MILLER *vs.* BARKELOO ET AL.

Judgments by default on forfeited delivery bonds, on motion, (rendered on bonds given prior to the act of 7th Jan., 1843), are absolutely null and void, although the record may state that the delivery bond is forfeited and the judgment remains unsatisfied.

An erroneous judgment is binding on all parties, until reversed by a superior tribunal; but a void judgment is binding nowhere, and may be relieved against without reversal.

Motion to quash and set aside Writ of Supersedeas.

The Circuit Court of Pulaski county, on the 8th day of March,

1841, the Hon. JOHN J. CLENDENIN, Judge, presiding, rendered judgment on motion on a forfeited delivery bond against John R. Barkeloo, Henry F. Shaw, and Lorenzo Gibson, and Richard Coulter, their security, in favor of George C. Miller. The judgment recites that "it appearing to the satisfaction of the court that execution issued on the judgment rendered in this case at the last term of this court, and that a delivery bond was given thereon by said defendants, John R. Barkeloo, Henry F. Shaw, and Lorenzo Gibson, and Richard Coulter, as security, and that said delivery bond was forfeited, and that the said judgment still remains unsatisfied," and then proceeds to adjudge to the plaintiff the amount of the original judgment, with interest and costs, and awards execution thereof against the defendants. A writ of *fieri facias* was issued thereon and levied upon certain property, and returned without sale. A *venditioni exponas* was subsequently issued. On the 20th day of October, 1845, the Hon. Williamson S. Oldham, on the application of said defendants, made an order, directed to the clerk of the Supreme Court, reciting that "as said judgment was rendered against said defendants without their appearance in said Circuit Court, on the motion for judgment therein against them, and without any service of process on them to appear, and without any other legal obligation on them binding them to appear in said Circuit Court, said court had no jurisdiction over the persons of said defendants, and the said judgment against them is absolutely null and void, and said writ of venditioni exponas improvidently and illegally issued," and awarding a writ of supersedeas to stay all further proceedings under said writ of *ven. ex.* The writ of supersedeas was issued; and on the same day the said George C. Miller appeared in court, and filed his motion to set aside and quash the writ of supersedeas because the same was improvidently and without authority of law awarded and issued.

RINGO & TRAPNALL, for the motion. The plaintiffs insist that the Circuit Court had jurisdiction of both the subject matter and the parties thereto, the action being founded upon a delivery bond, or bond taken officially by the sheriff for the delivery to him at a time and place therein specified of certain personal property levied on and seized by him

as sheriff by virtue of and to satisfy a writ of fieri facias previously issued out of said Circuit Court, and returnable thereto at the March term thereof, A. D. 1841, in his favor, against said Barkeloo, Shaw and Gibson; which writ was returned to said court at the return day thereof, by said sheriff, who also certified that the same was unsatisfied, and the said bond forfeited, the property not having been delivered to him according to the condition thereof, and the judgment now superseded having been given at the same term of the Circuit Court at which said writ was returnable; it is therefore not void (however erroneous it may appear to be), but may well be executed until it is reversed. *Rev. St. Ark. ch.* 60, *s.* 37, *s.* 40. *Hollingsworth* v. *Barbour,* 4 *Peters* 466. *Ex Parte, Tobias Watkins,* 3 *Peters* 194.

By the provisions of the statute above cited, the makers of a forfeited delivery bond are regarded as parties litigant in the court at the term thereof to which the execution is returnable—notified by the law itself of the right of the plaintiff to institute proceedings against them on such bond, and prosecute the same to judgment, at any time during that term, in the summary manner prescribed by law, subject only to such rules of practice as to the time and order of instituting such proceedings as each court may in its discretion adopt; and are therefore upon the institution of such proceedings, *ipso facto,* parties defendant thereto, subject to the power of the court to the same extent that they would be if actually summoned or served with a notice to appear to and answer the action; at least the statutory or legal notice is as effectual in every point of view as any constructive notice given by publication, or copy set up, or delivered to a third party, in any of the various modes prescribed by law, or the rules or practice of the courts, which have been always deemed sufficient to justify an adjudication of the rights of the parties so notified, and bind them thereby. *Patton & Stuart* v. *Wolcott,* 4 *Ark. Rep.* 579. *Webb & Taylor* v. *Brown,* 3 *Ark. Rep.* 488.

The writ of supersedeas in this case is to the judgment itself, and also to the process of execution based thereon. Can such writ be legally issued? The plaintiffs insist that it cannot, consistently with any known principle of law, and that it is without precedent. It cannot have issued consistently with law, because, if the court had not ju-

risdiction of the thing adjudicated and the parties whose rights were adjudged, the judgment pronounced is void, and in law cannot be enforced, or affect the rights of any one injuriously, and therefore it is not a subject matter to which such writ can be properly applied; and if the court had jurisdiction of the subject matter and the parties, the judgment is binding, and cannot, from any thing appearing in this case, be superseded. There is no precedent of a judgment having been superseded at common law, and the present is not a case within any of the statutory provisions in force here.

The plaintiffs insist that at common law the sole object of this writ was to prevent the enforcement and procure the return before its execution, of process issued by or out of the court issuing the writ, which had issued improvidently or illegally, but could be enforced or executed, not being absolutely void; and this court can only apply it to the like subject matter, except in a case pending in this court on writ of error, when by the constitution and statute, it may *perhaps* be applied to the judgment, as well as to the final process issued to enforce it.

