No. 11958

Supreme Court of Illinois

Downey

vs.

Smith.

71641

Jo Davis
Alexander Downey
Z
Daniel F. Smith
916

11938
1852

Referred

Daniel F Lunt
vs
Alexander Downey

In the Supreme Court
of the State of Illinois of the January
Term A.D. 1852

Appeal from Jo Daviess County

And the said Alexander Downey now comes and says that in the Record and proceedings aforesaid there is error in this to wit.

First. The Court erred in overruling the motion to dismiss this suit as no declaration had been or was filed as required by law - three terms having intervened before the declaration was filed viz: the October Term the March Term and the May Term of said Court after said action was commenced the declaration not having been filed until the 31st day of July 1851

Second. The Court erred in rendering judgment against the defendant when by the laws of the land it ought to have been given in favor of the defendant. Wherefore the said Alexander Downey says that said judgment may be reversed and that he may be restored to all things which he has lost by reason thereof

Higgins & Strother
Attys for Appellant

[11958-1]

State of Illinois } ss
Jo Daviess County } Pleas in the Circuit Court of said County, begun and held within and for the County of Jo Daviess aforesaid on the first Monday of October, in the year A.D. 1850 before the Hon Judge of the sixth Judicial Circuit (now of the fourteenth Judicial Circuit) in said State, to wit.

The Hon. Benjamin R. Sheldon, Judge
Wm H. Bradley Clerk
M. B. Pierce Sheriff

Daniel F. Smith — Plaintiff
vs.
Alexander Downey } Defendant

Be it remembered, that heretofore, to wit on the 13th day of September, A.D. 1850, the said Plaintiff Daniel F. Smith by his attorney, filed in the Office of the Clerk of the Circuit Court, for said County of Jo Daviess, a bond for costs, together with an affidavit and Precipe which said bond, affidavit and Precipe, are in the words and figures following, to wit;

State of Illinois } sct. In the Jo Daviess County Circuit Court
Jo Daviess County } October Term A.D. 1850

Daniel F. Smith Plaintiff
vs
Alexander Downey defendant } In Trespass

I do hereby enter myself security for costs in this Cause, and acknowledge myself bound to pay, or cause to be paid all costs which may accrue, in this action, either to the opposite party, or to any of the offices of this Court, in pursuance of the laws of this State - Dated at Galena, this 13th day of Sept. A.D. 1850.

James Bloomer [Seal]
By P. P. Cruikshank Attorney

Approved. Wm H. Bradley } Clerk of Jo Daviess County Circuit Court

Filed Sept. 13th 1850
Wm H. Bradley Clk

Σ 11858-2

State of Illinois } ss
Jo Daviess County }

Ephraim W. Coburn being duly sworn on the part and behalf of Daniel F. Smith, on his oath states, that said Daniel F. Smith is about to commence an action of Trespass against Alexander Downey, in the Circuit Court in and for the County of Jo Daviess and State of Illinois for damages for a trespass by said Downey committed on the personal property of said Smith, as herein below set forth, the nature and cause of which is as follows, to wit;

That in the month of July, about the twentieth day thereof, in the year 1850, said Smith was the owner and possessor of a certain lot of lumber, usually called a "rapids piece of lumber" about from fifteen to sixteen thousand feet in quantity, and of the value of about from one hundred to one hundred and fifty dollars; which said piece of lumber was then and there lying on the Claire River, in the State of Wisconsin, and the said Downey then and there entered upon the same, and cut the same loose from the fastenings that attached the same and fixed it stationary, and then and there cut the same apart and set the whole afloat on the said River and from thence to the Wisconsin River, then and there without any permission of said Smith, trespassing upon and destroyed the said "Rapids piece of lumber", to the injury of said Smith of about the value aforesaid. And further that there is danger of the said damages, caused by said trespass as aforesaid being lost, and the benefit of whatever judgment may be obtained by said Smith against said Downey, in his said action, so as aforesaid about to be commenced in said Court for damages for said trespass, will be in danger, unless the said Downey be held to bail. E. W. Coburn

Subscribed and sworn before
me this 13th September 1850
Wm C. Bostwick J.P.

