

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.

This is a suit by Edwin J. Hulbert against Mario Russo and Giovanni Zanardo, instituted in the state court, and was removed to this court by defendants. Heard on motion to remand.

John L. Wilkie, for plaintiff.

C. J. Simpson and Edmund C. Brown, for defendant Russo.

J. E. M. Bowen, for defendant Zanardo.

LACOMBE, Circuit Judge. To give to section 779 of the New York Code the effect contended for would be practically to amend the federal statute by adding to the paragraph authorizing non-resident defendants to remove cases into the federal circuit court the clause: "Provided, that at the time when removal papers are filed said defendants are not in default by reason of nonpayment of any motion costs imposed by the state court." It is hardly to be believed that the state legislature intended this, and, if it did, it is entirely clear that its enactment was inoperative to curtail the right of removal secured by the federal statute. The doctrine of waiver does not apply to such a case as this. Defendant has complied with the provisions of the federal statute. He has applied at the proper time, in the prescribed manner, and upon sufficient papers. He has done nothing in the state court whereby he has secured some benefit which should estop him from repudiating his former action, as did the defendant in *Bank v. Smith*, 13 Blatchf. 224, Fed. Cas. No. 6,035. His failure to comply with the order of the state court may leave him, after removal under a stay in this court, as he would be if still in the state court, but it cannot deprive him of the right secured to him by the federal statute, so long as its provisions are complied with. The technical objections to the papers are unsound. Motion to remand denied.

WESTERN UNION TEL. CO. v. POE, State Auditor, et al.

ADAMS EXP. CO. v. SAME.

(Circuit Court, S. D. Ohio, E. D. November 7, 1894.)

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—VALIDITY OF LOCAL STATUTE.

Where a federal court decides, on demurrer, that a state statute, the validity of which has never been passed upon by the highest court of the state, is in violation of the constitution of such state, and afterwards, but before a final decree is entered in the federal court, the state supreme court decides that such statute is constitutional, the federal court will reverse its former ruling in deference to the decision of the state court.

2. TAXATION—TELEGRAPH AND EXPRESS COMPANIES—NICHOLS LAW—VALIDITY.

Rev. St. Ohio, § 2778a, known as the "Nichols Law," relating to taxation of telegraph and express companies, is not in violation of Const. Ohio, art. 12, § 2, which requires all property to be taxed by a uniform rule. *State v. Jones* (Ohio) 37 N. E. 945, followed. 61 Fed. 449, 470, overruled.

Separate bills by the Western Union Telegraph Company and the Adams Express Company against Ebenezer Poe, auditor of the state of Ohio, and others, for injunctions, in which there were decrees