Chase, William H. vs Grant, Israel adm. McCord, Isaac 1854 Callaway Co 1st Cir. 20 1/5

Adm. Riley, Luther

68/5 old

Grant

McCord argued mortgagor cannot claim lien after death of a party.

Court a mortgage creates a lien that prevents foreclosure

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the first Judicial Circuit ——— in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Callaway County, in the Judicial Circuit aforesaid ——— wherein William H Chase admr. of Luther Riley, decd. was plaintiff and Israel B Grant admr. of Isaac Mc Cord, decd. was defendant ———

in an action of ——— manifest error hath intervened, to the great damage of the said plaintiff as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the first Monday in July next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the seventh day of June in the year of our Lord one thousand eight hundred and fifty five

Wm E Dunscomb

SEAL OF THE SUPREME COURT OF MISSOURI

In compliance with the command of the within writ I have made out a copy of the Record in the within case, which, with this writ are returned to the Supreme Court for inspection.

Given under my hand and official seal as clerk of the Circuit Court in & for Callaway County Mo this 13th day of June 1833

Geo Bartley Ech

Chas
vs
Grant

Filed 11th June 1833

50

W. H. Chaud admr.
vs
J. B. Grant admr.

Be it remembered that heretofore to wit on the 16th day of September 1854. William H. Chaud admr of Luther Riley sued out of the office of the Clerk of the Circuit Court in and for Callaway County State of Missouri the following Scire Facias

Writ " State of Missouri. To the Sheriff of Callaway County Greeting Whereas Luther Riley Trustee for Mary McCord late in our Circuit Court for the Circuit and County of Callaway at the Courthouse on the Tenth day of October in the year of our Lord Eighteen hundred and forty eight by a judgment and decree of said Court hath recovered against Osceola McCord on two Mortgages a Judgment for eight fifteen hundred dollars and ~~for~~ the further sum of two hundred and seventy seven dollars for damages, and five dollars and five cents for costs. and it was therein further decreed that the equity of redemption in the lands Mortgaged each mentioned to wit, the South West quarter of section one, the South East quarter of the North West quarter of same section, also the West half of the North West quarter, and the North East quarter of the North West quarter of section twelve, Township forty six and Range Ten West containing in all three hundred and twenty acres

2 be foreclosed, and the said Land be sold to satisfy the said debt, damages and costs and that the Complainant have his special Execution, and in default of said Land satisfying said debt, that said Execution run against other property or effects of said defendant; and Whereas as well the said Riley and the said defendant McCord have since the rendition of said Judgment departed this life. Nevertheless execution of the said Judgment still remains to be made as by the insinuation of William H. Chase administrator of Luther Riley we are informed and because those things in our said Court are right, we would have just in Execution We command you that you make known to Isaac B. Grant administrator of the Estate of the said Isaac McCord dec.d that he be and appear before the Judge of our said Court at the Courthouse on the first day of our next October Term, which Term will commence on the second Monday in October next to shew if for himself he can, any thing why the said Judgment and lien shall not be revived in the name of William H. Chase administrator of Luther Riley dec.d and against you the said Isaac B. Grant as the administrator of Isaac McCord dec.d the lien of the said Judgment continued agreeable to the statute in such cases, if to him it seem expedient. You are also commanded to summon Thomas Ansell, James B. Harris and Westly Wright to appear at the time and place aforesaid to shew if for themselves they

3 can, any thing why the said Judgment shall not be revived and the lien continued and the lands and premises sold to satisfy the said Judgment if to them it seem expedient, and have then there this writ, Witness George Bartley clerk of our said Court with the L.S. seal of office annexed this 16th day of September 1834. Geo. Bartley cl'd

Shff Return

upon which the Sheriff made the following return forwit, "Served this by reading the same in the presence and hearing of Thomas Ansell on the 16th day of September 1834. also by reading the same in the presence and hearing of James Herrin and Westly Knight on the 18th of September 1834. all in the County of Callaway and State of Missouri W. T. Snell Shff Cl'd Served this by reading the same in the presence and hearing of J. B. Grant admr of Isaac McCord decd on the 19th day of September 1834 in the County of Callaway and State of Missouri W. T. Snell Shff Cl'd

afterwards at a Circuit Court began and held for Callaway County at the Courthouse on Monday the 9th day of

leave to amd Scifa

October 1834. "On motion of the plaintiff leave is granted him to amend the Scire Facias by adding affidavit to the same" and which is as follows forwit, J. G. McCord agent of William H. Chase Admr makes oath and says that the Judgment recited in the foregoing Scire facias is still due and unpaid and that the same has not been satisfied and the amount due thereon is 1782. 5/100 dollars and interest since the date

