

WILLIAMS ET AL. vs. STATE, USE HEMPSTEAD COUNTY

Action on a collector's bond for failing to pay over county revenue; defendants made default, and the court rendered final judgment for the amount which the collector's settlement with the County Court showed him to be in arrear: HELD, that a jury should have been called to try the truth of the breaches and assess the damages.

The evidence by which the court determined the amount of damages not being upon record, this court presumes the judgment to be for the proper sum.

Writ of Error to the Hempstead Circuit Court.

DEBT, on the official bond of Arnett, as late sheriff and *ex-officio* collector of Hempstead county, determined in the Hempstead Circuit Court, in February, 1848, before the Hon. C. C. SCOTT, then one of the Circuit Judges. The action was brought in the name of the State, for the use of Hempstead county, against Arnett, the principal in the bond, Williams, Jett, and Paxton, his securities. The declaration assigned, as a special breach of the bond, that Arnett, as such sheriff and collector, on settlement with the County Court of Hempstead county, at the April term,

1847, in respect to revenue collected, or which should have been collected by him, was in arrear and indebted to the county in the sum of \$1,379.56½, which he had neglected and refused to pay over, &c. Judgment as follows:

“This day came said plaintiff by attorney, and the defendants being called came not; and it appearing that the defendants have been duly and in due time served with process herein; and this action being founded upon the official bond of the said William Arnett, as late sheriff and *ex-officio* collector of the taxes of Hempstead county; and thereupon the Court referred the matter to the clerk of this Court to ascertain the amount due by said Arnett, as such sheriff and collector; and the clerk reported that there was due and owing by said Arnett, as such sheriff and collector to the county of Hempstead, the sum of \$885.72½, the residue of debt in the plaintiff’s declaration in this cause mentioned. It is, therefore, considered by the Court that the plaintiff have and recover of and from the said defendants the aforesaid sum of \$885.72½, the residue of debt in form aforesaid found to be due, with 5 per cent. per month on the same from the date hereof until paid, (the plaintiff releases all former penalties,) together with costs,” &c.

A certified transcript of the record of the settlement made by Arnett with the County Court of Hempstead, appears to have been filed in the case, and is copied in the transcript, but it is in no way made part of the record.

Arnett died, and the other defendants brought error.

S. H. HEMPSTEAD, for the plaintiffs, relied on the point that this being an action on a penal bond with collateral conditions, and specific breaches assigned, it was necessary to submit it to a jury to inquire into the truth of the breaches and assess the damages, and cited *Phillips vs. The Governor*, 2 Ark. 390. *Adams vs. The State*, 1 Eng. 505. *Outlaw vs. Yell*, 3 Eng. 353.

WATKINS & CURRAN, contra,

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

The Court clearly had no right to render judgment in this case without the intervention of a jury to try the truth of the breaches and to assess the damages. The act, in relation to judgments upon demurrer, or by confession, or default upon penal bonds, requires that "the Court shall make an order therein that the truth of the breaches assigned be enquired into, and the damages sustained thereby assessed. And that the judgment in such action shall be entered for the penalty of the bond together with the costs of suit, and that the plaintiff have execution for the damages so assessed." (See *Digest, ch. 120.*) In view of the former adjudications of this Court upon the statute in question, we conceive that the point is no longer open to controversy. See *Phillips & Martin vs. The Governor, for use, &c., 2 Ark. Rep. 390. Adams et al. vs. The State, use of Wallace, 1 Eng. 497, and Outlaw et al. vs. Yell, Gov., use of Conant & Co., 3 Eng. 345.*

In respect to the other point presented by the assignment of errors, it is not for us to decide whether it is right or wrong. The record does not expressly nor by necessary implication disclose all the evidence in the cause, nor does it appear that the judgment is for a larger sum than was actually due, exclusive of the 5 per cent. and damages up to the time of its rendition. The legal presumptions, therefore, would be in favor of that part of the judgment, and, consequently, it would not, upon that ground, be reversed. But, as the Court rendered the judgment without the intervention of a jury, it must be reversed, and the cause remanded.

The judgment of the Hempstead Circuit Court in this case is, therefore, reversed.

Mr. Justice SCOTT, not sitting.