

Maryland Vs. Super

Maryland Vs. Super

SooperKanoon Citation : sooperkanoon.com/94624

Court : US Supreme Court

Decided On : Feb-01-1926

Appeal No. : 270 U.S. 9

Appellant : Maryland

Respondent : Super

Judgement :

Maryland v. Super - 270 U.S. 9 (1926)

U.S. Supreme Court Maryland v. Super , 270 U.S. 9 (1926)

Maryland v. Super (No. 1)

No. 23, Original

Argued December 7, 1925

Decided February 1, 1926

270 U.S. 9

PETITION FOR A WRIT OF MANDAMUS

SYLLABUS

1. The remedy of mandamus is grantable by this Court, in its sound discretion, on petition of a state to determine the legality of a removal of a criminal case from a state to a federal court under Jud.Code 33. P. [270 U. S. 28](#) .

2. The propriety of the writ in such cases results from the exceptional character of the proceeding sought to be reviewed and the absence of any other provision for reviewing it; it does not depend on lack of jurisdiction or abuse of discretion in the district court. *Id.*

3. Section 33 of the Judicial Code, which authorizes removal to the district court of any criminal prosecution commenced in any court of a state against

"any officer appointed under or acting under or by authority of any revenue law of the United States,

Page 270 U. S. 10

or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, . . ."

applies to prohibition agents (and their chauffeur) engaged in a quest for an illicit still, under commissions from the Commissioner of Internal Revenue empowering them to enforce the prohibition acts and internal revenue acts relating to manufacture, sale, taxation, etc., of intoxicating liquors. So *held* in view of 5 of the Act of November 23, 1921 (amending the Prohibition Act), which kept in force earlier laws and penalties regarding manufacture, etc., of intoxicating liquors; of Rev.Stats. 3282, forbidding and punishing unauthorized distilling, etc.; and of 28, Title II, of the Prohibition Act, extending to officers enforcing that Act the "protection" conferred by law for the enforcement of then existing laws relating to the manufacture, etc., of intoxicating liquors. P. [270 U. S. 30](#) .

4. In authorizing removal of a prosecution commenced "on account of" any act done by the defendant under color of his office, etc., 33 of the Judicial Code, *supra*, does not mean that the very act charged, e.g., a homicide, must have been done by him; it is enough if the prosecution is based on, or arises out of, acts

which he did, or his presence at the place, under authority of federal law, in the discharge of his official duty. P. [270 U. S. 32](#) .

5. In his petition to remove a prosecution, under 33, *supra*, the defendant must set forth all the circumstances known to him out of which the prosecution arose, candidly, specifically, and positively explaining his relation to the matter and showing that it was confined to his acts as such officer. P. [270 U. S. 34](#) .

6. The petition must aptly plead the case upon which the defendant relies so that the court may be fully advised and the state may take issue by a motion to remand. *Id.*

7. A removal petition setting forth acts done by the petitioners in performance of their duty as prohibition officers and alleging that their indictment in a state court is a criminal prosecution on account of acts alleged to have been done by them at a time when they were engaged in the performance of their duties as such officers as so set forth, is insufficient. P. [270 U. S. 35](#) .

Mandamus awarded.

Petition by the State of Maryland for a writ of mandamus directing the United States District Judge of the District of Maryland to remand to the proper state court an indictment for murder which had been removed

Page 270 U. S. 11

to the District Court under the provisions of 33 of the Judicial Code. See *also* the next two cases.

Page 270 U. S. 20

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a petition by the State of Maryland for a writ of mandamus against Morris A. Soper, the United States District Judge for Maryland, directing him to remand an indictment for murder, found in the Circuit Court for

Harford County, Maryland, against four prohibition agents and their chauffeur, which was removed to the United States district court under 33 of the Judicial Code, as amended August 23, 1916, 39 Stat. 532, c. 399. The text of the amended section, insofar as it is material here, is set out in the margin. *

The indictment, found February 10, 1925, charged as follows:

"The jurors of the State of Maryland, for the body of Harford County, do on their oath present that Wilton L. Stevens, John M. Barton, Robert D. Ford, E. Franklin Ely, and William Trabing, late of Harford County aforesaid, on the nineteenth day of November, in the year of our Lord nineteen hundred and twenty-four at the county aforesaid, feloniously, willfully, and of their deliberately premeditated malice aforethought did kill and murder Lawrence Wenger, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government, and dignity of the state. "

