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IS THE TIME FOR REMOVAL OF AN ACTION FROM STATE TO FEDERAL COURT SUBJECT TO EXTENSION¹

GEORGE J. LAIKIN

Both federal and state cases are in conflict as to whether the time for removal of an action from a state court to a federal court is subject to extension by stipulation of the parties, order of the court, or special appearance of defendant.² The United States Supreme Court has not yet decided this conflict.

Removal from a state court to the federal court is authorized by Section 28, Title 29, of the Judicial Code.³ Procedure is prescribed by Section 29⁴, and provides that, in proper cases, jurisdictional prerequi-

¹ Certain phases of Sections 28 and 29, Title 28, of the Judicial Code, 28 U.S.C.A. Sections 70 and 71, will be considered, particularly with respect to Wisconsin Law.

² 54 C.J. 304, 305, 307; 28 U.S.C.A. § 72, notes 56 and 57. *Telis vs. Palatine Ins. Co.*, 149 Fed. 560 (C.C.N.D. Cal. 1906).

³ 28 U.S.C.A. § 71, the relevant provisions being the following: "Any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a similar nature, at law or in equity, of which the district courts of the United States are given jurisdiction in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of the state. . . . Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed and order the same remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed. . . ."

⁴ 28 U.S.C.A. § 72:

"Whenever any party entitled to remove any suit mentioned in Section 71 of the title, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, *he may make and file a petition*, duly verified, in such suit, in such state court, *at the time, or at any time before the defendant is required by the laws of the state or the rule of the state court in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff*, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or her entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by said district court, if said district court shall hold that such suit was wrongfully or improperly removed thereto, . . . It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given to the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid, in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court." (Author's italics.)

sites obtaining, removal may be accomplished by filing a petition and bond in the state court, "at the time, or at any time before the defendant is required by the laws of the state, or the rule⁵ of the state court in which the suit is brought to answer or plead to the declaration or the complaint of the plaintiff . . ."

Unless a defendant files his petition and bond for removal within the time he is required to answer, his right of removal is irrevocably lost.⁶ *Quaere*: Does an order of a state court, or a stipulation of the parties, extending the time to answer, likewise extend the time for removal? The majority of cases hold in the negative.⁷ It is submitted, however, that in Wisconsin, the Supreme Court not having passed on the question,⁸ the minority view ought to prevail; and this, notwithstanding *Velie v. Manufacturer's Accident Indemnity Company of the U. S.*, decided in 1889 by what is now the District Court for the Eastern District of Wisconsin.⁹

The decision in the *Velie* case¹⁰ is typical of the majority view. The plaintiff commenced an action in the state court against the defendant, a foreign corporation. Summons and complaint were served on May 20th, 1889; the answer was due on June 9th. On June 3rd the parties stipulated to extend the time for answer until July 9th. On July 6th the defendant filed his petition and bond for removal in the state court. Were the proceedings for removal, not having been taken within the original twenty days for answer, but within the extended period, timely?

The court referred to what is now Section 263.05 of the Wisconsin Statutes, which provides for the filing of an answer within twenty days after service of the complaint, and held that this was the time designated by the Removal Act for filing a petition and bond for removal. Because: It was the intention of Congress, that if a case is to be removed at all, it should be removed at the earliest possible period in order that the issues might be properly presented and decided in the federal court. The statutory specification of the number of days for answer, provided an early and definite limitation upon the time for removal. True, the time for answer might vary from state to state,

⁵ The term "rule of court" has reference to the practice in those states where no time is fixed by statute for answering but under the law, the court rule prescribes the time. *Spangler v. Atchison, etc., R. Co.*, 42 Fed. 305 (C.C. Mo. 1890); *Amsden v. Norwich Union Fire Ins. Soc.*, 44 Fed. 515 (C.C. Ind. 1890); *Dills v. Champion Fiber Co.*, 175 N.C. 49, 94 S.E. 694 (1917).

⁶ *Commissioners of Road Improvement Dist. v. St. Louis*, 257 U.S. 547, 42 Sup. Ct. 250, 66 L.ed. 364 (1921). While the statutory limits of time have generally been rigidly adhered to by the courts, it has been held that the requirements as to the time within which removal proceedings shall be taken is not jurisdictional, but merely modal and formal. *Montgomery v. Sioux City Seed Co.*, 71 F. (2d) 926 (C.C.A. 10th, 1934); *Halsey v. Minn. etc. Co.*, 54 F. (2d) 933 (E.D. S.C. 1932); *Hendersen v. Midwest Refining Co.*, 43 F. (2d) 23 (C.C.A. 10th, 1930).

