

No. 13503

Supreme Court of Illinois

Stevens, et al.

vs.

Wheeler, et al

STEVENS *et als.*, }
vs.
 WHEELER, *et al.* } ORIGINAL.

AND

WHEELER, }
vs.
 STEVENS, *et al.* } COST BILL.

Points and Authorities for Appellant.

See Abstract of Appellee.

I.

Sylvester Stevens was not a competent witness for his co-complainants; but if he was his evidence is overturned by testimony of Walker; Greesly's Eq. Ev. 339, 373; 6 Paige's Ch'y, 565-568, 569; 10 *ibid*, 126; 7 Dana, 89-92, 93; 3 John's Ch'y 612.—Original and cross bill are but one suit. 13 Ill. 32.

II.

Stevens voluntarily interposed to act for Wheeler in the purchase Wheeler was going to make, and did so act, and afterwards in affirmance of his agency, received from Wheeler the money he, as agent, had advanced for him in the purchase: and these acts and receipt of the money show that he *advanced* the purchase money *for* Wheeler and is therefore, a good resulting trust. But, if not a technical resulting trust, the *acceptance* of the money, the consideration paid—created him trustee, holding the legal title for Wheeler. 1 Barbour (S. C.) 495-496, 497; 3 Gil. 330-31-34, 35; 15 Ill. 519; 17 Ill. 522; 1 John's ch'y 394-397; Lees vs. Nuttall, 1 Russell vs. Mylne 53; 2 Mylne vs. Keen, 819; 2 Sumner 520, 521, 524-525; 1 Paige Ch'y 147-157, 158; 6 *ibid*, 355, 357, 359, 364; 5 *ibid*, 561; *ibid* 656; 3 Sumner 482, 483; 1 John's Ch'y, 582; 3 *ibid*, 612.

III. *or of constructive trusts*

But, if not within the rules of resulting trusts, on account of fraud in the act of obtaining the land in a *fiduciary* capacity, and also Wheeler's money and attempting to hold both *land and money*, the facts amount to a parol purchase of land, with payment, purchase money and improvements and possession for about twenty years. And this takes the case out of the statute of frauds. 2 Scam. 220; 3 *ibid* 365; 4 Gil. 600.

IV.

Title deduced through an equitable link or constructive trust, is sufficient under limitation laws of 1835. 18 Ill. 160.

A deed conveying all the grantor's right is sufficient, under claim of the whole, to bar under our limitation laws. 17 Ill. 253. And by analogy, the limitation laws are applied in equity in all cases where the remedy is concurrent, and generally in all equity proceedings. 17 Ill. 267; 18 Ill. 519.

The deed of *S. F.* Stevens to Wheeler, made in 1840, gave him possession under deed for the land, from a tenant in common, and he had possession by residence, claiming the whole and adversely to complainants, for more than seven years before suit commenced; and the chain of title through this deed runs back to the United States.

Now treating the case as an equitable title liable to be defeated by setting up the statute of frauds—for want of written declaration of trust—the complainants are barred of remedy. The statute has the same effect upon title as a deed of Wheeler, or a sheriff's deed under sale or execution against him would have. And the adverse possession will bar setting up the statute, the same as it will bar setting up the deed of which, in effect, it is but the equivalent. *16 Ill 301*

The complainant's claim is stale and unconscionable. It has remained dormant for twenty years, with knowledge of the facts, and without claim. And during this time Wheeler was in possession, claiming the land adversely.

The evidence against Wheeler comes wholly from the hostile side and is made up of loose and incongruous supposed conversations, and of evidence inadmissible from its character; and which upon exception, was reserved for disposition on the hearing.

SKINNER,
 For Appellee.

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Stevens

v

Wheeler

appellee's brief

Filed Jan 21/67

Wm. C. Carney
cl

Supreme Court---Second Grand Division.

JANUARY TERM, 1861.

ABSTRACT.

STEVENS AND OTHERS, }
vs. } *Original Bill.*
WHEELER AND WIFE. }

WHEELER, }
vs. } *Cross Bill.*
STEVENS AND OTHERS, }

The abstract of appellant is incorrect in the following items:

- 18 Replication of Wheeler to answer to cross bill filed.
- 28 Wheeler's deposition—Alvah Wheeler had been to Illinois and returned to the East with a view to buy the land of Hoyt. He came to my house in New Fairfield, Connecticut, in 1836. I took him to Zadock Stevens, on our way to Danbury, to buy this lot of Hoyt—something was said at Stevens' about our business. Stevens said he could buy the lot cheaper than Wheeler could, as Hoyt knew Wheeler had been to Illinois and would suspect it was valuable, if Wheeler went to buy it.—Stevens asked Wheeler how much he should give for the lot, and Wheeler told him to give fifty dollars for it if he could not get it any cheaper. Stevens, Wheeler and I went to Danbury; Stevens stopped and we went on through the village to Bethel, beyond Danbury, and did not get back to Stevens' till night. We found Stevens had got home. Stevens was elated, said he had got the land for *five* dollars; had done better than Wheeler could have done. He bought the land for Wheeler. After we had returned to Stevens' and he had stated how well he had succeeded, and the price paid, Wheeler took out of his pocket five dollars and handed it to Stevens, which he took. Wheeler offered to pay Stevens for his trouble, but he seemed to resent the idea of taking *more* than he had paid out, and said the title had better remain as it was, as Wheeler's creditors might trouble him. Wheeler was in debt.
- 29 We (Wheeler and witness) left my house in the morning to go to Danbury to see Hoyt and buy the land for Wheeler. We stopped on the way at his father-in-law's, Stevens, and informed him what our business was, and he advised that *he* would go and see Hoyt himself, and buy the land for Wheeler, as he thought he could make a better bargain with Hoyt than Wheeler could, who had recently returned from Illinois. Stevens went to Danbury and on his return said he had bought it for five dollars and had made a better bargain than Wheeler could have made. Wheeler paid him back the five dollars he had paid for the land, and offered to pay him for trouble in buying it, which Stevens declined, and said it had better remain for the present as it was, on account of Wheeler being involved.
- 30 When we (Wheeler and witness) returned to Stevens' house in the evening, after he had purchased the land, the deed was shown and read. I saw it in the hands of Wheeler; I did not see it after that; Stevens proposed to let the title remain as it was until Wheeler could settle his affairs with his creditors.
- 31 Have heard Stevens call this land Wheeler's Hoyt lot, and never heard him describe it any other way.
I lived about two miles from Stevens' and about six miles from Hoyt's, in New Fairfield, and they lived in Danbury.
I was not present when the deed was made and know only what took place between Hoyt and Stevens from what he said on our returning to his house, when he showed the deed, which was the same day the deed bore date.
Deed shown, witness identified it as same deed.
At the time, Wheeler's family lived in Poughkeepsie, N. Y., and he was with me, going and returning from Bethel, and neither Wheeler nor me were present when Stevens traded with Hoyt.
- 32 I knew the date of the deed from seeing it, and remember, aside from the deed, that it was in 1836, and in the spring of the year. (Notes reason of knowledge.)
I have heard from Stevens that he owned several soldier's rights in Illinois.
States particularly the facts surrounding the transaction.
- 33 I distinctly recollect what was said before Stevens went to buy the land and after he returned. I once had a piece of land in Illinois, but cannot find it.