The defendants were arrested, and on February 11, 1925, filed a petition in the United States District Court for the District of Maryland, in which they averred that they were federal prohibition agents, except Trabing, who was their chauffeur, and was assisting them and was acting under the authority of the Prohibition Director, and that the act or acts done by Trabing, as chauffeur and helper, as well as by the other defendants at the time when they were alleged to have been guilty of the murder of Lawrence Wenger, which charge they all denied, were done in the discharge of their official duties as prohibition agents, and as officers of the internal revenue in the discharge of their duty. Thereupon an order of removal, together with a writ of certiorari, and habeas corpus *cum causa*, pursuant to 33, was made by Judge Soper of the district court. On March 12th, the State of Maryland, by its Attorney General and the state's attorney for Harford County, appeared specially and made a motion to quash the writ and rescind the order. On the 17th of May, the cause came on for hearing on the motion to quash, and, the

defendants having applied for leave of court to amend the petition, it was granted, and an amended petition was filed. After setting out the indictment, the third, fourth, and fifth paragraphs of the amended petition were as follows:

"3. That the acts alleged to have been done by the petitioner William Trabing are alleged to have been done at a time when he was engaged in the discharge of his duties while acting under and by authority of Federal Prohibition Director Edmund Budnitz and Federal Prohibition Officers Robert D. Ford, John M. Barton, Wilson L. Stevens, and E. Franklin Ely, as aforesaid, while the said officers were engaged in the discharge of their official duties as prohibition officers in making and attempting to make an investigation concerning a violation

Page 270 U. S. 23

of the National Prohibition Act and other internal revenue laws and while reporting and preparing to report the results of said investigation and in protecting himself and the said officers of the internal revenue in the discharge of his and their duty as set out in paragraph 4 below."

"4. That the acts alleged to have been done by the petitioners Robert D. Ford, John M. Barton, Wilton L. Stevens, and E. Franklin Ely are alleged to have been done at a time when they were engaged in the discharge of their official duties as federal prohibition officers, and in making and attempting to make an investigation concerning a violation of the National Prohibition Act and other internal revenue laws, and in reporting the results of said investigation, and in protecting themselves in the discharge of their duty as follows:"

"That on November nineteenth, nineteen hundred and twenty-four, your petitioners were directed by Maryland Federal Prohibition Director Edmund Budnitz to investigate the alleged unlawful distillation of intoxicating liquor on a farm known as the Harry Carver farm situated approximately three miles from the village of Madonna, about twelve miles northwest from Bel Air, Maryland, which said property was then unoccupied. Your petitioners reached the said farm premises shortly after midday on November nineteenth, nineteen hundred and twenty-four,

and discovered there in a secluded wooded valley and swamp materials for an illicit distilling operation, to-wit, nine empty mash boxes, three fifty-gallon metal drums, a fifty-gallon condenser, about one thousand pounds of rye meal in bags, a lighted fire, and men's working clothes. Your petitioners thereupon concealed themselves in woods and shrubbery nearby the still site and shortly thereafter became aware of the approach of a number of men bringing with them a still. Your petitioners thereupon made their presence known to the men who were approaching, and the men immediately dropped

Page 270 U. S. 24

the still and fled, and though your petitioners pursued them across the fields, no one of the fleeing men was overtaken or arrested. Thereupon your petitioners returned to the still site, destroyed the materials before mentioned which constituted the unlawful distilling plant, and started to return to their car, which had been left some distance from the still site, for the purpose of returning to Baltimore to report to the office of the Maryland Federal Prohibition Director concerning the results of their investigation when they discovered a man, whom they afterwards learned to be one Lawrence Wenger, mortally wounded and lying beside the path along which they were walking, some 400 or 500 yards from the still site and in a direction opposite to that from which the unknown men had approached and towards which they fled. Whereupon your petitioners carried the wounded man to their car and took him to Jarrettsville, Maryland, for medical treatment, but, finding none there available, proceeded with all speed to Bel Air, where they sought out in turn Drs. Richardson, Sappington, and Archer, without success, and finally placed the said Lawrence Wenger in charge of Dr. Van Bibber, who pronounced him dead. Your petitioners then, acting under the advice of the said Dr. Van Bibber, removed the body of the said Lawrence Wenger to the undertaking establishment of Dean & Foster in Bel Air. Your petitioners then proceeded to the State's Attorney's office in Bel Air and related the facts aforesaid to the state's attorney, whereupon, on being informed by them that your petitioners Robert D. Ford, John M. Barton, Wilton L. Stevens, and E. Franklin Ely were prohibition officers, and that your petitioner William Trabing was employed by the Federal Prohibition

