

Somerville v. Hamilton.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs, at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place ; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. It is no argument, that an answer was received at Georgetown ; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they *230] were the only judges of its *importance. There was, therefore, no contract concluded between these parties, and the court ought, therefore, to have given the instruction to the jury, which was asked for.

Judgment reversed, and cause remanded, with directions to award a *venire facias de novo*.

SOMERVILLE'S EXECUTORS v. HAMILTON.

Adverse possession.

Where the defendant in ejectment, for lands in North Carolina, has been in possession, under title in himself, and those under whom he claimed, for a period of seven years or upwards, such possession is, by the statute of limitations of North Carolina, a conclusive legal bar against the action by an adverse claimant, unless such claimant brings himself, by positive proof, within some of the disabilities provided for by that statute. In the absence of such proof, the title shown by the party in possession is so complete as to prove, in an action upon a covenant against incumbrances, that a recovery obtained by the adverse claimant was not by a paramount legal title.

Quære ? Whether, in an action upon a covenant against incumbrances, the plaintiff is bound to show that the adverse claimant recovered, in the suit by which the plaintiff is evicted, by title paramount, or whether the recovery itself is *prima facie* evidence of that fact ?

THIS was an action of covenant, brought in the Circuit Court of North Carolina, by the executors of John Somerville, the younger, against John Hamilton, on the following covenants in a deed of land in North Carolina, from Hamilton to John Somerville, the elder, dated April 15th, 1772.

*231] The grantor covenanted *with the grantee, his heirs and assigns, that the premises "then were, and so for ever thereafter should remain, free and clear of and from all former and other gifts, bargains, sales, dower, right and title of dower, judgments, executions, title, troubles, charges and incumbrances whatsoever, done, committed or suffered by the said John Hamilton, or any other person or persons whatsoever, the quit-rent afterwards to grow due to Earl Grenville, his heirs, &c. only excepted." There was also a covenant for a general warranty.

Hamilton claimed the lands under a deed, dated the 4th of October 1771, from one Stewart, who was then in possession, and who delivered possession to Hamilton. John Somerville, the elder, conveyed the same to his son, John Somerville, the younger, by deed dated the 8th of September 1777 ; and Somerville, the younger, conveyed to one Whitmill Hill, by deed dated the 9th of October 1795. W. Hill died on the 13th of October 1797, having by his last will devised the lands to his son Thomas B. Hill. The latter

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having entered under the devise, an action of ejectment was brought against him, in the superior court of the state of North Carolina, for Halifax district, on the 7th of June 1804, for 250 acres, parcel of the said lands, by one Benjamin Sherrod, who, at the April term 1805, of the said court, obtained a verdict and judgment for the possession of the said 250 acres of land, and was put in possession of the same. On the second of September 1804, Hamilton had notice from Somerville, the younger, of the institution of this suit, but did not aid in the defence. From the date of Stewart's deed to Hamilton *(October 4th, 1771) to the commencement of this suit by [*232 Sherrod against Hill, on the 7th of June 1804, the land in controversy was in the possession of Hamilton, and of Somerville and the Hills, claiming under Hamilton. On the 6th of November 1806, Somerville, the younger, died, leaving the plaintiffs executors of his last will and testament. The above facts were found by a special verdict in the circuit court, and the case came before that court upon the special verdict, at November term 1816, when the judges differed in opinion upon the following questions :

1. Whether the plaintiffs were bound to show that Benjamin Sherrod recovered against Thomas B. Hill, by title paramount to that derived from Hamilton ; or the recovery itself was *prima facie* evidence of that fact ?

2. Whether the title shown by Thomas B. Hill, under Hamilton, was not so complete as to prove that Sherrod's recovery could not have been by title paramount ? Which questions were thereupon certified to this court for decision.

February 6th, 1818. The cause was argued, at the last term, by *Harper*, for the plaintiffs, (a) no counsel appearing for the defendant.

