

13697

No. \_\_\_\_\_

# Supreme Court of Illinois

Holloway et al

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vs.

Clark

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71641  7



By this deed passed to Brainard the title obtained by his grantor from the sales and conveyances made to him by the Clerk and Sheriff.

A quitclaim deed passes *the fee* and not any smaller estate, and undoubtedly passes all the estate of the grantor in the land at the time of conveyance.

Bogy v. Shoal, 13 Missouri 366  
Frink et al vs. Darst, 14 Ill. 307.

The precise definition above given, taken from the opinion of the Supreme Court of Missouri, is cited as a true exposition of the principles intended to be decided in the *latter case*.

"The meaning of color is an apparent or prima facie right." Stephens' Plead. 241. "Color of title therefore is not given by a certificate of purchase of land at a tax sale, or an agreement for the purchase of land."

\* \* "The instrument relied upon as color of title must purport on its face to convey title." \* "Must apparently transfer title to the holder." \* "Not that the title should purport when traced back to its source, to be an apparently valid and legal title, but the instrument under which the occupant holds and upon which he relies must itself *profess to convey a title* to the grantee."

Bride vs. Watt et al, 23 Ill. 511.

There can be no doubt that this deed "professes to convey a title" to Brainard.

The decisions as to the effect of quitclaim deeds on subsequently acquired titles show that in the technical sense such deeds do pass title: they only hold that they were not intended to pass, and therefore should not pass, subsequently acquired titles.

In the case of *Bride vs. Watt*, the court cite with approbation the decision in *Woodward vs. Blanchard*, 16 Ill. 424, and "hold that a deed similar to that relied upon in that case would be color of title under *either* of these sections."

Now in that case the deed to the party by whom the taxes were paid was a conveyance "from the Auditor in the usual form."

Here then we have much more color of title, having two conveyances purporting to convey the land to Brainard's grantor.

It is objected that the conveyance by the clerk was void on its face. But it has always been held that color of title may be given even by a void and worthless deed.

Ewing vs. Burnett, 11 Peters, 41.  
Pillow vs. Roberts, 13 How. 472.  
Woodward vs. Blanchard, 16 Ill. 433.  
Moody vs. Fleming, 4 Georgia R. 118.  
Brodstreet vs. Huntington, 5 Peters R. 53, 54.  
Gregg vs. Lessee of Sayre & wife, 8 Pet. 253.  
Angell on Limitations, 435.  
La Frambois vs. Jackson, 8 Cow. 589.  
Clapp vs. Bromagham, 9 Ill., 530.

Again, there exists the deed from the Sheriff to Harding, under the sale of 1840: What valid objection can exist to this as color of title? Is it not quite equal to the Auditor's deed to Woodward, held good under this section, in *Bride*

vs. Watt? This deed is conceded in plaintiff's argument, page 3, to constitute color of title. The only objection taken is that it was not made in good faith.

Why should protection not be given to a person holding under the same deed under both sections of the Limitation Law of 1839? *Both* require color of title. The eighth section *requires also claim* of title,—but no protection is given unless the party seeking the benefit of the statute has *color* of title. Surely the statute which requires color only, cannot be construed so as to *make more demand* of the beneficiary. In chemistry, the union of two original elements sometimes gives one entirely dissimilar in all respects from either; e. g. from hydrogen and oxygen we have water. But this is believed to be a new doctrine in jurisprudence and alien to all its principles. When you *add* to the qualifications or conditions imposed, it seems unnecessary to say that you do not *subtract*. *The party who has claim and color of title must have color of title.* In striking down the eighth section, the ninth, in all essential respects precisely like it, is destroyed.

II. Had Brainard color of title made in good faith? This is a question of fact, and has been passed upon by the court, acting as a jury, and ought not to be disturbed.

It is urged that it was the duty of Harding to pay the taxes of 1839, and therefore he could not acquire any title by the purchase at the sale for non-payment thereof in 1840.

It does *not* appear that the land was then *listed* to Harding, and it is in proof that it *was* then *vacant*.

The plaintiffs demonstrate that he not only had no valid title to the land at the time of the purchase, but had no color of title to it,—in fact, no title whatever, the sale being absolutely void.

Why then should he pay the taxes? If he *was bound to do so*, and could get no title by purchase at tax sale, it is necessary to assume the absurd position that he had less right in regard to this land than even a stranger—he had no title, yet could acquire none. A fine modern illustration of the old doctrine of abeyance!

Section 48, Laws 1839, p. 19, only enlarges the period of redemption where “a purchaser of land at a sale for taxes suffers the same to be again sold for taxes before the expiration of two years from the date of his purchase.”

Sec. 10 provides that no one shall be *required to list lands* with the assessor unless he has a *clear and undisputed title* to the same, but in all such cases the land *shall be listed* by the assessor in the name of the patentee. Sec. 16 provides that the *party listing shall pay the taxes*. It thus appears that Harding *was not bound to pay the taxes by the statute*, but on the contrary exempted from such payment unless he desired to pay them.

The Supreme Court of Illinois have never held that a person, who was neither in possession of the land, nor had listed in his name, was bound to pay the taxes. They have never held in any case that the purchase for taxes by the party of the land listed or occupied by him was in bad faith, except where such party was a joint tenant or co-heir, as in *Choteau vs. Jones et al*, 11 Ill. 322, or a mortgagee, as

in Frye vs. Bank of Illinois et al, id. 383, or as a vendee under an executory contract, as in Voris et al vs. Thomas, 12 Ill., 444, and in Glancy vs. Elliot, 14 Ill. 457. In all these cases the purchase was held to be made in bad faith, not as against all persons, but as *against those only to whom* the purchaser bore a fiduciary relation.

The plaintiffs refer to the decision of Wright vs. Matteson, 18 How. U. S. R. 50, where the court held an instruction to the jury erroneous, on the ground that good faith is a question of fact. Surely this court could not say that it was the duty of a jury to find on this proof that Harding did not acquire his title in good faith? Yet when all the evidence is before the court and is entirely documentary, the Supreme Court should not treat the finding of a judge differently from the verdict of a jury, with the *same evidence* and on the *same issue*. There is no more room for *presumptions* in the one case than in the other.

Neither is there any foundation for the assumption that the purchase of 1848 for the taxes of 1847, shows that Brainard's title was not *made in good faith*. This purchase is not relied on as a basis for color of title. The only effect that a purchase could have is to show that *at the time of such sale* the party had doubts in regard to his title. It throws no light on his views *at the time* he acquired title, and this is the material time when good faith must exist.