State of Illinois
So Daviess County } ss

Daniel F. Smith
vs.
Alexander Downey

Circuit Court to October
Term 1850
Trespass on personalty
On filing affi. & bond for costs issue Capias ad re-
spondendum returnable &c. Damages $200.00
Hold to bail in $150.00/100.
Hoge & Wilson
for Plff

Wm H. Bradley Esqr.
Clerk C. C. & D. C.

Filed Sept. 13th 1850
Wm H. Bradley Clerk

And afterwards, to wit, on the same day, to wit on the 13th day of September A.D. 1850, a writ of Capias ad respondendum was issued from the said Clerk's office, against the said defendant, which, together with the Sheriffs return thereon, and the bail bond taken by the Sheriff of the defendant, are in the words and figures following, to wit;

State of Illinois } Sct.
So Daviess County

The People of the State of Illinois
to the Sheriff of said County, Greeting.

We command you that you take Alexander Downey, and him safely keep, so that you have his body before the Circuit Court of So Daviess County, at the next Term, to be holden at Galena, on the first monday of October next, to answer Daniel F. Smith, in a plea of Trespass on personalty

Damages two hundred dollars—

And have you then there this writ.

Seal

Witness William H. Bradley Clerk of the Circuit Court of Jo Daviess County, Illinois, at Galena, this 13th day of September A.D. 1850 Attest Wm H. Bradley Clerk

The Sheriff is directed to hold the defendant to bail in the sum of one hundred and twenty five dollars.

Wm H. Bradley Clerk

Executed this writ by reading to the within named Alexander Downey, and arrested him at the same time, after which he gave bond with security, and was released from my custody, this 13th day of September A.D. 1850

M. B. Pierce Sheriff

By R. Starr Deputy

Know all men by these presents, that we, Alexander Downey, Henry Rablin and Lyman Howe, are held and firmly bound unto Marshall B. Pierce, Sheriff of the County of Jo Daviess, and State of Illinois, and to his successor in office, in the penal sum of two hundred and fifty dollars, for the payment of which, well & truly to be made we bind ourselves, our heirs, executors, administrators and asigns, jointly, severally and formly. Signed with our names and sealed with our Seals, this 13th day of September A.D. 1850.

The condition of the above obligation is such, that whereas Daniel F. Smith, has lately sued out of the Circuit Court, of the County of Jo Daviess a certain writ of Capias ad respondendum, in a certain plea of Trespass, on personalty, returnable to the next term of the Circuit Court, to be holden at Galena, on the first Monday of October next. Now if the said Alexander Downey shall be and appear, at the said Court to be holden at Galena on the said first monday of October next, and in case the said Henry Rablin and Lyman Howe

shall not be received as bail in the said action shall put in good and sufficient bail, which shall be received by the Plaintiff, or shall be adjudged sufficient by the Court, or the said Henry Rablin & Lyman Howe, being accepted as bail, shall pay and satisfy the costs and condemnation money which may be rendered against the said Alexander Downey, in the plea aforesaid, or surrender the body of the said Alexander Downey, in execution in case the said Alexander Downey, shall not pay and satisfy the said costs and condemnation money, or surrender himself in execution, when by law such surrender is required; then this obligation to be null and void, otherwise to remain in full force and effect

Alex Downey (Seal)
Henry his × Rablin (Seal)
Lyman mark Howe (Seal)

Taken and entered into before me, this 13th day of September A.D. 1850. M. B. Pierce Sheriff of Sd Daviess County Ills
By R. Starr depty

And afterwards, to wit, on the 31st day of July A.D. 1851 the said Plaintiff, by his attorney, filed in the Clerk's Office of said Circuit Court his declaration against the said defendant, which said declaration is the words and figures following, to wit;

State of Illinois }
So Daviess County } ss

Daniel J. Smith }
vs. } Circuit Court To the October
Alexander Downey } Term A.D. 1850

1st Count. The said Plaintiff complains of the said defendant, in a plea of trespass

[11958-41]

For that the said defendant heretofore, to wit on the 20th day of July A.D. 1850, with force and arms at the "aux Claire" River in the State of Wisconsin, to wit: the County aforesaid seized and took a certain lot of lumber, usually called a "rapids piece of lumber" of great size, to wit, about fifteen thousand feet in quantity, of the said Plaintiff, of great value, to wit, one hundred and fifty dollars, then lying and being in the River "aux Claire" in said State of Wisconsin and then and there attached and fastened, and the said defendant then and there unmoored and unfastened the said "rapids piece of lumber" from the said place where she was so moored & fastened as aforesaid and thereby put and set the said boat adrift in the said River there, whereby the said "rapids piece of lumber" was damaged, broken to pieces and spoiled, and the said Plaintiff lost the use, profit and advantage of his said "rapids piece of lumber, to wit, at the County aforesaid.

