FISHER v. RUTHERFORD ET AL.

Case No. 4,823.
{Baldw. 188.}[1]

Circuit Court, D. New Jersey. Oct. Term, 1830.

EQUITY—ABATEMENT—DEATH OF PARTY—AMENDMENT—AVERMENT OF CITIZENSHIP—LIMITATIONS—STALENESS OF DEMAND—REFUSAL TO AMEND—APPEAL.

1. A suit in equity does not abate by the death of a co-plaintiff or co-defendant. If one plaintiff and one defendant survive, the suit is open for amendment. The averment of citizenship of a party may be added at any stage of the cause, if the amendment is moved for in a reasonable time after the defect is suggested.

2. If the statute of limitations is pleaded, and plea overruled, it cannot be again put in by the same parties or their privies.

3. The staleness of a demand, or the want of proper parties, is no objection to amend the bill. Where the refusal to amend will put the plaintiff out of court, and the defendant can avail himself of the matter on which he objects to the amendment, on appeal, the court will allow it.

{Cited in Woolridge v. M'Kenna, 8 Fed. 679.}

The complainants in this suit were originally Samuel R. and Myers Fisher, citizens of Pennsylvania, who in 1795 filed their bill against the respondents, citizens of New Jersey. Their claim was founded on a deed from Jane Waldie, as the heiress at law of Joseph Urmston, conveying to them certain proprietary shares of lands in New Jersey, which had been mortgaged by Urmston in 1720 to certain persons, under whom the defendants claimed. The bill set forth the title of Urmston, the mortgage, and the various proceedings which took place, until the defendants, or some of them, took possession of the mortgaged premises, took a seat at the board of proprietors in right of Urmston, located and sold large bodies of land, and received large sums of money, more than sufficient to pay the mortgage debt The object and prayer of the bill was to establish the right of the plaintiffs to one propriety or twenty-fourth part of New Jersey, in right of Urmston, for a discovery and account of all locations made in virtue of his proprietary right, of sales made, moneys received for payment of the balance, a reconveyance, a right to a seat at the board of proprietors, for an injunction against further locations, and general relief. The bill was served on the defendants, who lived in New Jersey, they appeared and pleaded the act of limitations, this plea was overruled in 1799, and the defendants ordered to answer over; from this decision a writ of error was taken to the supreme court, which was quashed. Vide {Rutherford v. Fisher} 4 Dall. {4 U. S.} 22. In 1802 and 1803 answers were filed by several of the defendants. In 1803 a rule was entered ordering the plaintiffs to give security for costs and staying proceedings; no replication had been filed. Myers Fisher died in 1819, and in 1825 his executors conveyed to Samuel R. Fisher all the interest of the former to the premises in controversy. Samuel R. Fisher filed a bill of revivor and supplemental bill

in 1826, up to which time no proceedings had been had by either party. The defendants, except John Rutherford and John Stephens, had died, and the representatives of some of them lived out of the state. A demurrer was filed to the bill of revivor, for the following causes: (1) That no cause was shown for discovery. (2) That relief was sought as to one of five proprietary rights; which one is not specified. (3) That the bill does not specify what part of the premises is in the possession of each defendant (4) That there are necessary parties who are not made defendants, and that the heirs of Myers Fisher are not made plaintiffs. (5) That the defendants are not averred to be citizens of New Jersey. (6) That security for costs has not been given. (7) That the proceedings are prolix, indistinct and expensive. In 1827 the demurrer was allowed, whereupon the plaintiffs moved to amend their bills. After argument at April term the court held the motion under advisement, in which state the case has remained till the present time, except that security for costs has been given by the plaintiff.

!Mr. Wall, for plaintiff.