It does not appear that he ever took out a deed on his purchase. The purchase may then have been accidental, and surely may be treated as no worse than a payment of taxes.

III. Does the receipt by Brainard of the money paid by Perkins to the County Clerk, to redeem from the tax sale of 1848, which sum included the taxes for five of the seven years paid by Brainard, estop the defendant from setting up the statute? The sum deposited was barely sufficient to redeem from said tax sale, *according to the provisions of sec. 69 of chap. entitled Revenue, R. L. 1845, i. e. double the purchase money and the subsequent taxes and six per cent. interest thereon from May 1st in each year.*

1. Section 95 of the same chapter provides that the receipt of the redemption money "shall operate as a release of all claim to such tract or lot under or by virtue of the purchase."

This is the *full statutory effect* of the act of Brainard.

The very head and front of his offending  
Hath this extent, no more.

When he took the money he knew the penalty prescribed by the statute; can he now be called upon to suffer another penalty which the law did not impose?

2. The 9th sec. of Chap. on Conveyances provides "that if any person having a better paper title, shall during said term of seven years pay the taxes assessed on said land for any one or more years of said term, the tax payer shall not be entitled to the benefits of this section."

Now the proper person to whom to pay the taxes was the tax collector. The

taxes had been paid to him and could not be again paid. No attempt was made by Perkins to pay them under the provisions of this sec. By his act of redemption from a tax sale, could he unwittingly pay, and Brainard unwittingly receive the taxes, so as to effect a result which neither intend?

The money is not paid to Brainard *during the period of seven years*, as the statute requires, but *after the bar* is complete. He was entitled to receive the redemption money from the tax sale so far as double the amount of his purchase goes, unquestionably, as the land was neither possessed by nor listed to him, yet he cannot take this without destroying rights which he has acquired under his color of title. This mixture of monies, or compound act, is done by Perkins intentionally: can he take advantage of his own wrong? Rather would not Brainard be entitled to take the whole of the money, on the same doctrine which prevails in the case of the *willful admixture of goods*. He could not get his own without taking the taxes, and therefore might take the whole sum in order to get that to which he was entitled, without fear or apprehension of a trick. But it ought to be conclusive, that the money is not paid to *the right party*, nor *received at the right time* by that party, if the Clerk is regarded as Perkins' agent, and is neither paid nor received by any of the parties *for the purpose* of depriving the tax payer of the benefit of the 9th section.

3. By the 10th section of the same chapter, it is provided that the said limitation law shall not extend to lands in case within three years after disabilities are removed the owner "shall pay to the person or persons who paid the same all the taxes, with interest thereon at the rate of *twelve* per cent. per annum, that may have been paid" on said land.

Now, in the first place, the sum paid to the clerk was *insufficient* to comply with the provisions of this section,—being *barely* the interest at six per cent. instead of *twelve* per cent. \$7 54 was paid as double the amount of the purchase money, and \$19 15 for the taxes of the five years, with six per cent. interest. The aggregate sum, \$26 69, was not paid for the taxes at all. Brainard was entitled to the redemption money, first because tendered as such, and plaintiffs are estopped by this act to deny his right to it, and next, because as the land was neither listed to nor occupied by him, he had a perfect right to buy it in, and was not bound to pay the taxes. Neither was it paid to *the right party*, nor at *the right time*, nor was it *paid or received for the purpose of defeating the operation of this law*.

4. Nor can it be said that the receipt of the money by Brainard gave to Perkins' act a character which it was not intended by him to have, and is a *substantial compliance* with the provisions of an act with which he *neither attempted nor desired* to comply. Had the effort been made to defeat the operation of the statute either under the provisions of the 9th or 10th sections above quoted, the mistake of the person, or the amount, or the time, could not even then have been overlooked; but how can a court be asked to construe an act as a compliance with provisions with which it neither complies nor was intended to comply? The *in-*

tion of the parties must be a *controlling guide* in determining the *effect of their own action*.

5. Again, the plaintiffs are estopped by the act of their grantor, Perkins, as to whom they are parties in interest, from denying that Brainard was entitled to the sum tendered by him as redemption money. It is an admission of the existence and validity of Brainard's claim to the money, as redemption money.

Of course, it would follow that the plaintiffs *could not be permitted to deny* that Brainard *took the money in the right to which by their act they assert he was entitled to it*, assigning as the reason that the court should so hold, that he *was not entitled to it* as redemption money.

6. No *proof* is furnished of the disability of Perkins; his right to make the *redemption* Brainard is estopped to deny by said 95th section of the Revenue Act. But no such estoppel is declared by the terms of the 10th section or any other section of the chapter on Conveyances. When it is claimed that the money paid for the taxes may be regarded as a payment under this latter section, in addition to the insufficiency of amount, to the *non-payment within the three years* to the proper party, a *fourth* difficulty arises in that there is no evidence or presumption that Perkins' disability existed. Nay the *evidence* is in the Record that it *did not exist*,—for James W. Perkins, and Clarissa, his mother, conveyed to Peter S. Hoes, on March 23rd, 1852. Hoes conveyed to Clarissa in November 1852, and in August 1854, Clarissa dying, James again became the owner of the land.

In point of fact, Jas. Perkins had no right to even redeem, unless it be held that the grantee of a minor can redeem, and that right is not a personal privilege—and even in such case the money should have been paid in the name of the party having the title. Certainly Brainard would not have taken this redemption money had he believed it would operate to destroy his title under the Statute of Limitations, since there was no *color of right* in Perkins to stop the running of that statute, under the provisions of the 10th section of the Conveyance Act.

7. But it is insisted that although the provisions of the statute for defeating the operation of the Limitation Law, were not complied with by Perkins, yet Brainard's receipt of the money paid as taxes operates as a *waiver* of the benefits, and a renunciation of the provisions of the statute. "To receive the money tendered as a redemption, is to say, "I claim no rights under the statute," and is an effectual estoppel to the defendant."

To sustain this proposition, various authorities are cited on the subject of estoppels in pais. None cited have any special application to the facts of this case, being for the most part merely illustrations of the principles that govern estoppels of this kind.

But it is to be observed, first, that the most essential and indispensable requisite of such an estoppel is wanting here, viz: that the party insisting on the estoppel has so acted upon the admission imported in our acts, that he will be injured by allowing the admission to be disproved.

Parsons' Contracts, vol. 2, p. 340 g. and note q. and cases cited.  
Carpenter vs. Stillwell, 12 Barb. 128.

