

## BRINKLEY ET AL. vs. THEISS.

The principles settled in *McKnight vs. Smith*, 5 Ark. Rep. 409 determine this case.

*Writ of Error to the Circuit Court of Clark County.*

WATKINS & CURRAN, for plaintiffs.

W. H. FEILD, contra.

CROSS, J. The judgment rendered in this cause rests mainly upon the act of 7th Jan. 1843, entitled "An act concerning judgments on delivery bonds." In the case of *McKnight vs. Smith*, 5 *Ark. Rep.* 409, from which this differs in no essential particular, it was held, 1st. That the motion which the act authorizes "is substituted in place of an action on the delivery bond:" 2d. That the proceedings in the original suit and the execution and delivery bond, although records of the court, belong to "a different and distinct proceeding:" and 3. That "the execution and bond are nothing more than evidence in the new action and like any other evidence do not become a part of the record unless made so by some appropriate proceeding." Applying these principles to the present case, the execution, delivery bond and return of the sheriff, although copied into the record by the clerk, are necessarily excluded, and there is nothing in the motion or judgment from which it appears that the plaintiffs in error had notice of the motion or that the same was made at the return term of the execution. One or the other being indispensable under the provisions of the act, the judgment must be reversed with costs and the cause remanded to the circuit court.

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