Case No. 12,405.

SAWYER v. SHANNON ET AL.

{Brunner, Col. Cas. 111;[1] 1 Overt. 465.}

Circuit Court, D. Tennessee. 1809.

REAL PROPERTY—TITLE BY PRESCRIPTION—EJECTMENT.

In an action of ejectment defendant is not required to show a connected chain of conveyances from a grant to entitle him to the protection of the statute of limitations; if he has possession and holds under a conveyance, though defective, it is sufficient.

Ejectment; not guilty and issue. The defendants {Shannon and Boling} claimed under the oldest grant, and relied on the statute of limitations. It was proved on the part of the defendants that Thomas Molloy purchased at sheriff's sale, and took a sheriff's deed; he sold to Shannon, and gave his bond to convey. Shannon took possession early in the spring of 1800, and made a lettuce and cabbage patch about twenty poles within the tract of the plaintiff; cleared a small quantity adjoining, perhaps a quarter of an acre, which in the following fall he added to, and continued to add to the clearing. On the 22d of August, 1800, Molloy conveyed to Shannon, and on the loth of August, 1807. The declaration in ejectment is indorsed as having issued, and came to the hands of the marshal, on the 26th of August, 1807. The defendants showed a copy of a grant to John Eaton; a judgment on a scire facias against the heirs of Pinkham Eaton, naming four persons, among whom was John Eaton. The land was sold, and a sheriff's deed made to Molloy as above.

For the plaintiff {Sawyer's lessee} the following grounds were taken: First, The defendant must show a regular and connected chain of legal title from the grantee; otherwise the statute cannot apply. Second. A connected title has not been shown. The judgment

is against four of the Eatons, stating them heirs of Pinkham Eaton, deceased; the grant, part of which was sold by the sheriff, is to John Eaton, administrator of Pinkham Eaton, deceased. The judgment was obtained upon two nihils, which is not legal in a case where heirs are to be affected. There should have been a scire feci returned. The judgment is invalid; but if good, the sheriff had no right to sell the land of John Eaton, for the grant does not state that John Eaton took as heir, and we cannot presume it; the sheriff had no more right to sell the land of John Eaton under this judgment than of any individual in society; the sale was therefore void, and no right vested under it in Molloy; he therefore had not any to convey to Shannon. The statute was intended to protect possessors, under a regular chain of legal title, against an older irregular title. It could not give a title, unless there was one before, and where there is a defective title, it is as none.

PER CURIAM (charging jury). We are inclined to think the statute applies; some doubt, however, exists on two grounds—whether it be necessary for the defendant to show a good legal title by valid conveyances from the grant. The point, however, upon which we doubt at present is, that the sheriff in his return on the execution does not state the particular tract out of which he sold; but at present the jury may consider the statute of limitations as applying to the case, as it is believed the plaintiff was not competent to make objections, on account of errors in the judgment.

The jury after some time found a verdict for the plaintiff, and upon a rule for a new trial it was argued by Overton and Haywood for the defendants upon the following grounds: First. The grant to John Eaton is good, and passes the estate to him, as heir of Pinkham Eaton, deceased. Second. If the judgment against Eaton's heirs is erroneous, the plaintiff being a stranger, not party nor privy in blood nor estate,

cannot take advantage of it. Third. If the judgment is erroneous, the sale is good. Fourth. But it is not even erroneous. Fifth. The statute of limitations protects irregular conveyances, and even where there is no regular chain of conveyances, provided the possessor claims under a deed bona fide.

As to the first point, it was said that mistakes in grants could not destroy their validity. See 2 Bay, 539; 2 Bin. 109; 3 Call, 242. The intention of the party granting must be collected as in construing other instruments. The grant recites the number of the warrant and entry, both of which are in the name of Pinkham Eaton, and the grant, though it states John Eaton administrator, manifestly designed that he should take as heir; in fact, he was obliged to take in that capacity, as the law would not allow of his taking in any other. Bac. Abr. (Ed. 1807) tit. "Grant," 1, 393; Id. 392, H 3; Id. 391, H 2; Id. 399, n. 378, 384; Id. 388, H 1; 1 Hayw. [N. C] 238, 239, 254, 377, 496; 2 Hayw. [N. C] 139, 148, 160, 179, 183, 354, 384, 301, 347, 348, 350; Acts Tenn. 1796, c. 20.

