DUNCAN *vs.* RIPLEY.

By appearing and pleading in abatement of the writ, the defendant admits the sufficiency of the service, and cannot afterwards question it.

As to the form of the affidavit which plaintiff is required to file with his declaration in replevin, relative to the time the cause of action accrued.

Appeal from the Circuit Court of Phillips County.

THIS was an action of replevin brought by Thomas C. Ripley against James Duncan, for a mare and colt, and determined in the Phillips circuit court in October 1845, before the Hon. JOHN T. JONES, judge.

The plaintiff filed with his declaration the following affidavit:

"State of Arkansas,
County of Phillips. } Set.

Personally came before the undersigned, clerk of the circuit court in and for the county and State aforesaid, Thomas C. Ripley, the plaintiff in the foregoing declaration, who, being first duly sworn, says on oath that he is lawfully entitled to the possession of the property in said declaration named, and that the same was wrongfully taken and is wrongfully detained by the said James Duncan, the defendant therein named, and that this said plaintiff's *right to the same* has accrued within two years.

THO'S C. RIPLEY.

Sworn to and subscribed
before me, this 17th Oct. 1844. }

WILLIAM KELLER, *(Clerk)*."

The declaration was in the *cepit et detinet*. At the May term 1845, defendant appeared, and filed a plea in abatement of the writ, alleging, in substance, "that the plaintiff did not file in the office of the clerk of the court, before the issuance of the writ, the affidavit of himself or some credible person for him, stating that his, the plaintiff's, *right of action* for the property in the declaration mentioned had accrued within two years next before the commencement of the suit, according to the statute," &c. Issue was taken to

the plea, the cause submitted to the court, sitting as a jury, the court found for plaintiff, and, as the record states, "the defendant saying nothing further in bar or preclusion of said plaintiff's action," rendered judgment that plaintiff retain the goods, and awarded a writ of inquiry returnable to the next term, at which time the writ was executed, and final judgment rendered. Defendant appealed, and assigned for errors: 1st, that the court found for appellee on appellant's plea in abatement: 2d, the court rendered judgment against appellant without process having been served upon him, &c. &c.

PIKE & BALDWIN, for appellants. Several points are presented by the record in this case. The return was wholly defective: the affidavit was defective in being for too much: the court proceeded to render judgment on the merits, on issue to a plea in abatement.

As to the first point *Pool vs. Loomis,* 5 *Ark.* 110, is to the purpose. The officer wholly failed to deliver the defendant the brief note in writing signed by the officer, the return expressly showing that the copy was not in writing: the copy was not signed by the officer as required by law. *Pool vs. Loomis.*

The return also shows that the writ was executed before the bond was executed. The service was therefore void.

The statement of the sheriff is that he took the property and delivered it to the plaintiff, and then tells about the plaintiff giving bond. The language of the return, if it shows any thing, shows that the writ was executed before bond given. *Pool vs. Loomis.*

"The return should show with reasonable certainty that the plaintiff's bond was executed before, and was in the hands of the sheriff, at the time of its execution, and the places of residence of the securities." *Pool vs. Loomis, ub. sup.* None of these requisites are shown, the return was therefore bad. *Pirani vs. Barden, id.* 81.

CUMMINS, contra. There is no bill of exceptions, and there is nothing in the record to show what evidence was adduced on the issue. There was a final judgment, or rather writ of inquiry ordered on the finding, as was proper where the issue is found

against the defendant on a plea in abatement. 1 *Saund. Pl. & Ev.* 5.

The defendant took no further steps in the cause after the finding on the plea. As the evidence given on the trial was not set out, nor any exceptions taken, no question is presented in this court.

The affidavit sent up with the papers is in due form and substantially good. But this affidavit is no part of the record, and cannot be considered in this court. *Pirani vs. Barden,* 5 *Ark. Rep.* 81: *Pike et al. vs. Lenox,* 2 *Ark. Rep.* 14. The case of *Pirani vs. Barden* shows that any mistake or accidental omission in the affidavit might have been amended at any time.

The record wholly fails to show upon what state of facts the court acted, and consequently the presumption must attach that it decided properly. Even if the affidavit in the case could be considered it would require a mind of peculiar acuteness to discern any defect in it—certainly nothing substantially affecting the rights of either party is defective.

JOHNSON, C. J. It is contended by the appellant that the circuit court erred in rendering judgment against him when he had not been legally served with process. To recognize the force of this objection at the present stage of the proceeding, admitting it to be well founded in fact, would be to permit the party pleading to retrace his steps, and thereby to invert the whole order of pleading as prescribed and settled by the wisdom and experience of ages. If he desired to question the sufficiency of the service, he should have moved to that effect in apt time and before interposing his plea in abatement of the writ. By pleading in abatement of the writ, he has admitted the legal sufficiency of the service, and that the court has rightfully acquired jurisdiction of his person. It is also contended that there is error in the judgment upon the plea. The plea denies the sufficiency of the affidavit. We have carefully compared the affidavit with the section of the statute upon which it is founded, and believe it to be a substantial compliance with it. *Rev. Stat., chap.* 126, *sec.* 4.

Judgment affirmed.