Barnitz' Lessee Vs. Casey

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Appeal No. : 11 U.S. 456

Appellant : Barnitz' Lessee

Respondent : Casey

Judgement :

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Barnitz' Lessee v. Casey

11 U.S. (7 Cranch) 456

ERROR TO THE CIRCUIT COURT

FOR THE DISTRICT OF MARYLAND

SYLLABUS

The statute of descents in Maryland has not declared how an intestate estate shall descend which was derived to the intestate from his half-brother, or from his brother of the whole blood, or from his son or daughter, or from his wife, but such

estates are left to descend as at common law.

A devise to A. in fee, and if he shall die under the age of twenty-one years and without issue then to B. in fee, is a good executory devise, and if B. die before the contingency happen, it devolves upon his heir, and so from heir to heir until the contingency happen, when it vests absolutely in him only who can then make himself heir to B., the executory devisee. And although A. be the heir at law of B., yet the executory devise thus devolving on him is not merged in the precedent estate, but, on the death of A., devolves to the next heir of B.

It seems very clear that at common law, contingent remainders and executory devises are transmissible to the heirs of the party to whom they are limited if he chance to die before the contingency happens. In such case, it does not, however, vest absolutely in the first heir, so as upon his death to carry it to his heir at law, who is not heir at law of the first devisee, but it devolves from heir to heir, and vests absolutely in him only who can make himself heir of the first devisee, at the time when the contingency happens, and the executory devisee falls into possession.

One tenant in common cannot maintain ejectment against his co-tenant without actual ouster.

Error to the Circuit Court for the District of Maryland in an ejectment brought by the lessee of Barnitz against Casey to try the title of Barnitz to certain real estate in Baltimore.

The facts of the case were stated by STORY, J. in delivering the opinion of the Court, as follows:

On or about 6 Feb., 1780, Daniel Barnitz died seized of the premises in the declaration mentioned, having, by his will devised the same to his wife, Catharine Barnitz, in fee, and leaving issue by his said wife, an only child and heir, Elizabeth Barnitz, who intermarried with one Charles McConnell, by whom she had an only child, John McConnell, after whose birth, and sometime in 1781, Charles McConnell died. Afterwards, his widow, Elizabeth, intermarried with one John

Hammond, by whom she had one child only, John Barnitz Hammond, and died on 22 April, 1788. After her death, John Hammond intermarried with Elizabeth Anderson and died on 7 April 1805, leaving issue by the last marriage, Jane B. Hammond and Henry Hammond, his heirs at law, who are now alive, under whom the defendant in ejectment claims. On 7 April, 1794, Catharine Barnitz died seized of the premises,

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having first duly made her last will and testament. By that will she devised to the said John McConnell in fee, two certain parcels of land. She then devised another parcel of land, including her mansion house to the said John Barnitz Hammond to the intent and uses following, *viz.,* subject (as to the rents thereof) to certain trusts for the maintenance and education of the said John Barnitz Hammond and for the payment of certain specific debts of the testatrix,

"to the use of John Hammond, the father, for and during the minority of the said John B. Hammond, if he shall so long live, provided the said John Hammond shall maintain, clothe, and educate the said John B. Hammond out of the rents thereof during his minority, and from and immediately after the said John B. Hammond shall arrive to the age of 21 years or the death of the said John Hammond, his father, which shall first happen,"

then to the said John B. Hammond in fee. The testatrix then provides,

"and if it should hereafter happen that the said John McConnell should die before he shall arrive to the age of 21 years and without issue, then I give, devise, and bequeath all the estate of the said John McConnell which is hereby devised to him to go immediately to the said John B. Hammond, his heirs and assigns forever. And if it should hereafter happen that the said John B. Hammond should die before he shall arrive to the age of 21 years and without issue, then and in such case, after the payment of my debts as above mentioned, I give, bequeath, and devise [the same land and mansion house before devised to John B. Hammond] to the said John Hammond, his heirs and assigns forever, and also all the residue

of estate hereinbefore or after devised to the said John B. Hammond, and not hereby otherwise disposed of, I then and in such case give and devise the same to the said John McConnell, to hold to him, his heirs and assigns forever from and immediately after the death of the said John B. Hammond as aforesaid, and in case of the death of both of my grandsons under age and without issue as aforesaid, then I give, devise, and bequeath all that part of my estate which I have hereinbefore given to the said John McConnell to Charles Barnitz, of . . . to hold to him, his heirs and assigns forever. "

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The testatrix then provides for the payment of her debts by a sale, if necessary, of some of her lots of land, on or near church hill in Baltimore, and then proceeds,

"And I give and devise all the rest and residue of the said lots on or near church hill aforesaid, and all my estate therein (subject nevertheless to the devises aforesaid) to my said grandsons John McConnell and John B. Hammond, their heirs and assigns forever, to be equally divided between them, share and share alike, as tenants in common and not as joint tenants."

