

JENNINGS AND BAKER vs. ASHLEY.

THIS was a proceeding on delivery bond, determined in the Pulaski Circuit Court, in November, 1842, before the Hon JOHN J. CLENDENIN, one of the circuit judges. The facts of the case were precisely the same, in all respects, as in the case last preceding, except that there was one more defendant. The case was argued by the same counsel.

By the Court, PASCHAL, J. The facts of the case are precisely as in the case of *Jennings vs. Ashley and Beebe*, and the same principles upon the merits, are involved.

The decision of the Court in that case was made upon the facts as argued by counsel; and owing to the peculiar manner in which the record was transcribed, the Court overlooked the fact that the declaration was not filed at the term to which the execution was returnable, and the delivery bond forfeited. Upon a nearer examination of dates, we find that the declaration was not, in fact, filed until the fol-

lowing term. Consequently, when the voluntary appearance of the defendants was entered, there was no suit to appear to—no declaration, process, or other thing, to which to hold the defendants. Such appearance did not bind them to answer the declaration filed at a subsequent term. Edwin Y. Baker was, therefore, never properly before the Court; nor, indeed, either of the other defendants, except so far as they resisted the motion for judgment, and filed a bill of exceptions. This they were not bound to do; and, had they remained silent, the plaintiff must have sued out his summons, and proceeded in the ordinary form of an action at law. Edwin Y. Baker never was before the Court. Consequently, the *nunc pro tunc* judgment as to him is the more apparently erroneous.

Judgment reversed and Jennings and W. R. Baker considered as in Court.