I made a quit-claim deed for a piece of land in Illinois to Wheeler; Stevens advised me to do it, &c.

The deed in record, from Hoyt to Stevens, is dated 23d April, 1836; quit-claim and consideration *five* dollars.

36 Deposition of Morris S. Bradley :

After the purchase of the land from Hoyt by father, I often heard it talked of in the family of father Stevens, that he bought it for Wheeler. Have heard every member of the family except Zadock W. speak of the purchase of the Hoyt lot for Wheeler. I never heard father set up any claim to the lot. After father's death I have heard, I think, every member of the family say the estate had no claim to the Hoyt land, and that the heirs had nothing to do with it, as it was Wheeler's; but that the heirs had other lands in Illinois. Charles L. Stevens was one of the executors of father Stevens' will, and he has often applied to me for power of attorney to sell other lands of the estate in Illinois. After the purchase, Wheeler claimed and controlled the land, and I always considered it his in good faith, and, with my wife, gave him a quit-claim deed for it in 1858. We gave it, because the land belonged to him and we had no right to it—no consideration was paid—it was made simply because we did not own the land.

37 Do not remember hearing father Stevens say anything about it; did not get my impression from Wheeler, nor his family, until it had been talked about for years in the family of mother Stevens here; did not see Wheeler or family for more than six years after father Stevens' death; think I did not see Stevens for more than twelve years after, and I did not hear from him on the subject, until I saw him; this talk about the land and it belonging to Wheeler was in the family here; the brothers and sisters, the mother and brothers-in-law, at different times spoke of it.

Deposition of Mrs. Bradley :

Stevens was my father and Wheeler is my brother-in-law. In answer to question as to the purchase of the land, she says: "I heard my father say he purchased the Hoyt land for Wheeler. Father said to Wheeler 'you have been in Illinois and if you go to Hoyt to buy the land he will think it valuable, and ask you more for it than me.'" He told me he bought it for Wheeler at a bargain,—for five dollars. I did not know at the time but the deed was given direct to Wheeler. I do not remember hearing anything more about it for some six years after father's death, but when anything was said about the Illinois lands, the Hoyt lot was called Wheeler's, and the other lands belonged to the estate. I have been asked to give powers of attorney to convey other land of the estate in Illinois, but not to convey this, as it was considered Wheeler's land. Never heard father set up any claim to the lot. Father came to my house shortly after the purchase and stated the facts about it. Before and after father's death, I supposed the land Wheeler's.—I supposed the family so considered it and heard nothing to the contrary till summer of 1857. My brother, Zadock W., in August, 1857, wrote me about our lands in Illinois, but said nothing of the Hoyt lot. Have heard father say that he purchased the land for Wheeler; have heard the others say so, and it was considered in the family as belonging to Wheeler, and I never heard any thing to the contrary till 1857.

45 *Frost's* deposition :

46 Had but partial acquaintance with Stevens and Wheeler in 1836,—have married a daughter of Stevens since the death of Stevens; have often heard the members of Stevens' family talk of their lands in Illinois and I always heard in conversation and understood that the Hoyt lot belonged to Wheeler; that Wheeler owned and occupied the Hoyt lot and has always occupied in good faith, and I and wife conveyed to Wheeler, because it belonged to him; in 1855, I lived in Illinois and neighbor to Wheeler and Sylvester, Zadock W., E. B. Stevens and William Stratton (the complainants); I often heard them talk about Wheeler's farm and it was always understood by them all that the Hoyt lot was a part of Wheeler's farm, and I never heard a pretension of claim to it by any the Stevens family, except of Wheeler; I was married at the old homestead of Stevens family in 1839. Heard the facts from the members of the Stevens family.

44 Deposition of *Mrs. Frost* :

In 1836 I heard my father tell Stevens not to go to see Hoyt about the land for he would ask him more money for it, because he (Wheeler) had been to Illinois, and that he (Stevens) would go and buy it for him for he (Hoyt) would not mistrust him, and he could buy it for him (Wheeler) cheaper than he could; after father come from Hoyt's, I heard him tell Wheeler, that he had bought the land for five dollars; I do not know who the deed was made to; we considered it was for Wheeler and have always heard, supposed and still believe it is Wheeler's land, and it has always been considered in father's family as Wheeler's land; I heard father tell Wheeler to keep away from Hoyt as he could buy the land for him

(Wheeler) cheaper than he could; I did not know that father pretended to have any claim to the land; he always called the land Wheeler's, and it has always been understood by me and all the family to be Wheeler's land, until about the time of this suit; I always understood that Wheeler owned and controlled it in good faith,—have regarded it as Wheeler's land and released the same to him in 1858, for that reason.