⁷ 28 U.S.C.A. § 72, note 56; 54 C.J. 307.

⁸ In *Beyer v. Soper Lumber Co.*, 76 Wis. 145, 44 N.W. 833 (1890), the Wisconsin Supreme Court held that the time for removal was measured by the time to answer the original complaint and not by the time to answer the amended complaint, and therefore does squarely meet the problem presented herein.

⁹ 40 Fed. 545 (C.C.E.D. Wis. 1889).

¹⁰ Decided by Judge Jenkins.

but within each jurisdiction the procedure under the Removal Act would be uniform. Unless removal were limited to this twenty-day period prescribed by statute for answer, the right to removal which "is not a floating right," would be "adrift upon the uncertain sea of stipulation, demurrer, dilatory pleas and proceedings." As was said in the *Velie* case: ". . . it is apparent that Congress intended that the right should be exercised at the earliest period possible. That period was designated to be at or before the time prescribed by law for answering; not the time when the cause, by reason of dilatory proceedings, might be ripe for an answer; not the time enlarged by stipulation of the parties or by order of the court, but the determined time specified in the statute or in the rule of the court. The statute or the general rule of the court speaks that time, not the order or the stipulation, made in the particular case."¹¹

To properly evaluate the majority position, exemplified as it is by the *Velie* case, the precise meaning of the phrase "the laws of the state," *supra*, with respect to time to answer, as found in the Removal Act, should be determined. The phrase "the laws of the state" is general and inclusive. It negates any implication of limitation. The Removal Act does not define "laws;" nor does it circumscribe its applicability. The natural meaning and clear implication of the phrase is that it embraces each and every provision of law relating to time for answer.¹² Thus, all of the provisions of law or of a state must be considered in determining the proper time for answer,—the proper time for removal.

What are "the laws of the state" of Wisconsin with respect to time for answer? An answer must be served within twenty days after service of a copy of the complaint.¹³ A court may extend the time within which any act or proceeding in an action must be taken and may do so after the time has expired.¹⁴ If the defendant does not answer within twenty days, or within such further time as may have been granted him, he is in default and judgment may be entered against

¹¹ This decision was recently followed by the same court, the District Court for the Eastern District of Wisconsin, in an unreported case, upon a motion to remand. *Wisconsin Liquor Co. v. The American Distilling Co.* (E.D. Wis. 1937). There, the petition and bond were filed in the state court within the time extended by the state court for answer. In the same case, upon a prior application to the state court for an order for removal, the Circuit Court of Milwaukee County followed the *Velie* case and held that the application for removal was not timely. See unreported decision, *Wisconsin Liquor Co. vs. American Distilling Co.* (Circuit Court, Milwaukee County, Wisconsin, 1937).

¹² *Citizens Trust & Savings Bank v. Hobbs*, 253 Fed. 479 (S.D. Cal. 1918); *Hyden v. Southern Ry. Co.*, 167 N.C. 584, 83 S.E. 689, (1914).

¹³ Section 263.05, WIS. STAT. (1935): "The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of a copy of the complaint."

¹⁴ Section 269.45, WIS. STAT. (1935): "The court or a judge may, upon notice and good cause shown by affidavit, and just terms, extend the time within which any act or proceeding in an action or special proceeding must be taken (except the time for appeal), and may do so after the time had expired."

him.¹⁵ Finally, the parties, or their attorneys, may, during the course of their litigation, bind one another by stipulation.¹⁶

When, "is the defendant required by the laws of the state (Wisconsin) . . . to answer . . . to the complaint . . . of the plaintiff . . . ?" When is a defendant in default for want of an answer? A defendant must answer, or be in default, within twenty days after service of the complaint, or within such additional time as may have been granted him by a court or stipulation of the parties.¹⁷ So long as a defendant may answer nothing in the Removal Act denies him the right of removal.¹⁸ To hold to the contrary would be to ignore salient provisions of the Wisconsin Statutes and to place upon the phrase "the laws of the state" a construction that is strained, narrow and unwarranted.^{18a}

While the United States Supreme Court has not passed upon the instant problem, it has indicated that the limitations of time for removal are merely modal and formal and not jurisdictional. True, diversity of citizenship and other jurisdictional prerequisites are absolutely essential for removal and cannot be waived. The filing of a proper petition and bond may be essential if insisted upon; but they may also be waived, either expressly or by implication. They are procedural in

¹⁵ Section 270.63, WIS. STAT. (1935): "Judgment may be had if the defendant failed to answer to the complaint as follows: (1) In actions on contract. In any action arising on contract for the recovery of money only the plaintiff may file with the clerk, with the summons and complaint, proof of personal service of the summons on one or more of the defendants and that no answer or demurrer has been received . . . and that the time granted by any order theretofore has expired . . ."