Here there is no evidence that at the time Brainard received the redemption money, that Perkins could in any way have defeated the bar,—on the contrary, the bar was *then complete*. It is not shown that Perkins was induced to act or to withhold action on the belief that the bar was destroyed. The evidence shows that more than three years had elapsed since Perkins became of age and had sold to Hoes, before Brainard received this money.

Again, “to constitute an estoppel in pais, a party must have *designedly* made an admission inconsistent with the defence or claim which he proposes to set up, and with his knowledge and consent another party must have so *acted* on that admission that he will be injured by allowing the admission to be disproved.”

Hawes vs. Marchant, 1 Curtis, 136.

It must be *wilfully* done and *for the purpose of inducing the other party not to act or to act*.

Pickard vs. Sears, 6 A. & E. 469.

He must *mean* his representation to be acted upon.

Freeman vs. Cooke, 2 Exch. 654, 663.

*Both the intention to influence and the actual influence* must be made out.

Howard vs. Hudson, 2 Ellis & B. 1.

Patterson vs. Lytle, 1 Penn. St. 53.

The acts depended upon to prove an estoppel in *pais* must be of such a character as to leave *no doubt* that the party claimed to have been estopped *intended* to assume a position inconsistent with his right to make the claim sought to be barred.

Cook vs. Hunt, 24 Ill. 536.

Again, “where there is *no violation or neglect of duty*, of any kind, we apprehend that it must be a very strong case which comes within the law of estoppel.”

Parsons on Contracts, vol. 2, p. 340.

Downer vs. Cooper, 2 Q. B. 256.

B. & W. Rail Road Co. v. Sparhawk, 5 Met. 469.

Brewer v. B. & W. Rail Road Co. 5 Met. 478.

Here the act done was the receipt of money paid as redemption money. Estopped themselves from denying Brainard's right to this money, surely the plaintiffs cannot complain of that receipt.

There is not then a *single element* of an estoppel in pais in said act. The authorities cited by the plaintiff only going to support the same principles, do not need discussion.

It may be regarded, then, as *conclusively established* that no *estoppel in pais* is created by the receipt by Brainard of the redemption money to prevent the defendant from setting up the statute.

But it is ingeniously urged that it is *inequitable* that a party should have the benefit of the statute against another from whom he subsequently *again* receives the taxes the payment of which created the bar. This is not a true statement of the facts. Were it true, this is a consideration proper to be addressed to the legislature, to add to the penalties which the Statute has provided. The party

having done that which gave him the benefit of the Statute, cannot be deprived of it, except according to the provisions of that Statute.

We are to impose no additional penalties for the act of receiving the redemption money. The penalties created by statute exclude others by construction, on the principle, *expressio unius exclusio alterius*.

This tribunal administers the law according to the well settled principles of jurisprudence; they cannot be asked to step aside and correct the errors of legislators.

But if the plaintiffs are deprived of their money and of their land, who have they to blame but themselves? The money was paid by Brainard to the tax collector, under the statute providing for tax payments. The redemption money is received by him under the law. Had the plaintiffs or their grantor chosen they could readily have stopped the bar by the payment of a single year's taxes. Why did they not pay the taxes of 1853, 1854 & 1855, after this redemption? Instead, they permitted Brainard to perfect his bar, and pay the taxes of 1856, '57 & '58, and bear the burthens of what they now ask shall be declared to be their land. Had they been occupants of the tract during this period their rights would have been saved. *Vigilantibus non dormientibus jura subveniunt*. But they were merely speculating in this thing and must take their chances, suffering the consequences of their acts.

It is not in such a case that the court should, under the guise of doing equity, by a kind of judicial *ex post facto* law, to declare additional penalties never dreamed of by the parties, against those who have simply received money deposited to redeem from a tax sale.

9. The defendant's right to the land was not acquired by the payment of a certain sum of money; and cannot be destroyed by the re-payment of the same.

The statute gave to the regular payment of taxes under color of title the virtue and efficacy it has.

The payment of the redemption money to the County Clerk also received its virtue from the statute. In and of themselves neither payment had any weight or could have any effect. Beyond this the payment or receipt to produce any effect on the title must derive its power from some contract of the parties.

Here no contract is pretended; nor does the evidence suggest any.

It is difficult to conceive a ground for the pretence that the payment or receipt of this money, under the facts in this case, could in any way affect the rights acquired under the 9th section.

10. *But this money was received by Brainard after he had sold to the Defendant's assignor. He had ceased to be the owner of the land, and could not destroy the title of his vendee. The defendant or his assignee, under their executory contract of purchase, had then a vested and an equitable right to the land by the contract, although the first payment under the contract had not matured and been paid.*

Judge Story says: "Courts of Equity treat contracts concerning land, for most purposes, precisely as if they had been specifically executed. Thus, if a man has entered into a valid contract for the purchase of land, he is treated in equity

as the equitable owner of the land; and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made; and it passes by descent to his heir as land.”

2 Story's Eq. Juris. sec. 790. Id. sec. 1212.

This is the universal doctrine of all the authorities.

If the vendor conveys, or in any way incumbers the title to the injury of the vendee, his acts are void as against the vendee, and no rights can be acquired under them except in favor of subsequent purchasers without notice.

No authority can be found denying to the vendee his equitable right to the property where he complies with the terms of the contract, *on the ground that at the time of the act complained of, e. g. a subsequent sale or conveyance, any part of the purchase money was not paid.* The doctrine requiring the payment of the purchase money to constitute a *purchaser*, extends only to cases where such subsequent purchaser seeks to set up the recording acts against a prior unrecorded title or purchase.

In such case it is well settled that he cannot be held to be a *purchaser*, until he has not only paid all the purchase money and parted with value, but clothed himself with the legal title by his deed. But it was never held that the *older purchaser in time and in right* was at all affected by the fact, that he had not paid the first payment or a dollar of his purchase money. The vendee's rights depend on the performance of the contract according to its terms, and so long as the contract is alive and not forfeited or cancelled, his rights cannot be rightfully affected by the acts of his vendor, or of any third person. He is the owner of the land. These positions are so plain and incontrovertible deductions from the doctrine that the vendee is the real owner of the land that no authorities are needed to support them.

The fact that the vendee, when sued for the payment of the purchase money, can only set up such defence by way of failure of consideration as the covenants in his deed or contract may give him, in no way affects this doctrine. This is only to say that he shall have such remedies for a breach of contract or covenant as he has provided for. It in no way questions, affects, or invalidates, his right to *have the title which his vendor had or acquired* to the premises *according to the contract.*

It is true that he cannot call for this title or conveyance till the time arrives when he is entitled to it by his contract, and shall not say, of course, that his vendor has failed to comply, or cannot comply, until this is legally demonstrated by the arrival of the time of performance, and till the duty of performance is imposed upon his vendor by the performance of conditions precedent, if any, on his part. To this effect only are the authorities cited by plaintiffs' counsel, including:

Duncan vs. Charles, 4 Scam. 568.