4 thereof down to the present time.
Sworn to and subscribed J. G. McCord (6)
before me this 9th day Oct. A.D. 1834.
Geo. Bartley Cch.
afterwards on the 12th day of October 1834
dismd. On motion of the plaintiff, it is ordered that
as to this suit be dismissed as to the defendants
part Thomas Ansell, Westly Knight and James C.
Herring — afterwards on the said 12th day
of October 1834. The defendant produced
his demurer the same is ordered to be filed
and thereupon the parties being heard, on
Demr. motion of the defendant leave is given him
to amend the same. and which said de-
-murer is as follows. Fourth W. H. Chase
administrator against J. B. Grant and
others defendants. Cal Cir Ct Oct
Term 1834. Demurer These defendants by
their attorney come and defend the wrong
and injury when &c. and say that the said
Scire Facias and the matters therein con-
-tained are not sufficient in law for the
said plaintiff to have or maintain their
said action against them the defendants
and that they are not bound by the law
of the land to answer the same, and this
they are ready to verify, wherefore by reason
of the insufficiency of the said Scirefacias
the defendants pray Judgment and that the
plaintiff may be barred from having or
maintaining their said action thereof against
them Thomas Ansell for defendants
afterwards on the 13th day of October 1834.

5 The parties appear, and the defendant
amd. produced and filed his amended demurer
Demr. Thereupon the parties being heard it is con
filed =sidered by the Court that the same be
sustained. On motion of the plaintiff he is
permitted to amend the Scire facias, and
thereupon he produced and filed the amend
=ment, the defendant produced and filed
his demurer to the said amended Scire
Facias, and the cause is continued until
the next Term. The said amended demur
=er is as follows, Vorrit, " Chard administrator
amd. &c. against J. B. Grant administrator &c.
demr. Demurer to the Scire Facias—
The defendant comes & demurs to the
Plaintiffs Scire facias & states that the
Scire facias and the matters therein con
=tained are not sufficient in law for the
said plaintiff to have or maintain
their aforesaid action thereof against
him the defendant, and that he is not
bound by the law of the land to answer
the same, and this he is ready to verify—
Wherefore for want of a sufficient Scire
=facias in this behalf, the defendant
prays Judgment, and that the plaintiff
may be barred from having or main
=taining his aforesaid action thereof
against him, and for cause of de
=murer to the said writ, the defendant
says 1 the writ of Scire Facias does
not state facts sufficient to consti
=tute a cause of action & 2. There

6 is a defect of parties in this, that the
demr. heirs of the Mortgagor ought to have been
made parties defendants to this suit,
and also in this, that the heirs of the
Mortgagee ought to have been made par
-ties to this suit, 3. It appears that
the lien of the Judgment had expired by
lapse of time, before the commencement
of this proceeding & after the Expira
-tion of the lien no proceeding can be
instituted against the personal represen
-tatives of the Mortgagor to revive the
lien of the Judgment

Thomas Ansell for defendants

The following is the amended Scire
Facias Court. In the Callaway
amd. Circuit Court, October Term 1854.
Sci Fa William H. Chase admr. vs J. B.
Grant admr. Sci-fa. and now on
leave first had and obtained of the Court
in the above entitled cause, the said
plaintiff William H. Chase as amen
-dment to the said Scire Facias says
that the heirs of the said Isaac McCord
the Mortgagor have no right title or inter
-est in the said land in the above Judg
-ment or decree, nor have they or any
of them either the actual or construc
-tive possession thereof because all the
right title interest and claim of the
said Isaac McCord was transferred from
and he was divested of the same in his
life time, and said property never descended

7 to his legal heirs devisees or representatives and for the said reason they have not been made parties to this suit and summoned in the said Scire facias to show cause why the said Judgment should not be revived &c. William H Chase admr. By Hayden & Jones his atty

The following is the demurer to the amended Scire facias Nowit

demr. to amd. Scifa "Chase admr. &c. against J. B. Grant admr. Cal Cir Ct. Oct Term 1834.

