

Davis Vs. Mason

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Court : US Supreme Court

Decided On : 1828

Appeal No. : 26 U.S. 503

Appellant : Davis

Respondent : Mason

Judgement :

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26 U.S. (1 Pet.) 503

SYLLABUS

In an action of ejectment to recover land in Kentucky, the law of real estate in Kentucky is the law of this Court in deciding the rights of the parties.

It seems that the rigid rules of the common law do not require that the husband shall have had actual seizin of the lands of the wife to entitle himself to a tenancy by curtesy in waste, or what is sometimes styled "wild lands."

If a right: of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband where no adverse possession exists.

At present it is fully settled in equity that the husband shall have curtesy of trust as well as of legal estates, of an equity of redemption, of a contingent use, or money to be laid out in lands.

Under the law of the State of Kentucky and the decisions of its courts upon it, a will with two witnesses is sufficient to pass real estate, and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will.

It is a settled rule in Kentucky that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it.

The lessee of Richard B. Mason commenced an action of ejectment in the Circuit Court for the District of Kentucky against John Davis and others tenants in possession for the recovery of eight thousand acres of land, claiming to recover the same under a right of entry under and by virtue of a grant from the State of Virginia to George Mason of Fairfax, dated 19 March, 1817.

William Mason and others conveyed by deed their interest in and to the land in contest, they being children of the patentee, to George Mason of Lexington, the eldest son of George Mason the patentee. George Mason the grantee and the father of the lessor died the ___ day of December, 1796, having first made his last will and testament, in a codicil to which, made on 3 November, 1796, he devised to the child of which his wife was then enceinte his Kentucky lands, "if the child should be born alive, and arrive at the age of twenty-one years, or married, whichever may first happen." Richard B. Mason, the lessor of the plaintiff, is, by the evidence in the cause, the posthumous child referred to in the codicil. This will was fully proved and admitted to record according to the laws of Kentucky, and was said to vest the title in Richard B. Mason.

At the trial of the cause in the circuit court, the plaintiffs in error requested the court, by instructions to the jury,

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1st. To exclude the depositions of Lund Washington and George Graham on the alleged ground that they were not taken and certified according to law.

2d. To exclude what the defendants designated as "the third codicil" annexed to the will of George Mason which it was said was not proved and certified according to law.

3d. That the plaintiff could not recover unless he could show that the land sued for was entered after George Mason the elder made his will, and not patented at his death.

4th. That if from the evidence they believe that the daughters of the patentee were dead before the commencement of this suit, they should find for the defendants, as the deed from the husbands did not pass the interest of the femmes, nor had the husbands a right by curtesy to the lands, as they never had other or further possession of the lands than that given by deed.

The court refused to give the several instructions prayed for, and a bill of exceptions was tendered upon which the case was brought before this Court. The facts of the case which appeared upon the record in connection with the matters contained in the exceptions are stated in the opinion of the Court.

The defendants in error insisted

1st. That the court should have excluded the third codicil. It was not, upon proof, ordered to be recorded by the County Court of Fairfax County. It is not certified as having been proved and ordered, or admitted to record. It was not proved upon the trial by any admissible and competent proof to have been executed by George Mason.

2d. That there was no competent proof upon the trial that the land in contest passed by conveyance to George Mason. It does not appear that they were not patented before the date of the will of George Mason and otherwise disposed of by him in his will. The plaintiff should have proved that the lands were acquired by the said George Mason after his will, and not having done so, the court should have given the instructions asked for on that point by defendants.

3d. The court erred in stating to the jury that the deed conveyed to George Mason the curtesy right of the husbands of the *feme covert*s, daughters of George Mason, Sr.

4th. The court erred in refusing to give the instructions asked for by defendants upon the other points stated in the bill of exceptions.

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MR. JUSTICE JOHNSON delivered the opinion of the Court:

The plaintiffs here were defendants below to an action of ejectment brought to recover eight thousand acres of land lying in the State of Kentucky.

The law of real estates in Kentucky, therefore, is the law of this Court in deciding on the rights of the parties. The plaintiffs below derive title under 1st, a patent to George Mason of Gunston issued in 1787; 2d, a deed of bargain and sale from seven out of nine legal representatives of the patentee, their brother, to George Mason of Lexington, executed in 1794; 3d, a codicil to the will of George Mason of Lexington, devising the premises to the lessor of the plaintiffs. Judgment was rendered for plaintiffs to recover eight-ninths of the premises. The defendants below relied on their possession, affecting to claim through the patent to the elder Mason, but adducing no evidence to connect themselves with it. The questions to be here decided are brought up by a bill of exceptions taken by the defendants below, and they will be considered as they regard the deduction of title, in the order in which they have been stated above.

