

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, 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

levy of an attachment and service on the defendant out of that state. Defendant removed the cause to this court, and now moves to vacate the attachment, set aside the service of summons, and dismiss the action, appearing specially for that purpose.

This was a motion to vacate a warrant of attachment, to set aside service of summons without the state, and to dismiss the action. The action was originally brought in the state court, and a warrant of attachment issued September 11, 1894, against the property of the defendant, on the ground that she was a nonresident. Immediately thereafter, notice of the attachment was filed in the office of the county clerk, whereby, under section 649 of the New York Code of Civil Procedure, a levy was made upon certain real estate of the defendant situated in New York City. On October 9, 1894, an order was entered authorizing service of the summons upon defendant by publication, or without the state, and personal service without the state was made pursuant to that order. Under the law of the state, when a defendant is thus served, and he does not voluntarily appear, any judgment which may be obtained against him in the action can be enforced only against the property which has been levied upon by virtue of the warrant of attachment. Code Civ. Proc. N. Y. § 707. Subsequent to service, and on October 26, 1894, a petition and bond was presented to the state court for removal of the cause to this court, and on October 30th the record was duly filed here. There has been no personal service of the summons within the jurisdiction of this court or of the state court. The defendant resides in and is a citizen of New Jersey. Her appearance in obtaining the removal was special, and for that purpose alone. Her appearance now is special, and for the purpose of this motion only.

A. G. N. Vermilya, for plaintiff.

Howard A. Taylor, for defendant.

LACOMBE, Circuit Judge (after stating the facts). There is a distinction to be made between this case and those heretofore decided in this circuit, and cited on the argument, namely: *Good Hope Co. v. Railway B. F. Co.*, 22 Fed. 635; *Golden v. News*, 42 Fed. 112; *Bentlif v. Finance Corp.*, 44 Fed. 667; and *Clews v. Iron Co.*, Id. 31. In those cases the service of process in the state court had given that court no jurisdiction, either of the person or of the property of defendant; and under the doctrine laid down in *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, and *Pennoyer v. Neff*, 95 U. S. 714, the federal courts would have treated any judgment rendered in the state court upon such service as a nullity. In the case at bar, however, the state court had, even under the theory of the United States supreme court decisions above cited, acquired jurisdiction of the property attached within the state.

When a precisely similar point was presented in *McKay v. Central Railroad & Banking Co. of Georgia* [no opinion], this court, the writer then sitting, followed the opinion of Judge Colt in *Perkins v. Hendryx*, 40 Fed. 657, and dismissed the summons and attachment. But attention was not at that time called to *Railroad Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444. Although much of that opinion is obiter, it affords a strong indication of the views of the supreme court upon the questions raised here. In conformity thereto, it should be held that where the state court has, by levy made under attachment and personal service effected before removal, properly acquired jurisdiction of the case, to the extent, at least, of being entitled to enforce

its judgment against such 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 this court could not have acquired original jurisdiction of such property by the issue of an attachment. The motion is denied.

GLOTIN et al. v. OSWALD et al.

(Circuit Court, D. Minnesota. December 12, 1894.)

CIRCUIT COURT—JURISDICTIONAL AMOUNT—PLEADING.

St. 1881, giving the right to commence suit, in a trade-mark case, without alleging the amount in controversy, is not repealed by the statutes of 1887 and 1888, requiring the amount involved to be \$2,000, to give the circuit court jurisdiction.

Suit by Marie Brizard Glotin and others, doing business as Les Heritiers de Marie Brizard & Roger, against John C. Oswald and another, partners as J. C. Oswald & Co. Defendants demur to the complaint. Demurrer overruled.

In this case an injunction is asked by complainants to restrain defendants from selling or offering for sale a spurious brand of liqueur called "Crème de Menthe," whereby the bottles, labels, and trade-marks duly registered in compliance with the laws of the United States, which have been used by the complainants for many years, are so closely imitated as to deceive the public into the belief that the goods so put up are the genuine liqueurs manufactured by these complainants. A demurrer is interposed by defendants, on the ground that it does not appear by the bill of complaint that the sum of \$2,000 is involved in this action, and hence this court has no jurisdiction.

Boardman & Boutelle, for complainants.

Taylor & Spooner, for defendants.

NELSON, District Judge. The complaint shows that these complainants, residents and citizens of the republic of France, are making a liqueur called "Crème de Menthe" in France, and exporting it to this country; and having filed their trade-mark here, and complied with the law in that respect, they are entitled to protection. The statute of 1881, which gives them the right to commence a suit without alleging the amount in controversy, was not repealed by the statutes of 1887 and 1888, which make it necessary, in order to give jurisdiction to the United States circuit court, that the amount involved be \$2,000. The demurrer is overruled, and the motion for a temporary injunction granted, and defendants will be given until next rule day to file their answer.

GREGG v. SANFORD et al.

(Circuit Court of Appeals, Third Circuit. January 2, 1895.)

No. 15.

1. TAXATION—PENNSYLVANIA STATUTES—JOINT-STOCK ASSOCIATIONS.

A joint-stock association is not subject to taxation under the acts of Pennsylvania of May 1, 1868, April 24, 1874, March 20, 1877, and June 7, 1879, imposing taxes upon the capital stock of "incorporated" companies.