

ing any other method of review, and that the action on which this judgment is based is in the nature of an action at law. It is worthy of notice, however, that the act of March 3, 1887, expressly provides the course of procedure from the inception of this suit to its conclusion. It provides in section 5 that the plaintiff shall file his petition, that it shall be verified, what it shall state, and the prayer it shall contain. In section 2 it provides that all causes brought and tried under it shall be tried by the court without a jury, and in section 7 that the court shall file a written opinion in the cause, which shall set forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and shall render judgment thereon. An appeal is certainly not an inconvenient nor an inappropriate method of reviewing a judgment on the record that such a procedure preserves. But we are not left to arguments from convenience or expediency here. Actions against the government cannot be maintained under the common law. They are the creatures of the statute that permits them to be, and must be governed and limited by its provisions. The law in force when the act of 1887 was passed expressly granted to the United States the right to review by appeal every judgment against them in actions of the nature of that at bar. Rev. St. § 707, supra. The act of 1887, the primary object of which was to give to the circuit and district courts concurrent jurisdiction with the court of claims over this and all other actions specified in section 1 of the act, expressly provides in section 4 that the right of exception and appeal in all proceedings under that act shall be governed by the law then in force. As the law then in force gave the United States this right to review all judgments in actions of the nature of that before us by appeal, this provision, in our opinion, not only failed to deprive them of that right, but expressly reserved it to them. It goes without saying that if the United States had this right of appeal from such judgments to the supreme court after the act of 1887, they have the right to appeal from them to this court under the act creating it. In our opinion, that right exists, and this court has jurisdiction to review the judgment below on this appeal. *U. S. v. Davis*, 131 U. S. 36, 9 Sup. Ct. 657; *Strong v. U. S.*, 40 Fed. 183. The motion to dismiss the appeal is denied.

UNITED STATES v. GREENWALD et al.

(District Court, N. D. California. November 8, 1894.)

No. 3,010.

1. FEDERAL COURTS—POWERS—REMOVAL OF PRISONER FROM PENITENTIARY TO COUNTY JAIL.

Rev. St. §§ 5541, 5542, provide that, where a person convicted of an offense against the United States is sentenced to imprisonment for more than one year, the court which sentenced him may order the sentence executed in any state jail or penitentiary in the district or state, the use of which is allowed for that purpose by the state legislature, and that, where any such person is sentenced to imprisonment and confinement to hard

labor, the court may order the sentence executed in any state jail or penitentiary in the district or state, etc. *Held*, that such court has no power, after the expiration of the term in which such sentence is imposed, to order the removal of the prisoner from a state prison to a county jail.

2. SAME—POWER OF ATTORNEY GENERAL.

Rev. St. § 5546, provides that the place of imprisonment may be changed in any case when, "in the opinion of the attorney general," it is necessary to the prisoner's health, or when, "in his opinion," the place of confinement is not secure, or the treatment is cruel, or improper, etc. *Held*, that the power of removal in such cases is in the hands of the attorney general, and not in the courts.

In re application for the removal of the prisoner, Louis Greenwald, from the state penitentiary at San Quentin, Cal., to a county jail. Application denied.

Thos. D. Riordan, for the motion.

Chas. A. Garter, U. S. Atty.

MORROW, District Judge. This is an application filed October 16, 1894, for the removal of Louis Greenwald from the state prison at San Quentin, Marin county, Cal., to a county jail. Greenwald was sentenced by this court on June 5, 1894, to imprisonment for the term of six years, for the offense of conspiring with E. W. McLean, George Wichman, George N. Thomas, John H. Voss, Fred Miller, A. Svenson, Harry Mensig, Charles Josselyn, and others, to commit the crime of smuggling opium into the United States, which sentence was to be executed in the state penitentiary at San Quentin, Cal. This sentence the prisoner is now serving. It was imposed in the February term of this court, which expired July 1, 1894. The application is made by the wife of the prisoner, and is based upon representations as to his precarious health, it being alleged that the prisoner is suffering from a chronic asthmatic affection, which is aggravated by his close confinement and the prison discipline to such an extent that, it is averred, he may not live to serve out his full term. The allegations of the petition are supported by the certificates of three physicians, one of them being the resident physician at the state prison. It is claimed, therefore, that the prisoner is being subjected to cruel and unusual punishment. The certificate of N. R. Harris, United States secret service agent, is also produced, certifying that since his imprisonment the prisoner has given important information to the government, which has very materially assisted the efforts of the treasury department in detecting counterfeiters, and persons feloniously imitating the coinage, and making and uttering of false coins. By section 5541, Rev. St. U. S., it is provided that, in every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose. Section 5542 provides that, in every case where any criminal convicted of any offense against the United States is sentenced

to imprisonment and confinement to hard labor, it shall be lawful for the court to order the same to be executed in any state jail or penitentiary within the district or state where such court is held, etc. I do not entertain any doubt that under these sections I could order the prisoner's removal from the state prison at San Quentin to the state prison at Folsom, which, by the act of April 15, 1880 (St. Cal. 1880, p. 67), was made a state penitentiary of equal degree and grade to that at San Quentin, and where the prison discipline would be the same. But I do not think that it is within my power, after the expiration of the term of court in which the sentence was imposed, to order the removal of the prisoner to a county jail,—a place of incarceration for the punishment of minor offenses, and the custody of transient prisoners, where the ignominy of confinement is devoid of the "infamous character" which an imprisonment in a state jail or penitentiary carries with it, and which is regarded as a part of the punishment. The discipline in a county jail in this state is not the same as enforced in either of the state prisons, and such a change of imprisonment would virtually result in lessening the prisoner's punishment, and involve the exercise of authority vested exclusively in the executive department. *Ex parte Wells*, 18 How. 314.

Section 5546 is also cited in favor of the granting of the application. All that can be said about its provisions is that, if it be applicable to the present facts, the power of changing the place of imprisonment is specifically vested in the attorney general. That part of the section which is material to the petition for removal reads as follows:

"And the place of imprisonment may be changed in any case, when, in the opinion of the attorney general, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment: provided, however, that no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner, or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf."

I think that the power of removal, in a case such as this, is to be found, if at all, in the hands of the attorney general of the United States. The application must therefore be denied.

HULBERT v. RUSSO et al.

(Circuit Court, S. D. New York. October 13, 1894.)

REMOVAL OF CAUSES—PARTY UNDER STAY IN STATE COURT.

The New York Code of Civil Procedure provides (section 779) that all proceedings of a party in default for nonpayment of costs of a motion shall be stayed until payment of such costs. *Helt*, that such provision does not prevent the removal of the case to the federal court by a party in default of nonpayment of motion costs, who complies with the provisions of the federal statutes, and who has not secured in the state court a benefit which he should not be allowed to repudiate.