No. 12497

Supreme Court of Illinois

Guyer.

---

vs.

Wookey.

Be it remembered that on the nineteenth day of March, A.D. 1857, there was filed in the office of the Circuit Court clerk, in and for the County of Peoria and State of Illinois, a declaration in Ejectment, in words and figures following, to-wit:-

In the Circuit Court of
the County of Peoria,
March Term, 1857.

Jacob Guyer
vs.
Stephen Wookey
} Ejectment.

Plaintiff in this suit complains of Stephen Wookey defendant in this suit for that whereas on the first day of October A.D. 1857 at the county aforesaid, he said plaintiff was possessed of the following described real estate:- The north east quarter of section thirty-two in township nine (9) north of the base line of range eight (8) east of the fourth principal meridian in the county of Peoria and state of Illinois. The title to which he claims in fee; and the said plaintiff being so possessed thereof, the said defendant on the 2d day of October A.D. 1857 entered into said premises and unlawfully withholds from the plaintiff the possession thereof, to the damage of the said plaintiff one hundred dollars, and therefore he brings suit, &c. N. H. Purple, Plffs. atty.

[12499-m]

To Stephen Wackey:- You are notified that on the first day of the next term of the circuit court to be holden in and for the county of Peoria or as soon thereafter as counsel can be heard, the foregoing declaration in ejectment will be filed, and thereupon a rule will be entered requiring you to appear and plead thereto within twenty days after the entry of such rule; and that if you neglect so to appear and plead, judgment by default will be entered against you, and the plaintiff will recover possession of the premises described in said declaration

Purple & Pratt
Pltfs. Attys.

State of Illinois }
Peoria County } ss.

Lorin G. Pratt being duly sworn, says that he served the foregoing declaration and notice on the defendant within named by giving him a true copy of the same, this 25th day of February A.D. 1857.

Subscribed and sworn to before me this day of A.D. } Lorin G. Pratt.

Proceedings at a term of the circuit court began and held at the court house, at the city of Peoria in and for the county of Peoria and state

of Illinois, on the first Monday of March in the year of our Lord one thousand eight hundred and fifty-seven, it being the second day of the month. Present, at the time of this proceeding, the Honorable David Davis, judge of the eighth judicial circuit, by interchange with the judge of the sixteenth judicial circuit in the state of Illinois, presiding, to-wit:-

Thursday, March 19, 1857.

Jacob Guyer

vs. Ejectment

Stephen Wookey

This day came the plaintiff by N. A. Purple his attorney, and filed his declaration herein, and suggested to the court that the defendant herein has become deceased since the service upon him of said declaration. The plaintiff then entered a motion that George Wookey, heir at law of said Stephen Wookey, be made defendant in this suit, and that scire facias be issued against said George Wookey and that the suit proceed against him, which motion upon consideration of the court, was overruled; whereupon E. G. Johnson, Esq., as former attorney for Stephen Wookey, moved the court that said suit abate. The court being satisfied in the premises do order that said suit abate. To which ruling of the court the plaintiff, then and there excepted.

[12497-2]

And afterwards to-wit: On the said nineteenth day of March, A.D. 1857, there was filed in the office of the circuit court clerk, aforesaid, a bill of exceptions, in words and figures following, to-wit:-

Jacob Guyer
vs.
Stephen Wookey } In the Circuit Court of Peoria County.

Be it remembered that on this day the plaintiff filed in this court his declaration in ejectment against the defendant which is as follows:- "In the circuit Court of the county of Peoria March Term, 1857 - Jacob Guyer vs. Stephen Wookey - Ejectment. Plaintiff in this suit complains of Stephen Wookey, defendant in this suit for that whereas on the first day of October A.D. 1857 at the county aforesaid, he said plaintiff was possessed of the following described real estate:- The North East quarter of section thirty-two in township nine (9) north of the base line of range eight (8) east of the fourth principal meridian in the county of Peoria and state of Illinois, the title to which he claims in fee; and the said plaintiff being so possessed thereof, the said defendant on the 2d day of October A.D. 1857 entered into said premises and unlawfully withholds from the plaintiff the possession thereof,

to the damage of the said plaintiff one hundred dollars, and therefore he brings suit &c.

A. H. Purple, Atty. for Plff."

To Stephen Woolley

You are notified that on the first day of the next term of the circuit court to be holden in and for the county of Peoria or as soon thereafter as counsel can be heard, the foregoing declaration in ejectment will be filed, and thereupon a rule will be entered requiring you to appear and plead thereto within twenty days after the entry of such rule; and that if you neglect so to appear and plead, judgment by default will be entered against you, and the plaintiff will recover possession of the premises described in said declaration Purple & Pratt, Plff attys

State of Illinois, Peoria County, ss.—

Losin G. Pratt, being duly sworn says he served the foregoing declaration and notice on the defendant within named by giving him a true copy of the same, this 25th day of February A.D. 1857.

