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FEDERAL REMOVAL JURISDICTION — CIVIL ACTION BROUGHT IN A STATE COURT[†]

by

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I. INTRODUCTION

THE Constitution of the United States does not mention removal of suits from state to federal courts. Section 2 of article III states that federal judicial power shall extend to certain enumerated cases. This does not imply that cases, over which Congress can give the inferior federal courts jurisdiction, must be commenced in those courts.¹ The first Judiciary Act of 1789 contained provisions for removal of certain suits from state courts to the federal circuit courts,² and a removal jurisdiction has existed since that time.³ While the constitutionality of some particular provisions may be questioned, the general power of Congress to provide for removal cannot be doubted.⁴ Section 1441 is the general removal section of the Judicial Code of 1948 and subsection (a) provides as follows:

§ 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any *civil action brought in a State Court* of which the district courts of

[†] This Article is adapted from a portion of an extensive treatment of Removal to be published in Moore's Federal Practice by Matthew Bender & Company.

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¹ *Railway Co. v. Whitton*, 80 U.S. (13 Wall.) 270 (1871); *Gaines v. Fuentes*, 92 U.S. (2 Otto) 10 (1875).

² 1 Stat. 73 § 12 (1789). In general see Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 91 (1923).

³ *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). In *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 265 (1879) the Court said: Whether removal from a State to a Federal court is an exercise of appellate jurisdiction, as laid down in Story's Commentaries on the Constitution, sect. 1745, or an indirect mode of exercising original jurisdiction, as intimated in *Railway Company v. Whitton* (13 Wall. 270), we need not now inquire.

⁴ See note 1 *supra*. See also *Tennessee v. Davis*, *supra* note 3, where the Court observed: The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since been beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use since.

the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place in which such action is pending (Emphasis supplied.)⁵

There are *several* requisites which must be met for removal under the general removal statute, 28 U.S.C.A. § 1441. This Article concerns one of the more abstruse limitations, namely, whether the proceeding (which a defendant(s) seeks to remove) constitutes a civil action brought in a state court.

While the removal statutes dealing with suits against federal officers,⁶ members of the armed forces,⁷ and certain civil rights cases⁸ authorize removal of both civil actions and criminal prosecutions, the general removal statute, quoted above,⁹ confines itself to any "civil action brought in a State court" of which, in general, the federal district courts have original jurisdiction.¹⁰ In confining itself to civil actions, it follows counterparts in the Judicial Code of 1911¹¹ and earlier general removal statutes.¹² The earlier counterparts spoke of any "suit of a civil nature, at law or in equity." Although it has been intimated that the more concise expression, "civil action," may have a broader connotation,¹³ the Reviser's Note to the present statute indicates that the term "civil action" was substituted in § 1441, in lieu of the earlier terminology, to harmonize with the federal rules; and the Note does not indicate that any change of substance was intended.¹⁴

⁵ 62 Stat. 937 (1948), 28 U.S.C.A. § 1441(a) (1950). The phrase "civil action" is also found in other sections of the removal statute: § 1442. Federal officers sued or prosecuted ("(a) A civil action or criminal prosecution commenced in a State court. . . . (b) A personal action commenced in any State court. . . ."); § 1442a. Members of armed forces sued or prosecuted ("A civil or criminal prosecution in a court of a State. . . ."); § 1443. Civil rights cases ("Any of the following civil actions or criminal prosecutions, commenced in a State court. . . .").

⁶ 62 Stat. 938 (1948), 28 U.S.C.A. § 1442 (1950).

⁷ 70A Stat. 626 (1956), 28 U.S.C.A. § 1442a (1959).

⁸ 62 Stat. 938 (1948), 28 U.S.C.A. § 1443 (1950).

⁹ *Supra* pp. 297-98.

¹⁰ Section 1441 is keyed generally to original jurisdiction.

¹¹ Jud. Code § 28 (1911), 28 U.S.C.A. § 71 (1940).

¹² Act of 1875, 18 Stat. 470 § 2. For discussion see *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894).

¹³ In *Iowa v. Chicago, B. & Q. R.R.*, 37 Fed. 497 (C.C.S.D.Iowa 1889), appeal dismissed, 145 U.S. 631 (1892), Judge (later Justice) Brewer, in holding that a state action, though civil in form was penal in nature and not removable, stated:

If congress had intended that the mere form of the action determined the right of removal, apt language would have been, "actions civil in form," or perhaps the more general expression, "civil actions;" but when the language is, "of a civil nature," it discloses an intent as affirmed by the cases of *Ames v. Kansas*, 111 U.S. 460, 4 Sup. Ct. Rep. 437, and *State v. Railroad Co.*, 33 Fed. Rep. 726, that the court should always look beyond the matter of form to the purpose, object, nature of the action.

¹⁴ In *Stoll v. Hawkeye Cas. Co.*, 185 F.2d 96, 98 (8th Cir. 1950), Judge Sanborn, a member of the Advisory Committee in drafting the Judicial Code of 1948, stated:

II. MUST BE A CIVIL ACTION

It has been said that the "expression 'civil action' as used in 28 USC § 1441(a) appears to be used in contradistinction to 'criminal case' or action or proceeding."¹⁵

Whether a state proceeding is a civil action, for removal purposes, and has been properly removed involves the construction of the removal statute; and hence presents a federal matter,¹⁶ and state characterizations of the proceeding are not determinative.¹⁷

In making the determination the federal courts have not considered the form of the state action as controlling. The nature of the right asserted has furnished the test of whether a proceeding was of a civil or criminal nature. Consequently, a suit may be criminal in form and yet civil in nature, or vice versa.¹⁸ Thus, a state action of

The term "civil action" was used in § 1441 as a substitute for "suit of a civil nature", § 71, Title 28, U.S.C., 1946 Ed., and equivalent terms found in former removal statutes. See Reviser's Notes relative to § 1441 in Title 28 U.S.C.A. A "civil action" is a civil suit.

¹⁵ Range Oil Supply Co. v. Chicago, R.I. & P. R.R., 140 F. Supp. 283, 285 (D. Minn. 1956), aff'd, 248 F.2d 477 (8th Cir. 1957). See also Milwaukee County v. M. E. White Co., 296 U.S. 268, 270-71 (1935). Relative to the phrase "suits of a civil nature," found in former § 4 Stat. 143, 28 U.S.C.A. § 41(1) (1940), which dealt with original jurisdiction, the Court said that the phrase

is used in contradistinction to "crimes and offenses," as to which the jurisdiction of the district courts is restricted by . . . [36 Stat. 1091, 28 U.S.C.A. § 41(2) (1940)] to offenses against the United States. Thus suits of a civil nature within the meaning of the section are those which do not involve criminal prosecution or punishment, and which are of a character traditionally cognizable by courts of common law or of equity. Such are suits upon a judgment, foreign or domestic, for a civil liability, of a court having jurisdiction of the cause and of the parties, which were maintainable at common law upon writ of debt, or of *indebitatus assumpti*.

¹⁶ Chicago, R.I. & P. R.R. v. Stude, 346 U.S. 574 (1954); Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100 (1941); Crivello v. Board of Adjustment of the Borough of Middlesex, 183 F. Supp. 826, 828 (D. N.J. 1960) ("The local law is determinative of the nature of the proceeding but the federal law is determinative of its removability.").

¹⁷ Commissioners of Road Imp. Dist. v. St. Louis S.W. Ry., 257 U.S. 547, 557 (1922):

The question of removal under the federal statute is one for the consideration of the federal court. It is not concluded by the view of a state court as to what is a suit within the statute. *Upsbur County v. Rich*, 135 U.S. 467, 477; *Mason City & Ft. Dodge R.R. v. Boynton*, 204 U.S. 570; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239. While the decision of the state court as to the nature of a proceeding under state statutes sought to be removed is, of course, very persuasive, it is not controlling because involved in the application of a federal statute and the exercise of a federal constitutional right.

Marchant v. Mead-Morrison Mfg. Co., 29 F.2d 40 (2d Cir. 1928), cert. denied, 278 U.S. 655 (1929); *Stoll v. Hawkeye Cas. Co.*, 185 F.2d 96 (8th Cir. 1950).

¹⁸ Illinois ex rel. Hunt v. Illinois Cent. R.R., 33 Fed. 721 (C.C.N.D.Ill. 1888) (criminal in form; treated as civil; opinion by Justice Harlan); Iowa v. Chicago, B. & Q. R.R., 37 Fed. 497 (C.C.S.D.Iowa 1889) (civil in form; treated as criminal in nature; opinion by Judge (later Justice) Brewer), appeal dismissed, 145 U.S. 631 (1892); Arkansas v. St. Louis & S.F. R.R., 173 Fed. 572 (C.C.W.D.Ark. 1909); *City of Montgomery v. Postal Tel. Cable Co.*, 218 Fed. 471 (M.D. Ala. 1914), see note 22 infra; *State ex rel. Warren v. F.W. Woolworth Co.*, 30 F. Supp. 410 (W.D. Mo. 1939), see note 21 infra; *Mulligan v. Western Union Tel. Co.*, 20 F. Supp. 953 (D. N.J. 1937), see note 21 infra. See *Ames v. Kansas*, 111 U.S. 449 (1884).

quo warranto, whether in form a criminal proceeding or civil action, has been treated as civil for removal purposes.¹⁹

A suit brought by and for the sole benefit of an individual to recover a penalty or damages, including punitive, is civil in nature, although recovery may help the state in vindicating its policy.²⁰ On the other hand, a suit to recover a penalty brought by the state or for the state or a state agency, that is not to redress an injury to its property rights but is brought to vindicate its public policy, and the recovery is for the benefit of the state or state agency, has been held not to be civil in nature for purposes of removal.²¹ Similarly, a suit by the state or a state agency to vindicate its criminal laws by

¹⁹ *Ames v. Kansas*, supra note 18 (a suit in nature of quo warranto, in form civil, by state to dissolve state railroad corporation because of attempted ultra vires consolidation held civil action for purposes of removal). In *Illinois ex rel. Hunt v. Illinois Cent. R.R.*, supra note 18, at 729 (criminal in form) Justice Harlan stated:

I am of opinion that, as the primary and only material object of the present proceeding is to enforce a civil right, it is to be regarded as a suit of a civil nature, within the principle of the decision in *Ames v. Kansas*, and within the meaning of the [removal] act of congress; and this, notwithstanding the court has a discretion, in addition to a judgment of ouster, to impose a fine.

Cf. *Moloney v. American Tobacco Co.*, 72 Fed. 801 (C.C.N.D.Ill. 1896).

²⁰ *Gruetter v. Cumberland Tel. & Tel. Co.*, 181 Fed. 248 (C.C.W.D.Tenn. 1909) (suit by individual against telephone company to recover penalties for discriminatory service); *Younts v. Southwestern Tel. & Tel. Co.*, 192 Fed. 200 (C.C.E.D.Ark. 1911); *Cross v. Ryan*, 124 F.2d 883 (7th Cir. 1941) (suit brought in federal court under Illinois Dram Shop Act by widow and minor children, to recover damages for loss of their means of support, against tavern proprietor causing intoxication of deceased); *Salonen v. Farley*, 82 F. Supp. 25 (E.D. Ky. 1949) (suit brought in federal court under Kentucky statute permitting third person to recover treble amount of sum lost to defendant in a gambling transaction where loser or creditor does not sue, is both remedial and penal; the suit is, nevertheless, civil for purposes of federal court's original jurisdiction; and the statute is not unenforceable as a "penal statute" within rule that one sovereign will not enforce the penal laws of another); *Hartlieb v. Carr*, 94 F. Supp. 279 (E.D. Ky. 1950) (similar).

