

appear that any intimation was given to Mr. Davis after that time of dissatisfaction with the terms of the lease, nor was he advised of any intention to assail it during his life-time.

March 18, 1869, Mr. Davis made his will, by which he devised the remainder interest in this real estate to the defendant. Ten years thus elapsing after the lease was recorded by Mrs. Laughlin before Mr. Davis made his will, he was justified in the belief that he had the right and power to devise this remainder interest to whom he pleased, and for this reason, if there were no other, I am of opinion that complainant is estopped from assailing this lease now, and is not entitled to have the same declared void and a cloud upon her title. She was fully cognizant of all the facts in relation to her title, and in relation to the execution of the instrument during the life-time of her father. To wait until after his death, and until after the death of most of the persons who could have had any knowledge of the transaction, and after her father, by will, had disposed of his estate, presumably, in some respects, in a manner otherwise than he would have done had he not believed himself possessed of this property, and then attack his will, would be inequitable and unjust.

Many authorities have been read and commented upon by the learned counsel on both sides, who have presented the questions involved with an ability rarely equaled, in this court, at least; but, with the view I have taken of the facts of the case, the rules of law controlling it are elementary, and a citation of authorities would but extend this opinion, already too long, without throwing further light upon the issues involved.

The result is that the relief prayed for in the bill must be denied, and the cause dismissed at complainant's costs.

THOMAS v. POLICE JURY OF PARISH OF TENNESAS.*

(*Circuit Court, E. D. Louisiana.* December, 1882.)

1. REVIVOR—REV. ST. 955.

The effect of the statute of 1789, (vol. 1, p. 90, § 31; Rev. St. 955,) is that the suit descends to the representative of the deceased party, be he heir, executor, or administrator, as the case may be. An acquired jurisdiction on the part of the United States circuit court will not be ousted by a state statute which, but for that previously existing jurisdiction, would have vested it elsewhere.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

2. ADMINISTRATOR—NATURAL TUTRIX.

The natural tutrix of the minor children is, under the law of Louisiana, clothed with the authority to administer the succession of the estate of the deceased parent.

Thomas J. Semmes and Edward H. Farrar, for plaintiff.

E. T. Merrick, W. H. Foster, and E. T. Merrick, Jr., for defendant.

BILLINGS, D. J. After the commencement of this suit the plaintiff died. He was at the time of the institution of the suit, as well as at the time of his death, a citizen of the state of Mississippi. Upon the suggestion of his death an order was entered that the suit be revived, and that Mrs. Virginia Thomas, widow of former plaintiff, have leave to prosecute the same as administratrix of his estate and as natural tutrix of her minor children. This hearing is upon a motion to vacate that order as having been improperly entered.

The facts which appeared upon the hearing were as follows: The death of B. R. Thomas; that he was domiciled in Mississippi; the appointment there of Mrs. Virginia Thomas as administratrix of his estate; and her recognition in this state as natural tutrix of the minor children.

My conclusion is upon these facts that she may continue this suit.

It has never been decided that under the statute (vol. 1, p. 90, § 31) it was necessary for the administratrix, in order to revive a suit, to have taken out letters within the state where the cause was pending. The court is already seized of jurisdiction, and the question would be whether the effect of the statute is not that the suit descends to the representative of the deceased party, be he heir or executor or administrator, as the case may be, in such a way that the only proof necessary is of the death and of that relation.

But it is not necessary to consider that question in this case, for if we concede that it would be necessary to hold that the proof of administration must be the same to entitle a party to revive as to commence a suit, such an administration is established. The natural tutrix of the minor children is under our law clothed with the authority to administer the succession of the estate of the deceased parent.

In *Bryant v. Atchison*, 2 La. Ann. 464, the court says it is immaterial whether the property of a succession, in theory, vests partly in creditors or wholly in heirs; that the tutor of minor heirs may, as such tutor, administer the succession, and may bring suit. Whether she has omitted to give bond, or whether there are major heirs, is matter to be established by proof, and until so established will not be assumed.

So, the objection that the assumption of domicile in this state was pretended, cannot be heard in this forum. Whatever ground it might furnish for a revocation of the appointment in the court appointing, it cannot be listened to here. See, also, *Labranche v. Trepagnier*, 4 La. Ann. 561; *Hair v. McDade*, 10 La. Ann. 534. In *Ventriss v. Smith*, 10 Pet. 169, the person conducting the suit was only a non-resident administrator, appointed *ad collegendum*; and even there the court held the authority sufficient.

