

Syllabus.

that while we shall retain jurisdiction of the case, the record will be remanded to the Court of Claims, with directions to return a finding of the facts, in accordance with the rule.

These principles also dispose of the motion for *certiorari* in the case of *Clark et al. v. United States*. The motion there is designed to require the Court of Claims to make a more extended statement of the evidence on which they find, "that the allegation of fraud or mistake in the concoction of the written agreement is not sustained by the evidence in the case."

This is precisely the character of finding which the rule of this court was intended to produce. The existence of the fraud or mistake set up in the pleading is one of the ultimate facts to which the law of the case must be applied, in rendering a judgment, and this court does not purpose to go behind the finding of the Court of Claims on that subject. To do so would require an examination of evidence, and a comparison of the weight to be attached to each separate piece of testimony, and the drawing of inferences from the whole, which is the peculiar province of a jury, and which, by our rule, we intended to exclude from the consideration of this court, by making such finding by the Court of Claims conclusive. The motion in that case is, therefore, overruled.

MOTIONS OVERRULED in all the cases, but in the second case the record remanded with directions to make a new finding of facts in accordance with the rules of court on the subject.

LEAGUE *v.* ATCHISON.

Under the fifteenth section of the statute of limitations of Texas, which enacts that "every suit instituted to recover real estate as against him, her, or them in possession under title or color of title, shall be instituted within three years next after the cause of action shall have accrued," and which adds that "by the term *title*, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfer down to

Statement of the case.

him, her or them in possession, *without being regular* (as if one or more of the muniments be not registered or not duly registered, or be only in writing, or *such like defect*, &c.), there is neither title nor color of title when any link in the chain is so wanting, as that there is a *hiatus* in the chain; that is to say, when the case is not that of a defect or flaw in some link which makes the chain weak at that point, but when there is no chain at all.

ERROR to the District Court for the Eastern District of Texas.

The statute of limitations of Texas, after making ten years a protection to one who enters without title, and five years a protection when the party has entered with claim under a deed on record, and has paid the taxes and made cultivation during that term, enacts by its fifteenth section as follows:*

"That every suit to be instituted to recover real estate, as against him, her or them in possession, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards. By the term *title*, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and *color of title* is constituted by a *consecutive chain* of such transfer down to him, her or them in possession, *without being regular*; as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or *such like defect* as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of head-right, warrant, or land-scrip, with a chain of transfer down to him, her or them in possession; and provided this section shall not bar the right of the government."

With this act in force Atchison brought suit against League to recover a lot of ground in Galveston.

On the trial, it appeared that both parties claimed title under the Directors of the Galveston City Company, from whom the title was deraigned, to one Hasbrook. The plaintiff asserted himself to be the owner of Hasbrook's title

* Hartley's Digest, Art. 2391.

Opinion of the court.

through a deed from him to one Curtis. The defendant denied the validity of this deed to Curtis, alleging it to be a forgery, and claimed under a levy and sale of the property under a judgment against Hasbrook *posterior* to the alleged sale of Hasbrook to Curtis. The validity of this deed was one of the issues to be tried, one however not involved in the case as here presented. The defendants pleaded the statute whose fifteenth section as to limitation of three years is above quoted. On this point the plaintiff's counsel requested the court to instruct the jury as follows:

"That, if the jury, under the instructions of the court, find a conveyance from Hasbrook and wife to Curtis to be valid, then the sheriff had no authority to make the levy, under the execution against Hasbrook, on the lot in question, or to make the deed to Atchison, and there is no such transfer of title from Hasbrook to Atchison as will sustain the plea of limitation."

The court refused the instruction, and whether it had done so rightly or not was the point for review here.

The case was fully argued *in behalf of the plaintiff in error* by Messrs. C. Robinson and W. G. Hale, who relied on the fifteenth section above quoted, as clear of itself; citing in addition, however, by way of illustration, the statutes of Kentucky, Pennsylvania, and other States, and decisions upon them, to show what possession was adverse.