On the second ground, the judgment having been rendered by a court of competent jurisdiction, must stand until reversed by parties or privies. 5 Com. Dig. tit. "Pleader," 3 B 7; 3 B 9. See, also, 4 Mass. 612; Hardin, 291; 2 Caines, Cas. 255, 259; and Swift's L. E.

As to the third point, we lay it down as certain that this land having been granted in right of representation of the deceased, was liable to sale for his debts. The twenty-third section of the court law (1794, c. 1) rendered lands, tenements and hereditaments liable to execution. Upon a similar clause in Ird. Rev. Nov. 1777, c. 2, it was determined by M'Nairy, J., previous to the act of 1793 (chapter 5, § 7), that an entry could be sold under execution. Frazier v. Haw [1 Overt. 465] at Nashville, in the state district court. The act 580 giving bounty lands to the officers and soldiers,

in case of the death of the officer or soldier, gives it expressly to the heirs. Acts 1782, e. 3, § 6. It is said Pinkham Eaton died in the year 1781, and that this land vests in the heir by purchase, and is not liable to the debts of the deceased. This we by no means admit; but supposing it did, if the heir or heirs were satisfied that it should be liable, it does not lie in the mouth of the plaintiff, who is a stranger, to say that it shall not. The sale is good, though the judgment may be erroneous or irregular. 2 Tidd, Prac. 936; Com. Dig. tit. "Execution," C 6; 2 Hayw. {N. C.} 79, 80; 1 Hayw. {N. C} 62, 63, 65, 66, 71, 95. See 2 Bin. 223; 1 Bin. 40; 2 Bay, 329; {Weitzell v. Fry} 4 Dall. {4 U. S.} 220; Hylton v. Brown {Case No. 6,981}. But it were not even necessary to name the persons who are heirs. 2 Salk. 600; 1 Ld. Baym. 669. They might have been named as heirs generally. A scire facias is not subject to the same strictness as an original suit. Latch, 112.

Fourth. But this judgment is not erroneous. John Eaton, to whom the grant issued, is one of the persons named as heirs, and though others might have been joined, who had no interest in the land, the judgment is good against John Eaton. He could only take advantage of more persons being joined than ought to have been, by plea in abatement. 1 Com. Dig. tit. "Abatement," F. 12, 13, 14, 15. Neither of the other defendants can reverse the judgment as to this land for two reasons: Want of interest (2 Bac. Abr. tit "Error," B; Id. tit. "Execution," P.); and having had a day in court. Anciently irregularities in executions were classed under the title "Error" (5 Com. Dig. tit. "Pleader," 3 B 1); but of late years such errors are rectified on motion (2 Tidd, Prac. 935). But in no case where a judgment shall have been reversed shall the party be restored to property sold on a fieri facias, which will be perceived by recurrence to the authorities last mentioned, and the cases referred to in Haywood's Reports, in the third division of

this argument, except indeed it be in a case where the party obtaining the judgment purchases under the execution. Lands are sold here by fieri facias, and the same principles are attributable to proceedings under it respecting land that would be respecting personal property. See Hylton v. Brown [supra]. An objection has been taken to the return of the sheriff in not describing the land sold; to this it is answered that the sale would have been good, if the execution had never been returned. A fortiori where the return is merely informal, and can do no injury. 6 Com. Dig. tit. "Return," F 1; 4 Com. Dig. tit. "Execution." C 7. See [M'Dill v. M'Dill] 1 Dall. [1 U. S.] 63; [Hamilton v. Galloway] Id. 93.

Though we have been thus minute in removing objections to supposed errors in obtaining the judgment and issuing the grant, it was not thought absolutely necessary. One plain and decisive answer to the plaintiff is at hand for all these objections. You are a stranger to them, and as you cannot be injured by these transactions of others, res inter alios acta non nocet, so you shall not derive any benefit from them agreeably to a maxim of the civil law, "Alli per alium non acquiritur exceptio." A judgment of a competent tribunal, and all the proceedings under it, stand good, and must be taken as true, until reversed. Whether John Eaton be heir or not, is immaterial with you; the title would be in some person with whom you would have to contend. The state has said in the grant that he takes as heir, and as such the judgment is against him, and this must be taken as true whenever it comes collaterally before the court. Amb. 761. Eaton makes no complaint that these lands have been sold for his brother's debts; the plaintiff has no right to complain.