After some intermediate bequests, the testatrix devises

"all the rest, residue, and remainder of her estate, real and personal, to the said John McConnell and John B. Hammond, their heirs and assigns forever, to be equally divided between them, share and share alike."

John McConnell attained his full age of 21 years, married, had issue, and afterwards, on 7 April, 1802, died without leaving any surviving issue. And John B. Hammond died on 12 February, 1808, under the age of 21 years, and without issue.

The lessors of the plaintiff are the children and heirs at law of Charles Barnitz, who was the only brother of Daniel Barnitz, the testator. And upon the defect of lineal heirs, the said lessors claim as next heirs, in blood, of John McConnell, on the part of his mother Elizabeth Barnitz, the daughter of Daniel Barnitz. It is admitted that

the inheritable blood is extinct on the part of Charles McConnell, the father of John McConnell.

At the death of John B. Hammond, the property consisted of four descriptions, which it may be proper to enumerate.

1. The land specifically devised to John McConnell, with a limitation over to John B. Hammond.

2. The land specifically devised to John B. Hammond, with a limitation over in fee to his father.

3. The moiety of the church hill lots, and the residuary estate devised to John McConnell, in fee.

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4. The moiety of the church hill lots, and the residuary estate devised to John B. Hammond in fee, with a limitation over to John McConnell.

At the time of the death of Catharine Barnitz (as she survived her daughter), her two grandsons, McConnell and Hammond, were her heirs at law.

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MR. CHIEF JUSTICE MARSHALL, WASHINGTON, DUVALL and STORY, J.

The Court having taken time since last term to advise,

STORY, J. (after stating the facts of the case), delivered the opinion of the Court as follows:

It is true that the general rule is that an heir shall not take by devise when he may take the same estate in the land by descent. 1 Roll.Abr. 626; 30 Hob. 30; 1 Salk. 242; 1 Bl. 22.

But it is not denied that all the estates which each of the grandsons derived under the will were estates by purchase. Admitting the executory devises over to be good, there could be no doubt as to any part of the estates, for the estates are of a quality different from what the parties would have taken in the course of descent.

It has been argued by the plaintiff's counsel upon the foregoing facts that as to the whole estate immediately devised to John McConnell, the lessors of the plaintiff are entitled to recover, in the events which have happened, as his heirs *ex parte materna,* and that as to the estate devised to him upon the contingency of the death of John B. Hammond under age and without issue, the lessors of the plaintiff are entitled to recover as the heirs at law of John McConnell at the time when the contingency happened, although not heirs at the time of his death.

The decision of these points depends upon the true construction of the Statute of Descents of Maryland and the application thereto of the principles of the common law.

This Statute of Descents, 1786, ch. 45, after reciting that the law of descents which originated with the feudal system and military tenures, is contrary to justice, and ought to be abolished, enacts

"That if any person seized of an estate . . . shall die intestate thereof, such lands . . . shall descend to the kindred, male and female, of such person in the following order, to-wit, first, to the child or children, and their descendants, if any, equally, and if no child or descendant, and the estate descended to the intestate on the part of the father, then to the father, and if no father living, then to the brothers and sisters of the intestate of the blood of the father, and their descendants equally, and if no brother or sister as aforesaid, or descendant from such brother or sister, then to the grandfather on the part of the father, and if no such grandfather living, then to the descendants of such grandfather and their descendants, in equal degree equally, and if no descendant of such grandfather, then to the father of such grandfather, and if none such living, then to the descendants of the father of

such grandfather in equal degree, and so on, passing to the next lineal male paternal ancestor, and if none such, to his descendants in equal degree, without end; and if no paternal ancestor or descendant from such ancestor, then to the mother of the intestate, and if no mother living, to her descendants in equal degree equally, and if no mother living, or descendants from such mother, then to the maternal ancestors and their descendants in the same manner as is above directed as to the paternal ancestors and their descendants. And if the estate descended to the intestate on the part of the mother, and the intestate shall die without any child or descendant as aforesaid, then the estate shall go to the mother, and if no mother living, then to the brothers and sisters of the intestate of the blood of the mother, and their descendants in equal degree equally, and if no such brother or sister or descendant of such brother or sister, then to the grandfather on the part of the mother, and if no such grandfather living, then to his descendants in equal degree equally, and if no such descendant

of such grandfather then to the father of such grandfather, and if none such living, then to his descendants in equal degree, and so on, passing to the next male maternal ancestor, and if none such living, to his descendants in equal degree, and if no such maternal ancestor, or descendant from any maternal ancestor, then to the father of the intestate, and if no father living, to his descendants in equal degree equally, and if no father living, or descendant from the father, then to the paternal ancestors and their descendants, in the same manner as is above directed as to the maternal ancestors."