Demurer to amended Scire Facias

The defendant demurs to the amended Scire facias, because it does not state facts sufficient to constitute a cause of action, because there is a defect of parties in the omission of the heirs of the Mortgagor, and also in the omission of the heirs of the Mortgagee, and because the lien of the Judgment had expired before the commencement of the present proceedings. Leonard & Ansell for defendant

afterwards at a Circuit Court Continued and held for Callaway County at the Courthouse on Thursday the 19th day of April 1835. This day come the parties aforesaid, and the Court being now

Judgt fully advised of and concerning the demurer, having maturely considered the same, do adjudge and order that the said demurer be sustained. Therefore it

8 is considered and ordered that the plaintiff take nothing by his action, but that the defendant recover of the plaintiff his costs by him about his defence in this behalf expended—

Judgt

As clerk of the Circuit Court in and for Callaway County, State of Missouri I do hereby certify that the foregoing eight pages contain a full true and complete copy of the record and papers in the case therein named, of William H. Chase administrator of Luther Riley against Israel B Grant administrator of Isaac McCord as fully as the same now remains in my office

Given under my hand and official seal as clerk as aforesaid this 13th day of June 1833.

Geo. Bartley clk

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10 15.

Wm H. Chase Admr
of Luther Riley decd. p. Es
vs } Record

J. B. Grant Admr
of Isaac Mc Cord
Examined

cch fee $3.00
att Geo Bartley cl

filed June 18 1855

Wm E Dunscomb
Clerk

Callaway
2nd

Wm H. Chase adm.r Pl.ff in error } Error to the
vs. } Callaway
J. B. Grant Adm.r Defd.t in error } Circuit Court.

The question in this case is, whether, the lien of a mortgage is merged in a judgment obtained in a proceeding under the Statute to foreclose the Mortgage. If the lien of the Mortgage is extinguished by the judgment the Mortgagee is in a dangerous situation, such a one, as would induce many Mortgagees to forego the remedy provided by the Statute. For if the Mortgage lien being extinguished by the lien of the judgment, obtained in the suit for a foreclosure, and the lien of the judgment taking effect from its rendition, if judgments should have been previously rendered against the mortgagor in favor of others, though subsequent in date to the mortgage, those subsequent judgment creditors would obtain a preference over a prior Mortgage though duly recorded. So proceedings for a foreclosure under the Statute may be begun when any part of the Mortgaged premises are situated: Mortgaged lands may be in several counties. The lien of a judgment is only operative in the County in which it is rendered, so that in such cases, the Mortgage lien would be destroyed.

It is the just expectation of the creditor, that when he takes a mortgage, he has a security, which lasts until the Mortgage debt is paid. This is a reasonable expectation, and it should not be defeated, unless the law plainly requires it. The statute concerning mortgages, was designed within itself to afford the Mort

gagee, the means of enforcing the payment of his debt. There is no reason, why the Mortgagee in resorting to the statutory remedy, should have his security if not entirely extinguished, at least very much impaired. We should be loth to adopt such a construction, ~~were~~ was there nothing but the general laws concerning judgments and administrations. But the legislature it seems to us never contemplated that the security of the Mortgagee should be lost to him by a resort to the statutory mode of foreclosure.

The 4th & 17th sections of the act concerning mortgages, show that the Legislature, intended that the proceedings to foreclose a mortgage, should not be arrested by the death of the Mortgagor. When a judgment is obtained, the enforcement of that judgment is not suspended as in ordinary cases by the death of the debtor. The last clause in the 17th sec. of the act, shows this very plainly. The 4th in allowing the proceedings to be begun against an adm.r of the Mortgagor or debtor, ~~to~~ indicates, that it was designed, that the process should continue, unenfluenced by any of the provisions of the administration law: Why suppose proceedings to be commenced in that way, when no other result is to be produced. than would have resulted from a mere allowance of the demand.