¹⁶ Section 269.46 (2), WIS. STAT. (1935): "No agreement, stipulation or consent, between the parties or their attorneys, in respect to the proceedings in an action or special proceedings, shall be binding unless made in court and entered upon the minutes or made in writing and subscribed by the party to be bound thereby, or his attorney."

¹⁷ "These provision of the Code must be construed together, so as to give effect to each phase therein. It is perfectly plain that the phrase . . . , 'Such further time as shall have been granted' is a provision of the law of the State of California, which provides for the time of the defendant to answer. . . . The granting of extension of time, . . . may be done by stipulation of the attorneys. A stipulation made by the attorneys extending the time for answer would, of course, be enforced by the court, . . . These provisions of the Code are the requirements of the law of the State of California, which determine the right of the defendant to answer." *Citizens' Trust & Savings Bank v. Hobbs*, 253 Fed. 479 (S.D. Cal. 1918), following *Tevis v. Palatine Ins. Co.*, 149 Fed. 560 (C.C.N.D. Cal. 1906), wherein the court upheld the timeliness of removal proceedings undertaken during an extended period for answer. Both cases considered the California Statutes relating to time to answer. These statutes were similar to those in Wisconsin, cited in notes 13, 14, 15, 16, *supra*.

¹⁸ "The statute (removal statute) refers to the time when the answer must be filed. . . . The provisions are procedural, and the statute does not refer to any particular period of time or number of days, but the actual filing of the answer, and, if the petition for removal is filed, before, or at that time, it is filed within the time required by the statute." *Bankers Securities Corp. v. Insurance Equities Corp.*, 85 F. (2d) 856 (C.C.A. 3rd, 1936).

^{18a} "It seems to have been overlooked in passing upon cases for removal from the state to the federal court, that our statute authorizes the . . . court to enlarge the time for filing pleadings . . . The time is extended to the same force and effect . . . as if the extended period had originally been allowed by the statute for filing the pleading." *Hyden v. Southern Ry. Co.*, 167 N.C. 584, 83 S.E. 689, 690 (1914).

nature.¹⁹ "The time of filing a petition of removal is not essential to jurisdiction . . ." ²⁰

The limitation of time for removal would seem to be, principally, if not entirely, to secure the plaintiff against undue or unfair delays, and therefore should not be considered mandatory in any sense that would prevent the plaintiff from agreeing to a postponement of the time for answer, or the correlative time for removal.²¹ In New York, with code practice provisions similar to those in Wisconsin, it has been consistently held for many years that an extension of time to answer likewise extends the time for removal.²²

It is apparent from the foregoing discussion, that the majority cases, and the *Velie* case in particular, overlook the provisions authorizing enlargement of time for answer, though such provisions are remedial in nature,²³ and clearly part of "the law of the state." Assuming that removal ought to be accomplished within the shortest possible time, a time that is "fixed, stable, measured," Congress could have provided an absolute, rigid, and unalterable period for removal by prescribing that a petition and bond be filed within a specified number of days following the commencement of an action, and not thereafter. However, Congress preferred not to limit removal in such manner.

¹⁹ "It does not belong to the essence of the thing; it is not in its nature a jurisdictional matter, but merely a rule of limitation." *Ayers v. Watson*, 113 U.S. 594, 5 Sup. Ct. 641, 28 L.ed. 1093 (1884). In *Southern Pacific Co. v. Stewart*, 245 U.S. 359, 38 Sup. Ct. 130, 62 L.ed. 345, (1917), the court said: "It is essential to the removal of a cause that the petition provided for by statute be filed in the state court within the time fixed by statute *unless the time has been in some manner waived*." See also *Montgomery v. Sioux City Seed Co.*, 71 F. (2d) 926 (C.C.A. 10th, 1934); *Halsey v. Minn. etc. Co.*, 54 F. (2d) 933 (E.D. S.C. 1932); *Henderson v. Midwest Refining Co.*, 43 F. (2d) 23 (C.C.A. 10th, 1930). In *Byron v. Barrizer*, 251 Fed. 328 (W.D. Ky. 1918), the defendant did not file his petition for removal within the proper time, yet as plaintiff's counsel agreed, that the petition should be treated as filed, although the time for answer had expired, any objection was waived.

