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Local Prejudice and Removal of Criminal Cases from State to Federal Courts

Theodore Krieger

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laws so that new companies may be started and flourish." We question whether the "lack of uniformity" favored by Professor Dickinson could provide new companies with an opportunity to enter the field. For by this phrase, he must be referring to state regulation in a form similar to that which exists today. How much opportunity a new company could have to enter the field in the six states covered by the S.E.U.A., can be inferred from the statistics presented by Justice Black in the majority decision. As already noted, 90 percent of all fire insurance and allied lines are controlled by the Association in that area. By refusing reinsurance privileges to new companies and by intimidating brokers and policy holders, the field has been effectively closed to *bona fide* competition.

What Professor Dickinson, in effect, is saying when he denies the right of the Federal Government to regulate interstate aspects of the insurance business and at the same time criticizes the high standards of New York State, is that he does not want effective regulation at all. That is precisely the attitude of the S.E.U.A. as well, and is the real issue at stake in this controversy rather than a zealous regard for States' Rights.

SEYMOUR LAUNER.

LOCAL PREJUDICE AND REMOVAL OF CRIMINAL CASES FROM STATE TO FEDERAL COURTS

An accused who has been unable to obtain a change of venue in a state court on the ground of local prejudice or even though successful in that, but aware that the prejudice has moved along with him from the original to the present situs, may well desire to have the case removed from the state to a federal court. This desire will be accentuated if the accused is in a state where only one change of venue is permitted, regardless of the existence and the degree of local prejudice in the second situs. In any event the accused may feel that he will benefit by the higher procedural standards and safeguards of a federal tribunal less subject to the emotionalism of the original situs. In 1866 Congress made provision for such an occurrence when it enacted as a part of the Civil Rights Laws a statute providing for removal of criminal cases from a state to a federal court:

When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit

Insurance, Part II (1930), showed that in a study of acquisition costs for forty-seven companies authorized to do business here and for two hundred fifteen companies not so authorized, the cost in the New York authorized companies was 48% of the first year's premiums while the cost for the other companies was 75.5% of such premiums.

or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States.¹

This statute was enacted to supplement the Thirteenth Amendment and to guarantee the Negro his newly acquired freedom. Congress, with reason, feared that the emancipated slaves would be unable to enforce their rights in the courts of the slave states and regarded this legislation as necessary. As Senator Henry S. Lane of Indiana remarked during debate on this measure:

We should not legislate at all if we believed the state courts could or would honestly carry out the provisions of the constitutional amendment, but because we do believe that they will not do that, we give the federal officers jurisdiction.²

The bill was attacked by Senator Garrett Davis of Kentucky as consolidating the power of the states in the Federal Government, to which Senator Lyman Trumbull of Illinois, its sponsor, replied:

Why, sir, if the State of Kentucky makes no discrimination in civil rights between its citizens this bill has no operation whatever in the State of Kentucky. Are all the rights of the people of Kentucky gone because they cannot discriminate and punish one man for doing a thing that they do not punish another for doing? The bill draws to the Federal Government no power whatever if the states will perform their constitutional obligations.³

While the states' rights argument was the strongest used against the enactment of the bill, it was answered by Representative Samuel Shellabarger of Ohio, who stated that, "Calhoun, one of the ablest of the States Rights school of American politics, conceded the power of the citizen to petition and to claim the protection of his government. These belong to him as a member of the body politic, and the possession of them is what separates citizens of the lowest condition from aliens and slaves. Protection by his government is the right of every citizen, and this right is equal to all citizens. It cannot be taken away or impaired by the action of the States."⁴ The bill passed the Senate by a vote of 33 to 12 and the House of Representatives by 111 to 38. It was vetoed by President Johnson and passed over his veto by 33 to 15 in the Senate and 122 to 41 in the House. When its passage was announced by the Speaker of the House, the Congressional Globe reports that "this announcement was received with an outburst of applause in which members of the House, as well as the throng of spectators, heartily joined, and which did not subside for some moments."⁵ Future events have proved this manifestation of joy as well as the remark of Representative William Lawrence of Ohio that, "this

¹ REV. STAT. § 641 (1875), 28 U. S. C. § 74 (1934).

