

## TAGERT vs. HARKNESS.

Under section 46, chap. 116 Rev. Stat., where process is served upon the defendant over fifteen, and under thirty days before the return day thereof, unless the defendant appear, and plead to the action at the return term, the plaintiff is entitled to judgment by default.

The right to a continuance, in such case, is dependent upon an appearance and plea to the action by the defendant.

Unless he appear and plead, the presumption is that he has no defence, and the plaintiff is entitled to judgment by default.

*Writ of error to the circuit court of Benton county.*

THE statement made by the court is sufficient.

PASCHAL, for the plaintiff.

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

This was an action of debt instituted by the defendant in error against the plaintiff in error in the circuit court of Benton county. The writ which was returnable to the May term, 1845, was served under thirty but over fifteen days before the first day of the term. At the return term the defendant below, failing to appear and plead, or otherwise answer the action, judgment by default was rendered against him. He now insists in this court that the circuit court erred in rendering judgment against him by default, because he was not served with process thirty days before the commencement of the suit.

All suits, in which the writ shall have been executed thirty days previous to the return day of such writ, must be tried at the return term unless good cause be shown for continuance. In cases where the defendant has been served with process, fifteen days before the return day thereof and under thirty days, he must appear at the return term and plead to the action, and when the process is served fifteen days, the cause must be continued until the next

regular term, when the defendant must appear and plead, and the cause be tried. *Rev. Stat. ch. 116 sec. 45-46.*

The right to a continuance when the process is served over fifteen and under thirty days, is dependent upon an appearance and plea to the action by the defendant. Unless he appear and plead, the presumption is that he has no defence, and the plaintiff is entitled to this judgment by default. This is the clear import of the Statute referred to, and it was properly acted upon by the circuit court in this case.

Affirmed.