Foster vs. Jared, 12 Ill. 454, and others.

11. But it is claimed that Brainard did not contract to sell a color of title, with the provisions of the statute complied with, because the sale was on the 10th

April 1856, while the seven years from the date of the first payment expired May 28th 1856. It does not appear when the taxes of 1855 were paid, except that the payment was made while the land was vacant, that is before *July* 1856. *We do not know*, therefore, whether the taxes were *paid before or after April* 10th 1856. For a number of the preceding years they were paid in February and March, and no presumption exists to throw light on the matter. Had Brainard paid them before the contract, his obligee had to wait fifty days, and the bar was complete. No act of Brainard was required, and his malfeasance or nonfeasance could not defeat the title he had sold.

But suppose it *were* true that Brainard paid the taxes after the contract was made; he reserved the right to do so in his contract, and was the proper party to pay it. Nay, according to the reasoning of plaintiffs' counsel, he would have been guilty of an act of bad faith had he not paid it, since the land had been bought by him at a preceding tax sale.

That Brainard could destroy the bar by failing to pay the taxes, *if true*, only shows that he had the *power* to injure his vendee, by nonfeasance. That he had such power over his vendee's title, under our decisions relative to this section, does not show that he had the *right* to destroy that title by the unauthorized act of the receipt of this redemption money, which if it belonged to any one was his vendee's. Surely the *accidental existence* of such power in a vendor to defeat his vendee's title, and prevent his right maturing into an effectual bar under a statute does not *reverse* the ordinary principles of law on the subject of vendor and vendee, and confer upon the former the absolute right of *disposition* or *destruction* of the *estate of the latter*.

12. But it is submitted that the law undoubtedly is that *Brainard's vendee* had the right to pay the taxes in his name, for the purpose of preserving and perfecting the bar, and the privilege, if not conferred by the contract by its terms, could not be withheld or denied by Brainard.

The analagous doctrine in the case of promissory notes sold, but not assigned, giving the holder the right to use the name of the payee, goes on the same principle. The defendant was not then dependent upon Brainard even to this extent.

When Brainard took this money he had no interest in the land. By paying the money to the clerk, Perkins had at best only destroyed the sale of 1848. On what principle is it then that Brainard could confer on Perkins' act the power to destroy the defendant's title? The act of Perkins in depositing the redemption money had no power to injure the defendant. No greater efficacy could be given it by Brainard. After he had parted with his interest in the land, he was a stranger to it and the defendant. He could retain no power over the property of another, except that given him or reserved by the contract.

The finding of the Circuit Court that the defendant was protected by the statute was then correct. The case was clearly within it.

The remarkable effort of the plaintiffs to give to their grantor's act of redemp-

tion a force which it cannot have, and which is a mere afterthought, springs from an opinion most unjust to this court, that here but little will serve to defeat a defence founded on this statute, that while the 9th section of the Conveyance Act is nominally sustained, yet each case as it arises will be found not to be within its provisions. This statute ought to be liberally construed as a Limitation Act, and the defendant asks and should receive from the court the protection of its beneficent provisions.

GEORGE F. HARDING,

*Att'y for Defendant.*

Robert Holloway  
St. Alb. N. H. No. 178-51.

John Clock

Agreement  
for  
Defendant's Work

178

13697

Filed June 1<sup>st</sup> 1861

L. Leland

Clerk

1861

178

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STATE OF ILLINOIS, THIRD DIVISION.

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SUPREME COURT, APRIL TERM, 1861.

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ROBERT HOLLOWAY ET AL. }  
vs. } Error to Warren.  
JOHN CLARK. }

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ARGUMENT FOR PLAINTIFFS IN ERROR,

BY W. C. GOUDY.

*Filed May 10. 1861*

*L. Leland*

*Blank*

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# STATE OF ILLINOIS, THIRD DIVISION.

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ARGUMENT FOR PLAINTIFFS IN ERROR,

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*May it please your Honors :*

The plaintiffs in error commenced their action of ejectment in the Warren Circuit Court, against the defendant in error, and the cause was tried by the Court without the intervention of a jury. Both questions of law and fact were decided by the Circuit Judge, and it will be necessary for this Court to review both questions of *law and fact*.

The plaintiffs proved a paramount title in fee by a regular chain of conveyances from the United States to themselves, commencing with a patent dated October 6, 1817, and ending with a deed from James W. Perkins to the plaintiffs, dated April 24, 1857.

The defendant interposed the second section of the limitation act of 1839, as a defence, and it is to be determined whether he placed himself successfully within its provisions.

## COLOR OF TITLE.

The defendant offered three deeds in evidence, as "*color of title.*"

1. The County Commissioners' Clerk of Warren County to Abner C. Harding, dated March 22, 1841, reciting a sale by the clerk to Harding, on March 9, 1839, for the taxes of 1838.

2. The Sheriff of Warren County to Abner C. Harding, dated December 30, 1842, reciting a sale by the sheriff to said Harding, on May 18, 1840.

3. A quit-claim deed, without covenants of any kind, from Abner C. Harding and wife to Nathan Brainard, dated August 26, 1845.

The plaintiffs insist that the defendant did not "have color of title, made in good faith," by either or all of these deeds.

The law authorizing the clerk to sell lands for the non-payment of taxes, was repealed Feb. 26, 1839.

*Laws 1839, p. 23.*

Therefore, on the 9th March, 1839, the clerk had no more power than the clerk of the Circuit Court, county assessor, or indeed than any private individual, to sell the land. The sale was absolutely *void*.

The deed upon its face recites a sale by virtue of a law that had been repealed, and therefore by simple reference to the revenue law of 1839, the deed itself and its recitals shows it to be void.

But the sale is not relied on as the color of title; the deed is presented as the color of title.

The clerk had no more power to make the deed, than the sale. The one was dependent on the other.

The defendant furnished evidence by the production of the sheriff's deed, that the tax of 1839 was not paid by the purchaser at the first sale, but instead thereof the land was suffered to go to sale, when the same person bid off the land at that sale. The effect of the failure to pay the tax of the subsequent year, was to extend the period of redemption for one year, so that the time would not expire until the 9th March, 1842.