²¹ *Iowa v. Chicago, B. & Q. R.R.*, 37 Fed. 497 (C.C.S.D.Iowa 1889) (action by state under statute providing for it to bring civil action to recover a forfeit for extortion held criminal in nature and non-removable), appeal dismissed, 145 U.S. 631 (1892); *Arkansas v. St. Louis & S.F. R.R.*, 173 Fed. 572 (C.C.W.D.Ark. 1909). *State ex rel. Warren v. F.W. Woolworth Co.*, 30 F. Supp. 410, 411 (W.D. Mo. 1939) involved a suit by the city treasurer to collect statutory damages of four times the amount of tax for filing false statements of goods sold. The fact that the suit is in form on a forfeited bond is immaterial:

[A] suit by the state or for the state or by an official in behalf of the state, to recover a penalty for some wrongful act from an individual, to recover that penalty for the state or for disposition by the state to some governmental agency of the state, must be a suit which is not civil in its nature. A suit civil in its nature is an action for private injury looking to a recovery for private benefit.

And see *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888) (Supreme Court did not have original jurisdiction of an action by a state upon a judgment recovered by it in one of its courts against a corporation of another state for a pecuniary penalty for violation of its municipal law). But see and compare *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

Qui tam.—*Mulligan v. Western Union Tel. Co.*, 20 F. Supp. 953 (D. N.J. 1937) (actions by informers to recover statutory penalty for alleged violations of lottery statutes not removable); and see *Younts v. Southwestern Tel. & Tel. Co.*, supra note 20.

enjoining violations thereof,²² and suits of a related nature,²³ have been held not to be civil in nature for purposes of removal. A related reason sometimes articulated in denying removal in these situations is that one sovereign will not enforce the penal laws of another sovereign.²⁴ To the extent that this doctrine remains valid,²⁵ a federal court would not enforce the penal law of a state either on original or removal jurisdiction. On the other hand, injunction suits brought on behalf of the state that involve property rights and are basically within "civil," in contrast to "criminal,"²⁶ equity jurisdiction are treated as civil in nature for removal purposes.²⁷ In brief, then, the

²² *Moloney v. American Tobacco Co.*, 72 Fed. 801 (C.C.N.D.Ill. 1896). Where an information in equity by state attorney general to prohibit foreign corporation from doing business in Illinois in violation of its criminal antitrust laws was remanded because the statute did not create a cause for action in equity within the federal court's cognizance, the suit is not one of a civil nature and is nonremovable. Cf. quo warranto cases cited in note 19 supra. *City of Montgomery v. Postal Tel. Cable Co.*, 218 Fed. 471 (M.D. Ala. 1914) (state equity suit brought by municipality).

²³ *Texas ex rel. Martin v. Continental Distilling Sales Co.*, 67 F. Supp. 389, 390 (N.D. Tex. 1946) where actions by district attorney on the relation of an individual person, to enjoin defendants from continuing in the liquor business in Texas under licenses issued by the state Control Board, remanded: "Each of the causes smacks, may be clearly sensed, as criminal in nature, for they deal with police power and the welfare of the people and the control of liquor vending."

²⁴ *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888) and *Huntington v. Attrill*, 146 U.S. 657 (1892), to the effect that one sovereign will not enforce the penal laws of another sovereign, are often cited and discussed. See, e.g., *Iowa v. Chicago, B. & Q. R.R.*, 37 Fed. 497 (C.C.S.D.Iowa 1889); *State ex rel. Warren v. F.W. Woolworth Co.*, 30 F. Supp. 410, 411 (W.D. Mo. 1939); *City of Montgomery v. Postal Tel. Cable Co.*, 218 Fed. 471 (M.D. Ala. 1914).

²⁵ In *Testa v. Katt*, 330 U.S. 386 (1947), the Court ruled that a state could not refuse to enforce a penal law of the United States. Justice Black did, however, state, at 393: "Nor need we consider in this case prior decisions to the effect that federal courts are not required to enforce state penal laws."

A suit on a judgment based on a state tax claim is, however, an action of a civil nature for purposes of original federal jurisdiction. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

²⁶ For discussion of "criminal" equity jurisdiction see 5 Moore's Federal Practice ¶ 38.24 [3], at 190 (2d ed. 1959).

²⁷ *Ohio ex rel. Seney v. Swift & Co.*, 270 Fed. 141 (6th Cir. 1921), appeal dismissed, 260 U.S. 146 (1922). This was a suit brought by a state officer on behalf of the state under its antitrust laws to enjoin the defendant from obtaining possession of its property held in storage for alleged violation of the antitrust laws; for the appointment of a receiver to take charge of the property and for eventual sale thereof; and to enjoin the defendant from any further acts or crimes in restriction of trade and commerce. The court treated this suit, for removal, as a suit of a civil nature between private individuals—between the state officer as an individual and the defendant corporation—where the defendant in its removal petition asserted a substantial claim that the state statute was unconstitutional; and sustained removal on the basis of diversity between the state officer and defendant corporation. This case is treated as the reverse of *Ex parte Young*, 209 U.S. 123 (1908), which held that where a party sues to enjoin a state officer from enforcing an allegedly unconstitutional statute violative of plaintiff's rights, the action is not a suit against the state but against the officer as an individual wrongdoer.

In rejecting the assertion that the suit in *Ohio ex rel. Seney*, supra, was not civil in nature, the court stated, at 152:

The plaintiff further contests the removal because he says the action commenced by his complaint was not a civil action, but was rather one based upon and for the enforcement of the Ohio penal statutes. So far as concerns

distinction that is drawn in these cases dealing with penalties and suits to enjoin is primarily between private and public rights. Suits to vindicate a private right and redress a wrong in violation of such right have been classed as civil. Actions at law to vindicate a public right by obtaining a judgment on the basis of a penalty, or suits in equity, whose dominant characteristics bring it within "criminal" rather than "civil" equity jurisdiction have been treated as non-civil in nature and nonremovable.

However, the dichotomy between civil actions and criminal prosecutions will not suffice because the term "civil action" does not embrace every action which is not a criminal proceeding. Thus, although a proceeding may not be criminal in nature, a determination must still be made of whether the action comes within the removal terminology. While the term "civil action," for removal purposes, embraces what may be conveniently designated as orthodox actions at law and suits in equity, it also embraces other actions.²⁸ To constitute a "civil action" it is not necessary that the suit be based on a common-law right; it may be based on a statutory right.²⁹ Nor is it necessary that the state proceeding be in the form of a traditional action at law or suit in equity.³⁰ A state declaratory action which presents a justiciable case or controversy is a civil action.³¹ A proceeding that is civil in nature is a civil action although it is summary in charac-

the form of the matter, this is plainly a civil action. It is not brought to cause imprisonment or to collect a penalty, but it is a proceeding in a court of equity, commenced by proper pleading, having a plaintiff and having defendants, seeking an injunction and a receiver, and, further, practically final relief through the receivership. This answers every description of a civil action, rather than of the criminal or penal actions with which those of a civil nature must be contrasted. Cases like those in which a city, which is a branch of the state government is undertaking to enforce its ordinances by injunction and at the same time to collect the tax and the penalty secured by the ordinance (*City of Montgomery v. Postal Co.* . . . [218 Fed. 471 (N.D. Ala. 1914)]) are distinguishable, as soon stated.

So far as concerns the substance of the matter, the question on this objection is the same as on the matter of diverse citizenship. If the action were one by the state of Ohio, it would have the color of, and it might be considered as, a proceeding in execution of its sovereignty rather than a mere civil action; but since the validity of the Ohio law is forcefully challenged under the Fourteenth Amendment, Mr. Seney cannot be heard to say that the action is by the state rather than by him.

²⁸ E.g., a proceeding before an "administrative board" charging an unfair labor practice which was essentially the same as an action for breach of contract that could be brought in a state court. *Tool & Die Makers, Lodge 78 v. General Elec. Co.*, 170 F. Supp. 945 (E.D. Wis. 1959). Concerning a declaratory action, see note 31 *infra*; a statutory mandamus which is basically an action at law or suit in equity, see note 47 *infra*; a statutory proceeding of a judicial nature to review administrative action, see p. 303 *infra*.

²⁹ *Brisenden v. Chamberlain*, 53 Fed. 307 (C.C.D.S.C. 1892).

³⁰ See cases cited notes 32 and 33 *infra*; *Tool & Die Makers, Lodge 78 v. General Elec. Co.*, 170 F. Supp. 945 (E.D. Wis. 1959).

³¹ *Southern Harlan Coal Co. v. Alabama Fuel & Iron Co.*, 58 F. Supp. 600 (E.D. Ky. 1945) (and removable when the other requisites for removal exist).

ter.³² A statutory proceeding in a state court to review an administrative determination is a civil action,³³ unless the review proceeding is such an integral part of the administrative process as to constitute a continuation of the administrative proceeding.³⁴ An *inter partes* proceeding, that is not ancillary to a probate proceeding, is a civil action.³⁵ In brief, the former term "suit," as does its present successor "action," embraces various modes of proceeding; it is a comprehensive term that, in general, applies to any *inter partes* proceeding in

³² *Famous Realty v. Flota Mercante Grancolombiana*, 81 F. Supp. 553 (E.D. N.Y. 1948) (eviction proceeding by landlord against tenant for possession and judgment for accrued rent); *State ex rel. Glassell v. Shell Petroleum Corp.*, 20 F. Supp. 795 (W.D. La. 1937).

³³ *Range Oil Supply Co. v. Chicago, R.I. & P. R.R.*, 248 F.2d 477 (8th Cir. 1957), affirming 140 F. Supp. 283 (D. Minn. 1956); *In re Chicago, M., St.P. & P. R.R.*, 50 F.2d 430 (D. Minn. 1931); *Larkin v. Roseberry*, 54 F. Supp. 373 (E.D. Ky. 1944) (statutory bill in equity to review Local Review Committee's marketing quota under 52 Stat. 63 (1938), 7 U.S.C.A. § 1365 (1940)); *Vann v. Jackson*, 165 F. Supp. 377 (E.D. N.C. 1958) (similar). In distinguishing *Decker v. Spicer Mfg. Div. of Dana Corp.*, 101 F. Supp. 207 (N.D. Ohio 1951), Judge Stanley, in the *Vann* case, stated at 380:

In the latter case removal would have required the federal court to assume administrative functions under the workmen's compensation laws of Ohio. In addition, its actions would not have been of a final and binding nature. Clearly, a proceeding which calls for the exercise of administrative functions and the rendering of non-binding decisions is not a "civil action" in a legal sense.

³⁴ *Decker v. Spicer Mfg. Div. of Dana Corp.*, supra note 33 (proceeding in Ohio court for review under Ohio workmen's compensation laws not removable), see p. 317 *infra*; for judicial comment on this case, see *Vann v. Jackson*, supra note 33. *Collins v. Public Serv. Comm'n*, 129 F. Supp. 722 (W.D. Mo. 1955) (statutory state court review of Public Service Commission's findings and order, that proposed condemnation would be in the public interest, is a continuation of the administrative proceedings and not a civil action brought in a state court of which the district courts of the United States have original jurisdiction; opinion by Judge Whittaker); for judicial comment on this case, see *Range Oil Supply Co. v. Chicago, R.I. & P. R.R.*, 140 F. Supp. 283, 285-86 (D. Minn. 1956). *Ex parte Oklahoma*, 37 F.2d 862 (10th Cir. 1930).

³⁵ In *Gaines v. Fuentes*, 92 U.S. (2 Otto) 10, 20 (1875), in sustaining the right of removal, Justice Field stated:

The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original process in a Federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other States.

In *Ellis v. Davis*, 109 U.S. 485, 497 (1883), Justice Matthews stated:

Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.

This was quoted with approval by Justice Bradley in *Upshur County v. Rich*, 135 U.S. 467, 476 (1890); see pp. 309-11 *infra*.

a court of justice; and if civil in nature, is a "civil action."³⁶ It is immaterial that the form of the state proceeding would require repleading in the federal court or would be awkward to try.³⁷ However, not every claim of an affirmative character set forth in a civil suit is an action for removal purposes. Thus, although defendant pleads matters in its answer of such a character that, even after plaintiff has discontinued his original suit, these matters constitute the basis, under state law, of a proceeding that may go on to trial and judgment, the proceeding is not a removable suit.³⁸

Let us now consider in more detail two types of proceedings which, because of their special nature, warrant individual treatment: arbitration and mandamus.

