PENNINGTON'S ADM'RX *vs.* GIBSON, USE &C.

Where a defendant, after legal notice, fails to appear and defend, a judgment by default will not be set aside for the purpose of letting in the plea of the statute of limitations.

It is otherwise where the judgment is rendered against him without notice.

Where an administrator rejects a demand presented against the estate, and it is presented to the probate court for allowance, the statute requiring ten days notice of the application is imperative, and the probate court can take no jurisdiction of the person of the administrator until the notice is given or waived.

A judgment rendered without such notice is a nulity.

To make a judgment binding upon a party, the record must show that he had notice of the proceedings, or waived it.

Where judgment is rendered without notice, the defendant by appearing and applying to have it set aside, waives no legal right except that of notice, and after the judgment by default is set aside, may interpose any defence whatever.

Though the statute dispenses with formal pleading in the adjudication of claims against estates before probate courts, yet if the defendant elects to file written pleas, he is held to the strictness of a special pleading.

Where a plea sets up a fact, which, if true and well pleaded, is a bar to the action, it cannot be stricken out as a mere nullity.

Appeal from the circuit court of Pulaski county.

In August, 1843, Lorenzo Gibson, surviving partner of the firms W. R. Gibson & Co. and L. & W. R. Gibson, suing for the use of Wm. K. English, presented to the probate judge of Pulaski county for an allowance against Sarah Pennington as administratrix of W. D. Penningtcn deceased, four notes executed by her intestate to the firms which Gibson represented. It was shown to the court that English had presented the notes to the administratrix, probated in the usual form, for allowance, and that she had refused to allow them; whereupon, it appears from the record, the court, without ordering any notice served upon the defendant that the claims had been presented ior allowance, entered up judgment against her for the amount of the notes.

At a subsequent day of the term, the administratrix appeared and moved the court to set aside the judgment, and continue the

case, upon the grounds that she was unable, from sickness, to attend court on the day the judgment was rendered against her; and that she was entitled to credits upon the notes, which she believed she could establish by the next term. The motion was verified by affidavit, and the court set aside the judgment, and continued the case.

At the following term of the court, the defendant appeared, and filed a plea of the statute of limitations. The plaintiff moved to strike out the plea upon the following grounds: "1st, because a fraud has been perpetrated upon the court, by defendant, in moving to set aside the original judgment to let in a meritorious defence, and then pleading the statute of limitations: 2d because after judgment by default, defendant cannot set up said defence, by law, after applying to the indulgence of the court for leave to plead." The court sustained the motion, the defendant excepted, and took a bill of exceptions, setting out the plea. The defendant then brought forward credits which she claimed, and the court, after hearing the evidence, rejected them, and rendered judgment for plaintiff, to which defendant excepted, and appealed to the circuit court.

The cause came on for hearing at the April term, 1845, before CLENDENIN, judge, the judgment of the probate court was affirmed, and the defendant appealed to this court.

BERTRAND, for the appellant.

We contend that the court was bound to set aside its judgment independent of any reason assigned in the motion of defendant for that purpose; because the judgment was rendered in violation of law, and was no judgment at all. Our statute provides that if any executor or administrator shall refuse to allow any claim after the same may have been exhibited in accordance with the provisions of the statute on that subject, such claimant may present his claim to the court of probate for allowance, "giving the executor or administrator ten days notice of such application to the court." *Rev. Stat. pages* 82 and 83. *Sec.* 95. No such notice was given, and judgment was rendered within ten days after said demand was presented to the administratrix for allowance. In appearing to the

action, and moving the court to set aside a judgment rendered in violation of law, the defendant waived notice only, and no other right. The case then stood as though there had been no proceedings had, and the defendant could plead any matter that could have been originally pleaded in defence of the action. So then, it would seem to be clear that the court erred in striking out the defendants plea. The judgment of default was not set aside upon terms, but the court absolutely and unconditionally done away with all its proceedings therefore had, and the cause stood as an original action with the exception of the waiving of notice. The defendant's plea of limitations was received by the court and ordered to be filed.

TRAPNALL & RINGO, and CUMMINS & HAYDEN, contra.

