

denial of jurisdiction. It is subordination of jurisdiction. It does not follow that because one court has obtained jurisdiction of the parties and the subject-matter of an action, another court of co-ordinate jurisdiction may not also acquire jurisdiction in another suit and over the same subject-matter. Thus the pendency of one suit would not abate a subsequent suit in another jurisdiction between the same parties for the same cause. *Stanton v. Embrey*, 93 U. S. 548, 554; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588; *Gordon v. Gilfoil*, 99 U. S. 168, 178. It is true that here, the suits remaining in different jurisdictions, the garnishees ought not to be charged. That is a rule of decision, not of jurisdiction. It would doubtless have been proper in the state court to stay its hand until the federal court had exhausted its jurisdiction, (*Clifton v. Foster*, 103 Mass. 233,) or, proceeding, to have held the garnishee acquit within the principles stated. But it had jurisdiction to stay its proceedings; to determine the liability of the garnishee, and to determine it erroneously; and, upon discontinuance or dismissal of the suit in the federal court, to proceed to adjudge and enforce the liability of the garnishee. The whole matter rests in comity, and is not availing to destroy jurisdiction. Its exercise might be inoperative as against the defendants, however effectual it might prove through erroneous decision against the garnishee.

The removal of the suit into this court draws to it jurisdiction over the ancillary proceeding against the garnishees. *Pratt v. Albright*, 10 Biss. 511, 9 Fed. Rep. 634; *Cook v. Whitney*, 3 Woods, 715, 719. While without jurisdiction of the persons of the defendants, this court, by virtue of the removal acts, takes the jurisdiction possessed by the state court over the *res*, and may rightfully determine the liability of the garnishees. Whether, the proceeding being now removed into this court by the procurement of the defendants, and, in the language of the removal act "to proceed in the same manner as if it had been originally commenced" in this court, the plea of prior suit in this jurisdiction is longer availing, is a question not arising upon this hearing. The motion to dismiss is overruled.

WHEELWRIGHT v. ST. LOUIS, N. O. & O. CANAL & TRANSP. CO.

(Circuit Court, E. D. Louisiana. May 20, 1892.)

No. 12,034.

1. JURISDICTION OF CIRCUIT COURT—SUIT TO ENFORCE LIEN—SINGLE DEFENDANT.

Act 1875, § 8, (18 St. p. 472,) confers power on the circuit court, in any suit to enforce a lien on property within the district wherein the suit is brought, in which "one or more of the defendants therein shall not be an inhabitant of or found within the said district," to order process against such absent "defendant or defendants." *Held*, that the circuit court has jurisdiction of such a suit when the citizenship is diverse, although there is but one defendant and neither party resides within the state in which suit is brought.

A. SAME—SEIZURE UNDER STATE PROCESS.

The fact that the property on which the lien existed was within the custody of the sheriff, under writs of attachment issuing from a state court, though it might affect the power of the circuit court to take possession of the property, could not affect its jurisdiction of the suit.

In Equity. Suit by William D. Wheelwright against the St. Louis, New Orleans & Ocean Canal & Transportation Company to foreclose a mortgage. Heard on a demurrer for want of jurisdiction and a plea to the jurisdiction. Demurrer and plea overruled.

Furrer, Jonas & Kruttschnitt, for complainant.

Gurley & Mellen, for defendant.

BILLINGS, District Judge. This is a case brought to foreclose a mortgage, and to have the mortgaged property preserved pending the suit. The complainant is a citizen of the state of New York, and the defendant is a citizen of New Jersey. The mortgaged property is situated within this district.

The first question presented is by an objection to the jurisdiction, which is urged in support of a general demurrer, on the ground that neither party is a citizen of the state within which the action is brought. It is urged by the defendant that the effect of the act of August 13, 1888, (25 St. p. 433,) is to deprive this court of jurisdiction. To this objection the complainant replies that this suit is brought and jurisdiction is conferred under and by virtue of section 8 of the act of March 3, 1875, which section is by section 5 of the act of 1888 expressly continued in force as if that last statute had not been passed. Section 5 of the act of 1888 (25 St. p. 436) is as follows:

"Sec. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one or in six hundred and forty-two or in six hundred and forty-three or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of congress of which this act is an amendment, or in the act of congress approved March first, eighteen hundred and seventy-five, entitled 'An act to protect all citizens in their civil and legal rights.'"

The reservation as to section 8 of the act of 1875 is full and complete, and the only question remaining upon this objection is whether section 8 of the act of 1875 (18 St. p. 472) confers jurisdiction upon the circuit courts where there is but one defendant, and neither party resides within the state in which the suit is brought. Section 8 of the act of 1875 is as follows:

"That when, in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain, to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also

upon the person or persons in possession or charge of said property, if any there be," etc.

It is to be observed that the language of the act is:

"When, in any suit commenced in any circuit court of the United States, one or more of the defendants shall not be an inhabitant of or found within the said district."

