THE

AMERICAN LAW REGISTER.

NOVEMBER 1880.

VOIDABLE AND VOID JUDGMENTS.

What is the difference between voidable and void judgments?

Can a judgment against two defendants be void as to one of them, and only voidable (that is to say valid), *as against the other?*

A judgment is rendered jointly against two defendants, one of whom was not summoned, and it is allowed to stand unreversed: Is it void *as against the summoned defendant? Can he be sued on it in another State? and how?*

THE leading case on these questions is *Hall* v. *Williams*, 6 Pick. 232, decided in 1828, which was an action of debt, instituted in Massachusetts upon a judgment recovered against two defendants, in the Superior Court in Georgia, and the points which the case presented may be thought to deserve a fuller consideration than they received then, or in later cases where they have arisen.

By the record it appeared that the plaintiffs brought suit in Georgia, in May 1824, against Williams and Fiske, as late co-partners trading under the firm name of E. Williams & Co.

The officer's return, dated May 4th 1824, was as follows: "I have served a copy on Edward Williams; Abijah Fiske not to be found in the county." The plea, filed July 15th 1824, was: "And the said Edward Williams, by William W. Gordon, *his* attorney, comes, &c., and saith that *he* did not undertake," &c. In another part the record states: "Afterwards, to wit, on, &c., came the

within named Henry Hall, &c., as well as the within named Edward Williams and Abijah Fiske within named by *their* attorney within named, and the jurors, &c., upon their oaths say, &c. Therefore, it is considered that the said Henry Hall, &c., do recover against the said Edward Williams and Abijah Fiske, the damages aforesaid," &c.

After passing upon certain points in pleading presented by the case, the Supreme Court of Massachusetts, while apparently conceding that the defendants would have been estopped by the record, if it appeared thereby "that the defendants had notice of the suit or that they appeared in defence," (p. 239), goes into a discussion of the conclusiveness of judgments obtained against a defendant who is not, or defendants who are not summoned, a discussion into which we need not follow the court, for it is well settled that when this fatal irregularity appears upon the face of the proceedings, the judgment has no binding effect in the courts of another state. "In the courts of another state"—so the doctrine is generally expressed—but as the reason for regarding such judgment as invalid, is because "to hold a defendant bound by such judgment is *contrary to the first principles of justice*," it is obvious, as Mr. Justice FIELD pointed out in *Pennoyer* v. *Neff*, 95 U. S. 714, 732, that the judgment is equally a nullity, and is entitled to the same disrespect, "in the state where rendered." If early authority be needed for the injustice of such judgments, we certainly get back to "first principles," in the case of *The King* v. *The Chancellor, &c., of Cambridge University*, 1 Strange 557, where Mr. Justice FORTESCUE says, "The laws of God and man both give the party an opportunity to make his defence, if he has any," and cites the case of Adam, upon whom sentence was not passed, before he was called upon to make his defence. "Adam, where art thou? Hast thou not eaten," &c., * * * "And the same question was put to Eve also."

To this rule as to the invalidity of a judgment against an unsummoned or non-appearing defendant, there is an exception as widely recognised as the rule itself, which may as well be mentioned here, and that is that a citizen, or even resident of any country, being bound by its laws, cannot complain if judgment has been recovered against him when he has been sued according to such process as may be provided by law, although actual summons or appearance be not included in that process. There are many cases in

the English reports where this principle has been laid down, the suits having been brought upon judgments obtained in some foreign or colonial court, and it has been decided by the courts of the different states often enough to make a citation of authorities needless. We may pass from this statement of the *general rule*, and of the *exception* to it, without further discussion, nor need we reopen the question as to the *conclusiveness* of a record's recital that the defendants were summoned or appeared in defence, for it has been settled, since the decision of *Hall* v. *Williams*, that such recital is not conclusive.

But it is plain that the case which the court had to decide, was very different from those cases in which judgment has been rendered against a *sole* defendant unsummoned or not appearing, or against two or more defendants, *all* unsummoned or not appearing. Here *one* of the defendants had been summoned and had duly appeared by his attorney. So far as any "first principles of justice" are concerned, the judgment in this case was good as to Williams (if a judgment *can* be good as to one and bad as to another), while it was clearly bad as to Fiske. If some other principle was to be applied, we should look for an ampler exposition of it, or stronger authorities in its support, than the court, after dwelling at some length upon "universal principles of justice" (p. 240), saw fit to give.

