

disregard the artificial arrangement of the parties by the pleader, and ascertain from the pleadings where the real controversy lies, and range the parties accordingly. Parties cannot, by arranging themselves as plaintiffs or defendants in a cause, create a fictitious ground of federal jurisdiction. This is denominated a collusive joinder of parties, to confer jurisdiction.

It is with some degree of regret that I feel compelled to hold that the court has no jurisdiction, as, from the examination of the facts of the case, I am led to the conclusion that the acts of Fleeman, as administrator of the estate of Robert H. Adams, bristle with fraud. But it is usurpation for a court to take jurisdiction where it does not have it under the law. With my view of the law regulating jurisdiction, and of the facts of this case, I feel compelled to order the dismissal of the case for want of jurisdiction.

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WILSON and others v. ROCKWELL and others.

(Circuit Court, D. Colorado. December 15, 1886.)

**INJUNCTION—TRESPASS—TITLE.**

A party showing an equitable title to realty will be protected against trespassers by injunction, though the location of the legal title has not been finally determined.

**Motion for Injunction.**

*Hugh Butler*, for complainants.

*L. C. Rockwell*, *per se*, for defendants.

BREWER, J. The facts stated in the bill give complainants a clear right to a preliminary injunction. It is immaterial whether the legal title be in complainants or the Woodmass of Alston Company. The dispute between them does not concern trespassers. Both parties are in court, the company being made defendant. The full equitable title ownership is with complainants, and a court of equity will protect the owners, as against trespassers, although the location of the legal title has not been finally determined. The allegations of the bill are met by affidavits and other testimony on the part of the defendants. The truth is in doubt. I shall not attempt to determine it now, nor comment, on the testimony, further than to say that Gwynn, the vendor to complainants, and Gwynn, the witness, do not speak in the same way. A little cross-examination may be helpful. The case made by the bill is shaken, but by testimony, some of which at least is open to strong suspicions.

A preliminary injunction will be granted as prayed for, upon the giving of a bond in the sum of \$10,000, with two sureties, to be approved by the clerk of this court, conditioned to pay all damages caused by this order, if the same shall finally be set aside. The complainants must also proceed, with all reasonable speed, to have the legal title determined.

## CAHN and others v. MONROE.

(Circuit Court, W. D. Michigan, S. D. November 19, 1886.)

## 1. COSTS—DEPOSITIONS NOT ADMITTED IN EVIDENCE.

When plaintiff is nonsuited upon the statement of his case by his attorney, the defendant is not entitled, in the taxation of costs, to include a charge for depositions taken against him by plaintiff, as the depositions are not, in such case, admitted in evidence.

## 2. SAME—WITNESSES NOT SUMMONED.

Witness fees are taxable in the case of witnesses whose attendance is procured in good faith, although they are not subpoenaed.

## Appeal from Clerk's Taxation of Costs.

On the trial of this cause the court directed a verdict for the defendant after the opening statement of plaintiffs' counsel to the jury and before the introduction of any testimony. No witnesses had been subpoenaed by defendant, but a witness was by him in good faith procured to attend for the purpose of testifying, but had not been sworn. The clerk declined to tax an item of \$35 attorney fees on depositions taken by plaintiff, upon the taking of which defendant's attorney had attended for the purpose of cross-examination; and also declined to tax the fee for the witness, on the ground that he had not been served with a subpoena.

SEVERENS, J. Respecting the item of \$35 for depositions, I do not find it necessary to decide whether, in case the depositions are used by being *admitted in evidence*, the party against whom they are taken may, if successful, tax the statutory fee therefor,—a somewhat difficult question,—because I am of opinion that the depositions were not admitted in evidence, within the meaning of the statute. *Stimpson v. Brooks*, 8 Blatchf. 456. The court ruled, on the statement of the plaintiff's case by his attorney, that he could not recover. The clerk's action in this particular will therefore be confirmed.

Respecting the second item, which is that of a witness fee disallowed solely because the witness was not subpoenaed, I am of opinion that the earlier and reported ruling of Judge WITHEY (*Anderson v. Moe*, 1 Abb. 299) in 1869 was sounder than the later ruling in this court (but not reported) by Judge BAXTER. The fact that the earlier ruling is reported, and the later is traditional only, leaves me, in a measure, free to follow my own convictions upon the point, and they are entirely in accord with the opinion of Judges GRAY and COLT, in the case of *U. S. v. Sanborn*, 28 Fed. Rep. 299. When a witness' attendance is procured in good faith, for the purpose of testifying in a cause, it appears to me there is nothing in the reason of the matter which should reject the allowance of the usual fees. Under such circumstances the witness attends "pursuant to law." It is a not unusual course in the actual practice of trials; and there is no reason that I am aware of which makes it necessary to put so technical a construction upon the statute as to exclude cases