DICKINSON *vs.* NOLAND

Issues to pleas in abatement for variance between the writ and declaration, should be determined by the court, upon an inspection of the record, and should not be submitted to a jury.

Replevin for slaves: the declaration is at the suit of Dickinson, by guardian: the writ corresponds with the declaration in that respect, and commands the sheriff to replevy the slaves, and deliver them to Dickinson—writ held to be in accordance with Rev. Stat. chap. 126, sec. 5.

As to several counts for same slaves.

Where, in replevin, defendant pleads in abatement of the writ, the plea is sustained, and the writ quashed, he is not entitled to judgment *de retorno habendo*—as held in Hartgraves vs. Duval, 1 English's Rep.

Appeal from the Circuit Court of Independence County.

Replevin, determined in the circuit court of Independence, at the February term 1845, before the Hon. WM. CONWAY B., then one of the circuit judges.

The declaration, in substance, follows:

"Townsend Dickinson, Jr., a minor under the age of twenty-one years, by his guardian, William C. Curry, plaintiff, complains of Charles F. M. Noland, of a plea whereof he took the goods and chattels of the said Townsend Dickinson Jr., and unjustly detains the same: and thereupon the said Townsend Dickinson Jr. by Wm. C. Curry, his guardian, complains: for that the said Noland heretofore, to wit: on the 7th day of August, 1844, at, &c., took the goods and chattels, and slaves of the said plaintiff, to wit: one negro woman, slave, named Eveline, aged about 35 years, and one negro boy, slave, named Altimo (child of the said Eviline) aged about three years; of great value, to wit: of the value of $1000, and unjustly and wrongfully detains the same: wherefore the said plaintiff, by his guardian aforesaid, is injured &c.

And for that said defendant, heretofore, to wit: on the 10th day of August 1844, at, &c., had possession of the other goods and

chattels and slaves of said plaintiff, to wit: one negro woman of a yellowish color, named Eveline, slave, and one negro boy, slave, named Altimo (child of the said Eveline) about *thirty-five years old,* the property of said plaintiff, of great value, to wit: of the value of $1000, and unjustly and wrongfully detains the same: wherefore &c.

And also for that the said defendant, heretofore, to wit: on the first day of November—at, &c., had possession of certain other goods and chattels and slaves of said plaintiff, to wit: one negro woman, of yellowish color, slave, named Eveline, and her child, a boy named Altimo, slave, the property of the said plaintiff, of the value of one thousand dollars, and unjustly, and wrongfully detained the same &c., wherefore the said Townsend Dickinson Jr., by Wm. C. Curry his guardian, saith that he is injured, and hath sustained damage to the value of $1000, and therefore suit is brought."

The writ follows:

"STATE OF ARKANSAS, to the Sheriff &c.

Whereas Townsend Dickinson Jr., by his guardian, William C. Curry, complains that Charles F. M. Noland, has taken and unjustly detains one negro woman, slave, named Eveline, aged about 35 years; and one negro boy, slave (child of the said Eveline) named Altimo, about three years old. Therefore, you are hereby commanded that, if the said Townsend Dickinson Jr., who sues by his guardian, William C. Curry, shall give you security as required by law, &c., you cause the said goods and chattels to be replevied, and delivered to the said Townsend Dickinson Jr. without delay: and also that you summon said Noland to appear &c., at, &c., on, &c., to answer the said Townsend Dickinson Jr. in the premises. In testimony" &c., &c.

The sheriff replevied the goods, and delivered them to plaintiff.

Defendant filed four pleas in abatement: the first, in substance, "that the said writ varies materially from the said declaration, in this, to wit: that by said declaration the right of the possession of the said slaves, Eveline and Altimo, is claimed to be in the said William C. Curry, as such guardian, and said writ commands the said sheriff to deliver them to the said Townsend Jr., and this &c.":

the 2d, "that the said writ has varied and departed materially from the said declaration, in this to wit: that in and by said declaration, the said defendant is required to answer said Townsend Jr., by his said guardian, and in and by said writ he is required to answer the said Townsend jr. alone, and not by his said guardian: and this &c.": the 3d, "the said writ varies materially from the said declaration, in this, to wit: that in and by said declaration, the said plaintiff complains of the taking or detention of six slaves, by said defendant, and in said writ but two of said slaves are named and described &c: and this &c.": and the 4th, "that no valid bond was executed by the said plaintiff, to said sheriff, with sufficient security before the execution of said writ, as required by law: and this, &c."

The plaintiff demurred to the pleas; which the court sustained as to the second, fourth, and overruled it as to the first and third. The plaintiff replied to the first and third pleas, and defendant took issue to the replications. Defendant then claimed a jury to try the issues so formed, to which plaintiff objected, contending that the court should determine the issues upon inspection of the record, but the court overruled the objection, and ordered a jury to try the issues, to which plaintiff excepted. The jury found for defendant, and judgment quashing the writ, and *de retorno habendo* was rendered by the court, to which plaintiff also excepted.

Plaintiff appealed, and assigns for error, among other things, that the court below ordered a jury to try the issues to the first and third pleas in abatement, instead of determining the issues by inspection of the record, and that the court rendered judgment *de retorno habendo,* instead of granting appellant an *alias* writ.

WATKINS & CURRAN, for appellant.

FOWLER, contra.

OLDHAM J., delivered the opinion of the court.

The questions presented by the issues in this case, were properly and strictly determinable by the court upon an inspection of the

record in the cause, and consequently the court erred in submitting the same to a jury. From an inspection of the record it is manifest that there is no variance between the writ and the declaration. The declaration is at the suit of Dickinson by guardian, the writ corresponds with the declaration in that respect, and commands the sheriff to replevy the slaves and deliver them to Dickinson as required by the Statute. *Rev. Stat. chap.* 126, *sec.* 5. It is also very clear from the declaration that each count is for the same slaves, with a slight variation between the counts.

The court also erred in adjudging a return of the property, as has already been decided at the present term of this court, in *Hartgraves vs. Duval,* 1 *English's Rep.* Let the judgment be reversed and the cause remanded.