"It appears by the record," says the court, p. 246, "that the attorney appeared for Williams only, and there is no plea filed but for Williams. There is nothing therefore in the record which is contradicted by the second and third pleas" [never served with process, never appeared to the action, &c., *but evidently the court means to assert this only as to the defendant Fiske*], "and the replication by estoppel is therefore bad and the plea good, which settles the case in favor of the defendants, unless"—here we come to the important point—"unless the judgment can be sustained against Williams alone, and this writ can be amended by striking out Fiske; but such an amendment would not help the case, for *the judgment being entire, if it is a nullity with respect to one, it is also in the whole: Richards* v. *Walton*, 12 Johns. R. 434." This is the beginning and end of the discussion of the point.

Only one case is cited as an authority for the law thus briefly laid down, and that case is found on examination to be not applicable.

For a mere statement of the case of *Richards* v. *Walton*, 12

Johns. R. 434—one of a large class, of which several typical cases were relied on by defendants in argument (p. 237)—will show that it does not sustain the doctrine which it was cited to support. "The defendants below were sued by warrant in trespass for cutting timber; the constable returned to the warrant, that the same was served agreeable to law; but only brought [A.] before the justice, no reason appearing why the other defendant was not brought. [A.] pleaded and demanded an adjournment, but * * * it was denied, and the justice gave judgment against both defendants." On a writ of error to the Supreme Court: "PER CURIAM. * * * The proceedings against [B.] were clearly erroneous; where a party is prosecuted by warrant, the justice has no authority to proceed unless the defendant appears in court. * * * As the judgment is against both and entire, it must be reversed."

This doctrine, which the Massachusetts court was then applying —and perfectly sound doctrine it is, but not applicable to the case before them—is to be found thus stated in Bacon's Abridgment, tit. *Error*. "Where, on the Writ of Error, Part only or the whole Judgment shall be reversed. A judgment, being an entire thing, cannot regularly be reversed for part, and affirmed for part." Several instances are given, for example: "In a writ of error upon a judgment in trespass against several, if the judgment be erroneous, because one of the defendants was within age, and appeared by attorney, the judgment shall be reversed *in toto* against all."

This is elementary law, which could not be successfully controverted, and it has been followed without question in very many cases. Among earlier cases may be cited *Curtis* v. *Patton*, 6 S. & R. 135; *Cole* v. *Pennell*, 2 Randolph 174. Among later cases on the subject, are *Benner* v. *Welt*, 45 Me. 483; *Donnelly* v. *Graham*, 77 Penn. St. 274; *Smith's Adm'r* v. *Rollins*, 25 Mo. 408, *Covenant, &c., Co.* v. *Clover*, 36 Mo. 392.[1]

Now it is one thing to say that *on an appeal or a writ of error to a higher court in the same state*, the judgment shall not "be reversed for part and affirmed for part," but "shall be reversed *in toto* as against all;" but where a judgment has been rendered against

[1] *Contra, Kitchens* v. *Hutchins*, 44 Ga. 620, and *Kelly* v. *Bandini*, 50 Cal. 530, which may safely be disregarded. The curious case of *Shirley* v. *Lunenburgh*, 11 Mass. 379, is quite exceptional in the aspect it presented. The technical rule which the court thought binding in *Hall* v. *Williams*, could hardly have been stretched so as to cover this earlier case.

two or more defendants, only one of whom was not summoned, and no writ of error is sued out, nor appeal taken, and the judgment is allowed to stand unchallenged, and *suit is afterwards brought on it in another state*, it is quite a different thing to say that the defendants properly summoned, &c., who might have appealed on account of the irregularity as to their co-defendant, but failed to do so, may rely on such irregularity as a fatal bar to the suit in the court of another state, and that such court must treat the judgment *as to them also*, as an absolute nullity. The Massachusetts court passed *per saltum* from one of these propositions to the other, but it is respectfully submitted that a wide gap separates them, although the highest courts of several other states, following the Massachusetts case, seem to have found it an easy leap across.

Before we discuss the other decisions supporting the doctrine of *Hall* v. *Williams*, it may be interesting to give a brief history of the later stages of that case as it was afterwards presented to the Supreme Court of Maine.

