No. 12792

Supreme Court of Illinois

Foote

vs.

Foote

71641 7

132

Anna L. Foote

vs

William A. Foote

132

1272

1859

In the Supreme Court

Merritt D. Woodhal

v.

George Goss & als.

Error to Peoria Circuit Court

Brief of Plaintiffs.

Filed April 18. 1859

L. Leland
Clerk.

[12792-4]

No 132 — 27

Anna B. Foote

vs.

Wm E. Foote, Dfft.

Argument on behalf of defft in Error by Wm W. Orme & Jno M. Scott

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Filed April 22. 1859
D. Leland
Clerk

Prepared

Supreme Court of State of Illinois

3d. Grand Division

Anna B. Foote vs. Wm. E. Foote –

Written Argument on part of defendant in error –

This is a proceeding to reverse so much of the decree of the McLean Circuit Court as awards to the plaintiff in error the sum of $500. for alimony – said sum to be paid ~~annually~~ every year in quarterly payments – and to have the amount of said alimony increased –

What is the object of the allowance of alimony, at all, to the wife?

Simply to provide for her – in the absence of any separate estate of her own – an adequate amount for her support while separated from her husband. –

To make this allowance it is necessary for the Court to take into consideration the circumstances of the parties and their social position; the amount of property owned by, and the business done by the husband; the amount of the indebtedness of the husband and his condition and ability to pay the sum to be fixed by the Court for alimony –

Governed by these rules and considerations it

[12772-4]

is insisted on the part of the defendant in error that not only should the decree of the Circuit Court be allowed to remain undisturbed, but that if there be cause for complaint it might properly be that the allowance of alimony is too high.—

From an Examination of the testimony in the record from pages 13 to 20, the Court will find that the defendant in error is indebted in amount one half as much as all his property is worth viz:

The value of the printing establishment — and which is the principal part of defendant's property — is from $8000. to $12000., taking the different estimates of the witnesses=

The defendant is indebted as appears from testimony of Shepard - page 18 - in the following sums $4790.96 by Bills payable, $860. on other Schedules $600. in small items &c. making the amount of $6250.96 all together — very nearly the whole value of the printing Establishment at the lowest estimate, and over half the value at the highest estimate —

The value of defendant's residence is stated in Worsdell's testimony on page 15 to be about $2000.= Gridley's testimony, page 20, is that the residence is only worth $1500. and that defendant owes him the full sum of $1500. on the residence —

The value of the tract of land mentioned in Warriner's testimony, page 15, is about $1000.; and the testimony of Holmes, on page 20, is that the

defendant is indebted to him $500. on said lot with a forfeiture of $200. if defendant does not build a house on said track of land. —

The testimony of Fell, on page 16, is that he sold to defendant a track of land for $15. per acre Equal to $2400. payable in Eight annual instalments — One of said payments has been made and the land is not with the balance of the purchase money unpaid —

It also appears from the testimony of Shepherd page 17, that the business of the defendant has fallen off from one source — the R. R. Co. — the sum of about $2500. — And from the testimony of Lewis, pages 19 and 20, and the other evidence that defendant is a practical printer publishing a weekly and daily newspaper in Bloomington that he employs Editors for his paper and Expends about $25,000. per annum in Carrying on and conducting his newspaper and job office —

And that the income or nett annual proceeds of both printing offices — Newspaper and Job office — was ~~exceed~~ not more than $2500. —

Upon consideration of all the Evidence the Circuit Court allowed $500. alimony per annum payable quarterly —

The Court will also notice that defendant surrendered to Complainant a piano and household goods valued at $500., and from December 30th 1857 to April 1858 defendant paid complainant the sum of $200. —

Now from the foregoing review we insist here that the proof shows that defendant is a practical printer relying upon his skill at his trade and his activity and energy in his business for his support.— That his property is all perishable property, and not such property as by time enhances in value or affords any permanent income to its owner =

And therefore that the sum of $500. per annum to be paid quarterly in money to complainant is a very high allowance of alimony made to complainant