Arbitration.—A judicial proceeding to obtain arbitration is a civil action for removal purposes.³⁹ Similarly, a proceeding to confirm or vacate an arbitration award is civil and removable if the other requisites of removal jurisdiction exist.⁴⁰ However, in this connection, if there is first a judicial proceeding to compel arbitration, arbitration is ordered, and subsequently a proceeding is brought to confirm

³⁶ *Stoll v. Hawkeye Cas. Co.*, 185 F.2d 96, 98 (8th Cir. 1950); *Dulion v. S.A. Lynch Enterprise Fin. Corp.*, 53 F.2d 568, 569 (5th Cir. 1931) ("The suing out of a writ of attachment for the enforcement of an alleged debt is a suit within the meaning of the statute [36 Stat. 1094 (1911), 28 U.S.C.A. § 71 (1940)] providing for the removal of a 'suit of a civil nature, at law or in equity'; the word 'suit' being a comprehensive one, and applying to any proceeding in a court of justice whereby a remedy given by law for the enforcement of a claim or demand is sought."), cert. denied, 285 U.S. 540 (1932); *Larkin v. Roseberry*, 54 F. Supp. 373 (E.D. Ky. 1944); *Vann v. Jackson*, 165 F. Supp. 377 (E.D. N.C. 1958).

In *Weston v. City of Charleston*, 8 U.S. (2 Pet. 449) 171, 173 (1829), Chief Justice Marshall defined "suit" as follows:

The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit.

³⁷ *Commissioners of Road Imp. Dist. v. St. Louis S.W. Ry.*, 257 U.S. 547 (1922), see text at note 81 *infra*; *Santa Margarita Mut. Water Co. v. State Water Rights Board*, 165 F. Supp. 870 (S.D. Cal. 1958).

³⁸ *West v. Aurora City*, 73 U.S. (6 Wall.) 139 (1868). For related discussion, see p. 325 *infra*.

³⁹ *Davenport v. Procter & Gamble Mfg. Co.*, 241 F.2d 511 (2d Cir. 1957).

Contra: *Marchant v. Mead-Morrison Mfg. Co.*, 7 F.2d 511 (S.D. N.Y. 1925) (proceeding to have state court appoint a third arbitrator not a suit of a civil nature), *aff'd* on procedural ground not here relevant, 11 F.2d 368 (2d Cir. 1926); cf. *In re Red Cross Line*, 277 Fed. 853 (S.D. N.Y. 1921).

The other requisites of removal jurisdiction must, of course, be satisfied. In the *Davenport* case removal on the basis of diversity and jurisdictional amount were upheld. The main discussion concerned jurisdictional amount, and the court repudiated the theory of *In re Red Cross Line*, *supra*, that no pecuniary value can be given to the right to compel arbitration.

⁴⁰ *Hetherington & Berner v. Melvin Pine & Co.*, 256 F.2d 103 (2d Cir. 1958) (in federal suit involving contract federal court ordered arbitration; after an award was made, *Pine & Co.* moved in the state court to vacate the award, and removal of this proceeding

or vacate the award, this latter proceeding is ancillary to the first.⁴¹ Hence, if the first proceeding is in a state court and it is not removed to the federal court or, if removed, is remanded, then a subsequent proceeding in the state court to confirm or vacate the award is not removable because it is not a separate proceeding—not an independent action⁴²—within the removal statute.⁴³

Mandamus.—A mandamus proceeding is not a civil action of which the federal district courts, held within the states, have original jurisdiction;⁴⁴ hence, such a proceeding instituted in a state court is not removable.⁴⁵ The crux of this doctrine is not that a mandamus proceeding fails to qualify as civil in nature, but that it is not within the federal district courts' original jurisdiction and hence does not satisfy this additional requirement for removal.⁴⁶ The federal court will, however, look through form to substance to determine whether the proceeding is basically one of mandamus or whether it is a proceeding at law or in equity over which it has original jurisdiction.⁴⁷

III. MUST BE BROUGHT IN A STATE COURT

The preceding discussion has dealt primarily with the characteristics of a "civil action" without consideration of the related require-

on the basis of diversity and jurisdictional amount was upheld); *Minkoff v. Scranton Frocks*, 172 F. Supp. 870 (S.D. N.Y. 1959). See *Marchant v. Mead-Morrison Mfg. Co.*, supra note 39 (dictum).

The point was raised but not decided in *International News Serv. v. Gerecny*, 160 F. Supp. 5 (S.D. N.Y. 1958) since jurisdictional basis for removal under Labor Management Relations Act was lacking.

⁴¹ *Marchant v. Mead-Morrison Mfg. Co.*, 29 F.2d 40 (2d Cir. 1928) (proceeding to have state court appoint a third arbitrator is part of one arbitration proceeding looking to an award, and confirmation of award is ancillary and nonremovable), cert. denied, 278 U.S. 655 (1929); *Hetherington & Berner v. Melvin Pine & Co.*, supra note 40.

⁴² See also pp. 319-26 infra.

⁴³ *Marchant v. Mead-Morrison Mfg. Co.*, 29 F.2d 40 (2d Cir. 1928).

⁴⁴ *Updegraff v. Talbott*, 221 F.2d 342 (4th Cir. 1955); *Marshall v. Crotty*, 185 F.2d 622 (1st Cir. 1950). See *Sleeth v. Dairy Prod. Co.*, 228 F.2d 165, 169 (4th Cir. 1955).

The district court for the District of Columbia does have original jurisdiction over mandamus proceedings. *Kendall v. United States*, 12 U.S. (12 Pet. 524) 834 (1838).

⁴⁵ *Rosenbaum v. Bauer*, 120 U.S. 450 (1887). See *Santa Margarita Mut. Water Co. v. State Water Rights Board*, 165 F. Supp. 870 (S.D. Cal. 1958).

⁴⁶ 62 Stat. 973 (1948), 28 U.S.C.A. § 1441(a) and (b); *Range Oil Supply Co. v. Chicago, R.I. & P. R.R.*, 248 F.2d 477, 479 (8th Cir. 1957). In general, removal jurisdiction under § 1441(a) and (b) is no broader than original federal jurisdiction, e.g., no divorce case may be removed from a state court to a federal court because federal courts do not have original jurisdiction in this area.

⁴⁷ *State ex rel. Glassell v. Shell Petroleum Corp.*, 20 F. Supp. 795 (W.D. La. 1937) (summary statutory mandamus proceedings to collect monies due under contract for sale of oil treated as action at law; removal sustained); *Santa Margarita Mut. Water Co. v. State Water Rights Board*, 165 F. Supp. 870, 873 (S.D. Cal. 1958) (The "court will look at the substance of the matter and not to form. For example, if in reality the removed case sets forth a cause for equitable relief [citing cases], this court would not be barred by the title of the action alone from hearing the cause [citing cases].").

For discussion of when mandatory relief can be obtained through the equitable remedy of a mandatory injunction, see Note, 38 Colum. L. Rev. 903 (1938).

ment that it be brought in a "state court." This requirement is satisfied whether the state court is one of limited or general jurisdiction,⁴⁸ but the proceeding therein must have reached the maturity of a civil action to be removable.⁴⁹ The name which the state attaches to its tribunal is not controlling; instead, the function which the tribunal actually performs in the proceeding is controlling.⁵⁰ For removal purposes, if the function being performed is nonjudicial then the state tribunal is not a court;⁵¹ if, however, the function is judicial then the tribunal is a court.⁵² While state decisions as to the judicial or nonjudicial character of the tribunal and the function being performed by it are entitled to serious consideration, they are not controlling.⁵³

It has been said that the Supreme Court of the United States has adopted a functional rather than a literal test in determining whether a state proceeding may be regarded as an action in a state court within the meaning of the removal statute.⁵⁴ Thus, although a state tribu-

⁴⁸ *Gaines v. Fuentes*, 92 U.S. (2 Otto) 10, 19-20 (1875). Here the Court said: 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 matter in dispute exceed a specific 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 the litigation, and was presented by the pleadings for judicial determination.

For discussion of what constitutes a "court" and "suit," see also *Fuller v. County of Colfax*, 14 Fed. 177 (C.C.D.Neb. 1882). Board of county commissioners of a county is not a court; the filing of a monetary claim with the board is not a suit; but after the docketing of an appeal by the claimant in the state district court, from a partial disallowance, where pleadings are filed and the cause proceeds in the ordinary way, a suit is then pending in a state court for purposes of removal, and claimant could remove. At this time either plaintiff or defendant could remove. *Delaware County Comm'rs v. Diebold Safe & Lock Co.*, 133 U.S. 473 (1889).

Justice of the Peace Court is a "State court" within removal statute when performing the judicial function. *Katz v. Herschel Mfg. Co.*, 150 Fed. 684 (C.C.D.Neb. 1906) ("Justices of the peace, when clothed with judicial power to hear and determine cases and render judgments, must certainly be regarded as courts."); *Cappetta v. Atlantic Ref. Co.*, 12 F. Supp. 89 (D. Conn. 1935). Contra: *Rathbone Oil Tract Co. v. Rauch*, 5 W. Va. 79 (1871). The point is mooted in *New York I. & P. Co. v. Milburn Gin & Mach. Co.*, 35 Fed. 225 (C.C.W.D.Tenn. 1888).

⁴⁹ *Village of Walthill v. Iowa Elec. Light & Power Co.*, 228 F.2d 647 (8th Cir. 1956).

⁵⁰ *Upshur County v. Rich*, 135 U.S. 467 (1890), see p. 309 *infra*; *Village of Walthill v. Iowa Elec. Light & Power Co.*, *supra* note 49 (Nebraska's "three-judge condemnation court is in reality just another board of appraisers."); *Tool & Die Makers, Lodge 78 v. General Elec. Co.*, 170 F. Supp. 945 (E.D. Wis. 1959).

⁵¹ *Upshur County v. Rich*, *supra* note 50; *Village of Walthill v. Iowa Elec. Light & Power Co.*, 228 F.2d 647 (8th Cir. 1956); *Fuller v. County of Colfax*, 14 Fed. 177 (C.C.D.Neb. 1882).

⁵² Page 299 *supra*; *Commissioners of Road Imp. Dist. v. St. Louis S.W. Ry.*, 257 U.S. 547 (1922), see p. 299 *supra*; *Tool & Die Makers, Lodge 78 v. General Elec. Co.*, 170 F. Supp. 945 (E.D. Wis. 1959).

⁵³ *Commissioners of Road Imp. Dist. v. St. Louis S.W. Ry.*, *supra* note 52; *Tool & Die Makers, Lodge 78 v. General Elec. Co.*, *supra* note 52.

⁵⁴ *Tool & Die Makers, Lodge 78 v. General Elec. Co.*, 170 F. Supp. 945 (E.D. Wis. 1959).

nal bears the name of an administrative board and the state supreme court has characterized the board's function as nonjudicial in adjudging unfair labor practice charges, removal of a proceeding before the board has, nevertheless, been sustained where the proceeding was equivalent to a traditional action for breach of contract that complainant could have elected to bring in a state court.⁵⁵

A judicial proceeding to obtain arbitration or to confirm or vacate an arbitration award is a civil action for removal purposes and removable when the other requisites of removal jurisdiction are met.⁵⁶ But a proceeding, although commenced by the service of a notice to arbitrate, which is not at that time in a state court but is pending before the arbitrator, is not at that time a civil action "brought in a State court"; and is not then removable.⁵⁷

A. *Administrative And Judicial Proceedings Distinguished*

Troublesome removal problems arise in applying the foregoing and related principles where it is unclear whether the particular state proceeding is administrative or in some other respect nonjudicial; and, if it is, at what juncture, if at all,⁵⁸ the proceeding can be said to be a civil action brought in a state court. A federal district court "does not sit to review on appeal action taken administratively or judicially in a state proceeding";⁵⁹ and a proceeding before a body acting in an administrative capacity is not removable because it is

⁵⁵ *Tool & Die Makers, Lodge 78 v. General Elec. Co.*, supra note 54 at 950. Judge Tehan stated:

It appears to this court that the proceeding before the Wisconsin Employment Relations Board meets the test of a judicial proceeding within the meaning of the Federal Judicial Code. In respect of subject matter, we repeat again that although the matter is described as an unfair labor practice the action in reality is a simple suit based on alleged breach of contract. No unfair labor practices are alleged in the complaints other than ones arising from breach of contract. Under Wisconsin law an identical action could have been brought in the trial courts of the State of Wisconsin, and had the complainants elected so to do, there would be no question of the right of respondent to remove the cause to the Federal court.

