Complainant moves to exclude that part of the answer in which the witness says he "purchased the land", on the ground that it is the conclusion of the witness, and on the further ground that it is not shown the title was vested in the grantors.

At the time the instrument above referred to was delivered to me, the land described therein was unfenced, cut-over wild land, with some timber growing on it.

Q. At the time said writing was delivered to you, who, if anybody, was in possession of the land described therein?

Complainant objects to the question because it calls for the conclusion of the witness.

A. Mr. Joseph Keller, as agent for Mr. Oscar O. Kimmel. Mr. Keller was living at Fairhope at that time, blacksmithing, I believe.

Q. The writing which you have referred to, and which is marked Exhibit "A" recites a consideration of $1760.00. Will you please state whether or not the recited consideration is true and correct?

Complainant objects to the question because it calls for immaterial, irrelevant and incompetent evidence, and because the title of the grantors is not shown, and if he had any title the consideration would be of no effect.

A. It is. I paid $900.00 at the time I received the deed. Mr. Joseph Keller was the agent of Mr. Oscar Kimmel, as I have stated. I gave a mortgage on the land for the unpaid purchase money, in the amount of $860.00, and I took up this mortgage in due course by forwarding a check to Mr. Oscar O. Kimmel for the $860.00, and received back from him the mortgage duly cancelled.

When I received this writing I went over the land frequently, and knew that it was just south of Mr. Mr. White. I have been going to that neighborhood, (Fairhope), ever since. Mr. Clarence O. White had a farm adjoining on the North.

Q. State whether or not if at any time you made arrangements with any one in regard to taking charge of said land in your absence?

A. I requested Mr. Clarence O. White, who lives on the land adjoining on the North, to look after this land, so far as the timber was concerned, for me during my absence.

As nearly as I can remember, I made this request of Mr. White during the year 1912, when I first became interested in this land. This arrangement with Mr. White has continued up to the present time. This was just a neighborly or friendly act on his part. Mr. White did communicate with me while I was absent on occasions, concerning this land.

Complainant moves to exclude that part of the witness' answer in which he stated "Mr. White did communicate with me during my absence", because the communication was obviously a written one, and the writing is the best evidence; and if the communication was sent by word of mouth, it is merely hearsay testimony.

Q. Did you have any of that land cleared?

A. About ten acres partially cleared by Dr. Pratt; that was done by Dr. Pratt, himself. His arrangement with me was to clear twenty acres, but he cleared only about ten. That portion of this land that was cleared, was cleared under his agreement with me. This clearing was done in the year 1915, between April and the first of August. I also had a well dug by Starke Johnson; I paid him $37.50 for digging it. I also furnished timber to Pratt for the erection of a temporary house on this land. He built such a shelter. I did not see it.

Complainant moves to exclude that part of the witness' answer as to the building of the shack, because his further testimony shows that he did not see it.

That was in the summer of 1915. I purchased the timber myself and had it hauled there to the land. Later in that year I authorized Mr. Wells, who lived on an adjoining eighty, to tear down this shelter and appropriate the lumber. He also removed some fence posts that had been cut on the land. This was also done with my consent. Since I have become interested in this land I have annually paid the State and County taxes assessed thereon, down to, and including the taxes for the year 1924. The tltal amount that I have paid on account of the State and County taxes, commencing with the year 1912, down to and including the year 1924, is $242.86. I have claimed to own the land in this controversy ever since I received the purported deed from Oscar O. Kimmel and his wife dated the 30th day of April, 1912, and hereinabove referred to as Exhibit "A", and I now claim these lands as mine.

Q. Please state whether or not you have had possession of these lands during all of this period that you have claimed to own them?

Complainant objects to the question on each of the following grounds, viz: Because it is illegal, irrelevant, incompetent and immaterial evidence; because it calls for the conclusion of the witness, and further because the witness has already specifically stated what acts of possession he exercised with reference to the land, and it affirmatively appears from his evidence that he has not had any possession at all.

A. I have had possession of said lands ever since the date of the delivery of that instrument above referred to, insofar as that kind of land can be possessed.

Q. State whether or not, when you bought these lands from Mr. Kimmel they were reputed in that neighborhood to belong to Mr. Kimmel?

Complainant objects to the question because the ownership, title or possession of that land cannot be shown by neighborhood reports.

Respondent states that the question is asked for the purpose of showing the notoriety of Mr. Kimmel's claim to said lands.

Same objection by complainant's counsel.

A. They were reputed in that region, Fairhope, to belong to Mr. Oscar O.Kimmel. Mr. Keller, his father-in-law, had owned several plats there, and transferred them to his children, and he transferred this plat to Oscar O. Kimmel, who was his son-in-law, for the benefit of his daughter, Mrs. Kimmel.

Complainant moves to exclude the witness amswer on the same grounds as stated in the objection, and especially that part of said testimony: "Mr. Keller, his father-in-law, had owned several plats there and had transferred this plat to Oscar O. Kimmel", because the evidence is illegal, incompetent, irrelevant and immaterial; because the title is not based on the reputation in that locality, and the transfer of Oscar Kimmel cannot be shown in this way.

Q. Please state whether or not George Hoyle, during his lifetime, ever asserted any claim to this land.

A. George Hoyle never asserted any claim to this land, except in a communication he wrote to me; this was in 1916, according to my best recollection. Prior to this communication I had never heard of any claim by him or anyone else. Mr. Hoyle never did anything on this land.

Q. Did he ever exercise any acts of possession over it since you claim to have bought the land?

Complainant objects to the question because it calls for the conclusion of the witness, and because from witness' previous testimony it is bound to appear that any answer he may make to the question is based on his mere conclusion, or on hearsay.

A. He did not, sofar as my knowledge goes. I had Pratt on the land for three months, and he was never molested by Mr. Hoyle, so far as I ever heard.

Complainant moves to exclude that part of witness' answer in which he states that "Pratt was not molested by Hoyle", because it is not shown whether the witness knows whether he was molested, or not.

Pratt reported to me that he had been molested by a man named Wilson. Wilson had put up a notice on the land and Pratt tore it down. Pratt stayed on this land for me something over three months. Pratt did not carry out the agreement which he made with me, and so

I notified him to leave the place. In pursuance of my notice he afterwards left the place. He was not there when I next visited it. The land that Pratt cleared for me, was not plowed, and green pine saplings were left standing. These were scattered about over the clearing. The old stumps, most of them, had been taken out on this ten acres. The cleared land was not in condition for cultivation.

RE-CROSS EXAMINATION BY B.F.McMILLAN
Solicitor for Complainant.

