

KEENEY *v.* ROBERTS.

Circuit Court, D. California.

July 19, 1886.¹

REMOVAL OF CAUSES—ACT OF 1875—TIME OF REMOVAL.

Under the removal act of 1875 a case cannot be removed after the term at which it could have been first tried in the state court, and where counsel do not take the objection it is the duty of the court to do so.

Before SAWYER, Circuit Judge.

SAWYER, J. This suit was commenced in the superior court of the state December 27, 1881. The answer was filed, and the case put at issue, and was ready for trial, May 2, 1882. The petition for removal to this court was not filed till January 25, 1884—nearly two years after it could have been tried. Not less than half a dozen terms of the superior court passed at which it could have been tried. The application for removal was too late, and the removal at that time was not authorized by the act of 1875, under which the petition was filed. *MacNaughton v. Railroad Co.*, 10 Sawy. 113, 114, 19 Fed. Rep. 881; *Car Co. v. Speck*, 113 U. S. 86, 87, 5 Sup. Ct. Rep. 374; *Gregory v. Hartley*, 113 U. S. 745, 5 Sup. Ct. Rep. 743. The court should take the objection, if counsel do not. *Williams v. Nottawa*, 104 U. S. 209-211; *Farmington v. Pills-bury*, 114 U. S. 144, 5 Sup. Ct. Rep. 807. The petition and record do not show a proper case for removal, and no order for removal was in fact

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made. The case is still pending in the state court, and liable, at anytime, to be properly called up and tried. As the state court is not obliged to let go its hold, till a proper case for a removal, under the statute, has been presented in the record, and as it has never done so, in fact, it has jurisdiction to proceed, at any time, and try the case. *Gregory v. Hartley*, 113 U. S. 745, 5 Sup. Ct. Rep. 743. The case must be remanded to the state court, at the cost of petitioner, and it is so ordered.

¹ This opinion was not published at the time of its delivery because of failure to receive a copy of it. It is published at this time on account of its citation in *Austin v. Gagan*, *ante*, 626.