

No. 12847

Supreme Court of Illinois

McClelland.

vs.

Kellogg.

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~~9~~ ~~9~~ ~~80~~
Joseph C. Bellman
Philo Kellogg

1856

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X

Joseph McCalland } Error to Pleas:
 as. }
 Philo Kellogg } Supreme court, Northern division
 Term A.D. 1854:

And said plaintiff comes & says that in the rendition of the judgment aforesaid there was manifest Error in this Court, the finding of said circuit court and its judgment thereon, ~~was against the plaintiff~~ in favor of the defendant, whereas the said finding & judgment of said court should have been in favor of the plaintiff.

And for further Errors said plaintiff assigns the following - viz:

1. said circuit court erred in permitting the deed from said David K. Carter wife to defendant to be read in evidence:
2. In overruling the motion of the plaintiff to exclude the evidence of title & testimony produced by defendant and to find title in said plaintiff, and in admitting said evidence and finding the issue joined & rendering judgment thereon & for costs in favor of said defendant:

Wherefore for the Errors aforesaid & for other Errors in said record & proceedings, said plaintiff prays that said judgment of said circuit court may be wholly reversed, annulled & for nothing esteemed, and that said plaintiff be restored to what he hath lost thereby -

By his atty

L. K. Coates

And the said defendant in error comes and says that in the said record & proceedings there are no such errors as above alleged nor any nor either of them, wherefore he prays that said judgment may be affirmed

Manning & Merriam
 for deft in
 Error

Be it remembered, that heretofore, to wit, on the
thirteenth day of September in the year of our Lord 1853
there was presented to the Circuit Court in and for the County
of Peoria in the State of Illinois and filed in the office
of the clerk of said Court a declaration, which with the
notice and affidavit thereto annexed are in the words
and figures following, to wit:

Narr.

In the Circuit Court of
Peoria County, held September Term 1853,
Joseph McCalland

vs
Phil Stellogg

Ejectment.

Joseph McCalland Plaintiff
in this suit complains of Phil Stellogg Defendant
in this suit for that whereas on the first day of June
A. D. 1836, he was possessed of the following described
real estate, to wit: the West half of the South West quarter
of Section Thirty six (No 36) in Township No Ten
North of the base line of Range No. Five (No. 5) East
of the fourth principal meridian in said County
of Peoria. The title to which he claims in fee and
the said Plaintiff being so possessed thereof, the said
defendant on the first day of January A. D. 1850,
entered into said premises and unlawfully withheld

from the Rent of the possession thereof, to the damage
of the said Plaintiff, one hundred dollars, and therefore
he brings suit. Co. Cooper & Reynolds

Attorneys of Plaintiff

notice

W. Phil. Kellogg Esq

You are notified that on the first
day of the next term of the circuit court to be holden
in and for the county of Boone or as soon thereafter
as counsel can be heard the foregoing declaration in
ejectment will be filed and thereupon a rule will
be entered requiring you to appear and plead thereto
within twenty days after the entry of such rule,
and that if you neglect so to appear and plead, judg-
ment by default will be entered against you, and
the plaintiff will recover possession of the premises
described in said declaration.

Cooper & Reynolds,

Attys for Plaintiff.

affd

State of Illinois, I ss.

Boone County, ss.

Leonard B. Cornwell being
duly sworn says that he served the foregoing declara-
tion and notice on the defendant within named
by giving him a true copy of the same, this seventh
day of September A. D. 1853.

Subscribed and sworn to before Leonard B. Cornwell,

on this 11th day of September

A. D. 1853. Clerk Sub. cl. B.

Sherriff, P. C. Sec.

Proceedings at a term of the Circuit Court begun and
held at the Court House in Peoria, in and for the county
of Peoria in the State of Illinois, on the Second Monday
of September in the year of our Lord one thousand eight hun-
dred and fifty three; it being the twelfth day of said month,
Present the Honorable Andrew P. Reis, Judge of the sixteenth
Judicial Circuit in the State of Illinois, Albridge B.
Johnson, State Attorney, Leonard B. Cornwell, Sheriff
and Jacob Hale, clerk, to wit:

Wednesday, September 13th A.D. 1853.

Joseph McCalland,

vs

Ex'tment.

Philo Kellogg.

This day came the Plaintiff by
his attorney and filed his declaration in this cause,
and proved due service of a copy thereof and of
the notice thereto annexed upon the defendant;
Whereupon on his motion it is ordered that the
defendant plead to this action in twenty days.

And afterwards on the 16th day of September A.D. 1853
the defendant filed his plea in the words & figures following, to wit:

plea = Joseph McCalland,

vs

Philo Kellogg.

Peoria Circuit Court,

Sept Term 1853.

And said defendant comes and

defends the wrong and injury when he, and says he
is not guilty in manner and form as in said declara-
tion and of this he puts himself upon the court's ver-

O Merriman for deft. "

Deft doth likewise

Wishes to try rolls for deft. "

Proceedings at a term of the Circuit Court begun
and held at the court house in the city of Peoria in
and for the County ^{of Peoria} in the State of Illinois on the second
Monday of May in the year of our Lord one thousand
eight hundred and fifty four, it being the eighth day
of said month, Present the Honorable Austin P. W.,
Judge of the Sixth Judicial Circuit in the State of
Illinois, Leonard B. Converse, Thurgood, Eldridge &
Johnson, State Attorney, and Jacob Sale, clerk, to wit:

Wednesday May 24th A.D. 1854.

Joseph M^o Chlanda,

vs

Exigent.

Philo Kellogg.

This day came the plaintiff by
Jonathan D. Cooper, his attorney and the defendant
by Julius Manning his attorney & waived a

trial by Jury and agree that all matters
both of law and fact arising in this cause
shall be tried by the Court, whereupon the
Court having heard the evidence of the
parties respectively took time to consider.

Proceedings at a term of the Circuit Court
begun and held at the Court House in
the City of Peoria, in and for the county
of Peoria, in the State of Illinois, on the
second Monday of May in the year of our
Lord one thousand eight hundred and
fifty four, it being the eighth day of
said month — Present the Honorable
Cuslow Peters, Judge of the sixteenth
Judicial Circuit in the State of Illinois,
Leonard B. Cornwell, Sheriff, Elbridge B.
Johnson, State Attorney, and Stuel Gals,
clerk, to wit;

Friday May 26th A.D. 1854.
Joseph Mc Clellan,

vs

Exemption.

Philo Kellogg,

[12047-11]
Jury — This day came the parties

by their respective attorneys, and the court
being now fully advised in the premises;
does find the said Philo Kellogg not
guilty of unlawfully withholding from the
said Joseph M^r Clelland the posses-
sion of the premises in his declaration
mentioned. Therefore it is considered
that the said Philo Kellogg go hence
without day and have and recover
of the plaintiff his costs and charges
by him about his defense in this be-
half expended and that he have exe-
cution therefor -

It is ordered on the agreement of
the parties that the bill of exceptions
of the plaintiff may be signed & sealed
by the Judge of this Court in vacation.

And afterwards on the eighth day of June in
year last aforesaid, the plaintiff filed his
Bill of Exceptions in said cause, duly signed and
sealed by the Judge of said Court in the
words & figures following, to wit,

"State of Illinois, } In the Circuit Court,
Peoria County, Oct. } May Term A. D. 1854.

Joseph Mc^r Clelland, } Ejectment for the W's. & M. Sl.
vs } T. H. K. R. S. C. in said county,
Phil D Kellogg. }
Trial by court without Jury.

