

1209. And likewise this rule by its section 3 prescribes the same practice on publication for a defendant. Id.

Now, then, by the next article of the chapter, the Code prescribes that where the defendant is a non-resident, and the fact is stated on oath in the bill, or by affidavit, "if the defendant does not cause his appearance to be entered," the clerk "shall enter upon the rule docket an order requiring the defendant to appear at a certain day therein named, being a rule-day, and defend, or the bill will be taken for confessed." Id. § 5097. The clerk is required forthwith to cause "a copy of this order" to be published in a newspaper for four weeks, and subsequent sections direct what it shall contain, and how the publication shall be proven. Id. 5098-5102. The plaintiff may compel an answer by proceeding for contempt; or he may proceed in default of answer by *pro confesso* to a final decree. Id. 5103-5126. But "a non-resident defendant, who is not served with process, may appear and defend *at any time before final decree*, as of course." Id. 5119. Then comes a provision, very important here, that cases brought under the *attachment* laws, heretofore referred to in this opinion, in the chancery court, shall be governed by that chapter on attachment in relation to the effect of a judgment by default; showing clearly that the Code itself seeks to prevent a confusion of the two classes of cases. Id. 5121. And, in all other cases, that is to say, in all cases brought in the chancery court that are not commenced under these *attachment* laws, a decree against a defendant does not become absolute for three years from the decree, unless, on service of a copy of the decree, it becomes absolute within six months after service. Id. 5122.

In this case, belonging to the second class of cases above distinguished, the clerk proceeds as if it belonged to the other or first class, and gives notice accordingly. He does not follow the directions for procedure as prescribed in the Code, §§ 5097-5102, as he should have done, but those prescribed in sections 4192 and 4259-4265, as he should not have done. It does not matter that in this case each method of procedure would or might have produced precisely the same result so far as the time appointed is concerned, if for no other reason, because a different time might have resulted but for the mere accidents of this case. Pursuing the attachment chapter, he gave notice under Code, § 4260, to appear "on the first Monday in June next," and published the order in a newspaper. The fact that this might have been, and probably was, a rule-day of the chancery court, and that, if he had pursued the other sections, (5097-5100,) by entering "on the rule docket" an order requiring the defendant to appear "on a rule-day" to defend the suit, and publishing "a copy of that order" in the same newspaper for the same time, he would or might have fixed the same day and published substantially the same notice, is only a factitious circumstance. He might under the attachment laws have designated any other day as well; and probably because the suit was in a chancery court he fixed a rule-day, according to that practice, exercising his power to fix the day under section 4260. But the distinctions pointed out show that we must not be misled by such

confusion of identity in results, at least so far as this act of congress is concerned in fixing a limitation upon the time of removal. One has only to read and contrast the two modes of procedure to show that, so far as they enter into this removal act of congress, they must be kept distinct. Therefore, the order of the clerk given under the attachment laws, as he recites, cannot be taken as his order entered on the rule docket under the chancery practice. In the one case the defendant's time "to answer or plead to the declaration or complaint of the plaintiff," as described in the act of congress, expires absolutely and forever "within twelve months" after judgment or decree by default, under the operation of sections 4270 and 5121 of the Code of Tennessee, and may be even sooner terminated by the refusal of the court to open the case; while, in the other, it does not expire for three years, under the operation of section 5122 of that Code. In the one case he may appear and defend at any time before final decree, and in the other he has only a stay of six or twelve months, etc. M. & V. Code Tenn. §§ 4268, 5119.

I am of the opinion, therefore, that we need not and should not now decide whether a notice fixing a day for the defendant to appear and make defense, issued under the attachment laws, imposes a limitation upon the time of removal under this act of congress, or whether he may, notwithstanding the notice, remove at any time before the expiration of the 12-months indulgence allowed under section 4270 of the Code, because this is not a case arising under the attachment laws at all, and the notice so issued by the clerk has no effect on the right of removal. Also I am of the opinion that we need not and should not now decide whether the publication of an order entered upon the rule docket under sections 5097-5102 of the Code, regulating proceedings in the chancery court in "cases of an equitable nature" commenced under sections 5023 and 5030, as this was, imposes any limitation upon the time of removal, or whether the defendant may, notwithstanding such rule, remove at any time before final decree, because of the indulgence of section 5119, or before the expiration of the further indulgence of three years granted by section 5122 of the Code, because, while this case belongs to that class of cases, no such rule has ever been entered on the rule docket, or publication been made, so far as this transcript shows.

Furthermore, I am of the opinion that the filing of a defendant's answer in no way affects his right of removal by imposing any limitation of time upon it, under this act of congress. The original judiciary act of 1789 did require that the defendant proposing to remove a case should file his petition "at the time of entering his appearance in such state court;" and under that act the right of removal was gone after any plea or answer was filed. Act 1789, c. 20, § 12; 1 St. 79. But this act uses entirely different language. It does not at all say that the petition shall be filed the first thing that is done on appearance. The conduct of the defendant is not referred to in defining the limitation of time, nor is any act of his designated as fixing the terminal point. The laws of the state and the rules of the court determine the time by fixing a period when his right to answer or plead terminates. To illustrate, it is a familiar law and rule

of court or practice in cases at law that the plaintiff has the first three days of the term to file his declaration, and the defendant two days thereafter to plead, etc. Now, often the plaintiff files his declaration before the term commences, and the defendant pleads immediately, or it is all done on the first day; and, surely, such a premature and voluntary action cannot be said to close the right of removal under this act of congress, but the expiration of the two days allowed the defendant to plead would close it, perhaps, whether he actually did plead or did not. Hence, in this case, the fact that the defendant filed his answer did not terminate his right of removal; for we have seen that he had under the chancery rule 11, already cited, three days after the first Monday in June to file his answer, even conceding that the published notice was binding on him, which it was not, and he actually answered May 16, 1887. His petition for removal was not filed until July 18, 1887, after the expiration of *that* three days; but at the very most it could not have been barred until those three days had expired, although the answer had been filed, unless we hold that the filing of the answer hastened the bar of the statute; and this would be to import an altogether new element of limitation into the statute, which we cannot do. The filing of the answer, therefore, has no effect upon the question.

There being no order upon the rule docket fixing a rule-day, and no publication of a copy thereof requiring the defendant to appear and defend, there has been, in this case, by the provisions of the Code and rule 11 of the chancery rules, no three days fixed within which the defendant was required to answer or plead to the bill, and there can, therefore, no limitation arise out of *those* "laws of the state or rules of the state court," and his petition was in time. If such a limitation upon the right of removal had been attempted by proper order and publication, whether it would have been effectual in view of the other provisions in the Code extending the time of defense we need not now inquire. Motion overruled.

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DAVIE *et al.* v. HEYWARD *et al.*

(Circuit Court, W. D. South Carolina. December, 1887.)

COURTS—APPEAL TO UNITED STATES SUPREME COURT—JURISDICTIONAL AMOUNT.

Defendant applied for a citation for a writ of error to the supreme court, but did not state in his affidavit the value of his interest in the judgment from which he appealed. Plaintiff's affidavit in opposition showed the value. *Held*, that the citation must issue, and the question of jurisdictional amount must be left to the supreme court.

Application for Citation for a writ of error to the United States supreme court.

W. R. Davie and others, plaintiffs, sued J. B. Heyward and others, defendants, for the recovery of a tract of land, and recovered judgment for the land, and five dollars damages, in August, 1873. One of the