

that in 1887 they became cognizant of their uncle's alleged fraud; and yet they waited until November 1, 1892, a period of five years and upwards, perhaps, before this bill was filed. When the original deed was discovered it furnished the evidence of its registration. Diligence would have plainly indicated that the registration books in Chattanooga be examined to show how the title appeared. The deed of Pressly to Whitley would have at once been discovered, and the reflection of complainants, which they say produced investigation, was unnecessary. Their want of diligence in this is a circumstance we may look to for what preceded. It is apparent that the statute of limitations, according to complainants' own theory, began to run in 1844, and continued to run until the death of Fuller, two years. His children were minors and had three years after arriving at their majority to bring suit. Suppose that they were fraudulently kept in ignorance of their rights until 1887. They would have three years from that time to bring suit before the bar of the statute would have been complete. But they waited for more than five years. But suppose everything up to 1887 was as complainants insist. It was a want of diligence on their part, in such a claim, to wait for five years and more to assert their claim.

It seems clear that complainants have been guilty of such laches that they cannot recover, and that they are barred, also, by the statute of limitations, and that these facts appear on the face of the bill. The demurrers and motions to dismiss will be sustained, and the bill dismissed.

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FULLER et al. v. MONTAGUE et al.

(Circuit Court, S. D. Tennessee, E. D. December 14, 1892.)

1. ACTION IN FORMA PAUPERIS—DISMISSAL—INSUFFICIENT OATH.

Where a suit prosecuted in forma pauperis has been dismissed on demurrer to the bill, defendant cannot, pending an application for the allowance of an appeal, sustain a motion to dismiss the case because the oath for leave to prosecute in forma pauperis was defective both in form and substance.

2. SAME—APPEALS—APPEAL BOND.

Act July 20, 1892, providing that any citizen entitled to bring any suit in the federal courts may "commence and prosecute to conclusion" such suit without prepaying fees or costs, or giving security therefor, embraces the right to appeal to the circuit court of appeals; and, when the proper oath has been filed, no appeal bond can be required.

In Equity. Bill by John P. Fuller and others, heirs at law of Simeon Fuller, Jr., against T. H. Montague and others to establish an interest in lands, and to have the same partitioned. The bill was heretofore dismissed on demurrer. See 53 Fed. Rep. 204, where a full statement of the case will be found. Plaintiffs having prayed an appeal to the circuit court of appeals, defendants now move to dismiss the case because the cause of action is frivolous, and because the oath in forma pauperis, under which they brought the suit, is insufficient. Motion denied, and appeal allowed on the filing of further affidavits.

Wells & Body, for complainants.

Wheeler & McDermott, Eakin & Dickey, W. G. M. Thomas, and W. H. De Witt, for defendants.

KEY, District Judge. In this case defendants move to dismiss the cause. (1) Because the alleged cause of action is frivolous, and, for the same reason, that the court refuse to allow complainants to further prosecute the suit, by appeal or otherwise, under the oath in forma pauperis. (2) Because the statement under oath, in writing, heretofore filed by complainants, is insufficient to support a right to sue or prosecute a suit as poor persons. Before this motion was made, complainants prayed an appeal to the circuit court of appeals from the decree rendered against them in this cause, dismissing their bill upon filing the oath prescribed for poor persons.

Although the oath under which the suit was instituted is not such, in substance or in form, as the statute requires, yet no objection was interposed upon that account until since the suit was dismissed upon the hearing of the demurrer filed therein. So that there is nothing in this court to dismiss, and this branch of the motion comes too late. Nor does the suit appear to be frivolous or malicious.

Acts Cong. July 20, 1892, c. 209, § 1, (page 252, U. S. St. 1891-92,) is as follows:

"That any citizen of the United States entitled to commence any suit or action in any court of the United States may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or giving security therefor, before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that because of his poverty he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action. Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees, or security for the costs, by filing a like affidavit."

He may commence his action and prosecute it to a conclusion by filing the affidavit required, or, if his suit or action has been commenced or is pending, he may avoid costs or security therefor by making the affidavit. The plaintiff can hardly be said "to prosecute his suit to a conclusion" unless he be allowed to take it by appeal to the court of appeals. I think a just interpretation of the terms of the act gives the right to the complainants to take their case to the circuit court of appeals upon their filing the affidavit required by the statute. Only such of the complainants as file the affidavit will be allowed to appeal under the provisions of the act. Another person cannot make the affidavit for him. The complainants having filed their petition for appeal, and along with it their assignment of errors, the appeal will be granted, upon the timely filing of the affidavits, or execution of the usual bond for costs.

**WEINFELD v. MUTUAL RESERVE FUND LIFE ASS'N.**

(Circuit Court, E. D. Tennessee, S. D. December 3, 1892.)

**LIFE INSURANCE—CONDITION OF POLICY—WHEN BECOMES BINDING.**

An applicant for insurance in a mutual life company paid the admission fee, and took a receipt therefor, which expressly provided that the policy should not go into effect until the application had been accepted and approved. The warranty paragraph in the application provided that the policy should not be in force until the actual payment to and acceptance of the annual dues, and the actual delivery of the policy to the applicant. The application was not accepted, nor were the annual dues paid. *Held*, that no binding contract was created.

In Equity. Bill by Rosa Weinfeld against the Mutual Reserve Fund Life Association. Dismissed.

Andrews & Barton, for complainant.

Richmond, Chambers & Head, for defendant.

**KEY**, District Judge. On the 20th of December, 1889, John Weinfeld made application for insurance with the defendant in the sum of \$3,000, for the benefit of his wife, Rosa Weinfeld. He paid \$15 as an admission fee. No policy ever issued, and he died March 12, 1890, in an insane asylum, and the bill is filed to recover the insurance.

Complainant insists that by the terms of the receipt for the admission fee the contract for insurance was complete, and was in force, until the company should notify the assured that the application had been rejected; and it is insisted that no such notice was given. I do not believe that the position of complainant's counsel can be maintained successfully under this record. The receipt is as follows:

"Received of John Weinfeld, of Chattanooga, Tennessee, fifteen dollars for the admission fee upon an application to the Mutual Reserve Fund Life Association, for a policy of insurance for \$3,000.00, subject to its provisions and the constitution or by-laws, rules, and regulations of the association. It is hereby expressly understood and agreed that, if the application be not approved and accepted by the officers at the home office of the association, in the city of New York, it shall be held that no benefits have ever been created or acquired under this receipt, and the amount paid hereon will be refunded by me on return of this receipt."

Certainly, language could hardly be used which would more clearly stipulate that the insurance should not go into effect until the application had been accepted and approved by the home office. This receipt refers to the provisions of the application as being a part of the contract, and let us see what these are. In the warranty paragraph of the application it is stipulated thus:

"And the applicant further agrees that under no circumstances shall the certificate or policy hereby applied for be in force until the actual payment to, and acceptance of the annual dues by, the association, and actual delivery of the certificate or policy to the applicant, with a receipt for the payment of the first annual dues, signed by the president, secretary, or treasurer of the association, during the lifetime and good health of the applicant."

The application shows that \$3 annually on each \$1,000, payable in advance, is to be paid as annual dues, and, in the warranty paragraph referred to, the applicant agrees "to pay dues annually, in advance, at