Be it remembered that on the trial of this cause, the
Plaintiff to maintain the issue joined on his part,
proved & read in evidence to the court -

1st A certificate of the Register of the Land Office
at Quincy, Illinois, in the words and figures following,
viz;

Register Office, Quincy,
Oct 19th 1853.

I hereby certify that William B. Tucker of Erie County,
State of New York, did on the 27th day of April 1836,
enter at this office, the West half of the East West
quarter of Section No. thirty six in Township Ten
North of Range Five East in the district of
lands subject to sale at Quincy, as appears from
his application on file and from the books of this
office.

Augustus C. March
Register of Land Office
Quincy.

Inds. Said plaintiff then offered and read in evidence, without objection, a deed in due form, dated May 9th 1836, from said William B. Tucker to plaintiff for said land in said certificate of entry and declaration mentioned — Also the certificate of Charles Kettle, then Recorder of said county, showing that said deed was duly recorded in the Recorder's Office in said county on said 9th day of May 1836 — Said plaintiff then called Charles Kettle & Simon D. W. Brown, who were duly sworn, and the former of whom proved that said defendant claimed title to and assumed to be the owner of said land prior to the commencement of this suit, and said Brown testified that a small part of said tract, in the South West corner, to wit: three or four acres, is fenced on the East & North sides and forms part of a large field extending South & West of the land in dispute — that said corner so fenced off from said tract is only enclosed on said East & North sides, but that a young hedge recently planted is started, apparently on the West line of this 80 acre tract — that said hedge has not been set out more than one or two years — witness further stated that he talked with defendant a few months since respecting this enclosure — that defendant then told witness that he defendant was in possession and cultivating the same and that he had been in possession for about three years — witness further stated that the residence of said Wm. B. T. was vacant.

unoccupied land, and that defendant did not reside
on or near the same,

The Plaintiff here rested his case,

The defendant then offered & read in evidence without
objection, except as to the legal title thereof offered
thereof

1st Duty exemplified copies from the
General Land Office of the Register's certificate of the
entry, on the 21st day of April A. D. 1836, by said W.^m
B. Tucker of the land in controversy, and of the assign-
ment on the 13th day of November A. D. 1837, by said
Tucker of his certificate of entry of said land, to
one David H. Carter.

2nd Exemplification of Patent for said land,
dated December 5th 1838, from the United States to said
Carter as assigned of said Tucker, = Defendant next
offers & read in evidence, in connection with the Statute
of Ohio on the subject of acknowledgments of deeds,
a deed for this & sundry other lands from said Carter
to defendant, which said deed with the certificates
of acknowledgment & record, also given in evidence,
are in the words & figures, as follows, viz:

"To all persons to whom these presents shall come, Greeting:
Know Ye, that we David H. Carter & Nancy H. Carter,
wife of the said David H. Carter of Adams in the county

of Portage & State of Ohio for the consideration of the
thousand dollars received to our full satisfaction of
Philo Kellogg of Strongsville of the county of Cuyahoga
Co, do hereby Give, Grant, Bargain, Sell &
confirm, unto him the said Philo Kellogg, the following
described tracts or lots of land, to wit: the West half
of the South West quarter of section thirty three and the
West half of the South West quarter of section thirty six
in township ten North of the base line of Range five
East of the fourth principal meridian in the District of
Lands, subject to sale at Quincy, Illinois, containing
one hundred and sixty acres. Also the West half
of the South West quarter and the North East quarter of
the South West quarter of section Twenty Five in Township
Ten North of the base line of Range Five East of the fourth
principal meridian in the District of Lands subject to
sale at Quincy, Illinois, containing one hundred twenty
acres. Also the East half of section Twenty Five
in Township Ten North of the base line of Range five
East of the fourth principal meridian in the District
of Lands, subject to sale at Quincy, Illinois, contain-
ing three hundred & twenty acres, be the same more or less.
To have and to hold the above granted and bargained
premises, with the appurtenances thereof, unto him the
said Philo Kellogg, his heirs and assigns forever, to
his and their own proper use and behoof. And also,
I the said David W. Carter do hereby certify, my hand,

executors and administrators, covenant with the said
Phile Kellogg, his heirs and assigns, that at and until
the unsealing of these presents, I am well seized of the
premises as a good indefeasible Estate, in fee simple, and
have good right to bargain and sell the same, in manner
and form as is above written; and that the same is free
of all incumbrances whatsoever.

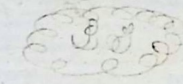
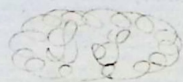
And, Furthermore I, the said David H. Carter, do by
these presents bind myself & my heirs, forever, to warrant
and defend the above granted and bargained premises
to him the said Phile Kellogg, his heirs and assigns
against all lawful claims and demands whatsoever.

And I the said Nancy H. Carter, do hereby remise, release
and forever quit claim unto the said Phile Kellogg, —
heirs and assigns, all my right and title of dower in
and to the above described premises.

In Witness whereof, we have hereunto set our hands and
seals the eighth day of January Anno Domini one
thousand eight hundred and thirty nine.

D. H. Carter

N. H. Carter



Signed, Sealed and delivered in
presence of B. V. Burroughs,
Sarah Green, Maria Howard.

The State of Ohio, ss. January 8th A.D. 1839.
Portage County.

Personally appeared David H. Carter,

Signer and Healer of the above instrument acknowledged
the same to be his free act and deed. She appeared
personally appeared Nancy H. Carter wife of the said
David H. Carter and having been examined separately
and apart from her said husband as to the contents of the
above deed having been to her fully explained and made
known, did declare, that she voluntarily did sign, seal, her
act and deed, did seal, acknowledge, & deliver the same
without any coercion or compulsion from her said
husband & that she is still satisfied therewith.
Before me, Alvah Hand. J. S. J.
Notary Public. 22

State of Illinois,
County of Peoria, Records Office,
I Charles Nettles, Recorder of
said county of Peoria, do hereby certify, the within
deed and certificate of proof is this 23rd day of June
A. D. 1840, duly recorded in said office in Book
L, pages 110 & 111.
Charles Nettles R. P. Co."

to the reading of which deed in evidence; plaintiff by
his counsel objected, which objection was over-ruled
by the court, and said deed admitted & read in evidence
to which decision of the court in over-ruling said objection
and allowing said deed to be read, plaintiff by his counsel
excepted, = Defendant next produced

Wellington P. Kellogg, a son of defendant, who being
sworn states, that he knows said David W. Carter,
and is also acquainted with all the lands described in
the deed from the said Carter to his father. —

