HOWELL ET AL. *vs.* MASON AS ADR.

Plaintiff filed a petition in debt on a note made to another, and writ issued: Afterwards he filed another petition on the same note, against the same parties, setting out an assignment of the note to himself, which was not alleged in the first petition, and writ issued. HELD, that the suits were distinct; that the last petition was not an amendment of the first, and might be filed without leave of court.

The defendants appeared to the second petition, and moved to dismiss for want of bond for costs, which motion was sustained; the plaintiff moved for a reconsideration of the judgment of dismissal, which motion was granted, and defendants then interposed further defence. HELD, that the granting of the motion to reconsider, was equivalent to setting aside the judgment of dismissal.

Afterwards, the death of the plaintiff was suggested by one of the defendants, and thereupon judgment that the suit abate; several terms afterwards, the suit was revived, on motion, in the name of plaintiff's administrator, and proceeded to judgment on the merits. HELD, that the judgment of abatement, though contrary to the statute, (*Digest, chap.* 1, *sec.* 7,) was final and erroneous, but not void, and that the proceedings and judgment subsequent thereto were *coram non judice,* null and void.

Writ of Error to Johnson Circuit Court.

On the 14th February, 1840, Henry Smith, *Senior,* filed in the office of the clerk of the Circuit Court of Johnson county, a petition in debt, stating that he was the legal owner of a note executed by John B. Howell and John Howell, to Henry Smith, *Junior,* setting out the note, and praying judgment for the amount thereof. He also filed a bond for costs, and sued out a summons against the makers of the note, returnable to the following April term of the court, which the sheriff returned served upon John Howell, and *non est* as to John B. Howell.

On the 25th of February, 1840, said Smith, *Sr.,* filed another petition in debt on the same note, against the same parties, setting out an *assignment* of the note to him by Henry Smith, *Jr.,* which assignment was not alleged in the first petition. On the filing of this petition, a summons was issued against defendants, returnable also to the April term following, and the same return made thereon by the sheriff as upon the first summons.

At the return term, on the 30th day of June, 1840, the record states "the defendants appeared," and filed a prayer for oyer of the obligation sued on, and also of the assignment thereon, which was granted by filing the original. Whereupon the defendants moved to dismiss the cause for want of a sufficient bond for costs, which motion was sustained by the court, and judgment rendered against plaintiff for costs. On the next day (July 1st) the plaintiff moved the court to restore the cause to the docket, which motion the court took under advisement. Then follows a record entry, of the same day, thus: "And now on this day came the parties, by their attorneys, and plaintiff moved the court to reconsider the judgment rendered in this case, on yesterday, which, after being argued by counsel, was sustained by the court."

Defendants then moved the court for a rule upon plaintiff's attorney to show his authority for bringing the suit, which the court refused, and they excepted.

Defendants then filed a plea in abatement, alleging that plaintiffs did not, previous to the issuance of the writ, pay the clerk's and tax fees thereon; which plea was not signed by defendants or their counsel. The plaintiff "moved the court to treat said plea as a nullity," which motion was sustained, and defendants excepted. No further steps appear to have been taken at the return term.

At the following term, December 23d, 1843, defendant, John Howell, by Paschal, his attorney, filed a suggestion of the death of plaintiff, supported by affidavit, and praying that the suit abate. Thereupon, the record states, "and this day *both* parties *appearing,* the defendant, by Paschal, his attorney, filed his affidavit suggesting the *death* of the *plaintiff,* whereupon it is considered that this suit abate." Here the cause rested until the 5th day of September, 1845, when the following entry appears of record:

"And now on this day comes Kinchen C. Mason, and (it having been suggested, and made to appear, at a former term of this court, that the plaintiff had departed this life) suggests that he

has obtained letters of administration on the estate of said plaintiff; and the court, being satisfied in the premises, it is ordered by the court that this suit be revived, and progress in the name of the said Mason, as such administrator; and it appearing to the court that this order was directed to be made at the last term of this court, but was omitted to be entered of record, it is ordered that this order be made now for then."

On the next day, the record states the parties appeared, "and the defendant pleaded the general issue, in short upon the record, and, by agreement of the parties, he was allowed three months, from this day, to file his special plea or pleas, and this cause stands continued until the next term of this court."

On the 2d of September, 1846, the parties appeared, by their attorneys, again, and "the defendant, having withdrawn his plea by leave of the court, and having nothing to say in bar," &c., judgment was rendered, against both of the defendants, in favor of Mason, as Smith's administrator, for the amount of the note sued on, and they brought error.

The proceedings in the court below were had before the Hon. R. C. S. BROWN, then one of the circuit judges.

CUMMINS, for the plaintiffs. Admitting the power of the court to set aside its judgment, during the term, upon proper notice, (*Tidd's Pr.*, 1 *vol.*, 439, 454,) denied that the judgment dismissing the suit was ever set aside, or could be, without notice to the defendants.