*February 20th, 1819. The opinion of the court was delivered, at the present term, by *Story*, Justice.—Upon the special verdict in [*233 this case, the judges in the court below differed in opinion on two points, which are certified to this court for a final decision :

1. Whether the plaintiffs were bound to show that Benjamin Sherrod recovered against Thomas B. Hill, by title paramount to that derived from Hamilton, or the recovery itself was *prima facie* evidence of that fact ?

2. Whether the title shown by Thomas B. Hill, under Hamilton, was not so complete as to prove that Sherrod's recovery could not be by title paramount ?

Upon the first point, this court also is divided in opinion, and therefore, no decision can be certified. But as we are unanimous on the second point, and an opinion on that finally disposes of the cause, it will now be pronounced. From the date of Stewart's deed to Hamilton, in October 1771, until the commencement of the suit by Sherrod against Hill, in June 1804, a period of thirty-three years, the land in controversy was in the exclusive possession of Hamilton, and those deriving title under him. A possession for such a length of time, under title, was, by the statute of limitations of North Carolina, a conclusive bar against any suit by any adverse claimant, unless he was within some one of the exceptions or disabilities pro-

(a) He cited *Duffield v. Scott*, 3 T. R. 374; *Blasdale v. Babcock*, 1 Johns. 517; *Kip v. Bingham*, 6 Id. 158; *Bender v. Fromberger*, 4 Dall. 436; *Hamilton v. Cutts*, 4 Mass. 353.

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vided for by that statute. (a) The special verdict in this case does *not find either that Sherrod was or was not within those exceptions or disabilities. The case, therefore, stands, in this respect, purely indifferent. By the general principles of law, the party who seeks to recover, upon the ground of his being within some exception of the statute of limitations, is bound to establish such exception by proof, for it will not be presumed by the law. In the suit by Sherrod against Hill, it would have been sufficient for the defendant to have relied upon the length of possession, as a suitable bar to the action; and the burden of proof would have been upon Sherrod, to show that he was excepted from its operation. By analogy to the rule in that case, the proof of possession under title, for thirty-three years, was presumptive evidence, and in the absence of all conflicting evidence to remove *235] the bar, conclusive evidence, that the title of Hill, *under Hamilton, was so complete, that Sherrod's recovery could not have been by title paramount.

Certificate accordingly.

BANK OF COLUMBIA v. OKELY.

Summary process.

The act of assembly of Maryland, of 1793, c. 30, incorporating the Bank of Columbia, and giving to the corporation a summary process, by execution in the nature of an attachment, against its debtors who have, by an express consent, in writing, made the bonds, bills or notes, by them drawn or indorsed, negotiable at the bank, is not repugnant to the constitution of the United States or of Maryland.

But the last provision in the act of incorporation, which gives this summary process to the bank, is no part of its corporate franchises, and may be repealed or altered, at pleasure, by the legislative will.

ERROR to the Circuit Court for the district of Columbia. This was a proceeding in the court below, under the act of assembly of Maryland of 1793, c. 30, incorporating the Bank of Columbia, the 14th section of which is in these words:

"And whereas, it is absolutely necessary, that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them: Be it enacted, that whenever any person or persons are indebted to the said bank *236] for moneys borrowed by them, or for bonds, bills or notes *given or indorsed by them, with an express consent in writing that they may

(a) This statute, which was enacted in the year 1715, provides (§ 3), "that no person or persons, or their heirs, which hereafter shall have any right or title to any lands, tenements or hereditaments, shall thereunto enter or make claim, but within seven years after his, her or their right or title shall descend or accrue; and in default thereof, such person or persons, so not entering, or making default, shall be utterly excluded and disabled from any entry or claim thereafter to be made." The 4th section contains the usual saving in favor of infants, &c., who are authorized, within three years after their disabilities shall cease, "to commence his or her suit, or make his or her entry." Persons beyond seas are allowed eight years after their return: "but that all possessions held without suing such claim as aforesaid, shall be perpetual bar against all and every manner of persons whatever, that the expectation of heirs may not, in a short time, leave much land unpossessed, and titles so perplexed that no man will know from whom to take or buy land." See *Patton's Lessee v. Easton*, 1 Wheat. 476.