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Adverse Possession - Void, Irregular or Defective Deeds or Grants - Whether a Forged Deed Imparts Color of Title within the Meaning of the Statute Providing for the Acquistion of Title to Lands on Payment of Taxes for Seven Years

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DISCUSSION OF RECENT DECISIONS

ADVERSE POSSESSION—VOID, IRREGULAR OR DEFECTIVE DEEDS OR GRANTS—WHETHER A FORGED DEED IMPARTS COLOR OF TITLE WITHIN THE MEANING OF THE STATUTE PROVIDING FOR THE ACQUISITION OF TITLE TO LANDS ON PAYMENT OF TAXES FOR SEVEN YEARS—Significant illumination has been shed upon the meaning of the term "color of title" as used in the statute providing for the acquisition of title to lands on payment

of taxes for seven years[1] by the recent decision in *Bergesen* v. *Clauss*.[2] The circumstances were simple and straightforward; the plaintiff had acquired title to a parcel of real estate and had never reconveyed; the defendant had purchased and had recorded a deed to the same parcel, had taken possession, and had paid the taxes for seventeen successive years. In the action, the plaintiff sought to have defendant's deed declared to be a forgery and the cloud removed from his title. The fact of the forgery was not denied; nor was the good faith of the defendant. The trial court sustained the defendant's motion for summary judgment and, on direct appeal,[3] the Supreme Court of Illinois, faced with this situation for the first time, affirmed. The court's ultimate conclusion was that a forged deed taken in good faith resulted in sufficient color of title to come within the meaning of the statute.

While the decision in this case certainly probes the outer reaches of the concept of color of title, it nonetheless rests on a firm foundation of prior decisions and fits neatly and quite logically there. Some difficulty was experienced in getting the structure started when the Supreme Court of Illinois, treating with the statute[4] for the first time in the case of *Irving* v. *Brownell*,[5] held that an auditor's deed issued pursuant to a tax sale was inadmissible without proof that the prerequisites of the law authorizing a sale for taxes had been met and that the color of title required was prima facie title. The difficulty was soon remedied when a similar situation was presented in the case of *Woodward* v. *Blanchard*,[6] wherein the court overruled the holding in the Irving case in this respect and held that a deed was effective to impart color of title regardless of its intrinsic worth or the constitutionality of the enabling legislation under which it was issued. Construction thereafter proceeded in an orderly fashion.

In the early case of *McCagg* v. *Heacock*,[7] the court fashioned the yardstick by which it has consistently measured color of title ever since.

[1] Ill. Rev. Stat. 1959, Vol. 2, Ch. 83, § 6, provides, in essence, that one in actual possession of land under claim and color of title, made in good faith, who pays the taxes for seven years, shall become the owner thereof according to the purport of his paper title.

[2] 15 Ill. (2d) 337, 155 N. E. (2d) 20 (1959).

[3] A direct appeal was proper since a freehold was involved: Ill. Rev. Stat. 1959, Vol. 2, Ch. 110, § 75(1)(a).

[4] The case was actually decided under Ill. Rev. Stat. 1845, Ch. 24, § 8. It contained substantially the same wording as the present statute.

[5] 11 Ill. 402 (1849).

[6] 16 Ill. 424 (1855).

[7] 34 Ill. 476 (1864). On rehearing, the court specifically affirmed its conclusions, with the one modification mentioned in note 19, post, but reversed and remanded on a pleading technicality, with leave to amend. See the later opinion in McCagg v. Heacock, 42 Ill. 153 (1866).

The defendant in that case claimed, through mesne conveyances, under a grantor whose title was subject to a judgment lien under which the property had been sold to the plaintiff's grantor. The defendant had been in possession under his deed for over seven years and, reserving the question of color of title, had qualified under the statute. The court held that the defendant had acquired color of title, notwithstanding want of actual title, and went on to state that any instrument indicating an intention to pass title, containing a description of the premises and naming a grantor and a grantee, would impart color of title irrespective of the fact that the named grantor had no title to pass.