That his father owned a cultivated farm of 150 acres
in Portage County, Ohio, rated at \$20. per acre, which
he gave in exchange to said Carter for the lands
named in said deed, that the tract of land now in suit
is of about an average value with the other lands men-
tioned in said deed. = That said lands do not lie

in a body and that this tract is separated from and does
not adjoin any of the rest = That his father does

not reside on or near it and that there are not now and
never have been any buildings on it = But that his

father is now in the actual possession of said tract,
and has been, in the manner hereafter mentioned, since
sometime between the 25th of May & the 14th of June
1846 — that at that time and for several years

previous, a man named Adams & afterwards one ^{said} Sutton
were in possession of four acres in the South West corner of

said tract, and that then said Sutton surrendered the
possession of said four acres to witness as Agent for his
father — and said Sutton thereupon took a lease of

said four acres from witness acting for said defendant,
& continued to occupy & cultivate said four acres as before,
but as tenant of defendant, for the space of four years
from that time — since when the said four acres have

been cultivated part of the time by defendant himself and part of the time by other tenants - That no other part except said four acres of said W's. S. N. E. 6, is now or has been at any time occupied, enclosed or cultivated by any one - whether the lease of said four acres to Sutton was in writing or merely verbal witness is unable to state - That said four acres first came to be enclosed thus - said Adams owned the lands on the South & West, adjoining the land in dispute - and wishing to enclose & cultivate a portion of his lands at & about the South West corner of said tract, and in order to make his field square he ran the fence on the East side of it Northward so as to cut into the South side of this tract and up to a point in ^a ~~the~~ line with which he designed to make & did make the North line or fence of said field and in this way cut off from said tract & enclosed within said field & as part of it the four acres above mentioned - That no change has been made in the fences about said four acres - That they still stand as originally set and said four acres still remain part of said field & enclosed or fenced only on the East & North sides, that said Adams sold his land to Sutton - That neither Adams nor Sutton set up any claim to said four acres, or pretended to hold the same adversely - On the contrary that when Adams sold to Sutton he told Sutton that he, Adams had no right or claim to said four acres and that Sutton must

surrender the possession whenever an owner appeared to claim said ground - and accordingly when witness claimed the same of him for his father Sutton yielded the possession peaceably & willingly as before stated. =

Defendant Neat offered & read in evidence receipts for the payment by him of taxes on said W. S. S. W. 36, for the years commencing with 1843, & ending with the year 1858 inclusive - said receipts being each for the taxes due on the whole of said tract for each of said years respectively =

Here defendant rested his case.

The Plaintiff then offered & read in evidence receipts for the payment by plaintiff of the taxes of the years 1842 and 1844, on said land, and offered to prove a good & valuable consideration paid by plaintiff to said Fisher for said land, which fact is admitted by defendant without proof. This was all the proof offered on either side in said cause,

And thereupon said plaintiff moved the court to exclude the evidences of title & testimony produced by defendant and to find for the plaintiff, which said motion the court then and there over-ruled & rendered judgment upon the issue joined for defendant - To which decisions of said court in overruling said motion & rendering judgment for defendant, said plaintiff

by his counsel then and there accepted & prayed that
this his bill of exceptions may be signed, sealed & made
of record by the court.

It was further then & there agreed between the parties
to this suit that said bill of exceptions may be made
up & signed by the Judge in vacation, which is done.

Andrew Peter, Seal

State of Illinois
Peoria County
I, Jacob Gale clerk of the Circuit
Court in and for said County of Peoria do hereby certify
that the foregoing is a correct transcript of the records
and proceedings in a said Court in a certain cause
of Joseph Mc Clelland plaintiff against Phil Kellogg
Defendant in Exigent, as the same are of records
and on file in my office -

In witness whereof I hereto set
my hand and affix the seal of
said Court at my office in the
City of Peoria this 17th day of
June A.D. 1834 -

Jacob Gale, Clerk -

Clerk's fees: for transcript, ent. & seal \$3.50 paid by pffr -

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Joseph Mc Clelland

vs
Philo Kellogg

Reverend, Evers & Jones

Filed June 23^d 1854.
McClelland, Clerk.

[12847]

Joseph McCalland }
vs. }

The Heirs at Law of
Philo Kellogg dec'd.

Supreme Court
Northern District, Ill.
Error to Peoria County =
On Ejectment =

Points & Argument for Plaintiff =

The Case made by the record is this: On the 27th of April 1836, Tucker entered the land in dispute, at the Land Office, at Quincy, And on the 9th of May next following sold it, for a full consideration, to the Plaintiff. The deed to Plaintiff, duly executed & acknowledged, was recorded in the proper county on the day of sale: On the 13th of November 1837 Tucker assigned the Certificate of Entry to Carter, to whom, as assignee, the Patent issued December 5/38: On the 8th of July 1839 Carter deeded this, with other lands to said Philo Kellogg, in exchange for a farm in Ohio: Kellogg recorded his deed in June 1840, And in May or June 1846, got possession (in manner hereafter named) which possession, such as it was, he continued and paid taxes on the whole tract, under his deed, till cut short a period, a little exceeding 7 years: He did not reside on the premises; Nor did they adjoin his other lands: There was actual possession of only 4 acres. The residue of the tract remaining vacant & unoccupied: These, except the manner of taking & holding the possession, are believed to be the material facts; And by the principles settled in Rogers vs. Brent 5 Gil. 573, the Plaintiff should recover, unless the defendants are

Protected by the Terms of the Limitation Law of March 2/39,
re-enacted in 1845 - see sec. 8 & 9 Chap. 24, Rev. Stat. And
on this the note, 1st. The defence set up below being pos-
session & payment of taxes for 7 years, under paper title of
record, it must stand solely on s. 1 of that act, being s. 8 above
named: For possession of part of a single tract under paper
title to the whole is, in law, possession of the whole. Such
possession, if available at all, is coextensive with the paper
title - Argue on Sim. 428, s. 21 = 433, s. 24 = 15 Ill. 273 =

So, under the Statute. The land is either vacant & un-
occupied, or it is not - If occupied in part, the tract cannot
be deemed vacant & unoccupied within the purview of the
law = So, by the terms of the act, the recovery, whether under the
one section or the other, is always for the whole; that is, to
the extent & according to the purport of the paper title.

The two sections are, in this respect, incompatible: There
can be no recovery of part under one & part under the other.
Still less can the defence rest wholly upon the 2nd sec. of said act
Unless therefore it is supported by said 1st sec., it must fail
altogether.

2. The possession relied on in this case was not ad-
verse for the length of time required by the Statute. And
under every limitation law the possession which will
toll the entry of the true owner must be adverse for
the whole time requisite to bar such entry =

More possession without claim of right gives
no title however long continued... It is the claim of title

that makes it hostile. 8 Cow. 603: The good animus with which the possession was commenced & continuance is the test of its character. Same 609. 613. 617: 9 Johns. 180: 18. 44. 355: Aug. on Lim. 400. 401. 406. 413.

It is a settled rule that the doctrine of adverse possession is to be taken strictly & not made out by inference, but by clear, positive proof. Every presumption is in favor of possession in subordination to the true title; and if a person enter without pretence of title, his possession will be deemed the possession of the true owner. Ad. on Eject. 486, in note: 1 Johns. 156: 9. 167: 1 Cow. 610: 6 S. & R. 23=

A tenant at sufferance is not an adverse occupant. 24 Miss. Rep. 261=

An adverse possession must be hostile in its inception - positive, notorious, uninterrupted & continued for the space of time required by the statutes of Limitations in order to toll an entry. Ad. Eject. 486, & cases cited=

Possession to be adverse so as to bar the owner must be such as to give him notice of its hostile character..... A presumed acquiescence in the hostile occupancy is the basis on which the title by limitation rests..... Hence, if so clandestinely taken as not to afford notice to the owner, such occupancy cannot bar him. Aug. on Lim. 396. 416. 427=

To constitute adverse possession sufficient to bar the true owner, it must be hostile in its inception & continue so uninterrupted for 20 years. It must be actual

visible & exclusive acquired & retained under claim of title in-
consistent with that of the true owner. 15 Ills. 273. And in
Irving & Brownell 11 Ills. 413, the Court, speaking of sec-
tion 1, act March 2/39, say - "As the Legislature in re-
ducing the time of possession thought it expedient to
require stricter proof of apparent title to the land than
was requisite under the old limitation of 20 years,
so also they have tho't proper to require that the pos-
session under the act of 1839 should be more open, man-
ifest & manifest than under the former law." Again -
"The possession must be actual: that is, visible, open
& exclusive, either by an enclosure, the erection of buildings
or in some other way actually appropriating & using the
land in such an open & visible manner as to give
the real owner notice that the person in possession
is occupying & claiming the land as his own."