Subscribed and sworn to before me this day of A.D. } Losin G. Pratt.

And thereupon the plaintiff suggested the death of Stephen Woolley since the service of the declaration in this cause and entered a

motion that George Wookey, heir at law of said Stephen Wookey be made defendant in this suit and that Scire facias be issued against said George Wookey and that the suit proceed against him; and thereupon E. G. Johnson Esq., formerly attorney for said Stephen Wookey as Amicus Curiae, suggested that said suit abate- which suggestion or motion said court then and there sustained and ordered that said suit abate, to which order the plaintiffs counsel then and there excepted & requested the court to seal this bill, which is done,

David Davis,

State of Illinois }
Peoria County } ss I, Enoch P. Sloan, clerk of the circuit court in and for said county and state, do certify that the forgoing is a full and complete transcript of the proceedings in said court and of the papers in the cause, wherein Jacob Guyer is plaintiff and Stephen Wookey is defendant, as the same appears of record and on file in my office. In testimony whereof, I hereto set my hand and affix the seal of said court, at Peoria, this 23d day of March, A.D. 1857.

Enoch P. Sloan, clerk

Clerks fees $1.50

Jacob Guyer } Pltff in Error
vs
Stephen Mockey } Defendant in Error

Error to Peoria.

And now comes the Pltff in Error and says, that in the Record and proceedings and in the Rendition of the Judgment aforesaid there is Error in this to wit

1st Said Court Erred in Refusing to issue a Scire facias against the heirs of Stephen Mockey to make him a party Defendant to the Suit

2nd Said Court Erred in giving Judgment that Said Suit abate

For these and other Errors in Said Record & proceedings Pltff prays that the Said Judgment of the Said circuit Court may be reversed Set aside & wholly for Nothing Esteemed

J. M. Lupton
Pltff Atty

L2499-44

Jacob Guyer
as
Stephen Mookey

In the Supreme Court
April Term A.D. 1857.

I do hereby Enter the appearance of George Mookey, heir at law of Stephen Mookey in this cause which appearance is to have the same Effect as though the said George had been served with a Scire facias issued in this cause from this Court, and Consent that the said suit may be disposed of or tried at the present term of this Court & I waive all irregularities in the Service and return of Service of the declaration & Notice in this suit

March 23. 1857.

E. G. Johnson atty

Jacob Guyer
vs
Stephen Mookey

Record

Filed April 8. 1857
L. Leland
Clerk

Sawyer
vs
Woolley

Sup Court of Illinois
April T. 1857

The simple question I propose to argue in this Cause is whether by the death a sole defendant — in an action of Ejectment — the suit abates —

I take the position that the heirs or devisees of the deceased defendant may be made defendants in the cause upon the suggestion of the death of their ancestor.

This identical question was argued fully before Judges Mc Lean & Drummond in the U. S. Circuit Court at Chicago in July last when Each of said Judges delivering separate opinions decided that actions of Ejectment in this State did not abate by reason of the death of a sole defendant

[AD 497-5]

The Case before that Court was where a Suit had been Commenced against a tenant in possession of the lot sued for. and the landlord had been admitted in substitution to defend and the Case was Continued against the landlord as sole defendant — The landlord died pending the Suit — a motion was made to make his heirs parties defendants in the same suit, which motion was allowed —

There is no doubt that at Common Law the Action of ejectment being to recover a fictitious action abates upon the death of the defendant — And we have to determine the Case upon the Construction of our Statutes —

In 1826 the General Assembly passed the Abatement act the 4th section of which

provided that when a sole defendant in any action should die pending the suit ~~provided~~ the suit should not abate provided the suit might have been brought against his executors or administrators —
See Gales Statutes — sec 4. of statement act —
This act the court said procure only provides that such actions shall survive as might be continued against the executors or administrators, and which did not include actions of this kind —
On the 1st June 1839. the legislature passed the Ejectment law, which is incorporated in the Statutes of 1848 — by which act the action of Ejectment was made an action & try titles, and was divested of its tort character
See sec 4. of this law which provides that action of Ejectment

may be brought against a party claiming title to the land in dispute. where the same is not in the actual occupancy of any person. & the 12th section provides the manner of commencing such in such cases. by service upon the party claiming the title — Sec 26. of same act provides for cases in which one of several defendants die pending the suit. but makes no provision when a sole plaintiff or sole defendant should die pending the action —

In 1845. the Abatement act was so amended that where in any action a sole defendant should die pending the action, the suit should not thereby abate if it might originally have been prosecuted against his heirs. devisees &c —