Deposition of Phoebe Stevens:

Wheeler told my husband, Zadock Stevens, he was going to see Hoyt to buy of him a piece of timber land in Illinois; husband told him he had better not go himself, but, get him to go and get it for him; Stevens saying: "Hoyt knows you have been to Illinois and you will scare him"; husband was to go and buy the land for Wheeler; he did go and buy it for Wheeler for five dollars, and I never heard anything to the contrary, until they began to make a fuss about this suit; it was called Wheeler's land and I thought the family all so understood it; my son Zadock first showed disposition to claim the land, and I think he did not understand it so well as the others; he was not there at the time of the purchase.

Irvine:

52 I lived never the land in 1837 and mostly since; it is timber, lies a half mile
53 from farm (prairie) of Wheeler; Wheeler made rails on land in 1837; have known
Wheeler's place and timber since fall of 1837; never knew anybody but Wheeler
to claim the land, till this difficulty. This timber land has been used in connection
with the farm for timber,—the only timber belonging to it; think the house on
this land was put there by Haskins for Wheeler; Wheeler always since my know-
ledge claimed and used the timber and prairie land; it was occupied by Wheeler
—some farm there since 1838 or 1839; it has been occupied by some one living
on it for last ten years; Haskins lived on the timber land in 1844 under Wheeler;
there was a house and garden there.

Griffith:

61 Have lived near the land 26 years; never know any one but Wheeler to claim the
land—he has claimed it since 1837; the prairie land was improved before 1840,—
rails for it hauled from timber land; Haskins built the house for Wheeler on timber
land before 1840; the farm land was used in connection with the timber; Wheeler
claimed prairie and timber and made the improvements; the timber land, S. E. 1,
has been used with prairie land, S. E. 2, by Wheeler, since first settlement of the
country, and both used as a farm by Wheeler.

Clark:

68 Lived near the land 17 years; Wheeler occupied timber and prairie land when
I went there,—the S. E. 1 for timber and S. E. 2 for farm land and have been
possessed the same way to present time by Wheeler; and Wheeler has always
69 claimed them as his property; house on the timber land was finally moved on the
70 prairie land; timber and prairie one farm; residence on the prairie part of the
farm for last ten years and has been occupied by actual residence under Wheeler
on the prairie part for last ten years; Stratton lived in same neighborhood and the
71 claim and possession of Wheeler was notorious, when Stratton claimed to have
purchased on interest in the land.

Patchin:

75 Have known S. E. 1 and S. E. 2 since 1845,—they were known as the Wheeler
77 property; they have been occupied under Wheeler by actual residence on the land
since 1846, and Wheeler claimed to own them.

Massie:

84 Proves improvements in 1838,—that Stevens called S. E. 1 Wheeler's land and
said he bought it for him. All prove possession under Wheeler and Wheeler's
claim of ownership from the beginning.

Walker:

Was present at the conversation (proven by Sylvester Stevens) in January, 1858;
parties excited—loud talk—each party claimed the land; Wheeler claimed he had
a right to the land and Stevens claimed that Wheeler had no title; they disputed
as to who had the title; did not hear Wheeler admit he had no right to the land;
was not present all the time.

118 Affidavit of Zadock W. Stevens does not prove letter destroyed, referred to by J.
F. Stevens. Exceptions reserved to hearing.

O. C. SKINNER,
For Appellee.

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Stevens

vs

Wheeler

Appellee's abstract

Pls Jan 21/63
J. P. King
clt

ABSTRACT.

Supreme Court—Second Grand Division.

Appeal from Adams.

SYLVESTER STEVENS, *et. al.*, Appellants,

vs.

ORIGINAL BILL.

ALVAH WHEELER, *et. al.*, Appellees.

ALVAH WHEELER,

vs.

CROSS BILL.

SYLVESTER STEVENS, *et. al.*, Appellants.

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The original bill was filed August 31st, 1858, in Hancock Circuit Court, and alleges that Zadock Stevens, deceased, the father of all the complainants therein, except Wm. Stratton, was in his life time seized as owner of the S. E. $\frac{1}{4}$ of Sec. 1, T. 3 N. R. 6 W.; that Zadock Stevens being so seized, died in July 1838, leaving complainants, (except Stratton,) and also Epaphras B. Stevens, Joseph F. Stevens, Jerusha Wheeler (intermarried with Alvah Wheeler,) Angeline Frost (intermarried with Jacob D. Frost,) and Mary Ann Bradley, wife of Morris L. Bradley, his only heirs and devisees. That by his said death, complainants, Sylvester Stevens, Zadock W. Stevens, Charles L. Stevens, Jerusha Wheeler, Angeline Frost, Mary Ann Bradley, Epaphras B. Stevens and Joseph F. Stevens, became tenants in common, or coparceners of said land, each of them owning one undivided eighth thereof. That after the death of Zadock Stevens, said Joseph F. Stevens, Mary Ann Bradley and Angeline Frost, conveyed their interest in said land to Alvah Wheeler.

3.

And that Epaphras B. Stevens conveyed his interest in said land to William Stratton; that said Wheeler had conveyed some part of said land to Levi G. Patchen, but as to date of such conveyance, or amount of land conveyed, complainants are ignorant.

That said land was chiefly valuable for the timber thereon; and that Wheeler had cut and removed therefrom, timber of the value of \$6,000.00; alleges a desire to have the land divided, or if that can not be done, a sale made of the same and the proceeds divided according to the interests of the parties.

4.

Asks for subpoena against Defendants, calls for answer under oath, asks that Wheeler be required to account and pay for the timber cut upon and removed from said land; that commissioners be appointed to make partition of the land if that can be done, and for such other and further relief as may be consistent with equity.

5.

