BANK OF THE STATE *vs.* RUDDELL ET AL.

A proceeding in error is an action, and the assignment of errors is in the nature, and in the place of a declaration.

Defendant cannot plead until the declaration is filed, nor can he plead in error until after assignment of errors.

A plea in abatement of a writ of error, is, therefore, properly filed after assignment of errors.

Defendant is allowed, by Statute, three days after assignment of errors to file a joinder, and he may, in the intermediate time, interpose matter in abatement.

In an original action, where a writ is issued against several, one of whom is dead at the time, it is cause for abating the whole writ.

So where a co-defendant in a writ of error is dead when the writ issues, if his death be not suggested in the writ, it is cause of abatement.

On demurrer to a plea in abatement for such cause, it will not avail the plaintiff in error that by order of Court the suit had been previously abated as to the dead party on a suggestion of death generally—the writ being false from the beginning—though on timely application it might have been amended.

Writ of Error to Independence Circuit Court.

Writ of error issued by the Clerk of this Court to the Clerk of Independence Circuit Court, returnable to the January Term, 1848, reciting thus: "Because, in the record and proceedings, and also in the giving of judgment, in a suit, which was in said Circuit Court, before the Hon. WM. C. SCOTT, Judge thereof, between the Bank of the State of Arkansas, plaintiff, and Asa McFeltch, William Moore and John Ruddell, defendants, of a plea of debt, manifest error has intervened, to the damage of said Bank as she alleges," and commanding, in the usual form, the Clerk to send up the record, &c. The writ was executed, and the transcript filed before the return day. At the return term (January, 1848) plaintiff's attorney suggested the death of Asa McFeltch, and took a scire facias against his administrator. At the July term, 1848, on the 10th of July, on motion of plaintiff's attorney, the scire facias was quashed, and the suit ordered to abate as to Mc-

Feltch. On the 15th July, plaintiff's counsel filed assignment of errors. On the 18th July, defendant Ruddell filed the following plea in abatement:

"And the said defendant, John Ruddell, by his attorney, comes, &c., and prays judgment of the said writ of error, because he says that at the time of the issuing of said writ of error, and at the time of the institution of this suit, the said *Asa McFeltch* was dead, and had been for some time previous thereto, *to wit:* on the sixth day of December, A. D. 1847; and this he, the said John Ruddell, is ready to verify, wherefore, inasmuch as the said *Asa McFeltch* was dead at the time of the issuing said writ of error, and at the time of the commencement of this suit in error, the said John Ruddell prays judgment of the said writ, and that the same may be quashed." *Fowler.*

The plea was verified by affidavit.

Plaintiff's attorney filed a motion to strike out the plea because it was filed too late, and because the death of McFeltch had been suggested, the cause ordered to abate as to him, and progress as to the other defendants. The Court, by CONWAY B. J., sustained the motion. Ruddell's counsel filed a petition for reconsideration, which was granted, and afterwards, the Court, by the Hon. C. C. SCOTT, J., delivered the following opinion, on the motion:

SCOTT, J., (on motion.)

The plaintiff in error moves to strike from the files the plea in abatement of John Ruddell, filed on the 18th July, 1848, the assignment of errors having been filed on the 15th of the same month.

A plea in abatement filed out of time should be stricken from the files as a mere nullity. But this was filed in apt time, because the law imposed no obligation upon the defendants in error to notice any part of the proceedings until after the assignment of errors, and then they had three days (*Digest* 826, *Sec.* 27,) for joinder, and within these three days it was competent for them to interpose matter in abatement provided they did not first join.

A proceeding in error is an action. (2 *Tidd's Pr.* 1065.) An

assignment of errors is in the nature and in the place of a declaration. (2 *Tidd's Pr.* 1107. 2 *Bac. Abr.* "Error" *page* 216.) Not only is a defendant not bound to plead before declaration is filed, but in England a plea filed before declaration is a mere nullity. (*Douglass vs. Green,* 2 *Chitty's Rep. page* 7.) And the same doctrine was recognized by the Supreme Court of Alabama in *Sturdevant vs. Gaines,* 5 *Ala. Rep.* The motion must be refused.

Afterwards, at the January term, 1849, the plaintiff filed a demurrer to the plea, assigning as causes therefor:

1. That the plea alleges no variance between the writ of error and judgment of the Court below.

2. By law, the death of one party to a judgment is not cause of abatement.

3. The death of McFeltch had been suggested, and the cause ordered to progress against his survivors. At the July term, 1849, the demurrer was determined, by the opinion below.

FOWLER, for defendants. A proceeding in error is an action and may be pleaded to as other actions. 2 *Tidd's Pr.* 1005, 1116, 1118. 2 *Bac. Abr.* 216, 218. *Com. Dig.,* "Abatement" (*E.* 15.) 1 *Bac. Abr. p.* 199, 201, 209.

The death of a co-defendant before and at the time of the commencement of the suit, is a good plea in abatement of the writ. *Story's Pleadings,* 103. 1 *Chit. Pl.* 441. 1 *Bac. Abr.* (abatement J.) 1 *Com. Dig.* (abatement E. 16, 17.) *Arch. Civil Pl.* 312; and the writ should have been sued out against the survivors.

LINCOLN, *contra.*

MR. JUSTICE SCOTT, delivered the opinion of the court.