See Sec 8. of Abatement act Revised Statutes —

What was the intention of the legislature in so amending the act relating to the abatement of suits unless it were to provide for actions of this kind — What actions are ~~then excepted~~ are intended to be embraced in this amendment unless actions of ejectment — In what other actions would an action lie against the heirs or devisees of the ancestor whatever title a man has to real estate descends upon his death to his heirs or devisees — any interest in personal property descends to his Executors or administrators. A. claims title to a tract of land & dies — Cannot B. the real owner of the land commence against the heirs of A. to try the title of the land whether they are in possession of the same or not —

And if the heirs or devisees do not wish to set up the

[illegible]

claim of this character. They can under the act of 1853 enter a disclaimer, and no costs can be adjudged against them — Then why shall it be said that if a party defendant die pending suit, the suit may not survive against his heirs or devisees. Then they have the same privilege of disclaiming as if suit was originally brought against them —

The Court ought to construe the Statutes if possible according to the meaning & intention of the framers thereof — They will observe that the amendment of the statement act was not made until after the change in the existing law and when justice seemed to demand it — The amendment by inserting the words being

provisions must have been
made for some purpose —
& I can conceive of no
purpose except for actions
of this kind —
This Construction can work
no hardship on the parties
sought to be made parties
defendants — If they do not
desire to defend the suit
they can abandon it
without Costs.
But on the other hand
it may work great injustice
to the other party — We
have all had experience
of the length of time suits
in Court. And we also know
that people are likely to
die — And in case of the death of a defendant
abatement of a suit, it
not only unnecessarily subjects
the plaintiff to Costs, but
in many instances, the Statute
of limitations of seven years
may be successfully
interposed against a good

52497-87

suit ~~when in fact~~
and the party thereby entitled
loses his land without
any laches or fault on
his part —

There are no decisions that
I can find upon statutes
similar to ours, although
in Alabama ~~there~~ the
question has been decided
that the suit does not
abate upon the death of
sole defendant —
Schuteh fields bis Hudson
23 Ala 393 —
In the case of Jordan vs
Abercrombie 13 Ala 540
The court recite the act
of that State as follows
"By the act of 1802 it is
declared that no suit
shall abate by the death
of either plaintiff or defendant
when the cause of action
survives" —

In Thomas vs Jones 10 Texas 52

the same question is decided upon the Texas Statutes, as I suppose —

So that I apprehend the whole question is to be decided upon the Construction of our Statutes —

O & L. Merriam

(Over)

Ginger
v
Brockey

Having a question pending in the Circuit Court of the United States - where a large amount of property is involved - which if the action abates by the death of the sole defendant - will be lost - The Court on one trial having decided the title in favor of the plaintiff - the defendant files the case up in equity - in which he has also been beaten - before the suit could be again tried the defendant died - If the suit abates - a new action will have to be brought - and they can I fear successfully defend under the seven years law - State the liberty of offering a few suggestions -

This question mainly if not entirely depends upon the construction of our statutes. The law of limitations was passed June 1st 1839. The present statute of Abatement was made in March 1845. (on)

[12494-10]

The statute in force when the statute regulating the action of ejectment was passed was unlike our present statute — and contains no such provision as is found in the eighth section so far as the action survives against heirs devisees &c — The law we understand to be that when a subsequent statute —

~~Now we do not understand it to be necessary in this case~~, ~~but there would be no difficulty in deeming it necessary. But we understand the law to be that where a subsequent statute~~ is passed affecting a right a question arising under another statute it is to be ~~treated~~ treated as an amendment if found applicable to the existing statute

Hence the inquiry is, is the subsequent statute applicable to ~~actions of ejectment~~ the case at bar; "when there is but one defendant" that is this case; "in an action" this is certainly an action. ~~such action shall not~~ and there is no exception excepting ejectment from its operation but all such actions "such action shall not thereby abate", if it might be originally prosecuted against the heirs &c of such defendant. Hence the inquiry is, if whether this suit had been prosecuted against the heirs. The question seems to clear for serious ~~question~~ controversy. By the death of the ancestor, whatever interest he has in lands is cast upon his heirs. Whatever claim he had to the same belongs to them. Howe vs Wood 16 Ill R 177, Smith vs McConnell 17 Ill R 141.

and act of ejectment is brought it must be against the heirs. So that if when the action was ~~brought~~ originally prosecuted, the ancestor was dead - the action would have to be commenced against the heirs - in the very sense of the Statute - But says Judge Rice this is in the nature of an action of Trespass and the ~~action~~ heirs ought not to be charged with their ancestors trespasses - This is not true, our action of ejectment is simply an action to try titles - not an action to recover damages (though by an ~~offshoot~~ for action growing out of ~~collateral~~ ~~or~~ those ejectment suits which in will relate to the use of the premises may be recovered) ~~But~~ This will be seen by reference to the fourth section of the action of ejectment - which provides - that the action may be brought against the occupant - if not occupied - against some person exercising acts of ownership - or claiming title thereto.