The suit has never abated, Samuel R. Fisher, one of the original plaintiffs, and John Rutherford and John Stephens, two of the original defendants, are alive; so that there is an existing suit as to those parties. All the rights of Myers Fisher accrued, on his death, to Samuel R. Fisher, as surviving partner, as well as by the operation of the deed of Jane Waldie to them as joint tenants, and the deed from the executors of Myers Fisher, who had power under his will to make the conveyance. No replication having been filed to the original bill, the cause is not at issue, and is open to amendments. An original bill may be amended by adding new matter which existed at the time of filing it, or bringing in new parties; the amendments, if allowed, are a part of the original bill, and the whole is one record. Hind. Pr. 21. After a bill is revived, amendments may be made as if the original party

had been alive, if the matter had existed in his lifetime. Mitf. Eq. PI. 62. Here the important amendment is, the averment of the citizenship of the defendants to have been in New Jersey at the time of filing the bill. That they were so is admitted, but it is contended that for the want of this averment the court have no jurisdiction of the cause, the amendment is therefore indispensable to enable the court to proceed in the cause; but though the averment is not in the record, the cause is not coram non judice, a judgment rendered on it would not be a nullity. {Kempe's Lessee v. Kennedy} 5 Cranch {9 U. S.} 173. The court has jurisdiction of the case, and whenever the objection is made, it is the common practice to direct the averment to be inserted. {Connolly v. Taylor} 2 Pet. {27 U. S.} 565. So as to an averment of the value of the matter in controversy, though necessary to enable the court to render a judgment, it is but matter of form and may be added after judgment has been arrested. Lanning v. Dolph {Case No. 8,073}. This is the only amendment to the original bill which is asked for. The amendments proposed to the supplemental bill are only as to introducing other parties, and such as are necessary to conform it to the bill as amended. The court will not look to the effect of the amendments any further than to be satisfied that they are allowable according to the rules of the court, and will lead to no injustice to the defendants. Whether there are such parties before the court as are necessary for a final decree, is not a material question in the present stage of the cause, it is always open to this objection, which will not be affected by allowing the amendment.

Mr. Vanarsdale and Mr. Wood, for defendants.

This is a stale demand, brought thirty-one years after the right of Jane Waldie, under whom plaintiffs' claim had accrued, and they are entitled to no indulgence. The suit was abated, and until it is revived, the bill cannot be amended (1 Harr. Ch. 126); the order of revival must precede the application to amend (Mitf. Eq. PI. 62); the bill of revivor must show good cause for reviving, and that a decree can be rendered against the new parties (Coop. Eq. PI. 70). But as the court have no jurisdiction for the want of an averment of citizenship, they can make no order in it, but may order it to be stricken from the docket, as was done in {Hylton v. U. S.} 3 Dall. {3 U. S.} 183; S. P., Dodge v. Perkins {Case No. 3,954}; {Capron v. Van Noorden} 2 Cranch {6 U. S.} 127; Wright v. Wells {Case No. 18,101}. The plaintiff has no reason to complain, after the suit abated he had his election to revive or bring a new suit; if he is allowed to amend now, he will bring in parties to answer whose ancestors would not be bound to answer if alive. He will revive the suit after it has been abated as to some of the parties twenty-two years, when his only excuse for the delay is, not having complied with the rule for security for costs. This is a hardship on those now sought to be made parties, as they could not move to hasten the cause, while the suit remained abated. They had a right to presume the suit abandoned, when no replication was filed for more than twenty years after the answer put in. There has been such gross laches, that the court will not sustain a bill of revivor, or a supplemental

