BUTLER ET AL. *vs.* WILSON.

In an action on a bond, given by the defendant in an attachment, issued by a justice of the peace to procure a release of the property attached, the justice's transcript of the attachment suit held incompetent evidence for plaintiff because it did not show that the plaintiff's cause of action was filed with the justice before the writ of attachment issued.

The transcript showed that the cause of action was filed on the same day the writ issued, but it should affirmatively appear that it was filed before the writ issued, no presumptions being indulged in favor of a limited jurisdiction.

The justice stated, in said transcript, that the plaintiff filed an affidavit, as required by law, before the attachment issued, reciting the substance of the affidavit: HELD, That the affidavit should have been copied in the transcript, and, for this omission, the transcript was incompetent evidence—all the legal prerequisites to the issuance of the attachment should affirmatively appear in the transcript to make it competent evidence.

The declaration alleged that, after the death of the defendant in the attachment, his administrator was made party, and judgment against him. Plea, no judgment against defendant in the attachment in his lifetime, nor against his administrator or legal representative after his death, and issue: HELD, That the transcript of the justice showing a judgment against the administrator in his individual, not in his representative, capacity, was incompetent to sustain the issue on the part of plaintiff.

Though otherwise as to an issue to the plea of *nul tiel record,* because the judgment set out in the transcript corresponded with the one set out in the declaration.

Appeal from Ouachita Circuit Court.

DEBT, determined in the Ouachita Circuit Court, in March, 1848, before the Hon. GEORGE CONWAY, then one of the Circuit Judges.

The action was brought by Myrick J. Wilson against Ryner Butler and Thomas S. Woodard, upon a penal bond for $150, executed 8th of April, 1846, to Wilson by one H. N. Barsto as principal, and Butler and Woodard as securities, conditioned as follows:

Reciting that, on the 7th April, 1846, Wilson sued out an attachment, from a justice of the peace of Ouachita Co., against

Barsto for $75 debt, which the constable had levied upon 700 pounds of bacon and a horse, as the property of Barsto, which attachment was returnable on the 14th April, 1846, then conditioned that if Barsto should answer the plaintiff's demand, and pay and satisfy such judgment as might be rendered in the attachment suit against him, the said bond was to be void.

The declaration alleged, as a special breach of the bond, that, after execution of process in said attachment suit, Barsto died intestate, Hugh W. Ashley was appointed his administrator, and the action revived against him by *scire facias;* and that, on the 6th July, 1846, Wilson recovered judgment against him, in said attachment suit, for $64.50 debt, and for costs, which remained unsatisfied.

Defendants filed two pleas: 1st. That plaintiff did not recover a judgment against Barsto in his lifetime; nor against the administrator or legal representative, after his death, in said attachment suit:

2d. That there was no record of the supposed recovery in said declaration mentioned remaining in said justice's court, in manner and form as alleged, &c.

To these pleas, plaintiff took issue, and the issues were submitted to the court. To support the issues on his part, plaintiff offered, in evidence, the justice's transcript of said attachment suit, to the introduction of which defendants objected, but the Court overruled the objection, admitted the transcript, and found the issues for plaintiff. The Court then, sitting as a jury by consent of parties, tried the truth of the breaches assigned in the declaration, and assessed plaintiff's damages. On this inquest no evidence was introduced but said transcript. Defendants moved for a new trial, which was refused, and they excepted, set out the evidence and appealed.

The objections made by defendants to the introduction of the justice's transcript, as evidence, appear in the opinion of this Court.

