COCKE EX'R OF POPE *vs.* WALTERS.

By the common law an executor might commence an action in right of his testator, but could not declare, before probate of the will.

Under our statute, the declaration is filed before the writ issues, and therefore the will must be admitted to probate before the institution of the suit.

A profert of letters testamentary in general terms, without alleging that the will has been proven, or showing by what authority it had been admitted to probate, is sufficient.

If the defendant desires to question the validity of the probate, or the regularity of the grant of letters, he should crave oyer, and make them part of the record.

Hynds' ex'r. vs. Imboden, 5 *Ark. R.* 385, reviewed, and held to reconcile with this opinion.

Writ of error to the circuit court of Pulaski county.

THIS was an action of debt, by John W. Cocke, as executor of John Pope, deceased, against Ebenezer Walters, determined in the Pulaski circuit court, in December, 1845, before CLENDENIN, judge.

The action was founded upon a writing obligatory, executed by the defendant to plaintiff's testator during his life; and the declaration was in the usual form, concluding with a profert of letters testamentary as follows: "And the said plaintiff brings into court here the letters testamentary of the said John Pope, deceased, whereby it fully appears to the said court here that the said plaintiff, John W. Cocke, is executor of the last will and testament of the said John Pope, deceased, and hath the execution thereof, &c."

The defendant demurred to the declaration, and assigned for causes of demurrer: "1st, that the writing obligatory therein mentioned was made payable to the said John Pope, and not to plaintiff: 2d, it nowhere appears upon said declaration that the said plaintiff has any right whatever to sue upon said writing obligatory: 3d, it nowhere appears upon said declaration that the said alleged will, of the said John Pope, was ever proven and established before any competent court or tribunal." The court sustained the demurrer, and, the plaintiff declining to amend, gave judgment for defendant. Cocke brought error.

RINGO & TRAPNALL, for the plaintiff.

The profert of the letters testamentary is made in the precise language of the form or precedent of the profert in such cases found in 2 *Chitty, marginal page,* 34. This precedent, we insist, is authoritative evidence that such profert is sufficient according to the common law, and the law or rules of pleading and practice in such case under it: and we have no statute or rule changing the common law or the form of pleading under it in this particular. Nor does the legislation of this State, prescribing rules to be observed in regard to the pleadings in our courts, warrant the conclusion that greater certainty in setting forth the rights of parties litigant in

their respective pleadings, may be required by the courts than was required by the common law and the rules of pleading established by and under its authority, and used in and approved by the courts of common law in England. But on the contrary, the certainty in pleading required by the common law has been greatly relaxed by various statutory provisions as well as the general course of practice in our courts. Consequently we conclude, that the profert in this case is sufficient, and that the judgment given on the demurrer to the declaration is erroneous.

The principle that an executor derives his authority and right to the property and effects of his testator by and from the will, which is the act of the testator: and consequently may institute suits founded on obligations to his testator, before the will is proven, is too well established and too familiar to admit of any question. *Toller's law of Executors, page* 46, 47.

In this principle, important and well defined as it is, consists the most essential difference between the rights of executors and those of administrators—the latter deriving their rights and authority exclusively from the act of the ordinary, or grant of administration, by what tribunal soever it is made; and this characteristic distinction pervades the form of pleading or profert of the one or other. The profert in the case of the executor referring for his authority to the will of his testator, by the style of "the letters testamentary of the said J. P., deceased, whereby" &c., which signifies simply that the testator by his will has appointed the plaintiff executor thereof or of his estate; and this fact is legally proven by production of the will probated according to law, whether such probate was made before or after the institution of the suit. While the profert by the administrator necessarily refers to the act by which he is constituted the representative of his decedent or intestate, and mentions the tribunal or authority by which or by whom such administration was granted; and to prove this allegation he is bound to show by competent proof that the administration was granted to him by some tribunal invested with the jurisdiction or power to grant it; and this can only be done by producing the original act or record of such grant, or a duly authenticated

transcript thereof, or the letters themselves or a certified transcript thereof. This view of the matter not only proves the pleading and profert in this case to be technically correct, but also shows the reason for the difference in the form of the profert, as shown by the precedents; and at the same time reconciles all the adjudications to be found on the subject.