From all which we deduce that to toll the entry
of the true owner he must know, either actually or by
clear implication of law, arising from open, notorious,
unrequited acts or circumstances, of the hostile
occupancy, and acquiesce in it for the length of
time required by the statute: It follows that he
must have legal notice, who it is that claims the
benefit of the occupancy as against his better title
no less than of the fact of occupancy itself: Other-
wise it is impossible to say that he acquiesces in
it: Much more, if the occupancy at first was
not hostile should notice of the change by which

The fences were not altered, nor was there any visible change in the
occupancy or manner of using the land, at least not till the time
last year -

it became so he bro't home to him: And now,
what is the proof? Briefly this. That some years prior
to 1846, Adams, who owned adjacent lands, made a field
about the south West corner of this tract. And to make this
field square, he so ran his fences as to cut off & enclose
within it ^{the} four acres above referred to: Adams afterwards
sold to Sutton, who occupied & cultivated this field, including
said 4 acres: Neither Adams nor Sutton set up any claim
to these 4 acres; but expressly held them subject to the
true title: Accordingly, in 1846, when the son of Kellogg
claimed the land for his father, Sutton yielded at once,
supposing him to be the owner, & accepted a lease of some
kind, under which he, Sutton, continued, without appa-
rent change of possession, to occupy & cultivate as before
for the space of four years; after which, Kellogg,
by himself & others, occupied & cultivated till suit brought
a little over three years:# This is the case made by
the defence below: On the other side there is some proof
that Kellogg himself, claimed only about three years pos-
session; and of a young hedge set out upon the premises
one or two years before suit: But, discarding this last
proof, and what is the case made? Simply this. That
the possession relied on had its origin in mere accident:
that it was not hostile in its inception, but the Con-
trary. And that this holding subject to the title of the plain-
tiff - the true title - continued, to all outward appearance,
uninterrupted, the same, till within some three years
of the commencement of the suit: If that holding really

became a hostile occupancy when the supposed lease was made, was the plaintiff duly notified of the change. It is not pretended he had actual notice. Had he proper constructive notice of the fact? We think not. The actual occupancy was not then changed. Kellogg, himself, did not take possession at that time - But a lease to Sutton is set up, and possession ~~the~~ ^{his} tenancy relied on: What were the terms of this lease, is not disclosed. Whether written or merely oral, the witness, tho' he made it, cannot tell. And consequently whether it was relied on or not under the statute of frauds we cannot determine. But whether verbal or in writing, it was most clearly in either case a transaction strictly inter partes. And not, of itself, notice in law or in fact to any body else. And to permit a man thus to slide into possession and become an adverse holder, under cover of a friendly occupant, would, we think, sanction a clandestine taking which did not afford notice of its true character to the real owner. Every circumstance precluded the suspicion that a change had occurred: The enclosures about the premises remained as before: The same person continued in the actual possession. The same method of culture was pursued. Every outward sign indicated a continuance of the same friendly occupancy which existed in the beginning. Besides, the possession of Adams & Sutton being expressly subordinate to the true title, was, in law, the possession of the plaintiff, who was entitled to treat them as his tenants, and while either remained in possession, he could not become an adverse holder for himself, or any body else, so as to bar the entry of the

Plaintiff, by anything short of an open & avowed repudiation of that tenancy; and of this, it is submitted, very distinct notice should be brought home to the plaintiff. In such case, "nothing should be left to inference", but every material point should be "made out by clear, positive proof."

Add to all this that Kellogg, himself, does not seem to have been about when the lease was made - that no rent appears to have been paid under it - that the plaintiff has no actual notice of Kellogg's title - which being subsequently acquired & recorded, was not notice to the plaintiff in law - And we are at a loss to discover on what principle of reason or of law, knowledge of a hostile possession by Kellogg under his adverse title, and acquiescence in it, on the part of the plaintiff, during Sutton's occupancy, can be ascertained.

3^d The defence does not show color of title within the meaning of the Law =

And 1st - Under limitation laws generally, possession taken & specifically held under a deed or grant emanating from a source wholly unauthorized to make it, is not adverse so as to bar the true owner - Thus, we understand it to be the doctrine of Jackson vs. Waters 12 Johns. Rep. 365, that

possession under a grant from a foreign government which cannot be a legitimate source of title, is not adverse, and is unavailing for any purpose = see also 11. Martin, La Rep. 715 = 9 Wheat. 541 = Ad. on Exct. 451. 453 = The same doctrine is, we think, admitted substantially in La Frambois & Jackson 8 Cowen 589. Tho' the syllabus of the case reads otherwise = see particularly p. p. 599. 600. 601. 608 = also to same point 5 Cowen 350-351 =

Again = possession under a grant from a foreign Government is not held under color of title so as to render it adverse and confer a right to the land. Angell on Lim. 444 = So, a grant from the Indians does not give color of title, and no length of ~~possession~~ occupancy under such grant will ripen into title by adverse possession. Same, 445 & cases cited =

In Maine, a sale made by an administrator after the time limited by law was adjudged not colorable under the Stat. Lim. of that State = Maine Rep. 30. 354 =

In Leffer of Powell vs. Harman, 2 Pet. Rep. 241, the Court held title derived from a tax sale & 7 years possession, invalid under the Limitation Laws of Tennessee the sale being made by one not authorized to make it.

So, in Walker vs. Turner, 9 Wheat. Rep. 541, where the possession was under a Sheriff's sale on execution, issued on a void judgment, it was held, under the same laws, that the Statute did not run = From Patteson's Leffer vs. Easton, 1 Wheat.

476. We learn that possession under these acts "is a bar only when held under a grant or a deed founded on a grant": see p. 482: There were two acts - one passed by North Carolina in 1715: another by Tennessee in 1797, Explanatory of the former. And the Supreme Court of N. C. held, that the statute of 1715, protected those who held by color of title: and this decision was subsequent to the act of 1797: Hence the inference that titles of the kind last named were not deemed colorable by those courts =

So in Living v. Brounne 11 Ill. 402, an Auditor's deed under the law of 1827, without proof that the prerequisites of the law were complied with, is held not to give color of title under the statute now in question =

These cases proceed generally, perhaps all of them, upon the ground of an original want of legal power in the grantor to pass the title: But the principle running through them is - that being void because of such defect of power, the party claiming under them, is bound to know it, and cannot therefore take supposing he is acquiring a good title: He is held constructively to notice of the defect. So rigorous indeed is the application of this rule, that even where the possession is actual to the full extent claimed, if that possession be coupled with a void deed or grant of the kind we are considering, it is held not to be adverse within the meaning of the law =

In Ad. on Eject. 464, the doctrine is broadly stated thus - "No act or deed which is void can be the

Foundation of an adverse possession, for it can give
no color of title". The cases cited to support this declaration,
are, it is believed, all of the class just given. But on page
468 it is said - that deed void because of fraud cannot
afford color of title; And this is clearly supported by all
the authorities, if restricted to parties ^{affected with} ~~who~~ have notice.

