

Gregg Vs. Forsyth

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SooperKanoon Citation : sooperkanoon.com/81221

Court : US Supreme Court

Decided On : 1864

Appeal No. : 69 U.S. 56

Appellant : Gregg

Respondent : Forsyth

Judgement :

Gregg v. Forsyth - 69 U.S. 56 (1864)

U.S. Supreme Court Gregg v. Forsyth, 69 U.S. 2 Wall. 56 56 (1864)

Gregg v. Forsyth

69 U.S. (2 Wall.) 56

ERROR TO THE CIRCUIT

COURT FOR ILLINOIS

SYLLABUS

Error does not lie to a refusal of the circuit court to award a writ of restitution in ejection.

Forsyth had brought ejectment against Gregg in the Circuit Court for Illinois, and obtained judgment for the land sued for. On writ of error taken by Gregg, this Court reversed that judgment and remitted the case with directions to issue a *venire de novo*. Between the time, however, that the circuit court gave its judgment of recovery and that when this Court gave *its* of reversal, Forsyth had been put in possession of the premises by a *habere facias*, and had collected, moreover, the costs of the suit.

As soon as the mandate of this Court reversing the judgment was sent down to the court below, but before it had been filed or a rule entered in pursuance of its directions, Gregg moved the court for a writ of restitution. This motion the Court refused to grant. Whereupon, a writ of error -- the present writ -- was brought.

MR. JUSTICE NELSON delivered the opinion of the Court.

Upon the facts of this case, it will be seen that at the time the motion was made in the court below, the cause was not then pending in the Court. Although the mandate had been

Page 69 U. S. 57

sent down to the circuit from this Court it had not been filed there, nor had the rule been entered in pursuance of its directions reversing the judgment. The court had not, therefore, obtained possession of the cause, and this was doubtless the reason for refusing the motion for restitution. The plaintiffs in error were entitled to restitution both of the premises and costs on the reversal of the judgment, and the modern practice is to apply to the court on the coming down of the mandate from the appellate tribunal and the entry of the judgment of reversal for a writ of restitution, setting forth the facts entitling the party to the remedy and giving notice of the motion to the adverse party. The earlier and more formal remedy was by *scire facias*. [[Footnote 1](#)]

It seems that the writ of restitution may be granted though a new *venire* has been directed. In *Smith's Lessee v. Trabue's Heirs*, [[Footnote 2](#)] this Court held that a writ of error would not lie to an order of the circuit court awarding a writ of

restitution on motion, and dismissed the case for want of jurisdiction. The writ in the present case must be dismissed for the same reason. The order is not considered a final judgment within the meaning of the Judiciary Act.

Dismissal accordingly.

[[Footnote 1](#)]

Rex v. Leaven, 2 Salkeld 558; *Sympson v. Juxon*, Cro.Jac. 699; 2 Sellon's Prac. 387; 2 Tidd's *do.* 1033, 1188; *Safford v. Slevens*, 2 Wendell 164; *Close v. Stuart*, 4 *id.* 95; [Smith's Lessee v. Trabue's Heirs](#), 9 Pet. 4; *Jackson v. Hasbrouk*, 5 Johnson 366; *Cassel v. Duncan*, 2 Sergeant & Rawle 57; *Russel v. Gray*, 6 *id.* 208; *Ranck v. Backer*, 13 *id.* 41.

[[Footnote 2](#)]

[34 U. S. 9](#) Pet. 4.