

all bonds, undertakings, or security given by either party, is preserved after removal. This is persuasive evidence that congress did not intend that the giving of such bonds should bar the right of removal.

The filing of the demurrer is the filing of an answer, within the meaning of the removal act. *Martin's Adm'r v. Railroad Co.*, 151 U. S. 674, 686, 14 Sup. Ct. 533. But that act does not provide that the petition for removal shall be filed in the state court before the filing of an answer or plea. It provides that the petition for removal may be filed at the time or at any time before the defendant is required by law or rule of court to answer or plead to the complaint. The mere act of filing a demurrer in the state court, upon which no action is invoked or had, is not clear, unequivocal, and decisive evidence that the defendant intended to move such demurrer to a hearing in the state court. The act is equivocal, and is as consistent with the intention to move it to a hearing after removal as before. To operate as a waiver, the act of the party must be irreconcilably repugnant to the assertion of his legal right. The mere filing of an answer or demurrer does not, in the opinion of the court, present a case of such irreconcilable repugnancy. Perhaps, if the demurrer had been argued and decided before the time for removal had expired, it would have constituted a waiver, and would have barred the right of removal. *Martin's Adm'r v. Railroad Co.*, supra. The following cases more or less directly support the foregoing views: *Gavin v. Vance*, 33 Fed. 84, 92; *McKeen v. Ives*, 35 Fed. 801; *Tan-Bark Co. v. Waller*, 37 Fed. 545; *Conner v. Coal Co.*, 45 Fed. 802; *Garrard v. Silver Peak Mines*, 76 Fed. 1; *Purdy v. Wallace, Müller & Co.*, 81 Fed. 513; *Goldey v. Morning News*, 156 U. S. 516, 15 Sup. Ct. 559. The motion to remand is overruled.

EIGHMY v. POUCHER.

(Circuit Court, N. D. New York. January 3, 1898.)

REMOVAL OF CAUSES—ACTION AGAINST UNITED STATES OFFICIAL.

An action against a United States district attorney for malicious prosecution will not be remanded to the state court when all of the proceedings in the criminal action were by United States officials, in a federal court, for a violation of federal laws.

This was an action by John W. Eighthmy to recover damages from William A. Poucher for malicious prosecution. The cause was removed from the supreme court of New York to the United States circuit court, and plaintiff moves to remand.

John W. Eighthmy, in pro. per.
W. F. Mackey, for defendant.

COXE, District Judge. The defendant, while acting as United States district attorney for this district, caused the plaintiff to be indicted, arrested and tried for an alleged violation of the pension laws. At the trial the court directed a verdict of acquittal. This action is for malicious prosecution based upon the foregoing facts. It was

brought originally in the supreme court of the state, and was removed by the defendant to this court upon the ground that he was a United States official acting under the constitution and laws of the United States. The plaintiff now moves to remand.

The defendant, who caused the complaint to be made against the plaintiff, the marshal, who arrested him, and the judge, who tried him, were all federal officials. The grand jury which found the indictment was impaneled in a court of the United States. The laws, which it was charged the plaintiff violated, were laws of the United States. The department to which, it was alleged, he transmitted false papers, was a department of the United States. In short, all the proceedings against the plaintiff were by United States officials in a United States court for violation of United States laws. The trial of this action, therefore, may involve and draw in question directly or indirectly the federal laws, practice and procedure, the validity of the organization of the grand jury and the title, authority and power of several executive and judicial officers of the general government. These are all questions for the courts of the United States to determine. Without pursuing the discussion further it is thought that the facts bring this cause directly within the reasoning of *Tennessee v. Davis*, 100 U. S. 257; *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658; *Houser v. Clayton*, 3 Woods, 273, Fed. Cas. No. 6,739. As the complaint alleges "that during all the time and times above mentioned the said defendant William A. Poucher was United States attorney duly commissioned by the United States" the deplorable result of *Walker v. Collins*, 167 U. S. 57, 17 Sup. Ct. 738, need not be apprehended. The motion to remand is denied.

SECCOMB v. WURSTER, Mayor, et al.

(Circuit Court, E. D. New York. December 22, 1897.)

1. STREET RAILROADS—GRANTING OF FRANCHISE—INJUNCTION—RIGHTS OF ABUTTING OWNER.

The mere granting of consent by the local authorities to the building and operation of a street railroad does not constitute irreparable injury to abutting property, so as to entitle an owner to maintain a suit to enjoin such action.

2. JURISDICTION OF FEDERAL COURTS—TAXPAYER'S SUIT.

Under the New York statutes authorizing suits by taxpayers (Laws 1881, c. 531; Laws 1887, c. 673; Laws 1892, c. 301), although the entire body of taxpayers in a city, the city itself, and the general public may be interested in the result, a complainant cannot be compelled to admit others as co-complainants; and a federal court has jurisdiction of such a suit where the requisite diversity of citizenship exists between the parties to the record.

3. TAXPAYERS' SUITS—RIGHT TO PRELIMINARY INJUNCTION.

In a taxpayer's suit under the statutes of New York to restrain an alleged illegal official act, which, if illegal, could not confer any rights nor work irreparable injury to complainant, to entitle the complainant to a preliminary injunction the right to such relief must be made clear and certain.

4. FEDERAL COURTS—CONSTRUCTION OF STATUTE—DECISION OF STATE COURT.

A decision of an appellate court of the state construing a state statute will be followed by a federal court in determining a motion for a prelim-