OUTLAW ET AL. *vs.* YELL, GOV. &C. USE CONANT & CO.

In an action upon an administration bond assigning as a breach, that the administrators did not keep a list of the claim, which had been legally exhibited to them, nor class the same, nor make return thereof to the Probate Court, it is no defence to say:

That the administrators had no assets of the estate at the time of the institution of the suit upon the bond or since;

Nor that the administrators gave due notice, but the plaintiffs did not exhibit their claim in time, and the assets were exhausted in paying other claims; unless they aver that such other claims were exhibited and allowed within the twelve months;

Nor that there were other claims against the estate having priority, nor that the estate was exhausted in paying other debts having priority, unless they aver that such claims were exhibited and allowed:

Nor that there was a large amount due the administrators of fees, unless they aver that they were allowed;

Nor that there is not sufficient to pay the widow's dower—the death of the intestate occurring in the year 1837, and the widow not being entitled to dower until after debts paid;

Nor that the claim was not allowed by the administrators or by the court,—the exhibition of the claim not being negatived;

Nor that the debt was not ordered to be paid by the Probate Court, out of the estate.

The securities in an administration bond are estopped by their deed from denying that their principals were administrators, as described in the bond.

It is error in the court, upon finding the issues, on the pleas of *nul tiel record,* in favor of the plaintiff, to assess damages. The court should render an interlocutory judgment, and call a jury to assess the damages.

Appeal from the Circuit Court of Jefferson county.

This was an action instituted in the Circuit Court of Jefferson, by A. Yell, Gov. &c., against Medicus R. T. Outlaw, Grant T. Fanning and Mary his wife, late Mary Fugate, Abraham Dardenne, Ignace Bogy and Joseph Bonne, on the administration bond of Outlaw and Mary Fugate, as administrators of Joseph Fugate, and determined at the April term, 1846, before the Hon. WILLIAM H. SUTTON, Judge.

The declaration sets forth a bond executed by the defendants, on the 25th Feb'y, 1837, conditioned that the administrators make a perfect inventory, &c., and return the same to the office of the clerk of the County Court of said county, on or before, &c., and well and truly administer all the goods, &c., and pay the debts, &c. and make settlements according to law, or the order, &c. of a court having competent jurisdiction, and well and truly do and perform all other matters and things touching said administration, as shall be prescribed by law, &c.; and assigns as a breach of the condition, that Conant & Co., having a claim against the estate, brought suit against the administrators, that process was duly served upon them, whereby the claim was legally exhibited; and that they recovered judgment by confession against them; that they did not keep a list of said claim, nor class the same, nor make return thereof to the Court of Probate, and avers that, at the time of the exhibition of the claim and the recovery of the judgment, the administrators had sufficient assets of the estate, unappropriated, to pay the same.

The defendants, Bogy, Bonne and Dardenne, filed eleven pleas: 1st. That the administrators had not, at the time of the institution of the suit, or since, any goods, &c., of the estate to be administered; 2d. That the administrators gave due notice, &c., but that Conant & Co. did not exhibit their claim in time, and that the assets were exhausted in paying other claims; 3d. That, at the time of the rendition of the judgment, in the declaration, there were other claims against the estate having priority; 4th. That the estate was exhausted in paying debts

having priority; 5th. That the administrators were entitled to retain a large sum for fees and services; 6th. That the widow was entitled to dower, and the estate remaining in the adminstrators' hands, was insufficient to pay the same; 7th. That the debt of Conant & Co. was not allowed by a court having competent jurisdiction, or by the administrators; 8th. That the debt was never ordered to be paid by the Probate Court of Jefferson county, out of the estate; 9th. That there is no record of any such suit remaining in Jefferson county, instituted by Conant & Co., against the administrators, as is set forth in the declaration; 10th. That there is no record of any such judgment; 11th. That said judgment was rendered against Mary Fugate and M. R. T. Outlaw, in the individual, and not in their representative capacity.

The plaintiffs demurred to the 1st, 2d, 3d, 4th, 5th, 6th, 7th, and 8th, pleas, and filed general replications to the 9th, 10th, and 11th. The demurrers were sustained. Dardenne, by leave of the court, filed four additional pleas; all of them, in substance, that Mary Fugate and Medicus R. T. Outlaw, were not legally appointed administratrix and administrator of the estate of Joseph Fugate, deceased. The plaintiff demurred, and the court, sustained the demurrer.