Beyond that it is not asked to extend it: The true doctrine,
with one limitation, we claim to be this. That no deed,
void for any cause, can give color of title in the hands
of one who has actual notice or who is fixed with notice
by implication of law - The exception referred to is - where
a title, void as to the first holder, comes into the hands
of ~~an~~ innocent purchaser, such bona fide holder
takes it purged of the fraud, or other thing which rendered it
void, and may pass it even to one who has notice of
the fraud: Thus A. sells to B., who fails to record his
deed. Afterwards A. sells again to C. who knows of the
sale to B.: Now if C. sells to D. who has no notice of
the sale to B., D. will take the title & may transfer it
to E., notwithstanding E. may have actual notice. Mass.
Rep. 13. 498 = 14. 296 = 16. 406: Pick. Rep. 2. 184 = 8. 329:
This however is solely for the protection of D., and the doc-
trine is not to be extended farther.

But, ^{2nd}, Under our act of March 2/39, the title must not only be colorable but made in good faith: More is required than under the general limitation law of 20 years. In *Irving v. Barnwell*, 11 Ill. 412, the Court say: "It would seem therefore that the Legislature intended to require a different sort of title to protect a party claiming under the 7 year law from what had been required under the limitation act of 20 years, else why require that claim & color of title made in good faith should be essential to protect a party claiming under the former act? We are bound to give these words some meaning, and they will here have if the same construction is to be put upon the act as if they were not in it." Now had Porter & Kellogg each had actual notice, when they purchased respectively, it will not be contended they would have acquired their titles in good faith, under this law: In such case if the subsequent deeds be recorded, the first not being recorded, Courts will uniformly set them aside ^{in the hands of such purchasers} as being not only void, but fraudulent. see *Le Neve vs. Le Neve*, 3 Atk. Rep. 646.

But for all purposes affecting titles to land, constructive notice is as effectual as actual notice. Not only does the doctrine of caveat emptor apply, but, as against a recorded deed, all subsequent deeds by the same grantor for the same land, are, in law, Mala fide void, as well on the part of the buyer as on that of the seller. And this, we take it, is the true meaning & force of our recording acts. Rev. Stat.

108-9: S.S. 23. 28: From the time the deed is filed for record, it is deemed to be notice to all subsequent purchasers:

The recording of a deed is constructive notice to all the world of its existence, and, on a question of the superiority of title, constructive notice is the same as actual notice, and takes away the bona fides of the subsequent purchaser: 10 Johns. Rep. 457: 15 Wend. 588: 17. 25: 6. Barb. Sup. Ct. Rep. 373:

Possession under an unregistered deed is constructive notice to all the world of the rights of the party under it, and one who afterwards buys & records his deed is not a bona fide purchaser. 6. Wend. 213 14 Ill. 205: 1 Barn's Penn. Rep. 472:

Notice to an agent is notice to the principal, and will in law taint the transaction with fraud, as to the principal, where that is chargeable to the agent: 3. Atk. 646: 2 Eden 228: Vermont Rep. 2. 574-609: 9. Johns. Rep. 163: 4 Scam. 250: 14 Ill. 205:

Under the registry acts there is no difference between Personal & Constructive Notice except as to guilt. Eden's Rep. 2. 228: 6 Wend. 227:

In Boyle & Leas 4 Scam. 250, the Court say substantially - that where there are lights, which with proper observation would lead a man to knowledge, he is held to have had notice, so as to taint his purchase with fraud in law. And this, we think, is the fair import of all the authorities on the subject, clearly & tersely

expressed: other references might be given, almost indefinitely, to the same purport. but it is deemed superfluous.

These authorities establish, we think, satisfactorily, these propositions. viz: That for every purpose affecting the title to land, Constructive notice is the same as actual notice = That in all questions touching the superiority of titles, Mala fides, in law, is as distinctly referable to the one kind of notice, as the other = That wherever a party is put on enquiry, he is not only bound to make that enquiry, but is deemed actually to have done so. is, in truth, held to have had notice, and his title acquired against & in disregard of that assumed notice, is tainted with fraud in law =

Some of the Authorities cited, (as those in 6. 15. & 17 Wendell) are cases where the actual notice or fraud of a remote grantor is, after several mediate conveyances & the lapse of years, imputed to the last grantee, to let in a deed which, tho' not recorded when such previous grantor with notice received & recorded his deed, was yet duly registered before sale to any bona fide grantee.

Cases little less strong to show the effect of constructive notice, are those where the principal is held by notice to his agent, and deemed to have acted Mala fide because of that notice = And with cases of this sort the Books abound = The law thus deduced, however rigorous it may seem, is yet essential to the security of real estate, and works no hardship which common prudence may not readily avert = By adhering rigidly to the doctrine, a rule of easy & certain application is retained.

By deviating from it, confusion ~~is~~^{must} inevitably ensue, which will greatly tend to the unsettling of titles, and taking from the registration acts their vitality & force.

It is however true the language of Judge Rogers in *Sailor vs. Hertzog* 4. Wheaton's Penn. Rep. 265-6: "there are certain things which the law presumes every purchaser of real estate to know. For instance, a person is presumed to know of the existence of a deed which has been recorded. This is the very object of the recording act. And whether in point of fact he knows it or not, is of no manner of consequence. He might have known it if he had chosen to enquire" &c.

Judged by this rule, as thus apparently settled, neither Carter nor Kellogg were bona fide purchasers with in the meaning of the Law: When they severally took their deeds, they each had that legal notice of the prior deed to the plaintiff, which in the language of the Books, tainted their purchases with fraud in law: in other words, they did not acquire title made in good ^{faith}, as required by the statute. But it is suggested that, tho' this be the true sense & application of the phrase when the point is made upon the simple, unsupported strength of the subsequent compared with the prior recorded deed; yet when the question is as to the effect of such subsequent deed in giving color of title merely, a different rule may prevail: that the expression then means, good faith in fact, and that the party chargeable with mala fides in view of it, must be guilty of actual fraud. Must be Morally, not merely

~~Plaintiff~~ legally delinquent - thus making the standard of decision a rule of law or a rule of morals, as it happens to be applied to test a perfect title or an imperfect one = To this we reply -

1st The Authorities, so far as we can discover, do not countenance the distinction: On the contrary, in those cases where void grants are declared to be not estimable titles, it is expressly put upon the ground that the party could not suppose he was acquiring a good title =

2nd The expression is a technical one, long in use, and having a fixed, well ascertained meaning, in law, embracing constructive fraud, no less than fraud in fact, as has been shown; And the Legislature in adopting it, without qualification, must be taken to have used it in the same unlimited sense =

3rd = The phrase has, we think, been judicially interpreted by this Court in the sense we now claim it:

In Irving v. Brownell 11 Ill., on page 412. The Court say "When would a reasonable man suppose he had claim & color of title to land; or what sort of title would such a man in good faith pay out his money for? For none other, we imagine, than what he supposed to be a good title. If he knew that he was not acquiring such a title, or, if the circumstances were such that a reasonable man might know that the title he was acquiring was wholly defective, then it would not be a title acquired in good faith, and consequently not entitled to the protection of the act of 1839" The import of this passage is

clear, and, in our view, decisive of the point under con- sideration. It is moreover, in its letter & spirit, in entire conformity to the tenor of the authorities on the subject: As already seen, even where this phrase, "Made in good faith," is not expressly used, the Courts hold grants & deeds which are void, for want of original power to make them, not to be colorable titles within the meaning of limitation laws. And why? Most assuredly be- cause the parties claiming under them are assumed to know the total invalidity of the such titles, and therefore deemed not purchasers in good faith. And now, in what do cases of this class differ from the one be- fore us? If a party is imperatively bound to know what the law is in the one case, why should he not equally be held to have made that enquiry which the law requires, in the other? Taking men's actual knowledge & course of action as the criterion, the rule should be most vigor- ously enforced in cases like the present. For it is certain that men ordinarily are better qualified to determine, and more likely to know whether a prior deed for the land they wish to buy has been placed on record, ~~than~~ than whether a government has power to grant, or a sheriff or other officer has proceeded according to law. It is indeed notorious that the mass of men are strikingly disqualified for judging of such things. And yet they must judge of them, and judge correctly, or be treated just as purchasers in actual bad faith.

