TOWN *vs.* WILSON.

The affidavit which the Statute requires plaintiff to file before suing out a writ of replevin, is not part of the record, and therefore a plea in abatement of the writ alleging that no such affidavit was filed, must be sworn to. (*a*)

Where replevin is in the *cepit,* it is proper to prove damages accruing from the taking.

Writ of Error to Washington Circuit Court.

Replevin in the *cepit et detinet,* by Wilson against Town, for a mahogany bedstead, determined in the Washington Circuit Court, in December, 1845.

Defendant pleaded, in abatement, that plaintiff sued out his writ without filing the affidavit required by law, (*Rev. Stat., chap.* 126, *s.* 4), but did not swear to the plea. On motion, the court struck out the plea, and defendant excepted.

Defendant declining to plead further, an interlocutory judgment was rendered, and a jury called to assess plaintiff's damages, who returned a verdict for ten dollars.

Pending the inquiry defendant took a bill of exceptions, from which it appears, that plaintiff introduced a witness by whom he offered to prove what damages plaintiff had sustained by the taking and detention of the property mentioned in the declaration, but defendant objected to any proof of damages as to the taking; but the court overruled the objection, "and permitted the witness to testify as to the taking of the property, and the damages which would accrue for the taking with violence or madness or without such madness or violence," to which decision of the court defendant excepted.

Defendant brought error.

LINCOLN, for the plaintiff. Two points are presented by the record in this case: 1st. The plaintiff contends that the affidavit in replevin should correspond in the form of action with the declaration

(*a*) But in *Pirani* v. *Barden,* 5 *Ark. Rep.* 81, PASCHAL J., said otherwise.

The declaration charges that the defendant *took and detained.* The affidavit is that the defendant *detained, &c.* The causes of action are distinct. The affidavit must correspond with the declaration: a variance is cause of abatement. *Pirani* v. *Barden,* 5 *Ark. R.* 81. 1 *Eng. R.* 22. *id* 39.

The facts appear of record and need not be sworn to. 5 *Ark. R.* 81. 1 *Eng. Rep.* 39.

The second point questions the admissibility of evidence of tortious taking. The plaintiff insists that evidence of the value of the property is the only legal evidence admissible to the jury.

E. H. ENGLISH, contra. Unless the truth of a plea in abatement appears of record it must be sworn to (*Rev. Stat., chap.* 1, *sec.* 1): or it may be stricken out on motion, as repeatedly held by this court. This case is precisely analogous to *Hardwick et al.* v. *Campbell & Co.,* 2 *Eng. Rep.* 118. There the plea (or motion) was that no bond for costs was filed; and the court held it must be sworn to: Here the plea is that no affidavit was filed, and upon the same principle, the plea should have been sworn to. An affidavit for an attachment is not a part of the record (2 *Ark. Rep.* 445), nor is a bond for costs (*Montgomery* v. *Carpenter,* 5 *Ark. R.* 264), nor upon the same principle is the affidavit in replevin. Being no part of the record, it could not appear from the record whether any affidavit or defective one was filed or not; the plea in abatement, therefore, should have been sworn to.

The question reserved by the defendant on the inquiry of damages, is frivolous. The action being in the *cepit et detinet* the plaintiff had a right to inquire into the damages sustained as well by the taking as the detaining of the property.

CONWAY B, J. This was an action of replevin for a mahogany bedstead. The defendant below pled in abatement, that plaintiff sued out his writ without filing the requisite affidavit. The plaintiff moved to have the plea stricken from the files because not verified by affidavit, and the motion was sustained. The defendant excepted and rested upon his exception. An interlocutory judgment was then

given against him, and a jury impanneled to assess the damages. On their finding, final judgment was rendered against defendant, and he has brought error.

The affidavit prescribed by the statute, is requisite prior to the issuance of the writ, and if it be shown to the court that the writ was issued without such affidavit having been made an abatement of the suit will be adjudged. But this must be made to appear according to the rules of pleading, or the court cannot legitimately take cognizance of the fact. The statute says, "no plea in abatement, other than a plea to the jurisdiction of the court, or where the truth of such plea appears of record, shall be admitted or received by any court in this State unless the party offering the same or some person for him shall make affidavit of the truth thereof." The plea in this case was not sworn to, and as its truth did not appear of record, it was inadmissible, and properly stricken from the files. The affidavit upon which a writ of attachment issues, is no part of the record. *Jones et al.* v. *Buzzard & Herndon,* 2 *Ark. Rep.* 443; nothing except the proceedings or facts, the law or practice of the courts requires to be enrolled as a perpetual memorial or judicial history of the case, constitutes or forms a part of the record. *Montgomery* v. *Carpenter,* 5 *Ark. Rep.* 264.

We perceive no force in the objection to the court admitting testimony of the damage sustained by defendant below taking the bedstead. Such proof is certainly competent when the declaration is in the *cepit,* as it was in this case. The judgment is in all things affirmed.