The case was then submitted to the court, sitting as a jury, on the issues to the 9th, 10th, and 11th pleas; the court found for the plaintiff on the issues, and proceeded to assess the damages; and rendered judgment. The defendant moved for a new trial, but the court overruled their motion, and they filed their bill of exceptions, setting out the testimony, and appealed to this court. The only evidence given on the trial, was the record of the proceedings and judgment set out in the declaration, consisting of the declaration and endorsement, the summons, return and endorsement, and the appearance and confession of the defendants, and the final judgment, which is not variant from the judgment stated in the declaration.

S. H. HEMPSTEAD, for the appellants. The demurrer to the second plea ought to have been overruled: the plea presents sufficient matter to bar the action. It was not necessary that the administrator should give notice, or aver it, for the act requiring notice is directory

merely, and the bar will attach whether the advertisement has been made or not. 3 *Yerger Rep.* v. 431. *Cooke Rep.* 200. 5 *Yerger,* 299. 5 *Haywood Rep.* 224. Nor can a debt which is against an estate be revived by the promise of the administrator to pay, or by confessing judgment thereon after the bar has attached. *Peck* v. *Wheaton, Martin & Yerger Rep.* 253. It is a good plea in bar to a claim against an estate, that the assets have been applied to claims of higher dignity, or that the assets will only be sufficient to discharge debts of a higher dignity made known to the executor and administrator. *Hartley* v. *ex'r of Gaines,* 4 *Hay. Rep.* 159. *Territorial Dig. sec.* 18, *p.* 53; *sec.* 29, *p.* 59. *Erwin* v. *Turner,* 1 *Eng.* 14. *Ter. Dig. sec.* 31, *p.* 61.

The separate pleas of Dardenne are sufficient to bar the action. The two first set up as a defence, that Mary Fugate and M. R. T. Outlaw, principals in the bond sued on, were appointed administratrix and administrator by the *County,* and not by the *Probate* Court of Jefferson county. The letters of administration were, therefore, void, and could not authorize them to represent the deceased, or allow or class a claim, or indeed do any act whatever. This doctrine has been frequently asserted by this court. *Heilman* v. *Martin,* 2 *Ark.* 162. *Hynd* v. *Imboden,* 5 *Ark.* 386. *Biscoe* v. *Butts, id.,* 307. *Const. Art.* 6, *sec.* 10. *Acts of* 1836, *page* 179. 1 *Saund.* 274, *note* 3. 5 *Co.* 30. 1 *P. Wms.* 43. 1 *Stra.* 75. *Carter* v. *Menifee,* 4 *Ark.* 153. If the appointment of those persons was void, it necessarily follows that the bond taken in consequence thereof was void also, and that no action can be maintained upon it, and especially against sureties. *Ashley* v. *Brazil,* 1 *Ark.* 151. *Heilman* v. *Martin,* 2 *Ark.* 168. 5 *Hay.* 121. *Martin* v. *England,* 5 *Yerg.* 317. *Germond* v. *The People,* 1 *Hill* 344.

But it is said that the sureties are estopped from denying that their principals were duly appointed administratrix and administrator, and on that ground the demurrer was rested and sustained. Estoppels are odious in law, but there could be none here, because the effect of it would be to make a proceeding valid, which, by our constitution and law, is not merely voidable, but utterly void. The foregoing authorities will show that this is a case to which such an estoppel

will not apply. 3 *Keble* 362. 1 *Hill* 344. 2 *Ld. Raym.* 1535. 1 *Stra.* 608. 8 *Wend.* 480. *Miller* v. *Bagwell,* 3 *McCord* 429. 4 *Com. Dig. "Estoppel"* (*E.* 2). (*E.* 7). 8 *Cow.* 643. In *Florence* v. *Goodin,* 5 *B. Monroe* 111, it was held that a bond taken in a case where the court had no jurisdiction, was absolutely void, both as a statutory and as a common law bond, and that no suit could be maintained on it. *McCormack* v. *Young,* 3 *J. J. Marsh.* 180. *Armstrong* v. *United States, Pet. C. C. Rep.* 47. *United States* v. *Samuel,* 4 *Wash. C. C. Rep.* 620.

