

searching for them, and in citing the above list, I have been impelled by curiosity, rather than a sense of necessity, to mass the authorities. It is an interesting fact that the supreme court has been called upon to reiterate so many times the clear declaration of the law by Chief Justice Marshall in the case of *Gracie v. Palmer*. In the case of *Trust Co. v. McGeorge* it was expressly ruled that the waiver may be made when the question arises where neither of the parties are residents of the district. The case being one of which the circuit courts of the United States are given jurisdiction by the first section of the act of March 3, 1887, as corrected and amended by the act of August 13, 1888 (25 Stat. 433, 434), the defendant had the right to remove it into this court under the provisions of the second section of said act; for by filing the petition and bond for removal it has waived the right to challenge the jurisdiction of this court, on the ground that the action was not commenced in the district whereof it is an inhabitant, as effectually as that privilege might be waived by any other form or manner of submission to the jurisdiction. *Stalker v. Palace-Car Co.*, 81 Fed. 989.

3. The right of removal in this case was not claimed on the ground of alleged local prejudice in the community, which might be supposed to operate to the disadvantage of the defendant, but solely on the ground of diversity of citizenship, and in such cases the law makes no distinction between aliens and citizens. The right of removal is given to a defendant who is a nonresident of the state in which the action is commenced, whether such defendant be an alien or a citizen of another state. The authorities cited by counsel on this point are decisions in cases of removal on the ground of local prejudice, and cases under different statutes than the one which governs this case.

4. If there is no controversy between the parties, the plaintiff had no occasion to commence this action. His complaint sets forth a claim of rights on his part to be protected, and wrongs on the part of the defendant to be redressed, by the judgment of the court; and the petition for removal states that there is a controversy between plaintiff and defendant, and that the amount and value involved therein exceeds \$2,000. I can find no ground for indulging a hope that there may be no controversy between the parties to this action, nor for supposing the record to be defective. Motion to remand denied.

In re ASPINWALL'S ESTATE.

(Circuit Court, W. D. Pennsylvania December 18, 1897.)

No. 20.

REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURTS—PROBATE PROCEEDING.

A proceeding in the orphans' court in Pennsylvania on appeal from a decision of the register of wills admitting a writing to probate as a will is one in rem, heard in the exercise of the probate jurisdiction of the court, and is neither a suit at law or in equity cognizable by or removable to the federal courts.

Sur motion to remand to state court.

A. P. Burgwin, for petitioner.

John G. Johnson and Dalzell, Scott & Gordon, for executor.

ACHESON, Circuit Judge. It may confidently be affirmed that a proceeding to establish and probate a will is not a suit at law or in equity, of which a circuit court of the United States, under the act of March 3, 1887, as amended August 13, 1888, has original cognizance, or can acquire jurisdiction by removal from a state court. Case of Broderick's Will, 21 Wall. 503; *In re Frazer*, Fed. Cas. No. 5,068; *Reed v. Reed*, 31 Fed. 49; *In re Cilley*, 58 Fed. 977; *In re Foley*, 76 Fed. 390, 80 Fed. 949. What, then, is the nature of the proceeding here in question?

The register of wills of Allegheny county, Pa., against the caveat of Mrs. Mary C. Delafield, admitted to probate a writing purporting to be the last will of Anna R. Aspinwall, deceased, and issued letters testamentary thereon to the executor therein named. From this decision of the register an appeal was taken by Mrs. Delafield to the orphans' court of Allegheny county. Pending proceedings upon this appeal in the orphans' court, Mrs. Delafield presented her petition to that court, for the removal of the cause into this court, upon the ground of diverse citizenship between the proponent of the will and the contestant. Now, the orphans' court is a special statutory tribunal, having under the law of Pennsylvania exclusive cognizance of appeals from the decisions of the register in the matter of the probate of wills and the granting of letters testamentary. In performing its appellate functions in such a case, the orphans' court undoubtedly exercises probate jurisdiction. The subject-matter involved in the appeal is the validity of the contested instrument as a will. The proceeding upon the appeal is in the nature of a proceeding in rem, and, when a final decree is reached, it is conclusive on all the world. *In re Miller's Estate*, 159 Pa. St. 562, 28 Atl. 441.

The supreme court of Pennsylvania, in *Re Miller's Estate*, 166 Pa. St. 97, 111, 31 Atl. 63, said:

"The appeal brings the rem—the will—within the jurisdiction of the orphans' court. The court then proceeds by its process to bring the persons interested in the res before it; so that all may be heard before the final decree is made, and be bound by it when made."

Such being the character of this proceeding, the federal decisions above cited are directly against our jurisdiction. Nor is this conclusion at variance with the rulings in *Gaines v. Fuentes*, 92 U. S. 18, and *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, that, where by the law of a state suit may be maintained in a state court to annul the probate of a will, such a suit may be maintained in a federal court, where the parties on the one side and the other are citizens of different states. The proceeding upon this appeal is not such an annulling suit, nor is it analogous to such a suit. It is a part of the probate proceedings for the establishment of the contested instrument.

As these views are conclusive against the jurisdiction of this court, it is not necessary for us to consider the other reasons assigned for

remanding the cause. And now, this 18th day of December, 1897, it is ordered and adjudged that this proceeding be, and the same is, remanded to the orphans' court of Allegheny county.

WHITELEY MALLEABLE CASTINGS CO. V. STERLINGWORTH RAILWAY SUPPLY CO.

(Circuit Court, D. Indiana. December 16, 1897.)

No. 9,518.

REMOVAL OF CAUSES—WAIVER.

Appearing in the state court, filing a demurrer to the complaint, and procuring an order discharging an attachment by giving the necessary bond therefor, all before the time at which the defendant is required by the state practice to answer or plead, is not a waiver of the defendant's right to remove, when no action was taken on the demurrer in the state court.

Gregory, Silverburg & Lotz and Gavin, Coffin & Davis, for plaintiff.
Woolen & Woolen, for defendant.

BAKER, District Judge. On July 14, 1897, the plaintiff filed its complaint against the defendant in the circuit court of Delaware county, Ind., to recover damages in the sum of \$3,500 for an alleged breach of contract. The complaint is in two paragraphs. The first paragraph sets out the contract and counts upon its breach. The second paragraph is a common count for goods, wares, and merchandise sold and delivered. On the same day proceedings in attachment were instituted against the defendant as a nonresident of the state, and the Lake Erie & Western Railway Company was duly garnished as a debtor of the defendant. The plaintiff indorsed its complaint as provided by law, requiring the defendant to appear to and answer the same on September 22, 1897, the same being the fifteenth judicial day of the September term, 1897, of the Delaware circuit court. On July 26, 1897, the plaintiff filed its affidavit showing that the defendant was a nonresident of the state, and procured an order for the service of the summons on the defendant by publication. The summons was published requiring the defendant to appear and answer the complaint on September 22, 1897. On August 14, 1897, the defendant entered its appearance and filed its demurrer to the complaint. At the same time the defendant filed a bond, as provided by law, for the dissolution of the proceedings in attachment and garnishment, and moved the court to accept the bond and discharge the proceedings. The court accepted the bond, and discharged the proceedings in attachment and garnishment. No action was asked for or taken on the demurrer in the state court. All these pleadings were filed and proceedings had at the April term, 1897, of the Delaware circuit court. On September 7, 1897, being the second judicial day of the September term, 1897, of the Delaware circuit court, no further proceedings having been had in said court than are above stated, the defendant filed in said court in said cause its verified petition, accompanied by a sufficient bond, asking for the removal of the case into the circuit court of the United States for the district of Indiana. The petition sets