

STATE BANK *vs.* WHITING ET AL.

In Error, pleas in abatement must be filed within three days after assignment of errors, (*State Bank vs. Ruddell et al., Eng. 123.*) or if errors are assigned before a defendant is served with process, he must plead matter in abatement within the first three days of the term to which he is served with process.

The court below erroneously dismissed this case under a mistaken opinion that a loose paper, in the form of declaration, which had, without authority, "straggled" into the case, was the commencement of a new suit.

*Writ of Error to Arkansas Circuit Court.*

This was an action of debt, by the Bank of the State of Arkansas, against James M. Harris, Elijah Whiting, John Malpass, and Dudley G. W. Leavitt, determined in the Arkansas Circuit Court, at the April term, 1849, before the Hon. JOSIAH GOULD, Judge.

All the defendants were served with process except Harris, as to whom several writs were returned *non est*. The cause was finally dismissed under the circumstances stated in the opinion of this court, and the plaintiff excepted and brought error.

The writ of error was issued as against all of the defendants in the suit below, and made returnable to the July term, 1849, of this court.

On the 3d day of July, 1849, the plaintiff filed an assignment of errors. On the 19th of the same month, she filed a suggestion that Leavitt was dead, and Harris not served with process in the court below, and asked that the suit abate as to them; and that an alias *sci. fa.* issue against the other defendants, and that the case be continued. Whiting appeared at the same term, and filed a joinder in error.

At the January term, 1850, plaintiff moved to amend the writ of error by striking out the name of Harris, again suggested the death of Leavitt, and asked for a *pluris sci. fa.* as to Malpass.

On the 1st day of February, and during the continuance of the January term, 1851, Malpass appeared and filed two pleas in abatement:

1. That before, and at the time the writ of error issued, defendant, Leavitt, was dead.
2. That at the time the judgment below was rendered, Harris was a party, and was still living, but was not joined with the other defendants in the writ of error.

On the 26th April, following, plaintiff filed a motion to strike out the pleas of abatement, and at the same time filed a motion to amend the writ of error, by stating therein that Leavitt had departed this life after judgment below, and before suing out the writ of error, and was not therefore made a party defendant.

Mr. Justice SCOTT delivered the opinion of the Court on the motion.

Both pleas in abatement were filed out of time. The assignment of errors having been filed some time previous to January term, 1851, and John Malpass having been served with process

in the month of December preceding, he could plead in abatement only within the first three days of that term. Therefore, as they were filed near a month afterward, the motion to strike them out must prevail. *The State Bank vs. Ruddel et al., on motion*, 5 Eng. 124.

The motion to amend the writ of error is granted.

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HEMPSTEAD for the plaintiff.

TRAPNALL & TRAPNALL contra.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The defendants, at the April term, 1849, filed a motion to discontinue the cause upon the ground that it had not been placed upon the docket, nor entered upon the minutes of the court, since the October term, 1847. The court sustained the motion to discontinue, not for the reason assigned in the motion, but for the fact that a declaration, which appeared to have been filed in the cause, on the 5th of February, 1848, had been withdrawn by the plaintiff on the same day that the order of discontinuance was made, and which declaration was deemed by the court the commencement of a new action. The original declaration and the one upon which the writ issued was filed on the 7th of August, 1846. It is unnecessary to say any thing as to the effect of a failure to place the cause upon the docket, and of an express order to continue it from term to term, as the state of case, as suggested by the motion did not exist in point of fact. The cause was regularly continued over by an express order from term to term from the April term, 1847, down to the final judgment. The declaration which appears to have been filed on the 5th February, 1848, was a mere loose paper that had straggled into the case and that without any authority, and so far as the record shows, without any connection whatever with the proceedings. The original declaration stood upon the files in full force without any

motion or order to withdraw it, nor is there any showing upon the record how the one which was withdrawn ever found its way into the case.

It is manifest, therefore, that there was no good ground to discontinue the cause, and as a matter of necessity the judgment must be erroneous and ought to be reversed. The judgment of the Circuit Court of Arkansas county, herein rendered, is therefore reversed, annulled and set aside with costs and the cause remanded to be proceeded in according to law and not inconsistent with this opinion.

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