The third and fourth separate pleas of Dardenne, are also good. They show and allege that the bond sued on was executed without consideration. This court has held that a general averment of a *want of consideration* for making a bond or note, is sufficient. *Dickson* v. *Burke,* 1 *Eng.* 414. *Rankin* v. *Badgett,* 5 *Ark.* 345. *Greer* v. *George,* 3 *ante.*

The issues upon the 9th, 10th and 11th pleas, ought to have been found for the defendants, and the record offered excluded. The original suit was instituted against Mary Fugate and Medicus R. T. Outlaw, in their individual, and not in their representative character, and, of course, could only warrant a judgment against them individually, and not against the estate of Fugate. Although the judgment purports to be rendered against the estate *de bonis testatoris,* yet it is a nullity, and, in contemplation of law, no judgment at all. The plaintiffs have not shown themselves to be creditors of the estate, by that suit or otherwise. *Brown* v. *Hicks,* 1 *Ark.* 237, *and cases there cited.* 5 *East.* 154. 6 *East.* 405. *Lyon* v. *Evans,* 1 *Ark.* 365. *Sabin* v. *Hamilton,* 2 *Ark.* 485. *Watkins* v. *McDonald,* 3 *Ark.* 266. *Perkins* v. *Crabtree,* 5 *Ark.* 476. By a judgment, is understood that which, in common as well as legal language, is deemed the exemplification of it, that is, all the pleadings and proceedings on which the judgment is founded, and to which as a matter of record it necessarily refers. *Owings* v. *Hull,* 9 *Peters* 624. It is alleged in the declaration, that judgment in the original suit was confessed. There is but one mode of confessing judgment, and that was not pursued. *Rev. Stat. sec.* 137, 138, 139, *p.* 638. *Johnston* v. *Glasgow,* 5 *Ark.* 311.

The proof was insufficient to warrant the verdict. The plaintiffs did not adduce any proof to show that the administrator and administratrix failed to list, or class, or return, the claim, or that they had assets or effects of their intestate sufficient to pay it, or that it was lost in consequence of such failure on their part. These facts were assigned as breaches of the bond, and, with or without pleading, the plaintiffs were bound to prove the truth of the breaches. *Rev. Stat. title "Penal Bonds," sec.* 5, 6, 7, *p.* 609. And the verdict must expressly find that the breaches are true. *Phillips* v. *the Governor, for the use of Dennis,* 2 *Ark.* 390.

The bond sued on was executed the 25th of February, 1837, as shown in the declaration. There was no law then imposing upon an administrator the duty of listing, or classing, or returning claims against an estate. The liability of the sureties was limited to the duties and obligations then imposed on administrators, and did not extend to duties and obligations subsequently imposed or pointed out. *Arlington* v. *Merrick,* 2 *Saund. R.* 403. *United States* v. *Kirkpatrick,* 9 *Wheat.* 729. *Miller* v. *Stuart, ib.* 702.

RINGO & TRAPNALL, contra. It will be manifest at once, that the first eight pleas are no answers to the breaches. They neither answer, or confess and avoid. The four amended pleas of Dardenne set up a defence from which he is estopped by the bond; that is, that Outlaw and Mary Fugate were not the administrators of J. Fugate, deceased.

When the condition of a bond recites a particular fact, the obligors shall be estopped to say there is no such thing. *Jones* v. *Prewett,* 3 *Marsh.* 303. *Mann* v. *Eikford's ex'r,* 15 *Wen.* 502. *Jackson* v. *Parkhurst,* 9 *Wend.* 209. *Cowen* v. *Jackson,* 4 *Peters.* 83. A party who has executed a note will be estopped to deny the existence of the payee. 1 *J. J. Marsh.* 380. *Henriques* v. *Dutch West India Co.,* 2 *Ld. Raym.* 1555. *Hob.* 211.

The principle is, that the estoppel concludes a party from alleging the truth. *Sinclair* v. *Jackson,* 8 *Cow.* 543. *Blackhub* v. *Barden,* 1 *Wend.* 113. *Arundel* v. *Arundel, Yelv.* 34. To a supersedeas bond the obligor is estopped from pleading no supersedeas ever issued.

Anderson v. *Barry,* 2 *J. J. Marsh.* 280. 1 *Litt.* 418. *Allen* v. *Luckett,* 3 *J. J. Marsh.* 166-7. *Thompson v. Buchannon,* 2 *J. J. Marsh.* 420. 2 *Starkie* 30. Estoppels are binding only on parties and privies. *Jackson v. Packhurst,* 9 *Wend.* 209. 3 *John.* 331. 1 *Marsh.* 496. In *Heilman* v. *Martin,* 2 *Ark.* 162, and *Hynds* v. *Imboden,* 5 *Ark.* 386, the defence was set up by parties who were not parties or privies, and therefore not bound by the estoppel.