Now the Court must look at the condition of the defendant, his business and circumstances.— For if you weigh him down by an assessment of a high amount of alimony, you strike at his very capital — his energy and pride of business and by destroying them you destroy the source from whence the alimony will come — you break him up root and branch;— you destroy his pride and energy of character.— The Court will pardon us for calling attention to the fable of the "Goose that laid the Golden Eggs"

Were the defendant a man of property that, without his own personal skill and labor, produced him a regular income then the Court might properly apply a different rule for the assessment of ~~the~~ the alimony —

In a leading case on the subject of alimony Peckford vs. Peckford 1st Paige Ch. Reports p. 274 the Court adopted as a rule the allowance of a third of the income from property - In that case the defendant was worth $12000. and the Court allowed $400. annual alimony -

In the case at bar the defendant, when his debts are paid, will have little or no property and yet he is made to pay $500. annual alimony and the complainant still demands more -

It must be evident to the Court that the alimony is already high enough -

In the case of Laurence vs. Laurence - 3d. Paige Ch. Rept. p. 270 to 273 the value of defendant's property was $2700. and the allowance of alimony was $75. per annum

Let the Court also bear in mind that the monetary condition of the country is now far worse than when this decree was entered.

Again the amount of alimony is subject to change or alteration at any time by the Circuit Court when a proper state of facts is shown to the Court; such for instance that the defendant has become more prosperous in business and is accumulating property and could be better able to increase the amount of alimony; or that he had become entirely destitute of property and defendant entirely on his daily labor and

[10799-D]

could not so well pay the sum fixed; in the one case the Court would raise, in the other decrease the amount of alimony—

Again this question of alimony is to a great extent controlled by the discretion of the Court making the allowance, and unless the Court below has greatly abused that discretion this Court should scarcely feel itself justified in interfering—

In asking of the Court a careful examination of the proof in ~~this~~ the record of this cause for the purpose of determining the ability of the defendant in error to pay the annual sum fixed upon him, and his inability to pay more we submit this case—

William D. Orme
Jno. M. Scott
Counsel for defendant in Error—

Anna B Foote

vs.

William B. Foote

Hence Appeal from Decree on

Argument of Thos Boyne on the amount of Alimony to be allowed Complt

{12792-5}

Supreme Court of Illinois

3rd Grand Dercain

April Term 1859

Anna B. Foote

vs.

William E. Foote } Appeal -

The discretion to be exercised by the Court in the allowance of alimony is not an arbitrary discretion, but a Judicial discretion to be exercised in reference to the general principles of Law relating to the subject and upon an equitable view of all the circumstances of the particular case -

Bishop on Marriage & Divorce Sec. 603 -

Rees vs. Rees - 3 Phillimore 1 English Ecclesiastical Rep 419 -

Burn vs Burn - 7 Hill - 207 -

Lawrence vs. Lawrence - 3 Paige 267 -

Cooke vs. Cooke - 1 Eng. Ecclesiastical R. 178 -

Mc Gee vs. Mc Gee - 10 Georgia - 477 ~~&~~ - 490 -

When the delinquency of the Husband has been established and the wife is the injured party - driven by his cruelty or other wrongful conduct from the comfort of domestic enjoyments, she should be liberally supported - Bishop on M. & Divorce Sec. 603

(12792-5)

Adams C. J. Burr - vs. Burr - 7. Hill - 207 -

But the alimony to be allowed should be a proportion of the Husband's estate, but even in cases where there is no estate, the duty of a Husband to support his wife does not depend upon his property. If she is compelled to seek a divorce on account of his misconduct, she loses none of her rights as a wife and he gains nothing by his own wrong. If he has no money or property the Court bases the alimony upon his earnings or ability to earn money -

Bishop on Marriage & Divorce sec - 604

Kirby - vs - Kirby - 1 Paige 261

Bussler vs. Bussler - 5 Rich 427.