Director as their chauffeur, they were placed under arrest by the sheriff of Harford County at the instance of the State's Attorney, and were confined in the Harford County jail until the following morning, November

Page 270 U. S. 25

twentieth, nineteen hundred and twenty-four. On the morning of November twentieth, nineteen hundred and twenty-four, your petitioners were taken by the sheriff and State's Attorney, in company with a number of men who that afternoon served upon the coroner's jury mentioned in the indictment, and in company with two Baltimore City police headquarters detectives, to the scene of their investigation of the previous day. They related the facts concerning their investigation of the unlawful distilling operation and their finding of the said Lawrence Wenger on November nineteenth, and then and there went over the scene of the said occurrences, relating freely and without reservation the events which took place November nineteenth, in accordance with their duty as investigating and reporting officers of the federal government and in compliance with their duties as federal prohibition officers. Likewise on the afternoon of November twentieth, your petitioners were called before the coroner's inquest heretofore described in the indictment, and freely and without reservation in accordance with their duty as investigating and reporting officers of the federal government and acting under the direction of the Maryland Federal Prohibition Director, related the facts aforementioned. And thereupon they were again placed in the Harford County jail and held for action of the Harford County Grand Jury until their release on bail upon the evening of November twentieth, nineteen hundred and twenty-four at the instance of the United States Attorney for the District of Maryland acting on their behalf."

"5. That the said criminal prosecution was commenced in the manner following:"

"A presentment against your petitioners was returned in the Circuit Court for Harford County February ninth, nineteen hundred and twenty-five, following which presentment the State of Maryland, by the State's Attorney

for Harford County, prosecuted and sued forth out of the Circuit Court for Harford County a writ of the State of Maryland of *capias ad respondendum* against your petitioners, to which there was no return by the Sheriff of Harford County, whereupon the indictment heretofore set forth was returned."

"The said indictment is now pending in the Circuit Court for Harford County, and is a criminal prosecution on account of acts alleged to have been done by your petitioners at a time when they were engaged in the performance of their duties as federal prohibition officers and chauffeur for federal prohibition officers as set forth in the foregoing paragraphs."

" *Wherefore* your petitioners pray that the said suit may be removed from the Circuit Court for Harford County, aforesaid, to this honorable court, and that writs of certiorari and habeas corpus *cum causa* may issue for that purpose pursuant to the statute of the United States in such case made and provided. (U.S. Compiled Statutes, 1015, being Judicial Code, 33, as amended Act Aug. 23, 1916, c. 399; Prohibition Act, Tit. II, 23.)"

A motion to quash the amended petition, April 11, 1925, was based on the ground, among others, that the allegations of the amended petition did not disclose a state of facts entitling the defendants to have the writ issue or to have the charge against them removed. On May 5, 1925, Judge Soper denied the motion to quash and directed that the order of court removing the indictment be ratified and confirmed. On the same day, the following stipulation was entered into by the parties:

"It is stipulated by and between the parties hereto that Robert D. Ford, John M. Barton, Wilton L. Stevens, and E. Franklin Ely, during the month of November in the year 1924, and prior to said time, and at the time of the matters and facts charged in the indictment in the

Circuit Court for Harford County, were federal prohibition officers, holding a commission under the Commissioner of Internal Revenue, and countersigned by the Federal Prohibition Commissioner, in the form following, that is to say:"

" This certifies that _____ is hereby employed as a federal prohibition officer to act under the authority of and to enforce the National Prohibition Act and acts supplemental thereto and all internal revenue laws, relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors, and he is hereby authorized to execute and perform all the duties delegated to such officers by law."

"And that William Trabing was at the time of the acts alleged in the indictment in the Circuit Court for Harford County, a chauffeur of the Reliable Transfer Company, engaged and employed by Edmund Budnitz, Federal Prohibition Director of the State of Maryland, in the capacity of chauffeur for the prohibition agents above named."