*Laws 1839, p. 19, § 48.*

The deed was made before that time expired, in direct violation of the statute, and was, therefore, void for that reason.

It is admitted that the deed from the sheriff to Harding, taken by itself, would constitute color of title, but it was not "made in good faith;" a question I will discuss hereafter.

The deed from Harding to Brainard is a mere quit-claim deed, purporting to release the title and interest of the grantor to the grantee, without any assurances of title whatever. There is no evidence that any consideration was paid.

This deed *alone* cannot be "color of title," because it does not *purport to convey the land or any title thereto*.

The question is presented, then, whether a void deed, executed by an officer without any authority from the law, or a quit-claim deed from one person to another, where the grantor has no title, is "*color of title*."

## I.

### WHAT IS COLOR OF TITLE ?

Considerable confusion has been produced in the numerous decisions upon limitation laws, by remarks not necessary in the decision of the points involved, or which were strictly applicable to the points before the court, but not to other cases where they have been cited as authority, without due consideration.

What is color of title? It is easier to answer what it *was*, than what it *is*, if we derive our information from the innumerable decisions of the courts.

Color of title is one thing; and claim of title sufficient to found an *adverse* possession, is another. Sometimes both are combined, sometimes one, and again the other; but in *all cases, in other States*, they have been coupled with a question of *adverse possession*, because the limitation laws of all other States require a concurrence of title and possession. The State of Illinois presents a limitation law dispensing with possession, and requiring only color of title and payment of taxes.

It becomes necessary, therefore, to inquire what color of title is, *separate* from the questions of claim of title and adverse possession.

Color of title necessarily must be *paper* title. There is a claim of title which may rest in parol, may be evidenced by adverse possession, or by either deeds or written contracts; but color of title always was paper title. Whether that is so or not, the legislature has required, by the express terms of the second section of the act of 1839, that the color of title shall be paper title.

This Court has settled the rule that it must not only be paper title, as required by the statute, but also that a written contract or agreement, or a written certificate of purchase is not color of title within the meaning of the statute, and that a DEED is required.

*Dunlap vs. Dougherty*, 20 Ill. 297.  
*Bride vs. Watt*, 23 Ill. 507.

The construction of the statute having been settled thus far, the question now arises in this case whether every paper purporting to be a deed, is color of title.

It certainly is true that a defective and even valid paper title may be color; but it is not *therefore* a legitimate conclusion, that EVERY defective and void deed is color.

I do not mean to say that the party must exhibit a *prima facie* title, as was decided in *Irving vs. Brownell*, 11 Ill., 413; but the deed produced as color of title *must be a deed according to the legal definition of the word, and must purport to convey a title; MORE, the deed must be such that the grantee would suppose and have a right to suppose that he was acquiring the title to the land.*

This proposition is fully sustained by the authorities and is consistent with general principles.

Color of title is an *appearance of title*. The examples put are, where A owns the land and made a deed to B, by which nothing passed for the want of livery of seizin, and afterwards made a deed to C, with livery, B there entered, it is said, by or under color of title.

3 *Black. Com.*, 309.

*Hatton vs. Morse*, 3 *Salk.*, 273.

This definition is adopted by this Court in *Bride vs. Watt*, 23 Ill., 511.

An apparent title, or an appearance of a title, is a very different thing from an *appearance of a deed*. In the old example the deed would be entirely regular and perfect, but lack vitality, because there was no livery of seizin. I have been unable to find a case where a paper or deed void on its face, or because of the fraud of the grantor and grantee, or where a bare quit claim deed, has been held color of title.

In *Wright vs. Mattison*, 18 *How. U. S.*, 50, Mr. Justice DANIEL, in delivering the opinion of the Court, says: "The Courts have concurred, it is believed, without an exception, in defining color of title to be that which in appearance is title, but which in reality is no title."

An auditor's deed, showing on its face that the sale was made eleven days sooner than it could be under the statute, if it was complied with, is void on its face and is not such a color of title as can be the foundation of adverse possession.

*Moore vs. Brown*, 11 *How. U. S.*, 424.

A deed obtained by the grantee by fraudulent representations is not such a color of title as will make the possession under it by the grantee and his assigns with notice, adverse to the grantor and his heirs, because the deed is void.

*Livingston vs. Peru I. Co.*, 9 *Wend.*, 516.

A grant from a foreign government and paper title under the grantee is not color of title; the possession under it is not adverse, because there can be no authority in a foreign government to grant lands in this country.

*Jackson vs. Waters*, 12 *J. R.*, 365.

The above case is directly in point. Here the clerk had no power and could have no power, except by statute, to make a sale and deed. He did not profess to have any title or to convey any title as an individual, but to execute a duty and power conferred by statute. There was no such statute or power: there was not an appearance of title, and the grantee could not have taken it as title.

An executory contract has been held not to be color, because it does not profess to pass title, and is not therefore an appearance of title.

*Jackson vs. Johnson*, 5 *Cow.*, 92.  
*Jackson vs Camp*, 1 *Ib.*, 605.

A sheriff sold land under an execution and gave a memorandum thereof to the purchaser, under which possession was taken. Subsequently, the successor undertook to execute a sheriff's deed upon the information furnished by the memorandum, and possession was thereafter held under that deed. These papers were held not to be color. The Court say: "It will not be considered that he settled upon the land under a color of title, with a fair expectation of enjoying it as his own, unless it be made to appear that he had some written document of title professing to pass the land, and one not so obviously defective that it could not have misled a man of ordinary capacity."

*Dobson vs. Murphy* 1 Dev. & Bat. 594.

See also, *Tate vs. Southard*, 3 Hawk's (N. C.) 119.

Independent of the question of good faith, the intent and knowledge of the party must in some degree be taken into consideration in determining the color of title, because the question as to whether it is an *apparent* title involves the inquiry as to how the grantee took it. He might take it as a claim of title, and not as color. The authorities all make this distinction where the question is raised.

It is frequently said that a void deed is good color of title; but that is true only in a qualified sense.

The case of *Gregg vs. Lessee of Sayre*, 8 Pet., 253, which is relied upon in *Woodward vs. Blanchard*, 16 Ill., 433, to support that position, was where the grantor made the deed for fraudulent purposes, of which the grantee was innocent. That deed was held color upon the express ground that the grantee had no knowledge of the fraud, that the deed purported to convey the land with covenants, and was accepted in good faith by the grantee.

The case of *Ewing vs. Bennet*, 11 Pet., 41, has been cited for a similar purpose. There the defendant held a junior deed from the same grantor, and it was alleged he was a purchaser with notice of the elder title.

