CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Arkansas

DURING THE JANUARY TERM, 1850.

[*Continued from Volume Ten.*]

TOWN *vs.* EVANS.

Where plaintiff after suit brought, is required by order of court to file a bond for costs, (under *sec.* 4, *chap.* 40, *Digest,*) and fails to do so by the time prescribed, the court may, in the exercise of a sound discretion, for the advancement of justice, extend the time; but where, on such failure, the court dismisses the case, this court will not reverse the judgment.

On the dismissal of an action of replevin, in such case, defendant is entitled to a restitution of the goods, or to judgment for their value, &c., if he prefer it.

Appeal from the Washington Circuit Court.

Replevin, in the *cepit,* by Evans, against Town, for a printing press, type, &c. Town pleaded *non cepit,* and property in himself; issues, trial, and verdict and judgment for plaintiff. Error

by defendant, and the case reversed, and remanded. See *Town vs. Evans,* 1 *Eng. R.* 260.

After the case was remanded, at the April term, 1849, there was a mistrial, and the cause continued. Whereupon, on application and showing by defendant, the court ordered "that plaintiff file a good and sufficient bond to said defendant, in the sum of $100, conditioned for the payment of all costs herein and that if he fail to file such bond on or before the second day of the next term of this court, this cause be dismissed."

At the next term, October, 1849, defendant moved to dismiss the case because of the failure of plaintiff to file a bond for costs, as required by the foregoing order. Whereupon, the plaintiff asked leave then to file the bond, and tendered a good and sufficient one, conditioned according to the order; but the court refused to permit him to file it, dismissed the case, and rendered judgment in favor of defendants for costs: to which plaintiff excepted. Defendant thereupon waived his right to a judgment for a return of the property replevied, and moved the court for judgment for the value of the goods, and damages for their detention, &c.; which motion the court overruled, and defendant excepted and appealed. The cause was determined before Hon. W. W. FLOYD.

W. WALKER, for the appellant, relied upon *sec.* 4, *ch.* 40, *Dig.,* to show that the court below correctly dismissed the suit, and upon *secs.* 44 and 45, *ch.* 136. *Dig.,* to show that the court erred in refusing the defendant's motion for judgment for the value of the property replevied.

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

The court below was well warranted in dismissing the cause on account of the failure of the plaintiff to file a bond for costs on or before the day named in the rule. True it is that the time might have been extended, if the court, in the exercise of a sound discretion had seen fit, for the advancement of justice, to do so; but, when it is shown that the time given had expired, and

that the act required had not been done, we do not feel authorized to say that the court committed error in refusing permission: and that, too, after a motion had been made to dismiss. The *4th sec., ch.* 40, *Dig.,* is positive that "If such plaintiff shall fail, on or before the day in such rule named, to file the obligation of some responsible person, being a resident of this State, whereby he shall bind himself to pay all costs which have accrued, or which may accrue in such action, the court shall, on motion, dismiss the suit."

We think there was error in the refusal of the court to permit the defendant below to have a judgment for the value of the goods and chattels replevied. The *44th* and *45th secs. of ch.* 136, *Dig.,* declare that "Whenever a defendant shall obtain judgment by the default of the plaintiff in any pleading, or in any other manner, after having pleaded any matter, which, if admitted by the plaintiff, would be sufficient in law to entitle such defendant to a return of the property replevied, he shall be entitled to the like judgment as provided in the preceding section;" and that "The defendant, whenever he shall be entitled to a return of the property replevied, instead of taking judgment for such return as herein provided, may take judgment for the value of the property replevied; in which case, such value shall be assessed by the jury on the trial, or by a verdict of inquiry as the case may require." The judgment in this case, it is admitted, was not obtained by the default of the plaintiff in pleading, but is was obtained in a manner, after having pleaded a matter, which, if it had been admitted by the plaintiff, would have been sufficient in law to entitle the defendant to a return of the property. The defendant had pleaded *non cepit,* and also *property in himself;* and, as a matter of course, if these pleas had been admitted by the plaintiff, the defendant would have been entitled to a return of the property. It is clear, therefore, that the circuit court should, upon request, have ordered a jury to inquire into the value of the property replevied, and should have also rendered a judgment upon the verdict of such jury. This case is clearly distinguishable from that of *Hartgraves vs. Duvall,* (1 *Eng.* 508,)

and that of *Dickinson vs. Noland,* (2 *Eng.* 28.) In those cases, the party defendant did not interpose a plea to the merits, but relied alone upon matter in abatement.

We are clear that the court below erred in not ordering a jury to inquire into the value of the property, and consequently the judgment is reversed, and the cause remanded with instructions to proceed according to law and not inconsistent with this opinion.