STATE, USE OF WALLACE *vs.* RITTER, ADR.

Where a party makes and files the proper appeal affidavit, and the clerk notices the filing of it of record, an omission to endorse it filed will not prejudice appellant.

Where a creditor of an estate brings an action upon the bond of an administrator to recover the amount of his own claim, he must aver, in assigning a breach of the condition of the bond, that his claim has been allowed, classed, and ordered to be paid, by the probate court, and that he has demanded pay-

ment of the administrator, and payment has been refused. *Outlaw et al. vs. Yell, Governor*, 5 *Ark. Rep.* 468, and *Porter vs. State, use Brown, ante*, The proper form of a declaration by a creditor upon the bond of an administrator, for the benefit of creditors generally, under sec. 170, chap. 4, Digest, declared. *Porter vs. State, use Brown, ib.*, cited.

Appeal from the Washington Circuit Court.

This was an action of debt brought in the name of the State of Arkansas, for the use of Alfred Wallace, against Young Ritter, as administrator of Daniel Ritter, determined in the Washington circuit court, in June, 1847, before the Hon. WM. W. FLOYD, judge.

The action was founded upon an administration bond executed by Daniel Ritter, in his lifetime, as administrator of William Ritter. The declaration sets out the bond sued on, and its condition, (which is in the form prescribed by statute,) and assigns breaches thereof in substance as follows:

"Plaintiff avers that said Daniel Ritter, so being administrator of said William Ritter, as aforesaid, (as recited in the condition of the bond sued on,) did not make, or cause to be made, a true and perfect inventory of all and singular the goods and chattels, rights and credits, which were of the said William Ritter, deceased, and file the same in the office of the clerk of the probate court of said county of Washington, within sixty days from the date of said writing obligatory: that said William Ritter departed this life possessed of goods and chattels, rights and credits to the value of $550, all of which came to the hands of said Daniel Ritter, as such administrator, and that he, the said Daniel, filed an inventory in the office of the clerk of said probate court within the time last aforesaid, charging himself with but $74.75 worth of property of said William Ritter, deceased, and kept and detained the residue of said property which came to his hands, amounting, in value, to the sum of $476, and so the said plaintiff saith that the said Daniel squandered and wasted the said residue of said estate so by him kept and detained as aforesaid.

"And said plaintiff further saith that, at the time of the death of said William Ritter, he, the said William, was indebted to said Wallace, for whose use this suit is brought, in the sum of $67.23, with interest, &c.; that, on the 15th March, 1841, said claim was presented, duly authenticated, to said Daniel, as such administrator, and by him endorsed, allowed, &c.; and afterwards, to wit: on the 16th April, 1841, said claim was allowed, by the court of probate of said county of Washington, against said Daniel, as such administrator, and classed in the first class, &c.; and the said plaintiff further avers that he, said Daniel, upon obtaining letters of administration on said estate, collected and took into his possession goods, chattels, rights and credits, of said William Ritter, deceased, of the value of $399.87, and did not make, or cause to be made, a true and perfect inventory thereof, and file the same in the office of the clerk of said probate court within sixty days from the date of said writing obligatory and of his letters of administration, but filed an inventory of only $74.75 worth of said property; and kept and converted the residue of said property to his own use, by means whereof said debt of said Wallace was not paid, but wholly lost, &c.

"Plaintiff further avers that, at the time of the death of said William Ritter, he was indebted to said Wallace in the further sum of $9.31, with interest, &c.; that, on the 23d February, 1842, said demand was presented, duly authenticated, to said Daniel, as such administrator, allowed by him, and afterwards, on the 15th April, 1842, said demand was allowed by said probate court, against said administrator, and classed in the fifth class of demands, &c.; and plaintiff further avers that said Daniel, so being administrator as aforesaid, upon obtaining letters, &c., collected and took into his possession goods and chattels, rights and credits, of said William, of the value of $399.87, and did not make, or cause to be made, a true and perfect inventory thereof, and file the same in the office of the clerk of said probate court, within sixty days from the date of said writing obligatory and his said letters of administration, but filed an inventory of only $74.75 worth of said property, and kept

and converted the residue thereof to his own use, by means whereof the debts aforesaid of said Wallace were not, nor are they yet, paid, but have been and are wholly lost to said Wallace.

"Plaintiff further avers that said Daniel, so being administrator as aforesaid, presented to the said probate court, on the 18th day of January, 1841, (at January term,) his account current with said estate, in which he charged himself with the sum of $399.87; but that said Daniel did not, at the first term of said court thereafter, settle with said court as to the amount of which he stood charged as aforesaid, but kept and converted the same to his own use, by means whereof the aforesaid debts of said Wallace were, and are, unpaid and lost.

"Plaintiff further avers that assets, more than sufficient, came to the hands of said Daniel, as such administrator, to pay all the demands allowed and classed against the estate of said Daniel Ritter, deceased; but that said Daniel wasted the same by delivering them to one James Wilson, who converted and disposed of them to his own use, by means whereof the debts of said Wallace remain wholly unpaid.

"Plaintiff further avers that said Daniel, so being administrator as aforesaid, presented to said probate court, on the 18th January, 1841, (in January term,) his account current with said estate, in which he charged himself with the sum of $399.87; but that the said Daniel did not, at the first term of said court thereafter, settle with said court as to the amount with which he stood charged as aforesaid, but kept said amount and converted and disposed of the same to his own use, and to the use of one James Wilson; by means whereof the debts aforesaid of the said Wallace, for whose use this suit is brought, are wholly unpaid, and are wholly lost, and said estate has become and is hopelessly insolvent.

