21st Congress,
1st Session.

MEMORIAL

OF

WILLIAM KELLY, OF ALABAMA,

ATTORNEY OF JOHN SMITH T.

In relation to the Claim of the said John Smith T. for land from the United States.

FEBRUARY 23, 1830.

Referred to the Committee on the Public Lands, and ordered to be printed.

To the Honorable the Senate and House of Representatives of the United States in Congress assembled.

The subscriber, William Kelly, of Alabama, begs leave to represent, that he has a power of attorney from Col. John Smith T. of Missouri, to represent him in disposing of his claim to lands in Alabama, or compromising with the United States.

That his claim is derived from the State of Georgia, under a grant to Zachariah Cox and Matthias Maher, and their associates, called the Tennessee Company, issued in pursuance of an act of the Legislature of that State, on the 24th day of January, 1795; and a deed of conveyance from Zachariah Cox, one of the grantees, to him executed, on the 16th of January, 1800, for all the lands not theretofore conveyed, in the following bounds: Beginning on the south side of Tennessee, at the mouth of Bear Creek; thence, up said creek, with the Tennessee Company's boundary line, to the most southern source thereof; thence, due south, to latitude thirty-four degrees and ten minutes north; thence, due east, to a point due south from the mouth of Elk river; thence, due north, to the mouth of Elk; thence, up the same, to the northern boundary of the Tennessee Company's grant, (the line between Alabama and Tennessee) thence, west with said line, to Tennessee river; thence, up the same, to the beginning.

Large grants were made by Georgia, in the same year, to three other companies. The Supreme Court of the United States have decided, in the case of Fletcher vs. Peck, that one of the grants vested a title in the grantees; that the State of Georgia had a right to make the grant, and that the possessory title of the Indians did not affect the validity of the grant. The grant then under consideration was, in all respects, similar to the one under which Col Smith derives his title. The court decided, also, that the State had no right to resume the title thus vested, and, consequently, that the rescinding act of 1796 was void.

The grant and deed are of record in the Department of State of the United States, in pursuance of the act of Congress of 1803.

The deed was acknowledged by the maker, on the 23d day of January, 1800, before Judge Roane, of Tennessee, and recorded in the Department of State of that State.

Two suits have been brought on the title of Col. Smith, in the District Court of the United States for the Northern District of Alabama, and have been tried there and decided against him, and brought up by writ of error, and are now pending in the Supreme Court of the United States. In the first, the deed of conveyance from Cox was excluded from the jury, because its execution was not proved, otherwise than by the certificate of Judge Roane, which the Judge held to be insufficient to admit the deed to record in Alabama; and, although in fact recorded, it was, as before remarked, excluded from the jury. Exception was taken, and the cause brought up on that point. Another suit was then brought against other persons, and the execution of the deed regularly proven, by the deposition of Washington Darden, the only subscribing witness then living; and, on that proof, the court allowed the deed to be read, and the jury found a special verdict, establishing the facts as contended for by the plaintiff, and submitted the law to the court. Whereupon, the District Judge decided that the grant from Georgia to Cox and Maher vested a legal title in them to the land it covered, as tenants in common; and that the deed from Cox to Smith, would operate to the extent of Cox's legal interest in the grant, and was consequently good for an undivided moiety of the land it covered:

That this title so vested in Smith was superior to the title of the United States, under the cession of 1802; but, that the defendants, so far as they held patented land, were to be considered as purchasers without notice, and to that extent the deed was inoperative:

That, as to the lands not patented, or held by certificate of further credit, he would give judgment for the plaintiff, but for the influence of a statute of limitations, passed on the 13th of December, 1816, in these words: "No per-"son or persons, body politic or corporate, who now have, or shall or may "hereafter have, any estate, right, title, claim, or demand, by virtue of any "title which has not been confirmed by either of the Boards of Commission-"ers of the United States, appointed for settling and adjusting land claims in "the Mississippi Territory, and not recognised or confirmed by any act of "Congress, in or to any lands, tenements, or hereditaments, in this Territo-"ry, shall, after the expiration of three years from and after the passing of "this act, have, prosecute, or maintain, any action or suit at law, for the re-"covery thereof, in any court in this Territory." This act, although not intended to prejudice these Georgia claims, but, as the Judge remarked, was designed to operate on certain British claims near Natchez, was still broad enough in its enactment to cover the plaintiff's claim, and, therefore, he must give judgment for the defendants. That cause is also brought up to the Supreme Court, and is now pending.

After this exposition of the law by the District Court, it was deemed important and prudent to take such measures as would prevent the acquisition of further titles, without accurate notice, as there was but little patented lands in the bounds of the claim. Notice was therefore published in the newspapers, and in hand bills, and, in many instances, given personally. It was also deemed prudent and lawful to adopt such measures as would avoid what was considered a statute of limitations, by connecting the title of Col.