Fifth. Whether the judgment or conveyances be regular or not, the statute of limitations covers the defendants' case. The act of 1715 confirms claims under executors, administrators, heirs, and wives. Now

it is clear that these persons had no more right to sell lands than one person would have to sell the land of another; yet validity is expressly given to them by the act, when attended by the seven years' possession. For many years in North Carolina the bench and bar were divided in their construction of the act of limitations. Some thought (and a very respectable portion of the bench and bar were of that opinion) that possession alone for seven years, without any title, or color of title, would give a right, and bar others (1 Hayw. [N. C.] 11; 2 Hayw. [N. C] 88, 223); the question was at length settled by the court of conference, that there should be a color of title to enable a person to hold by seven years' possession. Id. 336. But no person ever supposed or contended that a perfect legality of connected title was required. Id. 59; Napier's Lessee v. Simpson, Robertson, June, 1809 [1 Overt. 448]. The subject respecting seven years' possession was contested here in the same manner it was in North Carolina, and the difference of opinion was the reason of the passage of the act of 1797, c. 43, § 4. It was the only design of the act to make color of title necessary. The section transposed into plain language will read thus: "Where any person shall have had possession of land for seven years, such possession being in consequence of a grant, or deed founded on a grant, without claim by suit in law, that then all persons shall be barred." This act is professedly an explanation of the act of 1715; its object was not to introduce any new provision, it was only to remove a doubt, whether a naked possession for seven years would give a right or not; to carry the act any further would be going beyond its express words, which was to remove the doubt then existing. Before the passage of the act of 1797, no person ever doubted that possession would require anything more than a color of title, bona fide; 581 as a deed from some person honestly made, the land having been granted by the state.

The expression in the act of 1797 which has created the doubt is "founded on a grant," from which it is implied, according to the argument on the other side, that there must be a regular connection with the grant; if one link is broken, it cannot be said to be "founded on a grant." The act of 1715 speaks of titles derived under sales from executors, etc. In this case we know there is not any, regular, legal chain of title, and it surely was not the intention of the act of 1797 to repeal the act of 1715, as to irregular and imperfect conveyances by executors and others. The principles contended for on the other side would repeal the most beneficial part of the act of 1715, instead of explaining it, as the legislature profess to do. The expressions seem to be of the same import as those in the act of 1797; we ought not therefore to extend their meaning beyond the object the legislature had in view. The intention of the legislature manifestly was, that no seven years' possession should be available unless the possessor had a deed, and that the land so possessed should be granted; or in other words, that the possession should have its foundation or derivation in a grant from the state. The possession by deed must be bottomed or founded on a grant to make it available. Giving the act of 1797 this construction, which it will bear, avoids the absurdity of enacting a new law, which the legislature, from their own unequivocal language, never designed. To give it any other construction would nearly annihilate the highly beneficial provisions of the statute, which was to cure defects in titles, by protecting after a certain lapse of time the honest improver and cultivator of the earth. Cowp. 217; 1 Burrows, 119; 1 Hayw. [N. C] 319; 2 Hayw. [N. C] 11, 59, 69, 114, 345. See 4 Mass. 188; 2 Bay, 160; 1 Bin. 212.