At the October term 1858, said bill was by leave of Court, amended so as to show that said premises had been conveyed, before the filing of said bill, by said Patchens to one Philip L. Wheeler, who was made party and required to answer said bill, not under oath however.

6.

On Oct. 14, 1858, Alvah and Jerusha Wheeler filed their answer, admitting that Zadock Stevens died in 1838, leaving as his heirs the persons so described in the bill, and that he died seized of the legal title to the premises described in said bill, and that E. B. Stevens conveyed his interest therein to Wm. Stratton, as alleged in the bill. That Joseph F. Stevens, Mary A. Bradley and husband, and Angeline Frost and husband, conveyed their interest in said land to Alvah Wheeler. Said answer states that in 1836, Russell Hoyt claimed to own said land by patent title; that there was an outstanding tax title upon said land. That Wheeler and Hoyt were acquainted with each other. That the previous year Wheeler had been in Illinois and near said land, and about April 1836, he went to the residence of Zadock Stevens, about four miles from Hoyt's, intending to purchase said land from Hoyt; that said Zadock Stevens was the father of Jerusha Wheeler, the wife of Alvah Wheeler; that said Zadock knowing all the facts, and that said Hoyt knew that said Wheeler had been to Illinois, sugges-

ted that Hoyt would not sell said land to Wheeler, as he would suppose it of great value, and proposed himself, (Zadock Stevens) to go to Hoyt and purchase the land for Wheeler; that said Zadock Stevens accordingly went and bought said land for said Wheeler, and took a deed to himself, (Zadock Stevens) and paid therefor \$5.00, and upon his return home, Wheeler paid to said Zadock Stevens the \$5.00 he had paid to Hoyt, which Stevens accepted in full. It was then agreed that Zadock Stevens should at some convenient time convey said land to said Wheeler, and said Stevens did not claim any real interest in said land. That about May 1838, said Wheeler and his family removed, and Zadock Stevens came with them to Illinois, where said Zadock Stevens suddenly died without having executed a deed for said land to Alvah Wheeler, and seized of the legal title to said land. The answer then denies that Zadock Stevens ever held any other interest save the legal title to said land, and states that said Zadock Stevens never was seized in fee simple of said land, states that equitable title was and is in Wheeler. That about 1838, said Wheeler took actual possession of the land, built a house thereon, and has ever since held possession thereof by himself and his tenants and persons holding under him.

8. And has controlled the same as his own without molestation from the heirs of Zadock Stevens; that three of said heirs, to wit: Joseph F. Stevens, Mary A. Bradley and husband and Angeline Frost and husband, of their own accord and without consideration, have conveyed their interest in said land to Wheeler. Admits conveyance from E. B. Stevens to Stratton, but states that Stratton had notice of Wheeler's claim, and that said Wheeler at that time had actual possession of said land. Admits conveyance to Levi J. and Henry Patchen, of a portion of said land by Alvah and Jerusha Wheeler, but that before the filing of the bill herein, the same was conveyed to Philip L. Wheeler. Admits that land was mostly valuable for its timber, but denies that Wheeler has cut and removed timber to the value of \$6,000.

9. States that in 1838, Alvah Wheeler made a farm near the land in dispute, and has since then got rails, fuel, &c. for ordinary farming purposes, for the use of said farm; that at the time of cutting said timber to fence said farm, the whole of said land was not worth over \$300, and that since then, very little timber has been cut; that the whole land is not worth over \$800, never has been worth over \$1200.

Afterwards, on the day of 1858, an agreement signed by the Attorneys of the respective parties, that the answer of Alvah and Jerusha Wheeler should stand as the answer of Philip L. Wheeler, and the replication thereto as replication to his answer, and his appearance was then entered, and that no advantage should be taken because Philip L. Wheeler was not a party to the cross bill, and that decrees might be entered in said cause on bill and cross bill, against said P. L. Wheeler, the same as if he were a party thereto.

Replication complainants in usual form filed.

11. Alvah Wheeler filed in said Hancock Circuit Court, Oct. 11, 1858, his cross bill against Sylvester Stevens and others, stating that about 1836, Russell Hoyt owned patent title to said land, which land had been sold for taxes, and was then claimed adversely to said Hoyt, under said sales; that in 1836 said Alvah Wheeler had been in the neighborhood of said land, and then lived in New York, about 40 miles from Hoyt's residence; that Zadock Stevens, Wheeler's father-in-law, lived about four miles from Hoyt's residence; that in 1836, Wheeler went to Connecticut to purchase said land, and at the same time visited Zadock Stevens, and made known to him the object of his visit.

12. That said Stevens proposed to go to Hoyt and purchase said land for said Wheeler, to which said Wheeler acceded, and said Stevens did go and purchase the same for \$5.00 and took the title in his own name; that upon said purchase being made, Wheeler paid to Stevens said sum of \$5.00 which he accepted, and treated the purchase as made for Wheeler, and the land as belonging to Wheeler, and would at any time when convenient, or desired by said Wheeler, have conveyed the same to said Wheeler, during his lifetime, and the said land was during the lifetime of said Zadock Stevens, treated by him and his family, as the property of said Wheeler, and so understood. That said Zadock Stevens never in fact made such a deed, owing to delay and confidence reposed in him.

13. That in 1838, Alvah Wheeler with his wife and family came to Illinois, where they have since resided; that Zadock Stevens came with them, and suddenly died without executing a deed for said land, and seized of the legal title; that in 1838, Wheeler took possession of the land, built a house thereon, and has since kept possession thereof; that he has used the same to supply with timber his farm, half mile therefrom, and for about 20 years prior to the filing of the original bill, has had possession and control thereof, as his own property; that Stevens died leaving children and heirs at law as stated in the original bill. That Joseph F. Stevens, Mary Ann Bradley and her husband, Angeline Frost and her husband, conveyed said land to said Wheeler, without any consideration being paid by Wheeler since the death of Zadock Stevens. That Wm. Stratton purchased of E. B. Stevens, well knowing that

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Wheeler claimed said land, and that the legal title was all he was getting from E. B. Stevens, and whilst Wheeler was in possession. Cross bill sets up such possession and knowledge as good defence against Wm. Stratton's claim. Charges that the equitable title so far as claimed by complainants in original bill is in Wheeler, and asks to perfect the title to the Patchens, to whom he has conveyed 20 acres. Makes complainants to original bill and Jerusha Wheeler defendants to cross bill—waives answer under oath—asks decree that each of said defendants convey to Wheeler all their title to the land, and for further and other relief, &c.