It is also urged that under the Mississippi law of inheritance the widow inherits the portion of a child. This is true, but it is also true that the choses in action vest in the administrator or executor; therefore the right possibly to receive a portion of the fruits of the administration would not affect the right of Mrs. Thomas to maintain such a suit there as administratrix and here as tutrix. The exception is overruled, and the motion to vacate the order is refused.

REVIVOR. The section extends to every action where the cause of action survives, (*Hatfield v. Bushnell*, 1 Blatchf. 393; *Trigg v. Conway*, Hemp. 711,) but is confined to personal actions, (*Macker v. Thomas*, 7 Wheat. 530; *Green v. Watkins*, 6 Wheat. 260;) nor does it relate to or affect suits in admiralty, (*The James A. Wright*, 10 Blatchf. 160; but see *The Norway*, 1 Ben. 193.) The revivor of the suit by or against the representative of deceased is a matter of right, and is a mere continuation of the original suit, without distinction as to citizenship. *Clarke v. Mathewson*, 12 Pet. 164; S. C. 2 Sumn. 262. The death may occur before or after plea or issue joined, or before or after interlocutory judgment, and the proceedings are to be as if the representative was a voluntary party to the suit, (*Hatch v. Eustis*, 1 Gall. 160;) so it may occur before entry of a decree from which an appeal was taken, (*Story v. Livingston*, 13 Pet. 359.) The executor may be made a party on his own motion, but he must show that he is executor, and produce letters testamentary if required. *Wilson v. Codman*, 3 Cranch, 193. The suit will be continued in the name of the representative, (*Richards v. Maryland Ins. Co.* 8 Cranch, 84,) and the adverse party is not entitled to a continuance, (*Wilson v. Codman*, 3 Cranch, 193; *Griswold v. Hill*, 1 Paine, 483.) Upon a bill to revive, the sole question before the court is the competency of the parties and correctness of the frame of the bill to revive. *Bettes v. Dana*, 2 Sumn. 383. On the marriage of a *feme sole a scire facias* may issue in the name of the husband and wife to enable her to prosecute the suit. *McCoul v. Le Kamp*, 2 Wheat. 111. A bill of revivor cannot be brought against a representative in a state other than whence their authority proceeds, (*Mellus v. Thompson*, 1 Cliff. 125;) nor can it be filed against an administrator of a defendant who neither appeared nor was served with process, (*U. S. v. Fields*, 4 Blatchf. 326.)—[ED.]

UNITED STATES v. WILDER.*

(Circuit Court, S. D. Georgia. November, 1882.)

CRIMINAL PRACTICE—REV. ST. § 866.

A commission will be allowed to the defendant in a criminal case to take depositions of witnesses residing abroad, under section 866 of the Revised Statutes. Whether such depositions can be admitted in evidence upon the trial of the case, is a question that does not need to be decided until then; and if they be not allowed to go before the jury, in case of conviction will certainly be considered by the judge who shall be called upon to exercise the large discretion given by the statute in imposing sentence.

Information for Smuggling.

S. A. Darnell, Dist. Atty., for plaintiff.

Henry R. Jackson, for defendant.

PARDEE, C. J. The defendant, who is charged by the United States attorney with smuggling, submits a petition and affidavit showing that he has witnesses beyond the United States who are material to his defense, and he asks a *dedimus potestatem* to take the depositions of said witnesses under section 866 of the Revised Statutes. The application is resisted by the district attorney on the grounds that it is unprecedented, and without authority, to take the evidence of witnesses in criminal cases by commission, and that the evidence, if taken, would be inadmissible on the trial.

It is so abhorrent to all ideas of justice that a person charged with crime shall not have full opportunity to make his defense by witnesses, that although I am not prepared to hold that evidence taken as proposed in this case will be admitted on the trial, I am of the opinion that the commission and opportunity prayed for ought to be granted. Taking evidence in the manner asked in this case may be and probably is unprecedented in the United States courts in criminal cases, but I am informed is permitted in state courts of Georgia, and is allowed by statute in other states. At all events, the government cannot be seriously prejudiced by allowing this commission, as it will, of course, be at the expense of the defendant, and its admissibility will be determined on the trial. When the evidence is taken and the case comes on for trial, its scope, force, and effect can be seen, and its admissibility to go before the jury determined and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be con-

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.