It appears that on January 19th 1829, some years after the judgment was rendered in the Georgia court, and after the unfavorable decision by the Massachusetts court, on the motion of the plaintiffs' attorney in the Georgia court (notice being served on the attorney of record to the defendant Williams) it was ordered by the Georgia court that the judgment be amended, and that the plaintiffs have leave to enter judgment *nunc pro tunc* against Williams alone, which was done. Thereupon the plaintiffs brought, in Maine, an action of debt on a judgment *as rendered against the defendant Williams alone* by the Georgia court, and after elaborate pleadings on both sides, presenting some interesting points which need not be discussed here, the Supreme Court decided that the defendant's plea (that the judgment was rendered against himself and one Fiske jointly) was bad, and sustained the plaintiffs' demurrer.[1]

This was in 1832, and the case is found in 8 Me. 434. The case came again before the same court the next year, when *nul tiel record* was pleaded, and issue joined, and the court held (in this suit founded on the *amended* judgment), that while the original judgment was erroneously entered up against Fiske, the court was bound by the Constitution to give full faith and credit to the record

[1] There is a mistake in the last line of the report of the decision, p. 437—not corrected in the list of *errata*,—*overruled* being printed instead of *sustained*.

as amended, and judgment was accordingly rendered against the now sole defendant Williams: *Hall* v. *Williams*, 10 Me. 278.

Returning to the consideration of the point under discussion, we find that the doctrine of the Massachusetts case of *Hall* v. *Williams* was followed in *Holbrook* v. *Murray*, 5 Wend. 161, where the court based its decision upon the Massachusetts case and also on the case of *Richards* v. *Walton*, 12 Johns. Rep. 434, where "this precise point was decided," though we have seen that the point decided was essentially different.

The next case is *Rangely* v. *Webster*, 11 N. H. 299, which was decided on the authority of the Massachusetts case and the two New York cases.

Next is *Buffum* v. *Ramsdell*, 55 Me. 252, where the court, deciding that "the judgment being an entirety, if void in part is void in all," &c., held that such a judgment is erroneous, and will not sustain a levy made upon the real estate of the one, if the other of the defendants was not an inhabitant of the state and no legal service was made upon him. No new authorities of any value are cited, and the two Maine cases quoted, *Penobscot R. R.* v. *Weeks*, 52 Me. 456, and *Benner* v. *Welt*, 45 Me. 483, have no bearing upon the point which we are now considering.

The latest case, and the only other one directly applicable, which maintains the absolute invalidity of the judgment when the defendant who had been summoned is sued upon it in another state, is *Knapp* v. *Abell*, 10 Allen 485, and this case is based upon the authority of *Hall* v. *Williams*, and *Rangely* v. *Webster*.

Bissell v. *Briggs*, 9 Mass. 462, decided in 1813, has been sometimes relied upon as an authority for the inconclusiveness of judgment of a court of another state: "if it should appear that the court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment" (p. 467), but as it plainly appeared that the jurisdiction of the New Hampshire court had been properly exercised in giving judgment against the defendant, and the Massachusetts court pronounced judgment accordingly, the remark just quoted, however correctly it may state the law, is only *obiter*.

We come next to *Hendrick* v. *Whittemore*, 105 Mass. 23, an instructive case, which if not directly in point on the question which we are considering, is very near being so. This was an action for contribution, brought by one against the other of two sureties on a bail-bond, the full payment of which had been

enforced against the first by an execution issued on a writ of *scire facias* upon the bail-bond. The defence taken was that the writ of *scire facias* was defective in that it directed the officer to summon the two defendants therein to appear, &c., without specifying *at what hour* of the day; that consequently the judgment rendered upon their default was not binding, and the plaintiff if he paid it, could not hold the defendant to contribution. The court, in its discussion of the case, recognised a "distinction between erroneous proceedings which are to be treated as void, and those which are voidable only." (P. 28.)

"Many considerations favor the rule that judgments of a court of competent jurisdiction which are erroneous by reason of defect of process, or insufficiency or want of service, can be impeached by parties thereto only by proceedings instituted directly for that purpose. The plaintiff is concluded by such judgment. His demand is merged in it. He cannot treat it as a nullity, and proceed again upon his original demand as if no such judgment had been rendered. He can only proceed by levy of execution, or by suit upon his judgment. If the defendant may defeat any proceeding in either mode, the plaintiff is left remediless, unless he, too, may regard the judgment which he has obtained as absolutely void." (P 29.)

But the court has just told us that he *cannot* so regard it. The court here addresses itself to an adjustment of the rights between two *defendants* resulting from the *voidable but not void* judgment against them, but its reasoning is just as applicable to the question of the plaintiff's rights under such a judgment.

The plaintiff is concluded by such judgment; *he* cannot treat it as a nullity; his voidable but not void judgment is *so far good* as to keep him out of any other remedy except through and by means of it; shall he be told that it is just good enough to prevent his having any remedy at all?

