WHITE *vs.* YELL.

A plea in abatement of former suit pending in the same court, must, under our statute, be verified by affidavit, as the truth of the allegation that the cause of action and the parties were the same in both suits could not appear of record; though similarity in amount, date, &c., and in names might raise a strong presumption of the truth of such allegation.

Writ of Error to Jefferson Circuit Court.

This was an action of debt, brought by James Yell, against Oscar L. White, in the Jefferson Circuit Court, on a writing obligatory for $600. The defendant pleaded the pendency of a former action against him, by the plaintiff, on the same cause of action in the same court. The plea is in the usual form, but not sworn to. On motion of plaintiff, it was stricken from the record because it was not verified by affidavit, and defendant excepted, declined to plead further, and permitted final judgment to go against him.

The case was determined in the court below before the Hon. JOSIAH GOULD, Judge.

F. W. &. P. TRAPNALL, for the Plaintiff.

S. H. HEMPSTEAD, contra. A plea in abatement of the pendency of another action must be verified by affidavit, because the parties and subject matter must be the same in both suits and these facts all dehors the record. (1 *Stra.* 522. 2 *Chitt. Pl.* 904, *note y.*) Mere similarity in name does not indicate that the parties are identically the same, (*State vs. Murphy,* 5 *Eng.* 77,) that being a matter of fact, and no intendment being allowed to support a plea in abatement. (1 *Saund. Pl. & Ev.* 3.) Where the matter is not

apparent on view of the record, an affidavit is indispensable. 1 *Com. Dig., Abatement J.* 11.

Mr. Justice WALKER delivered the opinion of the Court.

To this action, the defendant pleaded in abatement the pendency of another suit between the same parties for the same cause of action. The plea was in the usual form but not verified by affidavit, and for that reason was on motion stricken from the files.

The only question presented is, whether the truth of the facts set forth in the plea appears of record. If not, the statute expressly declares (unless it is a plea to the jurisdiction of the court) that it shall not be admitted. It no doubt sufficiently appears of record that another suit is pending, the nature of the action and the names of the parties. But whether it is the same identical cause of action in suit in the second action, or whether these are the same parties, although of like names, does not appear of record, and although an identity in the amount, date, &c., of the contract, or a similarity of names in the two actions, might raise a strong presumption that such might be the case, yet this does not satisfy the strictness of the rule in regard to issues in abatement. The plea itself indicates very clearly the extent to which the record is to be relied upon. After describing the action and the parties to it minutely, the plea proceeds, "As by the record and proceedings thereof remaining in the said circuit court, &c., more fully appears. And said defendant further saith that the parties in this and the former suit are the same and not other or different persons; and that the former suit so brought, &c., is still pending," &c. It is evident that these latter averments are not intended to be verified by the record; but are distinct matters requiring other proof.

But few adjudicated cases, either in England or America, are to be found directly in point. The case of *Gardner vs. Buckbee,* (3 *Cow.* 127,) has some bearing on the question. Upon an issue of former recovery, it was, in that case, held, "That the record of recovery merely proved the pleadings, and that judgment was rendered for the defendant, but without other proofs it would not

make out the defence." And this court, in the case of *The State vs. Murphy,* who was indicted for an escape after conviction, held that the record of the conviction was not evidence sufficient to establish the fact that the prisoner was the same person convicted of record; but that other proof should have been offered upon that point. (5 *Eng.* 77.) And, to this effect are the decisions of the English courts. 1 *Strange* 522.

Whilst, therefore, part of the facts constituting this defence appeared of record, other facts equally necessary did not so appear; and under the rules of strictness required in framing a defence in abatement an affidavit was necessary, at least as to those facts not evidenced by the record. Let the judgment of the Circuit Court be affirmed, with costs.