BUSH v. VISANT.

1. ATTACHMENT: *Of land in actions before J. P.*
The act of 23d January, 1875, regulating attachments upon land in suits before Justices of the Peace, is not unconstitutional.
2. APPEAL.: *From J. P. Appeal bond necessary to stay execution.*
The granting of an appeal from the judgment of a Justice of the Peace condemning land to be sold in an action by attachment, will

not stay the execution of the judgment and sale of the land unless an appeal bond be given by the appellant.

3. ATTACHMENT: *When bond must be filed before executing judgment.*

When the defendant in attachment has been constructively summoned and has not appeared to the actions, his land, which has been attached and ordered to be sold, can not be sold until the bond provided by section 4727, Gantt's Digest, has been executed and filed.

4. ATTORNEY AD LITEM: *No authority to enter defendant's appearance.*

An attorney *ad litem* for a defendant constructively summoned has no authority by virtue of his appointment to enter the appearance of the defendant or to waive any of his rights, and he is presumed to act only on that appointment in the absence of any showing of authority from the defendant.

5. ATTACHMENT: *Statute to be strictly followed.*

The proceedings by attachment against the property of a non-resident are Statutory and must be strictly followed to make a valid sale of it.

APPEAL from *Arkansas* Circuit Court.

Hon. X. J. PINDALL, Circuit Judge.

W. H. Halliburton, for Appellant.

Plaintiffs muniments of title were not admissible in evidence, because—

1. The Justice had no jurisdiction to create "a lien on land" and condemn the same to be sold, &c. See latter clause *sec.* 40, *Art.* 7, *Const.* 1874. Said pretended judgment was not entered in the docket of the Circuit Court for common law judgments. *Act Jan'y.,* 1875; *Acts of* 1874-5, *p.* 111.

2. Defendant was a non-resident and the attorneys *appointed* by the Court could not enter an appearance, &c. The defendant was not in Court. *Gantt's Dig., sec.* 4727.

3. In a suit by attachment against a non-resident constructively summoned, no execution could issue until a bond

was executed. *Acts* 1875 *supra.,* and 2*d clause sec.* 4727, *Gantt's Dig.*

Martin & Trimble, for Appellee.

No personalty being found the attachment was properly levied on land. *Act Jan'y.,* 23, 1875. The constructive service was complete. Freeman & Johnson, the regularly retained attorneys of appellant, *entered his appearance, filed an answer and demanded a jury trial.* See *Gantt's Dig., sec.* 4727, *Sub. Div.* 1. If they had not regularly and positively entered his appearance the filing an answer had that effect. *Ib.*

The sale by the Sheriff and the proceedings before the J. P. were regular and valid. *Acts* 1875, *p.* 111, 1*st session.* The bond required by the act is the one provided by *Sub.* 2, *sec.* 4727, *Gantt's Dig.* None was necessary before the sale by the Sheriff, because that applies only to sales, where the service is constructive. Here the appearance of def't. was regularly entered, and a judgment *in personam* properly entered and the land condemned.

On conclusions of law see *G. D., sec.* 3822, 4727.

STATEMENT.

ENGLISH, C. J. The material facts disclosed by the transcript in this case, stated in the order in which they occurred, follow—

On the 22nd February, 1878, Crockett & Yancey commenced suit by attachment before a Justice of the Peace of Arkansas county, upon an account for $50, against Willis P. Bush, a non-resident. On the filing of the account, &c., an attachment was issued to a Constable, a warning order made, and Freeman & Johnson appointed attorneys *ad litem* for the non-resident defendant, Bush.

The Constable returned upon the attachment that he could find no personal property in the county belonging to defendant, and that he had levied upon the north half of the

south east quarter of section nineteen, Township four S. R. three W., as the property of Bush.