This disagreement with Pratt was not because I did not pay him. There was no contract that I should pay him. Pratt sued me in my absence and got judgment. I knew nothing about it. I never paid the judgment. I was in Biloxi, Mississippi, a portion of the time when Pratt was on the land, and the balance of the time Pratt was on the land for me I was in Norfolk or Washington. The man who molested Pratt was Gaines Wilson. I do not know where he lives. I do not know, personally, whether Mr. Hoyle made Pratt get off of the land. Pratt said nothing to me about it. The well was dug and the shack built in April, or possibly May, 1915. I cannot tell just when it was moved off, as I was absent at the time, but I am under the impression that it was moved off the latter part of the same year. The authority I gave to Mr. Wells, as I heretofore testified about, was in writing. Mr. Wells is dead. I purchased boards for the shack from some mill over on Fish River; I believe they called it Bishop's mill. I cannot tell his given name. I do not remember the quality of boards or lumber that I bought. I personally arranged with Starke Johnson to dig the well. It only took Starke Johnson probably a day to dig the well, or possibly a part of a day, and I do not know whether Mr. Hoyle made him get off of the land, or not; I never heard of it. I never heard of his making anybody get off of the land. I did not know that Mr. Hoyle claimed any interest in the land at that time. I never saw Mr. Hoyle's notice not to trespass, put up on the land. I have seen a notice posted on the land by the Hoyle estate. I suppose that notice is there yet, - I paid no

attention to it though, because there were two notices prior to that time on the land. One by a person by the name of Courtright; I think it was a woman, but I do not know. The other was by Wilson. They were spurious and I paid no attention to them, and there was one put up by the Hoyle estate. In other words, I placed no significance upon it. I do not know what has become of Pratt; I have not seen him since I saw him in Mobile. ; he tried to communicate with me the following spring, but after his action at Bay Minette, I had nothing further to do with him. I regarded his action at Bay Minette as treacherous. It was a suit for money which he claimed was due for wages under contract or agreement; that was done in my absence and I knew nothing about it. I never prevented Mr. White, or anyone else, from getting wood off of the land. Mr. Clarance O. White and I have been associated in a way for the last twelve years. He communicated with me at the time of this trial at Bay Minette when Pratt sued me. The land in this controversy is cut over land, and is capable of being put into a farm; I intended to farm it myself. It would have to be cleared before you could farm it. The ten acres that Pratt worked on was only partially cleared. This is simply wild and cut-over land, containing some timber. No one lives on it or farms it and no one has lived on it or farmed it since I have had it, except Pratt when he was there for me something over three months. I saw him on the land before he started to clear it, and before the shack was built, but I never saw him on it after this. In other words, I located Pratt, had the lumber hauled and the well dug, and then left. I brought Pratt over to Mobile and gave him some orders for what he needed; to McPhillips for groceries and to Kelly-Brady for tools. He got about $25.00 worth of tools, which I paid for, and he made a few purchases from Fairhope.

I am a retired army officer. I was born in Petersburg, Virginia; I suppose they would still call that my home, but I do not spend much of my time there now. When I am in the North my time is spent principally in Washington. I have been in Fairhope since last fall; I spent last winter there. It would be hard to tell just how much time I have spent in Baldwin County for the last twelve years. I shall spend the spring therein Baldwin County.

Clarence O. White, a witness for the Respondent, having been first duly sworn by the Commissioner, testified as follows:

DIRECT EXAMINATION BY JESSE F. HOGAN, Esq.,
Solicitor for Respondent.

My name is Clarance O. White. I live at Fairhope, Baldwin County, Alabama. I know the lands involved in this suit, viz: The Southwest quarter of Section 10, Township 7 South, Range 2 East. I have known these lands for nineteen years. In the fall of 1905 I moved to the adjoining lands on the North, and I have lived on these next adjoining lands continuously up to the present time.

When I first knew these lands Emanuel Keller resided on the 40 on the South next adjacent to these lands and had charge of the property.

Complainant moves to exclude that part of the witness' statement that "Emanuel Keller had charge of the property" on each of the following grounds: It is immaterial, irrelevant and incompetent; it is the conclusion of the witness, and the specific acts referred to are not set forth.

When I first knew these lands Emanuel Keller looked after the standing timber and down timber, and had charge of the property.

Complainant moves to exclude witness' statement on the grounds next above set forth.

Emanuel Keller worked for me that fall and winter and repeatedly went there and notified parties that were cutting the down wood, to cease their trespassing. Emanual Keller was not the owner of the property, but he was looking after it for the owner.

The Complainant moves to exclude the witness' statement because it is a mere conclusion of the witness.

Emanuel Keller continued to live on the adjoining lands until he sold his place to Mr. Wells, sometime after the 1906 storm. I think Mr. Wells bought the place about fifteen years ago and continued to live on it until that time. That would be about 1909. During that time Emanuel Keller lived on the adjoining lands; he and his son Roscoe cut both down and standing timber on the Southwest quarter of Section 10, they cut down the standing timber and sold it to the saw mills near by, and they sold the down timber for firewood. After the storm of 1906 there was a great deal of down timber, and they spent the next two winters in disposing of that down timber. During these years when Emanuel Keller lived near the lands in this suit, he would notify personally, any one who might be taking any timber, to stop taking the timber. Upon one occasion, towards the spring after the 1906 storm, some standing timber had blown across my fence and I was cutting it away, and Emanuel Keller notified me not to cut any of the timber on this Section 10. After Mr. Keller sold his place he moved to Fairhope, but continued to visit section 10; he was there every month or two at times, and again I would not see him more than every two or three months. He would come down with a wagon sometimes, but I do not remember just what he would take away. I know that Mr. Keller came down repetatedly, although I could not say just how long he kept it up. The Major bought in 1912 and Emanuel Keller sold his place in 1909; there were only three years in between. Joe Keller had a large strip right adjoining, and also had 160 acres adjoining this on the south, and Emanuel Keller came down and looked over it all, and he continued doing this up until the time Major McCaleb bought section 10; the southwest quarter.

The complainant moves to exclude that part of the witness statement that "Major McCaleb bought the Southwest quarter of Section 10, because it is a conclusion of the witness, and is not the proper way to show a sale.

The respondent states that the testimony is not offered for the purpose of showing the sale to Major McCaleb, but merely for the purpose of fixing the date.

Complainant renews his objection, and if admitted, moves that the evidence be limited to the purpose stated.

Q. During the years that you have known said Southwest quarter of Section 10, who was reputed to be the owner thereof?

The Complainant objects to the question because it calls for immaterial, irrelevant and incompetent testimony, and because title or possession of land cannot be shown by reputation.

The respondent states that this testimony is offered for the purpose of showing the notoriety of the claim of ownership of the Respondent, and those through whom he claims.

A. It was always known as the Keller property. Up to the time Major McCaleb became interested in this property I never heard of any claim on the part of either George Hoyle or Mr. Worcester. After Dr. Pratt did some work on these lands for Major McCaleb some notices were put up near my corner by the Hoyle estate. These notices were put up after the death of Mr. Hoyle. Dr. Pratt did this work about nine years ago, and this was my first knowledge of any adverse claim.

Q. Do you remember when Major McCaleb first claimed an interest in the Southwest quarter of Section 10? Ans. About 1912 Major McCaleb and Mr. Clements called at my place and the Major stated that he had bought the adjoining property.

Complainant moves to exclude that part of the witness' answer that "Major McCaleb said he had bought the lands", because the sale or purchase of lands cannot be shown in that way.

The Respondent states that the testimony is not offered for the purpose of showing a sale or purchase of the land, but merely for the purpose of fixing the time when the witness first knew of Major McCaleb's claim of title to the land.

Witness continues: Dr. Pratt cleared about ten acres of this land for Major McCaleb, and he put down a well, and also put up a small shack on the land; the shack has since been torn down. This was done about nine years ago. Major McCaleb has not cut nor sold any of the timber standing on this land. Major McCaleb appointed me as his agent to keep trespassers off of this land. The Major was down at my house several times, and upon one or two occasions he requested me to keep trespassers off of thes lands;

he requested me to look out for the timber on this land. This was soon after Major McCaleb claimed to have bought the lands. I looked after the lands for him and notified some parties to leave the timber alone. During all of the time that I have known these lands, no one other than Major McCaleb and members of the Keller family has done anything upon the southwest quarter of Section 10, except a notice which was put up by the Hoyle estate about seven or eight years ago. This notice is standing there yet. The well is still on the place. This well was dug by Starke Johnson. Dr. Pratt was in charge of the land when it was dug. He put up a shack and lived there and was clearing the land.