The State of Maryland applied to this Court for leave to file its petition for mandamus, in which it set forth fully the facts as above stated, including, as exhibits, the petition for removal, the amended petition for removal, its motion to quash, the stipulation, and the orders of the district court. This Court, granting leave, issued a rule against Judge Soper to show cause why the writ of mandamus should not issue in accordance with the prayer of the state.

Judge Soper, in his answer to the rule, recited the facts of the record as already given, said that the district court was of opinion that the petitioners were entitled to removal under 33 of the Code as revenue officers, and that, if not as revenue officers, as agents of the Commissioner by virtue of 28 of Title II of the National Prohibition Act; that a prosecution had been commenced against the

Page 270 U. S. 28

petitioners on account of acts done under color of their office and of the revenue and prohibition laws of the United States, notwithstanding that the petitioners did not admit having caused the death of Wenger, and that it had adjudged that it

possessed ample jurisdiction to order the removal and to try the case, and he therefore asked that the rule be discharged and that the petition of the state be dismissed.

It is objected on behalf of the respondent that this is not a proper case for mandamus, that whether the facts averred in the amended petition come within the requirement of 33 of the Judicial Code is a question within the regular judicial function of the district court to decide, and that this Court should not interfere thus prematurely with its exercise.

Virginia v. Rives, [100 U. S. 313](#) , *Virginia v. Paul*, [148 U. S. 107](#) , and *Kentucky v. Powers*, [201 U. S. 1](#) , were cases in which criminal prosecutions by a state, removed to a federal court under asserted compliance with federal statutes, were ordered remanded by writ of mandamus. The Attorney General of Maryland relies on them to show that the writ may issue to test the legality of the removal in all criminal cases. On behalf of the United States, it is pointed out that these cases differ from the one before us in that, in the former, the state prosecution had not reached a stage, or was not of a character in which, under the language of the statute, removal could be had at all, and so the federal court was wholly without jurisdiction. The writ in those cases was justified by the court because of the gross abuse of discretion of the lower court, its clear lack of jurisdiction, and the absence of any other remedy. *Ex parte Harding*, [219 U. S. 363](#) , at [219 U. S. 373](#) . In this case, the facts averred show the prosecution to be of the class and character in which removal is permitted by 33, and there is no lack of jurisdiction or abuse of discretion, and the only issue made is on the interpretation

Page 270 U. S. 29

of the facts and the application of the section, an issue clearly within the judicial jurisdiction of a district court.

Mandamus is an extraordinary remedy which is issued by this Court under Rev.Stats. 688, now Judicial Code, 234, to courts of the United States in the exercise of its appellate jurisdiction, and in civil cases does not lie to compel a

reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where, in regular course, the decision may be reviewed upon a writ of error or appeal. *Ex parte Roe*, [234 U. S. 70](#) , [234 U. S. 73](#) ; *Ex parte Tiffany*, [252 U. S. 32](#) , [252 U. S. 37](#) ; *Ex parte Park Square Automobile Station*, [244 U. S. 412](#) ; *Ex parte Slater*, [246 U. S. 128](#) , [246 U. S. 134](#) ; *Ex parte Oklahoma*, [220 U. S. 191](#) , [220 U. S. 209](#) ; *Ex parte Harding*, [219 U. S. 363](#) ; *Ex parte Nebraska*, [209 U. S. 436](#) ; *Ex parte Hoard*, [105 U. S. 578](#) .

It may be conceded that there are substantial differences between *Virginia v. Paul*, *Virginia v. Rives*, and *Kentucky v. Powers* and this case. But we do not think that those differences should prevent the issue of the mandamus here. In respect of the removal of state prosecutions, there should be a more liberal use of mandamus than in removal of civil cases. We exercise a sound judicial discretion in granting or withholding the writ. It may be "in cases warranted by the principles and usages of law." Rev.Stats. 688; *Ex parte Bardley*, 7 Wall. 364, [74 U. S. 376](#) ; *Virginia v. Rives*, *supra*, at [100 U. S. 323](#) , separate opinion of Mr. Justice Field at [100 U. S. 329](#) . It is granted in analogy to the intervention of equity to secure justice in the absence of any other adequate remedy. *Duncan Townsite v. Lane*, [245 U. S. 308](#) , [245 U. S. 312](#) . In the case before us, and in all state prosecutions removed under 33, the jurisdiction of the courts of a state to try offenses against its own laws and in violation of its own peace and dignity is wrested from it by the order of an inferior federal court. The state, by its petition for mandamus,

Page 270 U. S. 30

becomes a suitor at the bar of this Court to challenge the legality of the inferior court's action. Conceding the validity of the exceptional use of the national supremacy in a proper case, it seeks by this writ to test its propriety here. Except by the issue of mandamus, it is without an opportunity to invoke the decision of this Court upon the issue it would raise.