As a general proposition the fund out of which the wife is entitled to her alimony is the income of the Husband - and in the case at bar that is $2500 - will from his business per annum, and while the wife has the care - charge - expense of maintenance & education of the family; leaving him with no expense but that of his individual support, it is at least equitable that he should contribute sufficient to enable his wife to support herself & children -

The Courts in exercising their Judicial discretion always take into Consideration the facts whether there are Children or other relatives to support or educate, or when that burden devolves — the nature & extent of the Husband's delictum (Burr. v. Burr - 7. Hill 207) the demeanor & conduct of the wife to him since cohabitation — the ability of each party to earn money — the condition in life — circumstances — health — place of residence and consequent necessary expenditure of the wife, the age of the parties, and whatever other circumstances may address themselves to a sound Judicial discretion and on the case of Bensler — v. — Bensler 5 Rich 427 — The Court in that case even extended went beyond the income of the Husband by ordering a sale of his estate so that the amount necessary to pay extraordinary expenses incurred by failing health on the part of his wife might be realized — declaring "that the Husband's improper conduct ought not to excuse him from doing what by his marriage contract & it would have been his duty to perform

Bishop M. & D. Sec. 612.
Bensler v. Bensler 5 Rich 427 —
Burr — v — Burr — 7. Hill — 207 —

In the case of Williams -vs- Williams
4 Dessaus. 4 Dessaussure - 183 - where the ground of the
183. Divorce was as in this case cruelty & bad
treatment to the wife - the Court ordered
that One third of the nett income
be paid to the wife - and also a
sufficient Sum to board and educate
the daughter of whom there were
three the charge of whom was given to
the Mother -

In the case of Rathes -vs- Rathes 4
4 Dessaus 33 Dessaussure - 33 - One third of the Husbands'
income was allowed to the wife - the Court
declaring in that case - that the wife acquires
by her marriage or when for the comforts she
brings the right to maintenance support and
to a participation in her Husband's property
according to his degree and station in life

And again in a similar case
4 Dessaus 174 Taylor - vs - Taylor - 4 Dessaussure 174 - the Court
for similar reasons decreed to the wife for
her own maintenance only, one third of the
Husbands nett income -

In the State of New York the Court
of Chancery has usually allowed to the wife for
permanent alimony from One Fourth to

one half of the Husbands' income

Burn. v. Burn 1 Ves. the Court not to leave the Custody of

7. Hill 221 the Children - Burn. v. Burn. 7. Hill 221

opinion of Ruggles Senator -

Rockford v. In the case of Rockford - v. - Rockford.

Rockford. 1 Briges Ch. Rep. 246 - where there were no

1 Briges Ch. Children to be provided for. the Court allowed

246 - the wife - One third of the gross value

of the property in the shape of an annuity

which was equal to about one half of the

annual income during her life - And

the Court in the case says, "it is usual

" to allow the wife for permanent alimony

" from one half to one fourth of the Husbands

" estate where she is not to have the

" Custody of the Children "

In Redmon - v. - Redmon

5 Porter 5 Porter In Rep. 64 - the whole Real &

In. 64 personal estate of the Husband ~~of the~~

was only between $4000 & $5000 - yet

because the Conduct of the defendant

was grossly improper, it was proper they

say to decree the wife the sum of

$1,181 dollars - & the Court would not

interfere -

In the case of McGee - v. - McGee

10 Geo. 491 - the whole estate was worth $4000

[12792-2]

and yet the Court gave the wife in that case an allowance of $20- per month with no children to support or educate

In the case of Keiby-vs-Keiby 1 Paige Ch R. 261- the Husband was only worth $1000- his income in all from his personal services as a sea Captain was $35 per month. yet the the wife was allowed $25 per month of his gross earnings being $35-

In all the cases cited the Court took into consideration, what does not seem to have been taken into consideration by the Court here - the extent of the husband's delinquency and that his improper conduct compelled the wife to seek a divorce, - the Husbands' ability to pay - her rank and condition in life, - and that he was bound to support her in that condition; the necessary expenses of her living where her relatives live - at Chicago - the condition of her health - Even these circumstances should have entitled her to receive at least from one fourth to one half of his income $2500 dollars per annum without any

regard to Children - But when
the Court considered that the Court also
declined upon the wife the support
& education of the Children owing
to her brutality & unfaithfulness & have been
cause of ~~the~~ separation - at least
one half of her income should have
been appropriated to her ~~the support~~ more than
three fourths of the whole expenditure
of their family when living together -