In respect of the procedures employable before the Board, a review of the statutory language reveals its judicial character.

⁵⁶ See pp. 304-05 supra.

⁵⁷ *Minkoff v. Scranton Frocks, Inc.*, 172 F. Supp. 870, 876 (S.D. N.Y. 1959):

At the time the notice was served it could not be predicted whether the proceeding would ever come before any court. It is brought in the state court when that court is first asked to participate in the proceeding, for instance, either by a motion to compel or to stay the arbitration . . . or by a motion to confirm or vacate the award. . . . Until one of these steps is taken, or the court is in some way requested to intervene, the proceeding is not removable.

⁵⁸ For example, in most states a proceeding in a state court to review an administrative determination under the workmen's compensation law is held to be such an integral part of the administrative process that it is not removable. See p. 317 infra.

⁵⁹ *Chicago, R.I. & P. R.R. v. Stude*, 346 U.S. 574, 581 (1954), noted, 64 *Yale L.J.* 600 (1955).

not a "civil action brought in a State court."⁶⁰ If, then, removal is sought at the administrative or pre-judicial stage, it is premature; and the removed proceeding should be remanded.⁶¹ On the other hand, if the state proceeding is judicial, *i.e.*, a "civil action brought in a State court," and removal is not sought within the limited time provided by § 1446, then the removed proceeding is subject to remand unless the objection for untimeliness is waived.⁶² Two other limitations on removal must be borne in mind. The civil action brought in a state court: (1) must be one "of which the district courts of the United States have original jurisdiction"; and (2) only a defendant can remove. As the reader is perhaps aware, after a proceeding that follows administrative or other nonjudicial action gets into a state court, it may qualify as a civil action brought in a state court, but still may, nevertheless, not be removable. This may be so either because the district courts do not have original jurisdiction of such a proceeding,⁶³ or because the party seeking removal is not a defendant; and state classification of a party as plaintiff or defendant is not controlling.⁶⁴ This limitation of removal to a defendant has not always existed. At certain times in our judicial history either a plaintiff or defendant could remove.⁶⁵ Hence, cases discussing and holding that a proceeding is a suit for removal purposes are still in point as to that matter, but not as to the further matter that the suit was removable, if today the party seeking removal is not a defendant. Bearing these principles in mind, we now center our

⁶⁰ *Upshur County v. Rich*, 135 U.S. 467 (1890), see pp. 309-10 *infra*; *Village of Walthill v. Iowa Elec. Light & Power Co.*, 228 F.2d 647 (8th Cir. 1956); *Ex parte Oklahoma*, 37 F.2d 862 (10th Cir. 1930). See *Pacific Railroad Removal Cases*, 115 U.S. 2 (1885), see p. 315 *infra*; *Fuller v. County of Colfax*, 14 Fed. 177 (C.C.D.Neb. 1882), see p. 306 *supra*.

State administrative board may be treated as a court. *Tool & Die Makers, Lodge 78 v. General Elec. Co.*, 170 F. Supp. 945 (E.D. Wis. 1959) (Wisconsin Employment Relations Board), see also pp. 302-03 *supra*.

⁶¹ *Upshur County v. Rich*, *supra* note 60; *Village of Walthill v. Iowa Elec. Light & Power Co.*, *supra* note 60.

⁶² *Powers v. Chesapeake & Ohio Ry.*, 169 U.S. 92 (1898); *Ayers v. Watson*, 113 U.S. 594, 598 (1885); *McLeod v. Cities Serv. Gas Co.*, 233 F.2d 242, 244 (10th Cir. 1956). Compare *Park v. Hopkins*, 179 F. Supp. 671 (S.D. Ind. 1960) (permitting defective removal petition to be amended after expiration of 20 day period) with *Browne v. Hartford Fire Ins. Co.*, 168 F. Supp. 796 (N.D. Ill. 1959) (stating that court has no power to permit amendment of defective removal petition after expiration of 20 day period). The Park case is more persuasive in its reasoning and seems to be more in accord with the Supreme Court cases *supra*.

⁶³ *Collins v. Public Serv. Comm'n*, 129 F. Supp. 722 (W.D. Mo. 1955), see p. 303 *supra*. See *Commissioners of Road Imp. Dist. v. St. Louis S.W. Ry.*, 257 U.S. 547 (1922).

⁶⁴ *Chicago, R.I. & P. R.R. v. Stude*, 346 U.S. 574 (1954) (condemnor is not a defendant for removal purposes although treated as a defendant by Iowa law). This case was noted in 64 *Yale L.J.* 600 (1955).

⁶⁵ Act of 1875, 18 Stat. 470 § 2; see *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894).

attention upon the problem of whether a particular proceeding is a "civil action brought in a State court."

*Upshur County v. Rich*⁶⁶ expounds and illustrates most of the foregoing principles. In this leading case certain landowners took an appeal, under state law, from a tax assessment to a county court by filing a petition therein alleging that the acreage was less than the assessed figure and that the valuation was excessive. Immediately after filing this petition in the county court they removed the proceeding into the federal court, as they were at that time entitled to do whether they were plaintiffs or defendants, provided the proceeding was otherwise removable. The circuit court refused to remand and, after a hearing on the merits, reduced the assessment. The Supreme Court reversed. Justice Bradley stated:

But is an appeal from an assessment of property for taxation a *suit* within the meaning of the law? In ordinary cases it certainly is not. By the laws of all or most of the States, taxpayers are allowed to appeal from the assessment of their property by the assessor to some tribunal constituted for that purpose, sometimes called a board of commissioners of appeal; sometimes one thing and sometimes another. But whatever called, it is not usually a court, nor is the proceeding a suit between parties; it is a matter of administration, and the duties of the tribunal are administrative, and not judicial in the ordinary sense of that term, though often involving the exercise of quasi-judicial functions. Such appeals are not embraced in the removal act.

In this respect the law of West Virginia does not differ from that of most other States. It is true that the tribunal of appeal is called the "county court," but it has no judicial powers except in matters of probate. In all other matters it is an administrative board, charged with the management of county affairs⁶⁷

⁶⁶ 135 U.S. 467 (1890).

⁶⁷ The Court continued in detail as follows, at 472-74:

It was under this [West Virginia] law that the appeal from the assessment in the present case was taken. In our judgment it was not a suit within the meaning of the removal act—though approaching very near to the line of demarcation. We cannot believe that every assessment of property belonging to the citizen of another State can be removed into the federal courts. Certainly the original assessment, made by the township or county assessors, could not be called a suit, and could not be thus removed; and there is, justly, no more reason for placing an assessment on appeal within that category. It is nothing but an assessment in either case, which is an administrative act. The fact that the board of appeal may swear witnesses does not make the proceeding a suit. Assessors are often empowered to do this without altering the character of their functions.

This view is in accord with that of the Supreme Court of Appeals of West Virginia. . . .

At the same time we do not lose sight of the fact, presented by every day's experience, that the legality and constitutionality of taxes and assessments may be subjected to judicial examination in various ways,—by an action against the collecting officer, by a bill for injunction, by *certiorari*, and by other modes of proceeding. Then, indeed, a suit arises which may come within the cognizance of the federal courts, either by removal thereto, or by writ

In reference to *Boom Co. v. Patterson*,⁶⁸ *Pacific Railroad Removal Cases*,⁶⁹ and *Searl v. School Dist.*,⁷⁰ which involved the assessment of the value of lands condemned for public use under the power of eminent domain and which are subsequently examined, Justice Bradley stated:

The general rule with regard to cases of this sort is, that the initial proceeding of appraisalment by commissioners is an administrative proceeding, and not a suit; but that if an appeal is taken to a court, and a litigation is there instituted between parties, then it becomes a suit within the meaning of this act of Congress⁷¹

Relative to *Delaware County Comm'rs v. Diebold Safe & Lock Co.*,⁷² *Gaines v. Fuentes*,⁷³ *Ellis v. Davis*,⁷⁴ and *Hess v. Reynolds*,⁷⁵ Justice Bradley stated in the *Upsbur County* case:

In *Delaware County v. Diebold Safe Co.* it was held that where a claim against a county is heard before county commissioners, though the proceedings are, in some respects, assimilated to proceedings before a court, yet they are not in the nature of a trial *inter partes*, but are merely the allowance or disallowance, by county officers, of a claim against the county, upon their own knowledge, or upon any proof that may be presented to them; but that an appeal from their decision, tried and determined by the Circuit Court of the county, is a suit removable to the Circuit Court of the United States

Gaines v. Fuentes and *Ellis v. Davis*, arose out of proceedings to set aside the probate of wills; and although the granting of probate of a will is not ordinarily a suit, yet, if a contestation arises, and is carried on between parties litigating with each other, the proceeding then becomes a suit *Hess v. Reynolds* . . . was the case of a creditor instituting proceedings in a probate court against the estate of his

of error from this court, according to the nature and circumstances of the case. Even an appeal from an assessment, if referred to a court and jury, or merely to a court, to be proceeded in according to judicial methods, may become a suit within the act of Congress. But the ordinary acts and doings of assessors, or of appellate boards of assessors, in passing upon matters of mere valuation, appraisalment or proportionate distribution of expense, belong to a different class of governmental functions, executive and administrative in their character, and not appertaining to the judicial department. If an illegal principle of valuation be adopted, or an unconstitutional assessment or tax be made or imposed, or fraud be practised, it may be examined by one of the judicial methods referred to, and thus become the subject of a suit.

⁶⁸ 98 U.S. (8 Otto) 403 (1878).

⁶⁹ 115 U.S. 2 (1885).

⁷⁰ 124 U.S. 197 (1888).

⁷¹ 135 U.S. 467, 475 (1890).

⁷² 133 U.S. 473 (1889) (removal by plaintiff claimant at a time when a plaintiff could remove). See also *Fuller v. County of Colfax*, 34 Fed. 177 (C.C.D.Neb. 1882).

⁷³ 92 U.S. (2 Otto) 10 (1875).

⁷⁴ 109 U.S. 485 (1883).

⁷⁵ 113 U.S. 73 (1885) (removal by the creditor of an estate, following his appeal from the probate court to the state circuit court, was at a time when either plaintiff or defendant could remove).

deceased debtor, and then removing them into the Circuit Court of the United States.⁷⁶

Applying this principle to the facts in the *Upshur County* case, Justice Bradley held that the appeal, involving the tax assessment, to the county court did not constitute a suit in a state court; and hence the proceeding was not removable.⁷⁷

*Commissioners of Road Imp. Dist. v. St. Louis S. W. Ry.*⁷⁸ illustrates, on the other hand, that an *inter partes* proceeding in a tribunal, which irrespective of state judicial characterization is then performing a judicial function, is a suit for removal purposes, although at other times the tribunal may perform administrative or legislative functions. Under the Arkansas Constitution the county court was a judicial tribunal for many but not all purposes. In relation to road improvement district proceedings in the county, the court had such powers and duties as: the approval of a proposed improvement district which then became a municipal corporation capable of suing and being sued; the appointment of commissioners who are the governing body of the corporation; to pass upon the commissioners' plan of improvement and estimate of cost; to appoint assessors who assess the benefits and damages to the several parcels of land included; to

⁷⁶ 135 U.S. 467, 476-77 (1890). Justice Bradley summarized at 477 as follows:

The principle to be deduced from these cases is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit; but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other.