Henderson v. *Staniford*, 105 Mass. 504, which relies upon *Hendrick* v. *Whittemore*, says still more emphatically: "A judgment obtained without legal notice or service of process upon the defendant, there being no other objection to the jurisdiction of the court rendering it, is voidable only, not void." This case is not strictly applicable to the point under discussion, for it was a suit on judgment rendered against a *sole* defendant, who was a citizen of California temporarily absent from the state; the

plaintiff commenced an action upon a promissory note against him in the county where he had resided, notice being duly given by publication, and judgment was rendered, which was never reversed or annulled, but was valid and in full force in California. The plaintiff afterwards brought suit *on the note* against the defendant in Massachusetts, and the court held that he could not sue upon the original demand. All that the court really had to decide was that the defendant *being a citizen of California*, and sued according to the process provided by its laws, the judgment against him was *good*, and the plaintiff must sue *upon the judgment*, so that the discussion of the effect of judgments which "defendant has not attempted to avoid" seems rather uncalled for, inasmuch as this was a judgment which defendant could not have avoided if he had tried.

The case of *Stockwell* v. *McCracken*, 109 Mass. 84, is still more noteworthy in its recognition of a distinction between voidable and void judgments, and (as it seems to us) in its departure from the strict line of the *Hall* v. *Williams* case in 6 Pickering. Here the plaintiff, having recovered judgment in California against A. and B. jointly, of whom A. had been summoned and B. notified by publication, brought suit in Massachusetts against both of them upon the judgment, discontinuing it, however, as to B. A. was a citizen of California, and B. is also taken to have been a citizen of that state, as the contrary did not appear, so that, under principles well enough established, there was really no difficulty about the jurisdiction. The court also disposed of another defence, namely, that sufficient time, as required by the California statute, had not elapsed before the entering up of the judgment, and decided that the California court must be held to have passed upon that question in rendering the judgment, and that its decision thereon was conclusive. The court adds, however, this discussion of the effect which an irregularity might have: "But if an irregularity were shown to exist, we are referred to no statute or rule of law in California, under which the judgment would thereby be rendered void, or even voidable by [A]. The presumption from the law, as it exists here, would be otherwise. And if voidable, both defendants being citizens of California and subject to the jurisdiction of its courts, it is not at all clear that it could be avoided in another state, or in any other manner, than

by direct proceedings for its reversal in that state: *Hendrick* v. *Whittemore*, 105 Mass. 23; *Henderson* v. *Staniford*, Id. 504."

"Even voidable by A." What does this mean? Surely, it must mean that, supposing the presumption that B. was a citizen of California were shown to be erroneous, supposing, then, that there was no jurisdiction acquired as to him, yet the judgment which the Massachusetts court might then have to hold *void as to him*, it would hold *not even voidable as to A.*, who had acquiesced in it, and had taken no "direct proceedings for its reversal in that state." In other words, the Massachusetts court seems to have insensibly come to the doctrine (which we contend is the true doctrine), that a judgment which may be held to be void as to the unsummoned, the non-resident defendant, over whom jurisdiction was never acquired, may as to the summoned defendant, who has acquiesced in it, be only voidable, that is to say, practically *valid*. There would seem to be a greater inherent reasonableness in this doctrine than in the other, which, as applied by the Massachusetts court, leads to this inconsistency, that the plaintiff cannot recover when, having obtained an irregular judgment, he brings in Massachusetts an action of debt on judgment against the summoned defendant, because his judgment *is void there*, nor can he recover if he sues the summoned defendant in Massachusetts on the original cause of action, because his judgment is *only voidable, i. e. good, where rendered*, and has merged the original cause of action, and therefore he is to be left without any remedy either way.

Having seen how the latest decisions in Massachusetts have, to a certain extent, modified the doctrine of *Hall* v. *Williams*, and having noticed incidentally that a pretty strong argument *ab inconvenienti* stands in the way of its acceptance, unless it be in itself sound and well established, let us examine the basis of legal reasoning or of authority on which the doctrine is supposed to rest.

Now it is perfectly apparent that in reaching the conclusion that a judgment like the one sued on in *Hall* v. *Williams*, 6 Pickering, is void as to both defendants, the courts travel along two different lines of argument, that is to say, they begin with the first-principles-of-justice argument, and then suddenly abandon that for another, which, whether it be sound or not, is based upon merely technical considerations. "It is contrary to the first principles of justice that judgment should be rendered against

an unsummoned defendant (not a citizen), or against two or more unsummoned defendants (not citizens);" perfectly true; but if judgment has been rendered against A. who was, and B. who was not, summoned, and in another state suit is brought on this judgment, it is plain that, although this argument may help B., it has nothing to do with A.'s case, and then the courts suddenly plant themselves upon the technicality, "void as to one, void as to all."