² Congressional Globe, 39th Cong., 1st Sess. (1866) 603.

³ *Id.* at 600.

⁴ *Id.* at 1293.

⁵ *Id.* at 1861.

bill is scarcely less to the people of this country than the Magna Charta was to the people of England",⁶ to be premature.

The statute has been held to be constitutional,⁷ and was initially construed to give a right of removal to the federal court because of local prejudice,⁸ as it was clearly intended to do. In the *Dunlap* case the defendant, a former slave and an active member of the Republican party, was indicted for the murder of a white man and a member of the Democratic party. The defendant alleged in his affidavit that because of bitter political prejudice, and because Negroes were seldom summoned as jurors, he would be unable to receive a fair trial in the state courts. On the basis of this affidavit the trial court granted a removal of the indictment to the Circuit Court of the United States for the District of North Carolina. The case went up on appeal to the Supreme Court of North Carolina and that court modified the order of the trial judge by holding that instead of removing the case to the federal court it should proceed no further in the state court until the federal court had acted upon it. In analyzing the statute the court said:

Had the object been merely to prevent discrimination by the laws of the state, very few words would have answered the purpose, and there would have been no occasion for an affidavit in regard to matter which must appear on the face of the public law; but the act under consideration goes into details, and, among other things, guarantees to citizens of color as full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and provides for the removal of all causes, civil and criminal, when such persons are denied, or cannot enforce in the state courts the rights secured to them, upon the affidavit of the party that such is the fact. This I consider conclusive as to the intention to extend the operation of the act of Congress, so as to make it include cases, where by reason of prejudice in the community, a fair trial cannot be had in the state courts.⁹

Unfortunately, there is no record as to whether the federal court ever took any action upon the *Dunlap* case. However, it was in essence overruled a few years later in *Fitzgerald v. Allman*.¹⁰ There the court held that the statute applied only to cases when the laws or judicial practices of a state recognize distinctions on account of color, race, etc., and not to cases of local prejudice. The North Carolina court based its decision on the reasoning of the Supreme Court in *Strauder v. West Virginia*.¹¹ It has been consistently held that local and racial prejudice are not within the statute.¹² The courts have

⁶ *Id.* at 1832.

⁷ *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664 (1880); *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676 (1880).

⁸ *State v. Dunlap*, 65 N. C. 491 (1871).

⁹ *Id.* at 494.

¹⁰ 82 N. C. 492 (1880).

¹¹ Cited *supra* note 7.

¹² *Commonwealth v. Millen*, 289 Mass. 441, 194 N. E. 463 (1935); *Lamson v. Superior Court*, 12 F. Supp. 812 (N. D. Cal. 1935); *California v. Chue Fan*, 42 Fed. 865 (C. C. N. D. Cal. 1890).

maintained that the statute applied only to cases wherein the defendant was unable to enforce his civil rights because of a state constitutional provision or statute, and not where this was prevented by administrative or judicial action.¹³

In *Texas v. Gaines*,¹⁴ defendant, a Negro indicted for bigamy, alleged that because of his race, color and Republican politics, local prejudice was such that he would be unable to receive a fair trial in the state courts and petitioned to have the case removed to the federal court. The circuit court refused, saying that the statute was intended "to protect against legal disabilities and legal impediments to the free exercise of the rights secured, and not to private infringements of those rights by prejudice or otherwise, when the laws themselves are impartial and sufficient". The court did not examine the problem as to whether impartial and sufficient laws can function in a community where the private infringements of the defendant's rights by prejudice or otherwise are such as to preclude a fair trial. It did, however, point out that the privilege of removal would present a temptation to criminal defendants which when utilized would delay the administration of justice. As to that there is no doubt. However, the very concept of a change of venue is predicated upon an initial delay. This delay is the price for the assurance that steps will be taken to intensify the objectivity of the court procedure. Speedy justice has been known to lose sight of an accused's rights;¹⁵ the danger is even greater in the event that the community has already prejudged the defendant. But the objection as to delay loses its efficacy if in fact there is not that degree of local prejudice which renders a fair and impartial trial doubtful in the state court. For in that event the federal court will not assume jurisdiction and the state court will continue its trial of the case. If the state court is unable to furnish an accused a fair and impartial trial, there should be little question as to its consent to a removal. As a statement of principle there is little objection to the worthwhileness of a delayed fair and impartial trial in a federal court, as contrasted to a speedy trial in a state court which because of local prejudice is neither fair nor impartial.

