

GUESS vs. THE STATE.

In indictments for misdemeanors, the judgment of the court upon a plea in abatement is final.
If the issue on the plea be found against the defendant, the jury, or the court if sitting as a jury, should fix the penalty, and the judgment should be rendered accordingly.
Where, in such case, the judgment is not final, no appeal lies from it to this court.

Appeal from the circuit court of Independence county.

THIS was an indictment against Russell Guess, charging him with an assault and battery upon W. Holland, determined in the circuit court of Independence county, at the August term, 1844, before the Hon. THO'S JOHNSON, then one of the circuit judges.

To which he pleaded, in abatement, that his name was not Guess but Gist. The State replied that he was as well known by the name of Guess as Gist, to which he took issue, and the case was submitted to the court sitting as a jury. The court, after hearing the evidence, found for the State, and rendered judgment against the defendant for "*the costs of suit to that time.*" The defendant excepted to the finding of the court, and set out the evidence in his bill of exceptions.

After the trial, the court made an order that the sheriff take the defendant into custody; and after that, an order was made that an alias capias issue, and the cause be continued. The defendant then appealed to this court.

The Attorney General moved this court to dismiss the case, because there was no final judgment rendered, by the court below.

JOHNSON, C. J., not sitting.

OLDHAM, J., delivered the opinion of the court.

In this case, the defendant filed a plea in abatement, to which the State replied, and the court, by consent of parties sitting as a jury, found the issue for the State, and gave judgment against the defendant for costs. In cases of misdemeanors the judgment of the court upon a plea in abatement is final. 1 *Chitty Cr. Law*, 451. If the plea is found against the defendant, the jury, or the court, if the case is submitted to the court without a jury, should fix the penalty, and the judgment of the court should be in accordance with the verdict.

Inasmuch as the court only gave judgment for the costs without assessing and giving judgment for the fine, there is no final judgment from which an appeal will lie to this court. The case must therefore be dismissed to the circuit court, to be proceeded in to final judgment according to law.

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