HANNUM'S HEIRS *v.* WALLACE.

KNOXVILLE, SEPTEMBER, 1848.

Guardian ad litem—Cannot Submit the case to Arbitration. A guardian ad litem for infant defendants in an action of ejectment, commenced against the ancestor and revived by *scire facias* against the infant heirs, may waive service of a copy of the declaration and the notice required by statute, and agree that the suit shall be revived at the term at which the suggestion of death is made, when it is manifest that such course is obviously to the advantage of the infants, but he cannot submit the cause to arbitration. [Cited in Frazier v. Pankey, 1 Swan, 78, and Wheatley v. Harvey, 1 Swan, 486.]

Cited in: 12 Heis., 20.

[129] Wallace sued Hannum in ejectment for land in Blount county. During the pendency of the sunt Hannum died. His death was suggested at the May term, in 1845. At that term Ann Eliza H. was appointed by the court guardian to defend the suit for the minors. A *scire facias* was issued, and was made known to the guardian and to the minors, and at the same term, the parties appearing by attorney, an entry was made that the action should be revived against the heirs at law of Hannum, and that by consent it was referred. The arbitrators made an award, which was made the judgment of the court, in opposition to the objections of the guardian. The defendant appealed.

W. G. Swan, for plaintiff in error.

1. The rule of reference, made at the May term, 1845, conferred no authority upon the arbitrators, as the cause had not been revived. The act of 1819, ch. 16, sec. 4, provides that ejectment causes shall not abate by the death of the defendant, but may be revived against the heirs or devisees of the defendant. This cause was reinstated by bringing the heirs, and not devisees, or Hannum before the court; whereas the record shows Hannum had made a will.

2. Though the cause may have been properly revived, the guardian *pendente lite* had no authority to submit it to arbitration. Such a guardian being only a nominal party to "defend the suit," and that, too, under the [130] immediate control of the court, he is circumscribed to a litigation of the cause in the court appointing him, and he cannot transfer it to another forum. The nature of his office and his power is distinctly set forth in the act of 1819, which prescribes his office and power to be "to defend the suit." This act, being in derogation of the common law, must receive a strict construction. Consequently no other

than authority "to defend the suit" is given to a guardian *pendente lite* in an ejectment cause.

R. H. Hynds, for defendant in error.

1. The principal question in this case is whether a guardian *ad litem* can submit the cause of his wards to arbitration. It is insisted for the defendant in error that a guardian may submit to arbitration on behalf of his wards. Weed *v.* Ellis, 3 Cains, 253; Weston *v.* Stewart, 2 Fairf. 326; U. S. Dig. 483; 1 Steph. N. P. 56. In this case the submission was by rule of court, and, as the assent of the court in which the case was pending was had to the submission, it is believed there can be no legal objection urged against it.

2. The cause was properly revived in the court below. As to reviving the case, see act of 1819, ch. 16. The guardian *ad litem* being appointed by the court to conduct the defense of the cause, on behalf of the minors, might assent to anything having for its object to facilitate the trial of the case and save costs. For this purpose the guardian might consent to continuances, might assent to the taking of depositions, and move notice of time and place for taking them; and it is also insisted it was competent for the guardian to waive the issuance and service of copies of the declaration, and agree to the [131] revival. There is no error in the proceedings of the court below in reviving this suit against the plaintiffs in error.

H. Maynard, for plaintiff in error.

1. The suit was revived by appointing a guardian *ad litem* and issuing *scire facias.*

The act of 1819, ch. 16, sec. 4, directs that suit be revived by serving a copy of the declaration, with a notice to appear and defend.

The act requires the action of ejectment to be revived against the heirs or devisees, clearly implying that when the deceased leaves a will the suit is to be revived against his devisees.

The record shows that Eliza Ann Hannum, the widow, is the executrix of the deceased. The suit should have been revived against his devisees, and not against his heirs.

Section 6 of the act, providing for non-resident heirs, declares that the suit may be revived by strictly following the provisions of the act, even if the heirs be not before the court, giving the heirs power, at any time, to change their guardian, on application to the coourt—implying that, in the case of resident heirs, they are to be in court with, as well as by, their guardian.