The plea of the statute of limitations was filed without leave. Its being among the papers of the cause did not deprive the court of its discretionary power as to the admission of such pleas after a default set aside. It could still exercise that discretion in any way it thought fit, as by striking from the files. A judgment by default will not be set aside to admit such a plea. 1 *Tidd's P.* 508. *Willett vs. Alluton,* 1 *W. Black.* 35. Nor will it be admitted by way of amendment. *Martin vs. Anderson,* 6 *Randolph* 19. *Coit vs. Skinner,* 7 *Cow. R.* 401. *Lamot vs. McLaughlin,* 3 *Har. & McHen. R.* 324. *Plareble vs. Whitehill,* 2 *Yeate's R.* 279. *Sheperd vs. Lerme* 6 *Munf.* 592. *Brown et al. vs. Duplantier,* 18 *Mar. La. R.* 312.

The party cannot now urge that he had other reasons for asking the default to be set aside than his right to further credits. He waived all other grounds by basing his motion on that. *Anon.* 1 *Ch.* 126. *Thorpe vs. Beer* 1 *Ch.* 124: 2 *B. & A.* 263.

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

The 95th section of chapter 4, of the Revised Statutes of Arkansas provides that, "If any executor or administrator shall refuse to allow any claim or demand against the deceased after the same may have been exhibited to him in accordance with the provisions

of this act, such claimant may present his claim to the court of probate for allowance, giving the executor or administrator ten day's notice of such application to the court." And section 100 of the same act provides that "the court of probate shall hear and determine all demands presented for allowance under this act in a summany manner without the forms of pleading, and in taking testimony shall be governed by the rules of law in such cases made and provided." The assignment of errors is in general terms, and the court is, consequently, left to discover the particular points, if any, in which the error of the circuit court consists. We have looked into the record, and upon a careful examination of it, have found but one solitary question involved in it.

The only material question raised by the record is whether the probate court erred or not in striking from its files, the appellant's plea of the statute of limitations. This point was directly presented to the circuit court, and is now of necessity revived and again presented for the adjudication of this court. The circuit court affirmed the judgment of the court of probate, and in so doing necessarily decided that no error was committed by that court in relation to any material question either of law or fact.

It is contended by the appellee that the probate court decided correctly in striking out the plea, because it was interposed after judgment by default. It will not be controverted, that when the defendant has been legally notified to appear and defend against the proceedings, and wholly fails to do so, but makes default, such default will not be set aside for the purpose of letting in a plea of the statute of limitations. But how can this rule be made to apply to the case at bar? The appellee, it will be conceded, before he instituted this proceeding in the probate court, presented his claim to the appellant for allowance, and she refused to allow the same. Was this step alone sufficient to entitle him to a judgment? We think not. The statute is imperative that he should give the administrator ten days notice of the application. In the absence of such notice, the probate court is not authorized to take jurisdiction of the person of the administrator; and consequently, any judgment rendered against him is a mere nullity. The record in this case

wholly fails to show any notice to the appellant either actual or constructive, nor is there any showing that the appellant waived it. In order to enable any court to bind a party by its judgment, it is essential that the record should affirmatively show that he was either legally notified of the proceeding against him, or that he had waived his right to such notice. The appellant, by appearing and applying to have the default set aside, waived none of her legal rights, except that of notice. She appeared, as she had a right to do, to ask the court to set aside a mere nullity, and when that was done, she was in court for the first time, and consequently authorized to interpose any defence whatever. Such being our view of the law, it only remains to be seen whether the plea itself is a mere nullity and as such properly stricken from the files. The statute expressly dispenses with the necessity of formal pleading, and the appellant, by filing her written plea, has done more than the law required. But she has made her election to make her defence in writing and must be held to all the strictness of special pleading. The plea sets up a fact, which, if true, and well pleaded will constitute a full and effectual bar to the action, and consequently cannot be such a nullity as to be stricken out on motion. We are therefore clearly of opinion that the circuit court erred in affirming the judgment of the probate court.

Judgment reversed, and cause remanded to the circuit court for a trial *de novo,* and not inconsistent with this opinion.