As we said before in this
case the Court below could not exercise
an arbitrary discretion, but a judicial
one - to be exercised in reference to
the general principles of Law relating
to the subject and I hold in this
case that the Court exercised this
discretion contrary to all principles
settled upon the subject - and
that the decree in relation to the
amount of Alimony allowed under
the circumstances for the support of
the wife & Children is a gross violation
of all the equitable considerations &
principles governing this class of cases -

And I submit this view
of the case with the reference I have

(12992-8)

made to Authorities & cases to the
sounder Judgment of this Court. It
would be a reproach upon the Justice of
the Country - and the character of our
Judiciary could a decree stand
which so manifestly violated not only
general principles, rules, but inflicted
upon a poor & forsaken wife and
her neglected Children, the hardship and
misery of eking out an insufficient support
while the Cruel Heartless Cruel Husband
and the unnatural Parent revels in his
very abundance after driving them out
upon the Cold Charities of the world
utterly indifferent as to their wants, their
sufferings and their danger -

W. Hagerman
Att'y for Complt

Ottawa
April 26. 1859

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Supreme Court

Anna E. Foote

132 v.

William B. Foote

Argument

of

Wm Hoyne

for a/plt.

Filed April 26 1887

L. Lehmer

Clk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

ANNA B. FOOTE, Appellant, vs. WILLIAM E. FOOTE, Appellee.

Appeal from McLean County Circuit Court—In Chancery.

ABSTRACT OF THE RECORD.

Record.

1 to 5 BILL in Chancery, filed by appellant against appellee, for divorce.

10 The bill was taken as confesssed by defendant.

Cause was tried at the April Term of said Court, A. D. 1858.

Decree entered dissolving the bonds of matrimony theretofore subsisting between the complainant, Anna B. Foote, and the defendant, William E. Foote; and that the custody of the infant children of said parties be given to the appellant, Anna B. Foote. It was further decreed, that said William E. Foote pay as alimony to the said Anna B. Foote, for the support of herself and her two children, the sum of $500 per annum, in

21 equal quarterly instalments.

The complainant excepted to the allowance for alimony, as being in-

28 adequate, and not as much as should have been allowed by the evidence.

It appeared by the evidence of Thomas Lonergan that when complainant married defendant, she had a piano worth from $200 to $300; that on the day of her marriage, witness gave her $100; that since their marriage witness had let her have money and furnished her house, amount-

11 ing, in the aggregate, to between $700 and $800.

That the two children are both boys. That in his opinion $1,200 per year would be the ordinary and necessary expenses for the support of

13 complainant and her two children.

It appeared in evidence, by the testimony of John S. Auby, that $1,-200 would be a fair estimate for the support of complainant and children per year.

It was also proved, by the testimony of Robert Hill, that $1,400 would be the annual necessary expenses for their support.

It was further proved that the defendant, about eighteen months before the decree was made, told Thomas F. Warrell that he was worth

15 $10,000, and was clear of debt.

That the proceeds of the job part of his office (he was a printer) was worth $1,500 or $2,500 per month. That the children are aged, one seven years, the other two years.

It also appeared, from the testimony of William Thomas, that witness was an insurance agent; that on the 15th of January, 1858, defendant applied to him to insure his printing establishment, and defendant then stated that the value of the property to be insured, at last invoice, was $12,000. That a short time afterwards the witness remarked to defendant, that he thought the appraisement was too high, when defendant re-

Record. plied that he had, since such appraisement, purchased upwards of three thousand dollars worth of property and put it in the office, making between $15,000 and $16,000 worth of materials and apparatus connected
16, 17 with the office.

It was also proved, by the testimony of George W. Sheppard—see abstract, page 17 and 18—that he was book-keeper for defendant, and that in his opinion the annual *nett* proceeds of the whole Pantagraph office is about $2,500 per annum. It also appeared, by the testimony of this witness, that defendant had about $12,000 of unpaid bills standing out; that his bills payable amounted to the sum of $4,790.96; That defendant owed on two school notes $860—on debts about town $600; that $25,000 annually was necessary to carry on the office; there was then $1,500 of debts the office which was available, and $800 more of subscription debts.