Smith with the cultivation of the soil; and, for that purpose, provisional contracts have been made with such of the inhabitants as chose to do so, ascertaining the price to be given for the land they occupy, in the event of Col. Smith's title being adjudged valid by the Supreme Court of the United States.

These contracts interpose no difficulty in the way of a compromise with the United States, as they depend entirely on the success of the title in court.

It is not designed to argue the question of title, but barely to state the points relied on.

1st. A title vested under the grant and deed. [See Fletcher vs. Peck, 6 Cr.]

2d. The title so vested was a legal, and not an equitable one. [See Brown and Gilman, 4 Wh.]

3d. The doctrine of notice does not apply to purchasers from the Government, because the Government is supposed to be incapable of committing a fraud, and every citizen is bound to know the title of his Government to its public domain; and hence, in all Government grants, the elder patent prevails, without regard to the fact of notice to the junior patentee.

Again, constructive notice is given to all the world, by recording a title according to law The deed in this case was recorded according to the act of Congress of 1803, and, consequently, notice to all the world.

Again, the question of notice can only apply to purchasers from the same person: want of notice of a link in a chain of an adverse title can avail nothing; if the root be known, it is sufficient.

It is due to candor to say, that the questions of notice and limitation were not argued in the District Court; the argument being confined to the original question of title, without regard to these modifications. On the statute a few remarks were submitted, to show that its language did not include the case; that it could only apply to such claims as might have been presented to a board of commissioners, and had not been; that this claim, being evidenced by a patent, required no confirmation; and being for more than 5000 acres, no board had jurisdiction of it.

The law passed in December, 1816; the country had been acquired by treaty, in the Fall of that year, from the Chickasaws; none of it was sold until the Fall of 1818; so that there was no adverse possession, until two-thirds of the time had elapsed. The law, however, does not relate to adverse possession, and protect a defendant who has had three years' possession; but the time begins to run from the passage of the act. Now it is plain there can be no suit, until there is an adverse possession. The act, then, is not one of limitation, but an act *pro tanto*, abolishing, after three years, the Judicial Department of the Government, and is therefore unconstitutional. It is not from any fear of the result of the controversy in the Supreme Court, but to avoid the litigation that must ensue, that the subscriber proposes terms of settlement. The United States have sold the land for high prices; for one township, including court land, upwards of $120,000 have been paid.

The contracts of the country have been made upon the idea that the United States were the legal owners of the soil, and great confusion might and certainly would ensue, should a recovery be had by a paramount title. As to notice, the United States have no interest. If, as Judge Crawford decided, the title of Col. Smith was better than theirs, and these patentees

hold the land for want of notice, the United States will be as much bound to Col. Smith for the money received, as they would be to restore it to their grantees, in the event of his recovery. If the money was not theirs, the money obtained for it cannot be. It may be well to remark, that Col. Smith never relinquished his claim to the United States under the acts of Congress of 1814 and 1815, for compromising such claims; and of course is not bound by the decision of the Board, unless the principle of that decision can be sustained by reason and authority. This, it is believed, cannot be done. The Board awarded compensation to the holders of the certificates of stock in the company. These certificates were signed by Cox and Maher, the grantees, and certified, that the holder of each share had paid the 420th part of the purchase money, and was consequently entitled to that proportion of the proceeds, or to the land, if it remained unsold. These certificates were not inconsistent with the right vested by the grant in Cox and Maher to sell the land, and consequently a purchaser, even with notice of them, would acquire a legal title, and the holder of stock be only entitled to his share of the proceeds.

The Board considered that all those titles were equitable only, and on that assumption adjudged the compensation to the oldest equity, without considering the effect of a title legal and equitable both, contrasted with one equitable only.

Between equitable titles, it may be conceded that the elder should prevail; but if the junior equity has also a legal title, acquired without fraud upon the elder, then the legal title will prevail.

That these titles were *legal* so far as evidenced by grants and deeds of conveyance (and not merely equitable, as supposed by the Board,) has been ruled by the Supreme Court in the case of Brown and Gilman, in 4th Wh. In that case, the court settle the law on another point different from the Board; and Congress have, it is believed, relieved the New England Mississippi Land Company, in part, from the effects of that mistake, although they were parties to the decision.

It may be well to state, that Cox had not withdrawn his purchase money from the Treasury when he made the deed to Col. Smith on the 16th of Jan. 1800. On the 2d of March, however, 1801, he did withdraw $21,000, and upwards, as the part of the purchase money paid in by him. This could not affect the prior deed.

The subscriber is ready to submit his letter of attorney, and also the title papers on which he relies, to such committee as may have the subject under consideration, and proposes to execute a deed of relinquishment to the United States, if the sum of $100,000 shall be paid in cash or land.

All which is respectfully submitted.

WM. KELLY,
Attorney in fact for John Smith T.