By the words claiming title clearly makes this an action to try titles. If we can suppose any case where no person is in possession and yet an action can be brought against him - we shall demonstrate clearly a case of buying title. Suppose A owns the patent title & a vacant unoccupied lot. B acquires a tax title to the tax deed - and regularly pays all taxes for five successive years. Now I imagine that an action of ejectment could lie by A against B - to test the validity of B tax title. The twelfth section provides for the service of the declaration in such a case - and by the nineteenth the plaintiff is enabled simply to recover upon the strength of his paper title. The supposed case is nothing but the trial of the title - Now go one step further & suppose that B dies after paying the taxes seven years prior to the supposed case. before the action is commenced. Could it not be commenced against his heirs. Is not his claim a true land claim? Cases cited above. But it is said the heirs

may not ~~claim~~ chose to be
burthened with the claim to the
title. Then they can disclaim
it - and a disclaimer would
entitle them to their costs & ~~the~~
A. to his title. We then find a
case where before suit brought and
in the event of being brought upon the death of the ancestor might
originally have been brought against
the heirs. Now suppose the action
brought before the ancestor's
death - and while pending he
should die. # But if they are made
parties - they can disclaim and
end the suit so far as they concerned with but little trouble to themselves. But says prop.
Purple if made parties they
can be charged with the rents
& profits! this is not so! for in
the supposed case no rents &
profits can be recovered. ~~&~~
Neither they or their ancestor
having been in possession. The
statute only giving the party
succeeding in action of ejectment,
the actual value of the use of
the premises - from the time
it was actually occupied.
But admit the ancestor to have
been in possession - and to have

Shall the title be construed differently? Shall the heirs be permitted to recover the benefits and be in no disability? Shall the rule be construed differently?

recd the rents issues & profits and
during the pendancy of the
action. The action of ejectment
does not ~~claim~~ relate any thing
connected with the mesne profits
except the plaintiffs title. Such proceeding
is a new suit. Summons issues in
a claim filed. (3752c). ~~as which~~
~~summons issues~~ pleadings filed.
and defendant
may plead any defence in bar
Ark 38039. except plaintiffs title.
and the former proceeding does
not relate either the value of the
use of the premises or the time
during which the defendant
~~occupied~~ enjoyed the mesne profits
Section 41. So that the heirs
will be only charged with the
mesne profits during the time
they actually enjoyed the same.

In conclusion I say.
I. One action of ejectment is
so far as the proceedings in ejectment are concerned a proceeding
to try titles.
II. That under this statute of
abatement it does not abate
but may be revived against
the heirs.

(one)

IIII. Admitting the statute of abatement to be the same as in force when the act regulating the action of ejectment was passed the two laws must be construed together. I cannot with pardon me for these suggestions

I. F. White

95

Guyer
v
Woolley

Argument of
Merriman & Waite

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF Peoria GREETING:

BECAUSE, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Peoria County, before the Judge thereof, between Jacob Guyer

plaintiff, and Stephen Wookey

defendant it is said manifest error hath intervened, to the injury of the aforesaid plaintiff as we are informed by his complaint, and we being willing that error should be corrected if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the Third Tuesday in April A.D. 1857 ~~next~~, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 9th day of April in the Year of Our Lord One Thousand Eight Hundred and Fifty-Seven.

S. Leland
Clerk of the Supreme Court.
By J. B. Rice Deputy

12497-17

Jacob Guyer

vs

Stephen Woolley

Writ of Error

Filed April 9. 1857

L. Leland

Clerk

Sayer
vs
Wookey

Sec. 26. of the Ejectment
Law. pl. 507. Purple's Statutes
provides, that when there are Several
defendants, and one dies, the suit
shall not abate, But shall procead
against the Surviving defendant or
Defendants—

It therefore does abate
as to the deceased party— and his
heirs can not be made parties or
be Substituted in his place.

None Suppose in such case
(when there is more than one defendant)
all die. what is the Result?

There are no Survivors to procead
against— and can it be contended that
because all die, the heirs can be Substi-
tuted, when it is clear that if one
only dies, as to him and his heirs
the suit abates.

If the General abatement Law
Sec. 8 pl. 74. Purple Statutes is
at all applicable, it would involve
this absurdity— That if two are Sued
in Ejectment and both die— their heirs
can not be made parties— But if one only
is Sued — dies, the Law is otherwise

(Purple)

[12497-18]

55.

Guyer
vs
Wookey

Suggestions
Purple

Filed April 30 1857
D. Leland
Clerk

15

Jacob Guyer

vs

Stephen Wooley

12497

95

1857