whether it was competent for the one defendant to remove the cause upon the ground alleged without joining the others in its petition; second, whether the fact of prejudice and local influence was sufficiently made to appear to justify an order of removal; third, whether it was necessary that it should be shown that the value of the matter in dispute was such as to constitute the case, in that respect, one within the jurisdiction of the court; and, fourth, whether the entry above set forth amounted to an order of removal.

George F. Arrel and H. K. Taylor, for plaintiff in error.

Hine & Clarke, for defendant in error the New York, L. E. & W. R. Co.

Before TAFT, Circuit Judge, and SEVERENS and SWAN, District Judges.

Having stated the case as above, SEVERENS, District Judge, delivered the opinion of the court.

Before entering upon the consideration of the rulings occurring on the trial upon which error is specially alleged, it is necessary to look into the questions submitted affecting the jurisdiction of the circuit court; for, unless it appears that that court acquired jurisdiction by the removal proceedings, it is clear that we cannot proceed to discuss the merits of the controversy.

It is well known that, upon the first and second grounds above stated upon which the want of jurisdiction is alleged, there has been much difference of opinion in the subordinate courts; but, inasmuch as we are of opinion that the jurisdiction of the circuit court must be denied upon another ground, we do not deem it necessary to examine the questions whether one of several defendants can proceed for the removal of the cause for the special reason here alleged to exist, where the other defendants are citizens of the same state with the plaintiff, and whether such a showing as was made in this case in regard to prejudice and local influence is sufficient. It seems proper, however, to say that in the present case the question last referred to does not present itself in the same way in which it would have done if the plaintiff had prosecuted his motion to remand. By omitting to do that, he waived all objections which he was competent to waive, and there remains not the question whether there was sufficient fullness in the showing of prejudice and local influence in the petition and affidavit, but the question whether they constituted any evidence at all of the fact stated. Mere defects in the form and mode of procedure may be waived, though the essentials of jurisdiction cannot be. Ayers v. Watson, 113 U. S. 594, 5 Sup. Ct. 641; Martin's Adm'r v. Railroad Co., 151 U. S. 673–687, 14 Sup. Ct. 533.

Another question presented by the record is whether it was necessary, in order to justify the removal, that it should have been shown to the circuit court that the value of the matter in controversy was such as to bring it within the jurisdiction of the court. We are of opinion that it was, and that the case must be remanded to the state court, for the reason that it nowhere appeared from anything in the record or petition or affidavit that the sum or value of the thing sued for exceeded the sum of $2,000. The first section

of the act of March 3, 1887, defines the general jurisdiction of the circuit courts in suits originally brought there, and, in respect to the value of the subject-matter, requires that it shall exceed the sum of $2,000, besides interest and costs. By the second section, provision is made for the removal by defendants from state courts of cases of the same general character. The cases made removable by this section are divided into four classes. The first and second classes, taken together, cover generally all cases of which original jurisdiction is given by section 1; and in these it is necessary that all the defendants, if there be more than one, join in the removal. The third class is of cases of the same description as those included in classes 1 and 2, but it is a subclass as respects them, consisting of cases included in the former classes, in which part of the defendants are citizens of different states from that of the plaintiff, and have a separable controversy. In these the defendant or defendants in that controversy may remove the suit without joining codefendants. The fourth class is also a special class of cases included in classes 1 and 2, and consists of controversies between citizens of different states, in which justice cannot be obtained in the state courts, on account of prejudice and local influence. The first and second clauses of this section expressly refer to section 1 for the elements of jurisdiction. The third refers to the first two, of which it is a subclass; and, although the reference in the fourth clause is not quite so distinct, it is held by the supreme court, in the case of In re Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, that the words "and where," with which the fourth clause commences, are equivalent to the words "and when in any such case," in the third clause. Thus, the essentials of the jurisdiction in removal cases conferred by section 2 appear to be identical with those in original cases as defined in the first section (with certain conditions added by the third and fourth clauses of section 2); and one of those essentials is that the controversy must involve a sum exceeding $2,000. In re Pennsylvania Co., above cited. And it has long been the established rule that all the essential conditions must appear in the record (which includes the petition), as it is presented to the circuit court of the United States, before it is authorized to assume jurisdiction. It is only "in any such case" that an order of removal can be made. Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799; Stevens v. Nichols, 130 U. S. 230, 9 Sup. Ct. 518; Crehore v. Railway Co., 131 U. S. 240, 9 Sup. Ct. 692; La Montagne v. Lumber Co., 44 Fed. 645. In the cases in the supreme court here cited, the element lacking was that of an allegation of diverse citizenship; but in the case in 44 Fed. 645, it was that of the value in controversy, and Judge Jenkins applied the same rule; and we can see no difference in the principle involved. See, also, Oleson v. Railroad Co., Id. 1.

In regard to the other question, it seems doubtful whether there was any valid order for removing the case. The authority to make such an order is vested by the act solely in the circuit court of the United States. The entry recited in the foregoing statement of the facts was merely of a finding that the petitioner was entitled to remove the case into that court. It was not an order. The entry

in question was identical with the one which had been made by the United States circuit court in Pennsylvania Co. v. Bender, 148 U. S. 255, 13 Sup. Ct. 591. The state court, declining to treat the case as thereby removed, proceeded with it, and, after final judgment in the supreme court of the state, the case was removed to the supreme court of the United States, where Mr. Justice Brewer, in delivering the opinion of the court, treated the entry as a finding simply, and said:

"But such finding does not remove the case any more than an order overruling a demurrer to a petition makes a judgment. Such an order is simply an adjudication of the right of the plaintiff to a judgment. Upon it alone, execution cannot issue. There must be a judgment, or, in other words, an order based upon the determination of the right. A mere finding that the party is entitled to a removal is no order, and does not of itself work removal."

In that case, however, it does not appear that a copy of the entry was filed in the original state court, as was done here. There was in this case also an order made in the state court that the cause be removed. But that court had made the order previously, and it was in no wise responsive to the action of the federal court. The state court had no authority, either under state or federal law, to make the order when it did, and it was therefore void.

Whether, in view of the facts that the proceeding which had taken place in the United States court was brought to the attention of the state court, that the latter suffered the case to be removed, and that the plaintiff followed it into the United States court, and proceeded to trial without raising objection to the removal, the infirmity of the removal proceedings ought not to be treated as a matter of irregularity only, such as a party may waive, and not as of the essence of jurisdiction, is a question which we have not found it necessary to decide.

The judgment must be reversed, and the case remanded to the court below, with instructions to remand it to the state court. The defendant who removed the case must pay the costs of this court and of the court below. Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726; Hanrick v. Hanrick, 153 U. S. 192, 198, 14 Sup. Ct. 835.

VERMILYA v. BROWN.

(Circuit Court, S. D. New York. November 26, 1894.)

FEDERAL COURTS—JURISDICTION—SERVICE OF PROCESS.

Where a state court, by levy made under an attachment against the property of a defendant residing out of its jurisdiction and personal service on such defendant out of the jurisdiction, effected before removal, has acquired jurisdiction of the case, to the extent, at least, of being entitled to enforce its judgment against the attached property, the federal circuit court will not, where the nonresident defendant has voluntarily removed the cause, allow him to dismiss it, as to that property, on the sole ground that that court could not have acquired original jurisdiction of such property by the issue of an attachment.

This was an action by Peter B. Vermilya against Mary Brown. It was commenced in a court of the state of New York by the issue and