⁷⁷ *Upshur County v. Rich*, supra note 76. Justice Bradley further stated:

Applying this principle to the facts of the present case, it does not seem difficult to come to a decision. We have seen that, although the appeal from the assessment was made to the "county court" *eo nomine*, yet that this is not a judicial body, invested with judicial functions, except in matters of probate; but is the executive or administrative board of the county, charged with the management of its financial and executive affairs. According to the principles laid down by the state court, the acts of this board, in matters of taxation, are as purely administrative as are those of the county assessors in making the original assessment. Although we are not concluded by this decision, it is so much in harmony with our own decisions on the same subject that we accept it as correct.

Accord: *Ex parte Oklahoma*, 37 F.2d 862, 864-65 (10th Cir. 1930). Following a proceeding before the county treasurer to list and assess taxable property and his decision in favor of the taxpayer, the state appealed to the county court and the taxpayer removed. Held: The action was not removable: "Federal courts may give relief from unlawful or fraudulent taxation where jurisdiction exists, but they have no power to act in an administrative capacity, legislative or executive, in the listing, valuation and assessment of property for taxation. Those are not judicial functions."

⁷⁸ 257 U.S. 547 (1922). Principle applied in: *In re Judicial Ditch No. 24*, 87 F. Supp. 198 (D. Minn. 1949).

levy an assessment against all the real property in the district; and, after the commissioners have filed the book of assessments in its clerk's office, to hear and determine the justice of particular assessments upon written objections filed by affected landowners, pursuant to published notice, and enter a final judgment, subject to an appeal de novo to the circuit court.

The Court observed that the distinction between a proceeding which is the exercise of legislative power and of administrative character and a judicial suit is not always clear. In holding that a proceeding in the county court to assess benefits and damages growing out of a road improvement was a suit brought in a state court for removal purposes, Chief Justice Taft stated:

[The] proceedings for the making of this road improvement are in the main legislative and administrative. There is, however, one step in them that fulfills the definition of a judicial inquiry if made by a court. That is the determination of the issue between the Road District on the one part and the land owners on the other, as to the respective benefits which the improvement confers on their lands, and the damages they each suffer from rights of way taken and other injury

[T]he statutory designation of the action of a body as a judgment, or the phrasing of its findings and conclusion in the usual formula of a judicial order, is not conclusive of the character in which it is acting. When we find, however, that the proceeding before it has all the elements of a judicial controversy [Gaines v. Fuentes, 92 U.S. 10 (1875)], to wit, adversary parties and an issue in which the claim of one of the parties against the other capable of pecuniary estimation, is stated and answered in some form of pleading, and is to be determined, we must conclude that this constitutional court [the county court] is functioning as such.⁷⁹

The Chief Justice then asserted that the question of removal is a federal one, and rejected the state supreme court's holding in a similar case that the county court's functions were administrative and not judicial.⁸⁰ After noting that the commissioners' book of assessments and the landowner's written objections make the pleadings and that there is a hearing thereon at which oral evidence may be adduced, it was concluded that the proceeding is adversary and *inter partes*. Continuing, the Chief Justice stated:

The manifest distinctions between the Upshur County Case and this are, first, that the question here is not one of general taxation, . . . ; second, that the County Court of Arkansas, differing from the West Virginia County Court, is a court and by the constitution of the

⁷⁹ 257 U.S. at 553-55, 556, 557.

⁸⁰ See p. 299 *supra*. See also *Tool & Die Makers, Lodge 78 v. General Elec. Co.*, 170 F. Supp. 945 (E.D. Wis. 1959), pp. 306-07 *supra*.

State may exercise judicial functions in such subjects-matter; and, third, that the proceeding is *inter partes*. . . .

The next objection is that the Road District Commissioners could not file their assessment book in the federal court, assuming the necessary diverse citizenship, against any lot or lot owner, and so that the inquiry cannot be moved because, under . . . the Judicial Code, removal is limited to cases within the original jurisdiction of the District Court This limitation is not intended to exclude from the right of removal defendants in cases in the state court which because of their peculiar form would be awkward as an original suit in a federal court, or would require therein a reframing of the complaint and different procedure The limitation is that only those proceedings can be removed which have the same essentials as original suits permissible in District Courts, that is that they can be readily assimilated to suits at common law or equity, and that there must be diverse citizenship of the parties and the requisite pecuniary amount involved. . . .⁸¹

Accordingly, where, following an administrative determination, an appeal is taken to a court that is then functioning as a court in an *inter partes* proceeding, there is a civil action brought in a state court for removal purposes⁸² even though an appeal *de novo* would lie from this state court to another state court.⁸³ Thus, where the other requisites of removal jurisdiction are present, the suit may be removed by the defendant.⁸⁴ The nature of the interests involved prior to and on the appeal must be considered in determining who are the real parties in interest⁸⁵ and whether the appellant should be treated as a

⁸¹ *Commissioners of Road Imp. Dist. v. St. Louis S.W. Ry.*, 257 U.S. 547, 560-62 (1922).

⁸² *Ibid.*; *In re Chicago, M., St.P. & P. R.R.*, 50 F.2d 430 (D. Minn. 1931) (Proceeding before a state railway commission to determine whether tracks should be elevated or depressed and how the expense should be borne is administrative. Appeal by the city, in the name of the state, to the state district court to determine whether the commission's order is lawful and reasonable is a suit and removable by the railroad.); *Range Oil Supply Co. v. Chicago, R.I. & P. R.R.*, 248 F.2d 477, 479 (8th Cir. 1957) (After appeal of Minnesota corporation to state district court from commission's order denying its request that site on railroad right of way be set aside for its use, railroad could remove. "When appellant appealed to the state District Court it in effect began a civil suit in which it sought to have the court hold that the order under review was unlawful and unreasonable. Appellant was the aggressor and it alone sought relief from the order of the Commission. At this stage of the proceeding it became a civil action and as the jurisdictional requisites existed it was removable to the Federal court."); *In re Judicial Ditch No. 24*, 87 F. Supp. 198 (D. Minn. 1949) (proceeding for establishment of a judicial ditch were administrative; proceedings became judicial when railroads appealed their assessment to the district court). Cf. *Collins v. Public Serv. Comm'n*, 129 F. Supp. 722 (W.D. Mo. 1955), see pp. 303, 308 *supra*.

⁸³ *Commissioners of Road Imp. Dist. v. St. Louis S.W. Ry.*, 257 U.S. 547 (1922).

⁸⁴ *Ibid.*; *Range Oil Supply Co. v. Chicago, R.I. & P. R.R.*, 248 F.2d 477 (8th Cir. 1957); *In re Judicial Ditch No. 24*, 87 F. Supp. 198 (D. Minn. 1949); *In re Chicago, M., St.P. & P. R.R.*, 50 F.2d 430 (D. Minn. 1931).

⁸⁵ *In re Judicial Ditch No. 24*, *supra* note 84 (landowners who initiated administrative proceeding for establishment of a judicial ditch are real parties in interest, not the state;

plaintiff or a defendant. And the mere fact that a party appeals from the administrative and nonjudicial body does not constitute that party a plaintiff or a defendant for removal purposes.⁸⁶

B. Condemnation Proceedings

The foregoing general principles also apply to proceedings for the condemnation of property under the power of eminent domain. Such a proceeding in a court, acting as a judicial tribunal, is a common-law civil suit.⁸⁷ When the requisites of federal jurisdiction are present, the federal district court has both original and removal jurisdiction of condemnation actions, with removal jurisdiction usually predicated upon diversity and the requisite jurisdictional amount.⁸⁸ Where the condemnation proceeding is initially commenced in a court, acting as a judicial tribunal, the proceeding is a civil action from the commencement.⁸⁹ Thus, where a school district initiated a condemnation proceeding in a Colorado state court, *Searl v. School Dist.* held that a civil action was then begun in a state court for removal purposes. "The fact," said Justice Matthews,

that the Colorado statute provides for the ascertainment of damages by a commission of three free-holders, unless at the hearing a defendant shall demand a jury, does not make the proceeding from its commencement any the less a suit at law within the meaning of the Constitution and acts of Congress and the previous decisions of this court

and following appeal by railroads to the state court from the assessment railroads could remove); *In re Chicago, M., St.P. & P. R.R.*, supra note 84 (appeal by city in name of the state; city treated as real party in interest).

⁸⁶ *Mason City & Ft. Dodge R.R. v. Boynton*, 204 U.S. 570 (1907) (appeal by landowner from an administrative award in a condemnation proceeding; landowner, as condemnnee, to be treated as defendant, although state law classifies him as a plaintiff); *Chicago, R.I. & P. R.R. v. Stude*, 346 U.S. 574 (1954) (similar except appellant was condemnor; and he should be treated as a plaintiff, not a defendant, for removal purposes); *In re Chicago, M., St.P. & P. R.R.*, 50 F.2d 430, 434 (D. Minn. 1931); *In re Judicial Ditch No. 24*, 87 F. Supp. 198 (D. Minn. 1949).

⁸⁷ *Kohl v. United States*, 91 U.S. (1 Otto) 367 (1875).

⁸⁸ See *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

In the *Pacific Railroad Removal Cases*, 115 U.S. 2 (1885), the railroad removed on the basis of a general federal question in that it was incorporated under the laws of the United States. This would no longer be a basis for removal.

⁸⁹ *Searl v. School Dist.*, 124 U.S. 197 (1888). *City of Thibodaux v. Louisiana Power & Light Co.*, 255 F.2d 774, 776 (5th Cir. 1958):

Under the Federal statute [62 Stat. 937 (1948), 28 U.S.C.A. § 1441 (1950)] only civil actions may be removed from a state to a Federal Court. Although some state condemnation proceedings may not be, at every stage, removable civil actions, the expropriation suit authorized by the Louisiana act is a controversy between parties which is to be submitted to a judicial tribunal for determination by an exercise of the judicial power. Such proceeding is a civil action and so may be removed where, as here, diversity of citizenship and jurisdictional amount are present.

This case was reversed insofar as the court of appeals had reversed the district court for staying the removed action pending a determination in the state court of the city's power of expropriation. *Louisiana Power & Light Co. v. City of Thibodaux*, supra note 88.

It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant.⁹⁰

There are many divergent state condemnation procedures, sometimes even within the same state.⁹¹ Frequently a state will provide some pre-judicial procedure or a procedure that is difficult to classify as administrative or judicial, and then problems arise in determining when a proceeding, initiated before some organ of the state, becomes a civil action brought in a state court for removal purposes. In *Boom Co. v. Patterson*, referred to in the *Searl* case, Justice Field stated:

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 incidents⁹²

Applying the principles of the *Boom Co.* case, the *Pacific Railroad Removal Cases*⁹³ held that a proceeding instituted by the common council of a city, before the mayor and a jury, to condemn land of the railroad, to ascertain the value of the land taken, and to assess the cost thereof on the property benefited, is not, while pending there, a suit at law within the removal statute. However, it becomes such a suit when transferred to the circuit court of the state on appeal where it is heard *de novo*; and then, the other requisites of federal jurisdiction being present, the landowner could remove. Similarly, *Madisonville Traction Co. v. St. Bernard Mining Co.*⁹⁴ held that although a state county court may act administratively at a preliminary stage of the condemnation proceeding, when the proceeding in

⁹⁰ *Searl v. School Dist.*, *supra* note 89, at 199-200.

⁹¹ 5 Moore's Federal Practice § 38.32 [2] and notes thereunder at 249 (2d ed. 1959).

⁹² *Boom Co. v. Patterson*, 98 U.S. (8 Otto) 403, 406 (1878). For Justice Bradley's comment on this case and related cases, see p. 310.

⁹³ 115 U.S. 2 (1885).