16. On the 11th March 1859, the complainants in original bill filed their answer to cross bill, neither admitting nor denying Hoyt's claim, tax sales, adverse claim, &c. Neither admit nor deny Wheeler's having been in neighborhood of land in 1835; Denies that Zadock Stevens proposed to buy the land for Wheeler, or that he did buy it for said Wheeler, or for any other person than himself; also denies that Wheeler ever paid Zadock Stevens the amount paid by him for said land, and that said Stevens ever treated said land as Wheeler's, or said purchase as made for Wheeler, and avers that Zadock Stevens always treated and considered the land his, as it in fact was; denies that there was ever any agreement about said land, between Stevens and Wheeler, but if there was it was verbal, and not in writing. Sets up and claims the benefit of all the Statutes of Illinois, and especially the forty-fourth chapter of Revised Statutes, known as statute of frauds and perjuries, against relief asked for by said cross bill. Denies that Zadock Stevens would at any time have conveyed said land to Wheeler, or that there was any obligation upon him to do so. Denies that the land was ever regarded by Stevens and his family as Wheeler's land. Admits that about 1838, Wheeler with his family moved to Illinois, and that Zadock Stevens came out about the same time, and died shortly afterwards, seized of the legal title to said land, of which he was the absolute owner. Know
17. nothing about Wheeler's possession, but allege as in original bill, that the land was valuable principally for its timber, and that before the filing of the original bill, Wheeler had cut \$6,000 worth of timber. Avers that if Wheeler took possession, he did so in right of his wife as one of the heirs of Zadock Stevens, and as tenant in common with complainants in original bill, and those under whom they claim. Denies that Wheeler ever had possession of said land as his own, but avers that whatever possession he had of said land, was perfectly consistent with and not adverse to the title of said original complainants. Admits the heirs as stated in original and cross bills. Denies that J. B. Stevens, Mary A. Bradley and Angeline Frost, or either of them, have ever made voluntary conveyances, without a consideration paid to them of their interest in said land. Denies that William Stratton had any knowledge when he purchased of E. B. Stevens, that said Wheeler claimed to own the whole of said land, and alleges that said Stratton, by his said purchase, acquired the legal and equitable title. Avers that whatever possession Wheeler had at the time of Stratton's purchase, was only to the extent of his title which was his wife's interest as one of the heirs of Zadock Stevens and whatever interest he had acquired by conveyance from the other heirs of said Stevens, and that said possession was not adverse to E. B. Stevens. Denies that the equitable title as against respondents is in Wheeler. Neither admits nor denies conveyance by Wheeler to Patchens. On the
19. 16th day of March 1859, Alvah Wheeler filed his replication to said answer, in the usual form, and on the same day a decree pro confesso was rendered upon said cross bill against Jerusha Wheeler, and on the same day the said original bill was dismissed by said complainants as to said Patchens, and leave was granted by the Court to amend said original bill, by making Philip L. Wheeler a party thereto, and said P. L. Wheeler entered his appearance to said bill and cross bill, and by consent of all parties the venue of said cause was changed to Adams
20. County, and an agreement was then entered of record by consent of parties, that all the pleadings in the case up to that time, should stand as good for and against P. L. Wheeler, as if he had been a party to all the proceedings.

Nov. 18, 1859, Alvah Wheeler filed exceptions to Int. No. 17, and answer thereto in the deposition of J. F. Stevens, because Int. is leading and evidence secondary, without any foundation laid for it.

21. On the 18th of April 1860, Alvah Wheeler filed exceptions to deposition of Sylvester Stevens, on the ground of his interest in the result of the suit, and to the 4th, 5th, 8th, 12th, 13th, 14th, and 15th, in the deposition of Epaphras B. Stevens.

27. The deposition of Nathan B. Wheeler, taken on behalf of Alvah Wheeler. He states that he is nearly sixty-four years of age; that in 1836, he knew Stevens, Hoyt and Alvah Wheeler. Wheeler was Stevens' son-in-law. Alvah Wheeler, my brother, had been to Illinois, and wanted to purchase some land of Russell Hoyt, and I took him to Danbury, Conn. to his father-in-law. We started to buy this land of Hoyt. At Mr. Stevens' something was said about our business, and Mr. S. told Alvah that he (S.) could buy the land of Hoyt cheaper than he (W.) could, as he, Hoyt knew that he (W.) had been to Illinois, and if he (W.) should propose to buy of Hoyt, he (Hoyt) would want a larger price. Mr. Stevens asked Alvah
- 28.

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how much he should give for the lot, and Alvah said \$50 if he could not get it cheaper. Alvah and I went to Danbury, and when we returned Stevens had got home, and was quite elated because he had got the land for \$5.00. He bought the land for Alvah Wheeler. Alvah took out of his pocket \$5.00, *after Mr. Stevens had bought* the land, and handed it to him, and he took it. Alvah also offered to pay him for his trouble, but he declined to receive it.

30. Stevens said the title had better remain in him as Alvah's creditors might trouble him. Alvah was then involved in debt. All I know about what Stevens paid Hoyt was what Stevens said. I saw no money paid by S. to Hoyt. Some time after this, Mr. Stevens speaking to me, referred to this land as Alvah's Hoyt lot. I don't remember what was done with the deed Stevens got from Hoyt.

