

## TAYLOR ET AL. vs. KELLY.

When, to a petition to foreclose a mortgage upon land under the statute, defendant pleads that a person not sued is an occupant of the land, he waives the right to plead in abatement of the writ, the former plea being subsequent in the order of pleading to the latter.

*Appeal from Carroll Circuit Court.*

THIS was a petition to foreclose a mortgage upon land, filed under the statute, by Taylor & Paulding against Hardy Kelly, in the Carroll circuit court. At the return term, defendant filed the following plea :

“And the said defendant comes and defends, and prays judgment in this case; because, he says at and before the date of the institution of this suit, and now at this time, one Joseph Hutchison is an actual occupant of the land and premises described in said petition, and has not been made a party thereto, and this, the said defendant is ready to verify—whereupon he prays judgment, and that the writ and petition in this behalf abate.” The plea was signed by defendant, and verified by his affidavit.

Afterwards, defendant obtained leave to withdraw this plea, and then filed the following :

“And the said defendant, Kelly, comes and defends the wrong and injury, when &c., and prays judgment of the writ of sum-

mons, and that the same may be quashed, because he says that said writ was issued without the said petitioners' having first filed a petition, and this, the said petitioner is ready to verify—whereupon he prays judgment, that said writ may be quashed." Verified by affidavit.

Complainants filed a motion to strike out this last plea, on the ground that defendant "before the filing of said plea in abatement, filed in said court, his plea to the merits of this case."

The court overruled the motion, complainants declined to respond to the plea, and the court quashed the writ, and discharged the defendant. Complainants appealed.

F. W. & P. TRAPNALL, for the appellants. It was in violation of the settled order of pleading, to suffer the appellee, who had entered his appearance to the action by pleading in bar, to plead a matter after the withdrawal of said plea, of which he could avail himself, if at all, only previous to entering his appearance to the action. *Tidd's Pr.* 630. *Beane's Pleas in Eq.* 55, 63. *Stephen Pl.* 484. *4 Serg. & R.* 238. *14 Mass.* 409.

Mr. Justice SCOTT delivered the opinion of the Court.

This case is within the principle enforced in the case of *Denning v. Kelly*, 4 *Eng.* 435. The defendant having pleaded a plea of a subsequent order or division, lost the privilege of all pleas comprehended in any prior order or division. The motion to strike it out ought to have been granted.

The judgment must be reversed, and the cause remanded.