PORTER *vs.* STATE, USE OF BROWN.

In a declaration upon an administrator's bond, it is assigned as a breach thereof that plaintiff had obtained judgment in the circuit court against the administrator, that he had assets in his hands, and, though requested, neglected and refused to pay plaintiff's judgment. Breach held insufficient.

To charge the administrator, or his securities, upon his bond in such case, it should have been further alleged that the plaintiff's judgment was filed, allowed and classed in the Probate Court against the estate, that the court had ordered the payment thereof, on settlement with the administrator and ascertaining assets in his hands, and that he had neglected or refused to do so in obedience to the orders of the Probate Court, as held in *Outlaw et al. vs. Yell, Governor*, 5 *Ark. R.* 648.

In an action upon the bond of an administrator by a creditor (under *sec.* 170, *chap.* 4, *Digest*) to subject the administrator, and his securities, to damages for his failure to

account and settle according to the conditions of his bond, a general breach, alleging a non-performance in the language used in the condition of the bond, is sufficient.

In such an action it is proper that the character in which the plaintiff sues should appear in the commencement of the declaration, though it is sufficient if it appear in the conclusion.

As to the evidence necessary to sustain such action.

Appeal from the Phillips Circuit Court.

DEBT, in the name of the State, for the use of John Brown, against Clement Brown, Benjamin A. Porter, and Sidney P. Craig, determined in the Phillips circuit court, in May, 1847. before the Hon. WM. C. SCOTT, judge. The action was founded on an administrator's bond, executed by Clement Brown, as administrator of Jacob Hackler, principal, and Porter and Craig, as his securities, bearing date 9th August, 1842. The declaration, after setting out the bond and condition, assigns three breaches thereof, in substance as follows:

1st. That after the grant of letters of administration to defendant, Brown, upon the estate of Hackler, by the probate court of Phillips county, there came to his hands, as such administrator, $223.37. That John Brown, for whose use this suit was brought, having a claim against said estate for $466, presented the same, duly probated, to said administrator for allowance, and he rejected it; that afterwards, at the October term of the probate court of said county, he presented said claim to said court for allowance and classification against said estate, the court refused to allow it, and he excepted, and appealed to the circuit court of said county, and obtained judgment in the circuit court upon said claim for $360, which judgment remained in full force, &c.; and that although assets to the amount first above named had come to the hands of said administrator; and although payment of said judgment, or so much thereof as said John Brown was entitled to, taking into consideration other claims classed and allowed against said estate, had been frequently demanded of said administrator, he had wholly neglected to pay the same or any part thereof.

2d. That said Clement Brown has not, since the date of said

writing obligatory, and the grant of his letters of administration on said estate of said Jacob Hackler, deceased, made, or caused to be made, just and true accounts of his administration of said estate in pursuance of law and the orders of said court of probate of Phillips county.

3d. That said Clement Brown has not, since the date of said writing obligatory, and the granting of letters of administration to him on the estate of said Jacob Hackler, made due and proper settlement of said estate from time to time according to the law, or the lawful order, sentence, or decree, of the probate court of said county; by means of which said premises the said John Brown, and the other creditors of the estate of said Jacob Hackler, have sustained damages to a large amount, *to wit:* to the amount of $300; by reason of which said breaches the said writing obligatory became forfeited, and, according to the statute, &c., an action has accrued to said plaintiff, &c., &c.

The action was discontinued as to defendants Brown and Craig for want of service of process upon them. Defendant Porter demurred to the declaration, the court sustained the demurrer as to the first breach, and overruled it as to the second and third. Porter rested upon his demurrer, judgment was taken against him, writ of inquiry awarded, and the jury assessed the plaintiff's damages at $170.19. Porter moved for a new trial, which was refused, and he excepted, and put the evidence on record. It appears, from his bill of exceptions, that, on the inquest of damages, plaintiff proved, by the records of the probate court of said county, that at the term of said probate court next before the October term, 1843, Clement Brown, as administrator of Hackler, filed his settlement account, in which he charged himself with amount of sales, $223.37, and credited himself with items amounting to $53.18; that notice of the filing of said account for settlement was duly published, and that, at the October term of said probate court, 1843, said account was examined by the court, confirmed, and ordered to be spread upon the record. Plaintiff also proved by the clerk of said probate court, that said settlement account was the only one ever filed

by said administrator. This was all the evidence introduced on the inquest.

W. H. & A. H. RINGO, for appellant.

E. CUMMINS, contra.

JOHNSON, C. J. This was an action instituted in the Phillips circuit court by the State, at the instance, and for the use, of John Brown, against Clement Brown, as the administrator of Jacob Hackler, deceased, and Benjamin A. Porter and Sidney P. Craig, as his securities. The first count charges, by way of a breach of the bond, that the plaintiff had recovered against Brown, as such administrator, in the circuit court of Phillips, the sum of three hundred and sixty dollars, and that, though said administration had received property belonging to said estate of the value of two hundred and thirty-three dollars and thirty-seven and one-fourth cents, and though often requested to pay the sum so received, he had and still refused to do so. John Brown, the real plaintiff, seeks in this court to enforce a demand which he claims in his own individual right and not as the representative of all persons interested in the estate. For the purposes of this count we consider the exposition of the law as given by this court in the case of *Outlaw et al. vs. Yell, Governor*, 5 *A. R.*, 472, 473, as fully sufficient: "The judgment in the circuit court ascertained and established the claim, and the probate court ascertains the amount of the fund and fixes the order of its appropriation in satisfaction of such claim. We are not here required to decide whether, under any circumstances, the circuit court would be permitted to execute its own judgments in such cases, as this question is not raised by the record. We only intend to say that no action can be maintained upon the bond for the non-payment of the judgment of the circuit court without the judicial ascertainment in the probate court of the sufficiency of the assets and their liability in satisfaction of the debt." By sections from 121 to 125, inclusive, page 87, *Rev.*