31. To cross interrogatories he answers: I lived six miles from Hoyt and two miles from Stevens, at the time of said purchase. Knew nothing about the purchase by Stevens from Hoyt, except what Stevens said after his return from Hoyt's; the deed shown by Stevens on his return is the same one hereto attached marked A, and bears date April 23, 1836. (For exhibit A, see page 33 of record.)

Don't know what was said by Stevens or Hoyt when the purchase was made. Alvah's family were then residing in Poughkeepsie, N. Y., but he himself was with me all day, going to, staying and returning from Bethel.

32. Have heard from Zadock Stevens that he owned soldiers' rights in Illinois; don't know who was in possession of them. When Zadock Stevens left for the purpose of purchasing the lot, his wife, his daughter Angeline, and Charles and Fredrick were present. I once had a deed to a piece of land in Illinois but can not find it.

I did in April 1838, execute a deed of a piece of land in Hancock County, Illinois, to which I had no title that I know of. Alvah Wheeler is my brother.

33. Exhibit "A." Deed from Hoyt to Zadock Stevens.

36. Deposition of Morris S. Bradley on behalf of Alvah Wheeler. Am 60 years old, live in Danbury, Conn. Am brother-in-law of Alvah Wheeler. I often heard the purchase of the Hoyt lot spoken of as a purchase for Wheeler, in Stevens' family after it was made, never before. Never heard Zadock Stevens claim the land during his life. Charles L. was one of the Executors of Zadock Stevens, and he applied to me for Power of Attorney to sell my wife's interest in Zadock's lands in Illinois. Never heard Zadock Stevens say any thing about the land. After the purchase Alvah took possession of the land and cultivated it. I considered it his, and I and my wife deeded it to him, because we thought we had no right to it. No consideration was paid to us for the deed.

CROSS EXAMINED.

Never heard Zadock Stevens say any thing about the land.

38. The conversations about the land belonging to Alvah Wheeler was in the family of Zadock Stevens.

39. Deposition of Mary Ann Bradley on behalf of Alvah Wheeler. Am fifty-seven years old, daughter of Zadock Stevens. Alvah Wheeler married my sister. I heard Zadock Stevens say that he purchased the Hoyt lot for Alvah Wheeler. I do not know who paid the consideration money. I supposed this land was considered Alvah's; at least I so considered it. I was not present at the time of the purchase from Hoyt, and heard no conversation at that time; never heard any of my father's family speak of the land before his death.

40. Never heard that any one but Alvah Wheeler claimed or had control of the land. Zadock W. Stevens wrote to me Aug. 7, 1857, about my interest in my father's land in Illinois, but said nothing about the Hoyt lot.

CROSS EXAMINED.

I have no recollection of writing to Zadock W. Stevens that I did not know by what right Alvah Wheeler held said lot.

43. Deposition of Angeline Frost on behalf of Alvah Wheeler. Am fifty-four years old; live in Putnam County, N. Y. Was daughter of Zadock Stevens. In 1836 I heard my father tell Alvah Wheeler not to go to Hoyt's to buy the land, because Hoyt would ask him a large price, but to let him (father) go and he could buy it for him cheaper than he could. After Father came back from Hoyt's, he said he bought the land for \$5.00. I don't know to whom he took the deed. I supposed and still do, that it was Wheeler's land. Don't know who paid the purchase money. I have released my interest in said land because I considered it his.

46. Deposition of Jacob D. Frost on behalf of Alvah Wheeler. I am sixty-three years old; live in Putnam County, N. Y. Married Zadock Stevens' daughter after 1836. Know nothing of the purchase of said land from Hoyt. Since the death of Zadock, have heard his family speak of the land as Wheeler's. Have always heard that Wheeler owned and occupied it, and I and my wife conveyed to him without remuneration. In 1855, I lived in Illinois, neighbor to Alvah Wheeler, Sylvester, Zadock W. and E. B. Stevens and Wm. Stratton. The

Hoyt lot was considered part of Wheeler's farm, and I never heard of any claim to it except Wheeler's.

Page 47. Deposition of Phebe Stevens on behalf of Alvah Wheeler. Am eighty-four years old July 30, 1859. Dont recollect where Alvah Wheeler was in 1835, but when he went to Illinois, his family lived with me and Zadock Stevens, deceased. (Agreement that Wheeler went to Illinois in fall of 1834, and returned to Connecticut in spring of 1835; again returned to Illinois in 1837, and returned in 1838 to Conn.

48. I was acquainted with Russell Hoyt. She here makes same statement about the purchase from Hoyt that Mrs. Bradley makes. Have no recollection of Zadock Stevens ever speaking of the Hoyt lot after the purchase. I think it was always regarded as Alvah Wheeler's land. Have been told the land was in Hancock County. My son Zadock first claimed an interest in the land; he was not present at the purchase.

50. CROSS EXAMINED.

The conversation between Wheeler and my husband about the land, was about the time of Wheeler's first return from Illinois. It was not long afterwards that the purchase was made. When the purchase was made, Wheeler was in Danbury. Dont recollect how long Wheeler was at our house after his first return from Illinois. He and his family did not remain there until his second visit to Illinois. He went from our house to Poughkeepsie, N. Y. Can't say whether it was one or two years after he went to Poughkeepsie before he went to Illinois second time. Dont know that Wheeler gave my husband any money to pay for the land. Dont recollect any particular conversation about said land until this controversy arose.

51. Deposition of Samuel Irwin on behalf of Alvah Wheeler. Witness lived within 3 or 4 miles of this land; has lived in the neighborhood since 1837; the land is timber and brush; it is about one half mile from Wheeler's farm. In the winter of 1837 and '38, Haskins made rails on it for Alvah Wheeler. Alvah Wheeler claimed the land. My understanding is that this land has always been used in connection with the Wheeler farm; the Wheeler farm was occupied for Wheeler, as I understood it.