In this case the defendants appeared by attorney, not in person. They had no power to appoint an attorney. By the terms of the *scire facias* they were not called into court in person till the succeeding term, and not till then were they legally before the court. And, until the heirs were legally in court, neither their guardian *ad litem* nor any attorney appointed by her could consent to the revival of the suit against the heirs.

[132] At the time of the submission the defendants were not legally in court, and the suit was not properly revived.

2. Kid on Awards, 35, says: "It is a general rule that every one who is capable of making a disposition of his property, or a release of his right, may make a submission to an award, but not one can who is either under a civil or natural incapacity of contracting."

"On the principle that an infant cannot bind himself for anything but necessaries, it is clear he cannot be party to a submission." Kid on Awards, 35.

"An award, when an infant is a party to the submission, is not, at law, at all events during the infancy, binding either on the infant or any other party to the submission." 1 Steph. N. P. 56, and authorities cited.

In Baker *v.* Lovitt, C. J. Parsons says: "If an infant submit his rights to arbitration, he will not be bound by the award, from a presumed incompetency to choose suitable arbitrators." 6 Mass. 80. See, also, 6 Munf. 458.

A guardian has no right to dispose of the real estate of his ward, nor can he make any submission respecting the realty. See act 1762, ch. 5, secs. 30, 13; Kent's Com.; Kid on Awards, 47; 1 Steph. N. P. 56.

Under the act of 1819, ch. 16, the guardian to be appointed pending the suit is "to defend the suit," not to compromise or to arbitrate it.

In the present case the parties appeared "by their attorneys," and by consent the cause is revived against the heirs at law of Henry Hannuh, deceased, "and thereupon, by consent, this cause is referred, etc." It does not clearly appear whether by consent of the heirs or their attorneys.

The latter had no right or power to submit the cause to arbitration. 5 Hay. 65.

[133] McKINNEY, J., delivered the opinion of the court.

This is an action of ejectment, brought in the circuit court of Blount county, for the recovery of three lots of ground, situated in the town of Maryville.

At the May term, in 1845, of said circuit court, the death of Henry Hannum, the sole defendant in the action, was suggested, and it was further suggested that he had left several minor heirs, who had no regular guardian, and thereupon Ann Eliza Hannum, the widow and personal representative of the estate, was appointed by the court guardian *ad litem* for said minors, and it was ordered that a *scire facias* issue, requiring them to appear and show cause why this suit should not be revived against them. A *scire facias* was accordingly issued, which was made known to said minor heirs, and also to said guardian, and was returned at the same term at which the death was suggested. The record exhibits, on a subsequent day of the same term, an entry, as follows: "By consent of parties this suit is revived against the said defendants, heirs at law of the said Henry Hannum, deceased, and thereupon, by consent, this cause is referred to the arbitrament and award of Thomas C. Lyon and John H. Crozier, Esqrs., and if they can not agree they are authorized to choose a third person. And said arbitrators are authorized to settle said cause on principles of law and equity and a spirit of compromise —having regard to the interest of both parties—which award, when so made, shall be made the judgment of the court therein." An award was made and returned to a subsequent term of the court, to which various exceptions were filed on behalf of the plaintiffs in error; but the exceptions were overruled by the court, and judgment was rendered thereon. The award need [134] not be noticed, as it is not deemed necessary to discuss any of the questions arising thereon; our consideration of the case will be confined to two preliminary points, made and relied upon by the counsel for the plaintiffs in error: 1st. Was the suit properly revived? 2d. Had the guardian *ad litem* power to make a submission to an award?

1. Previous to the act of 1819, ch. 16, the death of a sole defendant in an action of ejectment worked an abatement of the suit. By the 44th section of that act it is provided that the "defendant's death, pending the action of ejectment, shall no longer abate the suit, but the same may be revived within two terms, by serving a copy of the declaration, filed in said action, on the heirs or devisees of the defendant, or, if they be minors, on their guardian or guardians, and also a notice to appear and defend said suit." The 5th section empowers the court in which the suit is pending, if the heirs are minors without a regular guardian, to appoint a guardian to defend said suit, and provides that notice of the appointment as guardian, and also of the pendency of said suit, shall be served upon said guardian at last three months before the succeeding term of the court, and before said

suit shall stand for trial and, if such notice be not served upon the guardian in the manner prescribed, and the length of time required, said guardian shall not be compelled to go into trial at the first term after such notice served upon him, but the suit shall stand over until the succeeding term thereafter.

