## ROSS ET AL., EXRS. *vs.* DAVIS.

Where, on appeal from the Probate to the Circuit Court, a motion is made by appellee to dismiss, for want of alleged compliance with pre-requisites to the granting of the appeal, and the motion is overruled, the grounds of the motion being properly matter in abatement, a renewal of the motion, and especially at a subsequent term, should not be allowed; and the court should not entertain the motion after passing upon the exceptions taken to the decision of the probate judge, and setting the case for trial *de novo*.

On appeal from the Probate to the Circuit Court, appellants are not required to give bond for costs. *Biscoe et al., v. Maddin ad., 7 Eng. R.* 765.

On appeal by several executors from the decision of the Probate Court allowing a claim against the estate of their testator, one of them filed an affidavit, stating that "*affiant is aggrieved,*" *&c.*, instead of that "*affiants are aggrieved,*" *&c.*: HELD, To be a clerical misprision, and that the affidavit was substantially good.

*Appeal from the Clark Circuit Court.*

Henry H. Davis filed, for allowance and classification, in the Probate Court of Clark County, a claim against Ross, Duncan and Flanagin, as executors of Wiley Newberry, deceased.

The executors contested the claim; a trial was had before the Probate Judge, the claim allowed and classed, exceptions taken by the executors, and an appeal prayed to the Circuit Court.

The following affidavit, for appeal, was filed:

"*Henry H. Davis, vs. Thomas A. Ross, Benjamin S. Duncan, and Harris Flanagin, executors of Wiley Newberry, deceased.*

I, Harris Flanagin, being duly sworn, do depose and say that the appeal in the above entitled cause is not taken for delay, or for the purpose of vexation, but that the affiant is aggrieved by the decision of the court"—signed by affiant.

No bond for costs was filed.

The proceedings in the Circuit Court, on appeal, are stated in the opinion of this court.

FLANAGIN, for the appellants.

WATKINS & CURRAN, contra.

Mr. Justice WALKER delivered the opinion of the Court.

In this case, a motion was made at the September Term, 1849, to dismiss the appeal, because (as alleged,) the statutory prerequisites to the granting an appeal by the Probate Court had not been complied with—which motion the court overruled. At the March Term, 1850, the motion to dismiss was renewed, and again overruled; and the court then took jurisdiction of the case, examined the exceptions, decided upon the errors, and set the case for trial *de novo* upon its merits at the next term. At the March Term, 1851, the motion to dismiss was a third time presented, and then sustained by the court and the appeal dismissed.

The grounds for the motion were properly matter in abatement; and, whether presented by plea or motion, the rules governing pleas in abatement, with regard to time, &c., are the same. Had the question been presented by plea, it would in order have preceded any defence in bar of the action, and would not have been subject to amendment, and when once decided, no second plea for the same cause could have been presented even at the same term, and before a plea to the action. And, if not at the same term, much less should it have been permitted at a succeeding term, and after the court had proceeded to investigate the merits of the appeal.

Independent of any consideration of the merits of the motion, we think the court erred in receiving and entertaining the motion to dismiss the appeal at the time it was dismissed. But upon examination of the grounds upon which the motion was made, we think them insufficient. The statute does not require the appellants to give bond for the payment of costs. *Biscoe et al., v. Maddin ad.*, 7 *Eng. R.* 765.

And the affidavit required by the statute, although not as definite in its terms as it might have been, is nevertheless not fa-

tally defective. The affidavit was made by one of the appellants, and the statement that "affiant is aggrieved," instead of "affiants are," &c., is the ground of objection. Taking the whole affidavit together, it is evidently a clerical misprision, which does not vary the sense and legal effect of the affidavit.

The Circuit Court, therefore, erred in dismissing the appeal; and, for this error, the judgment of the court must be reversed, with instructions to the Circuit Court to take jurisdiction of the case and proceed to hear and determine the same according to law, &c.

Mr. Chief Justice WATKINS did not sit in this case.