bill, otherwise all the evils against which the statute of limitation was intended to guard will be let in, and we may show that the statute is a bar to the bill of revivor, though it would not be to the original bill (Hollingshead's Case, 1 P. Wms. 744; Mitf. Eq. PI. 235); and this after a decree to account. A bill of revivor must be brought within six years after the suit abates, if an account is prayed for, as courts of equity will not sustain a bill in any case where there has been laches in prosecuting the claim; if not accounted for, the lapse of time is good ground for dismissing the bill. 3 Johns. Ch. 586. A mortgage cannot be redeemed after twenty years possession by the mortgagee (2 Sch. & L. 636); the party seeking relief must do it promptly (1 Ves. & B. 246); stale demands will not be enforced (Jeremy, 548; 18 Ves. 196, 286, 180; 2 Vern. 276; Willard v. Dorr [Case No. 17, 680]; 2 Ves. Sr. 400; 2 Eden, 109); nor an amendment be allowed after great delay (4 Price, 325; 3 Anstr. 807; S. P. [Elmendorf v. Taylor], 10 Wheat [23 U. S.] 168). This is not only a stale, but a hard, ungracious claim, on which a court of equity will act on the same principle as courts of law, in refusing amendments in penal or hard actions, where there has been delay (6 Durn. & E. [6 Term K.] 171; 8 Durn. & E. [S Term R.] 30); or in qui tarn actions (2 Durn. & E. [2 Term R.] 707; 4 Durn. & E. [4 Term R.] 228). There can be no decree in this case for the want of proper parties; the personal representatives of the mortgagee, and the assignees of the mortgage must be parties. 2 Freem. 59, pi. 66, 180, 245; 2 Atk. 235; Randall v. Phillips [Case No. 11,555]; [Caldwell v. Taggart], 4 Pet [29 U. S.] 202. The heir also must be a party; Coop. Eq. PI. 146,246. If one tenant in common dies, his heirs must be made parties. 11 Ves. 312. The want of proper parties is an objection to the jurisdiction of the court, which must be met whenever the question occurs. [Ketland v. The Cassius] 2 Dall. [2 U. S.] 368. Jurisdiction depends on the residence of the parties when the suit is brought [Mollan v. Torrance] 9 Wheat [22 U. S.] 539; [Connolly v. Taylor] 2 Pet [27 U. S.] 556, 565. In this case there were parties in interest residing in New York, who are necessary parties ([Strawbridge v. Curtiss] 3 Cranch [7 U. S.] 267; [Sullivan v. Fulton Steamboat Co.] 6 Wheat [19 U. S.] 450; 5 Johns. Ch. 303), but cannot be brought within the jurisdiction

of the court; the consequence of which is, that the bill cannot be sustained, though it is amended according to the plaintiff's motion. This is a fatal objection to the bill, existing when it was filed, which cannot be cured. 1 Ves. Sr. 446. This court cannot proceed against a citizen of New York in any way, as he cannot be brought in by publication or notice. Vide [Mandeville v. Riggs] 2 Pet [27 U. S.] 482. If the case cannot be completely decided between the litigant parties, on account of a person whom the process of the court cannot reach, being a party in interest the court cannot make a decree. [Elmendorf v. Taylor] 10 Wheat [23 U. S.] 167, 168. So if there is a joint interest in such party, and a party to the suit, the court have no jurisdiction. [Cameron v. M'Roberts] 3 Wheat. [16 U. S.] 593, 594; S. P. [Russell v. Clark], 7 Cranch (11 U. S.) 69, 98. The record shows this to be the situation of the defendants to the original bill; the court therefore cannot act upon the case.

BY THE COURT. It has been made a ground of objection to the motion to amend the original bill, that the suit has abated, and must be revived before the bill can be amended, but this objection is not sustained In point of fact. One of the original plaintiffs is alive, in whom the rights of both unite, as well by survivorship as by a conveyance from the executors of the deceased party. Two of the original defendants are also alive. There is therefore a cause in court between original parties, pending and open on the pleadings without an issue, so that the object of the bill of revivor is not to make a new suit, but to add other parties to one which has never abated. The demurrer to the bill of revivor and supplemental bill, pointed to a fatal objection to the jurisdiction of the court over the cause, inasmuch as there was no averment of the citizenship of the defendants in the original bill. As this is an objection always open, and conclusive against any action of the court after it is made, the cause will becoram non judice, unless it can be made to appear on the record that the defendants are citizens of New Jersey. The consequence therefore of sustaining this objection must be, that if there can be no amendment without revival, there can be no revival without amendment, as there will be no proceeding over which the court can exercise jurisdiction. The judgment on the demurrer is not final; had it been in favour of the plaintiff, the defendant would have been ordered to answer over, or plead to the bills, and after a judgment against him, the plaintiff may amend at any time. Where judgment was arrested for the want of jurisdiction in not averring the value of the property in controversy, the plaintiff was permitted to amend by adding the averment Lanning v. Dolph [Case No. 8,073]. It is the common practice to amend by inserting the averment of citizenship of parties, wherever the want of it is suggested. Connolly v. Taylor, 2 Pet. [27 U. S.] 565. The averment of value and citizenship are both indispensable to the jurisdiction of the court, yet are mere matters of form, as regards the merits of the case, and will be added, if true, in point of fact. Though the averment is not in the record, and the judgment would be reversed on error, yet it would not be a nullity to be