⁹⁴ 196 U.S. 239 (1905). In this case a Kentucky corporation filed an *ex parte* application with the county court for the appointment of commissioners to assess the damages which the landowner, a Delaware corporation, was entitled to receive; commissioners were appointed; following their report and award, the condemnor applied to the court for confirmation and process was then issued to the landowner, with a hearing to follow if exceptions were filed by either party; and from the judgment of the county court either party could appeal to the circuit court, where the appeal was to be tried *de novo*. The county court was acting administratively up to the application for confirmation of the commissioners report, but at that time a suit was begun in a state court and the landowner was then entitled to remove on the basis of diversity and jurisdictional amount.

the county court became *inter partes*, that a suit was then begun for removal purposes; that this was not altered by the fact that an appeal de novo could be taken from the county court to the state circuit court; and that, although an exercise of eminent domain involves the application of sovereign power, the state could not restrict its exercise to its courts when the proceeding became a suit that is otherwise within the cognizance of the federal courts.⁹⁵

In brief, an *inter partes* condemnation proceeding initiated in a state tribunal exercising judicial functions is a civil action brought in a state court for removal purposes.⁹⁶ But preliminary proceedings of an administrative, legislative, or executive character to ascertain the value of the property to be condemned do not constitute a suit (or civil action) within the removal statutes and thus are not removable.⁹⁷ Any subsequent proceeding, however, that has reached the maturity of a civil action in a tribunal exercising judicial functions is a "civil action brought in a state court" for purposes of removal; and is then subject to removal—the fact that a de novo appeal lies to another state court does not detract from the then existing right⁹⁸—provided the other requisites of removal are satisfied.⁹⁹ The name given by the state to a particular tribunal is not controlling as to whether it is a court for removal purposes.¹⁰⁰ It is the function then being performed by the tribunal that controls.¹⁰¹ Nor is the state classification of the parties controlling, for the condemnor is a plaintiff for removal purposes and may not remove under the present

⁹⁵ *Ibid.*

⁹⁶ *Searl v. School Dist.*, 124 U.S. 197 (1888); *City of Thibodaux v. Louisiana Power & Light Co.*, 255 F.2d 774 (5th Cir. 1958).

⁹⁷ *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239 (1905); *Pacific Railroad Removal Cases*, 115 U.S. 2 (1885); *Boom Co. v. Patterson*, 98 U.S. (8 Otto) 403 (1878); *Village of Walthill v. Iowa Elec. Light & Power Co.*, 228 F.2d 647, 653 (8th Cir. 1956). In this latter case Judge Van Oosterhout stated:

[I]t appears that in Nebraska, as well as in Iowa, the proceedings before the appraisers are not considered an action before a judicial tribunal. The three-judge condemnation court is in reality just another board of appraisers. We believe this conclusion to be somewhat further supported by the fact that section 19-704, R.R.S. Nebraska 1943, gives the municipality ninety days after determination of value to abandon the proceedings by ordinance, and the fact that an appeal is allowed the owner only in the event that the project is not abandoned. This, it seems to us, lends support to the view that the proceeding before the three-judge court is merely a valuation proceeding, and that the real controversy does not arise until after the lapse of the ninety days after the valuation allowed the municipality for abandoning the proceeding.

The case was remanded to the condemnation court.

⁹⁸ *Madisonville Traction Co. v. St. Bernard Mining Co.*, *supra* note 97.

⁹⁹ *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239 (1905); *Pacific Railroad Removal Cases*, 115 U.S. 2 (1885); *Boom Co. v. Patterson*, 98 U.S. (8 Otto) 403 (1878).

¹⁰⁰ *Village of Walthill v. Iowa Elec. Light & Power Co.*, 228 F.2d 647 (8th Cir. 1956).

¹⁰¹ *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239 (1905).

statute,¹⁰² and the condemnee is a defendant for removal purposes.¹⁰³

C. *Workmen's Compensation Proceedings*

Turning to proceedings under a state workmen's compensation statute, we find that where the right to compensation is so dependent upon the administrative procedure outlined in the statute as to render the hearing before the state court, in effect, but another step in the administrative procedure, the state court proceeding is not a civil action for purposes of removal.¹⁰⁴ However, where, as in a limited number of states, the statutory right is court-administered, the action is civil and has been removable when the other requisites existed.¹⁰⁵ The right of removal has, however, been largely eliminated by the 1958 amendment to § 1445.¹⁰⁶

D. *When A Civil Action Is "Brought"*

Under the general removal statute, § 1441, a civil action, to be removable, must have been "brought" in a state court, *i.e.*, some proceeding tantamount to a civil action in a state court must be pending before removal is in order; and until that time the petition for removal is premature.¹⁰⁷

Previous discussion has dealt with what constitutes a civil action;¹⁰⁸ when a state tribunal is functioning as a court;¹⁰⁹ with the distinction between administrative and judicial proceedings;¹¹⁰ and when an administrative proceeding followed by state judicial action may be said to have ripened into a civil action pending in a state court.¹¹¹

We turn now to orthodox proceedings of a civil nature to determine when they may be regarded as "brought" in the state court. The matter under discussion is narrow. It is whether there is a civil action pending for removal purposes or whether removal at this point of time is premature; it does not concern the broader although related question as to when defendant's time for removal will expire—

¹⁰² *Chicago, R.I. & P. R.R. v. Stude*, 346 U.S. 574 (1954).

¹⁰³ *Mason City & Ft. Dodge R.R. v. Boynton*, 204 U.S. 570 (1907).

¹⁰⁴ *Decker v. Spicer Mfg. Div. of Dana Corp.*, 101 F. Supp. 207 (N.D. Ohio 1951).

¹⁰⁵ *Fresquez v. Fransworth & Chambers Co.*, 238 F.2d 709 (10th Cir. 1956); *Valencia v. Stearns Roger Mfg. Co.*, 124 F. Supp. 670 (D. N.Mex. 1954).

¹⁰⁶ 62 Stat. 937 (1948), 28 U.S.C.A. § 1441(c) (1950). This section prohibits removal of compensation suits arising under the law of the state wherein the action was brought; if the compensation suit (a transitory action) arises under another state's law, the statute does not apply. See, e.g., *Texas Pipeline Co. v. Ware*, 15 F.2d 171 (8th Cir. 1926).

¹⁰⁷ *Village of Walthill v. Iowa Elec. Light & Power Co.*, 228 F.2d 647 (8th Cir. 1956); see p. 306 *supra*, note 48.

¹⁰⁸ Pp. 299-305 *supra*.

¹⁰⁹ Pp. 305-07 *supra*.

¹¹⁰ Pp. 307-14 *supra*.

¹¹¹ P. 308 *supra*.

a time that is not necessarily geared to when an action is "brought."¹¹²

A reference must be made to state law to determine what has been done; but, as in situations previously discussed, state law is not determinative as to whether a civil action has been "brought" for removal purposes.¹¹³

A removal by a defendant does not admit that the action was rightfully pending in the state court.¹¹⁴ Valid service of process upon the defendant is not a prerequisite to removal, and the validity may be challenged after removal.¹¹⁵ Indeed, a defendant, otherwise entitled to do so, may remove before any service of summons is made upon him, provided the plaintiff has "brought" a civil action by setting in motion the state's judicial machinery against the defendant.¹¹⁶ *English v. Supreme Conclave* treats this matter well. Here the plaintiff had obtained from the state court a temporary restraining order and an order to show cause, but original process had not been served on the defendant. In upholding removal the federal court stated:

The plaintiff contends that a suit is not brought in the state Chancery Court until subpoena [ad respondendum] issues

In the instant case the removal proceedings brought into the court, not only the filed bill, but the rule and ad interim restraint referred to. As the cause stood in the state court, and stands here, the de-

¹¹² Basically the statute provides that a petition for removal is to be filed within 20 days from the time suit first becomes removable; ordinarily the time the defendant is initially served, although in some instances an action will not become removable until subsequent pleadings are filed by the plaintiff. This latter situation is expressly covered by the second paragraph of § 1446(b). See, e.g., *Evangelical Lutheran Church v. Stanolind Oil & Gas Co.*, 251 F.2d 412 (8th Cir. 1958); *Mahony v. Witt Ice & Gas Co.*, 131 F. Supp. 564 (W.D. Mo. 1955).

¹¹³ *English v. Supreme Conclave*, 235 Fed. 630 (D. N.J. 1916). See pp. 299, 306 *infra*.

¹¹⁴ *Goldey v. Morning News*, 156 U.S. 518, 525 (1895), wherein the court stated:

Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the state court. . . .

¹¹⁵ *Goldey v. Mornnig News*, *supra* note 114; *Clark v. Wells*, 203 U.S. 164 (1906) (prior state ruling not conclusive as law of the case).

¹¹⁶ *English v. Supreme Conclave*, 235 Fed. 630 (D. N.J. 1916); *Parkinson v. Barr*, 105 Fed. 81, 82 (C.C.D.Nev. 1900) (where complaint had been filed the "parties defendant might appear without any service of process upon them, or either of them, and file their petition for removal."); *Williston v. Raymond*, 213 Fed. 527 (E.D. N.Y. 1914); *Trower v. Stonebraker-Zea Live Stock Co.*, 17 F. Supp. 687 (N.D. Okla. 1937) (service on other defendants); *Yellowstone-Merchants' Nat'l Bank v. Rosenbaum Bros.*, 277 Fed. 69 (D. Mont. 1922) (defendant may remove before service if service is theoretically possible); *Driscoll v. Burlington-Bristol Bridge Co.*, 82 F. Supp. 975, 985 (D. N.J. 1949): [T]he rule seems to have been in interpreting the old Judicial Code that defendants not served in the state court action could petition for removal of the cause to the federal court. . . . The revised Judicial Code apparently has not changed this rule. . . .

Also, a nonresident defendant, otherwise entitled to remove, who has been served with process may remove, although the other nonresident defendants have not been served with process and have not appeared. *Pullman Co. v. Jenkins*, 305 U.S. 534, 540-41 (1939). See also *Hutchins v. Priddy*, 103 F. Supp. 601, 607 (W.D. Mo. 1952); *S.E. Overton Co. v. International Bhd. of Teamsters*, 115 F. Supp. 764, 772 (W.D. Mich. 1953).

fendants were and are required to make answer to the rule directed against them, and they continue under the restraint imposed upon them in such proceedings. Surely in every sense, except a technical one, such proceeding was and is a suit pending

While the filing of a bill in the state Court of Chancery may not be the commencement of a suit, so as to bring it within the meaning of "pending" in a state statute, authorizing the transfer of a cause from one state court to another, the filing of an injunction bill in a state court, followed by an ad interim stay, pending the hearing of a rule to show cause why a preliminary injunction should not issue in said cause, is a suit within the meaning of the Federal Statute in question.¹¹⁷

If an action is commenced in a state court in accordance with its usual and normal procedure,¹¹⁸ then, of course, the action may be properly regarded as "brought" for removal purposes. However, as we see from the rationale of the *Supreme Conclave* case, something less than such a regular commencement will suffice. And so a state action is "brought," for removal purposes where an attachment or garnishment is levied;¹¹⁹ an order for the civil arrest of defendant is obtained;¹²⁰ or in some other manner the defendant's person or property is subjected to judicial restraint¹²¹ or the state's judicial machinery is set in motion against the defendant.¹²²

IV. MUST BE INDEPENDENT AND NOT SUPPLEMENTARY

Although such requisites for removal exist as the necessary diversity and jurisdictional amount, these alone will not suffice. In addition, to warrant removal the "civil action" must be an independent

¹¹⁷ *English v. Supreme Conclave*, 235 Fed. 630, 631-32 (D. N.J. 1916).

¹¹⁸ For discussion, see 2 Moore's Federal Practice ¶ 3.03, at 703 (2d ed. 1959); see also 2 U.S. Code Cong. Serv. 1268 (1949).

¹¹⁹ *Dulion v. S.A. Lynch Enterprise Fin. Corp.*, 53 F.2d 568 (5th Cir. 1931), cert. denied, 285 U.S. 540 (1932).

¹²⁰ *Williston v. Raymond*, 213 Fed. 527 (E.D. N.Y. 1914).

¹²¹ *English v. Supreme Conclave*, 235 Fed. 630 (D. N.J. 1916).