The judgment of a court of competent jurisdiction cannot be questioned collaterally, or by such proceeding as this, in any case. If the judgment here superseded can be avoided or held to be null, so may this proceeding itself, as the plaintiff had no notice, actual or constructive, of this proceeding, but his rights resting upon the solemn judgment of a court of general jurisdiction, are in a collateral proceeding, to which he is not a party, adjudicated, reviewed, revised and divested.

JOHNSON, C. J. The record in this case presents but one single point for our adjudication, and that is, whether the original judgment upon which the execution issued is merely erroneous or absolutely null and void. The decision of this question will depend entirely upon the fact whether the defendants were duly notified of the pendency of the motion against them. The 40th *sec.* of *chap.* 60 of the *Revised Code,* declares that, "If the condition of the bond be broken and the execution be returned unsatisfied, the defendant and his securities shall be deemed to have notice of the facts, and the plaintiff, without further notice, may, on the return day of the execution, or on

any subsequent day of the term at which such execution is returned, move the court for judgment on the bond against the defendant and his securities, or any of them, or the plaintiff may at his option bring an ordinary suit on the bond." The recital in the record and upon which the judgment was predicated is as follows, to wit: "On this day came the said plaintiff, by attorney, and it appearing to the satisfaction of the court that execution issued on the judgment rendered in this case at the last term of this court, and that a delivery bond was given thereon by said defendants, John R. Barkeloo, Henry F. Shaw, and Lorenzo Gibson, and Richard Coulter, as securities, and that said delivery bond was forfeited, and that the said judgment still remains unsatisfied." This court, in the case of *McKnight* v. *Smith*, said that "It is a universal principle pervading the whole jurisprudence of our country, necessary for the protection of civil liberty and the rights of property, that no person's rights can be impaired or destroyed by a judicial sentence, unless he has first been made a party to the proceeding, or an opportunity afforded him to defend himself against it. This may be done either by actual service of process against him, which informs him of the time, and place, and character, of the proceeding against him, or by constructive notice, which may be given in any manner provided by law. This 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. When a court has competent jurisdiction of the subject of controversy and the parties, every presumption of law in favor of the regularity of its proceedings, and of the grounds of them, is to be extended. This does not extend, however, to the proceedings of the court in taking jurisdiction of the parties, as it is well established that the exercise of jurisdiction by a court, does not prove that it correctly acquired it. The facts which confer jurisdiction upon the court, by operating as notice to the defendant, should not, therefore, be presumed, but appear on the record of the proceedings. The facts to which the law under this section, (the one already referred to), affixes the force of notice to the defendant, are the forfeiture of the condition of the delivery bond, and the return of the execution unsatisfied. These facts being established to the satisfaction of the court, it may entertain the case

and bind the defendant by its judgment. The record does not inform us whether the execution was returned or not, or of what return was made, nor whether the bond was returned by the sheriff with the execution as required by section 44 of the same act. For aught that appears to us, on the record, there may be such a return as would show the defendant discharged, the execution stayed or satisfied, and yet consistent with the fact that the condition of the bond had been broken by the failure to deliver the property." The construction given to the Statute in that case applies with equal force here, as the facts of the two cases are not materially different. True it is, that the record in this case states, in addition to the fact that the delivery bond was forfeited, that the judgment also remained unsatisfied. This, however, is not the expression used by the Statute, nor is it equivalent to it. For the judgment might have still remained unsatisfied, and yet the execution might have been stayed or otherwise satisfied. It is clear, therefore, that in the absence of the averment that the execution had been returned unsatisfied, or some other of equal import, that the defendants could not be said to be legally notified of the pendency of the proceeding against them. But it is objected, that although the defendants were not legally notified, yet the judgment rendered against them is not such a nullity as to be taken advantage of collaterally, but that the defect could only be reached by an appeal or writ of error brought to reverse it. The Supreme Court of the United States, in the case of *Hollingsworth* v. *Barbour et al.*, 4 *Peters Rep. P.* 471, said, "This court disclaims all authority to revise or correct the decree, on the ground of supposed error in the court, who pronounced the decree. The principle is too well settled and too plain to be controverted, that a judgment or decree pronounced by a competent tribunal against a party having actual or constructive notice of the pendency of the suit, is to be regarded by every other co-ordinate tribunal; and that if the judgment or decree be erroneous, the error can be corrected only by a superior appellate tribunal. The leading distinction is between judgments and decrees merely void, and such as are voidable only. The former are binding no where; the latter every where, until reversed by a superior authority." It is a general law of the land, that no court is author-

ized to render a judgment or decree against any one or his estate until after due notice by service of process to appear and defend. This principle is dictated by natural justice; and is only to be departed from in cases expressly warranted by law, and excepted out of the general rule. We are clear, therefore, that the record in this case does not disclose such facts as the Statute requires, to constitute a constructive notice to the defendants, and that consequently the judgment rendered upon the delivery bond is a mere nullity. This being the case, the execution founded upon is equally null and void, and was, therefore, properly superseded. The motion to set aside the supersedeas is therefore refused.