On the 29th April, 1878, the day set for trial, publication of the warning order in the VINDICATOR, a newspaper published in Arkansas county, was proved, plaintiffs appeared by attorneys, and Freeman & Johnson, who had been appointed by the Justice, attorneys *ad litem* for defendant, and accepted the appointment, also appeared, and asked leave to enter a general denial of the account sued on, which was granted, and demanded a jury, which was ordered, and there was a trial, and verdict in favor of plaintiffs for $30. The Justice rendered judgment in favor of plaintiffs against defendant for $30 and costs, to be made out of the tract of land attached, and that a copy of the judgment be certified to the Clerk of the Circuit Court of Arkansas County, to the end that execution might be issued in the manner prescribed by law. Freeman & Johnson, attorneys *ad litem* for defendant, asked for an appeal from the judgment to the Circuit Court, which was granted on condition that the affidavit required by law should be filed.

On the 17th of June, 1878, Crockett & Yancy, the plaintiffs in the attachment suit, assigned the judgment to Arthur B. Crawford; and on the 21st of the same month, a certified transcript of the docket entries and judgment of the Justice of the Peace was filed in the office of the Clerk of the Circuit Court, (no appeal bond having been executed), and an abstract of the judgment entered by the Clerk in the judgment docket.

On the 29th of June, 1878, the Clerk issued to the Sheriff a special execution (without the execution of any bond of indemnity) commanding him to sell the tract of land attached. The Sheriff advertised and sold the land, and it was purchased by Arthur B. Crawford for $45, who obtained a certificate of purchase, and on the 13th of June, 1881, and after the time

of redemption expired, the Sheriff (the successor of the officer who made the sale) executed to Crawford a deed for the land, acknowledged before a Notary Public.

On the next day Crawford and wife, by deed of that date, conveyed the land to Edward Visant.

On the 27th of June, 1881, Edward Visant commenced this action of ejectment for the land, in the Circuit Court of Arkansas County, against George W. Toland, a tenant of Willis P. Bush, exhibiting as evidence of title the deed from the Sheriff to Crawford, and the deed from Crawford and wife to himself, and alleging that Bush was the owner in fee of the land when attached, and that defendant Toland held possession of the land as his tenant, &c.

Toland was served with process, and Bush, on the application of Wm. H. Halliburton, Esq'r., as his attorney, was made defendant, and an answer filed for him, denying the title of plaintiff, and setting up title in himself; and making exceptions to the Sheriff's deed exhibited and relied on by plaintiff, on the grounds:—

1. That the Justice of the Peace had no jurisdiction to condemn the land to sale, &c.

2. That the Justice had no jurisdiction after prayer and grant of appeal.

3. That no bond was filed by the plaintiffs in the attachment suit before the Clerk issued the execution to the Sheriff for the sale of the land, &c.

The Court overruled the exceptions, and on trial of the case before the Court sitting as a jury, the plaintiff was permitted to read the Sheriff's deed in evidence, against the objection of defendant.

Plaintiff also read in evidence, besides the deeds relied on by him, from the judgment docket of the Clerk, an abstract of the judgment of the Justice of the Peace entered therein by the Clerk; and admitted that no bond had been filed before the issuance of the execution thereon.

1874 restoring the former jurisdiction of the Probate Courts, leaving in the Circuit Courts only an appellate jurisdiction. This required a restoration of the original language of the acts. It did not follow, however, that the word "Circuit Court" used in section 5794 was to be considered as changed and made to refer to the *Probate Courts,* so as to confer the right to file the bill on the final decision of the latter. It had no reference to them before they were abolished, but originally applied as shown above only to Circuit Courts in cases which had been appealed and retried. Nor can that section now authorize such a bill as this based upon a mere probate in common form.

The Chancellor erred in exercising jurisdiction. The bill should have been dismissed on demurrer, or on final hearing. The judgment must not stand as *res judicata* regarding the validity of the will, but that must rest upon the judgment of the Probate Court.

Let a judgment be entered here, reversing so much of the judgment below as establishes the will, leaving it to stand as affirmed for costs against the plaintiffs.