CROSS-EXAMINATION BY MR. B. F. McMILLAN,
Solicitor for Complainant.

I know Harry Gender, he is my son-in-law, and lives at Magnolia Beach. He lived with me at my place adjoining this land in controversy, one winter. Mr. Gender has lived in Baldwin County, for quite a while, possibly ten or fifteen years. He lived at Bay Minette up until about six or seven years ago; then he moved to Fairhope. He married my daughter about three years ago, and he lived with Mr. Miller up to the time he moved to my place about a year ago. He stayed at my place about a year.

Fairhope is about six and three quarter miles from the land in question; that is the center of Fairhope. I do not live in Fairhope, but I live on the South half of the Northwest quarter of Section 10, Township 7 South, Range 2 East. There is a division fence between my land and the land in controversy. I know the line, personally. I had it surveyed, but was not on the survey, and I put the fence up. I am a farmer, and that has been my occupation for the past nineteen years on the land adjoining the land in controversy. I have 110 acres, about eighty acres of which is cleared. I can look all over the property in question from my house. I never had anything to do with it, or any interest in it, except when Major McCaleb requested me to look after it for him. This was about eleven or twelve years ago.

In my direct testimony, when I spoke of "Major" I meant the respondent in this case. He visits my place quite often, and has been visiting it quite often ever since he bought the lands.

I came to the land where I now live, from Wisconsin, about nineteen years ago. I bought my land through Harry Landry, as agent, I cannot recall the name of the owner that I purchased it from. Mrs. Morrison had an interest in it, but whether it was bought from her or not, I do not know. I had to get a quit-claim deed from her.

Emanuel Keller lived in the town of Fairhope, I think, but I understand that he is now in Miami, Florida. I think his family is in Fairhope yet. I do not know what he is doing in Miami. Emanuel Keller told me that he was looking out after this land. I saw him, he was working for me and left my place and went over there and talked to parties on the land, but I do not know what he said to them, except what he said he said. I cannot give the names of the people I saw Keller talking to; they were mostly colored people. One of them was named Joe, but I cannot recall his other name, and the other was one of the Grass boys, but I cannot recall his given name. I cannot state, even approximately, the date I saw Mr. Keller talking to them, except that he worked for me one winter either 1906 or 1907, and he notified me, personally, in 1907 not to cut any timber there. I was only cutting two logs that had blown down across my fence in the storm, and was not cutting any other timber. I did not intend to cut any other timber. At that time Emanuel Keller was living on the 40 acres South of this land; I think it is the Northwest quarter of the Northwest quarter of Section 15; the Keller estate at that time had lands about there, I think about 640 acres, and Emanuel Keller had charge of, and looked after it all. Except for the time that Mr. Keller told me about the logs which had fallen on my fence, I cannot say, personally, that he had ever told anybody else to stop trespassing on the land. I do not know what Emanuel Keller does now. At the time I have been speaking of, when he was looking after this land,

he was farming. I think he sold out in that locality about 1909, and moved to Fairhope about that time.

I stated awhile ago that Emanuel Keller and his son, Roscoe, cut timber on this land; they cut on the North part of the land near my fence. I was not interested in it and paid no attention, but they were cutting there about a year. I cannot tell you how much they cut. At the time they were cutting there I do not know whether they were cutting on the other Keller lands, or not; the other land is not so I can see it. I did not see or hear the sale of the timber they cut off of this land. I did not see it delivered to a saw mill. I saw it cut down by Keller and his son, and it was hauled away on somebody's two-wheeled log wagon that carries three or four logs. I do not know whose log wagon this was, nor where the logs were carried to. I cannot give the names of any individual to whom Mr. Keller sold wood off of this land. I did not see or hear of any such sale, and I do not know that there was such a sale. Mr. Keller went on the land and got wood, himself, and took it off and loaded it on his wagon and carried it away to Fairhope. Fairhope was about the only place he could carry it, and he came back without any wood. He got this firewood from the North side of the Northwest corner of this land, and the west side of the land. I saw him cutting it. I was not on the land at the time. This was several years ago, when he lived down there. I do not know whether he was cutting wood from other lands of the Keller estate, or not. It is a fact that people in that locality cut wood whenever they want it and wherever they can find it, regardless of whose land it is on, and these conditions have been existing ever since I have been down there. After Mr. Keller moved away from there, he would come back through that locality occasionally, but I do not know what he came for. I would see him probably once in every two months; sometimes oftener. The Hoyle estate put notices on this land; it was about six or seven years ago. These notices notified people not to trespass on this land. I cannot give the exact wording of the notices; the notices have been there ever since, and nobody has been trespassing on the lands since then,

except when people came as they will do, and cut off the wood. This was in accordance with the neighborhood custom.

I do not know anything about Dr. Pratt, except that he was clearing land on the southwest corner of this property. I understand he is dead now. I do not know how long he has been dead; I do not know where he died. He was on this land in question three or four months. I do not know whether George Hoyle ever told him to get off of the land, or not, after he worked there three or four months, but he did not get off the land after he had worked there three or four months. He cleared about ten acres. Dr. Pratt did the clearing, himself, and by himself, and did not hire any one to do it. Dr. Pratt put the shack that I have spoken of, on the land himself. He got the well so he could pull water up with a rope and bucket by hand. He actually lived in the house three or four months.

Witness is requested to describe this house:

Well, I should say it was 16 feet long, 12 feet wide and about 8 feet high on the low side and about 14 feet on the other side, with a slanting roof. There was one room in it. I never saw him in it.

Q. Your statement that he lived in it is merely your conclusion, from what you say? Ans. Well, I don't suppose he slept out doors.

I was not intimate with Dr. Pratt. I think I met him twice. The first time he called at my place and was there probably an hour. I drove across the property once or twice while he was working on it and I had probably five or ten minutes conversation with him.

Q. He left there rather suddenly, didn't he? Ans. I don't know about that; the first thing I knew he was gone. I saw him several times in Fairhope after that.

Mr. McCaleb, the respondent, lives at hotels in Fairhope, Biloxi, Mississippi, Washington and probably New York. I do not know where his home is. I have seen the well on this land. I do not know that I ever saw Pratt draw water out of the well, but

I saw Starke Johnson draw water when he completed it. This is the only one.

Mr. McCaleb requested me to keep trespassers off, and I notified, for one, young Grass of Point Clear, I do not know his given name; he is the oldest son of John Grass, of Point Clear. I notified him once. I cannot give the year. He was cutting wood on the land. And the party whose name I could not think of before as having been notified by Emanuel Keller, was Joe Klumpp, of Point Clear. This was years ago; I cannot say the particular year when I first saw Joe Klumpp there. It was Joe Klumpp or his men. If it was his men, they said they were working for Joe Klumpp, but I cannot tell whether it was Joe Klumpp or his men. If it was his men, I do not know their names. It was on the land in this controversy.

