

Com. Law Cham.]

DONNELLY v. REID.

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of action cannot be pleaded in abatement 2nd. That it appeared from the particulars of claim in this action that an amount is claimed beyond the jurisdiction of the County Court, and therefore the County Court action cannot be for the same cause of action. 3rd. That the affidavit of verification of said plea was insufficient in substance. 4th. That the affidavit of verification should have been made by the defendant and not by the attorney.

Cause was shewn, and it was contended for the defendant,

1. That the term "Inferior Court, so far as this objection is concerned, does not apply to our County Courts, which are Courts of Record: *Laughton v. Taylor*, 6 M. & W. 695; *Grant v. Hamilton*, 3 U. C. C. P. 422.

2. Affidavits were filed contradicting second ground.

3. That the affidavit of verification may be made by a third person: *Tinseley v. Foster*, Burr. 344; *Chitty's Arch.* 12th ed. 914.

At all events the plea had to be filed within four days, and there would not have been time to get affidavits from defendant, and it is not the practice to enlarge the time for pleading in abatement, such pleas not being favored: *Jennings v. Webb*, 1 T. R. 279.

*Harrison, Q. C., contra*, referred to 4 & 5 Anne, cap. 16, sec. 11; *Onslow v. Booth*, 2 Str. 705; *O'Loughlen v. McGarry*, 2 Leg. Rep. 110; *Brunker's Digest*, 1614; *Coleman v. Grady*, Smythe, 155; *Chit. Arch.* 12th ed. 915; *Grant v. Hamilton*, 3 U. C. C. P. 426.

GWYNNE, J.—Independently of *Grant v. Hamilton*, 3 U. C. C. P. 422, I would not, upon a motion to set aside a plea in abatement for irregularity, grant an order to set it aside upon the ground that the prior action is stated to be pending in a County Court, which, although an inferior court, is still a court of record. But in view of that case, although it is not the point decided, the opinion of Chief Justice Macaulay appears to be, that it would not be a good objection on demurrer. If plaintiff desires to raise that question he must do so on demurrer.

As to the 2nd point, that the plea is not supported by a sufficient affidavit. By the Stat. 4 & 5 Anne, c. 16, s. 11, it is enacted, that no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or show some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true; and in 2 Saun. 210, in note, it is said, it is not necessary that the affidavit should be made by the party himself, if it be made by his attorney it is sufficient.

Now the defendant's counsel in this case, who is also his attorney in the action brought in the court below, undertakes to swear, from the information furnished to him as an attorney in both suits, that he verily believes the plea to be true in substance and in fact. It was contended before me that no one but the defendant himself could make the necessary affidavit. There is authority against this contention. No case was cited to show that assuming the attorney could make the affidavit, the frame of the one made in this case was insufficient.

In *Pearce v. Davy*, 1 Lord Kenyon, 364, an action of trespass was brought for breaking and spoiling certain fishing nets of the plaintiff, by throwing a grapple against it. The defendant pleaded in abatement, because the nets were certain large nets fastened together, called a pilchard seine net, and the plaintiff had no property in them, but jointly with sixteen others, naming them, who are still living, to wit, in A., in the County of Cornwall, and not joined with the plaintiff in the action. This plea was supported by two affidavits, the first made by one of the defendants, sworn after process served, but before declaration filed; and he swore that from the first setting up of the old pilchard seine, he had been, and still was, a proprietor of a thirty-second share therein, and the plaintiff of an eighth, and several other persons (not naming them) of different shares therein, some an eighth, others a sixteenth, &c.

The other was an affidavit of one Paslow, who swore he believed the above affidavit to be true, and that the nets therein mentioned were the same as were mentioned in the declaration, and that he believed the defendant was entitled to a thirty-second share therein.

A rule nisi was obtained to set aside the plea for defects in the affidavit: 1. That the first affidavit being before declaration could not be looked at, but if it could, it was defective in not identifying the nets to be the same; 2. In not mentioning by name who the other several part-owners were, which it was insisted must be done in order to give the plaintiff a better writ. 3. That the second affidavit was founded on belief only. The court set aside the plea, because it was not verified so as to give the plaintiff a better writ, by setting out the names of the part-owners, but it was agreed that there was enough to induce them to believe the truth of the plea.

This is the only case I have been able to find upon this point, whether or not a person, other than the defendant, making the affidavit must swear positively to the truth. A defendant making the affidavit might properly perhaps be held to greater strictness than his attorney. In the absence of any more express authority, I do not feel disposed to say, where the defendant's attorney in both actions declares upon oath that he verily believes that the causes of action are the same, and in the absence of any affidavit on the part of the plaintiff—that probable matter to induce me to believe that the fact of the plea is true is not shewn. If it is clear that the necessary affidavit may be made by the attorney, information and belief is all that he could well speak from. I do not think, therefore, I should set aside the plea on this ground. As to the other objections suggested to the plea, these are more proper to be considered on a demurrer, if the plaintiff thinks fit to demur, than upon a motion to set aside the plea.

As to the plaintiff's application, in case the plea should not be set aside, to be allowed to reply and demur, I shall not grant it; for if, which perhaps admits of doubt, I have authority to grant leave to demur and reply to a plea in abatement, I certainly shall not exercise it to cause a double trial of such a plea. The judgment in favour of a defendant on a demurrer to the plea would be that the writ should be quashed. To