¶ Upon the Authority of Rogers & Brent, already cited, we are authorized to pronounce the assignment to Carter & the deed of Carter to Kellogg (the prior deed to plaintiff being on record) both, "utterly void," see 5 Gil. 578. It is not our purpose to insist that Non est void deed can ever give color of title within the meaning of the law. For we presume even a forged deed in a chain of title, will not necessarily prevent that title from being held colorable. But certainly, we think, this can never be where all the parties claiming under it are affected with notice of the forgery. If the notice be actual, this will be admitted. Is it any less true where the notice is constructive? Suppose the forgery be of a patent from the Government to A., where the records show a prior genuine Patent to B.; and will it be contended that a title derived from such forged Patent is colorable? Such a case, it seems to us, could find ^{no} support in any recognized principle of law. Where however there is no record to oppose the grant, and a man is honest in the belief that he has a good title, and is not put on inquiry, then the necessity of the case may often require that he be protected. But where the means of knowledge lie directly in his path, and the law itself imposes the duty of investigation, which he refuses or neglects to make, there, the Maxim, Vigilantibus Non dormientibus lex adjuvat, which in other circumstances might bear against the true owner, applies with propriety & force to him.

But to return to the case of Rogers vs. Brent. That was

A Case of the assignment of the certificate of entry to a party, without actual notice, but after judgment against the assignor, upon which judgment execution issued and the land was sold as the property of the assignor. The Court hold that, except the right of redemption remaining in the assignor, the assignee was bound to know, the assignor had no further interest which he could assign. And this, because the judgment "was" "notice to all the world of every thing legally done" "under it." The Court further decide, that the patent issued to the grantee under this assignment "conveyed no more title right than would one issued on a second sale when the first was valid;" in which case they say, the patent would convey no title whatever. The reason doubtless is, that by one sale the government parts with its entire interest, and, so to speak, exhausts its power to give direction to the title to that land. Now, in such case, would a patent from the United States be any more color of title than if the power to sell had never existed in the Government at all? instance the school lands; and will it be said that the holder of a patent from the United States for section 16 in any township would have color of title to such land? If not, the reason must be, because the United States having wholly lost its power over ^{the title to} those lands by the articles of compact vesting the title in this State, is no longer a legitimate source of title ^{therefor} ~~for those lands~~. So when the United States has once sold to an individual, it has just as much parted

with the title. And that sale is a matter of record which purchasers are as conclusively bound to notice, as they are bound to know of the existence of these articles of Cession and Compact. But, if the patent under a second sale, the first being valid, would not have color of title, so neither, according to the case cited, can the assignee of the certificate or his vendee claim such color of title in the case now before the Court.

But this case of Rogers & Brent goes still further. On pages 579-80, the Court says in substance. That the patent issued to the assignee imparted no better title than the assignor would have acquired had the patent issued directly to him: So that the dependants in this suit occupy the same position which Tucker himself would do, were he now here setting up claim & color of title to this land, made in good faith. But as to Tucker the transaction was a base fraud. The Court indeed, in the case then before them, treat the whole thing as purely fraudulent, remarking that it is "none the less a fraud because the officers of Government were imposed on & made the instruments in its perpetration". And to the full effects of this fraud the assignee is subjected. The case turns likewise upon the question of constructive notice, the Court declaring that the assignee is "chargeable with notice", and hence the consequences deduced.

5. In every case of the unconditional sale & transfer of land to a bona fide purchaser & by valid deed, the title passes absolutely, at the time, from the vendor & vests in the vendee; but subject to be divested in favor of a subsequent bona fide purchaser or creditor, if the first deed be not recorded. But it is by force of the recording acts alone that the second purchaser is thus let into the title. And this, we apprehend, by way of causing the title already vested in the first purchaser to ensure to the benefit of the second, who can take nothing directly by his deed; for the grantor, when he made it, had no title left in himself which he could convey. And even this, will not take place, if, after the second sale the first grantee happens to step in and get his deed first recorded. See *Boyle vs. Leas*, 45 Conn. 452. So that, as between the first & second grantee, it is the registering of the deed & that alone, in the absence of actual notice, which determines where the title shall rest. When therefore Sucher conveyed to the plaintiff, he parted with his whole title to the land, which, as to him, rested at the time completely in the plaintiff, and he was estopped, in law & in fact, from transferring that title again. By recording his deed, the plaintiff fixed, absolutely, that title in himself, as against every body else. And so that the registry acts could not operate to divest it in favor of another. For, in the light of those acts no other could thereafter be a bona fide purchaser from that grantor. All the world then was

Estopped from acquiring title to that land under
a subsequent deed from Tucker: The asser-
tion to Carter then, was, Every way, a mere Nullity-
in law, void, absolutely, as well on the part of the gran-
tee as of the grantor: For it was a case where the gran-
tor could not give and the grantee could not take
title: It is difficult to conceive how a paper of this sort,
so wholly without legal sanction, as to Every party to
it, can give color or be regarded as title for any purpose.
Why should it indeed have greater efficacy than a grant
proceeding from a source which never could confer ti-
tle? Where, we have seen, the want of knowledge on the part of
the grantee don't help him - Be he ever so innocent in fact,
it is to no purpose - His ignorance of the law is charged
against him, and is as certainly fatal to his title,
for every purpose, as tho' he knew, at the time, that
the grant made to him was utterly void: That in
such cases the authority to grant never existed, can make
no difference, if, once existing, it is afterwards lost
and if, of this, the purchaser has legal notice -
Some other case cited ~~as~~ of this kind: as that
of an administrator, authorized to sell within a
limited time, who sells after that period, and which
sale, tho' followed by a deed in due form, does not give
color of title in law =

Shelf has been laid on a passage in the decision
of Irving & Brownell (see pages 412-13) which runs thus

"By the Words Claim & color of title made in good faith,
"must, therefore, be understood such a title as, tested by
"itself, would appear to be good: not a paramount title
"the, capable of prevailing over all others, but such an one as
"would authorize the recovery of the land when untraced
"or, as no better title was known: that is, a prima facie
"title". This passage is also quoted approvingly by the Court
in 15 Ill. 180. And similar language may have been used by other
courts, but under different statutes. Taken literally, as it seemed
to be by the Court below, in this cause, it certainly proves too
much. For it would let in ~~the~~ any title, however tortiously
obtained, which proceeded from a source apparently able
to pass the title, and which was regular on its face:
Not to name other instances, it would let in the second
grantee with actual notice of the prior sale; And this too, no
matter what collusion with the grantor to mislead & defraud
the first purchaser: But if it be said that cases of
actual fraud are, of course, excluded, we ask, why stop
there? Why not also exclude cases of constructive fraud?
For it is clear that the title is no less prima facie good
will no less certainly authorize a recovery when untraced
than when tested merely by itself. Where there is actual
than where there is constructive notice. In either case
we must go out of the land the paper title introduced to
show why it is not the valid title it purports on its face
to be. The letter of this passage then, isolated from the rest of the
case, expresses more than is intended. The Court did not
mean by it to declare any title, which is now because

pend arising from the joint legal delinquency of all the parties to it, to be colorable & made in good faith, within the meaning of the law - This is apparent from what precedes, and which we have already quoted: The fair import of the Case of Irving & Brownell on this point, undoubtedly is, that title is never to be deemed acquired in good faith when the purchaser either actual-ly knows that it is defective & void, or when he might know it, if he made that enquiry which, under the circumstances, it is legally incumbent on him to make. And, thus construed, we think the case an authority conclusive in our favor =