The demurrer of the plaintiff in error to defendant, Ruddell's plea in abatement, presents the question whether or not the fact of the death of McFeltch, who, though dead before the suing out of the writ of error in this case, was nevertheless made a co-defendant as if in life, without any suggestion of his death in the writ, is sufficient to quash the entire writ of error. This question,

presented as it is by a demurrer to a plea in abatement setting it up, is a dry point of law to be determined solely on principle and authority.

The writ of error is an original writ performing the double office of a certiorari to remove the cause from the inferior Court, and of presenting upon the record of the Court of Error, to which it is removed, the parties who are to litigate in that Court; and to answer this double purpose it must necessarily describe with accuracy the cause as it existed in the Court below, at the same time that, as the leading process in the suit in error, it must with equal accuracy present in this suit the proper parties litigant.— To secure the return of the writ that, with it, a transcript of the proceedings below may be brought into the Court of Errors, the penalty of contempt is held over the head of the Clerk of the inferior Court. The cause being now in the Court of Errors and the parties to the contest in that Court designated, the next object of the law is to secure their prompt appearance, that both sides may be heard; and, to accomplish this, ample provision is made in requiring at the hands of the plaintiff in error, under penalty of the dismissal of his suit, an assignment of errors within the first four days of the term to which the writ is returned, thus superseding the writ of *scire facias quare executionem non* of the common law; and, under like penalty, that he shall at or soon after the time of suing out the writ of error, also sue out a notice to the adverse party to do the office of the displaced writ of *scire facias ad audiendum errores.*

Like every other tribunal for the dispensation of justice, a Court of Errors must necessarily affect the interest of parties by its action upon the cause, and therefore when a cause is to be heard in this forum the presence of the parties in interest, or an opportunity to be present, that they may be heard, is as much demanded by the dictates of justice as in the other Courts; and these must necessarily be presented upon the record of the suit in error, at some preliminary stage of its progress, and if not done at the very commencement of the suit in error, the practice of this Court, in this particular, would be a departure from the usual

course of procedure in all the other common law courts; and for such a departure no sufficient reason can be perceived.—Accordingly we find the authorities to indicate strongly that this must be done. As to the parties plaintiff, the decisions of the courts, irrespective of our Statutory provisions on the subject, are numerous and emphatic that "All who shall have the thing for which the judgment was erroneously given, if the judgment had not been given" must join as plaintiffs in the writ of error, if alive, and if any of them be dead, their death must be suggested in the writ, and those who survive and the privies of all of them, if there be such, must be named as plaintiffs, and the reason assigned is that justice would otherwise be delayed by successive writs of error; and so inflexible is this rule that even when but one of several, against whom a judgment may be rendered shall be willing to prosecute a suit in error, still the writ must be sued out in the name of all who may be alive, and the death of those who may be dead suggested on the face of the writ, and those who refuse to prosecute the suit in error, must be summoned and served. This, not only that their right to institute the suit in error may be authoritively renounced, but that it may in the court of errors appear who are the real parties plaintiff in the suit in that Court. This being the well settled rule as to the plaintiffs in a suit in error, it is difficult to conceive of a good reason why a different rule should prevail as to the defendants, as they must necessarily appear upon the record at some preliminary stage of the proceeding, and if the uniform practice of all the other common law courts did not, in general, present upon the record the parties defendant at the same time the parties plaintiff were thus presented, and thus present a reason for uniformity here, the notice required by our Statute to be sued out and served upon the adverse party would seem to contemplate that the adverse party had been previously designated. We take it to be clear, therefore, that the same rule as to parties defendant in a suit in error must prevail as we have shown to be inflexibly settled as to parties plaintiff.

The writ of error then presenting the parties, both plaintiff and

defendant to the suit in error, and conforming in this particular to the suit below, except in excluding all parties who may be dead, and as to these suggesting on its face their death, the next question to be solved, to settle that which we have to determine, is whether or not the failure to suggest the death of a plaintiff or defendant who might have been dead before the suing out of the writ of error, and the presenting of such deceased party as a co-plaintiff or co-defendant as in life, would be fatal to the writ, if presented to the court by plea in abatement. And if writs of error are to be governed by the rules of law which govern other writs that perform like offices. This question seems to be settled by authority that cannot be disregarded. And we are not able to perceive why a writ of error, being as it is the leading process in the suit in error, and performing the office we have shown, can by any process of just reasoning be exempt from these rules. In *Chitty, Archbold, Gould,* and *Story's Pleading,* sustained by numerous authorities cited by each of these authors, it is distinctly laid down as the law that the death of a co-defendant before writ purchased, even in actions in which the death of one defendant pending the action is no cause for abatement, will abate the whole writ for the reason that "the writ was always false." 1 *Chitty Plead.* 452. *Arch. Civil Plead.* 291. *Gould's Pl. Ch.* 5, *Sec.* 92, 58. *Story's Pl.* 103. Nor can it avail the plaintiff that by order of court the suit had been previously abated as to the dead party on a suggestion of death generally, thereby seeking shelter under the provision of the statute for deaths that occur pending the suit: for whenever the death of a co-defendant before the commencement of the suit is shown to the court by demurrer to a plea in abatement setting up this fact, it must be adjudged, that the writ was false from the beginning and will be quashed, although by timely application to amend, the amendment would have been readily allowed.

We hold then that under the rules of law the plaintiff's demurrer must be overruled and the writ of error quashed.