## SMALL v. MONTGOMERY.[1]

(*Circuit Court, E. D. Missouri.* September 27, 1883.)

PRACTICE—WAIVER OF OBJECTION TO ILLEGAL SERVICE OF PROCESS.

The appearance of a defendant in a case pending in a state court, for the purpose of filing a petition for removal to a federal court, does not constitute such a general appearance as operates a waiver of defective or illegal service of process, so as to prevent his raising any objection to such service after the removal.

Demurrer to Replication.

This is a case removed to this court from the circuit court of the city of St. Louis, at the instance of the defendant, who is a citizen of the state of Tennessee. After the removal the defendant filed a plea in abatement, in which he stated that prior to the institution of this suit he was indicted in the St. Louis criminal court for obtaining money under false pretenses; that he was arrested, and gave bond to appear and answer to said charge when ordered so to do by the court; that he then returned to his home in Tennessee, and did not come back to Missouri until compelled by an order of said court, when he appeared to answer to said charge; and that while attending court to answer to said charge against him, and immediately after the case against him was dismissed, he was served by a deputy sheriff of the city of St. Louis with a copy of the complaint and summons in this case, though privileged from service of process at the time, and that the service on him was, therefore, illegal and void. The plaintiff, in his replication, stated that the defendant had waived any objection he might have made to said service by appearing before the St. Louis circuit court, and filing a petition for a removal of the case to this court.

*M. B. Jonas* and *C. H. Krum*,, for plaintiff.

*Jamison, Collins & Jamison*, for defendant.

TREAT, J. The only question presented is whether the special appearance of defendant in the state court, whence the cause was removed, for the purpose of having said removal to this court, constitutes such a general appearance as operates a waiver of defective or illegal service, so that objection to said service cannot be here raised. Judge DRUMMOND, in the case cited by counsel for defendant, holds that such special appearance is not a waiver of defendant's rights, nor does it operate as a general appearance, nor prevent his objecting in the federal court to the service. *Atchison* v. *Morris*, 11 FED. Rep. 582.

Reference is made to the case of *Sweeney* v. *Coffin*, 1 Dill. 73, decided in 1870 by this court, in which it was held that under the act of 1789 this filing of a motion for removal was a sufficient appearance for

[1] Reported by Benj. F. Rex, Esq., of the St. Louis bar.

that purpose without entering a general appearance in technical form.

The question arose on a motion to remand, because the record did not disclose such general appearance entered at the time of filing the petition for removal, as that act required. That case is clearly distinguishable from the present in many respects. Questions of actual and of constructive service under the state law had also to be considered, and the binding effect of a valid constructive service to bring the defendant into court, although such service was not valid in federal courts. When the case was removed, the original service was held to have the same effect as before removal.

Valid service is as effective as a voluntary appearance. And hence, under the act of 1789, the court ruled that in the case then before it, proper service having been had, the filing of the petition was a sufficient compliance with the terms of that act as to appearance. No question of waiver was presented.

The case of *Werthein* v. *Cont. Ry. & T. Co.* 11 FED. REP. 689, was decided under a rule in the state court which required "all pleas in abatement * * *" to "be filed on or before the opening of the court on the day following the return-day of the writ," which, in that case, was on September 13th, on which day the defendant appeared, but filed no plea in abatement. On September 22d the defendant filed his petition for removal. After the case was removed to the federal court, the defendant filed there his plea of abatement; and the court properly held that he had, by his inaction or failure to comply with the rule stated, waived his privilege. In the case now under consideration, the petition for removal was filed before the time for pleading had expired.

The language of Judge CURTIS in *Sayles* v. *Ins. Co.* 2 Curt. C. C. 212, seems to be broad enough to sustain the views of plaintiff's counsel; but that eminent judge put the appearance for the removal of the cause upon the same footing as pleading to the merits, whereby pleas in abatement are waived. There is, however, a marked distinction between the two procedures. The former is had merely to secure the constitutional and statutory right to have all questions heard and disposed of solely by the federal court; and the latter is by established law a waiver of all authenticated or dilatory pleas, with one exception, so that the party puts himself exclusively upon the merits of the controversy.

The act of 1875 differs from the act of 1789 as to the time of filing the petition, and says nothing as to the formal appearance entered. It has been often held that while a general appearance waives defective service, yet a special appearance, as in this case, has no such effect. We concur fully in the decision of Judge DRUMMOND, *supra*. See, also, *Blair* v. *Turtle*, 1 McCrary, 372; [S. C. 5 FED. REP. 394.]

The demurrer is sustained

McCRARY, J., concurs.

## DENVER & R. G. RY. CO. *v.* DENVER, S. P. & P. R. CO.[1]

(*Circuit Court, D. Colorado.* September 18, 1883.)

1. RAILROADS—LOCATION UNDER ACT OF CONGRESS IN MOUNTAIN GORGES.
The location of railroads in mountain gorges, on the public domain, is subject to the second section of the act of congress, approved March 3, 1875, relating to the use of canons, passes, and defiles by railroad companies, which provides that no company which locates its line through such place shall prevent any other company from the use and occupancy of the same canon, pass, or defile for the purpose of its road, in common with the road first located, or the crossing of other railroads at grade.
2. SAME—CONSTRUCTION OF ACT.
This act bears upon its face the meaning that where there is a canon, pass, or defile so narrow as not to admit of the passage of two roads conveniently, it may be used by two or more railroads; but only in cases of necessity can one company go upon the right of way of another for the purpose of building its road.
3. SAME—CROSS-BILL.
The company having prior right of way may enjoin intrusion thereon by another company, until facts are shown making it necessary for the second company to come on the right of way. Suit for injunction being brought, such necessity may be shown, and the right to enter upon and use such right of way may be enforced on cross-bill. The rights of the parties will be settled upon evidence by final decree, and not in a preliminary way upon motion.

In Equity.

*E. O. Wolcott*, for plaintiff.

*H. M. Orahood* and *H. B. Johnson*, for defendant.

HALLETT, J., (*orally.*) The plaintiff in this action located its road and built it under an act of congress approved June 8, 1872.

In *Railway Co.* v. *Alling*, 99 U. S. 463, the supreme court held this act to be subject to the second section of the act of March 3, 1875, relating to the use of canons, passes, and defiles by railroad companies. The act of 1875 provides that no company which shall locate its line through any such place shall prevent any other company from the use and occupancy of the same canon, pass, or defile for the purpose of its road, in common with the road first located, or the crossing of other railroads at grade. This act, although the meaning is not very fully expressed, is evidently understood by the supreme court, and bears upon its face the meaning that where there is a canon, pass, or defile so narrow as not to admit of the passage of two roads conveniently, it may be used by two or more. The supreme court, although they have not discussed the act at very great length, assume that the different companies are not to encroach upon each other's right of way, except there be a necessity for it. They say further:

"Where the Grand canon is broad enough to enable both companies to proceed without interfering with each other in the construction of their respective roads, they should be allowed to do so; but, in the narrow portions of the

[1] From the Colorado Law Reporter.