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**Moses Vs. Wooster**

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**SooperKanoon Citation** : sooperkanoon.com/85005

**Court** : US Supreme Court

**Decided On :** Nov-02-1885

**Appeal No.** : 115 U.S. 285

**Appellant** : Moses

**Respondent** : Wooster

**Judgement** :

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U.S. Supreme Court Moses v. Wooster, 115 U.S. 285 (1885)

**Moses v. Wooster**

**Submitted October 19, 1885**

**Decided November 2, 1885**

**115 U.S. 285**

*ORIGINAL MOTION, ENTITLED IN A CAUSE PENDING ON APPEAL FROM THE CIRCUIT*

*COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK*

## SYLLABUS

The plaintiff below obtained a decree in equity for damages and an injunction against three defendants who appealed. After docketing the appeal, one appellant died. The survivors suggested his death, and an order was issued

under Rule 15, 1, for notice to his representatives. This was duly published. The representatives not appearing, the surviving appellants moved that the action abate as to the deceased, and proceed at the suit of the survivors. *Held* that the suit proceed at the suit of the survivors.

The suit below was in equity and brought by George H. Wooster, the appellee, against Solomon Moses, Gotcho Blum, and Solomon Weil, partners under the name of Moses, Blum & Weil, for an infringement of letters patent. A final decree for an injunction and damages was rendered against the defendants May 23, 1883. From this decree all the defendants appealed, and the appeal was docketed here October 12, 1883. Blum died January 2, 1884. On the 11th of April, 1885, Wooster appeared in this Court and suggested his death, whereupon the usual order under Rule 15, 1, was entered that unless his representatives should become parties within the first ten days of this term, the appeal would be dismissed. Proof of the due publication of a copy of this order has been made, but the representatives of the deceased appellant have not appeared. The surviving appellants now move that the action abate as to the decedent, but that it proceed at their suit as survivors.

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MR. CHIEF JUSTICE WAITE delivered the opinion of the Court. After stating the facts in the language above reported, he continued:

The Judiciary Act of 1789, 1 Stat. 90, c. 20, 31, provided that

"If there be two or more plaintiffs or defendants and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against

the surviving defendant or defendants, the writ or action shall not be thereby abated, but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

This was reenacted in the Revised Statutes as 956, and is substantially a copy of the act of 8 and 9 W. III., c. 11, 7, which it was held in *Clarke v. Rippon,* 1 B. & Ald. 587, was applicable to writs of error. Lord Ellenborough, in giving that judgment, said:

"The proceeding is an action which is commenced by a writ, and the cause of action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action."

This Court gave the same effect to our statute in *McKinney v. Carroll,* 12 Pet. 66.

Appeals to this Court from the circuit and district courts are "subject to the same rules, regulations, and restrictions as are or may be prescribed by law in cases of writs of error." Rev.Stat. 1012. The cause of action in this appeal -- that is to say "the damage sustained by the parties in the previous decree" -- attaches to the surviving appellants. All the defendants were enjoined from infringing the patented machine, and all were made liable for the payment of the damages which the patentee had sustained by their joint acts as partners. Clearly, therefore, the case is within the statute, and may be proceeded with accordingly. The cause of action is one that survives to the surviving appellants.

Undoubtedly cases may arise in which the presence of the representatives of a deceased appellant will be required for the

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prosecution of an appeal notwithstanding the survivorship of others. If that should be so, the court can with propriety direct that the appeal be dismissed, unless it be properly revived within a limited time. The House of Lords made such an order in

*Blake v. Bugle,* a note of which is found in Macqueen's Practice H. of L. 224. Here, however, there is no need of a revivor that substantial justice may be done. The decree below was against all the defendants jointly, upon a joint cause of action. It affected all alike, and the interest of the decedent is in no way separate or distinct from the others. If the representatives of a deceased appellant voluntarily come in and ask to be made parties, they may be admitted. Such a course was adopted by the House of Lords in *Thorpe v. Mattingley,* 1 Phil. 200. In the present case, the representatives of the decedent, although notified, do not appear.

*It is proper, therefore, that the appeal should proceed under the statute at the suit of the survivors, and an entry to that effect may be made.*

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