This Court, in *Laflin vs. Herrington*, 16 Ill., 301, decided a void deed good "claim and color of title," under the first section of the Act of 1839. But the sheriff's deed was regular on its face, and only void because the defendant in the judgment was dead when the *fi. fa.* issued under which the sale was made.

For these reasons, and upon these authorities, I insist that the clerk's deed to Harding is not color of title. It does not purport to pass any title, except by virtue of certain laws, and the grantee was bound to know they were repealed; there is no assurance of title. The grantee knew that he purchased at his peril; that he was attempting to divest the title of the owner for a few cents; that the sale must be made in compliance with law, in order to avail him. His attention was directed to the laws at the sale, because it professed to be under the authority of the statute; the deed recited the authority of the statute.

It might, perhaps, be said that the passage of the revenue law of 1839 was probably unknown at the time of the sale to the officer and the purchaser. If true, that might account for the sale, and rebut the charge of violating the law in making the sale. But the deed was not made for *two* years after the sale. The defendant claiming no title by virtue of the sale, he only offers the deed as color of title. The clerk and purchaser certainly learned the laws prior to the Act of 1839 were repealed within *two* years.

Is, then, the deed from the clerk to Harding an apparent title? Is it an appearance of a title? Is it *prima facie* a title? Is it color of title?

No man can look at the deed and read it, that will not instantly say, that is no title; it does not appear to be a title, because the clerk had no authority by the very laws recited to make the deed.

I ask the attention of the Court to the quit-claim deed from Harding to Brainard. That deed is not color of title.

Where a quit-claim deed is insufficient to pass the title to land, and can only release to a person in possession, the question could scarcely arise. But it has been supposed that a quit-claim deed, in Illinois, is good color of title, because it is as effectual to transfer the estate of the grantor as a deed of bargain and sale.

A quit-claim deed does not imply that the grantor has a title; on the contrary, the presumption is that the grantor had no title that he would represent as good, and that the grantee has agreed to take the deed, running all the risk as to whether it passes title.

*McConnel vs. Reed*, 4 *Scam.*, 121.

*Doyle vs. Knapp*, 3 *Scam.*, 335.

The deed, to be color, must apparently convey the land. A quit-claim deed from a person not in possession, not having any title, does not apparently convey the land. If it is proved that the grantor was in possession, claiming title, or that he had any specific title, the quit-claim deed having by the law the effect to pass such interest, there would be an appearance of title constituting color.

The deed must on its face *purport to convey the title to the land.*  
*Bride vs. Watt, 23 Ill., 511.*

A quit-claim deed does not on its face purport to convey the title to the land.

This has been settled by this Court in construing § 11, *Ch. Conveyances, Rev. Stat. 1845, p. 104.* That section provides that, "If any person shall sell and convey to another, by deed or conveyance *purporting to convey an estate in fee-simple absolute* in any tract of land, &c., not then being possessed of the legal estate or interest therein," &c., but shall afterwards acquire it, the same shall enure to the grantee.

In the case of *Frink vs. Darst, 14 Ill., 304,* a carefully delivered opinion, overruling the decision in *Frisby vs. Balance, 2 Gilm., 141,* holds that a quit-claim deed does not purport to convey an estate in fee-simple absolute, and that the statute only applies to deeds purporting to convey a perfect title.

Cases can be found in the books where a deed from one person having in fact no title, to another, has been held color of title; but none of these cases were upon quit-claim deeds, without possession or covenants of warranty.

A deed, regular on its face, with covenants of warranty from A. to B., was held color of title.

*Bradstreet vs. Huntington, 5 Pet., 445.*  
*Davis vs. Easley, 13 Ill., 200.*

A man in possession of a tract of land as a squatter, conveyed by a quit-claim deed and surrendered possession, without any consideration except discontinuance of a suit then pending against him, and thereafter the grantees had possession under the quit-claim deed. The Court decided that the deed was not

color and the possession not adverse, for the want of a sufficient color of title on which to found it.

*Jackson vs. Hill*, 5 *Wend.*, 532.

A person took possession of a *gore* between two surveys, under a claim of ownership, upon the idea that the property would belong to the first occupant, and after being in possession for some time, sold and conveyed by a quit-claim deed, stating his title, and that he believed it good. The grantee had possession under the quit-claim deed for over 25 years. The Court held that the possession was not adverse, because there was no color of title. They say the deed did not purport to convey the title to the land, and the purchaser "was bound to know there was no title."

*Jackson vs. Frost*, 5 *Cow.*, 346.

The conclusion, upon a fair examination of all the authorities, and application of the test of reason and principle, is irresistible, that a mere quit-claim deed, without possession or title in the grantor, or proof of the payment of a pecuniary consideration, is not color of title within the meaning of the second section of the Act of 1839.

I cannot close the discussion of this point without reference to the cause of the popular error, that anything and everything is a color of title.

The two cases most of all cited to show that an agreement, and a defective, void title, is color, are,

*La Frambois vs. Jackson*, 8 *Cow.*, 589.

*Clapp vs. Bromaghorn*, 9 *Ib.*, 530.

Neither of these cases justify any such conclusion, and the remarks of the judges are *dicta*.

The limitation law under consideration was that of twenty years, which did not require any title whatever, either written or verbal, as a basis. An *adverse possession* of twenty years was all that was necessary. Therefore the inquiry in both of those cases was simply whether the possession was adverse; that was to be determined from the possession and the *claim of title*; it was not necessary that the claim of title should amount to legal color of title. Therefore it is held that possession under a contract, where the conditions were performed by the pur-

chaser, for a period of 40 years, with a continual claim as owner, repelling trespassers and the true owner, *was adverse*.

There can be no question but such is the law, and so it was held by this Court in

*Turney vs. Chamberlain*, 15 Ill., 271.

## II.

### THE COLOR OF TITLE WAS NOT MADE IN GOOD FAITH.

Harding bid off the land March 9, 1839, at a sale not authorized by law. The purchase was undoubtedly speculative, to get a title if he could, or if not, to get his redemption money. He knew, as all persons knew, that the chances were against him; that the owner could not be divested of his property except by compliance with the law. The very next year he failed to pay the taxes, having so little confidence in his purchase that he would not pay the taxes, as he must do to perfect his title, or even obtain redemption money. He had doubtless learned by that time, if he had not before, that the clerk had no authority to make the sale in 1839, and therefore he allowed the land to be sold for the next year's taxes, and purchased at that sale to get a claim to obviate the mistake of the first. Yet he took the deed a year after the second sale from the clerk; did he take it in good faith, believing that he was thereby acquiring a title to the land? or, did he take it because he could get it for a few cents, to get for it what he could?