In the argument thus far, we have assumed it to be clear law, that a title absolutely void upon its face - as, the deed of a Guardian, where there has been no report of sale made, nor confirmation by the Court - not only gives no color of title, but will not support an adverse possession under any limitation law. This position, we are advised, is controverted by the defence. And this distinction taken by: That tho', where a void title of this sort, is set up, the possession of the party availing it, will, by construction of law, be held subordinate to the true title, if it is left to inference merely under what title that possession is held - Yet that, whenever the proof is clear that he relies upon such void title & holds expressly under it, there the possession will be adverse and will be supported by that title, however groundless it

may be: We deem it unnecessary to attempt a formal
reputation of this view; because, if true, it would not fol-
low that such title would be colorable & made in good
faith within the purview of the act of March 2/39-
the contrary, indeed, being expressly ruled in in the case of
Erving Bromwell, so often referred to, and no less emphati-
cally affirmed in the case of Rawlings & Bailey, 15.
Ill. 180. And because we think the language of the
Books generally, too explicit to admit of doubt - With
proper deference however for the able counsel who take the
distinction, we submit, that the distinction really taken
in the Books, is misapplied. The true view of the
whole subject we take to be this - that possession
will always be held to be subordinate to the title of
the real owner, unless the contrary is clearly made
out by the proof - And that, while there may be an
adverse possession, without any title at all, which
after 20 years will hold the land; yet if the
party sets up a title absolutely void on its face
and distinctly couples his possession with it, and
relies upon it to sustain his possession - there, his
possession, however long continued, will not
avail him: For, by the very case made, he destroys
the presumption which the law would otherwise
raise in his favor - viz: that he may once have
had some title, the evidence of which has since
been lost =

It may be urged that this is a Statute of Repose, and ought therefore to be liberally construed to protect the party claiming under it. In answer we cite Adams on Eject. 461 & 14 J. R. 480, where it is laid down, that "Every limitation Law being in restraint of rights must be construed strictly". And the remarks of Judge Gibson, in Miller vs. Shaw, 7 S. R. 138, that limitation laws are not "intended as the means of acquiring title, or as an encouragement to people to enter on each others land with a view to hold it, but to compel them to decide their controversies while transactions are recent, & the evidence attainable; and there, their operation in protecting possession under a bad title or no title at all, is but a consequence of the object of the object of their enactment & not the object itself". To construe a statute, so short in its limitation as this, rigorously against the true owner, cannot be necessary on the score of proof, and might tend to encourage people to enter on each others land with a view to hold it. Nor is it

Nor is the objection well founded that if cases like the present are exempted from the operation of the Statute of March 2/39, the purpose of its enactment will be interfered with, and the act itself rendered nugatory. That act was, we think, designed to have a somewhat special application, which is sufficiently indicated by the time at & the circumstances under which it was passed. At that period difficulties

existed in the collection of the Revenue, and doubt & confusion hung over the tax titles acquired under the Revenue Laws previously made: To put an end at an early day to litigation touching these titles & establish them, where the substantial requirements of law had been complied with; and thus afford reasonable security to the holders of these titles, ⁱⁿ continuing to keep the taxes paid. And, at the same time, to facilitate the collection of the Revenue in the future from other vacant & delinquent lands, were objects of much moment, to effect which, two things were requisite - 1st A Revenue Law, relieving purchasers at tax sales from the burden of proving many of the prerequisites to the sale, otherwise necessary to be proved before introducing their deeds; And 2nd, A Limitation Law, which would in a short time ripen the prima facie titles, so acquired, into perfect titles, provided the holders should continue to help the State to collect her Revenue, by keeping all taxes upon the lands purchased promptly paid. Hence we find the Revenue Law of February 26/39, making the collector's deed conclusive or presumptive proof of nearly every fact requisite to its due execution, and imposing on the person who would attack it, the burden of first proving ownership in the land and that all ~~the~~ taxes due have been paid; followed, four days thereafter, by the act now in question: that its chief purpose therefore, was to cure defects which might still be found in the prima facie titles, to

he acquired under the Revenue Law just enacted. And to establish titles already acquired under some of the previous Revenue Laws, is, we think, at the least, presumptuous: But whatever the special object, there can be little doubt but that it will effectively cover all such cases: It may also apply in many others. As for instance, in cases, like that understood to have been recently before this Court, where the title set up was under a Sale on execution issued after the death of the defendant. No notice, actual or constructive, being brought home to the purchaser, ^{including purchaser,} ~~he~~ might, we conceive, well have color of title made in good faith. So, of titles, in the chain of which, there may even be forged deeds, and so of every other defective title, where the party setting ^{it up} is not affected by notice in law: This opens a wide field for the beneficial action of the Statute.

Limiting its operation thus, the claims of justice and the purposes of an enlightened legislation are fairly and fully met. But to extend the rule and apply it to cases like the present, where the party setting up the title of the Statute had full record notice, when he made his purchase, of the utter worthlessness of the title he was acquiring, would, it seems to us, assail the whole doctrine of constructive notice, in a manner seriously, if not directly to impair its force. Add to this, that the act of March 2/39, does not require the title of the claimant to be made of record. That such claimant may slip in desigreedly at the earliest moment & pay the taxes, and that from the manner the Books of Collectors are kept, it is often

altogether uncertain by whom the taxes are paid. And
it will be seen that the real owner may have lost his
land, before he is apprized of his danger or has been able
to discover from what quarter the blow comes.

Cooper & Reynolds
for Jeff.

McClelland vs Supreme Court
Kellogg vs Heirs of Kellogg

Ruth H. Sinnott
Wellington R. Kellogg
Walter R. Kellogg
Philander Kellogg
William R. Kellogg
Eiza R. Kellogg infant
Rolla R. Kellogg infant
Caroline N. Kellogg infant

55847-25

McClelland
vs
Heirs of Kellogg
Argts & Repts for 1856

Filed Feb 16. 1856

McClelland vs
Kellogg

20
M. L. Belland

~~and~~
Kellogg

Supreme Court

Heirs of Kellogg

Filed July 12, 1855.
S. Leland Clk.

Joseph McCallum
vs.
Philo Kellogg }

In the Supreme Court =

It is agreed between the counsel for the parties in this cause that the same be submitted for decision upon written arguments to be filed with the Clerk or sent to some one of the Justices of said court on or before the 1st day of January A.D. 1856.

Ottawa July 10th 1855

Jonathan R. Cooper
atty for self -
Manning & Morrison
for depts -

The death of the depts being suggested, Mr. Manning is to have the cause redocketed in the names of his legal representatives =

20
McClallan
Kellogg
Stipulations

Filed July 12. 1855.
L. V. Allen Clk.