Stat., the probate court is authorized and required to make settlement with the administrator, ascertaining the amount of debts legally exhibited against the estate, and the amount of assets in his hands for their satisfaction, to make an appropriation of them to the debts, and order the administrator to pay them in ten days. This seems to be necessary to fix his liability to pay the debts. The order of the court for that purpose makes it a duty of the administrator, for a breach of which an action may be maintained on his bond, under section 171. The first act which seems to fix his liability, is the refusal to pay in obedience to the order of the court. As there are facts necessary to make the administrator personally liable, they must be alleged and established before the securities can be reached. This we conceive to be a clear deduction from the several provisions of the statute upon that subject. If this interpretation of the administration law be sound and sensible, and that it is we do not entertain a single doubt, it is then manifest that the first count is palpably defective, and that it does not exhibit even the semblance of a cause of action.

The second and third counts seem to have been predicated upon the one hundred and seventy-first sec. of the fourth chap. of Rev. Stat. This section provides that "the bond of any executor or administrator may be sued on at the instance of any legatee, distributee, creditor, or other person interested, in the name of the State, to the use of such legatee, distributee, creditor, or other person interested, for any mismanagement, waste, or other breach of the condition of such bond, and the party to whose use suit is brought shall have judgment against the executor or administrator, and his securities, for the whole value of the estate mismanaged, or wasted, with costs of suit; and the amount so recovered shall be distributed by the court of probate in the same manner as if the same had been accounted for by the executor or administrator." These two latter counts do not seek to subject the administrator, and his securities, to the payment of any specific sum, which it is alleged has been recovered against him by the plaintiff, but simply charge him with a neg-

lect of duty, and seek to fix their liability for such damages as all persons in the estate may have sustained. The point to be determined here is as to the sufficiency of the breaches assigned by these two counts.

The breaches are in general terms: First, that the administrator had not made, or caused to be made, just and true accounts of his administration; and, secondly, that he had not made due and proper settlements thereof from time to time, according to law, or the lawful order, sentence, or decree, of the probate court of Phillips county, and then concludes to his own damage, and also to the damage of the other creditors of the estate of the said Jacob Hackler. We think that where a party merely seeks to subject the administrator, and his securities, to damage consequent upon his failure to account and settle according to the conditions of his bond, that it is all-sufficient to charge him in the language used by the law creating the obligation. The defendant cannot complain that the particular failure is not specifically set out and the amount of damage sustained is not directly and expressly charged, as he has nothing to do until his liability is fully made out and the damage which has accrued is clearly established by proof. In strictness the statute would require, that the party at whose instance suit is instituted, in case the law is put in motion by either of the beneficiaries specified in the act for the benefit of all, that the particular character in which he presents himself should be expressly set forth in the commencement of the declaration. It does not appear in this case at whose instance the State has instituted her suit, until we have reached the conclusion of the declaration: there it is that he represents himself as a creditor of the estate, and though perhaps substantially sufficient for the purpose of the law, yet it is not strictly and technically correct, and if not absolutely requisite it would certainly be desirable to have the precise character of the interest to appear in the beginning of the declaration. We are of opinion, therefore, that the circuit court committed no error in the disposition which it made of the demurrer interposed to the declaration.

This brings us to the only remaining question to be determined, and that is, whether the circuit court erred or not in overruling the motion for a new trial. The bill of exceptions purports to contain all the evidence offered upon the trial, and it is upon the sufficiency of this testimony to sustain the verdict of the jury that the decision must necessarily turn. In order to have entitled the State to a recovery upon either of the last counts, it was necessary that she should have shown either a failure to make just and true accounts of his administration, or due and proper settlements of the estate. The testimony adduced before the jury utterly failed to establish either of the breaches charged in the two last counts. The whole case made by the evidence offered merely went to show that the administrator filed an account current, which, after due notice, was confirmed by the court, and that, after deducting his claims against the estate, left a balance against him. This circumstance most certainly could not fix any liability upon the administrator or his securities. It did not appear that he had been guilty of any breach of legal duty, and consequently it could not be made to appear that any damages whatever had accrued to the plaintiff. It devolved upon the plaintiff, in order to entitle her to a recovery upon either count, to have shown not only a failure to make just and true accounts of his administration and due and proper settlements, but also to have shown what amount he retained in his hands, and for which he failed to account, or charge himself with in his setttlements with the court. Upon both of these points the testimony is wholly silent, and, as a matter of course, there is an utter failure to establish any liability whatever. It is manifest, therefore, that the defendant below was entitled to have the verdict set aside as being without evidence to support it, and consequently the circuit court erred in overruling his motion. The judgment of the circuit court is therefore reversed, and the cause remanded to be proceeded in according to law and not inconsistent with this opinion.