2nd. Count. And also for that the said defendant on the 20th day of July A.D. 1850 with force & arms, at the "aux Claire" river in the state of Wisconsin, to wit, at the County aforesaid, seized and entered upon, a certain lot of lumber, usually called a "rapids piece of lumber", of the said Plaintiff of great size, to wit, sixteen thousand feet in quantity, and of great value, to wit, one hundred and fifty dollars, then lying and being in the river aux Claire in the State of Wisconsin, to wit, the County aforesaid, and cut the same apart & into pieces, & then & there unmoored & unloosened the said rapids piece of lumber from the said place she was so moored & fastened as aforesaid and thereby put & set the said rapids piece of lumber adrift in the said river, there and from thence to the Wisconsin River, whereby the said rapids piece of

lumber was damaged, broken to pieces and spoiled and the said Plaintiff lost the whole use, profit and advantage, of his said rapids piece of lumber for a long space of time, to wit for the space of four weeks, & the said Plaintiff was forced thereby & obliged to and did necessarily lay out and expend divers sums of money in the whole amounting to a large sum to wit, one hundred dollars in and about the regaining and repairing of said rapids piece of lumber the same being so broken, cut and separated as aforesaid, to wit, at the County aforesaid -

3d Count. And also for that the said defendant on the 20th day of July A.D. 1850, with force and arms at the aux Claire River, State of Wisconsin, to wit, at the County aforesaid seized, took and floated away a certain lot of lumber, usually called a rapids piece of lumber, of great size, to wit, from fifteen to sixteen thousand feet in quantity, of the said Plaintiff of great value, to wit, one hundred & fifty dollars, there then found & being and converted and disposed of the same to his own use - And other wrongs the said Plaintiff then and there did, against the peace of the People of the State of Illinois, and to the damage of the said Plaintiff Two hundred dollars and therefore he brings this suit -

By Hoge & Wilson
his attys

Filed July 31st 1851
William H. Bradley Clk
By E. C. Ripley Depy.

And afterwards, to wit, on the 25th day of August A.D. 1851 the said defendant by his attorney, filed in said Circuit Court with the Clerk thereof his motion in the words and figures following, to wit

S11958-5

Alexander Downey ads. Daniel F. Smith

In Circuit Court
So. Davies County
August Term 1851

And the defendant by his attorney comes and moves the Court to dismiss the cause and for judgment, as in case of a nonsuit, because there was no declaration filed to or before the second Term of the Court, after said suit was brought

Filed 25th August 1851
Wm H. Bradley Clk

Higgins & Strother
for Dept.

And afterwards, to wit, on the 26th day of August A.D. 1851 in the August Term A.D. 1851 of said Court, in the Record of the proceedings thereof in said Cause is the following entry, to wit,

Daniel F. Smith
vs
Alexander Downey

Trespass

Now came on to be heard the motion heretofore filed by the defendant, by his attorney to dismiss this suit, for want of a declaration having been filed in time, which after argument by Counsel, is taken under advisement by the Court.

And afterwards to wit on the 27th day of August in the August Term A.D. 1851 of said Circuit Court in the Record of the proceedings of said Court in the above entitled cause is the following entry, to wit,:

Daniel F. Smith
vs
Alexander Downey

Trespass

The Court having fully considered, and being fully advised upon the motion heretofore filed by the defendant by his attorney

to dismiss this suit for want of a declaration having been filed in time, overrules the motion, to which ruling and decision of the Court, the defendant by his attorney excepts.

