

Mercer Vs. Selden

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Appeal No. : 42 U.S. 37

Appellant : Mercer

Respondent : Selden

Judgement :

Mercer v. Selden - 42 U.S. 37 (1843)

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Mercer v. Selden

42 U.S. (1 How.) 37

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF VIRGINIA

SYLLABUS

The statute of limitation of Virginia passed in 1735 barred the right of entry unless suit was brought within twenty years next after the cause of action accrued. The savings are infancy, coverture &c.;, and such persons are barred if they do not

bring their action within ten years next after their disabilities shall be removed.

The circumstances under which the defendant held in this particular case, constitute an adverse possession.

Disabilities which bring a person within the exceptions of the statute cannot be piled one upon another, but a party claiming the benefit of the proviso can only avail himself of the disability existing, when the right of action first accrued.

The general rule of law is that there must be an entry during coverture, to enable the husband to claim a tenancy by the curtesy.

The facts in the case are stated in the commencement of the opinion of the Court, which the reader is requested to turn to and peruse before referring to the sketch of the arguments of counsel.

The decision of the court being made to rest entirely upon the statute of limitations, all those branches of the argument relating

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to the invalidity of the deed from Selden and wife to Dr. Mackay, on account of its not having been read to her, and of a defect in its acknowledgment, are omitted.

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The opinion of the court was delivered by MR. JUSTICE Mc LEAN.

An action of ejectment was commenced by the lessors of the plaintiff to recover possession of certain undivided interests in a tract of land in Loudon County.

On the trial, the jury found a statement of facts, on which the questions of law mainly arise.

Mary Mason Selden was seized and possessed in fee simple of certain tracts of land in the County of Loudon, estimated to contain four thousand acres, a part of

which is the land in controversy. She intermarried with Mann Page, who died in 1779, leaving his wife and three infant children, John, William Byrd, and Jane Byrd. Mrs. Page continued a widow, seized in her own right, until 1782, when she married Wilson Cary Selden, who in right of his wife entered upon and held the lands. Soon after the marriage, Selden became guardian of the three infant children aforesaid, gave bonds &c.;, and continued to act as guardian during the minorities of the two sons and until the marriage of the daughter.

On 22 December, 1784, Selden and wife conveyed in fee simple to Cary Selden, father of the husband, the whole of the four thousand acres of land, with the exception of two thousand acres deeded to W. B. Page. Mrs. Selden was privily examined, as the statute requires. This deed was acknowledged and recorded by Selden 14 April, 1818, long after the decease of the grantee. On 1 January, 1785, Cary Selden and wife reconveyed the land, with the exception above stated to Wilson C. Selden, which deed was also recorded 14 April, 1818.

Selden and wife, previously to the execution of the above

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deed to Cary Selden made a deed to William Byrd Page, son of Mrs. Selden by her first marriage, for two thousand acres, part of the above tract of four thousand acres, which deed was never recorded and cannot now be found. From the time of their marriage, Selden and wife had their permanent dwelling in the County of Gloucester, until they removed to the County of Elizabeth City, where they established their residence. In September, 1787, Mrs. Selden being in a low state of health, accompanied by her husband on a return from the Springs, was taken extremely ill at Winchester, in Frederick County, Virginia, where she died on the 17th of that month. Two days previous to her death, Mrs. Selden with her husband, executed a second deed to William Byrd Page, for two thousand acres by certain metes and bounds, and also a deed to Dr. Robert Mackay for two thousand acres, being the residue of the four thousand acres in Loudon aforesaid. On the 17th, it being the day of her decease, the privy examination of Mrs. Selden was taken to the above deeds by three justices of the peace of Frederick County

under a commission issued by the clerk of Loudon County. Selden, on 8 October, 1787, acknowledged the above deeds, and they were ordered to be recorded. On 17 September aforesaid, and after the decease of Mrs. Selden Mackay reconveyed the land conveyed to him as above stated to Wilson C. Selden. This deed was recorded 8 October ensuing.

From the time of his marriage to the decease of Mrs. Selden, Selden, in right of his wife, held possession of the premises in controversy. After her death, he continued to hold possession, taking the rents, issues, and profits for his own use, claiming the land under the above deed. In 1818, when the legal sufficiency of that deed was questioned, he caused the deeds to and from his father to be recorded, as above stated, and so continued to claim the premises under both deeds and to exercise acts of ownership over the land until his death in 1835. Between the years 1796 and 1812, Selden sold, conveyed, and delivered possession to different persons, and among others to Thomas Swann, who had intermarried with Jane Byrd Page, various parcels of the land.

In April, 1794, Jane Byrd Page, with the consent of her guardian, she being under twenty-one years of age, married

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Thomas Swann, and died 31 October, 1812, leaving seven infant children, her heirs at law. Among others, Mary Scott, one of the lessors of the plaintiff, who, in June, 1818, being under twenty-one years of age, intermarried with John Mercer, one of the lessors of the plaintiff. In 1796, having received from Selden 640, Thomas Swann executed a receipt fully discharging him as guardian. John Page, the eldest son of Mrs. Selden died in 1800, having devised all his estate, real and personal, after the death of his widow, Elizabeth K. Page, to two of the children of his brother William Byrd Page, to-wit, William B. Page and Mary M. Page, and to three of the children of his sister, Jane B. Swann, to-wit: Edward, Mary, and Thomas, as tenants in common. Edward and Thomas died intestate and without issue. Mary intermarried as above stated with John Mercer.