The order of the United States district judge refusing to remand is not open to review on a writ of error, and a judgment of acquittal in that court is final. *United*

States v. Sanges, [144 U. S. 310](#) ; *Virginia v. Paul*, *supra*, at [148 U. S. 122](#) .

The fact that the United States district court may be proceeding in the exercise of a lawful jurisdiction should not, under such exceptional circumstances, prevent this Court from extending to the state the extraordinary remedy.

We come, then, to the sufficiency of the amended petition for removal under 33 of the Judicial Code to justify the district court in denying the motion to remand.

The first objection made by the state to the removal is that prohibition agents cannot have the benefit of 33, because they are not officers "appointed under or acting by authority of any revenue law of the United States," as provided in the section. The four defendants are admitted to have been acting under commissions issued by the Commissioner of Internal Revenue

"empowering them to enforce the National Prohibition Acts and acts supplemental thereto, and all internal revenue laws, relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors."

The fifth defendant, Trabing, it is admitted, was acting as a chauffeur and helper to the four officers under their orders and by direction of the Prohibition Director for the state. It is not denied on behalf of the state that he has the same right to the benefit of 33 as they. *Davis v. South Carolina*, [107 U. S. 597](#) .

Page 270 U. S. 31

The Act of November 23, 1921, 42 Stat. 223, c. 134, 5, known as the Willis-Campbell Law, amending the National Prohibition Act, 41 Stat. 307, c. 85, provides that:

"All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act."

Rev.Stats. 3282, forbidding fermenting of mash or wort, or the making of spirits therefrom in any other than a distillery authorized by law, or by a duly authorized distiller, and punishing its violation by fine and imprisonment, is not in conflict with anything in the Prohibition Act. The Willis-Campbell Act thus makes clear the criminality of such an act under the revenue laws. *United States v. Stafoff*, [260 U. S. 477](#) . In searching for the still for the purpose of preventing the violation of law, the prohibition agents in this case were therefore acting under the authority of the revenue laws.

More than this, they were brought within the application of 33 by the provision of 28, Title II, of the National Prohibition Act, providing that the commissioner, his assistants, agents and inspectors and all other officers of the United States whose duty it is to enforce criminal laws shall have all the power and protection in the enforcement of the Act, or any provisions thereof, which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquor under the law of the United States. We have no doubt that the word "protection" was inserted for the purpose of giving to officers and persons acting under the authority of the National Prohibition Act in enforcement of its provisions the same protection of a trial in a federal

Page 270 U. S. 32

court of state prosecutions as is accorded to revenue officers under 33.

Section 33 was derived from 643 of the Revised Statutes, which in turn was derived from the Act of July 13, 1866, 14 Stat. 171, c. 184, 67, and the Act of June 30, 1864, 13 Stat. 241, c. 173, 50. These acts extend the Act of March 2, 1833, 4 Stat. 633, c. 57, 3, applying to officers engaged in collection of customs duties to those engaged in the collection of internal revenue. *People's United States Bank v. Goodwin*, 162 F. 937, 939; *Tennessee v. Davis*, [100 U. S. 257](#) , [100 U. S. 267](#) . The act of 1833 was enacted in the days of attempted nullification of national customs revenue laws in South Carolina, and was during the Civil War extended to those charged with collecting the internal revenue. Congress not without reason assumed that the enforcement of the National Prohibition Act was

likely to encounter in some quarters a lack of sympathy, and even obstruction, and sought, by making 33 applicable, to defeat the use of local courts to embarrass those who must execute it. The constitutional validity of the section rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith, due to possible local prejudice, by state prosecutions instituted against federal officers in enforcing such laws, by removal of the prosecutions to a federal court to avoid the effect of such prejudice. *Tennessee v. Davis, supra.*

Do the facts disclosed by the amended petition for removal bring the defendants within 33? The state insists that they are insufficient because they do not show that the defendants committed the act of homicide upon which the indictment is founded. The case of *Illinois v. Fletcher*, 22 F. 776, seems to hold that a revenue officer can take advantage of the statute and secure a trial in a federal court only by admitting that he did the act for which he is prosecuted. We think this too

Page 270 U. S. 33

narrow a construction of the section. *Cleveland, Columbus, etc., Railroad v. McClung*, [119 U. S. 454](#) , [119 U. S. 461](#) .