RE-DIRECT EXAMINATION BY JESSE F. HOGAN,
Solicitor for Respondent

The people that were on the land cutting wood, and to whom Mr. Keller spoke, as I have already testified, would leave the land after Mr. Keller spoke to them; they stopped cutting wood on the land involved in this suit; they went on some other land and filled up. Although it was the neighborhood custom to cut down timber wherever people could, yet Mr. Keller kept them away from getting down timber on this land, and I have also kept them from cutting down timber on this land while I had charge of it for Major McCaleb. I do not know whether Major McCaleb has gone over the land, personally, since notices were put up by the Hoyle estate. Of course, there is a good road across the land and he may have gone over it many times. The land involved in this suit is wild land; timber is standing on all of this land except the ten acres which was cleared by Pratt; it is virgin timber; it has never been boxed or cut. On the ten acres that were cleared by Pratt all the old stumps were taken out. There may be a few green saplings, but very few.

RE-CROSS EXAMINATION BY MR. B. F. McMILLAN,
Solicitor for Complainant.

The saplings I speak of are four or five inches in diameter, probably ten or twelve years old. The road across the land is used

by the public, generally, in going or looking after the land. Mr. McCaleb did not pay me anything, but I was simply doing it as his friend.

Hugh E. Lowell, a witness for the Respondent, having been first duly sworn by the Commissioner, testified as follows:

DIRECT EXAMINATION BY JESSE F. HOGAN, Esq.,
Solicitor for Respondent.

My name is Hugh E. Lowell. I have known the lands involved in this suit ever since I was a boy,- ever since I can remember. I am now thirty-four years old. I was born and raised about three miles north of the land in controversy. I cannot state the exact distance, but I am pretty sure it is three miles. I know Emanuel Keller, and also knew his father, Joseph Keller.

Q. Do you remember whether or not Emanuel Keller or Joesph Keller ever asserted any claim to that land? Ans. Yes, sir, I always knew it as the Keller land.

Complainant moves to exclude that part of witness' answer "I always knew it as the Keller land", because it is incompetent, irrelevant and immaterial evidence, and because ownership or possession of land cannot be shown in any such way.

I also know Mr. Clarence O. White. I remember when he first moved to that neighborhood. I was a boy wearing short trousers at the time. I do not remember the exact date, but I must have been twelve or fourteen years old. I put on long trousers at fifteen and I worked for Mr. White and helped him clear his land. When I began working for him I was wearing short trousers. I worked for Mr. White off and on for about four years. I was about eighteen years old when I quit working for him. I have known this land continuously down to the present time. The Kellers were in possession of this land when I first knew it. I used to go down and stay all night with Ralph Keller, the son of Emanuel Keller; they lived on the adjoining forty, as near as I can remember. The Kellers continued in possession of the land up until the time Emanuel Keller sold his land. I do not remember the exact date. I do not know whether the Kellers got wood off of this land after Emanuel Keller moved off of the land, or not. I had no occasion to observe after Emanuel Keller went away, and I do not know what they did on the land after Emanuel Keller moved away. I remember when Major Mc-

Caleb asserted his claim to the land. According to my best recollection it was 1912 or 1913, that Major McCaleb asserted his claim to the land. It was before I was married, and I was married in 1914. He used to get my horse and buggy to go down on the land. He rented my horse and buggy and told me he rented it to go down to the land in question. Since Major McCaleb claimed to own the land he had some clearing done on it. I do not remember when this clearing was done, but it was a while before he bought it after he asserted his claim to it. The Major also had a well put down, and there was a little shack he had put on it. This shack was on the land for a short while; I do not know just how long it was there. I do not know exactly what Major McCaleb did about keeping trespassers off of the land.

Q. Do you know whether anybody was stopped from cutting timber on this land? Ans. My father and I stopped cutting timber from this land because we heard that other people had been stopped.

Complainant moves to exclude witness' answer "Because we heard other people had been stopped", because it calls for incompetent testimony.

I do not know whether the other people of the neighborhood got timber from that land, or not, but I do know that we did not, When I was working at Mr. White's Mr. Keller several times went over and stopped people from cutting timber on this land. I remember once or twice distinctly, although I do not remember who it was he stopped, Mr. Keller cut both standing and down timber off of this land; I do know that. That was when I was a boy and I did not pay close attention to it. I know that the Kellers claimed the land, and I went over it frequently when it was the Keller land.

CROSS EXAMINATION BY B. F. McMILLAN? Esq.,
Solicitor for Complainant.

I was born in section 32, Township 6 South, Range 2 East, I could figure it down, but I cannot tell you right off-hand now. (Witness then figured and stated):

It was the southeast quarter of the Northeast quarter of Section 32. I do not know the description of the land in this controversy. All I know is the mark of Mr. White's fense; the ad-

joining lands of Mr. Clarence O. White. I cannot say especially who showed me this. I do not know the description, I only know I used to go over this land adjoining Mr. C. O. White on the South, as a boy. I found out this land in the controversy adjoined Mr. White's on the south because the Kellers got wood off of it, and stopped other people from getting wood.

Q. How did you find out that the land in this controversy adjoined Mr. White's on the south? Ans. No special way, only that the Kellers used to stop people from cutting wood off of this land that adjoined Mr. C. O. White's on the south, and that is why I know the land in this controversy adjoined Mr. White's on the South.

Q. Who have you been talking to about this law suit? Ans. I have talked to Major McCaleb, and also to Mr. Worcester, but not about the law suit; not in particular.

Q. Who told you that it was the land south of Mr. C. O. White's that was in litigation? Ans. Both Mr. Worcester and Major McCaleb told me it was the land south of Mr. C. O. White's that was in this law suit.

Q. Did you, or not, tell Mr. J. T. Worcester that you did not know anything about this land? Ans. No, I did not tell him that.

I live at Fairhope. It is about six and three quarter miles from this land. The Kellers owned a great deal of land in that locality. I would not know by the description in the bill of complaint, whether they lived on that particular piece of land, or not. Mr. Emanuel Keller lived on the adjoining forty south of this piece of land, between him and Mr. C. O. White. No one lived on the piece of land that is involved in this litigation up to the time Dr. Pratt went there. Mr. Pratt lived there a few months. I do not know how long. As near as I can come at it, Dr. Pratt lived in a little old room or shed; it was just a shack built there. I saw it as I drove over the land going to the water hole.

When Emanuel Keller moved away, all of the Kellers went away. I cannot say exactly when this was; it was somewhere on or about the year 1906 storm when they moved to Fairhope. Since then no one has lived on the land except the time Dr. Pratt was there.

When I speak of the "Major" I mean Major McCaleb, the respondent in this suit. I have never seen him clearing the land, but I saw him making arrangements with Pratt to clear the land. This was in the home of Luther Clements, who lives in Fairhope. I heard that Pratt was dead. Mr. Clements has gone away, - I do not know where he is now. This arrangement was made before I was married, so that it was sometime before 1914; or it may have been just after I was married. It was the neighborhood custom when I was a boy for people in that locality to cut down timber and wood when and where they pleased. I do not know whether this custom still prevails, or not.

RE-DIRECT EXAMINATION BY JESSE F. HOGAN, Esq.,
Solicitor for Respondent.

You said that you lived on part of Section 32 in Township 6 South, Range 2 East? Do you mean Township 6 or Township 7? Ans. I would not be positive whether it was Township 6 or 7 or 10, or whatever it is. I know it is in section 32, and I am pretty sure it is in the Southeast quarter of the Northqest quarter of Section 32, directly across from section 28, but I had no occasion to pay any attention to the Township, and I can easily find it.