But was the color of title evidenced by the deed of the sheriff to Harding, based on the sale in 1840, "made in good faith?"

It might well be a subject of some discussion as to whether the deed, without a judgment and precept, (though defective,) is color, within the meaning of the second section of the Act of 1839. But I am disposed to admit it is; denying that it was acquired in good faith.

It was the duty of Harding to pay the taxes of 1839, and therefore he could not acquire any title or assert any right by virtue of his purchase in 1840.

*Laws 1839, p. 19, § 48.*

*Choteau vs. Jones, 11 Ill., 322.*

*Frye vs. Bank Ill., Ibid, 383.*

*Voris et al. vs. Thomas, 12 Ill., 444.*

*Glancy vs. Elliot, 14 Ill., 457.*

This precise question was presented in the case of *Wright vs. Matteson*, 18 *How. U. S.*, 50. The defendant first offered an auditor's deed of 1823; then proof of possession taken that the grantee took possession in 1829; then offered an auditor's deed, showing a sale to the grantee in 1831 for the tax of 1830, the deed dated in 1833. The Circuit Court instructed the jury, as a matter of *law*, that the latter claim and color of title was not acquired in good faith. The Supreme Court reverse the judgment because of this instruction, holding that the question of good faith was a question of *fact to be determined by the jury* from all the evidence, and not purely a question of law. They express no opinion as to the accuracy of the legal proposition, but simply refer it to the jury as other questions of fact.

Upon the proof adduced in this case, it would unquestionably be the duty of the jury to find that Harding did not acquire title in good faith from a sale procured of his own wrong, and indicating that he had no confidence in his claim of title.

As this case was submitted to the court without a jury, the Circuit Judge ought to have found the fact in the same way, and failing to do so, to grant a new trial.

This Court will not make the same presumptions where the issue is tried by the judge as where it is tried by a jury.

But here all the evidence without conflict is before the Court.

From what has already been said in regard to the nature of quit-claim deeds, it follows that Brainard, the grantee, could not be considered as acquiring, by means of that deed, color of title in good faith. If Harding did not acquire color of title in good faith, then he could not invest Brainard with any better right than he had himself.

It is also proved that the land was sold May 30, 1848, for the taxes of 1847, to Brainard. It was his duty to have paid them. His purchase at this sale, and allowing the land to be sold directly after he received his deed from Harding, shows that he did not rely on the title as good.

Therefore the color of title was not made in good faith.

### III.

THE DEFENDANT AND BRAINARD UNDER WHOM HE CLAIMS, ARE NOT IN A CONDITION TO AVAIL THEMSELVES OF THE STATUTE, BECAUSE THE TAXES PAID HAVE BEEN REFUNDED.

It is admitted that Brainard paid the taxes assessed for seven successive years, commencing with the taxes of 1848, paid May 28, 1849; so that the statute would commence to run, if he had the necessary title, May 28, 1849. The full time would expire May 28, 1856.

It is also admitted that the land was vacant and unoccupied for seven years, and that the first possession was in July, 1856. It is also admitted that the defendant holds under Brainard.

If then the Court is of the opinion that the deeds offered by defendant are color of title made in good faith, he has made out all the facts required by the second section of the act of 1839.

But it does not follow that the defence is complete, even then.

The land was suffered to go to sale by Brainard, because of the non-payment of the taxes of 1847, when, on the 30th May, 1848, he purchased it in his own name. He then paid the taxes for five successive years. During this period of time, the paramount title to the land, now in plaintiffs, was vested in James W. Perkins, until November 23, 1852.

On the 19th February, 1853, James W. Perkins, by virtue of being a minor, redeemed the sale of 1848; and in doing so paid \$7.54, double the purchase money, and \$19.15, for the taxes of the five years and interest thereon, making an aggregate of \$26.69.

This money was paid to the county clerk, where it remained until sometime in the year 1856, between 10th April, 1856, and

1st January, 1857, when the clerk paid it to Brainard, who received the money and receipted therefor.

It further appeared that Brainard sold the land to Joseph Godfrey, and executed a written contract for a deed, with covenants against his own acts, on payment of the purchase money, April 10, 1856, on which nothing was paid, or was to be paid, by its terms, until Jan. 1, 1857; therefore it was after the making of this contract, and before the payment of anything thereon, that Brainard received the money deposited with the clerk by Perkins.

The question presented is whether these facts prevent the defendant from availing himself of the provisions of the second section of the act of 1839.

The second section of the act of 1839, expressly provides that "If any person, having a better paper title to said vacant and unoccupied land, shall, during the said term of seven years, pay the taxes assessed on said land for any one or more years of the said term of seven years, then in that case such tax payer, his heirs and assigns, shall not be entitled to the benefit of this section."

The proof shows that James W. Perkins had a better paper title than Brainard, and if Perkins had paid the taxes of the five years, or any one of them, *to the officers authorized to collect taxes*, there would be no question but the defendant could not avail himself of the limitation law.

Brainard having paid them to the tax collectors, and the law being that a second payment to the officers would be no payment but a mere gratuity, (*Morrison vs. Kelly*, 22 Ill., 610,) Perkins paid *all* the taxes that Brainard had paid to the clerk for the use and benefit of Brainard who subsequently received and accepted the money.

The question, then, is, was such refunding of the taxes paid under the assumed color of title, *equivalent* to the payment by Perkins to the tax collectors?

The 3d section of the act of 1839 declares that the provisions of the two preceding sections shall not apply to lands where there is an adverse title owned by minors under the age of twenty-one years, *provided* such minor shall, within three years

after such disability shall be removed, pay to the person who shall have paid the same, all the taxes, with interest thereon, at the rate of twelve per cent. per annum.

In this case, if Perkins had on the 19th Feb., 1853, paid direct to Brainard, or tendered to him the amount of money deposited with the clerk and subsequently paid to Brainard, there would be no room for doubt in the matter. Such a payment would be strictly within the letter of the proviso. It is true there is no positive evidence that Perkins was a minor, but if he had made the payment under the claim that he had been a minor and it had been accepted, the payee could not dispute the right to make the payment afterwards. In this case the payment was made as a redemption from the sale in 1848, under the claim of minority. By the statute such redemption must be made within *one* year after the disability was removed. The acceptance of the money by Brainard would be an admission that the Perkins was within the required age, and, therefore, that the payment was made within *three* years after the disability was removed.