"And if the estate is or shall be vested in the intestate by purchase, and not derived from or through either of his ancestors, and there be no child or descendant of such intestate, then the estate shall descend to the brothers and sisters of such intestate of the whole blood and their descendants in equal degree equally, and if no brother or sister of the whole blood or descendant from such brother or sister, then to the brothers and sisters of the half-blood and their descendants, in equal degree equally, and if no brother or sister of the whole or half-blood, or any descendant from such brother or sister, then to the father, and if

no father living, then to the mother, and if no mother living, then to the grandfather on the part of the father, and if no such grandfather living, then to the descendants of such grandfather in equal degree equally, and if no such grandfather or any descendant from him, then to the grandfather on the part of the mother, and if no such grandfather, then to his descendants in equal degree equally, and so on without end, alternating the next male paternal ancestor and his descendants, and the next male maternal ancestor and his descendants, and giving preference to the paternal ancestor and his descendants; and if there be no descendants or kindred of the intestate as aforesaid to take the estate, then the same shall go to the husband or wife, as the case may be; and if the husband or wife be dead, then to his or her kindred in the like course as if such husband or wife had survived the intestate, and then had died entitled to the estate by purchase; and if the intestate has had more husbands or wives than one, and all shall die before such intestate, then the estate shall be equally divided among the kindred of the several husbands or wives in equal degree equally. "

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Three classes of cases are here in terms provided for.

1. "Estates descended to the intestate on the part of the father."

2. "Estates descended to the intestate on the part of the mother."

3. "Estates vested in the intestate by purchase and not derived from or through either of his ancestors."

The descent of an estate of purchase from brother to brother and from a son to a parent where the brother or the parent is the *propositus* is not directly within the language of the statute. For by the common law a descent from brother to brother is held to be an immediate descent, and not from or through the parents, and the express provision of the statute of Maryland as to estates of purchase necessarily involves the same conclusion, and the same may be declared of a descent from a child to a parent under the same statute.

It has been argued that the legislature intended to form a complete scheme of descents, and that the court ought not to construe any case to be a *casus omissus* if by any reasonable construction the words can be extended to embrace it. Both parties accede to this argument, but they apply it in a very different manner. The plaintiffs contend that the descent from brother to brother was meant to be included in the first and second classes of descents, as the parents were the common link of connection from and through whom the consanguinity was to be sought; that therefore the descent in such case is *ex parte paterna* or *materna,* as the father or mother happens to be the *commune vinculum.* And the plaintiffs rely on the words "and not derived from or through either of his ancestors," in the clause embracing the third class, as distinctly showing that the legislature deemed every case of descents to be completely within the preceding classes. On the other hand, the defendants contend that whatever might be the legislative supposition, it is impossible to support the position that a descent from brother to brother or from child to parent is a descent *ex parte paterna* or *materna.*

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It is therefore either a *casus omissus* or the words "and not derived from or through either of his ancestors" are to be considered not as qualifying and limiting the preceding words, but as either constituting a fourth class of cases, embracing all such as are not included in the three preceding classes, or as explaining estates by purchase to include all cases which are not paternal or maternal descents.

There are certainly intrinsic difficulties in admitting either of these constructions. If the legislature has proceeded on a mistake, it would be dangerous to declare that a court of law was bound to enlarge the natural import of words in order to supply deficiencies occasioned by that mistake. It would be still more dangerous to admit that because the legislature has expressed an intention to form a scheme of descents, the court was bound to bring every case within the specified classes. In the present case, equal violence would be done to the ordinary use of the terms employed by adopting the construction contended for by either party.

It is not a descent from or through the paternal or maternal line in the sense of the common law. Nor is it a purchase.

The words "and not derived from or through either of his ancestors" are manifestly used as explanatory of the legal import of purchase. They are the exact words which the common law selects to distinguish the estate of a purchaser from the estate of an heir.

