PRYOR *vs.* WILLIAMS' EX'R.

The transcript of the justice states,—"on this day came the parties by their attorneys, and plaintiff's account was proved by R: it is therefore considered by the court that plaintiff have and recover of defendant," &c.—Held that there being no formal pleading before justices, the statement by the justice that defendant appeared was sufficient evidence of the fact, that the judgment was not by default, and that an appeal would lie from it without any motion to set it aside.

The transcript of the justice states,—"appeal prayed and granted, affidavit and bond filed," &c.—Held that the entry sufficiently shows that an appeal was granted without any formal order by the justice granting it.

Writ of Error to the Circuit Court of Johnson County.

This suit was commenced by Philemon Williams upon an account for $100, money loaned, against Absalom B. Pryor, before a justice of the peace of Johnson county. The account was filed, and summonses issued 11th May, 1842, returnable on the 21st, which was duly served by the constable. The entry of judgment &c., by the justice as it appears in the transcript, is as follows: a line is drawn down the sheet, dividing it into columns, the right being the widest by an inch; on the right is the following entry: "Justices court, May 21st, 1842. In this case summons issued returnable on this day. Now at this day summons being returned served, plaintiff's account being filed here for $100, the parties came by their attorneys; and plaintiffs demand was proved by Jacob Rogers. It is therefore considered by the court here that plaintiff have and recover of and from the defendant the aforesaid

sum of one hundred dollars together with all costs in this cause." On the left is the names of the parties to the suit, a bill of the items of costs, a line, and then "appeal prayed and granted, affidavit & bond filed, June 4th 1842." Then running across the entire sheet below the columns, is the following entry: "Be it remembered that on this day personally appeared before me, &c., Absalom B. Pryor, who craves an appeal from a judgment on my docket in favor of Philemon Williams against said Pryor for $100, rendered 21st May 1842, and who after being duly sworn according to law deposes and says that the appeal is not taken for the purpose of delay but that justice may be done him. Sworn to and subscribed this 4th day of June 1842," &c. &c. Then follows the recognizance for the appeal.

The cause came on for hearing in the circuit court of Johnson county at the March term 1845, before BROWN, judge. Williams moved the court to strike the case from the docket on the grounds: "1st. The judgment of the justice is by default, defendant having failed to appear, and no appeal could be granted unless defendant had appeared within fifteen days after the rendering of the judgment, and moved to set it aside, which was not done: 2d. It does not appear from the justice's record that the defendant ever prayed an appeal, or whether the same was granted before or after bond and affidavit filed." The court sustained the motion, and Pryor brought error. In this court, the death of Williams was suggested, and the suit revived against Rogers, his executor.

BATSON for the plaintiff.

D. WALKER, contra. By the Revised Statutes, page 515, sec. 171, it is enacted that if judgment be rendered by default, the defendant, if he feels himself aggrieved, shall within 15 days thereafter move to set the same aside, and if the justice refuse then he may appeal. This salutary provision does not affect the constitutional right of appeal, but only requires that he who considers himself aggrieved, shall present his grievance to the inferior court before he complains of injustice there or troubles the higher tribunals with his complaint.

The record in this case simply states that the "parties appeared by their attorneys and that plaintiff proved his account." We contend that this is no appearance—there was no act done by the defendant. In order to constitute an appearance some substantive act must be done. *Murphy vs. Williams,* 1 *Ark. Rep.* 376. The mere presence of the party, if he interpose no defence, lessens rather than increases his claims to litigate further. No motion appears to have been made to set aside the judgment by default, and therefore the circuit court correctly refused to take jurisdiction of the case.

In the second place there was no appeal prayed or granted: there is an affidavit and bond, but no order was made granting the appeal. It is true there is a marginal note stating that such was the fact, but no order appears of record, nor is this marginal note signed by the justice. There is a marked distinction between certifying that an act has been done and doing it. Suppose the justice had said judgment rendered for $100—still it would be no judgment, nor is this an order. If correct in this, the circuit court acquired no jurisdiction by appeal. See 1 *Ark. Rep.* 205, *Ellis vs. McHenry. Smith vs. Stennett, id.* 497. *Woolford vs. Harrington,* 2 *Ark. Rep.* 85.

The circuit court correctly taxed the plaintiff in error with the costs of his motion; the court had jurisdiction to hear the motion and render judgment upon it.

OLDHAM, J. This was an appeal from the judgment of a justice of the peace to the circuit court. Upon the cause coming into that court, the appellee, for the reasons stated in his motion, moved "that the case be stricken from the docket." The court sustains the motion.

It is insisted by the defendant in error in support of the decision of the circuit court that the judgment rendered by the justice was by default, and that no appeal could be taken from it without a motion, in fifteen days after its rendition, to set it aside had been made and overruled. Upon examination of the proceedings before the justice we cannot agree that the judgment is by default. The

record states that the parties appeared by their attorneys. In most cases, such is the only evidence of appearance before justices of the peace. There are no pleadings in writing between the parties. The defendant may appear and perform many substantive acts of defence without any notice whatever being taken of them. The evidence of an appearance in the circuit court is very different from that before a justice of the peace, and the rules by which an appearance is determined in the one case are wholly inapplicable in the other. The justice has said upon his record that the defendant did appear and we cannot controvert that statement.

It is also contended that no appeal was prayed or granted. This position is also controverted by the record upon which the following appears: "appeal prayed and granted, affidavit and bond filed June 4th 1842." It is true that this entry appears upon the margin of the record, but justices of the peace cannot be held to the strict rules of technical formality. The entry as made contains substantial and satisfactory evidence of the facts stated in it that an "appeal was prayed and granted, and an affidavit and bond were filed." An affidavit in which an appeal is prayed from the judgment, as well as a recognizance in accordance with the statute, appears among the papers. The appeal was regularly taken and the circuit court erred in ordering the same to be stricken from the docket.

The judgment is reversed and the cause remanded to the circuit court to be reinstated upon the docket for a trial in that court upon its merits.