¹²² *Phillipbar v. Derby*, 85 F.2d 27, 30 (2d Cir. 1936) (before the complaint filed). The court stated:

The denial of the remand was therefore right unless the removal was premature because the process alone had been served, . . . we can find no decision suggesting that a cause may not be removed before the plaintiff has pleaded, and there is no reason in principle to support such a notion. *Dulion v. S. A. Lynch Enterprise Finance Corp.* [53 F.2d 568 (5th Cir. 1931), cert. denied, 285 U.S. 540 (1932)]. . . . When the removal depends upon the nature of the cause of action, for obvious reasons it is impossible to know what it will be until the plaintiff has pleaded, and he alone can say what the pleading will be. . . . But that has nothing to do with the removability of a cause for diversity of citizenship.

affirming 11 F. Supp. 709 (E.D. N.Y. 1935); *Hornung v. Master Tank & Welding Co.*, 151 F. Supp. 169, 172 (D. N.D. 1957), wherein the court stated: "The fact that there was no state court file on the case until completion [of the removal proceedings] has no significance because, so long as the state court had acquired jurisdiction by service of process, removal could be initiated prior to filing of the pleadings there."

suit and not a proceeding supplementary or incidental to another action.¹²³ This proposition is well settled and not subject to dispute. Difficulty, however, arises at times in applying the doctrine, and some conflict ensues in its application. This is particularly true in relation to garnishment proceedings brought to enforce a judgment.¹²⁴

Before proceeding to a discussion of the above proposition that the action must be an independent suit, we refer to certain related matters discussed elsewhere. Although the federal district courts, held within the states, have no probate jurisdiction, they do exercise both original and removal jurisdiction over *inter partes* suits, within common-law and equity jurisdiction and federal cognizance, that arise out of or pertain to probate proceedings but are independent in character and not merely incidental or ancillary to the probate.¹²⁵ And, if otherwise within federal cognizance, a federal court may adjudicate claims in and to a res, over which a state or other federal court has jurisdiction; but it may not exercise either original or removal jurisdiction over proceedings that interfere with the in rem court's prior and subsisting jurisdiction.¹²⁶

Despite a verbal kinship, the proposition under discussion that the suit must be of an independent character should be distinguished from the doctrine of 28 U.S.C.A. § 1441(c). This latter subsection (c) authorizes a defendant to remove an entire case whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined by plaintiff with one or more otherwise nonremovable claims or causes of action.¹²⁷ The independent

¹²³ *Bondurant v. Watson*, 103 U.S. (13 Otto) 281 (1880); *Barrow v. Hunton*, 99 U.S. (9 Otto) 80 (1878); *Bank v. Turnbull & Co.*, 83 U.S. (16 Wall.) 190 (1872).

¹²⁴ *Randolf v. Employers Mut. Liab. Ins. Co.*, 260 F.2d 461 (8th Cir. 1958); *Clarkin v. Worthley*, 114 F. Supp. 877 (W.D. Mo. 1953); *Toney v. Maryland Cas. Co.*, 29 F. Supp. 785 (W.D. Va. 1939).

¹²⁵ See pp. 303-04 supra; p. 321 infra.

¹²⁶ *Mullendore v. American Sur. Co.*, 27 F.2d 572 (9th Cir. 1928), cert. denied, 278 U.S. 653 (1929); *New York v. National Cancer Hosp. of America*, 153 F. Supp. 484 (S.D. N.Y. 1956); *Daughtery v. Sharp*, 171 Fed. 466 (C.C.E.D. Mich. 1908).

¹²⁷ *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951) (held not separate and independent); *Snow v. Powell*, 189 F.2d 172 (10th Cir. 1951) (held not separate and independent); *Evangelical Lutheran Church v. Stanolind Oil & Gas Co.*, 251 F.2d 412 (8th Cir. 1958) (held separate and independent). Section 1441 (c) has no application to removability of an after-judgment garnishment proceeding. As noted by J. Van Oosterhout in *Randolf v. Employers Mut. Liab. Ins. Co.*, 260 F.2d 461, 464 (8th Cir. 1958):

We are unable to see where § 1441(c) applies to the facts of our present case. The only issue is the liability of the garnishee. . . . Moreover, in the present controversy, we have only one defendant, the garnishee. There has been no joinder of the present civil action with any other cause of action, and certainly no joinder with a cause of action which is not removable.

We believe that the present case . . . was properly removed to the federal court by virtue of 28 U.S.C.A. § 1441(a). The garnishment proceeding is a civil action.

suit doctrine, now discussed, deals, however, with a controversy that arises subsequent to a state court action that was either nonremovable or, if removable, was not removed. The mere fact that the controversy had its origin in or emerges from the original state action does not make it a part thereof.¹²⁸ If otherwise within federal cognizance, the controversy is removable when it is essentially a separate suit;¹²⁹ but not if it is substantially a part of,¹³⁰ an incident to,¹³¹ or continuation of the prior action.¹³² Thus, the Court in *Barrow v. Hunton* stated:

The question presented with regard to the jurisdiction of the circuit court is, whether the proceeding to procure nullity of the former [state court] judgment . . . is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original [state] suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible.

On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding . . . In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof.¹³³

And the Court held that the statutory proceeding¹³⁴ brought, pursuant to Louisiana law, in the same state court which had rendered the default judgment to have that court declare the judgment "a

¹²⁸ *Bondurant v. Watson*, 103 U.S. (13 Otto) 281 (1880); *Pettus v. Georgia R.R. & Banking Co.*, 19 Fed. Cas. 396 (No. 11048) (C.C.M.D.C.Ala. 1874), modified on other grounds, 113 U.S. 116 (1885).

¹²⁹ *Bondurant v. Watson*, supra note 128; *Holbrook Irr. Dist. v. Arkansas Valley Sugar Beet & Irrigated Land Co.*, 54 F.2d 840 (10th Cir. 1931); *Ward v. Congress Const. Co.*, 99 Fed. 598 (7th Cir. 1900).

¹³⁰ *West v. Aurora City*, 73 U.S. (6 Wall.) 139 (1867); *Thompson v. Chicago & N.W. Ry.*, 14 F.2d 230 (D. Minn. 1926) (unsettled remnant).

¹³¹ *Ladd v. West*, 55 Fed. 353 (C.C.D.N.H. 1893); see note 150 infra.

¹³² *Barrow v. Hunton*, 99 U.S. (9 Otto) 80 (1878); *Bank v. Turnbull & Co.*, 83 U.S. (16 Wall.) 190 (1872).

¹³³ Supra note 132, at 82-83.

¹³⁴ For comparable federal practice, see rule 60(b), Fed. R. Civ. P. (1958).

nullity" for want of proper service was a direct attack and nonremovable. On the other hand, the cases hold that an action to enjoin or otherwise obtain relief from a judgment on the basis of fraud, accident, or mistake, which is essentially the same as the independent action in equity,¹³⁵ should be treated as a separate suit and removable if otherwise within federal cognizance.¹³⁶

The two foregoing distinct lines of cases illustrate the practical policy that underlies the separate suit doctrine. If the controversy is so related to the state action that it is not properly severable from the action that was either nonremovable or in any event not removed, then the controversy is not properly removable. This is true, for if removal of the controversy alone were allowed this would do practical violence to the state action; and the removal statutes do not warrant removal of both the controversy and the state action, which has quite often gone to judgment, on the sole basis of the controversy. On the other hand, where the controversy is severable, as a practical matter, from the state action and is substantially equivalent to a common-law action or suit in equity, removal is warranted since it does no practical violence to the state action and safeguards the statutory right of removal.

Although in deciding whether the controversy is or is not a separate suit for removal purposes the federal court must necessarily look to the state proceeding and state law to see what is being done, the ultimate determination involves the construction and application of the removal statutes.¹³⁷ Consequently, this is a federal matter for independent federal decision,¹³⁸ with due thought given to the proposition that a state cannot validly restrict the right of removal.¹³⁹ In *Barrow v. Hunton*¹⁴⁰ the Court said:

The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiae*, the Courts

¹³⁵ For discussion see 7 Moore's Federal Practice, ¶¶ 60.36-40, at 601 (2d ed. 1959).

¹³⁶ *Carver v. Jarvis-Conklin Mortgage Trust Co.*, 73 Fed. 9 (C.C.E.D.Tenn. 1896); *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.*, 62 Fed. 1 (C.C.D.S.C. 1894); *Stackhouse v. Zunts*, 15 Fed. 481 (C.C.E.D.La. 1883).

¹³⁷ *Barrow v. Hunton*, 99 U.S. (9 Otto) 80 (1878); *Ward v. Congress Const. Co.*, 99 Fed. 598, 604 (7th Cir. 1900) ("While the proceeding now in question evidently was intended to be auxiliary to the decree of the state court, and was so in form, yet in fact, *ratione materiae*, it was not of that character."); *Stoll v. Hawkeye Cas. Co.*, 185 F.2d 96, 99 (8th Cir. 1950).

¹³⁸ Note 137 *supra*.

¹³⁹ *Donald v. Philadelphia & Reading Coal & Iron Co.*, 241 U.S. 329 (1916); *Harrison v. St. Louis & S.F. R.R.*, 232 U.S. 319 (1914).

¹⁴⁰ *Barrow v. Hunton*, 99 U.S. (9 Otto) 80, 85 (1879); and see *Ward v. Congress Const. Co.*, 99 Fed. 598 (7th Cir. 1900).

of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it.

Although two other Supreme Court cases have failed to furnish an adequate guide for lower courts as to whether or not a post-judgment garnishment proceeding is a separate suit for removal purposes,¹⁴¹ they do, nevertheless, illumine our problem. These cases are *Bank v. Turnbull & Co.*¹⁴² and *Bondurant v. Watson*.¹⁴³ In *Turnbull*, after *A* had recovered judgment in the state court against *B* and a writ of execution had been levied on certain property, *T*, a third person, pursuant to state statute, intervened and asserted a claim of ownership, gave suspending and forthcoming bonds, and the state court made an order for trial of the issue of title. Following removal to the federal court by *T*,¹⁴⁴ the Supreme Court characterized the statutory proceeding to try title as "merely auxiliary to the original action, a graft upon it, and not an independent and separate litigation." Holding against removal, the Court further stated:

The contest could not have arisen but for the judgment and execution, and the satisfaction of the former would at once have extinguished the controversy between the parties. The proceeding was necessarily instituted in the court where the judgment was rendered, and whence the execution issued. No other court, according to the statute, could have taken jurisdiction. It was provided to enable the court to determine whether its process had, as was claimed, been misapplied, and what right and justice required should be done touching the property in the hands of its officer. It was intended to enable the court, the plaintiff in the original action, and the claimant, to reach the final and proper result by a process at once speedy, informal, and inexpensive. That it was only auxiliary and incidental to the original suit is, we think, too clear to require discussion¹⁴⁵

The *Turnbull* doctrine has been applied to a prejudgment intervention proceeding to determine the intervenor's title to attached property,¹⁴⁶ and also to a postjudgment proceeding to determine title, even

¹⁴¹ However, see the excellent discussion in *Randolf v. Employers Mut. Liab. Ins. Co.*, 260 F.2d 461 (8th Cir. 1958).

¹⁴² 83 U.S. (16 Wall.) 190 (1873).

¹⁴³ 103 U.S. (13 Otto) 281 (1880).

¹⁴⁴ The state court in its order to try title provided that *T* should be regarded as the plaintiff in the statutory proceeding. So far as removal was concerned this was, however, immaterial, for as the Court pointed out the Act of March 2, 1867, permitted either plaintiff or defendant to remove.

¹⁴⁵ *Bank v. Turnbull & Co.*, 83 U.S. (16 Wall.) 190, 195 (1873).

¹⁴⁶ *King v. Shepherd*, 20 Fed. 337 (C.C.N.D.Iowa 1884). After plaintiff had taken default against defendant, but prior to entry of default judgment, plaintiff removed the entire case against the defendant, the garnishees, and the intervenors. Held: Case should be remanded since plaintiff had lost his right to remove as to defendant by taking default against him, and the intervening proceeding to try intervenors' title to attached property was auxiliary to main suit.

though arising several years after the judgment was rendered.¹⁴⁷

Bondurant v. Watson,¹⁴⁸ involved a situation comparable to that of *Turnbull*, except that the third person did not intervene in the state action to assert his title, but instituted an equity suit in a state court to enjoin the judgment creditor in the prior suit from enforcing his decree against the now-plaintiff's property; the equity suit was removed by the defendant judgment creditor. In holding that this equity action was an independent suit for removal purposes, the Court reasoned that the controversy in the original cause had been ended by a final judgment. Further, the present equity case had its origin in the former judgment, but it was a new and independent suit between other parties and upon new issues. It was a suit in which the plaintiff sought, in effect, to be protected against a judgment, to which he was not a party, by which his property had been specifically condemned to be sold to satisfy a claim against others, and not against him.