This morning I did tell Mr. Worcester that I did not know anything about this law suit. I do not know anything about legal papers or understand them, but I do know the land. I was born and raised there, and I know that Major McCaleb rented my horse and buggy to go on the land.

The neighborhood custom that I spoke of awhile ago was to get pine knots anywhere. We never did cut any logs or standing trees. It was the general reputation of the neighborhood that Mr. Keller had stopped people from getting pine knots off of this land. That was something unusual, and we stopped getting pine knots from the Keller lands. The Keller lands were the upper part of the section. I do not know how much, but they extended from Mr. C. O. White's down to the Keller house, and east of there.

COMMISSIONER'S CERTIFICATE

I, Miss K. C. Cuthbert, Commissioner under the commission heretofore issued out of the Circuit Court of Baldwin County, Alabama, do hereby certify that under the power conferred upon me by said commission I caused the said Hugh E. Lowell and C. C. White, and under and by virtue of an agreement of counsel I caused the said Major Thomas S. McCaleb, witnesses for the respondent in said cause, who are known to me, and known to me to be the identical witnesses named in said deposition, to come b fore me; that is to say Hugh E. Lowell and C. O. White on the 20th day of January, 1925, at eleven o'clock A. M. at the office of Hogan & Mitchell, 420 First National Bank Building, Mobile, Alabama, and Major Thomas S. McCaleb on to-wit, the 23rd day of January, 1925, at eleven o'clock A. M. at the office of Hogan & Mitchell, 420 First National Bank Building, Mobile, Alabama; that said witnesses were first duly sworn by me before testifying, as aforesaid; that they were then orally examined by Jesse F. Hogan, of counsel for respondent, and cross-examined by B. F. McMillan, of consel for complainant; that said witnesses in response to the direct and cross examination testified as hereinabove written; that the testimony of said witnesses was by me reduced to writing as given by said witnesses, and as near as might be in the identical language of said witnesses; that the reading by me of said depositions to said witnesses, and their signatures to their respective depositions were waived by said Solicitors.

I further certify that I am not of counsel or of kin to any of the parties to this cause, and am not in anywise interested in the result thereof.

Dated on to-wit, this 1st day of October, 1930.

$18.20

(Miss) K. C. Cuthbert

Commissioner

W. W. WORCESTER, et al,
Complainants,
vs.
THOMAS S. McCALEB, et al,
Defendants.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.

ADDITIONAL MEMORANDUM BRIEF ON BEHALF OF VIVA L. PICKENS, ONE OF THE COMPLAINANTS.

We think the joint brief already filed is conclusive of the right of the complainants to a decree quieting title under the original bill.

However, there is one additional point that might be raised against the right of cross-complainant, McCaleb, to claim any right or benefit under the Grove Act (Sec. 9912-9928 of the Code of Alabama, of 1923)

We have already shown that our rights to recover under the bill pending when the Grove Act was approved were not intended to be destroyed, and in fact were not. Those rights were vested and fundamental.

Section 9921 (Sec. 5 of Grove bill) provides that when parties assert rights thereunder by cross-bill, the same "must in all respects comply with the provisions of this article applicable to the original bills of complaint for establishing titles".

Section 9912 (Sec. 1 of Grove bill) makes all rights of recovery to hinge upon the fact that "no suit is pending to test his title to, interest in, or his right to the possession of such lands",

which must be alleged in the bill and proven to be true.

It was impossible for McCaleb to either allege or prove this basic requirement for the simple reason that the present complainants, or those whom they succeed, had filed a bill to test the validity of McCaleb's title to, interest in, or his right to the possession of such lands, and such suit was pending when the cross-bill was filed.

It follows, therefore, that there is no such suit pending under the Grove Act as would permit cross-complainant, McCaleb, to claim any benefit under Sec. 9919 of the Code of Alabama of 1923, which provides what shall be prima facie or conclusive evidence in the cause permitted to be filed under the Grove Act. McCaleb's cross-bill is only such an one as could have been filed under the provisions then existing for the quieting of titles and we contend that the evidence clearly demonstrates that he has no standing in Court, either under the former statutes or the Grove Act.

His payment of taxes was a gratuitous act on lands shown by the records to have been vested in complainants or those under whom they held for nearly a century, when he should have been paying taxes on the Southeast quarter of said Section Ten (10), the records as clearly showing that those under whom McCaleb claimed bought and sold the Southeast quarter of said section by warranty deeds; and not until the Executor of John Bowen (said Executor living in New England) undertook to convey without any shadow of right, doubtless an honest mistake, the Southwest quarter of said Section, did that quarter section appear in their chain of title.

Respectfully submitted,

Gaillard Mahorner & Gaillard

omitted

WARREN W. WORCESTER, et al, COMPLAINANTS,

-vs-

THOMAS S. McCALEB, et al, RESPONDENTS,

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.

IN EQUITY, NO. 238

BRIEF AND ARGUMENT FOR COMPLAINANTS AND CROSS - RESPONDENTS.

WARREN W. WORCESTER, et al, COMPLAINANTS,

-vs-

THOMAS S. McCALEB, et al, RESPONDENTS,

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.

IN EQUITY, No. 238

BRIEF AND ARGUMENT FOR COMPLAINANTS AND CROSS RESPONDENTS.

****

STATEMENT OF THE CASE

This action was brought in 1920 to quiet title to the southwest quarter of Section 10, Township 7 South, Range 2 East, by Warren W. Worcester, executor of the estate of George H. Hoyle, deceased, who owned a four-fifths undivided interest in the land against McCaleb and D. P. Bestor, Jr.; later Worcester as an individual and Mrs. V. L. Pickens, who owned the remaining one-fifth interest, was added as a party complainant; Worcester, the executor, was also sole heir and devisee of Hoyle and died during the pendency of the cause, leaving as his heirs and devisees the individuals brought in as complainants by order of this court, dated October 8th, 1930 under Chancery Rule 101. The respondent, Bestor, disclaimed title and the respondent, McCaleb, denied complainant's title and by cross-bill specifically bringing in as defendants the same individuals named in the court's said order, sets up title in himself and asks for affirmative relief

so that the real parties in interest and the parties now before the court are: Rosa, Olive M., Edward, Warren O., George H., and Joseph T. Worcester and Mrs. V. L. Pickens, complainants and cross-respondents, and Thomas S. McCaleb, Respondent and cross-complainant. For convenience we refer to them hereafter as complainants and respondents respectively.

STATEMENT OF THE EVIDENCE.

The land is wild, unenclosed wood land; no one lives on it and no one has ever lived on it or had actual physical possession except as hereinafter referred to and complainants contend that the straight, legal paper title must prevail; in other words in such cases the law treats the holders of the legal title as having actual possession and under the authorities we will cite, this is sufficient to enable complainants to maintaim this bill. It therefore becomes necessary to consider the ~~representative~~ respective papers titles of the parties, and to facilitate the efforts of the court in this respect, we set forth these titles below:

COMPLAINANTS' RECORD TITLE.

