COX ET AL. vs. GARVIN ET AL.

Bond for costs is no part of the record unless made so by bill of exceptions.
This court will not inquire whether the reasons which influenced the decision of the circuit court were sufficient to authorize the decision pronounced, but whether the decision itself be correct.
The reasoning of the judge is no part of the record.
To authorize a court in dismissing a suit for want of bond for costs, it should be made to appear, in addition to the non-residence of the plaintiff, that no bond was filed.
Motion to dismiss for want of bond for costs, being matter in abatement, an affidavit is necessary to introduce it, and the affidavit of the defendant that the facts stated in the motion are true, is not sufficient proof that no bond was filed.
Where the court below overruled a motion to dismiss for want of bond for costs, this court, in aid of the judgment below, will presume that a bond was filed unless it affirmatively appear from the bill of exceptions that one was not filed.

Appeal from the circuit court of Benton county.

THIS was an action of debt by Garvin, Carson & Co., against Cox & Kelly, determined in the Benton circuit court. Judgment was rendered, by default, against defendants, and they brought the case to this court, and reversed it on account of defective service of the writ. See 5 *Ark. R.* 644. At the May term, 1845, the mandate of the Supreme Court was filed, and the case again determined before SNEED, judge.

The defendants below, Cox and Kelly, moved the court to dismiss the case for want of bond for cost: and, in the language of the record, "the court after hearing said motion, overruled the same, and the said defendants having nothing further to say in bar or preclusion of the said plaintiffs' cause of action, and the said plaintiffs having produced to the court here the writing sued upon, which gives to the court sufficient evidence of the justness of the plaintiffs' demand it is therefore considered," &c.—then follows the final judgment.

The defendants excepted to the overruling of their motion, and took a bill of exceptions setting out, first, their motion in these

words: "And the said defendants come, and move the court here to dismiss this suit, because the said plaintiffs are and were non-residents of the State of Arkansas at the time of the institution of the suit, and failed to file a bond for costs, as required by law, previous to the institution thereof." The motion was verified by the affidavit of one of the defendants. Then followed, in the bill of exceptions, this statement: "And thereupon the plaintiffs admitted that it is true that they were, before and at the institution of their suit, non-residents of this State, whereupon the motion and the facts thereon were submitted to the court; and the plaintiffs insisted that, after making themselves parties to this suit by prosecution of their writ of error, and being so ordered and directed by the decision of the Supreme Court in this case, defendants could not now interpose this motion: and the court, after due consideration, overruled said motion of said defendants on the ground that said motion could not now be interposed, after defendants having made themselves parties to the record by the prosecution of the aforesaid writ of error—to which opinion of the court in overruling said motion the defendants except at the time, and pray that this bill of exceptions, containing the whole of the evidence and facts before the court, may be signed, sealed," &c.

Then follows in the manuscript an informal bond for costs, which seems to have been filed by the counsel of the plaintiffs at the institution of the suit, but it is not part of the bill of exceptions, nor does it seem to have been made part of the record by any order of court.

The defendants appealed. The counsel for the appellants assigns for errors, that the court below overruled the motion to dismiss, and rendered final judgment instead of *respondent ouster.*

D. WALKER, for the appellants.

The first question to be decided is, had the defendants a right to this defence. The defendants were in court for the first time on the return of the record; it was to them the return term. They might avail themselves of any defence whatever. They made their motion, verified by affidavit, that no bond had been filed for costs and the plaintiffs when they commenced their suit, were and yet

are non-residents. This is substantially a plea in abatement. *Kittlerull vs. Scull,* 3 *Ark. R.* 477. It may be interposed either by plea or motion, at any time before defence to the merits of the action. *Clark vs. Gibson,* 2 *Ark. R.* 113. After several terms had elapsed and defendant had died, and his representatives brought in by scire facias, they were allowed this defence and by motion. *Owens use &c. vs. Finley,* 3 *Ark. R.* 143. There, as here, the non-residence of the plaintiff is admitted of record. Moreover, in this case we verify our motion by affidavit, which supersedes the necessity of all proof and throws the burden of proof on the plaintiff. An objection that there is no bond for costs is waived by pleading to the merits. *Lincoln vs. Hancock,* 5 *Ark. R.* 404.

If it be objected that the bond for costs was not saved by bill of exceptions under the decision of *Montgomery vs. Carpenter,* 5 *Ark. R.* 264, the answer is, first, that that was a motion to dismiss because the bond was insufficient; here the objection is that there was no bond filed: how could we set it out? There the record failed to show that they were non-residents: here the fact is admitted of record, and saved in the bill; here also the affidavit to the motion put the plaintiff to the proof of his bond and residence.—There is, however, a bond copied into the record, precisely such a bond as was adjudged insufficient in the case of *Pelham vs. Grigg & Elliott,* 4 *Ark. R.* 141. I care not, however, whether notice be taken of it or not. Concede it to be no part of the record: its sufficiency was not raised by the motion, nor was that the question decided by the court. The court refused to hear the motion: how could the bond be brought into the bill of exceptions? The court did not decide the bond a good one: the decision was that we could not interpose the motion at that stage of the pleadings: that because the Supreme Court had decided that we were to be considered as served with notice we could not plead in abatement. The case of *McQuaid vs. Tait,* 5 *Ark. R.* 310, is in our favor. There the testimony was not preserved; here it is, and no such presumpsion can be indulged.