It was also proved, by E. H. Rood, that the witness was (in connection with William Thomas) agent for four insurance companies; that defendant called upon them to insure his entire stock in Schemerhorn's building; that defendant said to him that there was $13,000 worth of property in the Schemerhorn building; that his property in the other building amounted to $1,000 or $1,500; that they gave him a policy for $9,000 on the property in the Schemerhorn building; that when he applied for the insurance, he stated the property was worth $2,400; and that he had made
18, 19 subsequent purchases to $1,500 or $2,500.

It was further proved, by the testimony of Edward J. Lewis, that the Pantagraph office, with good will, &c., free from debt was about $15,000. This witness stated that he was not a practical printer, but was the general editor of the weekly and daily Pantagraph, published by defendant.
19 Wm. McCracken estimated the value of the Pantagraph office at $8,000, and stated that he might be mistaken to the amount of $2,000 to $3,000.

It also appeared in evidence that he owed $800 on note to Merriman,
20 and $500 to Wm. H. Holmes for land, and $1,500 to A. Gridley, upon his residence.

That defendant had paid complainant, since the commencement of this
21 suit, $200; that he had sent her piano and household goods, which amounted in the aggregate to $500.

BRIER & BIRCH, *Compl'ts Solicitor.*
E. VAN BUREN, *of Counsel.*

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Emma B Foote

vs

William E Foote

Abstract

Appeal April
22

Filed April 20. 1859

L Leland
Clerk

SUPREME COURT.

ANNA B. FOOTE,
Appellant,
vs
WILLIAM E. FOOTE,
Appellee.

IN CHANCERY.

BRIEF.

The Bill in this cause was filed by the Appellant to obtain a Divorce.

The Court made a decree dissolving the marriage, gave the appellant the custody of their two children, and decreed that the defendant should pay her as alimony $500 per year, to be paid quarterly. To so much of the decree as relates to the alimony, the complainant excepted, as being inadequate in amount.

The only question here is, as to how much was necessary to support her, and her children, and as to the ability of the husband to pay what shall be fit and reasonable.

1 *Scam* 242—246.

It is difficult if not impossible to adopt any general rule as to the amount of alimony to be allowed, but it is submitted that the husband, in a case like this, should be decreed to pay a sufficient amount to support the complainant and her children, if he has the ability to do so. If she had remained his wife, the law would have compelled him to support her, the law also would compel him to support his children. If he so conducts himself as to compel the wife to seek for a divorce, and the court grants such an application, ought his misconduct to release him from an obligation that would otherwise exist? In other words, is an allowance which is insufficient to support her and her children, just, when he has the ability to pay sufficient for a decent support? Such a decree would permit the offending husband to profit by his own misconduct.

In this case $500 is allowed for the support of the wife and her two children, the entire family of the defendant, except himself. All the witnesses upon the subject testify that $1200 to $1400 per year would be necessary for their support.

See Testimony of Thos. Lonergan.
John S. Auley,
Robert Hill.

The appellant is a practical printer.

His printing establishment, from his own account, as given to the insurance agent, was worth at least $14,000.

See Testimony of William Thomas.
E. H. Rood.

His bills receivable due the office were,.....		$12,000 00
He owed Bills payable.....	$4,790 96	
Two School Notes	860 00	
Debts about town.....	600 00	
Notes to Merriman.....	800 00	
Note to Holmes.....	500 00	$7,050 96
		$4,949 04

He also owed $1500 to Gridley, and $500 to Holmes. Both these debts, however, were for real estate, and leave a balance in his favor.

The Holmes lot is estimated at.....		$1,000
Deduct Holmes' claims.....		500
Leaves Balance,.....		$ 500

See Testimony of R. O. Warriner, W. H. Holmes.

His Residence Property was estimated at.....	$2,000	
Incumbrance to Gridley.....	1,500	
Balance,.....	$ 500	$500
Balance due Defendant.....		$1000

See Testimony of D. T. Worrel and Gridley.

RECAPITULATION.

Printing Establishment, say.....			$14,000 00
Debts due him.....	$12,000 00		
Debts owing in all.....	7,050 06		
Balance due him.....	$ 4,949 04		4,949 04
Value of Real Estate over and above all incumbrances.....			1,000 00
Amount of Defendant's Property.....			$19,949 04

It will be remembered that a large amount of the indebtedness is the Bills payable, that is, *the current expenses of the business*, and which have doubtless been paid.