The process to foreclose the Mortgage, going on as though the Mortgagor had not died, none of the provisions of the statute concerning the administration of estates, which restrain the issuing of an execution against property in the hands of an administrator have any

effect in such case. The mortgage being a lien created by express contract, between the parties the law does not interfere and control it as in case of liens created by mere operation of ~~law~~ its own. The case standing unaffected by the administration law, it must be viewed, as though it was between the original parties to the mortgage: Assuming then, that three years had expired after the rendition of the judgment, in the proceedings to foreclose the mortgage, whatever effect such efflux of time might have had upon the mere lien of the judgment if any such thing existed, if the lien of the mortgage continued until it was satisfied, as we have maintained, such efflux could not have affected such lien. Why should it. The mortgage was recorded. It was ~~[illegible]~~ unsatisfied. No presumption of payment would arise until after the lapse of twenty years. The judgment itself although by our statute it ceases to be a lien after three years, is not presumed to be satisfied until after the expiration of twenty years from its rendition. Because a judgment has been rendered to foreclose a mortgage, why should the mortgagee be deprived of the security of the mortgage, after three years, when the law only presumes the mortgage or lien of a judgment discharged after twenty years. The judgment in the proceedings for a foreclosure would have showed, that it was founded on a recorded mortgage. It would have appeared that the judgment itself was unsatisfied. How then, could any one have sustained any injury by reason of the want of notice?

Another view of this subject may

be taken of this subject. ~~It~~ A mortgage creates a lien: It is not a mere lien. It is something more. It is an estate in the land, conditional it is true, but the condition is that it shall endure until the debt is satisfied. Why should a judgment unsatisfied ~~discharge~~ destroy this estate against the express stipulation of the parties.

The act concerning mortgages sections 4 & 17 show the the personal representatives meaning the executor or adm.r is a sufficient party for all purposes under this statute

Judgment reversed & cause remanded J. Ryland concurring: J. Leonard not sitting

Wm Scott

187

15.

Chase adm^r.
vs.
J. B. Grant adm^r.

Opinion

filed Sep. 29 1855

Wm E Dunscomb
Clerk

In the Supreme Court
July Term 1833

William H. Chase adm. Pltff in error
against
L. B. Grant adm. respondent

Gardenhire for respondent

1st The plaintiff in the judgment is dead, it concerns real estate, survives to his heirs or devisees, in whose names alone it can be revived, and execution issued. Rev. Stat. 1845, p. 623, Sec. 13. The ~~action~~ scire facias, therefore, is not prosecuted in the name of the real parties in interest. Pract. Act, art. 3, Sec 1.

2d The defendant in the judgment is dead, it concerns real estate, survives against his heirs or devisees, against whom alone it can be revived by Scire facias, or execution issued, Rev. Stat. 1845, p. 623, Sec. 14. They, therefore, have an interest in the subject of the Scire facias, and should have been made parties Prac. Act art.

3, Sec. 7. It was a special judgment against the mortgaged property, which went to the hiers or devisees, Rev. Stat. 1843, p. 751, Secs. 10, 11, and 13; and a special fieri facias the remedy, when revived. There to whom, therefore, the property went, were the parties in interest

3° The amended Scire facias shows that respondents intestate was divested of all interest in his lifetime, as an excuse for not making his hiers or devisees parties. The excuse goes too far. It excuses the respondents, renders him an improper party, and shows that those who divested the intestate are the proper parties; for if divested, there must have been somebody to do it, and what is the excuse for not having him before the court? Fatal excuse!

4th But if the proper parties were before the court, the judgment could not be revived. The Scire facias was sued out after the expiration of the lien, Rev. Stat. 1833, p. 339, Secs. 3, 6, 7, 8, 9 and 10; Rev. Stat 1843, p. 622, Secs. 3, 4, 7, and 8 and 12. Under the 6th and 10th Sections of the act

of 1835, the plaintiff or his legal representative, might, at any time before the expiration of the lien, sue out a Scire facias, revive the judgment, and continue the lien, for successive periods of two years, until the expiration of twenty years, when the judgment would be presumed to be paid; but by the 7th Section of the act of 1845, this right is limited to ten years. Under both acts, however, the Scire facias, must be sued out before the expiration of the lien. Otherwise, the lien, by the express terms of the Statute, ("shall commence on the day of the rendition of the judgment, and shall continue for three years") expires - is dead and past revival. The 8th Section of the act of 1845 does not help the plaintiff in error. It is but declaratory of what the law was already, as to the continuation of the lien, 12 Mo. 361. If issuing and levying an execution, before the expiration of the lien, continued it, by implication, surely a Scire facias would. See both acts in pari materia, and particularly the 10th Section of ~~1835~~ the act of 1835, and the 12th Section of the act of 1845. This last Section manifestly shows that the

Scire facias must be sued out, before the expiration of the lien. Its language is: "and the lien continued for another period of two years, and so on, from time to time, as often as may be necessary." If the Scire facias may issue after the lien expires, it does not continue the lien, but creates a new one.