The whole argument is based at last upon this supposed technical rule, which is repeated as if it were a self-evident legal truth, needing neither reason nor authority to sustain it, and the whole argument must fall when we find unquestioned authorities declaring that a judgment—that mysterious "entirety"—may be avoided as to one, and *yet allowed to stand as to the other.* Not, be it observed, on a writ of error, or on an appeal from the joint judgment, for so far as concerns these, "void as to one, void as to all," is a correct statement of the law. But on motion to vacate or set aside the judgment, addressed to the court which rendered it, the supposed rule does not prevent the relief of one defendant while the other is held bound.

The leading case on the subject is *Motteux* v. *St. Aubin*, 2 W. Black. 1133, decided in 1777. The case is as follows: Davy moved to set aside the judgment against Sir John St. Aubin only, and to strike his name out of the warrant of attorney to confess this judgment, which was entered against Sir John and one William Davis, his surety; it being proved by the affidavits of his mother and relations, that Sir John is now only eighteen years old, and that this judgment was obtained from him by advancing him money (how usuriously did not appear) in order to supply his extravagance at Westminster school. Walker showed for cause, that by Style 121, 125, judgment against an infant (who appeared by attorney) and two others, could not be reversed against the infant *only*, but must be against all or none.

GOULD, Justice.—I have no doubt. This is not a reversal of the judgment by writ of error, but the vacating the warrant of attorney, as against the infant, for imposition; after which the judgment drops of course. I remember Lord HARDWICKE, in the King's Bench, held that relief might be given upon warrants of attorney if unduly obtained, and the courts have always followed that opinion. I say nothing as to Davis [the other defendant], the procurer of this money. Let him shift for himself.

BLACKSTONE and NARES, JJ., concurred.

This case was relied on and followed in *Ashlin* v. *Langton*, 4 Moore & Scott 719. It was also followed, at an early day, by the Court of Common Pleas of Philadelphia, and by the Supreme Court of New Jersey.

Gerard v. *Basse*, 1 Dall. 119, decided in 1784, was as follows: A judgment was entered on a bond and warrant to confess judgment, executed by one partner with one seal, in the name and behalf of both. On motion, this judgment was set aside as to the partner who did not sign, but held valid as to the other.

The president delivered the unanimous opinion of the court: "* * * The law in 2d Blackstone 1133 has set us the example; we there see the judges, on an application of this sort, set aside a warrant of attorney as to one, and let the other shift for himself. We may with equal reason set aside the judgment as to the man who gave no authority for entering it, and let the other, who did really execute it, shift for himself. We are disposed to go further, if it shall be asked of us. We see no reason why, in this case, we may not give leave to the plaintiff to strike the name of Basse out of the proceedings, as a mere nullity. * * * Accordingly, judgment set aside as to Basse, and confirmed as to Soyer."

Silvers v. *Reynolds*, 2 Harrison (N. J.) 275, is equally emphatic. A judgment against two persons, by confession or warrant of attorney, may be set aside as to one of them (it appearing by affidavits that nothing is due and owing from him to the plaintiff), and stand good as to the other. "If the present case was before us on a writ of error, I do not say that we could reverse the judgment as to one defendant and affirm it as to the other; but courts of law have immemorially exercised an equitable power over judgments entered by their authority on warrants of attorney, by confession. * * Let a rule be entered, to strike the name of Brittin out of the record, so that it may remain a judgment against Silvers only."

Green v. *Beals*, 2 Caines (N. Y.) 254, decided in 1804, and *St. John* v. *Holmes*, 20 Wend. 609, do not *fully* sustain the doctrine of *Motteux* v. *St. Aubin*. They are instructive cases, though the decisions in each are in part *obiter*. But *Crane* v. *French*, *infra*, cited with approval in *St. John* v. *Holmes*, decides expressly that a judgment may be *void as to one, valid as to another*.