The prosecution to be removed under the section must have been instituted "on account of" acts done by the defendant as a federal officer under color of his office or of the revenue or prohibition law. There must be causal connection between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him for whatever offense has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty. But the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution.

Suppose that the prosecution of the officer for murder was commenced merely on account of the presence of the officer in discharge of his duties in enforcing the law at or near the place of the killing under circumstances casting suspicion of guilt on him. He may not even know who did the killing, and yet his being there and his official activities may have led to the indictment. He may certainly claim the protection of the statute on the ground that the prosecution was commenced against him "on account of" his doing his duty as an officer under color of such a law without being able to allege that he committed the very act for which he is indicted. It is enough if the prosecution for murder is based on or arises out of the acts he did under authority of federal law in the discharge of his duty, and only by reason thereof.

Page 270 U. S. 34

In invoking the protection of a trial of a state offense in a federal court under 33, a federal officer abandons his right to refuse to testify because accused of crime, at least to the extent of disclosing in his application for removal all the circumstances known to him out of which the prosecution arose. The defense he is to make is that of his immunity from punishment by the state, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based. He must establish fully and fairly this defense by the allegations of his petition for removal before the federal court can properly grant it. It is incumbent on him, conformably to the rules of good pleading, to make the case on which he relies, so that the court may be fully advised and the state may take issue on a motion to remand. *Chesapeake & Ohio Railway Co. v. Cockrell*, [232 U. S. 146](#) , [232 U. S. 151](#) -152, and cases cited. See also concurring opinion of Mr. Justice Field in *Virginia v. Rives*, *supra*, at [100 U. S. 332](#) , and *Hanford v. Davies*, [163 U. S. 273](#) , [163 U. S. 279](#) .

We think that the averments of the amended petition in this case are not sufficiently informing and specific to make a case for removal under 33. We have set forth the account the defendants gave in their amended petition of what they saw and did, but the only averments important in directly connecting the

prosecution with their acts are at the opening and close of their petition. They refer to the death of Wenger only by incorporating the indictment in the petition, and then say that

"the acts [*i.e.* the killing of Wenger] alleged to have been done by petitioners Robert D. Ford, John M. Barton, Wilton L. Stevens, and E. Franklin Ely are alleged to have been at a time when they were engaged in the discharge of their official duties as federal prohibition officers, and in making and attempting to make an investigation concerning a violation of the National Prohibition Act and other internal

Page 270 U. S. 35

revenue laws and in reporting the results of said investigation, and in protecting themselves in the discharge of their duty."

The amended petition closes with the statement that the indictment

"is a criminal prosecution on account of acts alleged to have been done by your petitioners at a time when they were engaged in the performance of their duties as federal prohibition officers and chauffeur for federal prohibition officers as set forth in the foregoing paragraphs."

These averments amount to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties. They do not negative the possibility that they were doing other acts than official acts at the time and on this occasion, or make it clear and specific that whatever was done by them leading to the prosecution was done under color of their federal official duty. They do not allege what was the nature of Wenger's fatal wound, whether gunshot or otherwise, whether they had seen him among those who brought the still and fled, or whether they heard or took part in any shooting. They do not say what they did, if anything, in pursuit of the fugitives. It is true that, in their narration of the facts, their nearness to the place of Wenger's killing and their effort to arrest the persons about to engage in alleged distilling are circumstances possibly suggesting the reason and occasion for the criminal

charge and the prosecution against them. But they should do more than this in order to satisfy the statute. In order to justify so exceptional a procedure, the person seeking the benefit of it should be candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicated, and in showing that his relation to it was confined to his acts as an officer. As the defendants in their statement have not clearly fulfilled this requirement, we must grant the writ of mandamus

Page 270 U. S. 36

directing the district judge to remand the indictment and prosecution. Should the district judge deem it proper to allow another amendment to the petition for removal, by which the averments necessary to bring the case within 33 are supplied, he will be at liberty to do so. Otherwise the prosecution is to be remanded as upon a peremptory writ.

*

"Sec. 33. That when any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner."