Chase adm.
res ⌶ Enoch to Calla-
way ⌶
Grant adm.

Gardenhire Bros
for Respondents.

Filed July 9 1855
Wm E Dunscomb
Clerk

(43)

In the Callaway Circuit Court

William H Chase Admr of Luther Riley pltff
vs } Sci Fa on Judgement
Israel B Grant Admr of Isaac McCord dfdt

To you the defendant in the above entitled cause you are hereby notified that the plaintiff has sued out a writ of Error in said cause to the Callaway Circuit Court returnable to the July term of the Supreme Court to be begun and holden at the City of Jefferson on the first Monday in July next.

William H Chase admr
By Jones & Hayden
his attys

I hereby waive service of the above notice
I B Grant

William H Chase

vs } Notice of Writ of Error

Israel B Grant

filed July 3 1855

Wm E Dunscomb

Clerk

In the Supreme Court
July Term 1855

William H. Chase admr of Luther Riley – Plff in Error
VS } Error to the Callaway Circuit Court
Israel B. Grant admr of Isaac McCord – Deft in Error

The original proceeding in this cause was a petition filed in the Callaway Circuit Court to foreclose a mortgage given by Isaac McCord in his life time on a tract of land to Luther Riley as trustee of Mary McCord. The petition was based upon the provisions of the Statutes of 1845 concerning Mortgages. The Circuit Court gave judgement for the plaintiff, decreeing that McCord's Equity of Redemption in the land be fore=closed and that the same be sold to satisfy the debt damages & costs. No execution issued upon the judge=ment – which was rendered at the October Term of the Court in the year 1848 – After the rendition of the judge ment the original parties in the proceeding Luther Riley plaintiff and Isaac McCord defendant died – William H Chase the administrator of Luther Riley sued out a scire facias upon the judgement against Israel B Grant administrator of Isaac McCord – and also against Thomas Ansell, James Herrin & Westley Knight who were in possession of the land under a sale of the Equity of redemption under another judgement to show cause why the judgement and lien should not be revived in the names of the respective administra=tors and execution thereof had in conformity to the judgement – The Sci. fa. was afterwards dismissed as =to Ansell, Herrin, & Knight. The administrator of McCord appeared and filed a general demurrer

to the Sci. fa. alleging the want of proper par=
ties, and that the Scire facias did not set forth facts
sufficient to constitute a cause of action - The
general demurrer was objected to on the ground
that it did not set out specifically the points of objec
=ion to the Scire facias. The defendant asked leave of
the Court to amend his demurrer which was gran
=ted and the amended demurrer was sustained by the Court
- Plaintiff then asked leave to amend his scire fa=
=cias which was granted - The amended Scire facias
stated that the Heirs of McCord the mortgagor had
not been made parties - because McCord the ancestor
had been divested of all title and interest in the land
during his life time, and that the same had not des=
cended to his heirs, who had not either the actual
or constructive possession of the lands or any interest
therein, The defendant then filed a ~~general~~ demur=
=rer to the amended Sci fa - The grounds of dem=
=urrer being - first, because there was a defect of
parties in the omission of the Heirs of McCord the
mortgagor - and also in the omission of the heirs
of Riley the mortgagee, 2nd Because the lien of
the judgement had expired before the commence=
=ment of the proceeding by Scire facias. The Circuit
Court sustained the demurrer and the plaintiff
brings his case here by writ of Error -

