

PELHAM ET AL. vs. PAGE.

To authorize a judgment on a forfeited delivery bond, under the act of 7th Jan'y, 1843, it should affirmatively appear upon the record, that the execution was returned unsatisfied.
In proceeding on a forfeited delivery bond, a judgment cannot be rendered, by default, without a writ of inquiry.

Writ of error to the circuit court of Independence county.

THIS was a judgment on a forfeited delivery bond, obtained, on motion, by Tho's T. Page against C. H. Pelham, the principal in the bond, and his securities, in the circuit court of Independence county, at the August term, 1844, before the Hon. THO'S JOHNSON, then one of the circuit judges.

The motion contained no statement that the execution, under

which the bond was taken, had been returned unsatisfied, nor does it appear in any part of the record. The court rendered the judgment by default, without a writ of inquiry.

W. BYERS, for plaintiffs. The judgment is erroneous because it is not in conformity with the statute, which requires that judgments upon delivery bonds shall be taken in the same manner as on penal bonds. See *acts of 1842, page 49, and Rev. Stat. p. 609, sections 5, 6, 7, 8, and 9.*

The judgment is clearly erroneous, according to the rule laid down by this court in the case of *McKnight vs. Smith, 5 Ark. Rep. 410*, and must be reversed.

JOHNSON, C. J., not sitting.

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

In the case of *McKnight vs. Smith*, it was decided by this court that to authorize a judgment upon a forfeited delivery bond in the summary mode authorized by the act of Jan'y 7, 1843, p. 50, it should affirmatively appear upon the record that the execution was returned unsatisfied. And in *Jennings vs. Ashley & Beebe, 5 Ark. 128*, it was also decided that upon the default of the defendants, in a proceeding upon a forfeited delivery bond, it is error for the court to assess the damages, but a writ of inquiry should be awarded for a jury to assess the damages. The case before us is erroneous in both these respects. Reversed.