The point involved in *Motteux* v. *St. Aubin*, was touched upon,

but not, strictly speaking, decided, in a recent case: *Shuford* v. *Cain*, 1 Abbott (U. S.) 302. This case came before the judge of the District Court for the northern district of Georgia—a court which has circuit court powers—and was decided on motion to vacate a judgment which had been rendered in that court against two defendants. Both of them had been summoned, but, for reasons which it would take too long to set forth here, the judgment was erroneous as to both. Counsel for the plaintiff contending that even if the judgment, so far as it affected A., was void, it must nevertheless stand good as against B., the court, in the course of the opinion, used the well-worn phrase: "This judgment being an entirety, if void in part, is void in all; if annulled as to one of the parties, it must be annulled as to both" (p. 310), but did not cite *Motteux* v. *St. Aubin*, or any other of the few authorities on the effect of judgments against joint defendants, *motion being made to set aside*. Moreover, as the court had already shown (pp. 306–308) that the United States court had *no jurisdiction* either as to A. and B. jointly, or as to A. alone, and that as against B., the plaintiff had, in the actual state of the pleadings, no standing at all, and as the court had declared (p. 309), "that the rendition of the judgment was *coram non judice*, and therefore utterly void," it is plain that the expression quoted in the last sentence is merely *obiter*.

But the courts have gone much further than merely to hold that judgment by confession *may be set aside*, at the instance and for the benefit of the defendant, who did not authorize it to be entered up, and may be allowed to stand as to the other. They have held such judgments to be simply *void as to one, valid as to the other*. When one member of a copartnership has confessed judgment for the firm, it has been repeatedly held that the judgment, though void as to the other partners, is valid as to the partner procuring it to be entered: *Crane* v. *French*, 1 Wend. 311; *The York Bank's Appeal*, 36 Penn. St. 458;[1] and if the creditor, treating the irregularly obtained judgment as void, sues on the original de-

[1] This doctrine derives some support from *Hall* v. *Lanning*, 91 U. S. 160, for although it is not directly laid down there, it is strongly implied from the language used by the court in the first and last sentences of the decision. "The question to be decided * * is * * whether a judgment against all the partners, founded on such an appearance, can be questioned *by those not served* with process in a suit brought thereon in another state." "The defendant [B] had a right, for the purpose of invalidating the judgment *as to him*, to prove," &c. The italics are our own.

mand, he is told that such judgment, *valid in part*, has merged the original cause of action: *North* v. *Mudge*, 13 Iowa 496.

The question of validity, *as to one but not as to all*, may also arise in the following case. In a state where the law requires that a judgment by confession or consent must be signed by the judge, and where, as in California, it is held that such judgment not so signed is illegal and may be set aside (*Chapin* v. *Thompson*, 20 Cal. 681), it would probably also be held that the unsigned judgment is *void*.[1] Now, it may happen that A. and B., being sued jointly, judgment is confessed by B. without the judge's signature, and afterwards by A., the judge duly approving *his* confession. It is pretty obvious that the judgment rendered is voidable, perhaps void, as to the one, but that even after it has been set aside as to him (if that step need be taken), it is still valid as to the other.

The question may also arise in the case of a judgment regularly entered against two defendants, from which only one of them *takes an appeal* within the time limited by the law of the state. After

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[1] *Chapin* v. *Thompson* is cited in Freeman on Judgments, § 547, as authority for the position that the judgment is void, but the case does not in fact go so far. The decision was on *motion to set aside* the judgment and the execution thereon, and the motion prevailed. The same author, at § 557, misquotes this well considered case on another point, being probably misled by the head note. "In California such a judgment [one entered under a statement purporting to authorize the entry of judgment against several, but which is signed by less than the whole number of the defendants] is treated as an entirety, and being invalid as to one defendant, is invalid as to all." This reads much like the *Hall* v. *Williams* doctrine, but it is not what the court decided. The court, after deciding, as we have seen, that the judgment could be set aside because it was not signed by the judge, also held that "the warrant of attorney" under which the judgment was entered was "ineffectual for any purpose. A fatal objection to it is, that it was signed by two of the defendants only—the signatures of the other defendants being attached without their consent. Of course, as to the latter, it [*the warrant of attorney*] was a mere nullity, and as no judgment could be entered upon it against them, it was equally ineffectual as to the former. * * The warrant was the measure of its authority, and any judgment other than that expressly authorized, would have been *coram non judice*. * * The rule in such cases is that the authority must be strictly pursued, and this rule has been repeatedly laid down." The court cites *Gee* v. *Lane*, 15 East 592, and other cases. The distinction between *Crane* v. *French*, *supra*, and the case in East, is sufficiently obvious. In the first, A., without authority, gives a warrant of attorney to confess judgment against A. and B., and judgment is entered accordingly; held valid as to A., void as to B. In the second, A. and B. give a warrant of attorney to confess judgment *against them both*, and it is entered, contrary to the terms of the authority, against A.; held void.

issuing its writ of summons and severance,[1] the appellate court entertains A.'s appeal, and perhaps reverses the judgment as to him, but the time having now gone by during which an appeal is allowed, B. stands bound by the judgment, though it is avoided as to A.