avoided collaterally. Kemp v. Kennedy, 5 Cranch {9 U. S.} 173. It is too late to object to the jurisdiction after an affirmance in the supreme court and a mandate for execution. Skillern v. May, 6 Cranch {10 U. S.} 267. So if all parties are aliens, the court may sustain jurisdiction, if no objection is made. Mason v. The Blaireau, 2 Cranch {6 U. S.} 264. In this case, there is jurisdiction in fact, as the defendants are citizens of New Jersey, the amendment is no surprise to them, and is in fact mere form, so considered by all parties who, with knowledge of the defect, and the decisions of the supreme court, have suffered the cause to remain in its original form from 1795 till 1826, without suggesting any want of jurisdiction.

It has been objected that the act of limitations has barred the plaintiff of all remedy, so as to prevent the court from affording him any aid in the prosecution of this suit, but so far as respects the matter in the original bill, the judgment of the court on the plea of the statute heretofore filed by the defendants, is conclusive on the parties who pleaded it and their privies. They cannot again set up the same matter as a bar, though it may be done by new parties (not privies to the parties who made the plea) to the original, the supplemental, or bill of revival; as to them the case will be open to all objections arising from any statutory limitation, any rule of equity adopted by analogy, or the staleness of the demand. But in the present stage of the case, we cannot yield to either objection, when made on a collateral question of amendment; they apply to the merits of the cause on a final hearing, or on plea or demurrer, not to a motion to so amend the record as to give the court jurisdiction to hear and determine the merits in some way.

By allowing the amendments, nothing is decided against the defendants; the original bill is not revived or new parties added, all questions as to the right of the plaintiff to revive, or whether there are proper parties to the suit, remain open; parties maybe added after the reversal of a final decree, and the cause remanded to the circuit court Russell v. Clark, 7 Cranch {11 U. S.} 99; Caldwell v. Taggart, 4 Pet {29 U. S.} 190. It is therefore premature, to now decide upon any matter affecting the right to revive, or as to proper parties, till the court shall have the power to decide these questions on a proper record. A refusal to amend, is fatal to the plaintiff's case without the right of appeal;

the supreme court cannot review a motion to amend which rests in the discretion of this court, whereas an appeal would lie on our final decree against him, upon any of the grounds of objection now made to the proposed amendments. It would be hard to place him in this predicament, that he would be debarred of any appeal by our decision on any of the collateral questions which have been made in the argument, while all would be open to the defendant after a final decree. The staleness of the demand has been much insisted on, as a reason for refusing the amendments, but we cannot permit it to prevail. If the lapse of time brings the case, in our opinion, within the act of limitation, we cannot reverse the former judgment of this court; if it does not, then the staleness of the demand cannot be so palpable at the first blush, as to authorize us to throw the plaintiff out of court for this cause on a motion to amend. The judgment on the plea of the statute, is yet open to revision by the supreme court after our decree on the merits, and if we differed from our predecessors on that point, it would be but a decent respect to their memories to leave the question open.

There is, however, one question arising from the lapse of time, on which it is proper to give an opinion, that is, whether the motion to amend was not too late in 1827. This objection would have been a good one, if the plaintiff had delayed making the motion, to amend an unreasonable time after the want of jurisdiction had been pleaded or suggested. It escaped the attention of all parties for more than thirty years after the commencement of the suit, when the defendants assigned it as one of the causes of demurrer; the present motion was made immediately after the judgment of the court, and was in due time. We are therefore of opinion, that the plaintiff's have a right to make the proposed amendments, according to the established principles of courts both of common law and equity, and that we are bound to allow them by the provisions of the thirty-second section of the judiciary act "in order to enable us to proceed and give judgment according to the right of the case."

Amendment allowed.

[1] {Reported by Henry Baldwin, Esq.}