

the defendant is required to make any defense in the state court, and that it was not seasonably filed in this case, is settled by the decisions of the supreme court of the United States in *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533; *Goldey v. Morning News*, 156 U. S. 518, 524, 15 Sup. Ct. 559. These decisions have recently been applied in the construction of said rules of practice by the supreme court of Connecticut in *Security Co. v. Pratt*, 65 Conn. 161, 32 Atl. 396.

The defendants further claim, however, that the plaintiff, by filing an answer, and by his delay, has waived his right to object on the above ground. That the provision as to the time of filing the petition is a mere rule of limitation, which may be waived by a failure seasonably to object, is well settled. *Ayers v. Watson*, 113 U. S. 594, 597, 5 Sup. Ct. 641; *Tod v. Railroad Co.*, 12 C. C. A. 521, 65 Fed. 145. It does not appear either that the plaintiff has taken any inconsistent positions, to the prejudice of the defendants, or has speculated on his chances in the state court by the trial of any issue therein, or has unreasonably delayed to assert his rights after knowledge of the facts. But in *Martin's Adm'r v. Railroad Co.*, supra, the supreme court has pointed out the analogy between the direction as to the time of removal, and the direction that a civil suit, within the original jurisdiction of the circuit court of the United States, shall be brought in a certain district. In the latter case the personal privilege is waived by a plea to the merits. *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982; *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905; *Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286; *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533. In the case at bar the plaintiff was ignorant of the construction of said statute by the supreme court. He has now asked leave to withdraw his answer. In view of all the circumstances, the answer may be withdrawn, and, if this is seasonably done, the motion to remand may be granted.

ALLMARK v. PLATTE S. S. CO. (Limited).

(Circuit Court, E. D. New York. November 2, 1896.)

1. REMOVAL OF CAUSES — EXTENSION OF TIME BY STIPULATION — NEW YORK PRACTICE.

Under the practice of the supreme court of New York, it seems that the time to answer may be extended by written stipulation, assented to by the judge, though not entered as an order of court; and the removal of a cause to a federal court is not too late if within the time fixed by such stipulation.

2. SAME — ESTOPPEL.

Even if this were otherwise, under such circumstances the plaintiff should not be heard to say, in the federal court, that time to answer had expired.

This was an action by John Allmark against the Platte Steamship Company, Limited. The case was heard on a motion to remand to the state court, from which it had been removed.

Magner & Hughes, for plaintiff.
Owen & Sturges, for defendant.

BENEDICT, District Judge. This is a motion to remand the cause to the state court, on the ground that the removal to this court was too late. It appears that in the state court, on some application before the state court, it was stated by Mr. Sturges, the attorney, to the court, that the time to answer must be extended, to which it is said the judge assented. No order to extend the time was presented to the judge, or signed by him. On the next day, the plaintiff's attorney signed a stipulation, extending the time to answer and to move, and, before the extension of the time to answer fixed by the stipulation had expired, the cause was removed to this court.

It seems to me that, under the practice of the supreme court of this state, the time to answer did not expire until the date fixed by the stipulation, which was June 10th, and the removal before that date was in time. It has been so held by Judge Wallace. *Winberg v. Lumber Co.*, 29 Fed. 721. But, if this were otherwise, I am of the opinion that, under the circumstances above stated, the plaintiff should not be heard in this court to say that the time to answer had expired. Motion to remand is denied.

ALLMARK v. PLATTE S. S. CO., Limited.

(Circuit Court, E. D. New York. November 2, 1896.)

REMOVAL OF CAUSES—MOTION TO QUASH SERVICE—RULING BY STATE COURT.

Where defendant has removed a case from a state court after denial by the state court of a motion to set aside the service of summons, he cannot renew such motion in the federal court without having obtained leave to do so, either from the state or federal court.

This was an action by John Allmark against Platte Steamship Company (Limited). The defendant moved to set aside service of summons.

Magner & Hughes, for plaintiff.

Owen & Sturges, for defendant.

BENEDICT, District Judge. This is a motion to set aside the service of the summons in a case removed to this court from a state court. It appears that, while the case was in the state court, the defendant made a motion to the state court to set aside the service, which was denied. Thereafter it removed the said case to this court, and, after its removal, now moves here to set aside the service, upon the same grounds urged in the state court. In my opinion, the defendant is concluded by the decision of the state court made upon its own request, before the cause was removed. This court takes the cause in the condition in which it was left by the state court. A similar motion had been made in the state court and denied, and no leave was obtained in such court to renew it; nor was any leave obtained in this court. *Brooks v. Farwell*, 4 Fed. 166; *Loomis v. Carrington*, 18 Fed. 97. Motion to set aside the service of summons denied.