After John Page, the above testator, had attained full age, on 21 December, 1792, he settled with Selden his guardian, and executed to him a release from all demands.

Thomas Swann, surviving his wife, conveyed by deed duly executed all his interest in the premises to his surviving children.

After William Byrd Page had attained full age, he made a claim against Selden on account of inequality in the partition of the aforesaid four thousand acres of land, which claim was finally adjusted by the payment of one thousand pounds and the purchase of five hundred acres of his land by Selden. And afterwards, on 23 July, 1794, Page, having received full satisfaction from Selden as guardian, executed to him a release, &c.;

From the death of Wilson Cary Selden up to the present time, the defendant, his son, has held the actual possession of the premises in dispute, claiming the same as his own, under the will of his father.

On 6 December, 1819, the lessors of the plaintiff, claiming as heirs of Mrs. Swann, with others, instituted their suit in the Superior Court of Chancery held at Winchester, against Wilson Cary Selden and others, claiming the lands now in controversy, upon certain defects, in the conveyances under which Selden claimed and upon alleged equities. Answers were filed, and upon the final hearing in October, 1830, a decree was pronounced whereby the court,

"disclaiming jurisdiction of the alleged imperfections in the conveyances aforesaid, but taking jurisdiction

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of the matters of equity, adjudged and decreed that the plaintiffs' bill should be dismissed with costs, but without prejudice to any suit at law which the plaintiffs might be advised to prosecute on account of the alleged legal defects, or want of validity in the said deeds."

This decree, on an appeal to the supreme court of appeals, was affirmed 17 April, 1837.

This cause has been ably and elaborately argued. Some points have been made and illustrated with great research and ingenuity which, from the view taken of the case by the Court, are not essentially involved in the decision. Among these are the construction of the statutes under which the deed from Selden and wife to Cary Selden in 1784 was executed and recorded, and also the deed from Selden and wife to Mackay, in 1787.

We will consider the case in reference to the statute of limitations.

The statute of 1785 bars the right of entry unless suit be brought within twenty years next after the cause of action accrues. The savings are "infancy, coverture, *non compos mentis*, imprisonment, or not being within the commonwealth at the time the right of action accrued." And such persons are barred if they do not bring their action within ten years next after their disabilities shall be removed.

Selden took possession of the premises in controversy, claiming them as his own under the deed from Mackay in the fall of 1787. Prior to that time, his possession was in right of his wife. Under the deed from Mackay, his possession was adverse to the right of the lessors of the plaintiff. He avowed his ownership by placing the deed upon record, by enjoying the profits of the land, and by selling and conveying different parcels of it.

In no sense can he be considered as holding possession in virtue of his rights as guardian of the heirs of his deceased wife or as tenant by the curtesy. The right under which he held possession during the life of his wife terminated at her death, there being no issue of the marriage. From this time he possessed and claimed the premises as his own. This was notorious to the public, and especially to the heirs of his wife. John Page, in his lifetime, settled with Selden as guardian and executed to him a release of all demands. William Byrd Page received from him one thousand pounds, the estimated difference in value between

the part of the four thousand acres conveyed to him over that which was conveyed to Page. Thomas Swann, the husband of Jane Byrd Page, actually purchased from Selden a part of the land conveyed to him by Mackay. Swann, at the time of the purchase, was a highly respectable lawyer, and not only knew that Selden claimed the land adversely, but he recognized the validity of such claim by the purchase.

Until his death in 1835, Selden continued in possession of the premises, and his son, the defendant, still holds the same adversely under his father's will. From these facts it is clear that the lessors of the plaintiff are barred by the statute, unless they shall bring themselves within its exceptions.

The right of action accrued in 1787. At that time, Jane Byrd Page, being an infant, was within the exception of the statute, and it is insisted that her marriage with Swann before she was twenty-one years of age added to her first disability that of coverture.

Mr. Preston, in his Abstracts, 2 vol. 339, says

"If the right accrues to a person who is at that time under a disability, the fine will not begin to run against him till he shall be free from disability, and successive disabilities, without any intermission, will continue to him a protection against being barred by nonclaim; but any cessation of disability will call the statute into operative force, and no subsequent disability will arrest the bar produced by the statute."

The saving in the Virginia statute is the same as that of 21 Jac. 1, but it has received in this country a different construction from that stated by Mr. Preston. In *Parsons v. McCracken*, 9 Leigh. 495, Mr. Justice Parker says, speaking of this statute,

"I am of opinion that cumulative disabilities ought not to prevent its operation, and that upon a sound construction of the act, a party claiming the benefit of the proviso can only avail himself of the disability existing when the right of action first accrued, since otherwise the assertion of claims might be postponed for the period

of the longest life, and possessions disturbed after sixty, eighty, or even a hundred years."

In that case, as in the one under consideration, the female in whom the right vested married before the disability of infancy had ceased.