Again. The fairest test of a man's ability to pay, is his income. Upon that subject there is no conflict of evidence. The only evidence is the testimony of George W. Shepherd, who says the *nett* proceeds of the office is about $2,500 per annum. That is the profits of the establishment, after paying all the expenses, including those bills payable, above spoken of, (for those bills payable are part of the expenses). Now, then, if the annual nett income of the defendant is $2,500, he certainly should pay towards the support of the complainant and their children more than *one-fifth of his income*, and especially when that one-fifth is not sufficient by one half to pay for their support.

It is therefore submitted "that the allowance of alimony is inadequate, and not so much as should be allowed by the evidence."

BRIER & BIRCH,
Solicitors for Appellant.
E. VAN BUREN,
Of Counsel.

42792-10

Recp. Bond

Amos B Foote
Appellant

vs

William C Foote
Appellee

Brief & Points

Brien & Birch
Attys for Appl

E Van Buren
Counsel

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

BENJAMIN B. REYNOLDS et al.
vs.
CHARLES PAVER.

The judgment in this case was authorized by the power of Attorney.

It is said that although the power of attorney would authorize a confession for B. B. Reynolds, David Reynolds and W. C. Richardson, or for any one of them singly, but not for two of them jointly.

To this there are two answers. The power of attorney was executed by B. B. Reynolds and D. Reynolds, and authorizes an attorney to appear for them and William C. Richardson, jointly and severally. If the attorney might appear for them *severally*, he might appear for as many of them or as few of them as he chose; and so is the very language of the power of attorney, for it says "That upon the appearance of the attorney, judgment may be forthwith entered of record against *us*, or *any* or *either* of *us*. In this phrase there are three terms, "us," "any of us," or "either of us," evidently meaning by "us" all *three* of them, by "any of us" any *two* of them, and by "either of us" either *one* of them.

2d. The other ground on which it is sought to set aside this judgment, is alleged usury.

The manner in which courts have exercised their equitable jurisdiction over judgments entered by confession, has been either, 1st, by setting aside the judgment, or, 2d, by allowing the judgment to stand as security, and admitting the party to plead and to try the merits of his defence. The application in this case was to set aside the judgment entirely; it was not merely to be allowed to plead, letting the judgment stand as security.

6 Johns., 296. 3 Barn., 501. 2 Gilm., 629.
15 Ill., 353. 9 Wend., 437.

In every case where courts have exercised their equitable jurisdiction to allow a party to come in and litigate a question of usury, they have retained the judgment and not set it aside, but have merely granted the party leave to plead. The application in this case to set aside the judgment entirely, we think was properly overruled.

9 Johns., 80.
20 Ib., 296.
6 Halstead, 110.
5 Johns. C. R., 320.
Barnes, 277, note.
8 Barn. & Cress, 21.
2 Cowen, 465.
12 Wend., 222.
2 Halstead, 199, note.
2 John. Ca., 258.

Nor should the court have entertained the application at all, unless Reynolds had come into court and tendered the amount of money which he acknowledges was justly due to Paver. The application is to the equitable jurisdiction of the court, and he who seeks the aid of equity must do equity. It would be grossly inequitable to allow the defendants to refuse to pay the principal of the note under the pretence that they ought to be allowed to litigate the question of interest.

Barnes, 243. 2 Arch. Prac., 11. Tidd's Prac., 512.

B. C. COOK,
For Def't in Error.

Weisroda 195 182
vs
Power

Deft's Brief

Filed May 26th 1859
L. Leland
Clerk

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

MERRITT D. WOOD & PATRICK W. DUNNE,
vs.
GEORGE GOSS, MOSES M. JACKMAN, AND RANSOM GARDNER.

ERROR TO PEORIA CIRCUIT COURT.

Brief of Plaintiffs on Demurrer to Plea of Release of Errors.

1. The release pleaded, even it be otherwise sufficient, extends only to work, &c., on the Peoria & Bureau Valley Railroad and actions therefor, yet no such work is specified in the declaration or other pleading of the plaintiffs. And if the words of release were not expressly confined to the work aforesaid, the law would so restrict them.