The first question in this order relates to the deed executed by the representatives of Mason the elder to Mason the younger, under whose will the lessor of the plaintiffs makes title. No exception was taken to the proof upon which this deed went to the jury. The exceptions go to the nature and extent of the estate which passed under it. And first it was insisted that it could pass nothing unless the plaintiffs should show that the land sued for was entered after George Mason senior made his will, and not patented at his death, on the ground that otherwise it passed under his will, and did not descend to these donors.

But it is obvious that this instruction was properly refused, since the fact nowhere appears in the record that the elder Mason ever made a will competent in law to transfer real estate. The deed, it is true, purports to carry into effect his intentions towards his children, but *non constat* whether that intention had ever been signified otherwise than by parol or by an informal will. If a will had ever been executed with the formalities necessary to defeat the heir at law, the defendants should have availed themselves of it by proof.

The next instruction prayed for by defendants and rejected by the court, was

"That if from the evidence the jury believed that the daughters of the patentee were dead before the suit was brought, that then it ought to find for defendants as to the undivided interest of such daughters, and that the deed did not pass their interest."

The court instructed the

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jury that the deed did not pass the interest of the daughters, but passed the interest of their husbands, who were tenants by curtesy, although they had never had other or further possession of the land than what they acquired by deed.

To understand this part of the bill of exceptions, it is necessary to notice that from the record it appears that among the parties of the first part to the deed to G. Mason the younger were four daughters of G. Mason the elder and their

husbands; that the daughters had formally executed a release of inheritance under a commission issued from a court in Virginia, but because the states were then separated, as a judicial proceeding, it had no validity as to lands in Kentucky, and the lessor of the plaintiffs was compelled to stand upon the interest conveyed to him by the deeds of the husbands as tenants by the curtesy.

In order to prove the pedigree of the donors, the marriage, birth of issue &c., and of the sons-in-law of the elder Mason the testimony of two witnesses was introduced by plaintiffs, taken under the act of Congress. To the introduction of this testimony an objection was made and overruled, and this constituted another ground of exception, which however has been very properly waived by the counsel in argument here. It appears that the requisitions of the act have been well complied with.

This testimony, besides establishing the pedigree, marriage, and birth of issue, &c., of the husbands and their wives and identity of the lessor of the plaintiffs as devisees of G. Mason the younger, also goes to prove the death of some if not of all the daughters, and the exception is intended to raise the question whether in the absence of evidence of actual seizin, the husbands had good estates as tenants by the curtesy, in the portions of the land belonging to their respective wives; if they had not, then by the death of their wives, their estates were determined. To repel this objection to the vesting of the estate by the curtesy, evidence is introduced into the bill of exceptions to prove that

"the adverse possession of the premises, relied on by the defendants did not commence until after the execution of the deed and after the death of George Mason -- in other words, that the land was waste, or as is sometimes styled, wild lands,"

at the time of executing the deed and at all times before and down to the time of the devise, from George Mason, Jr., to the lessors of the plaintiff took effect.

It is believed that the rigid rules of the common law have never been applied to a wife's estate in lands of this description. In the State of New York, 8 John. 271,

these rules have been solemnly repelled, and we know of no adjudged case in any of the states in which they have been recognized as

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applicable. It would indeed be idle to compel an heir or purchaser to find his way through pathless deserts into lands still overrun by the aborigines in order to "break a twig," or "turn a sod," or "read a deed" before he could acquire a legal freehold. It may be very safely asserted that had a similar state of things existed in England when the conqueror introduced this tenure, the necessity of actual seizin as an incident to the husband's right would never have found its way across the channel.

It is true that Perkins and Littleton and other authors of high antiquity, and great authority lay down the necessity of actual seizin in very strong terms, and exemplify it by cases which strikingly illustrate the doctrine. But even they do not represent it as so unbending as to be uncontrolled by reason.

The distinction is taken between things which lie in livery and things which lie in grant, and with regard to the latter the seizin in law is enough, because they admit of no other, and as Lord Coke observes "the books say it would be unreasonable the husband should suffer, for what no industry of his could prevent," and further

"that the true reason is that the wife has those inheritances which lie in grant, and not in livery, when the right first descends upon her, for she hath a thing in grant when she has a right to it, and nobody else interposes to prevent it."

And in another place he says "a husband shall be tenant by curtesy, in respect of his wife's seizin in law, where it was impossible for him to get an actual seizin," for "the favor which the law shows to the husband that has issue by his wife *shall not be lost without some default* in him." So when describing what is livery of seizin and defining the distinction between livery and deed and livery in law, he says of the latter "if the feoffee claims the land, as near as he dares to approach it, for fear of death or battery, such entry in law shall execute the livery in law."

