

a want of jurisdiction. The return of the sheriff, while not conclusive, is *prima facie* evidence of a good service. *Hagerman v. Slate Co.*, 97 Pa. St. 534; *Fulton v. Association*, 172 Pa. St. 117, 33 Atl. 324. Now, undoubtedly, it was open to the defendant, by promptly filing a petition for the removal of the case, to have obtained the judgment of this court upon the question of the validity of the service. *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126. But the defendant did not pursue the course, it was at liberty to take, of declining to subject itself in any way to the jurisdiction of the state court. It invoked the judgment of that court upon the question of the validity of the service. Certainly, so long as the cause remained in the state court, that question was within its cognizance. The proper determination of the question depended upon what the facts were. At the defendant's instance an issue of fact was raised in the state court, and submitted to its determination. The decision was against the defendant. Is the same question to be retried here upon substantially the same evidence? That, I think, is not permissible. This is not a court of review. The general rule is that, upon the removal of a cause, the circuit court takes the case as it finds it, accepting the decrees and orders made by the state court as adjudications in the cause. *Loomis v. Carrington*, 18 Fed. 97. As was said by Chief Justice Waite in *Duncan v. Gegan*, 101 U. S. 810, 812, the circuit court "takes the case up where the state court left it off." The present case, I think, falls within this general rule. In *Allmark v. Steamship Co.*, 76 Fed. 615, where the defendant removed the cause after denial by the state court of the defendant's motion to set aside the service of the summons, Judge Benedict held that the defendant was concluded by the decision of the state court. And now, July 7, 1897, the rule to show cause why the service of the writ of summons should not be set aside, etc., is discharged, with leave to the defendant to plead within 30 days.

CLARK v. BERNHARD MATTRESS CO.

(Circuit Court, N. D. California. August 31, 1897.)

No. 12.416.

DECREE DISMISSING BILL IN EQUITY—WHEN NOT A BAR TO NEW SUIT.

A decree dismissing a suit without a hearing, or determination of the merits, whether made with or without the consent of the complainant, is not a bar to a new suit.

J. J. Scrivner, for plaintiff.

John L. Boone, for defendant.

MORROW, Circuit Judge. The plaintiff in this case claims to be the owner, by assignment, of all the right, title, and interest in and to a certain invention and letters patent numbered 217,704, for an improvement in wire-coiling machines, for the territory of the city and county of San Francisco, state of California, and alleges that the defendant, without the consent or allowance and against the will

of plaintiff and his assigns, has made and used a large number, to wit, 100, wire-coiling machines containing the inventions and improvements described and claimed in said letters patent, whereby plaintiff has been damaged in the sum of \$50,000. To this complaint the defendant has interposed a plea in bar, in which it is alleged that the plaintiff, on the 16th day of July, 1896, filed in this court a bill of complaint wherein and whereby he charged the defendant with the same infringement upon the same letters patent referred to and charged to have been infringed in the complaint filed in this action; that the bill was in equity, and was for the same subject-matter, and between the same parties, and demanded the same relief as in the complaint filed herein; that on the 12th day of July, 1897, the plaintiff, by his attorney, without the knowledge or consent of the defendant, and of his own free will and volition, dismissed the suit, and caused a judgment of dismissal to be entered therein; and the defendant pleads that dismissal and judgment of dismissal as a bar to this action. Plaintiff moves to strike out this plea on the ground that it constitutes no defense to this action. The effect of the dismissal of a bill in equity is well established. The rule, in general terms, is that a decree or order of the court by which the rights of the parties have been determined, or another bill for the same cause has been dismissed, may be pleaded in bar to a new bill for the same matter. But an order of dismissal is a bar only where the court has determined that the plaintiff had no title to the relief sought by his bill, and therefore an order dismissing a bill for want of prosecution is not a bar to another suit. Whenever a bill of complaint is dismissed without a hearing, and without any consideration of the merits, whether with or without the consent of the complainant, the order of dismissal is in the nature of a nonsuit at law, and cannot be considered a bar to a new suit, because the matters in controversy are not thereby judicially determined. *Carrington v. Holly*, 1 Dickens, 280; *Curtis v. Lloyd*, 4 Mylne & C. 194; *Badger v. Badger*, 1 Cliff. 237, 2 Fed. Cas. 327 (No. 717); *Freem. Judgm.* 270, and cases there cited. The motion to strike out the plea in bar must, therefore, be granted, and it is so ordered.

HECHT v. METZLER.

(Circuit Court, D. Utah. August 16, 1897.)

No. 195.

ADMISSION OF STATES—TRANSFER OF PENDING CASES—WAIVER OF RIGHT.

The Utah enabling act authorized the constitutional convention to provide for the transfer of pending cases to the proper state and federal courts. Accordingly it was provided in the state constitution that, in cases of concurrent state and federal jurisdiction, a transfer to the federal court should be made upon motion and bond, in default whereof the case should proceed in the proper state court. *Held*, that where neither party sought a transfer, but after final judgment in a territorial court one of them took an appeal to the state supreme court, and the other joined in submitting it there for decision, this constituted an election to proceed in the state courts, and