

## WATKINS v. REED.

(Circuit Court, D. Kansas. 1887.)

## LIMITATION OF ACTIONS—RUNNING OF STATUTE—ABSENCE FROM STATE—TAX TITLE.

The Kansas tax law, § 141, (Comp. Laws, p. 967,) limiting the time for bringing an action to defeat or avoid a tax sale to five years after the recording of the tax deed, except in cases where the tax has been paid or the land redeemed, is to be construed in connection with Code Civil Proc. § 21, which provides that, if a person be without the state when any cause of action accrues against him, the period limited shall not commence to run until he comes into the state; and the running of the statute in favor of the holder of a tax title will be suspended during his absence from the state.<sup>1</sup>

Motion for a New Trial.

*C. N. Sterry*, for plaintiff.

*Uiley & Martin*, for defendant.

BREWER, J. There is but a single question in this case, and that is whether section 141 of the tax law (Comp. Laws, 967) provides, within itself, a complete and absolute limitation, unaffected by any of the provisions of the general limitation article of the Code of Civil Procedure, and especially section 21 of said article. Section 141 reads as follows:

"Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of land for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax deed, and not thereafter."

And section 21 of the Code of Civil Procedure, so far as is material to this case, reads as follows:

"If, when a cause of action accrues against a person, he be out of the state, the period limited for the commencement of an action shall not begin to run until he comes into the state."

Does this exception apply to section 141. Article 3 of the Code is devoted entirely to the matter of limitations. Section 15 provides "that civil actions can only be commenced, within the periods prescribed in this article, after the cause of action shall have accrued; but where, in special cases, a different limitation is prescribed by statute, the action shall be governed by such limitation." Then follow several sections prescribing different limitations for different actions. Besides these, there are three or four sections making special exceptions to the general operation of the limitation clauses; as, for instance, the legal disability of the plaintiff, the absence or concealment of the defendant, or the failure of the first action.

Now, it is contended by the defendant that this limitation section in the tax law is unaffected by these various exceptions in article 3. The

<sup>1</sup> Respecting the suspension of the running of the statute of limitations by absence from the state, see *Wood v. Bissell*, (Ind.) 9 N. E. Rep. 425, and note. See, also, *Engel v. Fischer*, (N. Y.) 7 N. E. Rep. 300; *Miller v. Lesser*, (Iowa,) 32 N. W. Rep. 250.

supreme court of the state has not definitely decided this. It is true that in *Walker v. Boh*, 32 Kan. 354, 4 Pac. Rep. 272; *Harris v. Curran*, 32 Kan. 580, 4 Pac. Rep. 1044; *Doyle v. Doyle*, 33 Kan. 725, 7 Pac. Rep. 615,—there are some expressions which seem to sustain the claim of the defendant. But it is also true that in *Bonifant v. Doniphan*, 3 Kan. 33, and in perhaps some other cases, there are intimations to the contrary. The matter is not clear in my mind, but it seems a fair construction of the various statutes, and more in consonance with the reasonable purpose of all limitation laws, to hold against the views maintained by the defendant.

1. Statutes *in pari materia* are to be construed together, and to be made harmonious if possible. Section 141, though in the tax law, is a pure statute of limitation, and as such should be made to harmonize with the general provisions concerning limitations. If it were found in article 3, there would be no doubt about the matter. Does its mere location compel a different conclusion?

2. The language in section 15, "where in special cases a different limitation is prescribed," refers to the general rule of limitation, and not to the matter of exceptions. Thus, section 141 is to be construed as prescribing a general rule for actions against the holders of recorded tax deeds, and not to exclude exceptions which otherwise apply alike to all limitation provisions.

3. Section 21 is general in its terms,—“when a cause;” not a cause mentioned in this article, but any cause. Could language be more comprehensive?

4. There seems no reason or justice in giving an exception in the case of an ordinary action for the recovery of real estate, and none in case of an action against the holder of a tax title. The fact that, by placing his tax deed upon record, the holder exposes himself to an action for the recovery of possession, although he be himself a non-resident, puts him in no different position than any other non-resident who is in actual possession. Each may be sued, but each alike must be served by publication. While short statutes of limitation may be necessary to compel prompt payment of taxes, why should non-residents be invited to invest their money in tax titles rather than in industries of general benefit to the state?

5. Not only is there no reason for a distinction in favor of the holder of a tax title, but in fact there seem weighty reasons for enforcing the exception, as against him; for by section 143, Comp. Laws, 968, by simply placing his tax deed on record he authorizes the holder of the original title to institute an action for the recovery of possession. Such an action is, however, to one in actual possession, at least, permissive, and not obligatory. *Myers v. Coonradt*, 28 Kan. 211. Actual possession is ordinarily better notice of the claim of title than the record of the deed; and it would often tend to injustice to hold a party barred of all remedy who failed to bring an action for the recovery of possession, where the land was absolutely vacant, simply because a tax deed had been placed on record more than five years.

For these among other reasons thus briefly stated, in the absence of any express ruling by the supreme court of the state, I agree with my brother FOSTER, and overrule the defendant's motion for a new trial.

---

HOWTH, Adm'r, etc., and others v. OWENS and others.

(Circuit Court, S. D. Georgia, E. D. April 6, 1887.)

**REVIVAL—DEATH—ORDER STRIKING OUT DECEDENT'S NAME.**

Where an unconditional order signed by the judge and duly enrolled, striking the name of a decedent from the cause, was taken, and eight years thereafter application was made for leave to file a bill of revivor, in the absence of any explanation of the order of dismissal, leave to revive will not be granted. (Syllabus by the Court.)

**Application for Leave to File a Bill of Revivor.**

Charles N. West, for the motion.

J. R. Saussy, for the defendants.

SPEER, J. On May 26, 1873, the original bill in this case was filed against Thomas E. Lloyd, George S. Owens, and Julian Hartridge, as the executors of Isaac M. De Lyon, deceased. The bill alleged a *devastavit*, and prayed a general account. In 1879, Julian Hartridge died testate, and Mary M. Hartridge qualified as his executrix. On June 3, 1879, counsel for complainant took the following order:

*"William E. Howth and others vs. George S. Owens and others.*

"The complainant suggests that since the last term of the court Julian Hartridge, one of the defendants, has died, and on their motion it is ordered that his name be stricken from the cause, and that the cause proceed against the other defendants. It is further ordered that the time for taking testimony in said case be extended to the first day of the next term.

"JOSEPH P. BRADLEY, Circuit Justice."

At this term the cause came on for final hearing and the defendant George S. Owens, for himself and as executor of Thomas E. Lloyd, who had long ago died, filed a plea in bar, setting forth the fact that Mary M. Hartridge, as the executrix of Julian Hartridge, was a necessary party, and that the complainants having voluntarily dismissed the bill as to her, by striking the name of her testator therefrom, that the action was barred as to the co-executors. This plea was demurred to, and this court held that the bill having been framed for a general account of trust funds in the hands of trustees, that all of the executors were necessary parties, and sustained the plea; also, holding that a plea for want of proper parties is a plea in bar, and goes to the whole bill. *Howth v. Owens*, 29 Fed. Rep. 722. The complainants now make application for leave to file a bill of revivor against Mary M. Hartridge, as executrix of Julian Hartridge, and this is resisted by her.