

viz. when the suit is one 'between citizens of the same state claiming lands under grants of different states.' [But] in all other cases the new act, by declaring that the removal may be made by the 'defendant or defendants' therein, has excluded the plaintiff from the exercise of this privilege. When he has chosen to begin his proceedings in a state court, he must abide by his election, and cannot transfer the cause to another forum. Although an element of removability is present in the cause, it cannot be transferred unless the defendant asks for it."

Defendant in error's contention has been considered adversely in the case of *West v. City of Aurora*, 6 Wall. 141. There the court was engaged in considering the right of a plaintiff to remove under the judiciary act of 1789, which, like Act 1887-88, limits the right to the defendant. It appears in that case suit was brought by *West & Torrance* against the city of *Aurora*, and that the defendant, having set up some defenses in its answer, was allowed, on its own application, to file three paragraphs setting up defensive matter, in each of which defendant prayed for an injunction to restrain the plaintiffs from proceeding further in any suit on the coupons or bonds, or from transferring them to any third party, and for a decree that the bonds be delivered up to be canceled. Upon the filing of these additional paragraphs, the plaintiffs entered a discontinuance to their suit, and, assuming that, under the Code, the new paragraphs in the answer would remain in substance a new suit against them, filed their petition for the removal of the cause. The petition for removal was allowed by the state court, and the new paragraphs, setting up the defendant's cause of action in the state court, were sent into the circuit court. The record shows that the plaintiffs in the state court had discontinued their suit against the defendant. The circuit court, on that state of case, though admitting, it seems, that under the state practice of Indiana the defendant's cause of action set out in the three additional paragraphs remained, notwithstanding the discontinuance on the part of plaintiff, a proceeding that may go on to trial and judgment, remanded the cause to the state court. The question then coming before the supreme court was whether or not the plaintiff originally in the state court could, on the state of case made therein by the reconventional plea set up by the defendant, remove its cause to the federal court. The chief justice, delivering the opinion of the court, said:

"We think that the circuit court was clearly right in its action. The filing of the additional paragraphs did not make a new suit, within the meaning of the judiciary act. They were in the nature of defensive pleas, coupled with a prayer for injunction and general relief. This, if allowed by the Code of Indiana, might give them in some sense the character of an original suit, but not such as could be removed from the jurisdiction of the state court. The right of removal is given only to a defendant who has not submitted himself to that jurisdiction, not to an original plaintiff in a state court, who, by resorting to that jurisdiction, has become liable under the state laws to a cross action. And it is given only to a defendant who promptly 'avails himself of the right at the time of appearance by declining to plead and filing his petition for removal.' In the case before us *West & Torrance*, citizens of Ohio, voluntarily resorted as plaintiffs to the state court of Indiana. They were bound to know of what rights the defendant to their suit might avail itself under the Code. Submitting themselves to the jurisdiction, they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants of a suit removable on their application to the circuit court of the United States."

For the reasons stated, the judgment should be reversed, and cause remanded, with instructions to the circuit court to remand the suit to the state court; and it is so ordered.

FT. WAYNE ELECTRIC CORP. v. FRANKLIN ELECTRIC LIGHT CO. et al.

(Circuit Court, D. New Jersey. January 16, 1899.)

APPEARANCE—WAIVER OF PROCESS—REMOVAL OF CAUSE.

A suit is only removable after it has been regularly commenced by service of process on the defendant; and, by appearing in the state court and filing a petition for removal, a defendant waives any objection to the sufficiency of the service upon him, notwithstanding the fact that his appearance was stated to be special, for the purpose of the removal only.

Heard on Motion to Set Aside the Service of Process.

Thomas N. McCarter and S. H. Grey, for the motion.

D. J. Pancoast, opposed.

KIRKPATRICK, District Judge. This suit was brought in the supreme court of the state of New Jersey. The service of the original writ to bring defendant in court was admittedly insufficient. Subsequently a qualified appearance was entered on behalf of the said defendant for the sole purpose of removing the cause to this court. The motion now is to set aside the service of the original process because defective. The only question to be determined by the court is whether, by its qualified appearance in the state court, and the removal of the cause to this circuit court, the defendant has waived the defective service.

The 12th section of the judiciary act (1 Stat. 79) provides that:

"If a suit be commenced in any state court * * * and the defendant shall at the time of entering his appearance in such state court file a petition for the removal of the cause for trial into the next circuit court * * * it shall be the duty of the state court * * * to proceed no further in the cause * * * and the cause shall then proceed in the same manner as if it had been brought by original process."

The object of the act was to confer a privilege upon defendants; to enable them to have suits against them prosecuted before a new tribunal,—one of their own choosing,—and to have the cause proceed therein as if it had been brought by original process. The purpose of the petition was to put the case in the federal court for trial and final disposition. Its filing was the voluntary act of the defendant, and a right which the statute accords to defendants in legally pending suits only. If no suit were pending, then there was not a suit properly removable. In considering the character of suits which may be removed from state to federal courts under the act of congress, the supreme court of the United States, in the case of *West v. Aurora City*, 6 Wall. 139, use this language: "A suit removable from a state court must be a suit regularly commenced * * * by process served upon the defendant;" and the principle so laid down is quoted with approval in *Bushnell v. Kennedy*, 9 Wall. 387. In *Schwab v. Mabley*, 47 Mich. 512, 11 N. W. 294, where the question arose incidentally, Judge