From the limited nature of the power of a guardian *ad litem*, and the vigilant and zealous care with which the rights of infants are guarded in the court, especially where their interests in real property are involved, it is supposed that the guardian in this case had no authority to consent that the suit should be revived in the mode [135] in which it was done, or to waive or dispense with any of the requirements of the above-recited act; that, to be operative against the minor defendants, the revivor must be in strict conformity with the letter of the act, and that upon this ground the revivor of this suit, in the mode in which it was attempted to be effected, was irregular and void, and consequently the suit abated. We think that, in reference to mere matters of form preliminary to a trial, and which can not, ordinarily, affect or prejudice the merits of the case or the interests of the minors, a guardian *ad litem* may exercise a sound discretion; and that for the purpose of saving delay and as useless accumulation of costs, and to expedite the final termination of the suit, such guardian may, if acting fairly and in good faith, as in this case, consent to waive service of a copy of the declaration and the notice required by the act, and agree that the suit shall be revived at the term at which the suggestion of the death is made, when it is manifest that such course, so far from being prejudicial to the interests of the heirs, will obviously be to their advantage. We are, therefore, of opinion that this suit was properly revived against the plaintiff in error, and stood regularly for trial in said court.

2. Had the guardian *ad litem* power to submit to an arbitration? We think not. It is conceded, in argument, that the minor defendants could not themselves make a submission to an award; but it is insisted by the counsel for the defendant in error that the guardian *ad litem* had competent power on their behalf to submit for them, and that such submission is binding upon them. The question whether a regular guardian is empowered to make a submission to arbitration in behalf of his wards, in any case in which their interests in real property are involved, [136] does not arise upon the record before us, and need not, therefore, be considered in this case. But however this may be, as respects a regular guardian, it is very clear that no such power or authority is possessed by a guardian *ad litem*. And it may be remarked here that the power and duty of such guar-

dian are limited and strictly confined to the defense of the particular suit in which he is appointed. He is to defend the suit in the court from which he derives his authority, according to the rule and principles of law applicable to the case as administered in that tribunal, and in conformity with the ordinary mode of trial and practice of the court in similar cases. It is not within the scope of his authority or duty to consent to change the tribunal for the trial, or that the decision shall be upon principles other than those applicable to like cases in the forum in which the suit is pending. His special and restricted power admit of the exercise of no such discretion.

We hold, therefore, that the submission to an award made in this case was unauthorized and void; that the court erred in rendering judgment thereon. The judgment of the circuit court will be reversed, the submission and award set aside, and the case remanded to the circuit court of Blount county, to be tried upon its merits.

HUFF *v.* LAKE.

KNOXVILLE, SEPTEMBER, 1848.

1. **Ejectment—Tenant in Possession.** In an action of ejectment, the tenant in possession is a party by service of process, and so continues, although the landlord appears, gives security for costs, and enters into the consent rule, and, if the landlord die afterwards, his death leaves the case as it stood before he was made a defendant, the tenant in possession being still a party entitled to come in and defend; but if he do not, the plaintiff is entitled to judgment by default. [Cited in Wallen v. Huff, 3 Sneed, 83.]
2. **Ejectment—Death of Landlord—Revivor.** The act of 1819, 16, 4, 5 (Code, § 3225), providing that the death of a defendant in ejectment shall not abate the suit, but the same may be revived against the heirs or devisees, does not require the plaintiff to make such heirs parties on pain of abatement of the suit, but gives an additional remedy which may be pursued or not.
3. **Ejectment—Amendment of Term of Lease.** Where the term of lease laid in the declaration in ejectment expires pending the litigation, there is nothing for the plaintiff to recover, but he should have leave to amend his declaration, at any time, in this regard, as of course, the lease being a mere fiction. [The fictitious character of the action has been changed by statute. Code, § 3230, et seq.]

[137] This action of ejectment was tried in the circuit court of Claibourne county, by Boyd, special judge, at the September term, 1848, and judgment rendered for the defendant. Plaintiff appealed.