The court having rendered a judgment abating the suit, that judgment, though erroneous and reversible, is not void, but binding upon the parties until reversed: and all subsequent proceedings were *coram non judice*, and void. *Walker & Faulkner vs. Walker*, 2 *Eng.* 554. *Byrd et al. vs. Brown et al.*, 5 *Ark.* 713. *Ashley vs. Hyde & Goodrich*, 1 *Eng.* 92.

FOWLER, also, for the plaintiffs. The amended or second petition is not a part of the record; the party could not amend with-

out leave of the court. *Digest, p.* 814, *sec.* 113, *et seq.* *Bently vs. Dickson,* 1 *Ark.* 169.

A suit shall not abate where the plaintiff dies before judgment, but the administrator may be substituted. (*Digest, chap.* 1, *sec.* 7); yet, if a final judgment of abatement be rendered, however erroneous it may be, it is not void, and must stand until reversed. The substitution of the administrator, without notice to the defendants, is erroneous, if not actually void. *Digest,* 98, 99.

BATSON and RINGO & TRAPNALL, contra. The first petition is no part of the record in this cause, and should not have been copied into the transcript: though, between the same parties, as the second, it was for a different cause of action, and if for the same, could be taken advantage of only by plea in abatement. The administrator was substituted in the place of his intestate in the manner authorized by law, and his right to prosecute the suit was never controverted in the court below, and cannot be controverted here. *Digest, chap.* 1, *secs.* 7, 16, 17.

JOHNSON, C. J. The second petition filed in this case cannot be considered in the light of an amendment of the first, and therefore the objection, that it is put upon the files without the leave of the court, cannot apply. It is true that the parties are the same in both petitions, yet the bases of the action are wholly different. In the first, the plaintiff counted upon the note as it was originally executed, and, in the second, he relied upon an assignment to himself. The ground of the two actions being essentially different, the latter could not be affected by the former without a plea showing that they were, in fact the same, and setting up the pendency of the one as a bar to the other.

The court below, on the 30th of June, 1840, on the motion of the defendant, dismissed the cause for want of a sufficient bond for costs. On the 1st of July, 1840, the plaintiff moved the court to reconsider the judgment dismissing the cause, which motion was granted. It is insisted that the granting of the reconside-

ration did not so operate as to vacate the judgment, and to restore the cause to the docket. We are clearly of opinion that such was the legal effect of the latter judgment, and, indeed if such had not been the effect in law, the subsequent appearance of the defendant and interposing a defence to the merits, would have amounted to a complete waiver of any right that he might otherwise have claimed under it. The instant the court granted the reconsideration, the case stood as though no decision had been pronounced, and it was then competent to have made the same or a different decision upon the same motion.

On the 23d of December, 1840, the following entry appears upon the record, to wit: "And this day, both parties appearing, the defendant, by Paschal, his attorney, filed his affidavit suggesting the death of the plaintiff, whereupon it is considered that this suit abate." The question that arises here is, whether this entry amounts to a final judgment. Is it merely an erroneous judgment, or is it an absolute nullity, and as such to be wholly disregarded in the further progress of the suit. The *7th sec. of chap.* 1, *of the Digest,* declares that "where there is but one plaintiff in an action, and he shall die before final judgment, such action shall not thereby abate, if the cause of action survive to the heirs, devisees, executor, or administrator, of such plaintiff, but such of them as might prosecute the same cause of action may continue such suit, by an order of the court, substituting them as plaintiff therein." True it is that this statute expressly declares that the action shall not abate by the death, but that it may be prosecuted to final judgment by the representatives of the deceased plaintiff, in case the cause of action be of such a nature as to survive. The notion has been started that, inasmuch as the statute has expressly and emphatically declared that the death shall not abate the suit, therefore the judgment of the court abating it is not simply erroneous, but that it is absolutely null and void. We are free to confess that we cannot fully comprehend the force of this argument. If the court had jurisdiction of the subject matter, and also of the parties, although the decision is in the very teeth of the law, yet it cannot be

said, with any degree of propriety, that that circumstance would invalidate the judgment of the court. If it were true that all judgments, that stand in direct opposition to the express letter of the law, are necessarily null and void, it would be difficult, if not utterly impossible, to discover the distinction between such as are erroneous and those that are merely void.

We are, therefore, of opinion that the decision of the court below, abating the suit, is a final judgment, and, whether correct or erroneous, binding upon the parties till reversed, and that consequently all the subsequent proceedings are *coram non judice,* and merely void. It is manifest, from this view of the law of this case, that the judgment brought into this court for reversal is a mere nullity, and consequently confers no jurisdiction upon this court. This case must, therefore, be dismissed for the want of jurisdiction.