CUMMINS, for the appellants. The transcript of the record, ad-

mitted in evidence, shows no valid judgment, because it does not appear that the foundation of the action was filed. (*Anthony Ex parte,* 5 *Ark.* 358. 1 *Eng.* 41. *Ib.* 187.) The certificate of the justice that an account was filed is insufficient: the account must appear in the transcript; the transcript must also show the affidavit for attachment, and the writ, to give the justice jurisdiction and warrant the taking a bond. (3 *Ark.* 509,) and that the bond was taken in the manner prescribed by law, (3 *Pick.* 226.) The bond is conditioned to pay such judgment as may be rendered against *the defendant,* (*Digest, chap.* 16, *sec.* 9;) and, therefore, it is not a good breach to aver that the judgment was rendered against the personal representative of the defendant, (*Chandler vs. Byrd,* 1 *Ark.* 152;) nor could the justice, upon the death of the defendant in the attachment, issue a *scire facias* to bring in his representative—the statute does not authorize such a proceeding; and, upon the death of the defendant, the attachment is dissolved. 7 *Mo. R.* 421.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The record in this case raises but two questions for our examination and decision. The first relates to the admissibility, and the second to the legal effect of the justice's transcript. It is contended, by the appellants, that the transcript of the justice was improperly admitted in evidence on account of its failure to show the fact that the account was filed before the issuance of the writ, and also for the omission to incorporate the affidavit and writ of attachment which are stated by the justice to have been filed in this office. The point, then, to be determined is whether the transcript discloses jurisdiction in the justice, because, if it does not, it is simply void, but if, on the contrary, he acted within the pale of his jurisdiction and in the mode prescribed for its exercise, it is a valid proceeding, and consequently was properly received in evidence. The justice recites that, on the 7th April, 1846, he filed the account of the plaintiff against the defendant, Barsto, and also that, on the same day, he filed the plaintiff's affidavit, according to the statute in such cases

made and provided, and stating that said Barsto was justly indebted to him in the sum of seventy-five dollars, which was then due, and that said Barsto was about to remove his effects out of the State, and that unless an attachment should be issued there was reason to believe that said debt would be lost or greatly delayed, and that, upon the same day, he issued an attachment directed to the constable, returnable on the 14th of April, 1846, and that, on said day, the said writ was returned levied by the constable on certain property in said return specified. The recital is, that he issued the writ on the same day that he filed the account, but he does not expressly aver that the account was filed before the issuance of the writ.

In cases where it is lawful to indulge presumptions, it would necessarily be inferred that the filing of the account took place anterior to the issuance of the writ, as the law in such cases will never condescend to notice the fractions of a day. In this matter, however, we are not permitted to indulge the least presumption in favor of the jurisdiction, and the filing of the account being, under the authorities, a jurisdictional fact, it is clear that, unless it affirmatively appears, the legal presumption is that it does not exist. (See *Everett vs. Clements & Thompson,* 4 *Eng.* 481, *and the cases there cited.*) This objection, therefore, is well taken.

The affidavit is substantially set out in the transcript. This being a prerequisite, under the law, to the issuance of the writ of attachment, it was necessary that a literal copy should have been exhibited, in order that the Circuit Court might, upon inspection, have determined whether it contained all the legal requisites to authorize the issuance of the writ. A copy of the bond and writ were also equally essential, so as to show that the justice had acted, throughout the proceeding, in the mode and manner prescribed by the statute. Any defect, either in the affidavit or the bond, would have been matter in abatement, and both being necessary to authorize and to call into action the constitutional jurisdiction of the justice, it is necessary that they should both appear affirmatively, and, in their absence,

no intendment can be indulged in favor of their existence. We think, therefore, that, upon these latter grounds, the objection is equally well taken. This settles the question of admissibility.

The next question relates to the legal effect of the transcript, upon the supposition that it could be properly used as evidence in the cause. The defendants in the Court below filed two pleas in bar, the first denying that the plaintiff had recovered a judgment against the said H. N. Barsto in his lifetime, or against his administrator or legal representative, since his death; and, second, that there was not any record of the supposed recovery in the declaration mentioned, remaining in the said justice's court. Upon each of these pleas issues were taken. Had the transcript contained all the facts necessary to show jurisdiction, there can be no doubt but that it would have been all sufficient for the purposes of the last issue, as it exhibited a judgment precisely identical with the one described in the declaration. But the result would have been entirely different in regard to the issue upon the first plea. The plea denies that any recovery had been obtained either against Barsto in his lifetime, or against his administrator, or legal representative, since his death. The judgment recited in the transcript does not purport to be against Ashley in his representative character, but simply and solely as an individual. Such being the character of the recovery, it most unquestionably could not have sustained the issue taken upon the first plea.

The judgment of the Circuit Court of Ouachita county is, therefore, reversed, and the cause remanded, with instructions to permit both parties to amend their pleadings, and procure additional evidence if they desire to do so.