

The case of *Bacon v. Rives*, 106 U. S. 99, S. C. 1 Sup. Ct. Rep. 3, does not help the defendants in their contention. The court there held that the executors of George Rives were not necessary and substantial parties to the issue between the complainants and the principal defendant, because no relief was prayed for against them; that they were made parties for the sole purpose of reaching the interest of George C. Rives in his father's estate, in their hands, if the complainants should succeed in their suit against him. Though made formally defendants, they were regarded substantially as mere garnishees. But, in the present case, specific relief is sought against the individual defendants, who are charged to be personally responsible for their alleged illegal acts in the misapplication of property which they held as trustees of the complainants. It falls rather within the principle of *Corbin v. Van Brunt*, 105 U. S. 576, where the suit was for the recovery of land, and damages for its detention. The controversy in regard to the recovery of the land was between citizens of the same state, and the one for damages for detention between citizens of different states. The court held that separate and distinct trials of these issues were not admissible, and that the case should be remanded to the state court from which it had been improperly removed.

Regarding the action as one where the main controversy is between citizens of the same state, and not finding in it any "controversy wholly between citizens of different states and which can be fully determined as between them," I must hold that the suit is not removable, on the ground of citizenship, under the second section of the act of March 3, 1875, and the motion to remand must prevail.

EDWARDS v. CONNECTICUT MUTUAL LIFE INS. CO.

(Circuit Court, N. D. New York. June 6, 1884.)

JURISDICTION OF UNITED STATES COURT—PARTY ESTOPPED FROM DENYING JURISDICTION OF COURT AFTER HAVING HIMSELF REMOVED THE CASE THITHER.

A case having been removed, on motion of defendant, from a state to a federal court, he cannot move its dismissal on the ground that it was improperly brought in the original court, such an objection being now immaterial; neither can he attack the jurisdiction of the court to which it has been removed upon his motion.

Motion to Dismiss.

William N. Cogswell, for plaintiff.

Forbes, Brown & Tracy, for defendant.

COXE, J. This is an action on a policy of insurance. The plaintiff is a citizen of Massachusetts. The defendant is a Connecticut corporation. The action was originally commenced in the supreme

court of the state of New York, and removed by defendant to this court. A motion is now made by the defendant to dismiss the action for want of jurisdiction,—*First*: because it was improperly brought in the state court; and, *second*: because, irrespective of that question, it is not a controversy of which this court can take cognizance. Even if the first ground of objection were well founded, the defendant is not in a position to take advantage of it. *Sayles v. N. W. Ins. Co.* 2 Curt. 212. Whether the state court had jurisdiction or not is a matter wholly immaterial. A decision in favor of the view advanced by the defendant upon this proposition would be indecisive and inconsequential. There is nothing for such a decision to operate upon. Let it be assumed that the state court had not jurisdiction. *Cui bono?* Can it be seriously maintained that this court should, on defendant's motion dismiss an action voluntarily brought here by the defendant, because another court which has now not even a remote connection with the cause has not jurisdiction to try it? In other words, should a court which has jurisdiction refuse to retain it because another court before which the action was once pending had not jurisdiction? Manifestly not.

The only pertinent question therefore is: Has this court jurisdiction? The defendant having alleged as the sole ground for removal "that the controversy in said suit is between citizens of different states" it may well be doubted whether it should now be permitted to challenge the jurisdiction of the court on the ground of citizenship. But it is contended that the court should on its own motion dismiss the suit pursuant to the fifth section of the act of March 3, 1875. It is urged that the papers now before the court demonstrate not only that the defendant is a corporation of Connecticut but also that it does not transact business in, is not an inhabitant of, and is not found within this district, and therefore the court should not retain the action. All the circumstances necessary to confer jurisdiction, as provided in the first and second sections of the act of 1875, are found to exist in this case; the amount exceeds \$500 and the parties are citizens of different states. Nothing more is required. *Brooks v. Bailey*, 9 FED. REP. 438; *Petterson v. Chapman*, 13 Blatchf. 395; *Clafin v. Ins. Co.* 110 U. S. 81; S. C. 3 Sup. Ct. Rep. 507. The subsequent clause of the first section, which provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings," does not limit the jurisdiction of the court but relates to the mode of acquiring it. It is intended for the protection of the defendant and confers a privilege which he can waive by appearing without asserting it. *Robinson v. Nat. Stock-yard Co.* 12 FED. REP. 361; *Toland v. Sprague*, 12 Pet. 300; *Sayles v. N. W. Ins. Co.*, *supra*; *Flanders v. Aetna Ins. Co.* 3 Mason, 158; *Gracie v. Palmer*, 8 Wheat. 699; *Kel-*

sey v. Pa. R. Co. 14 Blatchf. C. C. R. 89. If permitted to do so, the plaintiff would, undoubtedly, have little difficulty in showing that the defendant is found within this district and is therefore in no position to claim the benefit of the privilege alluded to, but confining the case strictly to the stipulated facts it must be held that the defendant has waived any objection which it might have taken. The jurisdiction of this court was invoked by the defendant and it should abide the result in a forum of its own seeking.

The motion to dismiss the action is denied.

LULL *v.* CLARK and others.

Circuit Court, N. D. New York. June 11, 1884.)

EQUITY PRACTICE—QUESTIONS ARISING BEFORE MASTER.

All questions arising before a master in chancery should be presented to the court by objection and exception to his report. Before such report is made, the court will not entertain a motion to instruct the master while discharging his duties according to the best of his ability.

In Equity.

Livingston Gifford, for complainant.

George J. Sicard, for defendants.

COXE, J. This is a motion to instruct the master in an equity action. The complainant has a patent for an "improvement in shutter hinges." The court heretofore sustained the patent and directed a decree for an injunction and an account. 13 FED. REP. 456. The infringing device introduced by the complainant on the trial was a hinge known as No. 1. On the accounting she sought to extend the investigation to several other hinges manufactured and sold by the defendants, contending that they were substantially the same as No. 1, and that they were covered by the decree. To this the defendants objected on the ground, *inter alia*, that the hinges other than No. 1 do not infringe, and, in the absence of a decision by the court holding that they infringe, the master had no authority to proceed. This objection was sustained by the master and complainant's counsel excepted, and immediately gave notice of a motion for an order directing and instructing the master to take and state, and report to the court, an account covering all the hinges referred to. A certified copy of the proceedings before the master is presented upon this motion. But the master has made no report and has not sought instruction or advice from the court.

The first objection interposed by the defendants is that this application is irregular and is not sustained by authority or the practice of the court. I am of the opinion that the objection is well taken. Rule 77 gives the master very general discretion in the conduct of