In reply to the defendant, we insist that the case of *Hynds' ex'r vs. Imboden,* 5 *Ark. R.* 385, upon which he mainly relies, is in no respect analogous to the present, and in no way involved the question presented by the pleadings in this case. The question here being upon the form or manner of pleading, making or setting out and declaring the right and authority of the plaintiff in his declaration; which the sole question in the case cited was as to the right or authority of the plaintiff shown by the oyer; which consisted of letters testamentary, not of the testator, but granted by a person or tribunal not invested by law with the jurisdiction or power to take and determine upon the proof adduced to establish the will, or issue such letters; which fact appears affirmatively from the oyer granted by the plaintiff of his letters or authority: by which it also appeared that the will of his testator at the time of the trial of said case had never been proven and established according to law. Consequently he had no right of action: but on the contrary, if his oyer had shown the will to have been legally proven and established at any time prior to the trial (whether before or after the institution of the suit is immaterial) the judgment of the Supreme Court would unquestionably have been in his favor, so far as it regarded his right to represent the testator in respect to the obligations then in question.

PIKE & BALDWIN, for the defendant.

The only point presented by the record is as to the sufficiency of the profert of the will. In the circuit court the case turned upon *Hynds' ex'r vs. Imboden,* 5 *Ark. R.* 385, where it was, in effect, decided that such profert as is made in the present case is insufficient It was held, and very properly as we think, in that case that the plaintiff must show in himself a legal title before he

can sue, and that he cannot make that showing but by showing the death of the payee and the subsequent commission to the plaintiff, by competent authority, the execution of the last will or grant of administration, &c. Consequently profert must be made and such profert as makes a clear title in the plaintiff. The form adopted in the case at bar is strictly in conformity with the English precedents. But the English practice with regard to last wills and administrations is very different from ours, and ought, in the very nature of things, to afford no precedent. The courts of this country will not give a blind adhesion to English forms unless the case warrants it. They will, and no doubt ought to, keep within the line of the precedents until the reasons for them fail; after which our own laws form the only guide.

In England one court takes proof of all wills, and grants letters of administration, and this is done in the Arch Bishop's court.—When, therefore, an English pleader says he "brings into court here the letters, &c., which give to the court here sufficient evidence of his right to sue," the substance of the law has been complied with: for the court there is bound to know that the letters were granted by the proper court, if at all—no other court having authority to make such a grant. But here the case is entirely different. Each county has a tribunal specially established for the purpose of supervising the conduct of executors and administrators, and the sole power of granting letters. Besides: we have a statute which authorizes a foreign administrator to sue in the courts of this State. *Acts* 1842, *p.* 105. Now, upon reading the declaration in the present case, the enquiry naturally suggests itself, what court made this grant? Was it in any county in this State, or was it in some court in the State of Kentucky? Under the peculiar statutes of this State we are entitled to know these things before called upon to make defence.

In *Watkins vs. McDonald,* 3 *Ark. R.* 266, the declaration was a literal copy from the English precedents, as to the formal parts, but this court held that the declaration was bad, and that case has been since implicitly followed; thus showing from the whole course of decisions of this court that the English precedents can only

govern where the reason of their rules conforms to our statutes; and this, in fact, is so declared by our statute, page 182. It is only where they are of a general nature and applicable to our constitution and laws. The whole system of probate in this country is dissimilar to that of England.

If the plaintiff is Executor by virtue of an appointment in Kentucky, the officers of the court ought to be apprised of it, so as to require him to give the necessary bond required by statute authorizing him to sue here.

It may be contended possibly by the plaintiff, that the case of *Hynds vs. Imboden,* is not a decision in point; but only a *dictum* of the Judge who delivered the opinion. This can avail nothing but the reasoning upon which his Honor there proceeded and the peculiarity of our statutes, and the uniform decisions of this court in cases of this sort fully warranted the decision below.

WATKINS & CURRAN, also for defendant.