Stronger, perhaps, than any of the cases above cited is *Douglass's Lessee* v. *Massie*, 16 Ohio 271. In 1832, Riddle and another, plaintiffs in an action for a breach of covenant of warranty, brought suit in the Court of Common Pleas of Ross county, Ohio, against five parties, heirs of one Massie, who had died intestate in 1813, and although only two of them were summoned, recovered judgment against all five, for $1625 damages and costs, to be recovered from any assets which had come to defendants by descent from their ancestor. In 1833 execution and levy was made upon land which had so descended, and under such proceedings it was sold to the lessor of the plaintiff. When he brought ejectment in the Supreme Court in Ross county to recover the land, a nonsuit was ordered by the court; the plaintiff moved to set aside the nonsuit, and on this motion the case came before the Supreme Court of the state.

"Two objections are made to the plaintiff's right to recover in this ejectment: First. That the judgment before the Common Pleas * * * is void. * * * It is claimed that the judgment is void, because, upon part of the defendants named in the original suit, no service was ever made. Now, it is conceded that if there had been no service upon either of the defendants, * * * the court would have had no jurisdiction, * * * the judgment would have been a nullity, and all proceedings under it void. Such a judgment, execution under it, and sale, would not have passed any title, and would not be treated as evidence in an action of ejectment. But that is not the present case. Two of the defendants were summoned, and * * * over [them] the court had jurisdiction. Could the judgment be pronounced *void*, because, with some who were liable, others not liable were joined? That the judgment would be erroneous is certain, and we have had frequent occasion, upon writs of error, to reverse such judgments. The judgment, too, because it is joint, would be reversed as to all the defendants. * * * Though this judgment is erroneous, upon principle, it cannot be collaterally impeached. * * * Consider-

[1] As, for instance, in *Mc'tu* v. *Primrose*, 23 Md. 482.

ing the judgment erroneous and therefore voidable, but not void the court decide that an execution could have been lawfully issued, and lands by virtue of it, subjected to sale. The nonsuit was set aside.

This case is affirmed and followed in *Newburg* v. *Munshower*, 29 Ohio St. 617.

The next case to be noticed is *Harvey* v. *Drew*, 82 Ill. 606. Suit was brought in the Supreme Court of New York against A., B., and others, of whom B. was not within the jurisdiction nor subject to the laws of New York, and judgment was obtained for the whole amount. The judgment was subsequently compromised by A. for an amount less than what was justly due, and he sued B., in Illinois, for contribution. The court held, as the Massachusetts court had held in *Hendrick* v. *Whittemore*, *supra*, that the defendant was liable to contribution on general principles, and whatever might have been the defects of the judgment, but it also held, herein departing from the doctrine of *Hall* v. *Williams*, that although the New York judgment would not have been good to sue B. on in Illinois, "*no doubt it was a valid judgment against* [*A.*]." P .608.

There are two recent cases which hold, contrary to the doctrine of *Motteux* v. *St Aubin*, that a judgment cannot be vacated as to one defendant and allowed to stand as to the other: *Van Renselaer* v. *Whiting*, 12 Mich. 449, decided by a majority of the court, and *Johnson* v. *Lough*, 22 Minn. 203. In neither case are any authorities cited bearing upon the point. But except in those states it appears that judgments—"entireties" though they be—may be vacated as to one defendant and allowed to stand as to another, or else without even being formally vacated, may be held valid as to one and void as to another, and consequently we find that the expression "if the judgment is a nullity with respect to one, it is also in the whole," is not, without qualification, an accurate statement of the law.

Once admit—and under the authorities cited one cannot help admitting—that, in spite of the supposed technical difficulty, a judgment may be valid as to one defendant while void as to another, or that it may stand good as to one defendant though struck out as to another, and it is hard to see how the decision in *Hall* v. *Williams*, 6 Pickering, can be sustained for the "first principles of justice" have nothing to do with the case of the summoned defendant, and the "full faith and credit" clause of the Constitution

settles it that if the judgment is good where rendered, it is just as good in any other state.