It is obvious that the legislature uses the words "descent" and "purchase" in their technical and legal sense. They have also expressly provided for the case of a descent from brother to brother, passing by the parents, and of a parent from a child when there are no brothers or sisters. These descents must therefore be direct and immediate, and the former case is so deemed also at the common law. It is therefore, in our judgment, perfectly clear that a descent from brother to brother is not within the statute, and of course is a *casus omissus,* to be regulated by the common law.

To apply this to the present case. By the arrival of John McConnell at the age of 21 years, all the estates

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devised to him immediately became absolute estates in fee simple. On his death, they passed to his half-brother, John B. Hammond, and upon his death they passed to the heirs at law of the latter. The lessors of the plaintiff have therefore made no sufficient title thereto.

Let us now consider the second question: whether the lessors of the plaintiff have any title to the estates which were devised over to John McConnell upon the contingency of John B. Hammond's dying under age and without issue.

It has been argued by the defendant's counsel that this executory devise is void because the contingency is too remote.

It is the acknowledged rule that an executory devise is not too remote if the contingency may happen within a life or lives in being or 24 years and a few

months after.

In the present case, the contingency must have happened within 21 years at all events. For if John B. Hammond attained his full age, the estate vested absolutely. To have defeated the estate over, it was sufficient either that he attained his full age or died under age leaving issue. The authorities are conclusive on this point. 1 Wils. 140, 270; 2 Burr 873; 1 Saund. 174; 5 Bos. & Pul. 38; 12 East. 288; 2 Str. 1175. There is no validity, therefore, in this objection.

In the next place, it will be necessary to consider what is the nature of an executory devise as to its transmissibility to heirs where the devisee dies before the happening of the contingency.

And it seems very clear that at common law, contingent remainders and executory devises are transmissible to the heirs of the party to whom they are limited if he chance to die before the contingency happens. Pollexfen 54; 1 99; Cas.Temp.Talb. 117. In such case, however, it does not vest absolutely in the first heir so as upon his death to carry it to his heir at law, who is not heir at law of the first devisee, but it devolves from heir to heir, and vests absolutely in him only who can make himself heir to the first devisee at

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the time when the contingency happens and the executory devise fails into possession.

This rule is adopted in analogy to that rule of descent which requires that a person who claims a fee simple by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate must make himself heir of such purchaser at the time when that reversion or remainder falls into possession. Co.Lit. 11. (b) 14, (a) 3 42. Nor does it vary the legal result that the person to whom the preceding estate is devised, happens to be the heir of the executory devisee, for though on the death of the latter the executory devise devolves upon him, yet it is not merged in the preceding estate, but expects the regular happening of the contingency and then vests absolutely in the then heir of the

executory devisee. The case of *Goodright v. Searle,* 2 Wils. 29, is decisive on this point, and indeed runs on all fours with the present.

But it is contended that the Statute of Descents of Maryland has changed the rule of the common law in this respect, and has made the death of the intestate the point of time from which the descent and heirship are in every case to be traced. The third section, which is relied on for this purpose, enacts as follows:

"That no right in the inheritance shall accrue to or vest in any person other than to children of the intestate and their descendants unless such person is in being and capable in law to take as heir at the time of the intestate's death, but any child or descendant of the intestate, born after the death of the intestate, shall have the same right of inheritance as if born before the death of the intestate."

In our judgment, the conclusion drawn from this clause is not correct. The object of the section is to limit the natural capacity to take, as heirs, to persons in being at the time of the death of the intestate, where the estate is then capable of vesting in possession, and not to make persons heirs, who, if in being at the time, would not, by the common law, answer the description of absolute heirs, or to give a vested absolute interest, where the common law had given only a possible contingent interest. The legislature had in view cases of

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posthumous children, and cases where a descent to an heir had been defeated by the subsequent birth of a nearer heir. The argument of the defendants on this point ought not, therefore, to prevail. No question has been made as to the land specifiedly devised to John B. Hammond in fee with a limitation over to his father in fee. As that limitation over was a good executory devise, and, in the events which happened, took effect, it is very clear that the lessors of the plaintiff cannot claim title thereto. This is indeed conceded on all sides.

The result of this opinion accordingly is that the lessors of the plaintiff are entitled, as heirs of John McConnell, at the happening of the contingency, on the death of John B. Hammond, under age and without issue, to one moiety of the Church hill

lands, and the residuary estates as tenants in common with the heirs of John B. Hammond, but they are not entitled to any portion of the lands of which John McConnell had an absolute vested fee at the time of his decease.

As, however, a tenant in common cannot in general maintain an action of ejectment against his co-tenant, and there are no facts found in this case to prove an actual ouster and to take it out of the general rule, the consequence is that the judgment, in the opinion of a majority of the court, must be

Affirmed with costs.