

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT OF JUDICATURE.

FOR

THE COUNTY OF MERRIMACK, AUGUST TERM,

A. D. 1827.

BENJAMIN PRITCHARD *versus* SIMEON ATKINSON.

In a writ of entry judgment was rendered in favor of the demandant and the tenant having sued out a writ of review, died pending the review—it was held that the writ of review was abated by the death of the tenant.

This was a writ of entry in which the demandant counted upon his own seizin of land in Boscawen, and upon a disseizin by the tenant.

The cause had been tried upon the general issue, a verdict had been returned, and a judgment had been rendered thereon, in favor of the demandant, when Atkinson, having sued out this writ of review and entered the same here, died.

Woodbury, now moved the court, that the administrator of Atkinson might be admitted to prosecute the writ of review.

Mason, for Pritchard, objected that the right to the land did not survive to the administrator, and of course the remedy could not survive to him. The statute of June 21, 1797, 1 N. H. Laws, 108, provides that "actions of

ejection" shall not abate by reason of the death of either party. But if by "actions of ejection" writs of entry were here intended, the provision can be applied only to the case of a writ of entry brought to obtain possession of land under a mortgage; in which case, as the debt secured by the mortgage belongs to the administrator, the remedy has been holden to survive to him. 2 N. H. Rep. 71, *Bickford v. Daniels*. In no other case can an administrator, as such, maintain a writ of entry, and for the very plain reason that in no other case has he any interest in the real estate.

Pritchard
v.
Atkinson.

By the court. The general rule is, that in a writ of entry, if the demandant or tenant die pending the suit, neither the heir, nor the executor or administrator can prosecute or defend, but the writ necessarily abates. Stearns on Real Actions, 199; 2 Mass. Rep. 480; Com. Dig. "Abatement" H 32—34.

It is also a general rule that executors and administrators cannot maintain an action to recover seizin of the land of their testators or intestates; because in general they have no interest in the real estate. 2 N. H. Rep. 72; 3 N. H. Rep. 306.

To this rule, however, estates of testators or intestates in land holden by them in mortgage, form an exception, and it has been holden that an executor or administrator may maintain a writ of entry upon a mortgage. 2 N. H. Rep. 27; 16 Mass. Rep. 18, *Smith v. Dyer*; Stearns, 258.

It has however been supposed that where the statute of June 21, 1797, to which counsel have alluded, declares that "actions of ejection" shall not abate by the death of either party, writs of entry were intended. But if this supposition be well founded, it is clear that the provision can be applied only to the case of mortgages, in which executors and administrators have an interest, and not to other real estate with which they have no concern, and will form only an exception to the general rule first abovementioned.

Prichard
v.
Atkinson.

It is settled, that a writ of review is affected by the death of a party in the same manner as an original writ. We are therefore of opinion, as it is not suggested that the demandant's title is under a mortgage, that the administrator of the tenant cannot be legally admitted to prosecute the review.

Writ of review abated.

JEREMIAH TILTON *versus* ISAAC PARKER and another.

It is competent to the court in its discretion to quash a writ upon motion for a defect of service, or put the defendant to plead the matter in abatement.

Where there were two defendants in review, one of whom was supposed both in the original writ and in the writ of review to be an inhabitant of a town in this state, it was held that a service of the writ of review upon their attorney who had appeared in the cause was insufficient. And if at the time of such service both the defendants were in fact inhabitants of another state, it was held that affidavits showing that fact, could not cure the defect of service; but might furnish a ground for leave to amend the writ of review in such manner as to make the service good.

This was a writ of review tested the 12th April, 1826, in which the defendants in review were described as follows: "Isaac Parker of Boston in the county of Suffolk and commonwealth of Massachusetts, and Jonas M. Melville of Jaffrey in our county of Cheshire, merchants and late partners in trade under the name and firm of Isaac Parker and company."

The sheriff's return of the service of the writ was as follows:

"Merrimack, ss. July 7, 1826. I have this day served the within precept on the within named defendants by reading this precept in the presence and hearing of