And as a proof that even in his time, the common law had begun to untrammel itself of the rigorous rule that livery of seizin or entry was indispensable to vesting a freehold, the fact may be cited that livery of seizin was held unnecessary to a fine, devise, surrender, release, or confirmation to lessee for years. The mode of conveyance by lease and release and some other modes, it is well known, arose out of an effort to disembarass the transfer of titles of an idle form which had survived the feudal system.

As it relates to the tenure by curtesy, the necessity of entry grew out of the rule which invariably existed that an entry must be made in order to vest a freehold, Co.Lit. 51, and out of that member of the definition of the tenure by curtesy which requires that it should be inheritable by the issue. When a descent was cast, the entry of the mother was necessary, or the

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heir made title direct from the grandfather, or other person last seized.

But in Kentucky, we understand, the livery of seizin is unheard of. Freeholds are acquired by patent or by deed or by descent, without any further ceremonies, and in tracing pedigree, the proof of entry, as successive descents are cast, is never considered as necessary to a recovery or in any mode affecting the course of descent.

If a *right of entry* therefore exists, it ought by analogy to be sufficient to sustain the tenure acquired by the husband where no adverse possession exists, as it is laid down in the books relative to a seizin in law "he has the thing if he has a right to have it." Such was not the ancient law, but the reason of it has ceased. It has been shown that in the most remote periods, exceptions had been introduced on the same ground, and in the most modern, the rule has been relaxed upon the same consideration. We ought not to be behind the British courts in the liberality of our views on the subject of this tenure. A husband, formerly, could not have curtesy of an use; that is, where his wife was *cestui que use*, Perkins' Curtesy, fo. 89, and this continued to be the law, down to the time of Baron Gilbert, Law of

Uses and Trusts 239, at present it is fully settled in equity that the husband shall have curtesy of a trust as well as of a legal estate, 2 Vern. 536; 1 P.W. 108; Atk. 606, of an equity of redemption, a contingent use, or money to be laid out in lands.

The case made out in the bill of exceptions is one in which there could not possibly have been any default in the husbands, since the disseizin by defendants did not take place until after the death of George Mason, Jr., and of consequence, after the transfer of title by the husbands and after the devise took effect in favor of the plaintiff's lessor.

These points being disposed of, it only remains to consider the questions raised upon the introduction of the will of George Mason, Jr., or rather of the codicil, under which the lessor of the plaintiffs makes title.

Under a law of the State of Kentucky and the decision of its courts upon it, a will with two witnesses is sufficient to pass real estate, and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will.

The objection here is that it does not appear from the exemplified copy that this codicil was duly proved, because the probate does not go to that codicil, but to another, and secondly because it appears to have been admitted to record on the testimony of a single witness.

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The probate purports "that the two codicils were proved by the oath of Daniel McCarty." From the exemplification it appears that at three several dates, the testator added to his will what he calls codicils, but as there is no signature to the first, we are satisfied that the first and second were well considered as making but one, and therefore that the probate, although purporting to go to two codicils only, was well considered as going to this, which but for the want of the signature to the first would have been the third codicil. What is decisive on this subject is that the first two codicils have no subscribing witness distinct from the last, and the name

of McCarty, the witness sworn, is subscribed to the second, or as the defendants contend it should be considered, to the third codicil.

With regard to the second exception to the sufficiency of the proof of this codicil, it can only be necessary to resort to adjudged cases as they seem conclusive to this point.

There were two witnesses to this codicil, to-wit, Thompson Mason and McCarty. McCarty only was sworn, and the probate upon which it was ordered to be recorded imports that the two codicils were proved by the oath of Daniel McCarty. In the case of *Harper v. Wilson*, decided in the Court of Appeals of the State of Kentucky in 1820, in which the right to lands was in controversy, the probate was in these words, "this will was produced in court, proved by the oath of Sarah Harper, a subscribing witness thereto, and ordered to be recorded." There was another subscribing witness to the will, and exception was taken to the sufficiency of the proof. The language of the court in that case was

"As to the proof of the execution of the will, it need only be remarked that its admission to record is sufficient to show that the witness by whom it was proven in that court established every fact essential to its due execution, and it is a settled rule that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it."

2 Marshall 467. The same doctrine has been since fully recognized in the case of *Turner v. Turner*, 1 Litt. 103, adjudged in the same court in 1822, and the identity of the certificate and facts in this case, with those in the case of *Harper v. Wilson*, leaves nothing for this Court to deliberate upon.

There is spread upon the record a considerable body of testimony taken by the court by which the will had been previously admitted to record, and which upon the face of it appears to have been taken in order to remove all doubt on the sufficiency of the will and authenticity of the attestations to it. But as it does not appear to have been followed up by any order

of that court, it was not taken into view in the bill of exceptions, and made no part of the evidence in the court below. It therefore only required this remark in order to prevent any misapprehension on this point.

We are of opinion that there was no error in the judgment below and that it be

Affirmed with costs.

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