts certain persons charged with violation of the state's criminal laws? If the interest of the state in enforcing its laws must be balanced against

[55] The amenability of federal officials to the motor vehicle laws of the states has been the subject of a small amount of criminal litigation. *Johnson v. Maryland* (1920), 254 U. S. 51, 65 L. E. 126, 41 S. C. 16, held that a state could not require a federal employee, driving a post office truck, to cease driving the truck until he secured an operator's license by the payment of a fee and passing of an examination before a state official. *Florida v. Huston* (1922), 283 Fed. 687 refused removal to a prohibition officer who was arrested for reckless driving of an automobile, while returning to his office from some of his official business, inasmuch as he was not then on official duty. *Commonwealth v. Closson* (1918), 229 Mass. 329, L. R. A. 1918C 939, 118 N. E. 653, held that a mail carrier could be prosecuted under the traffic laws of Massachusetts for "cutting a corner" while making a left turn in Boston.

that of the nation in carrying out its own, where is the line to be drawn? What is the mandate of the constitution?

The federal constitution itself has nothing to say about removal, mentions habeas corpus only in a negative way,[56] and has no direct word concerning the immunity or liability of federal officers under state laws. To apply the constitution to this situation we must extend the language found there.

After the enumeration of the powers of Congress we find the following words:[57]

"The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Reading further, we can discover:[58]

"This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the land, and the judges in every state shall be bound thereby."

These phrases, when read in connection with the part of the Constitution relative to the judiciary[59] have been used as the constitutional basis for this right to interfere with the administration of justice by the state courts.

In general there is the same constitutional problem underlying the use of the habeas corpus and the use of the privilege of removal, for in either case the cause is taken away from the state court and heard by the federal court. In both the prisoner is apparently taken away from the courts of the sovereign whose dignity he has affronted, and who claims the right to punish him therefor.

Where habeas corpus is used, this right is summarily withdrawn, and the entire cause is disposed of when the petition is granted after hearing. But to offset this is the feature that the writ will not be granted, as a matter of practice, except in the most urgent cases, and it is, indeed, very little used.

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[56] Article I, Section 9, Clause 2. "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

[57] Article I, Section 8, Clause 18.

[58] Article VI, Clause 2.

[59] Article III, Section 2, Clause 1, "The judicial power shall extend to all cases in law or equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made under their authority."

When the privilege of removal is availed of, the tribunal is changed, and the trial of the cause goes ahead as if brought originally in the Federal court. The state does not lose quite so much of its power on removal, as it does when a writ of habeas corpus has been successfully sought; for after a removal the accused is still subject to a trial, with the state authorities conducting the prosecution.

In some ways the use of removal resembles the carrying of a case from the highest court of a state to the Supreme Court of the United States by writ of error or *certiorari.* There is a closer similarity to the removal of civil cases for diversity, or for a federal question. Some of the latter are allowed under the very terms of Title 28, Section 76, which also provides for the removal of civil causes against the designated officers when the suit is the outcome of some official activity.

But there are striking differences in these varying modes of procedure. Where writ of error is used, an abstract question of federal law is all that must be decided, but the state still has the use of its courts to decide the facts, and the state law. Where civil suits are removed, the state is not a party, is not seeking to avenge its sovereignty or dignity, and cares not whether state or federal courts be used.

But when we face the problem of removing a criminal case from the state courts, we find the state authorities are interested in enforcing the state laws in the usual courts and in the usual manner, but if there be a removal, they must appear in a different set of courts where they are practically strangers.

One of the stock objections to this form of removal, advanced by some of the earlier constitutional objectors, was that it was inherently impossible for the courts of one sovereign to try offenses against the dignity of another. They contended that the state, and the state alone, could try offenses against state laws.

This was an interesting old doctrine, based on the idea of dual sovereignty in the United States. If we wish to accept the idea of separate and independent sovereigns to its limit, then we must agree that the federal officers thereby become diplomatic representatives sent by the federal sovereign to represent it within the territory of the state. The rules of international law will thereby prevent the state from exercising complete jurisdiction over these diplomatic representatives. If they are to be punished for their acts at all, it must be by their native sovereign, the United States. Or, perhaps a

series of diplomatic communications must be exchanged between the state capital and Washington relative to the matter.

But this merely shows the absurdity of allowing the old idea of dual sovereignty to interfere with the removal of criminal prosecutions against federal officers. Dual sovereignty means comparatively little. The state is not a complete sovereign. The local government and the central one are merely coördinate agencies of the one sovereign, and in certain matters the state branch must yield to the nation. Here is one instance of it. The nation can say just what the state may and may not do with the nation's officers.

If it can give complete immunity to its officers by the use of habeas corpus, and if it has seen fit to favor the state by lessening the interference to a mere removal, all is well. Changing the tribunal is certainly more favorable to the sovereign interests of the state than a peremptory snatching of a prisoner by use of habeas corpus. Certainly the power in Congress to make necessary laws and the principle that these laws shall be supreme are enough to justify certain activities of federal officers and to justify the action of the courts in freeing them when prosecuted for these activities. If they are not freed, but merely granted a change of forum akin to a change of venue, the state is not hurt.