In this case the declaration was demurred to because there was no sufficient profert of the letters testamentary. The profert is made in language precisely similar to that in the case of *Hynds' ex'r vs. Imboden,* 5 *Ark. R.* 385, and which in that case was adjudged insufficient by this court, but held to have been waived by the prayer and grant of oyer, which made the letters part of the declaration; and the objection for want of profert came too late from the defendant. In that case the want of profert of the letters is held to be good ground of demurrer; and if that case be law, it is decisive of the only question arising in this case.

But since that suit (*Hynds' ex'r vs. Imboden*) originated, the Act of the General Assembly of the 1st February, 1843, has been passed, allowing administrators, executors, &c., appointed in any of the States, &c., of the United States, to sue in the courts of this State in their representative capacity, with the like effect as if they had been qualified under the laws of this State, "provided that they shall be required before they shall institute such suit or proceeding to execute the like bond as is required of other non-residents by the laws of this State." This act strengthens and confirms the rea-

soning of this court in the case of *Hynds and Imboden.* Since its passage, unless the declaration shows, "when and by what authority the letters were granted," a foreign administrator can evade the law which authorizes him to sue upon the condition of giving bond for the costs of suit. The suit may be dismissed, but if he sues in his representative capacity he is not personally liable, and there are no tangible assets of the estate, or what is the same thing, no representative through whom they can be reached. The Act in question is the only authority by which a foreign administrator can sue in our courts. It contemplates, as we contend, that the plaintiff shall disclose upon the record, whether his administration is of foreign or domestic origin, not only as affecting the obligation for costs, but upon grounds of public policy, that the plaintiff should declare in what state and to what jurisdiction he is accountable for the assets sought to be recovered.

JOHNSON C. J., delivered the opinion of the court.

The plaintiff insists that the circuit court erred in sustaining the defendant's demurrer to his declaration. At common law an executor was permitted to commence actions in right of the testator, as for trespass committed or goods taken or on a contract made in the testator's life time, although he could not declare before probate, since, in order to assert such claims in a court of justice, he must produce the copy of the will, certified under the seal of the ordinary, or, as it is sometimes styled, the letters testamentary, but when produced they shall have relation to the time of suing out the writ. The reason why probate was necessary before the plaintiff declared, is that he was required to make profert of his letters in his declaration. The statute of this State, in requiring the declaration to be filed in the office of the clerk before the issuance of the writ, necessarily requires that the will should be admitted to probate before the institution of the suit. In the case of *Hynds' ex'r vs. Imboden,* 5 *Ark. R.* 387, the court say that "in the case under consideration the declaration contains a profert in general terms of letters testamentary, granted by the plaintiff as executor of the last will and testament of John Hynds, deceased, which

however defective it may have been on account of the omission to show when, or by what authority, the letters were granted, the defect in this respect is shown by grant of oyer of the letters, a certified transcript whereof was thereupon made parcel of the record by a literal copy thereof being inserted in the defendant's pleading; whereby, according to the well established rule in such case, the law regards it as constituting a part of the previous pleading of the plaintiff, and therefore the letters so shown upon oyer must now receive precisely the same consideration which they would have received if they had been literally copied into and made to form a part of the plaintiff's declaration; and thus the question of their validity is distinctly presented by the demurrer to the declaration." It is contended by the plaintiff that the principle asserted in that decision is conclusive upon the point, and that consequently no doubt can now exist as to the insufficiency of the declaration. We do not understand the court in that case as asserting the necessity of alleging in the declaration that the will had been proven, and also of showing by what authority it had been admitted to probate, but rather as suggesting a doubt of the necessity of such an allegation. We could not, under our impressions of the law, think of giving sanction to the doctrine contended for by the defendant without a direct and unequivocal adjudication, and that too where the question had been necessarily involved.—The profert, as made in this case, we conceive to be in strict accordance with the law and supported by the best and most approved precedents. If the defendant desired to question the validity of the probate or the regularity of the grant of letters, he should have craved oyer and made them a part of the record. If he had craved oyer and had them spread upon the record he could legitimately have questioned their validity; but having failed to do this, he will not now be permitted to controvert the right of the plaintiff to prosecute the suit. We are therefore, of opinion, that the circuit court erred in sustaining the defendant's demurrer, and that therefore the judgment ought to be reversed. Judgment reversed.