52. On cross examination the witness stated: The Hoyt lot was a good timber lot when I first knew it. I have lately passed over a portion of it, where there is not much timber.—Timber is scarce in that neighborhood. I have not seen Wheeler or any one for him, cutting timber there for 2 or 3 years last past. Wheeler moved on to his farm some time after the spring of 1847. Before that Haskins and Patchen had lived on it; Haskins lived on it in 1844. There was no house on the Wheeler farm before 1847.

53. Haskins did not reside on the Hoyt lot all the time that Wheeler's farm was being improved.

54. Deposition of Wm. Griffith on behalf of Alvah Wheeler. Proves substantially the same state of facts proved in the foregoing deposition, except that his knowledge dates from 1840, as to possession or claim of Wheeler.

61. Samuel Clark's deposition taken by Alvah Wheeler, proves that his acquaintance with the land commenced in 1843, and substantially agrees with the two foregoing depositions as to facts after that date.

62, 63, 64, 65, 66, 67. Levi Patchen's deposition taken by Alvah Wheeler, proves his acquaintance with the land since 1845, and he substantially agrees with Griffith's and Clark's depositions.

75 to 84 inclusive. Deposition of Patsey Massie taken by Alvah Wheeler, proves that her father, Haskins, lived on the land in 1838. She thinks the improvements on the Wheeler farm was commenced in 1838. I heard in 1838, Stevens call the land Alvah Wheeler's; he said that he had bought it for him. Alvah Wheeler claimed the land, and exercised acts of ownership over it in 1838.

84. Deposition of George Walker on behalf of Alvah Wheeler. Was present and heard a part of a conversation between Alvah Wheeler, Zadock W. Stevens and Sylvester Stevens, in January 1858, about a land claim; it was in a disputing tone, and a part of it in a loud voice; think it was about the Hoyt lot, both parties claimed the land. I did not hear Wheeler admit that he had no right or claim to the land.

On cross examination he states that he was not present during the whole of the conversation.

88. Deposition of Joseph F. Stevens, on behalf of original complainants. I am a son of Zadock Stevens, deceased. He died July 13, 1838. I resided with him to the time of his death. I know of his purchasing the land in dispute from Hoyt; Wheeler was then living in N. York.

89. I sold my interest in said land in 1840, to Alvah Wheeler for \$15. Some time in 1846, Wheeler told me he was cutting timber upon said land, and that he did not know but that he was running some risk in doing so. I never heard during my Father's lifetime of Alvah Wheeler having any claim to the land—never heard Wheeler claim that Father purchased the land for him until this controversy commenced.

I heard Wheeler offer to buy the land from my Father in 1838. I was one of my Fa-

Page 92. ther's Executors. Alvah Wheeler said to his wife in my presence in Nov. 1857, that he never did give Father \$5,00 to buy the land with, and that she was mistaken in supposing that he did. Alvah Wheeler and his family were not staying at Father's house at the time of the purchase; they were in Poughkeepsie, N. Y.

In 1837, I saw a letter purporting to be from Alvah Wheeler, in which he says to Father, "I have seen your Hoyt lot and it is a — rate lot."

93, 94.

Deposition of Sylvester Stevens on behalf of original complainants except Sylvester Stevens. Zadock Stevens bought the land of Hoyt, think on April 23, 1836; I saw the deed. Alvah Wheeler was not in Danbury at that time to my knowledge. In June 1837, I heard Zadock Stevens tell Wheeler that he had purchased the land of Hoyt; this was at Poughkeepsie, N. Y. Wheeler was talking of going to Illinois, and Zadock encouraged him to do so, and told him he had land in Illinois, but spoke more particularly about the Hoyt lot, because there was a tax title on it as he said.

95. Wheeler did go to Illinois in the fall of 1837; in January following, he wrote to Zadock Stevens respecting said land; he said it was a rate lot. Dont know where the letter is.— Wheeler returned to Connecticut in spring of 1838.

96. Zadock Stevens went to Illinois in May 1838, with Wheeler, to look after this land, as he said. He wrote to his family about the last of June or 1st July 1830, in regard to this land, and in his letter he said that to secure the title he deemed it best to build a house upon it, which he could do with Alvah Wheeler's assistance. Dont know where the letter is. Zadock Stevens died in Knoxville, Illinois, July 13, 1838. I first came to Illinois in 1850. In 97. 1851, I had a conversation with Wheeler in regard to our title; he said the tax title was no account, that he had cut timber from this land to fence his farm, and had not been called to account for it. In January 1857, I heard Alvah Wheeler say to Zadock W. Stevens that he never bought this land of his Father, nor did he (Wheeler) ever give him five dollars to buy it with, nor make any bargain with him, and that he (Wheeler) had no legal claim to the land, and Wheeler then offered to buy Zadock W's interest.

Wheeler married my sister.

98. I conveyed my interest in the land to Zadock W. Stevens on the 26th day of Sept. 1859, by quit claim deed and have no interest in the event of this suit.

99. On cross examination he says: I am the same Sylvester Stevens named in the original bill as a complainant. I was not present when the purchase was made from Hoyt, but I saw the deed about the last of April or first of May 1836. I was in Westport, Conn. on the 23d April 1836, 25 miles from Zadock Stevens' home.

101. Alvah Wheeler did not go to Illinois in 1835-6.

102. Zadock W. Stevens paid me \$50 for my interest in the land; my only object in selling was to get out of this suit. Am friendly with Alvah Wheeler—he visits my house, I do not visit his.

103. Exceptions to the deposition of Sylvester Stevens were attached to his deposition, based on the ground of his having been a party to the original bill, and a party in interest. There are also objections made to Ints. 4, 7, 9, and 22, and answers thereto, because parol evidence is not competent to prove conveyance; to Ints. 9 and 15, 23, and answers, because no foundation is laid, and it is irrelevant and inadmissible.

104 & 105.

