SHROPSHIRE *vs.* MCCLAIN.

As to trial, verdict and judgment where the defendant appears, and submits the case to the jury without pleading.

Writ of error to the circuit court of Johnson county.

THIS was an action of assumpsit for services as an attorney and counsellor at law, brought by McClain against Shropshire, and determined in the circuit court of Johnson county, in September, 1845, before BROWN, judge.

The transcript of the record consists of the declaration, in the usual form, the writ with the Sheriff's return of service, and of the following entry of the trial and judgment:

"And now on this day came the parties, by their respective attorneys, who requiring a jury, the Sheriff returned into open court the following panel, to-wit: A. W. Peacock," &c., (naming them) "twelve good and lawful men of Johnson county, who, after being duly elected, empannelled and sworn, well and truly to try the issue joined in this case; and after hearing the evidence adduced, and argument of counsel, retired from the bar to consider of their verdict, and, after some time spent in their deliberation, returned into open court with the following verdict: "we the jury do find that the defendant did undertake and promise as in said declaration set forth, and do assess the plaintiff's damages to fifty dollars;' —therefore it is considered by the court here that the said plaintiff do have and recover of the said defendant the said sum of fifty dollars so assessed, together with costs," &c.

The defendant brought error: the errors assigned are stated in the opinion of the court.

LINTON & BATSON, for the plaintiff.

There is no interlocutory judgment by default in this case, and the plaintiff below was not entitled to an inquiry of damages until after interlocutory judgment by default was entered. *Rev. Stat. Ark. p.* 630, *sec.* 77, 81. 1 *Caines' Rep.* 6; nor until the next term of the court after such interlocutory judgment, unless the court direct it to be made at the same term. *Rev. Stat.* 630, *sec.* 81.

The jury should have been sworn to assess damages, and swearing them to try the issue joined, when there was no issue to try, is error. 2 *Marsh.* 64.

RINGO & TRAPNALL, contra.

That the record is informal and irregular cannot be denied. Yet if the judgment be right on the whole record, the judgment will be affirmed. *Saunders vs. Johnson,* 1 *Bibb* 332.

Where no plea has been filed, no verdict or judgment can be given for defendant *Alexander vs. Leatch,* 3 *Marsh.* 503.

To swear the jury to try the issue where there has been no plea filed or issue joined, and verdict and judgment for the defendant is error. *Everheart's admr. vs. Hickman,* 4 *Bibb* 341.

A verdict and judgment for the plaintiff when a valid plea is filed by defendant, and although the record states that there was a replication filed by plaintiff and issue joined, yet no issue or replication appearing on the record is erroneous. *Patrick vs. Conrad, Litt. Sel. Cases,* 509. *Hopkins vs. Preston,* 2 *Marsh.* 64. *Roberts vs. Swearingen, Hardin* 121.

In this case the plaintiff had an uncontested cause of action against the defendant, and the record shows that there was a fair trial and verdict. The judgment will not be set aside for an irregularity, that does not affect the merits of the case either for plaintiff or defendant. To reverse a judgment, the plaintiff in the court of error must not only show an error in the record, but that it is to his prejudice, this is not the case in this instance.

The principle is clear and well settled that if judgment be given for plaintiff when a plea in bar is unanswered, or for the defendant when there is no plea on the record, it is inconsistent with the record and erroneous: and the converse is equally clear; if the judgment had been for defendant in the first instance, or for the plaintiff in the second,—although irregular, it appearing right on the whole record, it will be affirmed.

OLDHAM J., delivered the opinion of the court.

The plaintiff in error has specially assigned three causes of error,

all of which are inconsistent with the record. 1st, That a jury came to assess damages, when no interlocutory judgment had been rendered by default. 2d, That a jury came to assess damages at the same term of the defendant's default without any order of court. 3d, That the jury were sworn to try the issue, when the defendant had wholly failed to appear.

It is true that the record does not show that any plea was filed; nor does it show that a judgment by default was rendered, but it shows that the parties appeared,'' that a jury came, who were sworn to try the issue joined, that evidence was adduced and argument of counsel heard, and that the jury found ''that the defendant did undertake and promise as in the said declaration set forth.'' If any error was committed it was caused by the plaintiff in error and not by his adversary. He had all the advantage of a fair trial, as though he had pleaded to the action, and it does not appear that any injustice has been done him. The defendant below by failing to plead admitted the facts contained in the declaration, for which reason, had the jury found in his favor, no judgment could have been rendered on the verdict, as it would have contradicted the pleadings upon the record.

We conceive that substantial justice has been done between the parties, and therefore affirm the judgment.