

DU PONT v. ABEL.

(Circuit Court, D. South Carolina. July 2, 1897.)

SERVICE OF PROCESS—PUBLICATION—PROPERTY WITHIN JURISDICTION—JUDGMENT AGAINST NONRESIDENT.

Defendant, a resident of New York, held a mortgage on land in South Carolina, and was proceeding to sell the mortgaged land under a power in such mortgage. Plaintiff, the mortgagor, brought suit in a state court to enjoin the sale and to recover damages for breach of contract, and served defendant by publication. Defendant removed the case to the federal court, and moved to set aside the service. *Held*, that the state court had jurisdiction of the property right claimed by defendant under the mortgage, and the service, accordingly, could not be set aside, but that no general judgment could be taken against defendant, and, in requiring him to plead, it should be declared that no judgment or decree rendered should affect any interest or property outside the state of South Carolina.

Murphy & Legare and H. E. Young, for plaintiff.
Mordecai & Gadsden, for defendant.

SIMONTON, Circuit Judge. This case began in the state court for Charleston county. The defendant holds a mortgage upon lands of the plaintiff situate in said county, and advertised the lands for sale under a power contained in the mortgage. The complaint prayed an injunction and also set up breach of contract on the part of the defendant, and claims damages therefor. In South Carolina the procedure is governed by the rules of Code pleading. The defendant is a citizen of New York, and nonresident in this state. On his petition the cause was removed into this court, and he now moves to set aside the service of the summons and complaint which had been made under an order of publication. This he can do; his petition for removal not being a general appearance, or submission to the jurisdiction. *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126. It is denied that the state court had any jurisdiction of the case. The defendant was not within the jurisdiction, but he had property, or at least a claim of property, under his mortgage, within the state of South Carolina. He was proceeding upon this mortgage, and exercising his claim to the property. Indeed, in no other way could plaintiff obtain relief from the act complained of. She could not attach the debt nor garnishee herself. The state court clearly had jurisdiction. But another difficulty arises. As defendant cannot be made a party by personal service within the jurisdiction, and only becomes such by reason of the property within the jurisdiction, no general judgment can be had against him. Such judgment cannot affect any other property than that within the jurisdiction. The rule is clearly stated in *Machine Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92. A personal judgment is without validity if rendered in a state court in an action upon a money demand against a nonresident upon whom no personal service within the state was made, and who did not appear. Such a judgment may be perfectly valid in the jurisdiction in which it was rendered, and enforced even against the property, effects, and credits of the nonresident there situated, but it cannot be enforced or made the foundation of an action in another state. The defendant therefore does not wish

to appear in person, fearing that he would lose the benefit of this principle, and would subject himself to the claim for personal damages. The present purpose of these proceedings is to secure an injunction against the sale of the plantation. Incidentally, they seek damages. If the damages grew out of, and are inseparably connected with, the injunction, and the equities upon which it is sought, this court, sitting in equity, may go on and administer full relief; grant damages, also. *Bird v. Railroad Co.*, 8 Rich. Eq. 55. If, on the other hand, the question of damages is not so intimately connected with the equities of the case, that question must be decided at law. As in this court the jurisdiction and form of procedure in law and in equity are entirely distinct, in such event the pleadings must be recast. At the present stage it cannot be determined what is, or what will be, the full scope of the case. The defendant's motion to dismiss the case must be refused. He is, however, entitled to protection. Let him plead to the complaint on or before the rule day in August next, taking such defense as he may be advised; it being distinctly understood and now declared that defendant is within this jurisdiction only as to the property right in the mortgage set out in the complaint, and that no judgment or decree of this court can in any way affect any other rights, interest, and property of the defendant except such as are within the district of South Carolina.

DE BEAUMONT v. WEBSTER. ¹

(Circuit Court of Appeals, Third Circuit. May 10, 1897.)

No. 15, March Term, 1897.

1. COMPETENCY OF WITNESS—TRANSACTIONS WITH DECEDENT—INTERESTED PARTY.

In the federal courts the competency of parties or interested persons as witnesses is controlled by Rev. St. § 858, and their testimony is not to be excluded thereunder in suits by or against administrators, etc., except as to any transactions with or statements by the deceased. 71 Fed. 226, affirmed.

2. CANCELLATION OF CONTRACTS—EVIDENCE.

Complainants, owning certain patents, by a written agreement gave defendants, who were to furnish the capital and have an interest in the business, the "exclusive rights to the sales and management of all the business connected with the said patents," etc. Defendants, after carrying on the business for some time, presented to complainants' attorney a statement thereof, showing large losses. Shortly afterwards they received from him a letter saying that by his advice complainants had given to a certain third person "a power of attorney to act as their exclusive agent in all things pertaining to their rights and interests in" such patents. One of the defendants afterwards in a personal interview stated to the attorney that he considered this a cancellation of the agreement, and was assured that that was what it meant. *Held*, that this, together with the subsequent conduct of complainants themselves, showed a cancellation of the contract by their own act.

Appeal from the Circuit Court of the United States for the District of New Jersey.

¹ Rehearing denied June 28, 1897.