

## CHEATHAM, EX PARTE.

Where the Sheriff was commanded by the writ to summon the defendant to answer William *Cunnington* in an action of debt, &c., and a judgment, after due service of the writ, was rendered, by default, against the defendant in favor of William *Cunningham*, held that defendant had no notice of any action against him by *Cunningham*, and therefore the judgment was void. Where a *fi. fa.* was issued upon such judgment, levied upon defendant's property, a delivery bond taken, forfeited, and judgment obtained upon the bond, by motion, the original judgment being void, the subsequent proceedings based upon it were also declared void, and perpetually superseded on the petition of the security in the delivery bond.

*Petition for Supersedeas.*

THIS was a petition to this court by Henry Cheatham for a supersedeas: the facts sufficiently appear in the opinion of the court.

PIKE & BALDWIN, for the motion.

CROSS, J., delivered the opinion of the court.

This is an application for a supersedeas. The material facts, as stated by Cheatham in his petition, and shown from a certified copy of the proceedings, are that William Cunningham sued out from the office of the Clerk of the Hempstead circuit court a writ of summons against Robert Carrington, commanding the Sheriff

of Hempstead county to summon the said Carrington to appear in said court on a day therein mentioned and answer William *Cunnington* in an action of debt &c. and that on the return of the summons, after due notice, judgment by default was taken against him in favor of William Cunningham. Upon this judgment an execution was issued, Carrington's property levied on, and a bond entered into by him for its delivery &c. with Cheatham as his security. The bond having been forfeited by a failure to deliver the property, a judgment on Cunningham's motion, without notice, was entered against them for the penalty of said bond. The supersedeas prayed for is to this latter judgment.

The principal question presented is whether the judgment against Carrington, upon which the validity of the latter mainly depends, is absolutely void or voidable only. It is clear that Carrington had no notice either actual or implied of any action at the suit of *Cunningham*. The notice under the summons was to answer *Cunnington*, an entirely different name from that in which the judgment was entered. This court held in the case of *McKnight vs. Smith*, 5 *Ark. Rep.* 410, that "notice is necessary to give the court jurisdiction of the person, and unless it is acquired in some mode the judgments of the court are mere nullities," that "the exercise of jurisdiction by a court does not prove that it has correctly acquired it" and that "the facts which confer jurisdiction by operating as notice to the defendant should not be presumed, but appear on the record of the proceedings."

The first judgment, having been rendered without notice and, consequently, jurisdiction on the part of the court, is absolutely void, and so is also the second, as well as all other proceedings resting upon it. The application therefore must be granted and a supersedeas to the judgment against Carrington and Cheatham awarded, as prayed for in the petition.