And afterwards, to wit, on the 28th day of August, in said August Term of said Court A.D. 1851 the said defendant by his attorney, filed in said Court, the plea of the said defendant in the words and figures following, to wit

Alexander Downey — In Do Davies Circuit Court
ads — August Term —
Daniel F. Smith

And the said Alexander Downey comes and defends &c and says that he is not guilty in manner and form as the said Daniel F. Smith hath complained against him, and of this he puts himself upon the Country.

Endorsed filed Augt 28th 1851 } Higgins & Strother
W. H. Bradley clerk } attys for Deft.

And afterwards, to wit, on the 3d day of December A.D. 1851 in the November Term of said Circuit Court in the Record of the proceedings of said Court, in the above entitled cause, is an Entry in the words and figures following, to wit;

Daniel F. Smith —
vs. — Case.
Alexander Downey

Now at this day came the Plaintiff by his attorney, and the defendant by his attorney withdraws his plea and appearance, and the Defendant being three times solemnly called came not but made default. It is therefore considered by the Court that the Plaintiff have and recover of the Defend-

[11958-6]

-ant his damages; but as these damages are not cer-
-tainly known, it is ordered by the Court, that a writ of in-
-quiry issue returnable instanter, and the writ having this
day been returned executed, thereupon came a jury
of good and lawful men, to wit, John Rithley, Wm S.
Green, Michael Duncan, Wm McKillips, Hugh McGuire
Alex: McKillip, Peter Ostrander, Milton Claypole, Joseph
Finley, Newell Holcomb, L. D. Marsh and Jacob Buck
who were duly elected, tried and sworn, well and truly
to inquire of damages, and after hearing the testimony
on the part of the Plaintiff, on their oaths do say, we
the Jury find and report the damages of the Plaintiff
at the sum of one hundred and sixty two dollars and
thirty eight cents. It is thereupon considered by the Court
that the Plaintiff have and recover of the defendant
the said sum of one hundred and sixty two dollars
and thirty eight cents so as aforesaid found and
reported by the jury, together with his costs in this be-
-half expended and that Execution issue therefor-

And on the trial of the above entitled cause the Defend-
-ant by his attorney, filed the following exceptions which
were made and allowed, to wit;

Daniel F. Smith
vs.
Alexander Downey

In the Jo Daviess Circuit Court
of the August Term A.D. 1857

Be it remembered that on the 25th
day of August at the August term of said Court the
above named defendant came and filed in open
Court his motion in the words and figures following to wit

Daniel F. Smith
vs
Alexander Downey

In the Jo Daviess Circuit Court
of the August Term A.D. 1857

And the said Alexander Downey comes and moves

the Court to dismiss this suit, and for judgment as in case of a non suit, because there was no declaration filed until after two Terms of the Court had elapsed since said suit was commenced and brought into this Court.

Higgins & Scrotton
attys for dept.

which said motion afterwards, to wit, on the 26th day of August, being yet of the August Term, comes on to be heard and after argument of Counsel the said motion was overruled by the Court, to which ruling of the Court in overruling said motion, the said defendant, by his Counsel, then and there excepted, and then and there prayed that his exceptions might be allowed, and that the said motion and order thereon might be made a part of the record in this case, which is accordingly done. Signed sealed and allowed this 27th day of August A.D. 1851

Seal

The motion was overruled because only one Court had been held between the time of the commencement of this suit and filing the declaration. The last March and May Terms of this Court were not held, there being no Judge of this Court at those Terms the Judge having resigned before the March Term and the present Judge not having been commissioned till after the May Term

Filed August 27th 1851 Benj R. Sheldon Seal
Wm H. Bradley Clerk

And afterwards, to wit, on the 8th day of December A.D. 1851 being yet of the November Term of said Circuit Court A.D. 1851 in the Record of the proceedings of said Court in said entitled case, is an Entry in the following words to wit

Daniel F Smith
vs
Alexander Downey } Case

The defendant by his attorney comes and prays an appeal to the supreme Court

[11758-7]

And afterwards, to wit, on the 25th day of December A.D. 1851, being yet of the November Term of the aforesaid Circuit Court, A.D. 1851 in the Record of the proceedings of the said Court in the said entitled case is an Entry in the following words & figures, to wit;

