GASQUETT & CO. *vs.* BERRY.

The writ of error should correspond with the judgment, in every essential matter.

Where the writ of error omits the name of one of the defendants to the judgment below, it is sufficient ground to quash the writ, and the defect cannot be amended.

Writ of error to the circuit court of Pulaski county.

THIS was a suit, by judicial garnishment, determined in the circuit court of Pulaski county, at the May term, 1845, before Judge CLENDENIN.

The writ of garnishment—issued out of the Pulaski circuit court, and directed to the sheriff of Conway county—recited, that William Gasquett, James Gasquett, and Peter Conway, partners, under the style of W. & J. Gasquett & Co., obtained judgment against James De Baun, in the court from which the writ issued, on the 26th of September, 1842; that they had reason to believe that Eli

Bentley and *William* Berry, under the style of E. Bentley & Co., were indebted, &c. to De Baun; the sheriff was "therefore commanded to summons the said Eli Bentley and *Hiram A.* Berry" to answer, &c. This writ was served upon Berry, but not upon Bentley.

Berry moved to quash the writ, on the grounds, 1st, that it was improvidently isued to Conway county; 2d, that it recited an indebtedness, &c. on the part of Bentley and *William* Berry, but commanded the sheriff to summons *Hiram A.* Berry. The judgment of the court was as follows:

"Came the *parties,* by their attornies, and on argument of counsel on the motion heretofore filed to quash the writ of garnishment in this case, it is considered by the court that said motion be sustained—It is therefore considered by the court that said *Garnishees* go hence, &c., and recover against said plaintiffs all their costs," &c.

The plaintiffs brought the case to this court by writ of error.

The writ described the parties to the judgment below thus: "*W. & J. Gasquett & Co., plaintiffs, and Hiram A. Berry, defendant,*" in other respects it was in the usual form.

A. FOWLER, for defendant, moved this court to quash the writ of error, on the grounds stated in the opinion of the court.

RINGO & TRAPNALL, contra, moved the court to amend the writ, so as to make it correspond with the judgment: their brief follows:

On the motions to dismiss, and to amend the writ of error issued in this case, the plaintiffs present the following points and authorities, viz:

1. That the writ is a process of this court. *State Constitution, Art. VI, s.* 2. *Rev. Stat. Ark. ch.* 117, *s.* 1.

2. That every court of record has power over its own process, and may amend the same, unless restrained by some positive enactment of law, and by express authority of the 112 sec. of chap. 116, of the Revised Statutes of this State, this authority is given to all courts of this State "in which any action may be pending." Nor is this right in regard to the amendment here sought in any re-

spect changed or taken away by any thing contained in the 117 chap. of the Revised Statutes. *Clapp vs. Bromagham et al.* 8 *Cow.* 746. *Ib.* 9 *Cow.* 304.

3. A process void in law (as for instance, a writ without "the seal of the court," or a writ not running in the name of "the State of Arkansas," or a writ not "signed by the clerk," &c.) cannot be amended: but a process, defective merely and not void, but which may be avoided, may generally be amended in furtherance of justice, if application therefor be appropriately made in due time. Here the writ is not void, and application has been made at a proper time to amend it. Writs of error have in this country been amended. *Course et al. vs. Stead, et ux.,* 1 *Cond. Rep.* (*U. S.*) 217. *Rafael vs. Verelst,* 2 *Blackstone's Rep.* 1067.

4. The writ of error in this case is good and in strict legal conformity with the record before the court. The original process in the case was a writ of garnishment, issued against the defendant and one Eli Bentley, but was never executed upon Bentley, and he never appeared to the writ, which was quashed by the circuit court, on the separate motion of the defendant, Berry, upon whom the writ of garnishment had been well executed; and who, when the final judgment quashing the writ was pronounced, was the sole party defendant in the cause: And he, as well as all of the plaintiffs below are appropriately named in the writ. The writ therefore is neither void nor voidable. But if it shall be adjudged that Bentley was a party to the suit, then the plaintiffs insist that, in furtherance of justice, the writ should be amended.

5. The reason upon which the courts in England refused to amend writs of error, seems to have been because they were issued there from a different tribunal or authority, from the court into which they were returned, and were regarded as its commission or authority to hear and adjudicate the cause; which reason never having been applicable to this court, or had any existence in this country, the rule founded thereon cannot be considered as binding upon this court. 2 *Tidd's Practice,* 9 *Ed.,* 1134.

JOHNSON, C. J., delivered the opinion of the court.

The defendant in error has filed motion to quash the writ of error issued in this case, and the plaintiffs have, also, filed their motion to amend the same so as to correspond with the judgment. The motion to amend, having been interposed before any final action on the one to quash, is in apt time, and will, consequently, receive the consideration of this court. The defendant insists that the writ ought to be quashed, 1st, because it does not contain the individual names of the plaintiffs as set forth in the judgment; and 2d, because the writ states a judgment in favor of Hiram A. Berry only, when the record shows that it was rendered in favor of Eli Bentley and said Berry as late partners, &c. The objections to the writ are well founded, and fully sustained by the facts. The question then arises whether they are sufficient to quash and dismiss it. It is a rule which admits of no exception, that the writ must, in every essential particular, correspond with the judgment. It would be difficult to conceive of a more material or fatal variance between the judgment as described in the writ, and the one certified in the transcript, than the omission of one of the defendants. We think it clear, therefore, that there is not such a correspondence between the writ and the judgment sought to be reversed as is required by the law, and that therefore the motion ought to be sustained, and the writ quashed.

The question now recurs whether the defect is of that character which will admit of amendment. The statute provides that "the court in which any action may be pending shall have power to amend any process, pleading, or proceeding in said action in form or substance for the furtherance of justice, on such terms as may be just, at any time before final judgment rendered therein." Would this statute sanction such an amendment as to bring a new party before the court, and that too without ever having been served with notice of the proceeding against him? We imagine not. The statute requires all the parties, whose rights are to be affected by the decision of this court, to be notified to appear and defend the action. The defendant, Bentley, has a judgment in his favor in the court below, and the plaintiffs are now seeking to reverse that judgment, and without having taken any steps to bring him before

this court. There is nothing in the record showing that he has been apprised of the present proceeding, and the statute of amendments certainly could not be so expanded as to bring a new party before the court, without giving him notice in some of the modes prescribed by law. But it is contended that Bentley is no party to the judgment, as he was not served with the writ of garnishment issued in this case in the court below. There is no showing that the garnishment was executed upon him, yet he appears in the record of the judgment, and the only presumption there can arise is, that he waived the service, which he had a right to do, and submitted himself to the jurisdiction of the court by entering his voluntary appearance to the action. He being a party to the judgment below, and that judgment being in his favor, he is most unquestionably entitled to notice of any proceeding by which it is sought to be reversed. For these reasons, we think the writ of error in this case ought to be quashed and dismissed.

Writ quashed.