Green *v.* Watkins.

Death of parties.

In real or personal actions, at common law, the death of parties, before judgment, abates the suit; and it requires the aid of some statutory provision, like that of the 31st section of the judiciary act of 1789, to enable the suit to be prosecuted by, or against, the personal representative or heirs of the deceased, where the cause of action survives.

In writs of error upon judgments already rendered, in personal actions, if the plaintiff in error dies, before assignment of errors, the writ abates, at common law; but if, after assignment of errors, the defendant may join in error, and proceed to get the judgment affirmed, *if not erroneous, and may then revive it against the representatives of the plaintiff.

*261]

But a writ of error, in personal actions, does not abate by the death of the defendant in error, whether it happen before or after errors assigned; and the personal representatives may not only be admitted voluntarily to become parties, but a *scire facias* may issue to compel them.

By the rules of this court, if either party, in real or personal actions, die, pending the writ of error, his representatives in the personalty or realty, may voluntarily become parties, or may be compelled to become parties, in the manner prescribed by the rule.

March 1st, 1821. *B. Hardin*, for the defendant in error, moved to dismiss the writ of error, in this case, which was a real action, upon a suggestion of the death of the demandant and plaintiff in error, pending the proceedings in this court. He insisted, that, at common law, the death of either party, any time before final judgment, would have abated the suit (Tidd's Pr. 1024; Bac. Abr. tit. Abatement); that the judiciary act of 1789, § 31, made no provision for this case, since it merely extended to the case of the death of parties, in personal actions, before judgment; and that the statute 17 Car. II., c. 8, and the act of Kentucky, showed the sense of parliament and the local legislature, that real actions abated by the death of the parties, before judgment, upon writ of error on judgments already rendered.

March 8th. Story, Justice, delivered the opinion of the court.—The preliminary question which has been argued at the bar, is, whether the writ of error in this case, *which is a writ of right, has abated by the death of the demandant, who is the plaintiff in error, pending proceedings in this court. There is a material distinction between the death of parties, before judgment and after judgment, and while a writ of error is depending. In the former case, all personal actions, by the common law, abate; and it required the aid of some statute, like that of the 31st section of the judiciary act of 1789, ch. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived.[1] In real actions, the like principle prevails, for a still stronger reason, for, by the death of either party, the right descends to the heir, and a new cause of action springs up; and the plea is not, therefore, in the same condition as it was in the lifetime of the party.

*262]

But in cases of writs of error upon judgments already rendered, a different rule prevails. In personal actions, if the plaintiff in error dies, before assignment of error, it is said, that by the course of proceedings at common law, the writ abates; but if, after assignment of errors, it is otherwise. In this latter case, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous; and he may then revive it against the representatives of the plaintiff. But in no case, does a writ of error, in per-

[1] See Macher *v.* Thomas, 7 Wheat. 530.

sonal actions, abate by the death of the defendant in error, whether it happen before or after errors assigned. If it happen before, and the plaintiff will not assign errors, the representatives of the defendant may have a *scire facias quare executio non*, in order to compel *him; if it happen after, they must proceed as if the defendants were living, till judgment be affirmed, and then revive by *scire facias*. And the plaintiff, in order to compel the representatives of the defendant in error, to join in error, may sue out a *scire facias ad audiendum errores*, either generally, or naming them. Such is the doctrine of approved authorities. 2 Tidd's Pr. ch. 43, Error, p. 1096. It is clear, therefore, that at common law, in these cases, a writ or error does not necessarily abate: and that the personal representatives may not only be admitted voluntarily to become parties, but a *scire facias* may issue to require them to become parties. And such has been the practice hitherto adopted in this court, in all personal actions, whether there has been an assignment of errors or not; for a specific assignment of errors has never been insisted on here, as a preliminary to the argument, or decision of the cause. [*263

In respect to real actions, this is the first time the question has presented itself upon a writ of error, where the death of either party has occurred *pendente lite*. There is no doubt, that the heir, or privy in estate, who is injured by an erroneous judgment, may prosecute a writ of error to reverse it. And there seems no good reason why, in case of the death of his ancestor, pending proceedings, he may not be admitted to become a party, or be cited to become a party, to pursue or defend the writ, in the same manner as in personal actions. The death of neither party produces any change in the condition *of the cause, or in the rights of the parties. It would seem reasonable, therefore, that the suit should proceed, and not be dismissed or abated. In the absence of all authority which binds the court to a different course, we are disposed to adopt this doctrine, and shall promulgate a general rule on the subject. [*264

Rule accordingly.(*a*)

(*a*) See new order of court of the present term; *ante*, Rule 32.