The second exception is so manifestly clear that it is only necessary to refer the court to the authorities. This defence was in

abatement. Final judgment could not be rendered on it if the defence was bad. The judgment should have been *respondent ouster. Renner vs. Read,* 3 *Ark. R.* 339. *Fulcher vs. Lyon,* 4 *Ark. R.* 446. *Gould's Pleading, page* 300.

E. H. ENGLISH, contra.

The motion to dismiss for want of sufficient bond for costs, was a preliminary question for the decision of the court. Being determined against appellants, they had a right to plead over. That they were afforded an opportunity so to do, and declined, is manifest from the record. "Having *nothing to say in bar or preclusion* of the action," final judgment, *nil dicit,* was then properly rendered against them.

Did the court err in overruling the motion to dismiss? This court, in accordance with a well established rule, will presume in favor of the correctness of the judgment below, and require it to be shown affirmatively that it was wrong. If it were necessary for the plaintiffs to file a bond for costs before commencing their action, and if they did not, or filed a defective one, these facts must expressly appear from the bill of exceptions, otherwise this court will presume the court below properly overruled the motion to dismiss. A bond for costs is no part of the record. *Montgomery vs. Carpenter,* 5 *Ark. R.* 264. And the court could not know whether one was filed or not without the proper proof. The bill of exceptions does not show that it was made to appear to the court that no bond, or a defective one, was filed. The motion, sworn to by one of the defendants, states that no bond was filed, but the motion was in the nature of a plea in abatement, and defendants were bound to prove the facts set up in it *aliunde.* To allow the affidavit of one of the defendants as proof of the facts stated in the motion, would be to make him a witness for himself.

The bond copied in the transcript being no part of the record, this court cannot notice it, to determine whether it is defective

This court having nothing to do with the argument of counsel, or the reasoning of the court below, as set out in the bill of exceptions—it has not to determine whether the reasons given by the

court for overruling the motion were sufficient, but to decide the *naked point*—did the court err in overruling the motion? If the court did err, the judgment being correct, it matters not though the judge arrived at a correct conclusion from erroneous premises. Inasmuch as it does not expressly appear from the bill of exceptions that no bond for costs was filed, this court must presume the judgment of the court below to have been correct.

OLDHAM J., not sitting.

MACLIN, special judge, delivered the opinion of the court.

The defendants below filed their motion to dismiss this suit because they alleged that the plaintiffs were not residents of the State of Arkansas, and had failed to file a bond for costs, which motion was overruled by the court, and the defendants saying nothing further, final judgment was rendered for the plaintiffs.

To authorize a court to dismiss a suit for want of a bond for costs, two facts should be made to appear: *First,* That the plaintiffs are not residents; And *secondly,* That they failed to file a bond for costs as required by law, before the institution of the suit. The first fact was admitted in this case, but the record is silent as to the existence of the other. The bond for costs is no part of the record. *Montgomery vs. Carpenter,* 5 *Ark. R.* 264. If no bond for costs was filed before the institution of the suit, that fact should have been made to appear by the bill of exceptions, to authorize this court to reverse the judgment. Upon this point the bill of exceptions is silent, but it shows that the only fact established was, the non-residence of the plaintiffs. The bill of exceptions states that the motion and the facts therein were submitted to the court, and the plaintiffs insisted that the defendants, after having made themselves parties by prosecuting their writ of error to the Supreme Court, &c., could not now interpose their motion to dismiss; and the court, after due consideration, overruled the motion upon the ground that said motion could not be made, &c. The motion was made, the non-residence of the plaintiffs admitted, and upon these facts the motion was submitted to the court.

This court cannot inquire whether the reasons which influenced the decision of the court was sufficient to authorize the decision pronounced, but whether the decision itself be correct. In the case of *Coolidge vs. Ingle,* 13 *Mass. R.* 50, it was held that "the reasons given for the final opinion of the court is not a part of the record." Although the bill of exceptions in this case sets forth the reasons given by the circuit court for the decision upon the motion to dismiss, yet those reasons cannot be regarded as part of the record, or be considered by this court. In *Pike vs. Lenox,* 2 *Ark. R.* 14, it was held that "the object of a bill of exceptions is two-fold: First, It is to object to the opinion of the court on some point of law, and refers generally to the competency of witnesses, the admissibility of evidence or the legal effect of it, or the like; and secondly, It is to reduce to writing and incorporate on the record the substance of the transaction on which the opinion of the court is founded; so that the court above, when called on to revise the decision, may be able to see and correct the errors, if any exist." And the question thereby presented is whether the facts, which induced it are sufficient to justify it.

The only question presented by the record in this case is, whether the facts authorized the decision of the court in overruling the motion. To have authorized the court to dismiss the suit, it should have been satisfied, in addition to the non-residence of the plaintiffs, that they had filed no bond for costs. The affidavit of the defendant, Kelly, did not establish that fact. That being necessary for the introduction of the motion, it being a subject of abatement. The record being silent upon that point, this court, in aid of the judgment of the circuit court, must presume that a bond for costs was filed before the institution of the suit.

The judgment of the circuit court is affirmed.