Daniel F. Smith
vs. } Case
Alexander Downey

Now came on to be heard the prayer for an appeal to the Supreme Court heretofore prayed for by the defendant by his attorney, which after argument by counsel is granted by the Court, conditioned that Henry Rablin as agent of said defendant, with Osee Welch and Van H. Higgins or either of them, as surety, enter into bond in the sum of four hundred dollars, conditioned according to law, within thirty days from this date, to which ruling and decision of the Court as to granting an appeal without the defendant enters into bond, the Plaintiff, by his attorney, excepts—

Which bond mentioned in the preceding order is in the words and figures following, to wit;

Know all men by these presents, that we, Henry Rablin, as agent for Alexander Downey, and Van H. Higgins, of Jo Daviess County Illinois, are held and firmly bound unto Daniel F. Smith in the penal sum of four hundred dollars current money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly, severally and firmly by these presents. Witness our hands and seals, this 22nd day of January A.D. 1852.

The condition of the above obligation is such, that whereas the said Daniel F. Smith

did on the third day of December A.D. 1851 in the Circuit Court, in and for the County and State aforesaid, recover a judgment against the above named Alexander Downey for the sum of one hundred and sixty two dollars and thirty eight cents damages, and sixteen dollars and ninety one cents costs, from which said judgment of the said Circuit Court, the said Alexander Downey has prayed for and obtained an appeal to the Supreme Court of said State.

Now if the said Alexander Downey shall duly prosecute his said appeal with effect and shall moreover pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against him, in case the said judgment shall be affirmed in the said Supreme Court then the above obligation to be void, otherwise to remain in full force and virtue

Henry his X Rabbins (Seal)
mark

Van H. Higgins (Seal)

Taken and entered into
before me this 24th day of
January A.D. 1852
Wm H. Bradley Clerk

Filed Jany 24th 1852
Wm H. Bradley Clerk

State of Illinois
Jo Demp Com. Co. } ss.

I William H Bradley Clerk of the Circuit Court in and for said County do hereby Certify that the foregoing transcript is a true full and correct copy from the record of all the proceedings which now [illegible] in said Circuit Court in the aforesaid Case of Daniel J Smith against Alexander Downey. In testimony whereof

L1958-8

I have hereunto set my hand
and seal of said Court at my
Office in Galena this 26th day
of May A D 1852
Attest
Wm H Bradley Clerk

Deputy Clerk

Jo Davies

Daniel F Smith

ats. Transcpt

Alexander Downey

Filed June 3d – 1882.

L. Leland Clk.

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$3.85 for Transcpt

$3.85

IN THE SUPREME COURT OF THE STATE OF ILLINOIS.

OF THE JUNE TERM, A. D. 1852.

Daniel F. Smith
vs.
Alexander Downey.
} Appeal from Jo Daviess County.

This suit was commenced on the day of August, A. D. 1850, by a capias, on which the defendant was arrested, and released from custody by giving bail; at the October Term no declaration was filed, and the cause was continued; no Courts were actually held until the next August thereafter. A declaration was filed on the 31st day of July, 1851. At the next term after the filing of the declaration, a motion was made for a Judgment, as in case of nonsuit, or in other words, to dismiss the suit, because no declaration had been filed before the second *term* of the Court, *three* terms having intervened between the filing of the precipe and suing out the capias and the making of the motion, although only one Court had been held by the Judge. The October, March and May terms of the Court intervened. It is thought the Court erred in over-ruling the motion to dismiss the suit, three terms having intervened between the filing of the declaration and the suing out of the capias, and this is the error assigned, upon which reliance is had. Did the Court err? The reasons assigned by the Court are that no Court was actually held, and therefore there was no term of Court.

This position is believed to be entirely erroneous, for nothing can be plainer than that the sitting of a Court is not a term of Court.

The *law* fixes the *terms* of Court, and the Judges hold the sittings of the Court. 5 Mass. 197, Anonymous; 4 Dev. 427; G. Green's Iowa Rep. 13; 10 S. and Mar. 438.

The law fixes the terms of Court, of which the public are bound to take notice, and the sessions of the Court are held by the Jndges, yet a failure of the Judge to hold a Court, does not change the term of the Court.