Plaintiffs counsel will insist on the following
points and authorities -
1st The Circuit Court erred in sustaining the
demurrer for the reason that the heirs of the mort
gagor & mortgagee had not been made parties

to the proceeding— The statute prescribes the man=
=ner in which a mortgage can be foreclosed and
mentions the requisites parties ~~to be summoned~~ as
plaintiffs and defendants— See Statutes 1845— Title
Mortgages. page 749. sec 1. In case of the death of the
mortgagee or mortgagor before or after action brought
the statute directs that the personal representative
of the deceased party should be made plaintiff or
defendant— Sec 4. 9 + 17— Sec 8 points out who may
be made parties to the proceeding among whom the heirs
of neither mortgagee nor mortgagor are mentioned. Nor
is it absolutely necessary that those mentioned in
Sec 8 should be made parties. the only effect of an
omission of them would be that they would not
be bound by the judgement— but would be entitled
to redeem. The demurrer admits all the facts stated
in the amended Scire facias— one of those facts being
that the heirs of McCord had no interest. They having
no interest were not proper parties— See Swift vs
Edson 5 Conn 531. By the judgement of foreclosure
in McCord's life time the equity of redemption was
barred and there was nothing to descend to his
heirs— The Revised Statutes 1845— page 84 sec 6 + 7 title
administrators provides that in case of the death
of the mortgagor having made no provision to re=
deem the property mortgaged the County Court
shall make an order for the sale of the property
— The statute in that case does not require that either the heirs
of the mortgagor or mortgagee should be made par
ties— The heirs of Riley were neither necessary or
proper parties— Riley by an act of Record asks that
the lands be sold to satisfy his debt— In accordance

with his prayer the mortgage is foreclosed and the lands decreed to be sold - The only thing that remains (28) to be done is to carry Riley's act done in his life time into execution by a judicial sale of the property - The right to issue the execution and take the money arising from the sale of the lands vested in the administrator and not in the heir 1 Bibb 526. 1 J J Marshall 258. 2 Marsh 209. Smith vs Slyer 16 Mass 18. Hathaway vs Valentine 14 ib 500 3. U.S. Digest page 36 sec 139. 4 Pick 19. Mulanphy vs Simpson 3 Mo Rep t.p. 346. 2nd Cow. 195. 6 John 290. 11 John 534 15 John 319. The statutes prior to 1845 required the heirs or representatives to be summoned the words "heirs" is omitted and "personal representatives" is substituted in the act of '45 See 3 vol Mo Rep Statutes 25 sec 1 Mulanphy vs Simpson t.p. 346 - Even in Chancery proceedings the heir is only a party pro forma being considered in the light of a trustee for the administrator who alone is entitled to recieve the money See 1 J J Marshall 258. The heirs of Riley holding titles for one purpose only - as a security for the payment of the money no injustice can be done them by omitting to make them parties to the proceeding -

2nd the Court erred in sustaining the dem=
=urrer on the grounds that the lien of the judgement had expired – The object was to re
=vive ~~it in~~ the judgement in the names of the administrators of the original parties, they being deads, which was necessary to be done before execu
=tion could be had of the judgement. The mortgage still remained a specific lien against the land
– An interest in the lands passed by the mort=
gage – The only way in which the ~~judgement~~ mortgage could be enforced was by a judgement of foreclosure and it is a solecism in law to say that the very remedy provided for the enforcement of a right operates to decrease, divest or extinguish it
The lien of a mortgage can only be discharged by a payment or release See 12 Vol US Digest page 442 sec 165 – 31 Maine Rep 246 (1 Red) 13 St M 103 – 3 Vol US digest p 46 sec 417. 3 Penn 368. 3 Vol US digest p 48 sec 452, 2 Vol US. Dig p 420 sec 263 ib page 414 sec 123 – Hembolds VS Mann 4 Wharton 410 – 3 marshall 621, 3 Littell 50 + 51. 1 Freem Ch 79 1 Alabama RS 23. Patterson VS Carneal 3 A K Marx

shall 618, 12 Mass 379 –
Even if it had been the object to revive a general judgement lien under the statute the time had not expired, the plaintiff having ten years in which to issue a sci fa Rev Stat 45 Title Judgements + Decrees page 622 sec 7 –
That execution could issue from the Circuit Court on the judgement – see Rev Stat 45 title Mortgage sec 17 – Ayres vs Heirs of Shannon 5 – Mo Rep 282
Sec 20 Title Mortgage preserves the remedy by proceedings in a court of chancery and clearly shows the intention of the legislature to be that the requisite parties to be summoned and the proceedings in toto are entirely distinct and independent of each other and ~~that~~ it is judicial legislation for courts of justice to add parties to ~~a~~ statutory proceedings whom the legislature have not in their wisdom seen fit to require