If the state thinks its dignity would be offended by having its attorneys appear in the courts of this "foreign sovereign," it can waive its chance to prosecute and let the prisoner go free. It is an interesting question of state constitutional law whether the penal authorities of a state have the right to execute a sentence imposed by this "foreign court." That is for the state to settle for itself. One can imagine a state court wrestling with the problem of whether or no it would be due process to imprison a person in a state penitentiary under a sentence of a federal court, imposed after trial and conviction by the Federal Court in a removed cause.

Or, can the state executive pardon one thus sentenced? Can the President of the United States? Probably not the latter. Perhaps the best solution of these problems can be arrived at by considering the federal court when it sits in a removed cause, as a temporary branch of the state's judicial system, made so by the Supreme Law of the land.

The problems stated above do not trouble the federal government. It is interested in seeing that the federal officers get fair play. If

there is no doubt of the impropriety of the prosecution, habeas corpus will release the officer forthwith. If there is a doubt, removal will assure him a fair trial. If the state does not care to lower itself to the plane of a federal court-room, it can let the prisoner go free. If it cannot enforce such sentence as might be imposed by the federal judge, it is at liberty to change the state law to provide for such emergencies. The interests of the nation are protected. The state can make its choice.

It is said that the federal courts must enforce state laws in the event of a removal. But they certainly do so when a civil cause is removed for either diversity or federal question. There is certainly a federal question present when a federal officer is being prosecuted for an act which he would never have done but for federal law.

The Supreme Court has handed down several opinions involving the use of the privilege of removal, or the habeas corpus, and more directly involving the constitutional problems presented by their use. Mr. Justice Story, upholding the use of the writ of error to the highest court of a state said, in the course of his opinion in *Martin v. Hunters Lessee*:[60]

"This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is given only by implication, as a power necessary and proper to carry into effect some express power. . . ."

In the same case, Mr. Justice Johnson, concurring with the result of the majority view, but not with their reasoning, said:

"The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional power."

It is this language that is later found to be quoted with approval in *In re Neagle,* and *Tennessee v. Davis,*[61] leading cases on habeas corpus and the removal of criminal causes.[62]

Mr. Justice McLean, writing the opinion in *Gordon v. Longest,*[63] a case involving the removal of civil causes, used language which has a bearing on the problem under discussion. He said:

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[60] (1816) 1 Wheaton 304, 4 L. E. 97.
[61] (1880) 100 U. S. 257, 25 L. E. 648.
[62] *Cohens v. Virginia* (1821), 6 Wheaton 264, 5 L. E. 257, settled that there could be a writ of error to a state court, even where the state was a party, and the accused person was the one to take out the writ.
[63] (1842) 16 Peters 97, 10 L. E. 900.

"One great object in the establishment of the courts of the United States . . . was to have a tribunal in each state free from local influence, and to which all who were non-residents or aliens might resort for legal redress."

It can certainly be said that federal officers are just as keenly interested in having an impartial tribunal to try their causes as are non-residents or aliens.

While many state and lower federal courts had decided both for[64] and against[65] the constitutionality of the several statutes which allowed the removal of criminal cases, it was not until 1867 that the Supreme Court was called upon to pass on the validity of any of them, and then in a civil case, under a statute no longer in effect.

Then, in the case of *Mayor v. Cooper*,[66] the court held constitutional one of the Civil War removal acts, passed in 1863.[67] Mr. Justice Swayne, writing the opinion, said:

"It is the right and duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals. . . . This is essential to the peace of the nation and the vigor and efficiency of the government. A different principle would lead to the most mischievous consequences. . . . For every act of an officer, civil or military, he would be liable to harassing litigation in the state courts."

This was the leading case on the constitutional point until *Tennessee v. Davis* squarely decided in a criminal case that there was a constitutional warrant for this removal of a criminal cause. There, Davis was a revenue officer who had been indicted for murder in the state court for some act growing out of his official activity. He sought removal under the removal clause, then Section 643 of the Revised Statutes, and on motion to remand the judges of the lower court were divided and certified questions to the Supreme Court. On the first question the court held Section 643 to be constitutional, pointing out that the states had surrendered some of their sovereignty, and that this was an occasion when that surrender was material.

[64] *Clark v. Dick* (1870), Fed. Cas. 2818; *Hodgson v. Millward* (1863), 3 Grant Cas. 412; *Jones v. Seward* (1864), 41 Barb. (N. Y.), 269; *Kulp v. Ricketts* (1863), 3 Grant Cas. 420; *McCormick v. Humphrey* (1866), 27 Ind. 144; *State v. Hoskins* (1877), 77 N. C. 530; *Tod v. Court of Common Pleas* (1864), 15 Ohio State 377.

[65] *Benjamin v. Murray* (1865), 28 How. Pr. 193; *Jones v. Seward* (1863), 40 Barb. (N. Y.), 563; *State of Ohio v. Bliss* (1863), 3 Grant Cas. 427; *State v. Davis* (1879), 12 So. Car. 528.

[66] (1868) 6 Wallace 247, 18 L. E. 851.

[67] Act of March 3, 1863, *supra*.