In Rucker *vs.* Fuller, 11 Ills. Rep. 223, it was held that where an attachment was sued out returnable to the *next term* of the Court, and no Court was actually held, that this fact did not change *the term of the Court*, and that Judgments entered up at the *next sitting* of the Court, were not entitled to share in the property attached by writs which had been made returnable to the term which was not actually held. Now if an actual *sitting* of the Court constituted a legal *term* of Court, then this decision would be clearly wrong, as *no term* would have intervened! But it is not wrong, not even in the case of a special *term* of the Court, for, if a Judge were to hold a Court at a *time* or *place* not authorized by law, all his proceedings would be void. 2 Scam. 227, Gallusha *vs.* Butterfield.

It is only by virtue of the power conferred upon the Judge by the Legislature to hold special terms, that he can hold them, and when the *time* is fixed by the Judge, that time becomes a *term* of the Court. But a Judge cannot alter the terms of a Court, the time for holding which is fixed by law. He may not hold the Court, but the term still remains a legal term of Court. But in this case, there being a vacancy in the office of Judge, there could be no Judge to alter the *terms* of the Court, even if the Judge had power to do so. Three terms of Court having intervened, we think it clear that the Court should have sustained the motion of the defendant.

It may be urged, that a plea has been filed, and that this is a waiver of our right to insist on this objection.

We think it would have been safe for us to have not only put in our plea in *bar*, but to have resisted this action as far as possible.

An appearance, we admit, cures defects in a summons, or the manner of being served, in all cases of notice, citation, &c. However defective, they are cured by an appearance; but an appearance will not cure any other defect than the manner of notification.

An appearance being the end and object of a citation, a party is estopped after appearance from saying that he was not legally notified; but an appearance cures no other defect than that which relates to the means and the manner in which a party is brought into Court. 6 How. U. S. P. 111, 605.

An appearance would not aid a defect in the declaration, nor a Judgment improperly rendered; from the nature of things, it cannot aid any defect save that of the manner of being brought into Court. The taking of any subsequent step in a cause, generally waives the error or irregularity of a prior one relating to the same matter; as the filing of a plea amended, would be held an abandonment of the original plea. Yet in such case if the declaration is found to be in assumpsit, and the action in debt, the Judgment would be reversed, notwithstanding the appearance and plea. The taking of a subsequent step cures only those irregularities and errors which are of the same class as the step taken by the party. Even if this case was to be treated like a dilatory motion, the mere filing of a plea would not prejudice us, for it is well settled that they (dilatory motions) are in the nature of pleas in abatement, and subject to the same rules; and it is well settled in this Court, that an erroneous decision on a plea in abatement, may be assigned for error, although a party has pleaded in bar. Delahay *vs,* Clement, 3 Scam. 201, (vide the reasoning on pages 203, 204;) 11 Ill. Rep. 573, Weld *vs.* Hubbard.

There is no good reason why, when the party has been prevented from obtaining a final Judgment in his favor by the erroneous ruling of the Judge, that the matter should not be corrected as well and in the same manner on a motion, as by plea.

Suppose a Court refuses to dismiss a case where a non-resident commences a suit and neglects to file a bond for costs, the application being properly made: or suppose a Court refuses to grant a continuance, where a proper affidavit is made; cannot error be assigned on these rulings and decisions of the Judge? They are matters of *law* and not of discretion, and it is *error* for the Court to disregard the *law,* and if the party except to it he may have the benefit of it.

The defendant in this case, as a matter of law, was entitled to a Judgment as in case of a nonsuit, (8 Sec. practice act,) and shall it be said, when he applied for such a Judgment, that the Court refused it?—and that because he tried to prevent a Judgment against himself he legalized the erroneous rulings of the Court? An appearance in such case does not prejudice. 19 Pick. P. 247, Ames *vs.* Wilson; 4 Pick. P. 89, Rathbone *vs.* Rathbone; 4 Mass. 591, Cleveland *vs.* Walsh; 2 Aikens 31.

But the Court is relieved from the trouble of passing upon this question, as the plea which was filed was withdrawn by leave of Court, the party abiding the question on his motion.

The plea and appearance being withdrawn by leave of Court, is the same as if it had never been entered or filed. 6 Blackf. 557, Lodge *vs.* The State Bank; 3 Watts and Serg. 501, Michew *vs.* McCoy; 6 How. U. S. 111, 605.