²⁰ *Powers v. Chesapeake & Ohio R. R. Co.*, 169 U.S. 92, 18 Sup. Ct. 264, 42 L.ed. 673 (1898).

²¹ *Muir v. Preferred Accident Ins. Co.*, 203 Pa. 338, 53 Atl. 158 (1902); *Mapes v. Shaub*, 54 F. (2d) 419 (M.D. Pa. 1931).

²² ". . . Since the requirements of the laws and court rules of New York make liberal provisions for extensions of time to answer by order of the court or by stipulation, it has been uniformly decided by the Federal Court in this state for many years that an application for removal within the extended time is compliance with Section 72 (28 U.S.C.A. § 7, Section 29, Title 28, Judicial Code). "*Silverstein v. Pacific Mutual Life Ins. Co.*, 16 F. Supp. 315, (N.D. N.Y. 1936).

In *Rycroft v. Green*, 49 Fed. 177 (C.C.S.D. N.Y. 1892), the court said: "It is the law and practice of this circuit that an extension of time to answer by order of the court, whether made on stipulation or not, extends the time for removal. This was settled practice here before the decisions in other circuits which are referred to in the argument, and, in view of what an 'extension of time to answer' is under the code rules, and practice of the courts of this state, seems conformable alike to the letter and the spirit of the Removal Act."

See also *Dancel v. Goodyear Shoe Machinery Co.*, 106 Fed. 551 (C.C.S.D. N.Y. 1900); *Earle C. Anthony Inc., v. National Broadcasting Co. Inc.*, 8 F. Supp. 346 (S.D. N.Y. 1934); *Samuel S. Glauber Inc. v. Lehigh Valley R. Co.*, 8 F. Supp. 347 (S.D. N.Y. 1934); *Silverstein v. Pacific Mutual Life Ins. Co.*, 16 F. Supp. 404 (N.D. N.Y. 1936).

²³ *Brown v. Becker*, 135 Or. 353, 295 Pac. 1113 (1931).

It adopted a formula authorizing removal so long as a defendant could answer, and it placed no limitations upon that time to answer.

In every case the time when a defendant answers, or the time beyond which he is in default for want of an answer, is a definite and fixed point in the proceedings. Joinder of issue, or default for failure to join issue, is as specific a phase of an action as is the commencement or the trial thereof. In every case, the joinder of issue, or the correlative default for want of answer, is the same and identical stage in the chronology or progress of the litigation, and this is true, although this point is not reached within the same, or fixed period of time after the commencement of the action. It is this stage of the proceedings that is "fixed, stable, measured." The uniformity cherished by the majority is present, though it is achieved on a sounder and more logical basis, and in a manner more in harmony with the spirit and phraseology of the Removal Act.

To summarize, so long as a defendant is not in default, that is, so long as he may answer as a matter of right, removal proceedings are timely.²⁴ Now, *quaere*, is the time for removal extended by the special appearance of a defendant? Assume, that after service of a summons and complaint upon him, the defendant interposes a special appearance challenging the court's jurisdiction over his person. Twenty days for answer have passed and the court has not passed upon the propriety or the validity of the special appearance. Has the time for removal lapsed by reason of the passing of the initial twenty days for answer? Does a special appearance *ipso facto* toll the running of time for answer? When, after a special appearance is the defendant in default?²⁵ If a special appearance tolls the running of time to answer, does it likewise toll the time for removal? Upon these questions there is an irreconcilable conflict of authority.²⁶

²⁴ "Required" in the Removal Act has reference to the time when the defendant, to avoid any default must necessarily answer or plead to the complaint. Until that time comes, and at it, whether fixed by statute, by rule, or by agreement between the parties, whether it is the time originally limited or that time extended, the right to removal continues and can be exercised. Extending the time to answer or plead, to defend, the principal thing extends the time for removal, to chose the forum wherein to defend, an included incidental thing. The time to plead is the measure of the time to remove—is the time to remove. The federal law and the state law must be read together. The former prescribes a limitation, the latter the extent of it. From the language of the Removal Act, all this would seem a necessary conclusion. And it accomplishes the object of the limitation, viz., that all the defendant's pleas may necessarily be determined in the Federal Court. . . . It will be remembered the time for removal is not jurisdictional, but is a rule of limitation, and like most limitations, may be subject to waiver and estoppel, express or implied. . . ." *Hansford v. Stone, etc., Co.*, 201 Fed. 185 (D.C. Mont. 1912).