That the mortgage still remained a specific lien against the land after the equity of redemption was foreclosed and judgement obtained is clear from the fact that if the mortgage lien was merged or lost in the judgement, then a general judgements obtained against the defendant before the foreclosure would have a prior lien to the junior judgement on the mortgage. Rev Stat 45 Title Judgements + Decrees Sec 3 – 2nd sec of the act concerning Mortgages (Rev. C.) 1845. –
In New York a mortgage is only a chose in action and the only right the mortgagee has in the land itself

is to take posession thereof with the assent of the mortgagor after the debt has become due and payable and retain such posession until the debt is paid Waring vs Smith 2 Barb Ch Rep 119 – 135 – 4 Kent seventh edition t.p. 164 note (1)

J. W. Morrow, J. F. Jones &

H. C. Hayden pltffs. attys

W. H. Chace admr
V. S. Pltffs brief
J. N. B. Grant admr &c

Brief of pltffs in error

(88)

Supreme Court
July Term 1855.

Wm H. Chase admr. Plff in error
vs } Error to the Callaway Circuit court.
G. B. Grant admr Deft in error.

This was a proceeding by seire Facias by Plff as admr of Luther Riley trustee of Mary McCord against G. B. Grant admr of Isaac McCord instituted on the 16th day of September 1854 returnable at the October Term of said court next thereafter. The writ of seire Facias set forth that said Riley obtained a judgment, on the 10th day of October 1848 in said Court against said Isaac McCord on two mortgages, for $1747.00 for debt and damages besides costs and that the equity of redemption in and to the 320 acres of land mortgaged was foreclosed, and that the lands be sold to pay the judgment and that special execution issue thereon the writ further sets forth that both Riley and McCord are dead and that the judgment has not been satisfied. It commands Deft Grant to shew at the return Term of the writ, why judgment and lien shall not be revived and the lien thereof continued. Ansell, Herring and Knight are made parties to the writ and commanded to shew why the judgment shall not be revived and the lien continued and the lands sold to satisfy the judgment.

The writ was served upon all Defts thereto.
At the October Term Plff amended the writ by making affidavit thereto by agent.

Afterwards at the same term the suit on motion of Plff was dismissed as to Ansell, Knight and Hering Defts. And at same term, Dept Grant filed a general demurrer to the writ, which demurrer was on leave granted, amended by filing a special demurrer, the causes of demurrer set forth are these. 1st The writ does not state facts sufficient to constitute a cause of action.

2nd That there is a defect of parties in this, that the heirs of the mortgagor as well as the heirs of the mortgagee ought to be parties Plaintiffs or defendants respectively as the case may be.

3rd That the lien of the judgment had expired by lapse of time before the commencement of this proceeding and after the expiration of the lien no proceeding can be instituted against the personal representative of the mortgagor to revive the lien of the judgment.

This demurrer was by the court sustained. And Plff obtained leave to amend his writ thus. that the heirs of the mortgagor have no right, title or interest in the said land, nor

have they or either of them the actual or constructive possession thereof, because all the right, title, interest and claim of the said Isaac McCord was transferred from him and he was divested of the same in his lifetime, and that said property never descended to his legal heirs, devisees or representatives—

This Amendment was demurred to by Deft, setting out as causes of demurrer 1st that it does not state facts sufficient to constitute a cause of action

2nd that there is a defect of parties in the omission of the heirs of the Mortgagor, and also in the omission of the heirs of the Mortgagee

3rd the lien of the judgment had expired before the commencement of these proceedings—

The cause was continued till April Term 1855 of said Court when this demurrer was sustained, and judgment rendered thereon for Deft, and the cause is brought here by writ of error—

[redacted] ~~Goodenhue~~, and Hardin for Defendant.

1 This proceeding is to revive a special judgment and lien upon special property, of which the mortgagor was divested of all claim in his lifetime, and to do so, would present the anomalous fact of reviving against the admr a special judgment and lien upon property of which his intestate was totally divested of every claim in his lifetime and to which his heirs and legal representatives have now no claim, not even possession actual or constructive. ~~Stat of Mo 1845 on the law of Mortgages page 751 Sect's 11. 12. 13~~

2 The original writ is silent as to the ownership of the property, and as the judgment concerns real estate, the heirs of plaintiff's intestate as well as those of Defendants should have been parties thereto. Rev. Code, 1845. page 123 sections 13 and 14. For this reason the court below committed no error in sustaining the demurrer to the writ.