[11958-10]

Abstract

IN THE SUPREME COURT OF THE STATE OF ILLINOIS.

OF THE JUNE TERM, A D. 1852.

Daniel F. Smith
vs.
Alexander Downey.
} Appeal from Jo Daviess County.

This suit was commenced on the day of August, A. D. 1850, by a capias, on which the defendant was arrested, and released from custody by giving bail; at the October Term no declaration was filed, and the cause was continued; no Courts were actually held until the next August thereafter. A declaration was filed on the 31st day of July, 1851. At the next term after the filing of the declaration, a motion was made for a Judgment, as in case of nonsuit, or in other words, to dismiss the suit, because no declaration had been filed before the second *term* of the Court, *three* terms having intervened between the filing of the precipe and suing out the capias and the making of the motion, although only one Court had been held by the Judge. The October, March and May terms of the Court intervened. It is thought the Court erred in over-ruling the motion to dismiss the suit, three terms having intervened between the filing of the declaration and the suing out of the capias, and this is the error assigned, upon which reliance is had. Did the Court err? The reasons assigned by the Court are that no Court was actually held, and therefore there was no term of Court.

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An appearance, we admit, cures defects in a summons, or the manner of being served, in all cases of notice, citation, &c. However defective, they are cured by an appearance; but an appearance will not cure any other defect than the manner of notification.

An appearance being the end and object of a citation, a party is estopped after appearance from saying that he was not legally notified; but an appearance cures no other defect than that which relates to the means and the manner in which a party is brought into Court. 6 How. U. S. P. 111, 605.

An appearance would not aid a defect in the declaration, nor a Judgment improperly rendered; from the nature of things, it cannot aid any defect save that of the manner of being brought into Court. The taking of any subsequent step in a cause, generally waives the error or irregularity of a prior one relating to the same matter; as the filing of a plea amended, would be held an abandonment of the original plea. Yet in such case if the declaration is found to be in assumpsit, and the action in debt, the Judgment would be reversed, notwithstanding the appearance and plea. The taking of a subsequent step cures only those irregularities and errors which are of the same class as the step taken by the party. Even if this case was to be treated like a dilatory motion, the mere filing of a plea would not prejudice us, for it is well settled that they (dilatory motions) are in the nature of pleas in abatement, and subject to the same rules; and it is well settled in this Court, that an erroneous decision on a plea in abatement, may be assigned for error, although a party has pleaded in bar. Delahay *vs*, Clement, 3 Scam. 201, (vide the reasoning on pages 203, 204;) 11 Ill. Rep. 573, Weld *vs.* Hubbard.

There is no good reason why, when the party has been prevented from obtaining a final Judgment in his favor by the erroneous ruling of the Judge, that the matter should not be corrected as well and in the same manner on a motion, as by plea.

Suppose a Court refuses to dismiss a case where a non-resident commences a suit and neglects to file a bond for costs, the application being properly made: or suppose a Court refuses to grant a continuance, where a proper affidavit is made; cannot error be assigned on these rulings and decisions of the Judge? They are matters of *law* and not of discretion, and it is *error* for the Court to disregard the *law*, and if the party except to it he may have the benefit of it.

The defendant in this case, as a matter of law, was entitled to a Judgment as in case of a nonsuit, (8 Sec. practice act,) and shall it be said, when he applied for such a Judgment, that the Court refused it?—and that because he tried to prevent a Judgment against himself he legalized the erroneous rulings of the Court? An appearance in such case does not prejudice. 19 Pick. P. 247, Ames *vs.* Wilson; 4 Pick. P. 89, Rathbone *vs.* Rathbone; 4 Mass. 591, Cleveland *vs.* Walsh; 2 Aikens 31.

But the Court is relieved from the trouble of passing upon this question, as the plea which was filed was withdrawn by leave of Court, the party abiding the question on his motion.

The plea and appearance being withdrawn by leave of Court, is the same as if it had never been entered or filed. 6 Blackf. 557, Lodge *vs.* The State Bank; 3 Watts and Serg. 501, Michew *vs.* McCoy; 6 How. U. S. 111, 605.

[11958-11]