

RUNYON AS AD. *vs.* HALE.

Where an action of unlawful detainer is dismissed for failure of plaintiff to enlarge his possession bond, on rule requiring it, the defendant is entitled to judgment for restitution.

Writ of Error to Hot Spring Circuit Court.

On the 27th April, 1846, John C. Hale brought an action of unlawful detainer, in the Hot Spring Circuit Court, against Garrett Williamson, for the possession of some improvements situate in the Hot Springs valley. The sheriff put the plaintiff into possession of the improvements in question, on his executing the usual bond in such cases.

At the return term, September, 1846, after the pleadings were made up, defendant filed a motion for a rule upon the plaintiff to give a possession bond in a larger penalty. The motion was granted, and the plaintiff required to file a bond by the next term of the Court in a penalty of \$600 [the original bond was for \$400] or show cause.

At the following term, (March, 1847,) plaintiff filed, as a response to the rule, that the bond given by him to the sheriff was a full indemnity to defendant. On hearing the evidence, the Court decided, says the record, "that the present bond is too small, and that the plaintiff may give bond in the sum of \$600, with good security. The plaintiff declines giving any further bond," &c. Whereupon, defendant moved to dismiss the suit, and and for writ of restitution. The Court dismissed the suit, but refused judgment for restitution, defendant excepted, and afterwards applied to this Court for Mandamus to compel the Court to render judgment for restitution, which was denied, and he then brought error. The cause was tried below before the Hon. C. C. Scott, then one of the Circuit Judges.

After error brought, Williamson died, and Runyon, his administrator, was made plaintiff.

FOWLER, for the plaintiff. Upon the question that the Court should have awarded a writ of restitution, relied upon *Mooney ex parte*, 4 Eng.—. *Williamson vs. Scott*, *ib.* —. *Fleeman et al. vs. Heren et al.*, 3 Eng. 355. *Dig.*, *ch.* 71; and cited *Parsons vs. Brown et al.*, 7 Paige 360. 1 *Cond. R.* 258. 5 *J. R.* 366. 10 *J. R.* 308.

ENGLISH and WATKINS & CURRAN, contra. The act of 23d December, 1846, (*Dig.*, *ch.* 71,) was passed subsequent to the institution of this suit, and has no bearing upon it—not being retrospective. (1 *Eng.* 487. 7 *J. R.* 477.) The act of 1845 authorizes judgment of restitution on verdict only. In this case, there was no verdict, nor did the plaintiff dismiss his suit as in the case of *Fleeman et al. vs. Heren et al.*

Mr. Justice WALKER delivered the opinion of the Court.

The question presented by the assignment of errors, has no reference to the decision of the Circuit Court upon the motion to enlarge the bond given by the plaintiff in the Court below. The decision upon that motion was against the plaintiff below, and, had he felt himself aggrieved by the decision, he should have presented the error to this Court by appeal or writ of error. This he did not do, but submitted to the decision. The argument addressed to this Court upon that decision, therefore, need not be noticed.

The only question presented upon the record is, whether the Circuit Court correctly overruled the motion of the plaintiff in error for judgment for restitution of the property of which he had been dispossessed by the plaintiff's writ. It appears that the Circuit Court ruled the plaintiff to give an enlarged bond, which he declined doing, whereupon the Court rendered judgment of discontinuance against him, but refused, upon the motion of the defendant, to render a further judgment of restitution

The statute, which was in force at the time the rule was made, and which regulated the practice in the case, is of itself decisive of this question. The 12th sec.; Dig. 537, provides that "if the bond be adjudged insufficient, and a new bond shall not be filed within such time as may be prescribed by the Court, judgment of discontinuance shall be rendered against the plaintiff, and such other judgment as the nature of the case may require, in order to restore to the defendant the possession of the estate and to compensate him for his damages." This provision of the statute (so reasonable and necessary to prevent the grossest injustice by using the statutory remedy for the purpose of getting into possession and then suffering a discontinuance) has, in effect, been repeatedly recognized by this Court, (*Fleeman et al. vs. Heren et al.*, 3 Eng. 355, and *Sumner vs. Spencer*, 4 Eng. R. 441,) affirming the right of the defendant to restitution. And, with equal, if not greater reason, it should extend to a case like the present, which is expressly provided for by statute.

We are, therefore, of opinion that the Circuit Court erred in overruling the motion of the defendant below for judgment of restitution.

The judgment must be reversed, and the cause remanded, to be proceeded in according to law and not inconsistent with this opinion.

Mr. Justice SCOTT not sitting.