

HARDWICK ET AL. *vs.* CAMPBELL & Co.

Motion to dismiss upon the grounds that plaintiff was a non-resident at the time the action was commenced, and filed no bond for costs as required by the statute, must be verified by affidavit, because it sets up matter in abatement. The affidavit should verify all the facts stated in the motion—should verify the

allegation that plaintiff failed to file bond for costs, as well as that he was a non-resident. If the plaintiff has filed a bond, the validity of which is questioned, defendant need not swear that it is insufficient, but may set out the bond in his motion, and submit its validity to the determination of the court.

If the motion is not sworn to, or is verified by a defective affidavit, it may be stricken out, but the want of, or a defective affidavit, is no cause of demurrer to the motion.

*Appeal from the Circuit Court of Benton County.*

THIS was an action of assumpsit, on a promissory note, brought by Hugh Campbell, Arch. Campbell and John H. Martin, partners under the firm name of H. & A. Campbell & Co., against John and Charles Hardwick, and determined in the Benton circuit court, November term 1845, before SNEED, judge.

Defendants filed the following motion:

“Defendants, by attorney, come for the purpose of making this motion only, and move the court to dismiss this action, because the plaintiffs herein were before, and at, and after the commencement of this suit, non-residents of the State of Arkansas; and because the said action was commenced without filing the obligation of some responsible person, being a resident of said State, by which he acknowledged himself bound to the said defendants to pay all the costs which might accrue in such action.”

The motion was verified by affidavit thus:—“On this day J. P. Spring personally appeared in open court, and being duly sworn, states that it is true, as stated in the foregoing motion, that the plaintiffs in said action, before, and at, and after the commencement thereof, were non-residents of the State of Arkansas:” which was subscribed by affiant, and attested by the clerk in the usual form. Plaintiffs demurred to the motion, assigning for cause, among others, that the affidavit was defective in not extending to all the facts stated in the motion. The court sustained the demurrer, and, the defendants declining to answer over, rendered final judgment for plaintiffs.

Defendants appealed.

D. WALKER, for the appellants. At the appearance term of the circuit court, the defendants filed their motion to dismiss this suit,

because the plaintiffs, being non-residents, had at the institution thereof filed no bond for costs. The fact of non-residence is verified by affidavit. To this motion the plaintiff demurred and the court sustained the demurrer, decided the motion insufficient and rendered judgment for the plaintiff. The motion is to be taken as true when demurred to. 5 *Ark. R.* 661, *Keith vs. Platt. Stephen Plead.* 179. It is matter in abatement and may be taken advantage of either by plea or motion. 2 *Ark. R.* 113, *Clark vs. Gibson.* An affidavit of the non-residence of the plaintiff was sufficient; to swear to more would be swearing to a negative, and worse than that, swearing to a matter of law; for the question continually arises whether it be a valid or invalid bond. *Smith vs. Dudley*, 2 *Ark. R.* 70, *id.* 113: *id.* 117.

The sufficiency of the affidavit was not before the court: if it had been deemed insufficient, a motion to strike it from the files would have been proper. 3 *Ark. R.* 141. 4 *id.* 410.

The sufficiency of the bond was not before the court: it is no part of this record. 5 *Ark. R.* 264, *Montgomery vs. Carpenter.*

OLDHAM, J. The defendants below moved to dismiss this suit because the plaintiffs, as they allege, are non-residents and failed to file a bond for costs before the suing out of their writ. The non-residence of the plaintiffs was sworn to, but the affidavit is silent as to their failure to file a bond for costs. The motion was demurred to because of the insufficiency of the affidavit, which was sustained, and the defendant saying nothing further, judgment was rendered for the plaintiffs.

The statute which authorizes suits by non-residents to be dismissed upon motion, in case of a failure to file a bond for costs before the institution of the suit, does not require the motion to be sworn to, yet we are of opinion that an affidavit of its truth is necessary. The grounds set out in the motion are matters in abatement, and in the absence of the statute allowing them to be presented upon motion, would have to be regularly pleaded. Pleas in abatement are not favorably regarded by courts of justice, as they tend to defeat the action without touching the merits of the con-

troversy; consequently, both by the common law and our statute, an affidavit of their truth is required to all such pleas as a prerequisite to their admissibility, except where their truth appears of record. The same objections apply whether matter, which tends to abate the writ, be brought before the court either by plea or motion, and an affidavit of its truth is as necessary in the one case as the other. The facts contained in the motion may be disputed, and a trial had upon them in the same manner as if they had been pleaded.

The affidavit in this case does not go to all the facts contained in the motion. All the facts contained in a plea in abatement should be sworn to, and if the affidavit relates to but part of them, and is silent as to the rest, it is defective and insufficient.

It is insisted by the counsel for the appellants that an affidavit of the non-residence of the plaintiff is sufficient; to swear to more would be swearing to a negative as well as a matter of law, for the question continually arises whether the bond be valid or not. This objection does not take the case out of, or form an exception to the rule above laid down, that all the facts in abatement should be sworn to. If a bond has in truth been filed, which the party deems insufficient or invalid, he can set out the bond in his motion and thus submit its sufficiency to the determination of the court. Such a practice would be allowable to avoid the consequences suggested.

The insufficiency of the affidavit is however no cause of demurrer. The motion fully sets forth the facts, which if found to be true would warrant the dismissal or abatement of the suit. The affidavit is essential to its admissibility, in the absence of which it might have been stricken from the files upon motion. For this reason the judgment of the circuit court is erroneous, and is therefore reversed.