A question of pleading, of vital importance and not easy to decide, must now be briefly considered. When judgment has been rendered jointly against A. who was summoned and B. who was not, and suit is afterwards in another state brought against A. on the judgment, if the plaintiff were to declare as on a *separate* judgment, the defendant would argue that however defective was the judgment against B., it was still, *on the face of it*, a joint judgment, and that the plaintiff must be put out of court on the plea of *nul tiel record*. What if the bewildered plaintiff takes the other course, and declares as on a *joint judgment?* There is not wanting authority for the position that in this case too he must be put out of court on the same plea, for now A. takes the ground that the judgment which (as he proceeds to argue) was not only voidable but void as to B. *is not and never was a joint judgment:* *Smith* v. *Smith*, 17 Ill. 482. And as the plaintiff would be told, if he attempted to sue A. on the original cause of action, that that is merged by the judgment, which, at least as against A. *is valid where rendered*, he might as well have no right to sue at all, for it is plain he can never recover. The Illinois court say, in *Smith* v. *Smith*, *supra:* "[A.] is certainly estopped to deny that the judgment is valid and binding upon him, * * he may deny that it is a judgment against him and [B.] * * If the record would not answer a plea of *nul tiel record* interposed by [B.], it could not when interposed by [A.]." But can the defendant blow hot and cold in this way? If he is to prevail by such legal hocus-pocus, it has been a waste of time to discuss at all the question of validity or invalidity, it has been a useless exercise of ingenuity for the courts to discriminate between the position of the summoned and of the unsummoned defendant, it has been quite futile for them to insist (as the Illinois court emphatically did in the very case of *Smith* v. *Smith*) that the judgment is valid as against the summoned defendant. There ought to be some way out of the difficulty.[1] We suggest two possible solutions, without

[1] When suit on judgment is brought against an unsummoned defendant *for whom an attorney, though without authority, had appeared,* he must make his defence, not under the plea of *nul tiel record*, but by special plea, because *such* a judgment is good on the face of it: *Bowler* v. *Huston*, 30 Grat. 266; *Hill* v. *Mendenhall*, 21 Wall. 453, and if the plaintiff were to sue the co-defendant (summoned or author-

pretending to say which is the more reasonable, but through one or the other—perhaps through either, as he chooses—the plaintiff should be allowed to obtain his remedy. That is to say, either, First, by declaring as on a judgment rendered against A. and B. under *such or such circumstances*, setting forth fully the facts, and the inference of the law that because B. was not summoned it is in fact only a binding judgment against A., and such a declaration should be held good either on demurrer or against the plea of *nul tiel record;* or else, Secondly, by declaring as on a joint judgment, on the theory that the court must hold (contrary to *Smith* v. *Smith*) that when A. is sued, *he* may *not* deny that the record shows a joint judgment against him and B. We submit that the court should then reason it out thus: "Admitting that the judgment was most irregular, admitting that as against B., it is entitled to no respect in the state where it was rendered, or anywhere else, admitting that any court of any state would *in B.'s favor* declare it to be *void as against him*, nevertheless the judgment *has not yet been declared void*, and this is not the proper occasion so to declare it; for the purposes of this action *against A.*, it *is* a joint judgment and *A.* is estopped to deny it."[1]

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izing the appearance) declaring as on a joint judgment, still less could this defendant escape on the plea of *nul tiel record*, nor is it to be supposed that a special plea would be allowed to avail him. But the authorities quoted throw no light on the question how the plaintiff is to declare against A. when *not even an unauthorized appearance* had been entered for B.

[1] See *Bruce* v. *Cloutman*, 45 N. H. 37, an interesting case, which perhaps has some application here.

That judgments should not lightly be pronounced *void*, was forcibly insisted on by the Supreme Court of New Jersey in *Denn ex dem. Inskeep* v. *Lecony*, 1 Coxe 111, decided in 1791. The point actually determined is, that a *fi. fa.* tested out of term, is not absolutely void but may be amended; but in discussing the case the court takes a somewhat wider range. "It is certainly true that some cases are to be found, which go to the length of saying, a writ tested out of term is void, in the full extent of the term. * * * Many cases have been cited on the point of void proceedings, and the counsel for the defendant have considered the term 'void,' frequently used in the books, in its most unlimited sense, as implying an act of no effect at all, and being a nullity *ab initio*. But this is a mistake, when the term is used in reference to the solemn judgments and acts of the superior courts, it means no more than *voidable*. The judgment or proceeding may be avoided, but until this is done in the direct and regular course of revision, they stand, are available, and may be justified under as the solemn acts of the courts. This also is reasonable, or it would follow that the inferior courts might decide upon the proceedings of the superior, by declaring them void."