When a consideration is admitted the parties are estopped from denying the particular consideration. *Allen* v. *Luckett,* 3 *J. J. Marsh.* 166-7. *Thompson* v. *Buchanan,* 2 *ib.* 420.

The record of the case given in evidence shows that it was an action of assumpsit, against the administrator, for a debt due on the intestate, and although there may be some irregularity, the judgment is good, and all errors are waived by the judgment of confession.

The breaches of the bond are admitted by the pleas, and a finding for the plaintiff in such case amounts to a verdict as to the truth of the breaches assigned: The case was referred to the court by consent of parties, and this dispensed with the jury and their oath.

That the bond was given before the passage of the act of administration before referred to, makes no difference, for it provides expressly that the administrators shall perform whatever other duties should be thereafter prescribed by law.

CONWAY B, J. This suit was instituted on an administration bond, against the administrators and their securities. The plaintiff alleged that, in October, 1839, they obtained judgment against the administrators for $565.34, to be levied of the goods and chattels of the intestate, in the hands of the administrators, to be administered; that the administrator did not list said judgment and class the same, or make return thereof, to the Probate Court; that they then had in their hands unappropriated assets sufficient to pay said judgment, as appeared from their settlements, and that, by their failure to pay, or list, class and make return thereof, to said court, plaintiffs' said judgment was totally lost to them.

The defendants filed fifteen pleas, and the plaintiffs demurred to all except three, upon which issues were joined. The demurrers

were sustained, and the issues found for plaintiffs, and judgment given them for the amount of their claim.

The defendants moved for a new trial, which was refused; they excepted, spread out the evidence, and appealed.

All the pleas demurred to were bad, and the demurrers to them properly sustained. The first offered no valid defence. It is no excuse that the administrators had not assets at or after the institution of this suit.

The second should have alleged that the assets were exhausted by claims exhibited and allowed within the twelve months.

The third and fourth are bad, because they do not affirm that the debts and claims referred to had been exhibited and allowed.

The fifth should have made allegation that the fees had been allowed by the court.

The sixth presents no legal defence. At the time of the intestate's death, the law did not authorize the assignment of dower before debts discharged. In truth, if the estate proved insolvent, the widow was entitled to no dower. *Steel & McCampbell* 54, *sec.* 21; 212, *sec.* 4; 213, *sec.* 5.

The seventh is not good, because it does not deny the legal exhibition of plaintiff's claim against the estate.

The eighth is bad, because it neither responds to the allegations of the declaration, nor presents any matter in avoidance of them. If the complaint was simply for the non-payment of the money, it would be a good answer that the court had not ordered it paid; but, when the administrators are charged, as in this case, with the omission of other duties imposed by their bond, and loss and damage are imputed to them, as the consequence of the default, such a plea is no defence. The orders not having been made by the court surely affords no excuse for the neglect of duties necessary to be performed to enable the court to make the order.

The four other pleas demurred to were by the defendant, Dardenne, and are in substance and legal effect the same. They all rely on the invalidity of the administration, and only allege it in different forms.

From well settled authority, the defendants were estopped from denying that Outlaw and Fugate were administrators. They had ac-

knowledged them such in their bond; and that which is expressly acknowledged by deed, cannot be denied by plea, without an allegation of fraud or mistake; and when the condition of a bond has reference to a particular thing, the obligor is estopped from saying there is no such thing. 3 *Mar. Ky. R.* 302, *Jones et al.* v. *Prewit.* 3 *Johnson's R.* 331, *Jackson* v. *Hasbrouck.* 2 *J. J. Mar. Ky. R.* 280, *Anderson* v. *Barry, &c.* 3 *J. J. Mar.* 164, *Allen* v. *Luckett.*

The three pleas upon which issues were formed were in effect but pleas of *nul tiel record.* The court was correct in finding the issues for the plaintiffs, but erred in assigning damages and in giving final judgment. As demurrers had been sustained to all of the other pleas, and plaintiff's cause of action left wholly undefended, the court, on finding the issues for plaintiff, ought to have rendered an interlocutory judgment against defendants, and ordered a jury to be empannelled, to inquire into the truth of the breaches, and assess damages. *Rev. Stat.* 609, *sec.* 7; and the same 630, *sec.* 81.

The judgment is therefore reversed, and the case remanded, with instructions to the Circuit Court, to grant defendants a new trial, and leave to amend their pleadings.