3. "The writ as amended does not alledge facts sufficient to constitute a cause of action against Defendant in error, for the reason that "all the right, title interest and claim of the Mortgagor was transferred from him, and he was divested of the same in his lifetime, and that the lands did not descend to his heirs or legal representatives nor have they or either of them the possession thereof, actual or constructive."

4 The Defendant is not a proper party to this proceeding. It should, if at all, have been against the present holders of the title and possession of the property, and creditors, if any. The purchaser of the interest of the Mortgagor in the lands is substituted to all the rights of the Mortgagor, and if the lien fails or expires by laches, lapse of time, or other contingency, the purchaser succeeds to all the rights originally held by the Mortgagor. McNair vs O Fallon 8 Mo R 199 to 201. Benton vs O Fallon 8 Mo R 652, 653, 654; Anthony v. Rogers et al, 17 Mo. 394, 396 and 397

5 If there were occupants of the land, they should be parties. If none, the writ should so state. Rev. Code 1845 page 622 section 9.

6 All intermediate incumbrancers, if any, between the expiration of the lien of the judgment and the institution of this proceeding should be parties. If none, the writ should so state. Rev. Code pages 622-23 sections 8, 10, 11 and 12.

7 This judgment foreclosing certain mortgages was obtained in the lifetime of the mortgagor, and if bona fide, was a lien upon the lands mortgaged for three years thereafter, and no longer unless revived and continued in force in the manner provided by law. Rev. Code 622 sections 8 to 12. Rev. Code 1835 p. 339 sections 3 to 10 — 12 Mo. Repts 361. Bank of Missouri vs Wells &c

8 A lien on land created by a mortgage is merged in the judgment foreclosing such mortgage, and the lien of such judgment has no other or greater force than the lien of other judgments, but is subject equally to the same limitations and provisions of law. The People vs Belle 1 Barbour's S C Rp 379. 388

If it were possible to revive that part of said judgment, that declares that in default of said lands satisfying the debt, that the execution run against other property or effects of the defendant for the purpose of reaching other property, real or personal, the writ should not only set forth that all the necessary facts to this end transpired, but expressly to disclaim every purpose to revive the judgment and lien against these lands, or to subject them to the payment thereof — Rev. Code 1845. Mortgages page 751, sections 11, 12 and 13.

10. The Court committed no error in sustaining the demurrer and giving judgment for Defendant thereon.

11 If in consequence of the Mortgagor having been divested in his lifetime of all interest in the lands specified in the judgment - and his heirs failing to acquire by descent or otherwise any title or interest therein, are not proper parties to this proceeding, then there is no cause of action against the present defendant.

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Wm H C Chase Adm &c of Riley
vs
J B Grant Admr &c of McCord

Brief and
Statement of the
Case

filed July 3 1853
Wm E Dunscomb
Clerk

9

In the Supreme Court
July Term 1853 —

William H Chase admr of Luther Riley - Pltff in Error
against } Error to Callaway Cir Court —
Israel B Grant admr of Isaac McCord. Dft in Error

And now on this day the plaintiff in Error by his attorneys come and allege that in the record and proceedings and in the judgement of the Circuit Court rendered in the above entitled cause there is manifest Error in this to wit — For that by the said Record and proceedings it appears that the Circuit Court gave and rendered judgement against the plaintiff and for the defendant in said cause whereas by the law of the land said judgement ought to have been rendered by the Court for plaintiff against the defend=ant in this therefore there is manifest Error 2nd There is also manifest Error in this to wit. For that by the said record and proceedings it appears that the said circuit Court rendered judgement upon the demurrer of the defendant to the Scire Facias, for the defend=ant, whereas by the law of the land this judgment ought also to have been rendered by the Cir Court for plaintiffs against said defendant In this the Court manifestly Erred

And for which said several errors and other apparent errors in said Record and proceed=
=ings the said plaintiff in Error prays judgement that the said judgement of the Circuit Court Court be set aside annulled and wholly held for nought & that he may be restored to all things by him lost on occasion thereof

Hayden & Jones
Attys for Plff

William H Chaseadm
vs } assignment of Errors
Israel B Grant admrx

filed July 3 1855
Wm E Dunscomb
Clerk