²⁵ "Properly speaking a judgment by default is one taken against a defendant, who, having been duly summoned or cited in an action, fails to enter an appearance. . . . though the term is usually extended to include judgment of *nil dicit*. The distinguishing feature of such judgment is that it follows upon the negligence or omissions of the defendant, and the rule appears to be firmly established that when an answer or other pleading of the defendant, raising an issue of law or fact, is properly on file in the case, no judgment by default can be entered against him, but that such answer or other pleading must be disposed of by motion, demurrer, or in some other manner." *Central Deep Creek Orchard Co. v. C. C. Taft Co.*, 34 Idaho 458, 202 Pac. 1062 (1921).

²⁶ *Heller v. Ilwaco Mill & Lumber Co.*, 178 Fed. 111 (C.C. Or. 1910); *Hagen v. New York Oil Co.*, 20 F. (2d) 944 (W.D. Wash. 1927); 54 C.J. 306.

While an appearance is the act by which a party submits himself to the jurisdiction of the court,²⁷ a special appearance challenges the jurisdiction of the court.²⁸ Though the Wisconsin statutes do not provide for a special appearance,²⁹ the Wisconsin courts recognize and approve it as the proper medium of raising a jurisdictional question.³⁰ The problem is: If a defendant appears specially, may the court authorize or engage in any proceedings other than a hearing and ruling on the special appearance? Can a default judgment be entered against such defendant for not filing his answer within the prescribed time, when, obviously, by answering he would waive all objections to the jurisdiction?

A special appearance is roughly analogous to a demurrer. A demurrer challenges the legal sufficiency of the complaint; a special appearance challenges the sufficiency of the court's jurisdiction over the defendant. Both raise questions of law. To sustain either bars plaintiff's right to proceed in that action. Since a judgment by default could not be entered against a defendant whose demurrer to the complaint is still to be passed upon, ought not a special appearance bar further proceedings until the court has ruled upon the objections to jurisdiction? In some states, the courts hold that any motion, the determination of which would affect the right of the plaintiff to proceed with the action, prevents the entry of a default judgment.³¹ The logic is apparent; the entry of a special appearance should stay proceedings until it has been determined.³² If the special appearance is overruled, the defendant should be permitted to answer. True, the Wisconsin

²⁷ *Dauphin v. Landrigan*, 187 Wis. 633, 205 N.W. 557 (1925). The filing of a petition and bond in the state court for removal to the federal court does not constitute an appearance and does not waive any jurisdictional defect that could be urged under a special appearance. *State ex rel. Bergougnan Rubber Corp. v. Gregory*, 179 Wis. 98, 190 N.W. 918 (1922); *Wabash Western R. Co. v. Brow*, 164 U.S. 271, 17 Sup. Ct. 126, 41 L.ed. 431 (1896); *Goldey v. Morning News*, 156 U.S. 518, 15 Sup. Ct. 559, 39 L.ed. 517 (1895). All jurisdictional objections can be urged in the federal court after removal that could be urged in the state court.

²⁸ A litigant desiring to avail himself of the objections of want of jurisdiction over his person must keep out of court for all other purposes. If he takes any steps consistent with the idea that the court has jurisdiction of his person, that will amount to a general appearance and will give the court jurisdiction for all purposes. *Bestor v. Inter-County Fair*, 135 Wis. 339, 115 N.W. 809 (1908); *Milwaukee Elevator Co. v. Feuchtwanger*, 141 Wis. 266, 124 N.W. 264 (1910).

²⁹ The only references to appearance apply, it would seem, to general appearances. See §§ 270.62, 256.27, 262.17, Wis. STAT. (1935).

³⁰ *Schwantz v. Morris*, 219 Wis. 403, 263 N.W. 379 (1935); *State ex rel. Nelson v. Grimm*, 219 Wis. 630, 263 N.W. 583 (1935); *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N.W. 38 (1896).

³¹ Wisconsin has not passed upon this question. But see *Robinson v. Earl Fruit Co.*, 35 Idaho 254, 204 Pac. 534, (1922); *Mihelick v. Butte Electric Ry Co.*, 85 Mont. 604, 281 Pac. 540 (1929); *Smalley v. LaSalle*, 26 S.D. 239, 128 N.W. 141 (1910); *Blythe v. Hinckley*, 84 Fed. 228 (C.C.N.D. Cal. 1897); *Brauer v. Paddock*, 130 Fla. 1175, 139 So. 146 (1932).