There is no doubt but that the defendant Shannon, and Molloy, under whom he claims, had been in possession upwards of seven years. From April, 1800,

until the 22d of August following, when Shannon got his deed, it was the possession of Molloy, Shannon having been placed on the land by him. 2 Bac. Abr. 423, tit. "Ejectment," D 3; 6 Com. Dig. tit. "Trespass," B 12; 2 Strange, 1128; 2 Hayw. [N. C.] 11, 345; 2 Caines, Cas. 301; 4 Johns. 230. The suing out of the declaration in this case ought to be considered on the 26th of August, 1807, when it came to the hands of the marshal; and this would be steering clear of the objection that Shannon had no deed to cover his seven years' possession. Computing from this day he had a deed the whole time, and four days to spare. There is no telling that this declaration issued at the time it is marked on the back; the attorney might have ante-dated to prevent the running of the statute; and if he had written it he might not have given it to the marshal. It was the same thing as if it had not been written at all. Unless then, it could be proved that it had been issued before, we must take the time of its coming to the hands of the marshal as the true time, 2 Burrows, 958. It is not, however, wished to be understood that we have no other defense than the statute of limitations. We have an older entry than their grant, which according to the practice of the state we could rely on. The entry was read and compared with the plat. Our entry has been surveyed agreeably to its call. Acts Nov. 1777, c. 1, §§ 5, 10; 1779, c. 6, § 6; 1783, c. 2, § 12; 1786, c. 20, § 1.

The beginning of the entry is special, and in running down towards Harpeth the surveyor was obliged to stop at Moore's tract, which was an older one. The land being taken upon the west, the surveyor could run it no other way than he did. A surveyor in surveying acts independent of the claimant, and if he did not construe the entry in the equitable manner now contended for, is that to operate to the injury of Eaton, or those claiming under him? Much was said in the case of Polk's Lessee v. Robertson [2

Tenn. 456, 457], and many cases cited from Haywood's Reports, to show that the mistake of a surveyor shall not prejudice a grantee. [Bell v. Levers] 4 Dall. [4 U. S.] 210; [Hepburn v. Levy] Id. 218; 3 Bin. 30, 32. Why should the surveyor's mistaken construction of an entry prejudice the enterer or claimant? It would be highly unjust that the act of the surveyor should operate to the prejudice of the enterer, unless in cases where he surveyed contrary to the plain words of an entry. Not a meaning by what is called an equitable construction; as where the inclusion of a particular object is called for, that you must put it in the center, or where an entry calls to lie on a water course, it must be on both sides, or equally on both sides. In the first case, as common men and surveyors have and will always understand such entries, there would be a compliance with it, if the object should be included in any part of the survey; and in the second, if the land surveyed should he on the creek, though on one side, and bounded by it. Hoggat v. M'Crory [1 Tenn. 8-12]; Kerr's Lessee v. Porter [1 Tenn. 353-361]; and Kendrick v. Dallum [2 Overt. 212]. As the oldest entry was to be first surveyed, having by all our acts a preference in being surveyed and granted, precise certainty was not necessary in an entry, and none of the statutes require it. Agreeably to our law and its practice, an entry may be more or less certain. We have understood it to be the design of the first to confine the surveyor in making the survey to precise limits, the enterer choosing a particular spot, as calling for course and distance. In the other the surveyor surveys as he thinks proper, according to the plain calls of the entry; and if he conforms to the calls according to common understanding, being the oldest entry, and having the preference in survey and grant, by law it must hold. But where certain courses and distances are called for in 582 an entry, if different courses or distances are taken by the surveyor, this is what we

call surveying contrary to an entry, and a subsequent claimant, without notice, upon the principles of equity, is not to be affected. We have conformed to these principles, and therefore without the aid of the statute of limitations we have the right to hold.

Dickenson & Campbell, in conclusion, said they did not mean to contest the regularity of the judgment. It was the act of 1797 that must be relied upon. The legislature were competent to make what alterations in the act of 1715 they thought proper. Their meaning in the act of 1797 is very plain; when they require a deed of conveyance founded on a grant, it must necessarily be connected with it by regular conveyances; if it is not it cannot be founded on a grant.

TODD, Circuit Justice. It is not intended at this time to give any decided opinion; I will therefore suggest an idea which may be attended to on both sides. Is it not a rule in construing explanatory statutes to confine the construction strictly to the letter? Otherwise there should be an explanation upon an explanation. See Bac. Abr. (Wils. Ed.) 388, and notes.