1. Patent to George E. Sherwin to complainants' Exhibits "A" & "B".
2. Deed George E. Sherwin to F. J. McCoy, Complainants Exhibit "C"
3. Deed F. J. McCoy to W. J. Lee, Complainants' Exhibit "D"
4. Affidavit showing heirship of complainants' grantors and Mrs. V. L. Pickens to W. J. Lee, Complainants' Exhibit "E"
5. Deed Heirs of W. J. Lee to John W. Lee, Complainant's Exhibit "F"
6. Deed John W. Lee to George H. Hoyle, Complainant's Exhibit "G"
7. Will, George H. Hoyle to Warren W. Worcester, Complainants' Ex. "H"
8. Will, Warren W. Worcester to Complainants, Complainant's Ex. "I"

The foregoing documents, except the Worcester will, are attached as exhibits to depositions of Joseph T. Worcester taken be-

fore Leila C. Harris, acting as Commissioner and the Worcester will is attached to the deposition of said witness, later taken before Ruth Macdonald, acting as Commissioner.

RESPONDENT'S TITLE.

In his answer and cross bill, the allegations of which complainants deny, the respondent, McCaleb, states a chain of title back to the Government but while in his answer he suggests that the chain is unbroken, he fails to refer to the fact that an essential link conveys the southeast and not the southwest quarter of the section. The chain of title offered by him down to and including the deed from Sherwin to McCoy, ~~will come~~ is common to both chains, but by referring to his deeds it will be seen that the first deed which purports to convey this land, is the one from Torry Bowen's executor, dated in 1903; the instrumentsin his chain antedating that were by general description none of which specifically describes this land and all of which are supposed to be based on a deed from McCoy to Allen and James Grist, which, however, conveys the southeast and not the southwest quarter of the section, as stated. It thus appears that while McCoy at one time had the legal title to the southwest quarter now involved and we assume to the southeast quarter also, he conveyed this land to complainants' grantors and conveyed to respondent's grantors entirely different land so that there being no physical possession, respondent's record title wholly fails, nor does the respondent otherwise show title.

If, therefore, the complainants' record title is perfect and the respondent has no record title or had no possession when this suit was filed, no possession would be available to him unless it reached the dignity of such adverse possession as would and did ripen into title by the statutory period of ten years continuous and exclusive adverse possession and we submit that if we eliminate all of complainant's evidence tending to negative the respondent's evidence and give his evidence every favorable inference, he shows absolutely nothing from which title can attach. His witnesses as to his possession are Hugh Lowell, C. O. White and himself. None of these parties ever lived on or occupied the land. The only thing Lowell knows is that he spent the night with one, Ralph Kellar and heard some of the Kellars speak of this as the "Kellar Land." He also testifies something about Kellar then warning off trespassers but he doesn't know who or when, but he also says that all of the Kellars moved away from this locality about the time of the 1906 storm, since when none of the Kellars have been even on the adjoining land, so that it was twenty years at the time he gave his testimony since the witness knew anything about the Kellar claim or of the land except that "the Major" borrowed his horse and buggy on one occasion at Fairhope and said he wanted to drive down to the land. Mr. White's testimony and "the Major's" testimony is about along the same line and is to the effect that White lived, not on this but somewhere near this land and "the Major" asked him as a friend to keep an eye on the land. These witnesses testify that one, Dr. Pratt, did at one time go on the land and build a "shack." When this was done isn't shown and the duration of Pratt's stay there isn't shown except that the respondent's wit-

nesses estimate it at about three or four months when he left suddenly, the shack disappeared and since then no one connected with "the Major's" title is shown to have even seen the land.

It would be pretty hard to form any idea of what kind of a "shack" this was from the respondent's testimony. Certainly it couldn't have been very much to have disappeared so quickly when Hoyle, Complainants' grantor, began to object. Complainant's witness, Charles M. Nelson, who had been going across the land hunting sheep, cattle and one thing and another for fifty or sixty years at intervals sometime once a week and sometimes for several months at a time, says:

"Pratt, when he was on the land, lived in a kind of camp, some of it of wood, some of it of cloth and battens. It would do as a makeshift for a camp . . . . a man with a helper could put up the structure that I saw on the land in two, three or four hours." "I think he was there about two or three months off and on."

And further on in his testimony this witness says, regarding the shack:

"I don't know whatever did become of the shack that I saw on the land. Shortly after Pratt left there it disappeared. I don't know whether it burned or whether the cows ate the cloth up or what became of it."

The witness, Parker, in describing the shack says:

"He had a shack built out of boards with a cloth roof. It was simply a temporary structure and could be put on there in a day probably." . . since Pratt left, no one has lived on that land or put any improvements there

So that it affirmatively and definitely appears that the improvements to which the respondent appears to attach so much importance, were never anything more than a temporary shelter, probably such as any camp hunter would throw up at his camp site where he expected to stay for one or two days and it was probably such a structure that the owner, if he had passed by and seen it, would never have concluded therefrom that the camper was asserting title

to his land. Nelson said he hardly noticed it. At any event the camp was placed there at latest in the year 1915 and disappeared from there the same year.

But another thing arises about this time and it stands out mountain high as regards a definite and unmistakable assertion of title and possession: As soon as Pratt began to establish himself, if his temporary sojourn could be called establishing himself, and Parker told Mr. Hoyle, Complainants' grantor, about it, Hoyle at once sent to McCaleb to find out what he was doing there but did not find him because McCaleb was gone and Dr. Pratt was gone and "the Major" himself, page four, shows that about this time George Hoyle was taking the matter up with McCaleb by letter. This, coupled with the fact that the same complainant objected to Pratt's occupancy, through Parker, shows that Hoyle was asserting his claim, objecting to both McCaleb and Pratt being on the land and that they left the land in response to these objections. Not only this, but Hoyle, just as soon as he found out anyone else was claiming the land had it posted against trespassing and these trespass notices and those notices placed on the land by Hoyle's estate, have remained there ever since, thereby showing that Hoyle, one of complainant's grantors, and complainants and their Grantors only have asserted physical possession of the land from long before this bill was filed until now.

It therefore appears that not only do complainants show a perfect record title but they also show such possession of the land as its nature permits and this possession would not be interrupted by the intermittant trespasses of the respondent, by his getting

wood from the land or looking after it to prevent trespassers, even if he did those acts. Even if we assume that the respondent did everything he claims he did on the land and even if in 1916 he put a structure on the land, all of these were abandoned by him five years before this suit was filed and there has been nothing in that time to show his claim to the land or to show the claim of anyone except the complainants who have all that time and until now had the land posted. Surely the mere trespass the respondent shows, when that trespass has been abandoned by him, is not of a continuing nature that will avoid this suit.

POINTS AND AUTHORITIES .

1. Possession of land cannot be shown by notoriety. Notoriety of ownership is admissable only when possession and its continuity is otherwise shown.

Williams vs Lyon, 181 Alabama, 531.

2. An occasional cutting of timber is not such possession of land as will ripen into title by prescription against the true owner.

Snow vs Bray, 198 Alabama, 398.

3. Occasionally riding along a road over land to warn off trespassers is not sucy actual possession as to give title.

Bass vs Jackson Lbr. Company 169 Alabama,455.

4. Mere occasional trespass of wild and unoccupied land to remove timber therefrom is not sufficient to show adverse possession.

Williams vs Lyon, 181 Alabama, 531.

5. Possession of land is not shown by an occasional going upon the land or over the land to warn off trespassers.

Bass vs Jackson Lbr. Company, 169 Alabama,455.

6. Mere payment of taxes or an occasional trip over land looking after it does not constitute adverse possession.
1

Redick vs Long, 124 Alabama, 260.

7. Mere color of title in itself is not evidence of adverse possession but it requires evidence of visible acts of ownership and payment of taxes cannot alone establish the adverse holding.

