BROWN *vs.* BICKLE.

Matters in abatement must be pleaded as such, and at the proper time: and will not avail if attempted to be pleaded in bar.

Non est factum and *nul tiel record* may be pleaded together, in an action upon a bond which is of record in court.

Writ of Error to the Circuit Court of Crawford County.

DEBT, determined by Brown judge in February 1845. Bickle sued Brown. The declaration showed in substance that Bickle sued one Washbourne by attachment, and seized certain property to release which Washbourne executed his bond with Brown as his security, conditioned that he would appear and answer the plaintiff's demand at such time and place as by law he should, and would pay and abide the judgment of the court or his security would do the same for him—that such proceedings were had that he recovered judgment against Washbourne in the suit: that W. did not appear and answer the demand, nor abide the judgment, nor did his security do the same for him. The declaration is drawn with care, and the bond sued on set out by its words, letters and figures. The defendant pleaded *non est factum,* and six special pleas; first, that Bickle did not before suing out the attachment file a declaration or statement in writing of his demands as by law he should; second, that no affidavit was filed, as by law should have been done; third, that no bond was filed with the clerk as by law should have been; fourth, that no writ of attachment was ever sued out or issued as stated and set forth in the bond sued on; fifth, that there is no record of the supposed recovery mentioned in the declaration, remaining &c.; sixth, that before the execution of the bond sued on, the attachment was dissolved by order of plaintiff's attorney, all the pleas conclude with verification. To the six special pleas there was a demurrer and joinder. One cause of demurrer assigned was, that the bond sued on, showed upon its face that the declaration, affidavit and bond, had been filed according to law, before the at-

tachment issued, and that the attachment was duly issued, so that the defendant was estopped by his bond to deny these things. Another cause was, that as to the fifth plea the defendant was estopped to plead *nul tiel record,* he having pleaded *non est factum.* There were other causes assigned the substance of which are that *nul tiel record* was no answer to the declaration—and that all the pleas presented no material issue, and were uncertain and insufficient.

The demurrer was sustained—issue was joined upon the *non est factum* and on trial a verdict and judgment for the plaintiff. Brown brought error.

W. WALKER, for the plaintiff. The demurrer to the 2d and 3d pleas was erroneously sustained. The filing of a bond and affidavit in attachment, as required by the statute, are conditions precedent to the issuing of the writ; and a failure to file such bond or affidavit may be pleaded in abatement even after the defendant has filed bond for the dissolution of the attachment. *Delano et al. vs. Kennedy,* 5 *Ark. R.* 457.

If the writ issue before the filing of the bond or affidavit, the attachment will be a nullity; and the plaintiff will not be entitled to recover on the bond filed by the defendant for the dissolution of the attachment. The security in a bond filed for the dissolution of an attachment can avail himself of any error that may exist in the original action. "If there be error in the original judgment the bail may take advantage of it on the scire facias against him for he cannot have error on that judgment; otherwise, if there be judgment on the scire facias, for then it would be too late to complain of an error in the original judgment." 5 *Dane's Abr. ch.* 150, *art.* 2, 88. See *Hume vs. Leveredge,* 3 *Tyrw.* 257. *Morton vs. Danvers,* 7 *Ten. R.* 375.

The precedents for the 2d and 3d pleas will be found in 1 *Chitty's Precedents* 447 and 448.

The demurrer to the 4th plea was improperly sustained. On scire facias against bail, and in actions on bail bonds, the bail can plead that no process issued in the original action. 5 *Dane's Abr.*

ch. 163. 3 *Chitty's Pleading, m. p.* 520. *ib.* 478. 1 *Chitty's Precedents,* 448.

In actions on bail bonds, and on scire facias against bail, that *nul tiel record* may be pleaded. See 6 *Dane's Abr. ch.* 190, *art.* 4, *sec.* 21. 2 *Com. Dig. title Bail,* 58 *R.* 1 *Chitty's Pleading, m. page* 521. *Story's Pleading* 336. 2 *Chitty's Pleading* 489. That the plea concludes correctly. See 5 *Dane's Abr. ch.* 169, *sec.* 9. 1 *Chitty's Pleading, m. p.* 558. If the conclusion were improper it could be taken advantage of only on special demurrer. 6 *Com. Dig. title Pleader E.* 29.

That *non est factum* and *nul tiel record* may well be pleaded together. See *Rev. St. ch.* 116, *sec.* 68.

OLDHAM, J. All the matters set up by the defendant in the court below, in his first four pleas, are matters in abatement, of the action by attachment, of which the defendant in that action might have availed himself at the proper time. The bond for the release of the property having been voluntarily executed for a valuable consideration the pleas furnish no discharge from liability upon it.

The fifth plea traverses an averment alleged in the declaration and necessary to be proven to entitle the plaintiff to recover. The plea being in the negative properly concludes with a verification. In 1 *Ch. Pl.* 537, it is said "when the declaration is founded on matter of record, which is traversed by the plea, it should not in general conclude to the country, but should allege there is no such record and usually concludes with a verification and prayer of judgment *si actio.*" The demurrer questions the sufficiency of the plea to bar the right of the plaintiff to recover and not whether the plea is inconsistent with some other plea interposed by the defendant.

The sixth plea is vague and indefinite. It is an essential rule of pleading that a party must either traverse or confess and avoid the allegations of the opposite party. This plea does not conform to that general rule, but is wholly vague, indistinct and uncertain. But for the error in sustaining the demurrer to the fifth plea, the judgment must be reversed.