Counsel for the Plaintiff. There can be no doubt that the rule is as stated; the meaning of the words "founded on a grant," here, plainly import a connection of title; and irregular or void titles are the same as none. It is clear that when John Baton took a grant from the state he took the land as trustee for the heirs of Pinkham Eaton, and it was decided in the case of Williams v. M'Ferson that an equitable right, as a bond, etc., was not subject to execution. The defendants have not produced any proof who were the heirs of Pinkham Eaton, which they ought to have done. But if they had it would not have been sufficient, for this land was not subject to the debts of the deceased; the law allowing bounty lands did not pass until after the death of Eaton. Though it says the heirs of the deceased shall receive a grant, the right must vest in them as purchasers, arid not

as heirs, and consequently the debts of the deceased cannot fall on it. The sheriff having no right to sell this land, no right of course was conveyed; the act of 1797 makes it necessary for the court to decide the legality of the proceedings at law, as well as the conveyance. If either are essentially defective there cannot be a regular chain of title. Eaton's entry was a mere nullity, as it was made in the name of Pinkham Eaton, when he was dead. In the argument of the plaintiff's counsel every position taken by the defendants was contested at length.

Among others it was urged that the statute of limitations was not to be favored, and if doubtful ought to be construed in favor of the plaintiff, so as to save his right Mr. Campbell towards his conclusion observed that John Eaton did not take the land as heir, and if he did as one of the heirs, he held it as trustee, and nothing but a bill in equity could render it liable to execution.

TODD, Circuit Justice. There is one point in this case that I wish the plaintiff's counsel to attend to particularly, which is this: If Pinkham Eaton's heirs are satisfied as to the proceedings in obtaining the judgment at law, and selling the land, can strangers take advantage of any errors in those proceedings, or complain of them in a collateral way?

Mr. Campbell concluded by observing that they had the oldest grant, which gave them a clear legal right, and to take away that the court should see that there was a regular chain of title.

Mr. Overton, for defendants, observed that as the court would have the matter under consideration, he wished leave to state as to the construction of statutes that the difference between an explanatory statute, alluded to by one of the court, seemed to consist in this: An explanatory statute should never be extended nor narrowed by an equitable construction, where the words were plain, because this would be an

explanation upon an explanation; but if doubtful, as was manifestly the case in the act of 1797, the same rule must be applied as in other cases, to find out the intention of the legislature. What did the legislature mean to do in passing the fourth section of the act of 1797? The answer is in the preamble, to remove doubt as to the act of 1715. What was that doubt? We all know it was whether a naked possession, without deed, of ungranted land, would produce a bar or not. To carry the act any further new principles will be introduced, and as to the intention of the legislature in introducing them, whether any, and to what extent, must be ascertained by the principles of sound construction, in the same manner as in any other case, there may be different rules in construing the same statute; as where its provisions are penal and also remedial (2 W. Bl. 1226); so here if it be doubtful whether the enacting words go further than a preamble which is to explain, if the act be considered as explanatory, it must receive such a construction as will confine it strictly to the removal of doubts; if attempted to be explained any further it will be subject to such rules as will enable judges to ascertain whether the legislature designed to introduce a new law, instead of explaining an old one; and he took it to be a clear principle that the court would not construe such an act, as introductive of a new law, unless the words used by the legislature could not admit of any other construction. 11 Mod. 150; 6 Bac. Abr. (Wils. Ed.) 384. All the rules respecting the construction of statutes amount to nothing when the intention of the legislature is plainly expressed; they vanish; they are never thought of. In doubtful cases the intention is what is sought after, and the rules of construction, which are nothing but the dictates of common sense, apply in one case as well as in another, according to the subject-matter. 583 TODD, Circuit Justice. Let a new trial be granted in order to avoid delay. There

are several points which may he considered open to further discussion upon the trial if the parties choose.

M'NAIRY, District Judge. It was clear to him from the wording of the Act of 1715 that irregular and defective conveyances were sufficient, with seven years' possession, which existed in this case, and he felt well satisfied that the statute applied. The construction of the act of 1715 by the defendants' counsel he believed to be correct.

TODD, Circuit Justice. As to the construction of the act of 1797 he had great doubts at first, which were not entirely removed. The opinion of those who knew the cause of making the statute, and the doubts intended to be removed, certainly deserve consideration in doubtful cases. The case, however, will stand open for a new trial.

At a subsequent term there was a verdict for the defendants.

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