

JOSSLYN v. PHILLIPS.¹*(Circuit Court, W. D. Michigan. March, 1886.)*

REMOVAL OF CAUSE—COSTS—ATTORNEY'S FEE ON REMAND—ACT OF 1875.

Where a case is remanded to the state court on the ground that the circuit court has no jurisdiction, the court may allow such attorney's fee as would ordinarily be allowed on the final disposition of the cause.

Motion to Allow Attorney's Fee.

Geo. F. Edwards, for plaintiff.

BROWN, J. This case was remanded to the circuit court for the county of Berrien upon motion of the plaintiff. He now moves for the allowance of a reasonable attorney's fee under the fifth section of the act of March 3, 1875. Prior to this act the rule had been never to allow costs where a case was dismissed for want of jurisdiction appearing upon the face of the record. It was considered that the court, having no jurisdiction of the case, could not even render a judgment for costs; but by the act of 1875 this rule is so far modified as to permit the court, in remanding a case, to "make such order as to costs as shall be just." The third section of the same act also requires a bond to be given for filing a transcript in the circuit court, and for "paying all costs that may be awarded by the said circuit court, if said court shall hold that the suit was wrongfully or improperly removed thereto." *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 386; S. C. 4 Sup. Ct. Rep. 510. This case, however, throws no light upon *what* costs the court is authorized to impose. The general fee-bill makes no provision for an attorney's fee upon motions, and it has not been our practice to allow one, unless it could be imposed as a condition of granting the motion; as, for instance, in the case of applications for continuance. But as the clerk's fee for filing the transcript is the only other item of cost likely to arise in a removed case before the motion to remand is made, and as this is always paid by the party procuring the removal from the state court, it seems to us that the statute must have intended to permit the court to impose a reasonable attorney's fee as a compensation to the party for his services in procuring the remand. In ordinary cases, these would be the only costs to which the language of the act would attach, as the motion to remand is usually made before any further proceedings are taken in the circuit court. We think it competent for the court to allow such a fee as is ordinarily awarded on the final disposition of a cause, viz., a docket fee of \$20.

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

WINCHELL *v.* CONEY and another.

(Circuit Court, D. Connecticut. May 11, 1886.)

1. REMOVAL OF CAUSE—FAILURE TO ENTER RECORD IN TIME—RETENTION OF CASE IN STATE COURT—EFFECT UPON RIGHTS OF PETITIONER AND ADVERSARY.
Pending a suit in a state court to foreclose a mortgage, the plaintiff amended his complaint in order to reform the deed in technical particulars. One of the defendants thereupon filed his petition to remove to the federal court upon the ground that, by force of the amendment, a new and separable controversy had been added. The state court proceeded with the case, and the defendant did not enter the record in the federal court on the first day of the next term. The plaintiff subsequently entered the record and moved to remand. *Held*, that the defendant had a sufficient excuse for not entering the record, and that the cause should not be remanded for that neglect.
2. SAME—SEPARABLE CONTROVERSY—FORECLOSURE OF MORTGAGE—REFORMATION OF DEED.
Held, that the prayer for a reformation of the deed was merely incidental to the main object of the complaint, *viz.*, a foreclosure, and did not create a separable controversy within the meaning of the act of 1875, and that the plaintiff's motion to remand should be granted.

Motion to Remand.

John W. Alling, for motion.*John H. Whiting*, against motion.

SHIPMAN, J. This is a motion to remand the above-entitled cause to the state court. The facts are disclosed in the copy of the record which has been entered in this court. After the cause had been remanded to the state court upon the first petition for removal, for the reason that the two defendants were necessary parties to the suit, (*Coney v. Winchell*, 116 U. S. 227; S. C. 6 Sup. Ct. Rep. 366,) the state court, at its September term, 1885, which was the term next succeeding the one to which the suit was brought, took jurisdiction of the case, and proceeded with the trial thereof. A plea in abatement to the jurisdiction was overruled, and the argument of the defendants' demurrers was commenced. This argument showed that the defendants claimed, upon somewhat technical grounds, that the condition of the mortgage failed to state that the interest was payable annually, and that the mortgage did not show that the interest had become due. The notes were payable in five years from date, "with interest annually, at 6 per cent." The condition in the mortgage described the notes as bearing interest at 6 per cent. per annum, "and payable five years from date."

The plaintiff, during the argument of the demurrer, moved to amend his complaint, which motion was allowed, and he thereupon, at said term, amended by inserting, in addition to the allegations and prayers of the complaint, allegations of a mutual mistake of the parties to the deed in the description in the condition of the interest clause of the notes which were intended to be secured, and a prayer for a reformation of the deed. The defendant Coney thereupon, at