The leading case on the question of removal of criminal cases from state to federal courts on the ground of local prejudice is *Virginia v. Rives*.¹⁶ In this case two Negroes, aged 17 and 19, were indicted for the murder of a white man. They filed a petition for removal to the federal court, alleging that because of strong prejudice in the community and that because Negroes had never been allowed to serve as jurors in any case, civil or criminal, in which they had

¹³ *State of New Jersey v. Weinberger*, 38 F. (2d) 298 (D. C. N. J. 1930); *Kentucky v. Power*, 201 U. S. 1, 50 L. Ed. 633 (1906); *Gibson v. Mississippi*, 162 U. S. 565, 40 L. Ed. 1075 (1896); *Bush v. Kentucky*, 107 U. S. 110, 27 L. Ed. 354 (1882); *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667 (1879).

¹⁴ 23 Fed. Cas. 869, No. 13847 (C. C. W. D. Tex. 1874).

¹⁵ *Commonwealth v. O'Keefe*, 298 Pa. 169, 148 Atl. 73 (1929).

¹⁶ Cited *supra* note 13.

been in any way interested, they could not obtain an impartial trial before a jury composed exclusively of whites. The Supreme Court in denying their petition held that the statute was intended to protect against state action and against that alone, and that it was not intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial. This decision has resulted in a circuitry of litigation for after a conviction has been affirmed by the highest state court it may be brought to the Supreme Court on the ground that there has been a denial of the equal protection of the law as required by the Fourteenth Amendment. This occurred in one of the *Scottsboro* cases.¹⁷ If a removal to a federal court would have been allowed at the commencement of the action, upon the defendant showing the existence of local prejudice a final adjudication would have been sooner made.

The Fourteenth Amendment protects the individual from judicial or administrative as well as legislative action. In *Moore v. Dempsey*¹⁸ the Supreme Court held a "mob-dominated trial" to be void. In *Smith v. Texas*¹⁹ wherein the wording of the state statute relative to the drawing of grand jurors did not envisage racial discrimination in the drawing of grand jurors, but whereas in actual practice there was discrimination against Negroes, the conviction was reversed. Thus in both these cases which are representative of a marked trend, which has been most recently manifested in the *Ashcraft* decision,²⁰ we find that the Supreme Court has peered behind the façade of state criminal procedure and reversed convictions which were based on the shortcomings of the judicial and administrative arms of the state. It would seem that these decisions call for a re-analysis of *Virginia v. Rives*²¹ and the cases predicated thereon. The narrow construction which the courts have put upon the removal statute has been criticized.²² It is indeed so restrictive that no accused has ever been able to have his case removed from the state to the federal court and tried in the latter. Congress did not intend this to be the result of its enactment of the statute. It is submitted that it should be restored to its original purpose and a right of removal allowed on the ground of local prejudice.

THEODORE KRIEGER.

STARE DECISIS, THE NATIONAL LABOR RELATIONS ACT AND THE NORRIS-LAGUARDIA ACT

The present Justices of the United States Supreme Court are now engaged in an acerbitous struggle in hopeless disagreement over

¹⁷ *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074 (1935).

¹⁸ 261 U. S. 86, 67 L. Ed. 543 (1923).

¹⁹ 311 U. S. 128, 85 L. Ed. 84 (1940).

²⁰ *Ashcraft v. Tennessee*, 322 U. S. 143, 88 L. Ed. 845 (1944).

²¹ Cited *supra* note 13.

²² Note (1941) 54 HARV. L. REV. 685.