By this measure, the Supreme Court of Illinois has held that the good or bad faith of the grantor is irrelevant[8] and that any deed regular on its face[9] will impart color of title, including deeds not under seal,[10] a sheriff's deed pursuant to a void sale,[11] and deeds issued under void foreclosures[12] or other void or erroneous decrees.[13] In the case of *Branch* v. *Lee*,[14] for example, the grantee in a master's deed, issued pursuant to a decree of partition, sought to invoke the operation of the statute as a defense to the prayer for the removal of his claim as a cloud on the title. The partition decree was attacked for want of jurisdiction. The court held that even though the deed was void it was still sufficient to impart color of title and the fact that the deed failed to pass actual title was not material. The court has also held that a deed by a minor was sufficient color of title,[15] as were deeds by tenants in common purporting to convey the entire title,[16] or those given by mere volunteers.[17]

The statement that color of title is any sort of title that a reasonable man would pay money for, and pay yearly taxes on,[18] aptly describes and prescribes the requirements. It also suggests that the real criterion

8 Hardin v. Gouveneur, 69 Ill. 140 (1873).

9 Belanski v. Oakes, 6 Ill. (2d) 176, 128 N. E. (2d) 689 (1955); Yoakum v. Harrison, 85 Ill. 202 (1877); Webster v. Webster, 55 Ill. 325 (1870); Brooks v. Bruyn, 35 Ill. 392 (1864); Dickenson v. Breeden, 30 Ill. 279 (1863); Holloway v. Clark, 27 Ill. 483 (1861); Daily v. Doolittle, 24 Ill. 578 (1860).

10 Sanitary District of Chicago v. Allen, 178 Ill. 330, 53 N. E. 109 (1899); Kruse v. Wilson, 79 Ill. 233 (1875); Watts v. Parker, 27 Ill. 224 (1862).

11 Fritz v. Joiner, 54 Ill. 101 (1870).

12 Foote v. City of Chicago, 368 Ill. 307, 13 N. E. (2d) 965 (1938); Hinckley v. Greene, 52 Ill. 223 (1869).

13 Dalton v. Erb, 53 Ill. 289 (1870); Hasset v. Ridgley, 49 Ill. 197 (1868); Huls v. Buntin, 47 Ill. 396 (1868).

14 373 Ill. 333, 26 N. E. (2d) 88 (1940).

15 Cole v. Pennoyer, 14 Ill. 158 (1852).

16 Hinchman v. Whetstone, 23 Ill. 185 (1859); Goewey v. Urig, 18 Ill. 238 (1852).

17 Maring v. Meeker, 263 Ill. 136, 105 N. E. 31 (1914); Lake Shore & M. S. Ry. Co. v. Pittsburgh, Ft. W. & C. Ry. Co., 71 Ill. 38 (1873).

18 Dickenson v. Breeden, 30 Ill. 279 (1863).

is willingness to pay, and that the conveyance is a mechanical element of the manifestation of that willingness. The Supreme Court of Illinois has said that there is a presumption that taxes are paid by the owner of real estate and that such presumption, enduring for seven years, becomes conclusive as a protection to the party so in possession and in order to promote the interest of the public and the peace and quiet of the community.[19] In other words, the overriding consideration is that one believes himself to be the owner of real estate, which belief is to be tested by a regular form of conveyance together with a maintenance of the status of ownership or, more simply, by good faith measured within a defined area.

The present case, in presenting the apparent anomaly of a forged deed, itself no more than absolute nullity, buttresses the suggestion that color of title rests on an entirely different conceptual basis than one demanding respect for the validity of the underlying conveyance. Applying the premise that the operation of the statute is based on good faith conditioned by acquisition in apparently regular form plus assumption of the role of ownership, the anomaly of the forged deed imparting color of title can be reconciled. If this application is accepted, the plaintiff's argument, relentlessly directed to the want of a valid deed, is defeated. The defendant acquired what he believed to be title by a regular form of conveyance. The plaintiff conceded that the defendant believed himself to be the owner. The latter's assumption of the responsibility of ownership by paying the taxes for seventeen years, ten more than required for this purpose, completed the requirements for activation of the statute.

That the application of the premise thus derived is desirable is indicated by at least three considerations. In the first place, it is entirely consonant with established concepts of justice that an innocent purchaser for value be protected. This is precisely the effect of the application. Nor is this protection violative of the sanctity of real estate titles since it only attaches after seven years of prescribed conduct, allowing ample time for the true owner to assert and sustain his position. Secondly, it is in the interest of the community that title to real estate therein be made certain both in order that members thereof be protected in dealings with the apparent owner and that the responsibilities of ownership as they relate to the community itself be discharged. Lastly, the interests of the state are advanced by the removal of any impediment to, and the encouragement of, continued payment of taxes.

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[19] McCagg v. Heacock, 42 Ill. 153 (1866). The matter arose on rehearing of the holding in 34 Ill. 476 (1864), wherein the court modified its statement in the original appeal that the statute operated to vest title in one so qualifying and held that it was, in reality, a statute of limitation. The court also observed that as long as the party intended to be benefited thereby maintain possession it amounted to the same thing as a statute designed to vest title.