Justices Clifford and Field dissented, not on the more broad constitutional ground, but because they believed that there could be no trial in the federal court except where a specific act of Congress had made the offence charged, a crime. The majority opinion had the following to say to their contention:

"The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the state in civil cases, and there is no more difficulty in administering the state's criminal law."

There is, however, a constitutional limitation on the privilege of removal, which is the one imposed by the Seventh Amendment.[68] The removal, if had at all, must be taken before final judgment in the state court. There is no attempt made by the present removal statute to evade this restriction, but some of the earlier ones did so try.

The Act of 1863 attempted to allow removal to the federal court by writ of error, after judgment in the state court, with a trial *de novo* in the federal court. This was held to be invalid in the case of *Justices v. Murray*,[69] and the doctrine was approved in the later case of *McKee v. Rains*.[70]

It is an interesting question as to how far the right to remove can be constitutionally extended. It is doubtful whether legislation would be sustained, did it attempt to allow the removal of all prosecutions of federal officers, whether arising from official activities or not. Perhaps changed circumstances in the mode of attack on federal officers would cause the Supreme Court to be more lenient toward federal legislation designed to check such attacks. As things now are, it is hard to see how the court would sustain legislation giving a quasi-diplomatic immunity from process to federal agents and allowing them to be free from all interference, whether acting within the scope of their duties or not.

But if the states should find the use of prosecutions for such offences as perjury and conspiracy to obstruct justice valuable in actually hindering the enforcement of unpopular national laws, Congress probably would step in and provide for the removal of all prosecutions against federal officers. If the states actually can hinder the federal

[68] ". . . and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law."

[69] (1870) 9 Wallace 274, 19 L. E. 658.

[70] (1870) 10 Wallace 22, 19 L. E. 860. See also: *Wetherbee v. Johnson* (1817), 14 Mass. 412, where a state court applied the same restriction to the Act of March 3, 1815, *supra*.

officers by such means, no doubt the court will hold valid a statute providing an escape from them. If the need of such statute is doubtful, probably the court will be prone to find that there has been an undue interference with the sovereignty of the state, and will say that the constitution does not warrant such extension.

Some interesting problems can arise in connection with the exercise of these statutory privileges given to federal officers. Suppose a federal prohibition officer makes an unlawful search and seizure. He is guilty of offences against both state and federal laws,[71] and if he be indicted by the state for his offence against it, he is entitled to remove to the federal courts where he will have to be defended by the United States attorney.[72] But as his act is an offence against federal law, it now becomes also the duty of his attorney to prosecute him under the federal law. The District Attorney must make a lightning change in aspect from defender to prosecutor of the same individual.

It is said that the removal is allowed so that the federal officer may have an unprejudiced trial court. But it can as easily be said that the federal court might be prepossessed in his favor to the same extent that the state court might be prejudiced against him. This would tend to injure the interests of the state to the same extent that the interests of the nation would be injured by the trial in the state court.[73]

A jury panel, accustomed to having a federal officer appear before it as the star witness for the prosecution might be loathe to convict him of a crime against the state when they know that his appearance in their court is a sign of possible prejudice against him by the state. The District Attorney who has won the confidence of his jurymen as a prosecutor should have little trouble in swaying them as defender.

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[71] United States Code, Title 18, Section 53.

[72] United States Code, Title 28, Section 485.

[73] Of the 113 recorded homicides committed by prohibition enforcement officers between the adoption of the Volstead Act and September 16, 1927, the state authorities commenced prosecutions about 57. Of these, 22 were removed to the Federal Courts, and there the cases resulted in 13 acquittals, one plea of guilty, one conviction and seven cases still pending, in October, 1927. *Literary Digest*, October 8, 1927, Volume 95, page 12. These figures might indicate one of three possible conclusions, first, that the Federal Courts are prepossessed in favor of accused prohibition officers, or second, that there exists a need for the removal clause, due to the great amount of persecution now being directed by the states at the federal officers, or, third, that—quite accidentally—these cases are the ones that would result in an acquittal in the state courts.

It would seem to be a choice of evils, between a possibly prejudiced state court and a prepossessed federal one. The fact that the federal judiciary has always been of a higher type than has the state bench might tend to throw the balance in favor of removal. The sensible limitation imposed by *Maryland v. Soper*[74] in requiring the accused to waive his privilege against self-incrimination will help to protect the state's interests, for either a smaller number of removals will result, or the chances of conviction after removal will be greater.

It would seem that the protection now afforded to federal officers is very efficient. The habeas corpus secures immediate relief where it is necessary, while the right to remove gives a slower escape by providing a fair trial before an impartial tribunal.

The prohibition laws furnish the present situations in which federal officers seek protection. The enforcement officers are entrusted with the duty of enforcing an unpopular law and have already been the subject of some apparent persecution by state officials. No doubt, there will be more.

Perhaps *Maryland v. Soper* has furnished a hint of a limitation on the right of removal, so that the states will take advantage of it and carry on persecution under the guise of prosecution. Perhaps it has reminded the enforcement officers that there are other laws to be respected besides the prohibition laws.

[74] No. 23, *supra.*