1. Color of title is that which tested by itself is a good title - Irons v Brownell 11 Ill 45

This case turns upon the construction of the ^{statute} act of 2. March 1839. (acts of 1838-9. pg. 266) -

The payment of taxes for 7 successive years after the taking possession in May or June 1846 is well proved - The deft had actual possession of a portion of the land, claiming the whole under deed from that time for more than seven successive years before the commencement of this suit. The possession was for a portion of the time by himself, a portion by his tenants, still it was open, actual, exclusive.

The possession was adverse. He claimed it in his own right and against the world. The case of Jackson v Lem, Bonnel vs Sharp, 9 Johns. 162. and other cases standing upon the same principle are in no wise similar to this: There the entry was made without claim of title. Here, altho' there was such an entry, the defendant did not claim under it - he claimed in his own right, and those having made the entry without title, surrendered to him

~~from the~~ At the time of such
surrender he entered in his own right -
thereafter it was his possession - the
claim, nothing from their possession but
claiming that it was void & a trespass
as against him

There also, Foster being in
possession under Bogner took a covenant
to convey from Thorne, which is con-
sidered to be a covenant to convey the
real owners title - here the defendant
took possession from Sutton in his own
right, and claimed it against all persons.

2. The defendant had in his hands, a
perfect title, purchased for a valuable
consideration. He took and held
possession under it.

He had claim & color of title.
Iving vs Brownell, 11 Alb. 402. It is
a prima facie title. To hold that,
because the defendant had presumptive
notice that there was another title, which
when his title and that were brought in
conflict might defeat his, he could
not be entitled to the benefit of this
act, would be to nullify the intended
benefit of the act - it was precisely
such cases that the act was intended
to cover.

There can be only one title: The possessor is certainly not bound to have that title, it is another title, and not the perfect title which is to be protected. Here, admit for the purpose of the argument that the defendant had not the perfect title - he had one good as against the world except the plaintiff - he claimed & held adversely to the plaintiff - even as against the plaintiff his title might be good if plf's title was fraudulent - he has this possession which is notice to the plf. of his rights - and if this title is not protected by the statute what title is?

^{question}
The Law requires the owner of land to pay the taxes. The plf neglects this for 7 years consecutively - permitting the deft to pay his money for the plf. The plf seeks to avail himself of the benefit of this payment of deft's money, while he has notice of it - It was such possession - such color of title, and such payment of taxes, which the statute intended to protect. So to permit the defendant to pay taxes and to avail himself of the benefit, is a fraud on the part of the plf against the deft.

2. The act has no reference to notice of other titles or the registry laws. It places the rights of the purchaser on entirely different grounds. If it only means that where there is a better title it shall not prevail against the purchaser, except where the purchaser has notice of it, the legislature have omitted this very material exception entirely; And we certainly ought not to interpolate this exception.

3. By claim and color of title made in good faith in this act is clearly meant a title which is purchased for a good and valuable consideration. If a person purchase upon such consideration he is not to be presumed to have purchased fraudulently. If there was fraud, it must be proved. None is shown in this case.

But under the statute the title is made in good faith to the purchaser, unless there has been a concert between the vendor and purchaser to defraud some one. None such can be presumed

The case of Rogers v. Brent
5 Gil. 573. is in no wise analogous
to this. The court merely decide
that where a lien was acquired
on land held by purchase from
the U.S. and the purchaser
afterwards assigned his certificate
and a patent issued to his assignee,
that the right of the holder of the
title under the lien was superior.
But there no question is made as to
the rights of the parties if a purchaser
under the assignee had held possession
seven years with payment of taxes.

The act of 1839 is intitled "an
act to quiet possession, and confirm
titles to land" and the object of
the act evidently is to confirm
purchasers in their apparent rights
where they hold possession and pay
taxes according to the provisions of
the first section. If others hold a
superior title they are bound to
take notice of this adverse possession
and payment of taxes. This section
is in effect a statute of limitations,
and under the circumstances stated
in the act, the owner is bound to
prosecute his action within the
seven years or be barred of his
right of action.

In all cases where the act is intended to apply beneficially, there is necessarily a superior title: the possession and payment of taxes cuts this off. If it does not accomplish this object in the case under consideration, neither would it where the possessor claimed under a prima facie tax title. There also he would be chargeable with notice of the defects in his tax sale, and that the title had not been divested from the real owner.

This Statute should be liberally construed, at least so far as the first section is concerned. It is a Statute of 12 pages 270 - 10 W. Mon. 5. Vet. 407. 3 Vet. 270 - 10 W. Mon. 163. 1 Barb. 65. Head vs Maunier 5 J. J. Marsh 256 -

The possession by a Tenant is sufficient. Gainer vs Lyford 1 Dana 481, White vs Bates 7 J. J. Marsh 542. So under the Tennessee Page v Chinn 4 Dana 50.

An entry under a void deed
or grant where the party entering
claims under it in his own right
creates an adverse possession under
the statutes of limitation

5 Peters 446.

8 Oran 594, 596

1 Meigs 207.

There are numerous cases where it is
held that a possession under a void
deed will not be presumed or con-
strued to be adverse, but where the
evidence is clear that the entry and
holding were adverse there is nothing
left for presumption or construction.

It is an adverse possession, whatever
defects might be in the title under
which entry was made.

Deeds tho' fraudulent on the part of the grantor, if accepted bona fide on the part of the grantees give color of title
Gregg v. Sayre 8. Pet. 244.

Pap^r of a part is sufficient pap^r of the whole under the limitation law of Pa.

Cluggage v. Duncan 1 S.R. 111.

So in Vermont Pease v. Thorpe 1 Chip 92.
So in Pa. McCall v. Hoover 4 Watts & S. 151.

Bell v. Hartley 4 Watts & S. 32.

Seven years pap^r by a junior patentee bars the right of the elder patentee in Ky.
Styke v. King 2 A.R. Marsh. 385.

Where in fact pap^r is adverse the Stat. vests tho' the pap^r has used deceit to lull the opposite into belief that he would not claim adversely.

Strange v. Dunkham, Brewster 83.

In Pennsylvania adverse possession
however, commenced if continued 21 years
bars the action

Molson vs Fry 1 Watty 433
Bedrick v. Spindle 5 S. & R. 236
Pipley v. Lodge 4 S. & R. 310.
Royer v. Penlow 10 S. & R. 303

So in N. J., Den v. Wright 12. Hatcl. 175.
In Tennessee, Gork v. Bright 4 Humph. 312.
In Ky (comb. 2. B. Monroe 20. 4 ib 386.

If a tenant in common sell the whole
tract, and possession be taken under the
deed this possession is adverse under
the limitation laws

Cullen v. Motz 13 S. & R. 356
^{ex dem. Byrd}
Jackson v. Huntington 5 Pet. 402.
Clapp v. Bromaghani 9 Cow. 557. et seq.

A vendee may hold adversely to his vendor
Blight's Case Rochester 7 Wheat. 535.
Vid Wilson v. Watkins 3 Peters 53.

Pop^r to give title to land under Statute must
be actual, but it need not be under a
co-extensive deed. 1 Overt. 448

A party having paramount title in pop^r of
a part, may be deprived of a part by the
adverse pop^r of a junior grantee
Uddleton v. Dupuis 2 N. & M. 310

We contend that this case is
within the spirit and effect of the
decisions of our supreme court
on this statute and the decisions
of the Supreme Court of the U. S.
Woodward vs Blanchard 16 Ill. 424
Wright vs Mattison Dec. Term
1853. U. S. Sup Court

Tho the title set up under the
statute be void
Lafin vs Harrington 11 Ill. 301.

Manning Merriman
for defts in error

12847-33

M. S. Adams
"
Manning
defts in error