It would seem that this expression, "one or more of the defendants," means one defendant, if there is but one, or one or more, if there are several; for the necessity of the provision springs out of the fact that the *res* upon which the lien is sought to be asserted and enforced is located in a district not that of the defendant's domicile. If another defendant resided in the district, it would still leave an equal necessity for the provision as to the nonresident defendant. In this class of cases, it is the residence of the defendant away from the property sought to be affected which is the reason for conferring the jurisdiction; for the property must be in the district where the court sits, so that it can lay its hand upon it to enforce the lien. This would be equally true whether there was one or more defendants, or whether some of them were residents. In this connection it is to be noticed how differently the provision is constructed, conferring jurisdiction over resident defendants, where some of the defendants were nonresidents, found in 5 St. p. 321, in that case, it is added, "when there shall be several defendants." The reason for that provision caused this additional expression to be inserted, while, in the provision under consideration, it caused it to be omitted. The reason for the statute leads me to think it was the intent of congress that it should apply in case of a single defendant as well as in case of several defendants. Possible jurisdiction is given under the constitution of the United States, since the parties are citizens of different states, and it is made effectual by section 8 of the act of 1875, which is unrepealed.

There is further objection to the jurisdiction presented by the plea. The plea pleads that the property upon which the lien exists is already in the custody of the sheriff, under two writs of attachment issuing from the state court. Whatever impediment these attachment writs might interpose to the court taking actual possession of the property, either for the purpose of preservation or for the purpose of enforcing any final decree, they do not at all prevent or qualify the jurisdiction which the court has over the parties and over the cause. The demurrer is overruled, and the plea adjudged insufficient, and the defendant has until the next rule day to answer the bill of complaint.

McCLASKEY *et al.* v. BARR *et al.*BARR *et al.* v. McCLASKEY *et al.*

(Circuit Court, S. D. Ohio, W. D. May 27, 1923.)

No. 3,984.

L. POWERS OF ATTORNEY TO CONVEY LAND—SCOPE OF AUTHORITY—MISDESCRIPTION SOURCE OF TITLE.

In 1881 four persons brought suit against numerous occupants of a tract of land for partition, alleging that they were "the heirs at law of William Barr, Sr., deceased, and as such heirs at law were the owners in fee simple," etc. For the purpose of settling with any defendants willing to purchase their interest they each gave to a third person a power of attorney to convey "my interest as heir at law of my father, William Barr, who was the son of John Barr, who was the brother of William Barr, Sr.," in the land in controversy, "being the same premises owned during his life by William Barr, Sr., the granduncle of the constituents of this power of attorney." The attorney made conveyances to various defendants, generally by quitclaim deeds, which in some cases followed the language of the power of attorney in describing the source of title. It appeared, however, that plaintiffs derived no interest in the land as heirs of their father, William Barr, but that they did derive by inheritance an interest through Jane Barr, in whom the title vested on the death of William Barr, Sr. *Held* that, as the powers of attorney and deeds were given for conveying the interest in litigation, they were effectual to pass any interest derived from William Barr, Sr., by representative heirship, notwithstanding the misdescription as to the immediate source of title.

R. SAME.

At the time of giving the power of attorney, and at the date of the deeds made by the attorney, plaintiffs also had an interest in the land, derived from a devise to them by Robert Barr, a brother of William Barr, Sr. But this interest was then unknown to them, was not involved in the litigation, and the will, which was executed in another state, had not been admitted to record in the county where the lands were situated, as required by the local statutes. *Held*, that this interest did not pass by virtue of the power of attorney and the quitclaim deeds.

R. SAME—REVOCAION BY DEATH.

A power of attorney to convey lands is immediately revoked by the death of the principal, and deeds subsequently made by the attorney are null. *Ish v. Crane*, 3 Ohio St. 521, distinguished.

In Equity. Bill for partition of lands. For former decisions, see 38 Fed. Rep. 165; 40 Fed. Rep. 559; 42 Fed. Rep. 609; 45 Fed. Rep. 151; 47 Fed. Rep. 154; 48 Fed. Rep. 130.

C. W. Cowan, Henry T. Fay, and Howard Ferris, for complainants.

Samuel T. Crawford and W. S. Thurstin, for cross complainants.

Stephens, Lincoln & Smith, and Bateman & Harper, for respondents.

JACKSON, Circuit Judge. The questions now before the court for determination in the above causes arise under the cross bill, and relate chiefly to the proper construction of the powers of attorney given in 1881 and 1882, by Robert Barr, Samuel Barr, Jane Chapman, and Martha Reed, to Ozra J. Dodds and Irvine B. Wright, and to the effect and operation of the releases which said attorneys in fact executed to the several cross defendants under and by virtue of said powers. Cross complainants do not attack or attempt to set aside and vacate said releases for fraud or want of consideration. They claim that said powers of attorney did not authorize any release of the interests in the land which their present suit seeks to recover; that said powers of attorney only authorized their agent to release such interest in the land as they inherited as heirs