The Court distinguished *Turnbull* on the basis that *Turnbull* involved merely a statutory proceeding to try in a summary way the title to personal property seized on execution. The state court in directing its own process, according to the Court in *Bondurant*, had merely made a graft upon the original action.

That an action is in form an independent suit is not determinative. It has been held that the *Bondurant* doctrine does not warrant removal where the now-plaintiff was in privity with the defendant in the original action, and the matter now made the basis of the independent suit could have been pleaded in the prior original action;¹⁴⁹

¹⁴⁷ *Flash v. Dillon*, 22 Fed. 1 (C.C.E.D.Tex. 1884). In September, 1877, *A* recovered a money judgment against *B* in a Texas state court. In January, 1882, an execution issued and was levied upon a stock of goods. Under Texas statutory law *T* filed her oath and claim bond and took the property levied upon as her own. *A* then removed the proceeding by *T*, but the federal court remanded on the theory that the proceeding was not such an independent suit as could be removed unless the original suit had remained undetermined and was also removed with it.

¹⁴⁸ 103 U.S. (13 Otto) 281, 287 (1880).

¹⁴⁹ *Richmond & D. R.R. v. Findley*, 32 Fed. 641, 643 (C.C.N.D.Ga. 1887). *A* brought an ejectment suit in the state court against *B*, who was holding possession under the *X Company*, a Georgia corporation. During the pendency of this suit the *X Company* transferred the property, by perpetual lease, to the *R Company*, a Virginia corporation. The *R Company* then sued in the state court to enjoin further prosecution of the ejectment suit, and subsequently removed this suit into the federal court. In remanding, the court characterized the *X Company* as the real defendant in the ejectment suit, and distinguished the *Bondurant* case in this manner:

The complainant in that case . . . had distinct rights which he claimed independently of those claimed by any party to the original litigation. The original case had gone to judgment. He sought to be protected against the judgment on account of rights he had that were in no way involved in the controversy between the parties to the original suit.

Here the complainant acquires the control of the property, to recover which a suit is pending, and then instead of defending that suit, sets up by

or, where proceedings at law and equity are distinct, the subsequent suit in equity is to complete or perfect the right adjudged at law.¹⁵⁰ Where following judgment for plaintiff in an ejectment suit the defendant, under the state statutes, filed his petition in the suit as an "occupying claimant" to have the value of his improvements ascertained, this proceeding was "essentially part of and ancillary to the main suit" and nonremovable.¹⁵¹ And, even though a plaintiff has dismissed his suit, defendant's cross-action or counterclaim against the plaintiff, which remains for adjudication, is not removable.¹⁵²

On the other hand, the following have been held to be independent suits for removal purposes, within the *Bondurant* rule: a proceeding to enforce a decree against a person who was not a party to the original suit nor in privity with a party;¹⁵³ a creditor's bill to reach and apply property fraudulently transferred;¹⁵⁴ and, despite a contrary holding,¹⁵⁵ a motion proceeding by a judgment creditor of a corporation, with execution returned nulla bona, and on notice to a stockholder to have an execution against the stockholder for the amount of his unpaid stock.¹⁵⁶

bill in equity the same matters he could have pleaded in the original case, and claims the right to remove the case to this court when it could not have been removed by the party from whom he acquired his rights. I do not think he can do so.

¹⁵⁰ *Ladd v. West*, 55 Fed. 353, 354 (C.C.D.N.H. 1893). Plaintiff sued a managing partner for damages resulting from a nuisance created by the partnership, and recovered judgment. Later plaintiff brought another such action against the same defendant for the same kind of nuisance occurring at a subsequent period; and still later brought a proceeding in equity against both partners, setting up the former judgment and the pendency of the later action at law, and praying for consolidation, perpetual injunction, and the assessment and recovery of damages accruing subsequent to the proceedings at law. In holding that the equity proceeding was not removable by the defendants, the court said:

The right having been established at law in a case not removable, a subsequent proceeding in equity to regulate or perfect the right by injunction is ancillary to, or in aid thereof; or in other words, in a sense, at least, a part of the original proceeding. . . . Bringing in a new party defendant, who was a partner in the business sought to be regulated, does not make this proceeding any less a part and parcel and continuance of the original litigation.

¹⁵¹ *Chapman v. Barger*, 5 Fed. Cas. 477 (No. 2603) (C.C.D.Iowa 1877).

¹⁵² *West v. Aurora City*, 73 U.S. (6 Wall.) 139 (1868); see p. 304 supra.

¹⁵³ In *Ward v. Congress Const. Co.*, 99 Fed. 598, 602 (7th Cir. 1900), the court stated: "In its essence, the proceeding was a new suit or new application for an injunction against a new party, rather than an ancillary proceeding for contempt of the original injunction against a party bound thereby."

¹⁵⁴ *Kalamazoo Wagon Co. v. Snively*, 34 Fed. 823 (C.C.D. Kan. 1888); contra in tenor, *Coeur D'Alene Ry. & Nav. Co. v. Spalding*, 93 Fed. 280 (9th Cir. 1899), cert. denied, 174 U.S. 801 (1899).

¹⁵⁵ *Webber v. Humphreys*, 29 Fed. Cas. 525 (No. 17326) (C.C.E.D.Mo. 1879); *Lackawanna Coal & Iron Co. v. Bates*, 56 Fed. 737 (C.C.W.D.Mo. 1893), discusses but refuses to follow the *Webber* case.

¹⁵⁶ *Lackawanna Coal & Iron Co. v. Bates*, supra note 155. The court said:

It would not be questioned if, in the absence of this statutory proceeding, the judgment creditor had found Mr. Bates in this state, and had proceeded against him by bill in equity to reach assets in his hands belonging to the

Other cases are cited in the notes as illustrative of a proceeding that is sufficiently auxiliary or supplementary to another proceeding or action as to be nonremovable;¹⁵⁷ and of a proceeding which, if otherwise within federal cognizance, is sufficiently independent as to be removable.¹⁵⁸

debtor corporation, it would have been a "suit" removable into this jurisdiction. And since the state supreme court declares that the motion for execution is in the nature of a suit in equity to reach such assets, and is an independent and original action, to be treated independently of the cause against the corporation, as between the petitioner and the defendant stockholder, with the right of trial, appeal, and writ of error as in any other action at law, it must be a suit, within the meaning of the act of congress; and if so, why is not this defendant, who by chance is found within the state, and called into court by process to litigate the question as to whether or not he is a stockholder, and the extent of his liability, entitled to his constitutional right as a non-resident to have his cause tried in a federal court?

¹⁵⁷ *Thompson v. Chicago & N.W. Ry.*, 14 F.2d 230, 231 (D. Minn. 1926). Enforcement of statutory lien for attorney's fees. Intervention proceeding by plaintiff's attorneys to enforce their statutory lien for fees, which was a lien upon plaintiff's chose in action or any settlement thereof without the attorney's consent. The court stated:

It is true that the only real controversy which now exists in this case is that between the attorneys for the plaintiff and the defendant; but the attorneys are resorting to the original cause of action and enforcing a right with respect to it allowed them by statute. It is not a new controversy, but in effect the unsettled remnant of an old one, and the right of removal must be based upon that controversy.

New York v. National Cancer Hosp. of America, 153 F. Supp. 484 (S.D. N.Y. 1956) (application in a state receivership for an order directing cy pres distribution; and see note 126 supra); *Coeur D'Alene Ry. & Nav. Co. v. Spalding*, 93 Fed. 280 (9th Cir. 1899) (proceeding for appointment of receiver in aid of execution; and see note 154 supra), cert. denied, 174 U.S. 801 (1899).

¹⁵⁸ *Porter v. F. M. Davies & Co.*, 233 Fed. 465 (8th Cir. 1915) (plenary action by receiver to recover a money judgment against a third person). *Holbrook Irr. Dist. v. Arkansas Valley Sugar Beet & Irrigated Land Co.*, 54 F.2d 840, 842 (10th Cir. 1931) was a suit to determine water priority between a plaintiff with a favorable statutory adjudication rendered in one water district and a defendant with a favorable statutory adjudication rendered in another water district. Neither party was a party to the statutory adjudication in favor of the other. The court stated:

In determining whether, when priorities are decreed in different districts, a federal court has jurisdiction to determine a conflict between them, it is only necessary to consider whether this is a civil suit at law or in equity between citizens of different states, and a sufficient amount is in controversy. In such a case, a federal court has original jurisdiction and a suit may be removed to that court from a state court. . . .

It is contended that there is no removable controversy because this suit is merely supplemental to a main action. But it is not of that character, and there is no statute in Colorado which authorizes supplemental proceedings for the determination of conflicting priorities arising in different water districts. The plaintiff itself invoked the equity jurisdiction of the state court by virtue of a statute, which requires an independent suit for that purpose. . . . If the state court had jurisdiction to adjudicate the conflict in this suit, then the federal court, on removal, had jurisdiction over the controversy.

Pettus v. Georgia R.R. & Banking Co., 19 Fed. Cas. 396, 400 (No. 11048) (C.C.M.D. Ala. 1879) involved a claim for attorney's fees as a lien on the adverse party's property. A bill had been filed in a state chancery court, by certain complainants, in behalf of themselves and other creditors, to assert and enforce a lien on certain railroad property which had been sold and was in the possession of the purchasers. After final decree by which the lien was established, and while a reference to the master was pending to ascertain the amounts due the creditors who sought the benefit of the decree, the purchasers of the railroad property against which the lien had been declared, paid the com-

V. CONCLUSION

The removal limitation embodied in § 1441 by the phrase "civil action brought in a State court" is perhaps troublesome in but a few of the several thousand suits that are annually removed from state forums to the federal district courts.¹⁵⁹ Like so many phrases that abound in law, civil action is easy to define in general terms, but sometimes difficult to apply in a particular proceeding. Although the problem of what constitutes a civil action can be prevalent in original suits, the problem is more inherent to removal. This is because a state proceeding may commence as administrative matter and then at a subsequent stage change to a civil action,¹⁶⁰ and because a state forum may characterize the nature of a proceeding differently than the federal court.¹⁶¹ Much of this confusion, of course, can be obviated by bearing in mind that the question whether the removed suit equalled a "civil action brought in a State court" is to be determined under federal law.¹⁶² On the whole, however, as reflected by the cases, the federal judges and the practicing bar have shown an admirable appreciation of the problem presented.

plainants their claims in full, and bought up and settled other claims entitled to the benefit of the decree. Counsel for complainants having received no compensation for their services, in respect to these last-mentioned claims, filed their petition in the original suit against the purchasers of the railroad property and claimed a lien on the property for fees in respect to those claims, that the amount of their fees be determined, and, if said sums were not paid, that the property be sold to pay the same. This petition was not a mere graft upon or appendage to the original suit. The court said:

If the purpose of the petition in this case were to obtain an order of the court that the petitioners' fees for services might be paid out of the property of their clients, which their services had secured and brought into court, or which the court had in its possession, there might be some ground for the idea that this was a graft on the main suit. But that is not the object of the petition.

The petitioners are asserting a claim for their fees, not against their own clients, but, in effect, against the property of the opposite party.

Modified on other grounds, 113 U.S. 116 (1885).

¹⁵⁹ During 1959, 4,054 cases were removed from the state courts. Annual Report of the Director of the Administrative Office of the United States Courts 184 (1959).

¹⁶⁰ Range Oil Supply Co. v. Chicago, R.I. & P. R.R., 248 F.2d 477 (8th Cir. 1957).

¹⁶¹ Crivello v. Board of Adjustment of the Borough of Middlesex, 183 F. Supp. 826 (D. N.J. 1960).

¹⁶² See cases cited in note 16 supra.