

BIRD *vs.* MATHIS USE OF VAN HOOK & CARR.

Where, upon plea in abatement, the writ is quashed, the case stands as though no writ had issued, and the defendant is not bound to appear until served with a valid writ:

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

This was an action of debt upon a promissory note, brought by Mathis for the use of Van Hook & Carr against Bird, and determined before the Hon. JOHN FIELD, then one of the circuit judges, at the May term of the circuit court of Union county, 1844.

At the return term, November, 1843, Bird filed a plea in abatement of the writ on the ground of variance between it and the declaration. Issue was taken upon the plea, the court determined the writ bad, and gave judgment that it be quashed. The plaintiff asked, and obtained leave to amend the declaration, and the cause was continued. At the following term of the court, without the issuance of any other writ, judgment, by default, was rendered against Bird for the amount of the note, and he brought error.

FLANAGIN, for the plaintiff.

This court has decided in *Moore vs. Watkins, and others*, 1 Ark. R. 209, and in *Pool vs. Loomis*, 5 Ark. R. 112, that without writ or appearance judgment by default cannot be rendered. The writ was quashed, and subsequently this requisite was not complied with. There is no appearance in the plea of abatement entered. In this all authorities concur. The judgment by default expressly negatives the idea of any appearance; had it been otherwise judgment would have been *nil dicit*.

E. CUMMINS, contra.

OLDHAM J., delivered the opinion of the court.

After the finding of the plea in abatement in favor of the plaintiff in error, and the rendering of judgment quashing the writ, the

case stood as though no writ had ever been issued, and the party was not bound to appear, until regularly notified by the service of a valid writ. The judgment by default entered at a subsequent term was erroneous, being without notice upon the party. The judgment is reversed, the cause remanded, and Bird considered in court, in consequence of having prosecuted his writ of error to this court.

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