

LUNGREN vs. HARRIS.

Held that pending a writ of error to the judgment, the circuit court properly permitted the sheriff, on motion of the plaintiff, and without notice to defendant, to amend his return upon the writ of summons—as in *Brown's ad. vs. Hill & Co.* 5 Ark. R. 78.

Writ of error to the circuit court of Hempstead county.

This was an action of debt brought by Benjamin J. Harris against Hanson R. Lungren, determined in the circuit court of Hempstead county, in January, 1845, before the Hon. GEORGE, CONWAY, judge. The action was founded upon a bond for the payment of money.

The sheriff made the following return upon the writ: "I executed the within writ on the within named HANSON R. LUNGTAND, by delivering to LUCY ANN LUNGLUNGTIN, a white member of his family over the age of fifteen years, a true copy of said writ, in the county of Hempstead, in the State of Arkansas, on the 10th day of October, 1844."

At the return term, January, 1845, judgment, by default, was rendered against the defendant.

The defendant brought up the case by writ of error, returnable to the July term of this court, 1845; and assigned for error that the court below rendered judgment against him, by default, without service of process upon him, &c.

After the assignment of errors, and before joinder, the counsel of the defendant in error, suggested a diminution of the record as to the sheriff's return upon the writ, and the court awarded a special writ of certiorari to the clerk of the circuit court of Hempstead county, commanding him to certify to this court, on the first day of the January term, 1846, a perfect "transcript of the record and proceedings in the matter of the service and return of the writ of summons issued in said cause," &c.

The return of the clerk shows that at the May term of the circuit court of Hempstead county, 1845, which was subsequent to the writ of error to the judgment of the court below in this case, on motion of the plaintiff below and without notice to defendant, the court permitted the sheriff to amend his return upon the writ. The clerk sent up a transcript of the proceedings to amend, together with the writ, and amended return, which shows a good service. After the return of the special certiorari, a joinder in error was filed, and the cause determined.

WATKINS & CURRAN, for the plaintiff.

The question now presented is whether the circuit court had the power at a subsequent term, after error brought, to permit so material an amendment to be made, without any notice to the adverse party. It would seem that, after the judgment was rendered and the term had closed, the circuit court had no power over the matter. If the court has power at a subsequent term to permit an amendment which legalized an invalid judgment, why could not a court set aside and alter its judgment at a subsequent term?

The transcript shows no judicial seal to the writ. *Rutherford et al. vs. State Bank*, 3 Ark. 558. The suggestion of diminution merely extended to "the return and service" and not to the writ itself; consequently the copy of the writ in the original transcript will govern.

PIKE & BALDWIN, contra.

From the record and assignment of errors in this case but one question is presented. In the original record sent here, there was

a defective return of service upon Lungren, but, upon certiorari returned, it appears that the sheriff had by leave amended his return, which complies strictly with the statute. The only question then is, may a record be amended after writ of error sued out thereon.

This court held in *Brown's ad. vs. Hill*, 5 Ark. 78, that such amendment might be made, and indeed goes farther than the present case; the question then is not open for argument, every thing having been settled heretofore.

This court will presume that the sheriff preserved some note or memorandum in writing of the execution of the summons by which he was governed in amending. *Brown's Adr. vs. Hill*, 5 Ark. 78.

OLDHAM J., delivered the opinion of the court.

The question raised in this case was fully settled in *Brown's ad. vs. Hill & Co.*, 5 Ark. R. 78, in which it was held that, after the prosecution of a writ of error and before joinder in error, the circuit court properly allowed the sheriff to amend his return on the motion of the plaintiffs below without notice to the opposite party. The ends of justice very frequently demand the exercise of such a power. We are of opinion that the circuit court did not err in permitting the amendment in this case. The sheriff's return being thus amended, the record presents a judgment by default regularly entered after legal notice to the defendant, let the judgment of the circuit court be affirmed.