"And plaintiff also saith that said William Ritter departed this life leaving personal estate to the value of $550, and more than sufficient to pay all demands allowed and classed against his estate, all of which came to the hands of said Daniel, as his administrator, and was by him not legally accounted for, but

wasted and disposed of to his own use; by means whereof the debts aforesaid of the said Wallace have not been paid, but have become and are wholly lost."

In the last special breach, it is alleged that said Daniel administered on the estate of said William Ritter, and took into his possession all his goods and chattels, &c., that Wallace demanded of him payment of said claims, but that he refused to pay the same or any portion thereof.

Defendant demurred to the declaration on the grounds that it was not averred that the probate court made an appropriation of the assets in the hands of said Daniel Ritter to the debts against his estate: that it was not averred that said Daniel, as such administrator, was ordered by the probate court to pay said claims within ten days, &c.: and not averred that said Daniel refused to pay said claims in obedience to such order, &c.

The court sustained the demurrer, and plaintiff appealed.

Wallace, for whose use the suit was brought, made the affidavit required by statute on appeal, and the clerk made a record entry of the filing of it, but omitted to endorse it filed.

FOWLER, for appellee, moved to dismiss for want of an affidavit.

E. H. ENGLISH, for appellant.

CONWAY B, J. On motion, at January term, 1848. This case was brought here by appeal, and it is now moved to dismiss it on the allegation that the requisite appeal affidavit was not made and filed in the court below.

We can perceive no substantial objection to the affidavit or its filing. It seems in due form, and is certified by the clerk to have been sworn to and subscribed in open court. And the entry of record that "the said Alfred Wallace came into court and filed his affidavit for said appeal," is sufficient evidence of the affidavit having been filed without the clerk's endorsement. The omission of the clerk to mark the affidavit "filed," was but a clerical misprision, and did not affect the party's right to appeal.

Wallace, being the beneficiary plaintiff, and responsible for costs, was the proper person to make the affidavit. The motion is refused.

JOHNSON, C. J. The circuit court decided correctly in sustaining the demurrer to the declaration of the plaintiff. All the breaches assigned were evidently intended to rest upon sec. 171 of chap. 4 of the Revised Statutes, and yet they seek to subject the administrator to the payment of the individual demand of Wallace alone, and clearly look to his claim against the estate as the measure of damages. The creditor of an estate, where his demand has been allowed, classed, and ordered to be paid, is not of necessity forced to his action upon the bond, as he is entitled, upon such a showing as is required by the 124th section of the act already referred to, to his execution for the amount which has been ordered to be paid to him, yet if he should elect to waive his summary remedy and resort to an ordinary action upon the bond, he will be held to strict allegation and proof of all the requisitions of the law in order to mature his claim in the probate court, and also that such claim has been demanded and not paid in obedience to the order of the court. The distinction between the cases where a creditor, or other person interested in an estate, is suing for his own individual demand, and where he puts the law in motion merely as the agent and general representative of all the beneficiaries of the estate, is broadly laid down and enforced in the case of *Outlaw et al. vs. Yell, Governor,* 5 *Ark.* 468, and in the case of *Porter vs. The State, use of Brown,* decided at the present term of this court. It is obvious that neither count in the declaration contains a good cause of action, when tested by the rule of those cases, if it is conceded that the object of the suit was to recover the specific sums which the plaintiff alleges had been allowed and classed by the probate court, as there is an utter failure to show that those claims had been ordered to be paid, or that the administrator had failed to pay them after demand made for that purpose. The counts are all equally bad, if the suit is regarded as having been brought by

Wallace not exclusively for his own individual benefit, but as the agent or representative of all persons interested in the estate. The 171st section of the 4th chapter of the Revised Code 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." This section, without a rigid scrutiny, is well calculated to mislead as to its real object. The first clause of the section speaks of the suit being brought in the name of the State for the use of such legatee, &c., and, if considered alone and unconnected with the latter clause, would convey the idea that the judgment, when recovered, would inure solely to the use and benefit of the party at whose instance the suit is instituted. This, most clearly, was not the design of the Legislature: but, on the contrary, the only object that they had in view by this proceeding was to enable any person interested in the estate to compel the administrator to proceed and to settle the estate according to the requirements of the law and the express stipulations of his bond. It matters not what amount he might recover in this action, and although it is brought at his instance, and nominally to his use, it would not necessarily follow that he would actually realize one solitary cent of the amount so recovered. The judgment when rendered is turned over to the probate court, and there to be distributed in the same manner as if the same had been accounted for by the executor or administrator.

It is necessary that the party at whose instance the State institutes her suit should disclose the precise nature of his interest

(that is, whether he is legatee, creditor, &c.) in the commencement of the declaration, as it is only a person interested in the estate that is armed with the power to coerce the administrator. This is a matter material to be stated, and the defendant, if he chooses, may traverse it, and call for the proof. It is not essential to a recovery, upon the 171st section, that the party suing should set forth specifically the precise amount of his claim against the estate, or what steps he may have taken to bring it forward; but it is all-sufficient for him, after setting out the bond and its condition, to charge a breach in the language of that instrument, and then, after inserting the usual breach of his promise to pay, (the penalty of the bond,) conclude to his damage with a sufficient sum to cover the damages actually sustained. If the sum, to which the party suing is entitled, were the measure of damages, there would then be good reason for specifying the amount to which the party himself were entitled; but when it is considered that such is not the case, but, on the contrary, that the amount, whatever it may be, which is found in the hands of the administrator, and unaccounted for, is the extent to which the jury are allowed to go, then it is clear that no such showing is necessary. We are, therefore, clearly of opinion that there is no error in the judgment of the circuit court in sustaining the demurrer to the plaintiff's declaration. The judgment is, therefore, in all things affirmed.