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In the same case, Mr. Justice Brockenborough says

"If she married after she became of age, her subsequent coverture was not a disability which would obstruct the operation of the statute, and even if she married while yet an infant, we cannot mount one disability on another so as to prevent a continuous obstruction to its operation."

Mr. Justice Tucker says,

"It is true that Rebecca was an infant, but she came of age in 1824, when her disability ceased; for, notwithstanding some loose opinions to the contrary, she cannot tack the disability of marriage to that of infancy."

The same doctrine was recognized by the court of appeals, in the chancery case lately decided in that court, between the parties now before us. The same principle is sanctioned 2 Hen. & Munf. 306, and in *Eager v. Commonwealth*, 4 Mass. 182; *Jackson v. Wheat*, 18 Johns. 40; *Demarest v. Wynkoop*, 3 Johns.Ch. 129.

Chancellor Kent says, in the last case cited, "I am clearly of opinion, that the party can only avail himself of the disabilities existing when the right of action first accrued." In 1 Plowd. 375 it is laid down that, "if several disabilities exist together at the time the right of action accrues, the statute does not begin to run until the party has survived them all." In *Doe v. Jesson*, 6 East 80, it was held that cumulative disabilities in different persons could not be added.

At the time of her marriage in April, 1794, Mrs. Swann wanted about three months of being of full age. Of course, in July ensuing, she was of age, from which time

the statute began to operate, and in twenty years would have barred her right of entry, had she survived. But her death in 1812 arrested the operation of the statute, and gave her heirs ten years within which to bring their action. The proviso in the statute, after enumerating the exceptions, among which are infancy and coverture, declares that

"Every such person and his or her heirs shall and may, notwithstanding the said twenty years are, or shall be expired, bring and maintain his action, or make his entry, within ten years next after such disabilities removed, or the death of the person so disabled, and not afterwards."

By the settled construction of this proviso, the heir has ten years to bring his action, where his ancestor is not barred. This

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time is given him without reference to the time that has elapsed or the disabilities of his ancestor, if the right of entry has not been tolled.

But it is insisted that the right of entry did not devolve on the heirs of Mrs. Swann at her decease, as her husband became tenant by the curtesy.

In 1 Coke on Litt. 29, c. 4, sec. 35, it is said

"Tenant by the curtesy of England is where a man taketh a wife seized in fee simple, or in fee tail general, or seized as heir in tail special, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life, by the laws of England."

"And first, of what seizin a man shall be tenant by the curtesy. There is in law a twofold seizin -- viz., a seizin in deed and a seizin in law. And here Littleton intendeth a seizin in deed, if it may be attained unto, as if a man dieth seized of lands in fee simple, or fee tail general, and these lands descend to his daughter, and she taketh a husband and hath issue, and dieth before any entry, the husband shall not be tenant by the curtesy, and yet in this case she had a seizin in law; but

if she or her husband had during her life entered, he should have been tenant by the curtesy."

The wife at common law was endowable where there had been no actual possession, and the reason is that during coverture she could not take possession of the lands of her husband. But actual seizin was necessary to enable the husband to claim as tenant by the curtesy. This rule was not inflexible. It yielded to circumstances, as in the case of an advowson, or rent, or where an entry was prevented by force. Litt. s. 417, 418. In like manner, if a man have a title of entry into lands, but does not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he hath presently, by such claim, a possession and seizin in the land, as if he had entered in deed. Litt. s. 419. And under some circumstances, living within view of the land will give the feoffee a seizin in deed, as fully as if he had made an entry. It has been held that the husband may claim as tenant by the curtesy, without entry, wild lands of which his wife was seized, and which were not held adversely. But the general rule of law is that

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there must be an entry during coverture to enable the husband to claim by the curtesy.

At no time during the life of Mrs. Swann does it appear that there was an entry upon the premises in controversy by herself or her husband. On the contrary, it appears the defendant and his ancestor held the land adversely. It is clear, therefore, that Swann could not claim as tenant by the curtesy, and consequently no such right could interpose to prevent the entry of the heirs of his wife. They were bound, without regard to their infancy or other disabilities, to bring their action in ten years from the decease of their ancestor. This results from the fact, that the right of action accrued in the lifetime of their ancestor, and the rule of law, which does not admit of cumulative disabilities.

By the same principles, the devisees of John Page, who died in 1800, are also barred. The statute also bars the right of entry in William Byrd Page.

From this view of the case it can scarcely be necessary to notice the bill of exceptions taken on the trial by the plaintiff. So far as evidence was offered to disprove the consideration named in the deed to Mackay with the view of rendering it invalid, the evidence was properly rejected. And so far as regards the circumstances which the plaintiff offered to prove, they could have no other, if any effect, than to create a suspicion of unfairness or fraud in the execution of the deed. All matters of fraud and trust arising out of this transaction were considered and decided in the case in equity lately brought before the Court of Appeals of Virginia by the parties to the present suit. If that jurisdiction were rightfully exercised, it concludes all questions of fraud in this case. Upon the whole, we

Affirm the judgment of the circuit court.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Virginia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby affirmed with costs.

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