HARTGRAVES *vs.* DUVAL.

At common law the defendant in replevin is entitled to judgment *de retorno habendo* where he pleads property in himself, or a stranger, and the issue is found in his favor.

Revised Statutes, ch. 126, *sec.* 43, 44, extend the right of defendant to this judgment where he shall obtain judgment by discontinuance or non-suit &c., but there is no law entitling him to a return of the property replevied, where he elects to evade the determination of his right to the property, by interposing matter in abatement.

Replevin for a horse: plea in abatement of the writ, on account of variance between it and declaration: issue to the plea: court found for defendant, and quashed the writ: defendant asked for judgment of *retorno habendo*, refused by the court, he excepted, and brought error:—held that there is no law entitling defendant to judgment for a return of the goods in such case.

Writ of error to the circuit court of Crawford county.

REPLEVIN, for a horse, determined in the Crawford circuit court, at an adjourned term in July, 1844, before Brown, Judge.

In addition to the statement made by the court, it is necessary only to add that in the declaration the plaintiff's name was written, *Duvale,* in the writ, *Duval,* which the defendant pleaded in abatement as a variance.

CUMMINS for the plaintiff.

Upon the finding upon the plea in abatement, the proper judgment would have been, that the writ be quashed. 1 *Tidd's Pr.* 589. And upon this the plaintiff might have taken an alias writ. *Pool vs. Loomis,* 5 *Ark. Rep.* 110. *Hartley vs. Tunstall, Waring & Byrd,* 3 *Ark. R.* 119.

But upon the failure and refusal of plaintiff to take an alias writ, the 43*d sec. of ch.* 126, *Rev. Stat. Ark.* peremptorily required the court to enter judgment of non-suit, or discontinuance, against plaintiff, adjudge a return of property &c.

Such an omission would be an error in the court for which the plaintiff could reverse the case, though in his favor. *Loomis vs. Taylor,* 4 *Day's R.* 141.

SCOTT, contra.

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

This was an action of replevin brought by Duval against Hartgraves in the circuit court of Crawford county. At the return term the defendant below appeared and filed a plea in abatement to the writ, upon which there was an issue which was found in favor of the defendant below, and the writ was abated accordingly. The defendant then moved the court for a judgment for the return of the property replevied, which motion the court overruled, to which the defendant excepted, and has brought the case into this court by writ of error.

If the plaintiff in error was entitled to a judgment of *retorno* in the circuit court, the judgment of that court is incomplete, and there is no final judgment to which a writ of error may issue. It is not contended by the plaintiff in error that the court erred in the judgment rendered upon the issue made by the pleadings but that

it was not sufficiently extensive in not awarding to him a return of the property upon the abatement of the writ. He does not therefore seek either to affirm or reverse the judgment of the circuit court but to obtain an extension of that judgment in accordance with the motion made by him in the circuit court and which was overruled. We apprehend that a writ of error cannot be made effective for the accomplishment of the desired object, but that some other procedure must be resorted to, to obtain a completion of the judgment in the court below.

At common law the defendant in replevin is entitled to a judgment of *retorno habendo* when he pleads property in himself or a stranger and the issue is found in his favor. Our Revised Statutes extend the right of the defendant to this judgment "when he shall obtain judgment by discontinuance or nonsuit," and also "when he shall obtain judgment by the default of the plaintiff in any pleading, or in any other manner after having pleaded any matter which, if admitted by the plaintiff, would be sufficient in law to entitle such defendant to a return of the property replevied. *Rev. Stat. ch.* 126, *sec.* 43, 44.

There is no law entitling the defendant to a return of the property replevied in a case like the present where he elects to evade the determination of his right to the property in question by interposing matter in abatement of the proceedings. If he is in law and justice entitled to a return of the property, he should interpose a plea to the merits, upon the determination of which in his favor he will by law be entitled to that judgment which accords with his rights. The defendant in this case having avoided an issue upon the merits by his pleadings, must resort to some other mode of redress, if he is entitled to it.

The circuit court correctly refused to render judgment for the return of the property replevied upon the finding the plea in abatement in favor of the defendant. Let the judgment be affirmed.