Messrs. Green Adams, and W. P. Balinger, contra.

Mr. Justice GRIER delivered the opinion of the court.

The only question involved in this case arises on the construction to be given to the 15th section of the statute of limitations of the State of Texas. It is somewhat peculiar in its terms, and is well suited to the policy of a new State desirous to encourage emigration, and the settlement of its vacant lands.

For this purpose the usual limitation of twenty years, which alone would protect one who had entered without title, was held insufficient. Hence the legislation of Texas

Opinion of the court.

reduced the term to ten years. This term was also reduced to five years when the disseizor entered with a claim of title under a recorded deed, and had paid the taxes and cultivated the land for that length of time.

The limitation of three years now under consideration was intended to protect settlers under junior grants emanating from the State of Texas against older titles under the former Mexican sovereignty, as well as a fraudulent issue of head-right certificates or land scrip under the Republic. This policy is clearly exhibited in this peculiar term and the provisions of this section.

As respects the instruction requested by the plaintiff's counsel, we are of the opinion that the court erred in refusing it.

There was no dispute that the defendant purchased with full notice of the previous deed to Curtis. The only question was, whether this deed from the sheriff gave him such a title or color of title as is required by the statute.

Unnecessary labor and learning has been expended by counsel, as to the construction of similar statutes in other States, and as to whether the possession of defendant was adverse or not. This section of the statute is its own interpreter. It was not made to protect mere adverse possession; it carefully defines the construction of the words used. By the term title, as used in this section, is meant "*a regular chain of transfer from, or under the sovereignty of the soil;*" and color of title is constituted by a consecutive chain of such transfer down to him or her or them in possession, without being regular, as if one or more of the memorials or instruments be not registered, or not duly registered, or be only in writing, *or such like defect,*" &c., &c.

Now, this case shows no such "chain of title or transfer from the sovereignty," as to constitute either title or color of title. As defined by the act, a link in the chain is absent, which is necessary to make the whole one chain. It is not merely a defect or flaw in some link in the chain which may make it weak at that point, but there is no chain at all. A sale of the sheriff on a judgment against "A," confers nei-

Statement of the case.

ther title nor color of title to the property of "B." In *Thompson v. Cragg*,* the court say: "Nor can there be color of title where there is a complete hiatus in the chain. Color of titles differs from titles only in externals. The substance of both is the same, were this not so. If color of title were something intrinsically and substantially less or weaker than title, then the wisdom of the legislature could not be vindicated," &c. This construction of the statute as thus settled by the courts of Texas is conclusive, even if we doubted its correctness, which we do *not*.

JUDGMENT REVERSED, AND A VENIRE DE NOVO AWARDED.

[See *infra*, next case, *Osterman v. Baldwin*, in regard to this same section 15 of the Texas statute of limitations.—REP.]

OSTERMAN v. BALDWIN.

1. A citizen of the United States, and who, as such, was of course before the admission of Texas into the Union, an alien to that republic, and so, as against office found, incompetent to hold land there, became on the admission, competent, no office having been previously found.
2. A purchaser at sheriff's sale buys precisely the interest which the debtor had in the property sold, and takes subject to all outstanding equities.
3. Trusts of real estate are not embraced by the statute of frauds of Texas, and may be proved, as at common law, by parol.
4. A mere declaration in writing by a vendor of a vendee's purchase of land, that the vendee had paid the money for it, and that the vendor intended to make deeds when prepared to do so, is not a document purporting to convey title; and accordingly will constitute neither a link in "a consecutive chain of transfer," nor "color of title" within the meaning of the fifteenth section of the statute of limitations of Texas.

APPEAL (submitted) from the District Court for the Eastern District of Texas.

In 1839, prior to the admission of Texas into our Union, and that country being then an independent republic, Bald-

* 24 Texas, 596. See also *Wright v. Daily*, 26 Id. 730; *Berry v. Donley*, Id. 737; *Harris v. Hardeman*, 27 Id. 248.