

anywhere specified, necessarily, it must close with the act of pleading itself, and the removal petition must be filed either before or at the time of pleading to the declaration.

This disposes of the case, unless the filing of the pleas in abatement terminated the right of removal under this ruling. But it is plainly manifest that they did not. However it may be elsewhere, in Tennessee a plea in abatement is not a plea "to the declaration or complaint of the plaintiff,"—to use again the language of the act of congress. It goes to the writ only, and in this case challenged the truth of the return of the sheriff. If the decision be in favor of the plea, the writ, and of course, along with it, the declaration, abates; but, if the decision be against the plea, the judgment is always, as it was in this case, *respondeat ouster*, and the defendant is allowed further time to plead to the declaration,—generally a specified time named in the order of the court, though in this case no time was fixed. The very object of the plea was to determine the fact whether the writ and its service required the defendants to plead to the declaration, and there can be no doubt under our practice that the defendants were not required to plead to this declaration until their plea in abatement was disposed of, and then, both by this particular order of the court, which failed to fix any limit of time for pleading, and by the usual practice, they had an indefinite time to plead the declaration, after the demurrer to the plea in abatement had been sustained. *Caruth. Lawsuit*, §§ 183, 186, 187; *Morgan v. McCarty*, 3 *Humph.* 147; *Robb v. Parker*, 4 *Heisk.* 58, 70; *Battelle v. Rolling Mill Co.*, 16 *Lea*, 355, 365, 368. If the order allowing the defendant to plead over had fixed a day certain within which to plead, or if the rules of practice in such a case should fix a day certain, that day's ending would terminate the right of removal, unless the time were previously enlarged. But neither of these conditions existed, and the removal was in time. Motion overruled.

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LOOMIS *et al.* v. RUTLAND R. Co.

(Circuit Court D. Vermont. March 30, 1889.)

**EQUITY—PRACTICE—COSTS.**

The grantees of a lease brought a bill in equity, alleging that the lessor claimed that the lease would terminate with the death of the original lessee, and asking for a reformation of the lease if such was its construction. The lessor answered, asserting such claim, and testimony was taken showing that the lease was to be terminable by the election of the lessor to take certain property on the leased premises at its value; and the lessor submitted to a decree establishing such construction. *Heid*, that the orators were entitled to the costs of taking their testimony and the decree, but not to the costs of the bill.

**In Equity.**

*William G. Shaw*, for orators.

*Charles A. Prouty*, for defendant.

WHEELER, J. The defendant leased water front to a grantor of the orators for a wharf, reserving the right to terminate the lease and take the wharf at its value. The lease run to the lessee, without naming heirs, assigns, or representatives. A person proposing to purchase the whole interest of the orators and defendant was informed by the officers of the defendant that they claimed that the whole would belong to the defendant upon the death of the original lessee. He informed the orators of this claim, and abandoned the negotiations because of it. They brought this bill to have the lease reformed, if by its terms as drawn it would terminate by the death of the lessee. The answer asserts the claim, and that the lease as drawn expressed the true meaning of the contract. The testimony shows that a continuing lease, terminable only by an election to take the wharf at its value, was intended. The defendant at the hearing admits that such is the effect of the lease as drawn, and submits to a decree establishing that construction; but denies that the orators are entitled to costs. The bill does not allege anything more than that the officers of the defendant claimed that effect from the lease, as a matter of opinion, upon the legal construction of the lease, without any practical effect upon any rights of the orators. A demurrer to it would have probably made an amendment necessary. The answer made the taking of testimony prudent, and a decree proper. The orators would, on demurrer to the bill sustained, have been liable to pay costs, as well as to lose their own to that time, by rule 35. The defendant did not demur, nor become in any manner entitled to costs. Costs in equity cases are always somewhat controllable by discretion. In this case the orators appear to be justly entitled to the costs of taking their testimony and of the decree, and not to the costs of the bill. Let the decree entered be without costs as to bill, and with costs subsequent to the bill.

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ADAMS *et al.* v. KEHLOR MILLING Co. *et al.*

(Circuit Court, E. D. Missouri, E. D. April 12, 1889.)

1. ATTORNEY AND CLIENT—COMPENSATION OUT OF FUND.

In a suit to set aside a fraudulent conveyance, in which other creditors intervene and secure benefits from the litigation, the court, having the fund in its control for distribution, will award a sum therefrom in payment of complainants' solicitors.

2. SAME—COSTS TAXED AGAINST DEFENDANT.

No fee can be taxed against defendants in such case, except the fee of \$20 allowed by Rev. St. U. S. § 824.

3. SAME.

Compensation for the services of the solicitors in obtaining the judgment in the state court on which the suit to cancel the fraudulent conveyance is founded, cannot be allowed in the latter suit.

In Equity.