It is true that the payment was made for the purpose of redeeming from the sale of 1848, and not under the proviso of the 3d section of the limitation law, and it may be claimed by the defendant, that it cannot for that reason be considered as a compliance with the latter statute; and it may likewise be suggested that the one statute required 6 per cent. interest, while the other required 12 per cent.

An accurate calculation from the tax receipts in evidence shows that the *five years taxes* paid by Brainard, with 12 per cent. per annum, amounts to the aggregate sum of \$

The aggregate sum deposited with the clerk and paid to Brainard, was \$26.69, more than enough to make the payment under the limitation law.

But it may be said that Brainard was entitled to the money under the redemption statute. This is not true. He bid off the land in 1848, when he was bound by law to pay the taxes, and his payment of the purchase money at the sale was no more than the payment of the tax. He could claim no right under it as a purchase, and, therefore, was not entitled to double the purchase

money; it being an illegal and wrongful act, he could not claim any *benefit from it even as a payment of the taxes.*

*Irving vs. Brownell*, 11 Ill., 412.

The question, then, is, whether the payment of the taxes to the clerk, with a view to redeem from a sale which the party was not bound to redeem, the receipt thereof by Brainard being the same money and the same taxes that Brainard would be entitled to under the statute of limitations, would be a substantial compliance therewith, and equivalent to a payment direct to Brainard.

The object of the act of 1839 was, as expressed by the title, "to quiet possessions and confirm titles to land." There was also another object, to prevent *laches* in the payment of taxes by the owner, and to encourage those holding defective titles, to confirm their titles by the payment of the public revenue.

The defendant's title, without the payment of seven years taxes, would be entirely worthless. The *only* thing required of the defendant in addition to acquiring colorable title in good faith, was to pay the taxes for seven successive years. Now, can he have the benefit of the statute without payment? Can he be protected by the mere advance of the money for a short time, he then receiving it back from the owner of the land?

Most clearly the legislature intended to confirm bad titles merely by the payment of taxes; and it is equally clear that the title would not be confirmed unless the person holding the color of title paid the taxes and permanently parted with his money. The provisions defeating the bar, if the owner paid any one year's tax, or if he refunded the tax within three years after disability removed, show conclusively that he cannot insist on the statute if he receives the taxes back.

If the defendant, from superior facilities for reaching the collector, was able to pay the taxes first, all the owner could do would be to repay the person making the payment. If the money is actually paid, the law will not quibble as to the channel in which it reaches the party.

It would follow from these premises, that the receipt of the taxes would be a *waiver* of any benefit that might otherwise have accrued to the defendant. He renounced the provisions of

the limitation law, and said in the most emphatic way, I do not rely on the statute, nor claim any rights under it.

The receipt of the money would be an *effectual estoppel* on Brainard and the defendant from claiming the benefit of the law:

*Starkie's Evid.*, 99, and *Notes*, ed. 1860.

*Wood vs. Maguire*, 15 *Geo.*, 202.

*Tilton vs. Nelson*, 27 *Barb.*, 595.

*Eldred vs. Hazlett*, 33 *Penn. S. R.*, 307.

*Rupp vs. Orr*, 31 *Ibid*, 489.

*Carpenter vs. Stillwell*, 12 *Barb.*, 128.

Brainard was not obliged to receive the money, but as he has without objection, the right of Perkins to pay the money to make the redemption, and that the sum was sufficient, will be considered as admitted. It is too late to raise objections of that kind.

But it is claimed by the defendant that the receipt of the money by Brainard, after he had sold the land to Godfrey and executed a contract therefor, cannot prevent Godfrey and his assignee, the defendant; from claiming the benefit of the statute.

The bar did not become complete by the lapse of seven years from the time it commenced to run, until May 28, 1856. The sale and contract were made April 10, 1856, before the bar was complete; therefore Brainard did not contract to sell a color of title with the provisions of the statute complied with, but only the color of title, that being all he had to sell. Brainard retained the *legal color of title in himself*, and he alone could complete it by the payment of the tax of 1855, which was necessary for that purpose.

*Dunlap vs. Dougherty*, 20 *Ill.*, 397.

*Dawley vs. Van Court*, 21 *Ill.*, 460.

*Stearns vs. Gittings*, 23 *Ill.*, 392.

Therefore, the conclusion is irresistible, that he could, by neglect to pay the tax of 1855, leave the color of title as it stood at the time of the sale to Godfrey, not protected. If he could thus

deprive Godfrey of the benefit of the limitation law, he could likewise receive the taxes he had paid, and in this manner deprive Godfrey of the provisions of the statute.

When all this was done, he still held just the *same title and the same rights* he had at the time of the sale and contract to Godfrey, which his deed would pass.

The proof is that Brainard received the redemption money from the clerk after the 10th April, 1856, and before January 1, 1857; the seven years did not run until May 28, 1856. It is not then proved by the defendant that the money was paid to Brainard after the full time had run.

Godfrey did not acquire any *vested* right by the contract; he had no *equitable* right, because he had paid no money whatever. If he had a contract that would entitle him to the results flowing from the payment of taxes, and such right was defeated by the receipt of the money by Brainard, such fact occurred before he paid *any money*, and, therefore, he could not be compelled to pay any.

Brainard agreed to give a deed with covenants against his own acts; if the receipt of the money, and a consequent defeat of the rights accruing under the statute of limitations, could be had, because of his sale and contract, then such receipt would be a breach of this covenant, and a complete defence to any suit for the purchase money.

But the law undoubtedly is that where a vendor gives a contract and retains the legal title, he can do what he pleases affecting it, and will only be required to make such a title as called for by his agreement. Any breach of the contract is a matter for settlement between the parties. The vendee has no vested rights; the vendor has not parted with the title.

*Duncan vs. Charles et al.*, 4 *Scam.*, 568.

*Foster vs. Jared*, 12 *Ills.*, 454.

*Tyler vs. Young*, 2 *Scam.*, 441.

*Slack vs. McLogan*, 15 *Ills.*, 249.

This is emphatically so when the *legal holder* of the title is the only person having the power to create the bar by the payment of taxes.

The plaintiffs in error therefore insist in this case,

1st. That there was no color of title.

2d. That the color of title, if any, was not made in good faith.

3d. That, even if there was color of title made in good faith, there was a waiver of the statute, and the defendant is *estopped* from setting up the same, because *all* the taxes paid prior to February 19, 1853, were paid by Perkins to Brainard.

W. C. GOUDY,

*A'tty for Plaintiffs in Error.*