Deposition of Epaphras B. Stevens on behalf of original complainants. Knows Zadock Stevens' handwriting from having seen him write, and states that "Exhibit A," attached to his deposition is in the handwriting of Zadock Stevens—body, signature and superscription.

Exhibit A, purports to be a letter from Zadock Stevens, dated Knoxville, June 11th, 1838, and is addressed on the inside: "Dear Wife and family," and is post marked "Peoria, Illinois, June 14," and is superscribed "Mr. Charles L. Stevens, Danbury, Fairfield Co. Ct.," and signed "Zadock Stevens."

In the fall of 1835, I heard Zadock Stevens trying to negotiate a purchase of this land from Hoyt. Hoyt then said he did not want to sell, but would give him a chance when he concluded to sell.

106.

I went to Poughkeepsie about last of March or first of April 1836, and boarded and lodged at Alvah Wheeler's from that time until June 29, of same year; I have no recollection of Wheeler leaving home during that time. Poughkeepsie is 40 miles to Danbury, and was one day's drive. If Wheeler had gone to Danbury whilst I was staying at his house I would have known it. If he had been absent for two or three days during that time I would have known it. I lodged in his house every night. Zadock Stevens was in Knoxville in June 1838. He started there May 1st, 1838, and died there July 13, 1838.

108.

109. On cross examination, he states that in 1838, Alvah Wheeler was embarrassed in Poughkeepsie; he built upon two lots, the title to which was in Zadock Stevens. I conveyed to him my interest in one or more of said lots, as one of the heirs of Zadock Stevens; cant remember why or for what consideration.

Page 110. Know of no controversy between the heirs of Zadock Stevens, except as to this land and a lot in McDonough Co. I cut some poles on the Hoyt lot in 1855, when I first came to this State, because I had a right to do so as one of the owners. I conveyed my interest in the Hoyt land to William Stratton, two years ago.

111. Upon re-examination he says Zadock Stevens never held the title to Alvah Wheeler's property to screen him from his creditors. Whenever he held title to property in which Wheeler was interested, it was to secure debts due to him from Wheeler.

112. Direct interrogatories 4, 5 and 13, and the answers thereto in the foregoing deposition, objected to by Wheeler, because incompetent and irrelevant, and the answer to Int. 4, gives the statements of complainants ancestor.

113. Exhibit A, referred to in, and attached to the deposition of Epaphras B. Stevens, contains the following passage. "I wish to take such measures in relation to the Hoyt lot as will secure my title and prevent litigation, possession will most effectually do this, I therefore wish to put up a small house upon it and get in a tenant, but perhaps I shall not accomplish this. The lot is said to be worth \$1,000,00, which I think is worth saving. Alvah thinks that he, George and myself can put up a cot in about a week when we can get to it, but at present it is impossible to leave the business here."

The balance of said letter relates to other matters, and does not affect this case.

117 & 118. Complainants in original bill then read the affidavit of Zadock W. Stevens, that the letter referred to in the deposition of Joseph F. Stevens in answer to the 17th Int. is not and never has been in the possession of any of said complainants except Charles L. Stevens, who was one of the Executors of Zadock; that Charles L. had the letter in his possession in Conn. until 1852, when being about to remove to Illinois, and deeming it of no importance, he destroyed it with other papers supposed to be of no value.

Certificate of evidence shows that complainants read on the hearing:

119. A quit claim deed from Sylvester Stevens and wife to Zadock W. Stevens, dated Sept. 26, 1859, conveying his interest in said Hoyt lot, duly executed and acknowledged.

120. Defendant's certificate of evidence shows that defendants read on the hearing, patent from the U. S., and deeds showing title in Zadock Stevens, and proved that they come from the possession of Wheeler. A deed from Joseph F. Stevens to Alvah Wheeler, dated Nov. 21, 1840, purporting to convey all his right, title and interest in same land. A certificate of County Clerk of Hancock County, purporting to show that said land was sold for taxes of 1829, on the 9th January 1830, and for taxes of 1831, on 7th January 1832.

This is all the evidence there was in the cause.

And thereupon the Court, Sibley Judge, rendered a decree, reciting as follows:

122. Disregarding of the deposition of Sylvester Stevens, and ordering that complainants in the original bill, and each of them, should within thirty days, convey to Alvah Wheeler, all the title which they had when the cross bill was filed, Oct. 16, 1858, to said premises, and that upon default thereof the Master convey at Wheeler's cost. That all title be divested out of complainants in original bill, and vested in Alvah Wheeler—relief against Jerusha Wheeler being waived, and that complainants in original bill pay $\frac{1}{3}$ of cost, and Wheeler $\frac{2}{3}$ of cost.

And thereupon complainants in original bill prayed an appeal, which was allowed upon bond being filed within 30 days in penalty of \$500, conditioned according to law, to be approved (by consent of parties,) by the Clerk.

123. Nov. 30, 1860, filed their bond conditioned according to law, which was approved by the Clerk.

THE ERRORS ASSIGNED, ARE,

- 1st. In rejecting on the hearing the deposition of Sylvester Stevens.
- 2d. In rejecting said deposition on the hearing of the cross bill, and in granting relief on said cross bill after rejecting said deposition.
- 3d. In ordering a conveyance by appellants to Wheeler, and divesting title to premises out of appellants and vesting the same in Wheeler.
- 4th. In rendering decree in favor of Wheeler, when by law decree should have been as asked for in original and amended bill.
- 5th. In not entering a decree as prayed for in original and amended bill.
- 6th. In not rendering a decree for partition, and in ordering a conveyance to Wheeler, and in divesting title out of complainants and ordering them to convey to Wheeler, and in vesting title in Wheeler.

WILLIAMS, GRIMSHAW & WILLIAMS,
Attorneys for Appellants.

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Stevens, et al.

vs

Wheeler, et al.

Abstract

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13503

Filed Jan 1/67

Wm. A. C. Wm.

Ch