Brannon vs Henry, 175 Alabama, 454.

8. If McCaleb had no actual possession, Worcester's perfect title is sufficient to sustain this bill to quiet title.

Montgomery vs Spears, 117 Southern, 753,
King vs Spragner, 176 Alabama, 564,
Coste vs Teague, 110 Southern, page 17

The complainants respectfully submit therefore that they have shown a perfect paper title sufficient to sustain this bill, that they have shown such possession as the land in its present nature permits and that the respondent has shown neither title nor possession.

Since writing the foregoing we have been furnished a copy of the respondent's brief by his attorney, Mr. Hogan, and desire to submit the following in answer to what Mr. Hogan has said:

He makes the broad statement that an executor cannot maintain a bill to quiet title and cites the case of Gulf Coke and Coal Company, 157 Alabama, 325 in support of that proposition. If he had stated the real import of the opinion, he would have said that an executor cannot maintain such bill under Section 809 of the Code of 1896, but that Section was changed by Section 5443 of the Code of 1907, (9905 of the present Code) under which

proceedure this bill was filed, which provides that this bill can be maintained by either the owner or his personal representative. This change was clearly recognized by this court in the case of Davis vs Daniels, 204 Alabama, 374.

Respondent next contends that there has been an entire elimination of the original complainant and therefore the original bill should be discontinued, and cites six decisions of our Supreme Court to sustain this position. The cases cited we submit have absolutely no bearing on the point. Most of them do not refer to any situation even akin to the point for which he contends, and all of them that do refer to a change of parties, have reference to an entirely different state of facts. For instance in the McKay case, 70 Alabama, the suit was brought by an administrator, who was an improper party and was afterwards amended by striking him out and bringing in the heirs instead. This was clearly a discontinuance but has absolutely nothing to do with this case where the executor was the proper party but died during the pendency of the cause. We have referred to the McKay Case only of those cited by respondent because it seems to us that that is about the only one he cites, that could, by any stretch of the imagination touch the point he contends for. The present proceedings are not strictly an amendment anyway but rather a succession of the interests represented in the original suit made necessary by reason of the death of the parties complainant pending suit. However, without regard to that, we submit that rule 101 of the practice of this court providing that upon the death of the plaintiff no revivor shall be necessary but the per-

sonal representative or heirs or both shall be made parties on motion either before the Chancelor or Register and further providing that a legal representative or heirs may come in voluntarily and make themselves parties, all of which was done. The executor, W. W. Worcester, now deceased, was the heir and devisee as well as the executor of George H. Hoyle, then deceased, and the individuals brought in under rule 101 are the heirs of said Worcester, so that they succeed to the title of both Hoyle and Worcester, This is shown both by the affidavit filed by them and by the evidence.

In addition to this, however, the respondent himself by his cross-bill makes these very persons parties respondent to his cross-bill. In other words, he himself brings them in as respondents and they filed their answer and incorporated in it their own cross-bill. The affidavit filed by them and the evidence shows that they are the proper parties in interest and Chancery will of its own motion in such cases see that the proper parties are before the court, so that it doesn't matter whether they are in the case as original complainants or cross-complainants under the respondents cross bill. The real parties in interest are as stated in the first Paragraph, page 2 of the brief.

Evidently realizing that he has no record title, because the land conveyed to his grantor was the southeast quarter and not the southwest quarter of Section 10, respondent attempts to span the chasm by presenting the theory that McCoy intended to convey the southwest quarter, and cites a number of authorities to support his contention which, when read, will be seen to hold

this: If there is a latent ambiguity in the description and the evidence clearly shows the grantor intended to convey a piece of land which is not accurately described, equity will correct the error. This, of course is the law, and in a proper case would be enforced, but it doesn't apply to the facts in the present case: (first) because there is not latent ambiguity; There is no ambiguity at all but the land conveyed is described by legal subdivision and is definitely and without ambiguity fixed as the southeast quarter of Section 10, and being so fixed it will not be changed in a proceeding of this nature against a bona fide purchaser even if it could be corrected in a direct proceeding between the parties themselves; (second) there is absolutely no evidence to support the idea that McCoy intended to convey to respondents grantor any other land than he did convey, viz: The Southeast quarter of Section 10, He warranted that he owned the land so described and so far as appears he did own it. Mr. Hogan attempts to show that he didn't own it by offering as a witness the Honorable Samuel C. Jenkins of Bay Minette, who testified that he examined the indexes of the records and didn't find a deed conveying the land to McCoy, which, however, even if Mr. Jenkins didn't find it, doesn't prove anything because the deed may have been made but not recorded, or, it may have been recorded and not properly indexed; or, McCoy may have claimed the land by adverse possession; or, McCoy may have claimed the land and had no title; or, it is barely possible that Samuel may have overlooked the deed in his search. Mr. Jenkins testified as we recall the evidence that there are a

great many records in Baldwin County and that his search was over a very limited time and while his evidence isn't now before us, we are sure he testified that along about the dates he searched a great many deeds to land were made and never recorded, but even if we assume that McCoy intended to convey the southwest instead of the southeast quarter, in the face of the fact there is nothing on the record or in the evidence to show such intention, the intention would not supercede the deed by the proper description from the grantor to W. J. Lee, who conveyed to John W. Lee and who in turn conveyed to George H. Hoyle for valuable considerations.

We are sure respondent's attorney must have been joking in suggesting that he had acquired title by adverse possession. In order for title to ripen by adverse possession, such possession must have for ten continuous years been actual, exclusive, open, notorious, continuous, visible and hostile, and if anyone of these elements ~~are~~ is lacking, there is no adverse possession, and so long as there is no such adverse possession, the owner owes no duty to assert visible possession or claim of ownership and no unfavorable inference can be drawn from his inactivity. Rucker vs Jackson, 180 Alabama, 109. In the present case the evidence shows that just as soon as and at the only time respondent asserted anything that could be termed any kind of possession, by building a shack on the land, George Hoyle, who had the straight record title, immediately interfered and the respondent and his man Pratt, left the land. Hoyle then posted it, it has remained posted ever since

and no one has gone upon the land adversely to the claim of Hoyle and those claiming under him. The cases we have cited on pages 7 and 8 of this brief clearly establish this: Adverse possession is not shown by evidence of occasional timber operations, occasional riding over the land to warn off trespassers, mere occasional trespasses and mere payment of taxes. The only real bit of evidence outside of the shack that respondent attempted to present is the statement of his witness that the land was sometime in the indefinite past, known as "McCaleb's land" and our Supreme Court has held not only that this does not amount to adverse possession but that it is incompetent as evidence untill possession and its continuity is otherwise shown and at the time the witnesses testify about, no possession had been shown even by building the shack. Respondent cites the case of Jordon vs McClure as upholding the principle that ~~respondent's~~ claimants posting of the land amounted to nothing more than an assertion of title but the principles involved in the McClure case and those involved in this case are about as far apart as the poles. In that case the primary consideration was the validity, vel non, of the old swamp and overflowed land patents with which the record title of McClure connected. The court held that the patents were good, thereby holding that McClure's record title was complete; in an agreed statement of facts McClure was in possession and pending such possession Jordon went there and posted the land but McClure's possession existed before the posting, during the posting and after the posting

and was in no way disturbed by the posting, so that under those facts the posting would only amount to an assertion of title but in the present case no one was in physical possession and when McCaleb attempted to go into possession Hoyle went on the land and McCaleb left so that in such case the posting was more than an assertion of title. In other words Hoyle's record title was complete, thereby giving him constructive possession and when he posted the land and put McCaleb off, in 1912 or 1915 this act and direct assertion of title, coupled with a perfect record title was possession of the land itself. Under the decisions we have cited a record title carries with it such possession as enables the owner to maintain this bill.

