

No. 12671

Supreme Court of Illinois

Wood et al

vs.

Goss et al

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15th
In the Supreme Court

Merritt D. Wood & al

vs.

~~Charles G. Gifford~~ & al

Error to Peoria Circuit Court -

Abstract -

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George Goss & al.

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Filed Apr 18, 1860 -

R. L. Evans

Clerk

MERRITT D. WOOD AND PAT- RICK W. DUNNE, PLAINTIFFS IN ERROR, <i>versus</i> GEO. GOSS, MOSES M. JACK- MAN & RANSOM GARDNER, DEFENDANTS IN ERROR.	}	STATE OF ILLINOIS, SCT. IN THE SUPREME COURT AT OTTAWA. E R R O R TO PEORIA CIRCUIT COURT.
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ABSTRACT.

Præcipe in assumpsit. Damages \$15,000. Filed Nov. 16, 1854.

Summons accordingly. Alias summons Nov. 21, 1854. Served same day on Moses M. Jackman.

Declaration. Damages \$15,000. No averment of partnership. Austin & Bonney, Attorneys. Filed Jan. 10, 1855.

Affidavit by Chester Warner of non-residence of Merritt D. Wood filed March 5, 1855.

Motion by all defendants to dismiss suit for want of security for costs, entered March 5, 1858.

March 8, 1855, motion heard. Pending hearing, leave to defendants to amend affidavit. Exception taken. Suit dismissed. Exception taken. Bill of exceptions filed.

ERRORS.

1. The Court erred in allowing the motion of defendants to amend their affidavit at the hearing.
2. The Court erred in allowing the motion of said defendants to dismiss said suit.
3. The Court erred in giving judgment against the plaintiffs for costs.

PLEA.

Plea by all defendants of release of errors. That plaintiffs since assignment of errors, to-wit: April 4, 1856, at State of Illinois, said Wood then

and there being a partner of said Dunne, by his writing of release, &c., for FIFTY DOLLARS released all sums due to Wood & Dunne, from defendants, and all work done &c., and all other indebtedness, &c., and all suits now or hereafter pending, &c. Verification and prayer of dismissal of writ of error.

AFFIDAVIT.

Affidavit of Patrick W. Dunne, that plea is false and fraudulent as to him. Suit commenced and prosecuted by him alone, &c. Wood joined to prevent abatement. Work left by Wood before completion, and completed by Dunne. Wood left to avoid liabilities of Wood & Dunne, and to leave Dunne alone to finish work and to settle with defendants. No partnership existing at commencement of suit or since. Wood non-resident. \$2262 28 justly due from defendants. Wood not equitably entitled to more than \$578 44 thereof. Wood insolvent. Defendants' knowledge of facts in affidavit mentioned before release obtained. Release obtained for express purpose of cheating, wronging and defrauding affiant. Release fraudulent as against affiant, &c., and if sustained will defraud affiant out of sum of \$1683 79.

MOTION.

Motion of Dunne to set aside plea or strike it from the files, &c., and to reverse judgment below.

AUTHORITIES, &c.

The plea is to the further maintainance of the suit, and if not technically a plea *puisdarrein continuance*, is clearly in the nature thereof. It is so defective in substance and in form that it ought to be treated as a nullity, and is sufficiently shown to be fraudulent to warrant the Court in setting it aside. If the defendants are permitted at all to plead it, that should be only on remanding the cause.—Story on Partnership, Sec. 132, and cases cited. 1 Chitty's Pleading, 658, 659, 660, 661, and cases cited. *Note P*, page 658, and cases cited. *Note 6*, page 659, and cases cited. "It is in the discretion of the Court to receive the plea or not, and this discretion will be governed by circumstances extrinsic and which cannot appear on the face of the plea." 7 Taunt, 421; Jones v. Herbert; 6 Hill, 237; Firnan v. Leland.

The Court erred in dismissing the suit. The whole object of the statute was satisfied by the residence of Dunne within the jurisdiction of the Court, and subject to its process.—Statute of Costs, Sec. 1, 2; Thulman and al. vs. Barbour and als.; 5 Indiana, 178; 3d Porter.

CHARLES C. BONNEY, of Counsel, &c.

MERRITT D. WOOD AND PAT-	}	STATE OF ILLINOIS, SCT.
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