

influence. The affidavit in the case at bar is open to the same objection as that which was considered by Judge BREWER. It makes nothing apparent to the circuit court save that the defendant believes he will be prejudiced, which, under the phraseology of the new statute,—materially changed as it is from the act of 1867,—is not sufficient.

ON SECOND APPLICATION. (April 18, 1889.)

LACOMBE, J. The defendant since the filing of decision on April 16th, has presented another affidavit made by himself, in which he says that from prejudice and local influence he will not be able to obtain justice in the supreme court of New York in New York county, or in any other state court to which he may under the laws of the state have the right on account of such prejudice or local influence to remove the cause, and adds "I state unqualifiedly that such prejudice and local influence actually exists so that a fair trial cannot be had in the state court."

Being satisfied (as indicated in the memorandum filed on the 16th) that the act of 1887 effected a radical change in the procedure for removal, I fail to see that the affidavit now filed is sufficient to "make it appear" to this court that defendant cannot obtain justice in the state courts especially in view of the provisions of section 987 of the New York Code of Civil Procedure, authorizing a change of the place of trial wherever there is reason to believe that an impartial trial cannot be had in the proper county. See *Southworth v. Reid*, 36 Fed. Rep. 453.

HURD v. GERE *et al.*

(Circuit Court, N. D. New York. April 15, 1889.)

REMOVAL OF CAUSES—APPLICATION—TIME OF FILING.

Where a defendant, after the time to answer has expired, procures an *ex parte* order extending his time, contrary to the practice in the state court, and then files an application for removal, the application is not filed, within the meaning of the removal act of March 3, 1887, "before the defendant is required by the laws of the state or the rules of the state court" to answer the complaint.

On Motion to Remand.

Hamilton Ward, for plaintiff.

Tracy, MacFarland, Boardman & Platt, for defendants.

WALLACE, J. The order of the state court, extending the time of the defendants to answer the complaint, having been made after the time to answer had expired, without notice to the plaintiff of the application, was doubtless irregular; but it was not void, although the court might have vacated it upon the application of the plaintiff, and it would then have been regarded as a nullity. Nevertheless it would

violate the intent, if not the literal terms, of the removal provisions of the act of March 3, 1887, to permit a defendant, after the time to answer a complaint has expired, to obtain an *ex parte* order extending his time, contrary to the practice of the state court, and then, by removing the cause, prevent the plaintiff from applying to the state court to vacate the order, and thus preclude him from an opportunity of having it treated as null. It should be held, in such a case, that the petition for removal was not filed "before the defendant is required by the laws of the state or the rules of the state court" to answer the complaint. The motion to remand is granted.

TUTHILL v. UNITED STATES.

(District Court, N. D. Illinois, April 29, 1889.)

1. COURTS—FEDERAL—JURISDICTION OF SET-OFF BY UNITED STATES.

Under Rev. St. U. S. § 563, conferring on the United States district courts jurisdiction "in all suits at common law brought by the United States," etc., the district court has jurisdiction of a set-off interposed by the United States to an action by a district attorney to recover fees brought under act Cong. March 3, 1887.

2. DISTRICT ATTORNEYS—COUNSEL FEES.

Under Rev. St. U. S. § 824, providing that where an indictment "is tried before a jury, and a conviction is had, the district attorney may be allowed, in addition to the attorney's fee herein provided, a counsel fee in proportion to the importance and difficulty of the case, not exceeding \$30," the attorney is entitled to a counsel fee in a case where the defendant pleads not guilty, and the prosecution produces its evidence, even though the defendant offers no evidence, or then consents to a verdict of guilty.

3. SAME—REVISION OF ACCOUNTS BY TREASURY OFFICERS.

While Rev. St. § 846, and act Feb. 22, 1875, § 1, seem to reserve to the accounting officers of the treasury a right of revision of the accounts of the district attorney after they have been allowed by the court, this right of revision must be exercised when the account comes before those officers for action upon it; and after they have passed the account as allowed by the court, and it has been paid, it cannot afterwards be impeached, except for fraud or palpable mistake.

At Law. Suit by Richard S. Tuthill for fees as district attorney.
A. S. Bradley and Jesse A. Baldwin, for plaintiff.
W. G. Ewing, U. S. Atty., for defendant.

BLODGETT, J. This suit is brought under the second section of the act of March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States." It is to recover a claim made by the plaintiff against the United States for services rendered by the plaintiff while acting as district attorney for this district. It is admitted that plaintiff was duly appointed, confirmed, and commissioned as United States district attorney for this district, and that he was acting as such from the 1st day of January to the 1st day of October, 1886.