Bac. Abdg Release A, p. 247. I. p. 283 K, pp. 289, 290, 291, and cases cited.
Saunders Plead. and Ev. Vol. 2 Pt. 2, pp, 759, 761.

2. But a release of all actions does not bar a writ of error.

Bac. Abdg. Release I. 2 p. 287, citing.
2 Inst. 49. Yelv 209. Co. Lit. 288

3. But this release is not made as the deed of the firm of Wood & Dunne, but of said Wood only, and being not a negotiable instrument, but a writing under seal, it applies to Wood only, and does not bind the firm.

Story on Partnership. Sec. 102, 102a and authorities cited.
James v. Bostwick, Wright's Ohio R. 142.
Button and al. v. Hampson Ibid. 93.

Brief of Plaintiffs on Errors Assigned.

1. The non-residence of "the plaintiff or person for whose use the action was commenced," is not sufficiently shown by the affidavit of Chester Warner, nor otherwise.

Statute of Costs, Sec. 1, 2.

2. The court below erred in dismissing the action. The whole *object of the statute* was satisfied by the residence of the plaintiff Dunne within the jurisdiction of the court, and subject to its process. It is not pretended that he was not "able to pay the costs of suit."

Statute of Costs, Sec. 1, 2.
Thulman and al v. Barbour and als. 5 Indiana R. (3 Porter,) 178.
Sedgwick Statutory and Constitutional Law, 229.

3. But if sufficient cause for the dismissal of the suit were shown, the judgment upon such dismissal should have been against the attorneys commencing the action, and not against the plaintiffs.

Statute of Costs, Sec. 2.

CHARLES C. BONNEY,
of Counsel for Plaintiff in Error.

In the Supreme Court

Merritt D. Wood et al.

v.

George Goss et als

Error to Peoria Circuit Court

Brief of Plaintiffs

Filed April 18, 1857

L. Lamb Clerk

[12792-1]

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

MERRITT D. WOOD & PATRICK W. DUNNE, vs. GEORGE GOSS, MOSES M. JACKMAN, AND RANSOM GARDNER.	ERROR TO PEORIA CIRCUIT COURT.

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1. The release pleaded, even it be otherwise sufficient, extends only to work, &c., on the Peoria & Bureau Valley Railroad and actions therefor, yet no such work is specified in the declaration or other pleading of the plaintiffs. And if the words of release were not expressly confined to the work aforesaid, the law would so restrict them.

Bac. Abdg Release A, p. 247. I. p. 283 K, pp. 289, 290, 291, and cases cited.
Saunders Plead. and Ev. Vol. 2 Pt. 2, pp, 759, 761.

2. But a release of all actions does not bar a writ of error.

Bac. Abdg. Release I, 2 p. 287, citing.
2 Inst. 40. Yelv. 209. Co. Lit. 288

3. But this release is not made as the deed of the firm of Wood & Dunne, but of said Wood only, and being not a negotiable instrument, but a writing under seal, it applies to Wood only, and does not bind the firm.

Story on Partnership. Sec. 102, 102a and authorities cited.
James v. Bostwick, Wright's Ohio R. 142.
Button and al. v. Hampson Ibid. 93.

Brief of Plaintiffs on Errors Assigned.

1. The non-residence of "the plaintiff or person for whose use the action was commenced," is not sufficiently shown by the affidavit of Chester Warner, nor otherwise.

Statute of Costs, Sec. 1, 2.

2. The court below erred in dismissing the action. The whole *object of the statute* was satisfied by the residence of the plaintiff Dunne within the jurisdiction of the court, and subject to its process. It is not pretended that he was not "able to pay the costs of suit."

Statute of Costs, Sec. 1, 2.
Thulman and al. v. Barbour and als. 5 Indiana R. (3 Porter,) 178.
Sedgwick Statutory and Constitutional Law, 229.

3. But if sufficient cause for the dismissal of the suit were shown, the judgment upon such dismissal should have been against the attorneys commencing the action, and not against the plaintiffs.

Statute of Costs, Sec. 2.

CHARLES C. BONNEY,
of Counsel for Plaintiff in Error.