

HICKEY ET AL. vs. SMITH ET AL.

Where a motion to dismiss a suit for want of bond for costs is overruled, and the record fails to show that any evidence was offered in support of the motion, this court will presume in favor of the decision of the court below —as in *Cox & Kelly vs. Garvin, ante*.
Judgment against three defendants without service of the writ or appearance as to one of them, reversed.

Writ of error to the circuit court of Pope county.

THIS was an action of debt, by Smith, Hubbard & Co. against John Hickey, Gibson, and James Hickey, determined in the circuit court of Pope county, at the September term, 1843, before the Hon. R. C. S. BROWN, judge.

The action was founded on a writing obligatory for the payment of money.

The writ was served, by the Sheriff, upon John Hickey, Gibson, and returned not found as to James Hickey.

John Hickey appeared, by attorney, and filed a motion to dismiss the suit, stating in the motion, as grounds of dismissal, that the plaintiffs were non-residents, and had filed no bond for costs before the institution of the suit. The court overruled the motion, and no further defence being interposed, rendered final judgment against all the defendants.

The motion to dismiss is not verified by affidavit, and no bill of exceptions was taken to show what evidence was introduced in support of the motion. A defective bond for costs, which seems to have been filed by the plaintiff at the commencement of the action, is copied into the record, but it is in no way made part of the record.

The defendants brought error.

BATSON, for the plaintiff.

OLDHAM, J., delivered the opinion of the court.

It is contended by the plaintiffs in error, that the circuit court erred in overruling the motion to dismiss the suit for want of a bond for costs. The record failing to set out any evidence whatever in support of the motion, the presumption is in favor of the decision of the court below. *Montgomery vs. Carpenter*, 5 Ark. R. 264. *Cox & Kelly vs. Garvin*, decided at this term, *ante*.

The judgment, however, is rendered against all the defendants, without any service of notice upon James Hickey, or voluntary appearance by him. In this there is error, for which we reverse the judgment, and remand the cause to be proceeded in according to law.