BRUTON ET AL. *vs.* GREGORY.

Where one of several defendants die after suit brought, and before judgment, the representatives of the deceased cannot be made party to the suit, under *Rev. Stat. chap.* 1, *sec.* 8, but the action must proceed against the survivors.

If judgment by default be rendered against one of two defendants, and the other appear and interpose a successful defence to the merits of the action, such defence will enure to the benefit of both, and the party in default is entitled to be discharged also.

Writ of Error to Pope Circuit Court.

DEBT, in the Pope Circuit Court, by Gregory against Bewly, Langford and Bruton, on a writing obligatory. The case has been to this court before. *See Gregory* v. *Bewly et al.* 5 *Ark. R.* 318.

At the September term, 1844, after the cause was remanded, the death of the defendant Langford was suggested, and the suit abated as to him. Defendant Bewly filed a separate plea of usury, and the cause was continued. At the March term, 1845, on motion of the plaintiff, a *scire facias* was ordered against the executors of Langford, requiring them to show cause at the next term, why the suit should not be revived against them, and the cause was continued. At the March term, 1846, the sheriff having returned the *scire facias* served, and the executors failing to appear and show cause, the suit was revived against them; and judgment by default rendered against them, and defendant Bruton. At the same term, plaintiff took issue to Bewly's plea of usury, the issue was submitted to the court, sitting as a jury, and the court found, and gave judgment, for Bewly.

Bruton and the executors of Langford brought error.

W. WALKER, for plaintiffs. In actions in form *ex contractu,* the plaintiff must recover against all the defendants or none, unless one of the defendants be discharged by matter subsequent to the making of the contract. 1 *Chitty Pl. m. p.* 45. *Frazier et al.* v. *The Bank,* 4 *Ark. Rep.*

The plea of one of several defendants enures to the benefit of all: for the contract being entire, the plaintiff must succeed upon it against all or none: and therefore, if the plaintiff fail at the trial upon the plea of one of the defendants, he cannot have judgment against the others, who let judgment go by default. *Tidd's Practice, (9th Ed.) m. p.* 895.

In case of the death of one of several defendants before final judgment, the suit must abate as to him, and cannot be revived against his representative. *Chitty Pl. m. p.* 50.

By the 8th sec. of the 1st ch. of the Revised Statutes, it is provid-

ed that when there are two or more defendants, and one of them die before final judgment, such action shall not thereby abate, but that such death shall be stated on the record, and the action proceed against the surviving defendants.

The *scire facias* against the executors of Langford, to show cause why the suit should not be revived against them, is a mere nullity—it recites a different suit altogether.

The judgment being void as to Langford's executors, is void also, as to Bruton. This court has repeatedly decided that a judgment void as to one, is void as to all the defendants.

WATKINS & CURRAN, contra

JOHNSON, C. J. The object of prosecuting the writ of error in this case is, to reverse the judgment by default rendered in the court below, against the plaintiffs in error. It is contended, first, that the plaintiffs in the Circuit Court had no right to revive against the representatives of Benjamin Langford, who was one of the original defendants; and secondly, that the plea of usury interposed by Bewly, enured to the benefit of all his co-defendants. The *8th sec. of chap.* 1, of the *Revised Code,* declares that "If there are two or more plaintiffs in any action, and one of them die before final judgment, the action shall not thereby abate if the cause of action survive to the plaintiff or plaintiffs; and when there are two or more defendants, and one of them die before final judgment, such action shall not thereby abate, but in either of such cases, such death shall be stated on the record, and the action shall proceed, at the suit of the surviving plaintiff, or against the surviving defendant." This provision of the statute will admit of but one construction, and that is, that where the action is against a single defendant, and the cause of action be such as might originally have been prosecuted against the heirs, devisees, executor or administrator of such defendant, the same may be revived and prosecuted to final judgment against such of them as might originally have been prosecuted for the same cause of action; but that where there are two or more defendants, the action shall not be revived against the representatives of such as have died since the com-

mencement of the suit, but it shall be prosecuted alone against the survivor. It is consequently clear that the executors of Benjamin Langford, inasmuch as they were under no legal obligation to appear in obedience to the scire facias, could not be subjected to the consequences of a default. The judgment against them by default, upon that ground alone, independent of the successful defence of Bewly, was manifestly erroneous. But Bruton was one of the original defendants, and of course must rely solely upon the defence interposed by Bewly, his co-defendant. The *79th sec. of chap.* 116, *Rev. Stat.*, provides that "Where there are several defendants in a suit, and some of them appear and plead, and others make default, an interlocutory judgment by default may be entered against such as make default, and the cause may proceed against the others, but only one final judgment shall be given in the action. This provision we consider decisive of the question. It is perfectly manifest that the interlocutory judgment, which is authorized to be taken against such as make default, is required to stand and to abide the result of any defence to the merits, that those, who appear to the action, may see fit to interpose. If two are sued jointly, one of whom makes default, and the other appears and interposes a successful defence to the action, there can be no doubt but that the plea of the one appearing, will enure to the benefit of the other, and that he will also be entitled to his discharge, notwithstanding the interlocutory judgment by default. If this construction of the statute be correct; and that it is we think there can be no doubt, it is clear and unquestionable that the Circuit Court erred in entering the final judgment by default.

Judgment reversed.