³² *Paramount Publix Corp. v. Boucher*, 93 Mont. 340, 19 P. (2d) 223, (1933); *Cities Properties Co. v. Meachen*, 33 Cal. App. 696, 166 Pac. 593 (1917); *Prudential Ins. Co. v. Hathaway*, 49 Ga. App. 211, 174 S.E. 736 (1934); *Rahr v. Jeffrey*, 128 Kan. 541, 278 Pac. 725 (1929); *Rauch v. Zander*, 134 Wash. 40, 234 Pac. 1039 (1925).

courts have permitted a defendant in such position to answer,³³ but the distinction is between answering as a matter of right rather than by exercise of a court's discretion.³⁴

It is elementary that a valid judgment by default cannot be rendered without due proof of proper service upon the defendant, due proof that the court has acquired jurisdiction over him.³⁵ A special appearance constitutes a warning to the court that there is a flaw in the manner by which the plaintiff attempted to bring the defendant within its jurisdiction. If the flaw is fatal to the proceedings any action by the court would be invalid. Having been duly warned the court ought to satisfy itself as to its jurisdiction, and it ought not proceed until it has overcome the challenge to it. If the court proceeds without a hearing and determination of the special appearance, how can it be said that it has acted properly and within its jurisdiction?

Unless the courts of Wisconsin will hold that a stay of proceedings results from a special appearance, it is futile to challenge the jurisdiction of the court. If, after a special appearance, a defendant must answer within twenty days in order to avoid being in default, he is forced to submit himself to the court's jurisdiction, when actually he challenged and objected to it. If he permits a default judgment to be entered against him rather than answer or act in any other manner inconsistent with a special appearance, his property may be seized and sold on execution, or he may suffer other irreparable damage. He cannot help himself, he cannot prevent damage, unless he invokes the assistance of the court and thus submits himself to the very jurisdiction he challenges.³⁶ Suppose the defendant has thus been forced to waive his objections, and he unsuccessfully seeks to vacate the default judgment, the court having ruled that it may stand, then, the defendant is in a dilemma,—there is a judgment against him and he can no longer challenge the jurisdiction of the court. He has unwittingly been placed in a helpless position. The special appearance which was recognized as the proper method of challenging jurisdiction will have become a mockery. To prevent this result, the special appearance must be given its logical effect, namely, to stay or bar further proceedings until it has either been sustained, in which case the action falls, or it has been denied, after which the defendant may answer as a mat-

³³ See *Upper Mississippi Trans. Co. v. Whittaker*, 16 Wis. 220 (1862), where the court recognized that trial courts, of their own motion, often extend the time to answer, after a special appearance.

³⁴ In some states by statute a special appearance stays the running of time for answer and a defendant is permitted to answer after his special appearance is overruled. *State v. District Court*, 80 Mont. 97, 257 Pac. 1014 (1927); *Kamp v. Bartlett*, 164 Ill. App. 338 (1911); *Cheraw Motor Sales Co. v. Seymour*, 130 S.C. 307, 126 S.E. 39 (1925). It is submitted that it is not necessary to resort to statute to reach the conclusion contended for in the text, though no doubt similar statutes in Wisconsin would clarify the situation.

³⁵ *Pennoyer v. Neff*, 95 U.S. 714, 24 L.ed. 565 (1877). "No judgment should be entered on default without proof of the service of summons being on record." *Rockman v. Ackerman*, 109 Wis. 639, 85 N.W. 491 (1901). See also Section 270.62 (Wis. Stat. 1935) requiring "Proof of personal service of the summons" before judgment by default may be entered.

³⁶ *Farmington Mutual Fire Ins. Co. v. Gerhardt*, 216 Wis. 457, 257 N.W. 595 (1934); *Beale v. Linnquist*, 92 Mont. 480, 15 P. (2d) 927 (1930); *Duncan v. Jones*, 138 Okl. 91, 280 Pac. 436 (1929).

ter of right. So long as a defendant may answer as a matter of right nothing in the Removal Act denies him the right of removal.³⁷ Thus, in conclusion, the time for removal is subject to extension by stipulation of the parties, order of the court, or special appearance of the defendant.

³⁷ See, contrary to the argument in the text, *State ex rel. Neel v. Love*, 110 Fla. 91, 148 So. 208 (1933), holding that a special appearance does not extend the time for answer and therefore does not extend the time for removal; also, *Miller v. Troy Laundry Machine Co.*, 2 F. Supp. 182 (D. Okl. 1933) holding that the time for filing a petition for removal is not tolled by the filing of a motion to quash service of summons.

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