Respondent attempts to bring himself within the protection of Section 9912 et sequal of the Code of 1923. We submit that, in the first place that Act could not affect this suit started three years before the said law was enacted, especially in view of Section 11 providing that the Code shall not affect any existing right, remedy or defense. The statute invoked would not apply to the facts in this case anyway because by its specific language it applies only to one in actual peacable possession or when no other person is in possession. Evidence is to the effect that he paid taxes on the land but so did the Complainants at least for the last few years and for aught that appears throughout the entire time and certainly even if it were admitted that only the respondent paid the taxes, the complainant has shown that there is no period of ten years in which they did not have possession of the land and assert title thereto.

The statute to which our friend refers was enacted for the repose of land claims and it was never dreamed that an active claim supported by a perfect record title posting the land and such possession thereof as its nature permits would be subverted by mere payment of taxes.

We submit that the complainants' record title is shown to be unbroken, that that title, in the absence of any other actual possession, carries with it constructive possession that our courts have construed to be actual possession, that the respondents have shown no connected record title at all and no possession and that therefore a decree should be rendered in this cause quieting title of the Worcesters and Mrs. Pickens as owner of the land.

Respectfully submitted,

B. F. McMillan Jr.

ATTORNEYS FOR COMPLAINANTS AND
CROSS-RESPONDENTS.

Form 40-H&Co.

THE STATE OF ALABAMA,
Probate Court of Mobile County.

Whereas, the Last Will and Testament of John Bowen was duly proved at a PROBATE COURT held for said County, at the Court House in the City of Mobile, on the Seventh (7") day of January 1888, in which Will he appointed Charles Torrey Executor thereof, and by an express provision in said Will to that effect, exempted him from giving Bond and security as such Executor and said Charles Torrey having made the application required by law;

THEREFORE, that the Will of said Testator may be well and truly performed, We by these Presents, grant and commit to said Charles Torrey administration of all and singular, the Goods and Chattels, Rights and Credits whatsoever, belonging to said John Bowen at the time of his death, according to the true intent and meaning of said Will, hereby requiring the said Charles Torrey to file in the office of said Court within two months from this date, a true and full inventory of said Goods and Chattels, Rights and Credits, and to render a full and true account of his administration whenever thereto legally required.

WITNESS, *PRICE WILLIAMS, Jr.*, Judge of said Probate Court, at office, in the City of Mobile, this 7th day of January eighteen hundred and Eighty Eight

ATTEST:

Price Williams Jr. Judge.

—1M—D.-H.P.Co.

THE STATE OF ALABAMA
Mobile County

PROBATE COURT

I, PRICE WILLIAMS, Judge of the Probate Court in and for said State and County, here-

by certify that the within and foregoing Thirteen pages

contain a full, true and complete ~~copy~~ copies of the 1. Last Will & Testament together with the proof thereof, of John Bowen deceased as the same appears of record in my office in Will Book 6 pages 284 et seq. 2. Order of Court admitting the last Will and Testament of John Bowen to probate & record, as the same appears of record in my office in Minute Book 44, pages 468-469. 3. Letters Testamentary as issued to Charles Torrey as Executor under the Last Will and Testament of John Bowen Deceased.

as the same appears of record in my office in Letters Testamentary / Book No. 1878

Page 230

Given under my hand and seal of office, this 29th day of May 192 3

PRICE WILLIAMS

Judge of Probate.

W. W. WORCESTER, et al,

Complainants,

vs.

THOMAS S. MCCALEB, et al,

Respondents.

DECREE FOR COMPLAINANTS AND QUIETING TITLE AS AGAINST DEFENDANT AND CROSS COMPLAINANT.

This cause having been regularly submitted for final decree on the pleadings and evidence, as shown by the note of evidence on file, and on motion of cross-complainant to dismiss complainants' bill of complaint, and having been duly considered by the Court, the Court is of opinion that complainants are entitled to the relief prayed for in their bill of complaint, as amended:

It is therefore Ordered, Adjudged and Decreed that the motion of cross complainant, Thomas S. McCaleb be and is overruled and disallowed.

It is further ordered, adjudged and decreed that the respondent and cross complainant, Thomas S. McCaleb, has no right, title or interest in or incumbrance upon the South-west quarter of Section Ten (10), Township Seven (7), South, Range Two (2), East, and lying in Baldwin County, Alabama,

It is further Ordered, Adjudged and Decreed that cross-complainant, Thomas S. McCaleb is not entitled to the relief prayed for in his cross-bill, and that his prayer for relief be and is denied.

It is further Ordered, Adjudged and Decreed that defendant and cross-complainant be and is taxed with all costs incurred in this cause, for which let execution issue.

This January 13th., 1931.

F. W. Hare
Judge.

January [illegible] 1931.

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Ok V

W. W. WORCESTER, et al,

vs.

Thomas S. McCaleb, et al,

DECREE

Filed Jan 15th/931
T. V. Richmon
Register

1st Div. 653
Baldwin
Circuit
Court

(In Equity)

Thomas S. McCaleb

vs

Warren W. Worcester, et al

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered in so far as the decree of the Circuit Court grants relief to the Complainants, it is reversed and annulled; and this Court proceeding to render the decree in this respect which the Circuit Court should have rendered, doth order, adjudge and decree that the original Bill of Complaint, as last amended, be, and is dismissed.

It is further ordered, adjudged and decreed that the decree of the Circuit Court in so far as it dismissed the cross-bill be modified so as to dismiss said cross-bill without prejudice and as modified the decree is affirmed.

It is further ordered and adjudged that the appellees pay the costs of this suit in the Circuit Court, for which execution may issue.

It is also considered that the appellees pay the costs of appeal of this Court and of the Circuit Court.

STATE OF ALABAMA—JUDICAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1st Div., No. 653

Thomas J. McCaleb, Appellant,

v.

Warren W. Worcester, etal, Appellee,

From Baldwin Circuit (In Equity) Court.

The State of Alabama,
City and County of Montgomery.

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages ~~numbered from one to~~ inclusive, contains a full, true, and correct copy of the decree rendered March 17, 1932 by

said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, this the 19th *day of* March 1932

Robt. F. Ligon

Clerk of the Supreme Court of Alabama.

The Supreme Court of Alabama.

1st Div., No. 653

Thomas J. McCaleb

Appellant,

v.

Warren W. Worcester

et al

Appellee.

From Baldwin Circuit Court. In Equity

Certified Copy of

Decree

BROWN PRINTING CO., MONTGOMERY, 1931

Filed March 21, 1932
P. W. Richmond, Register

The State of Alabama,:

Baldwin County. : Know all men by these Presents,That Joseph Keller and Sarah Keller his wife,for and in consideration of the sum of Three Hundred & fifty dollars to us in hand paid by Oscar O.Kimmell the receipt whereof we do hereby acknowledge,have granted,bargained,sold and conveyed and by these presents do hereby grant,bargain,sell and convey unto the said Oscar O.Kimmell heirs and assigns the following described real estate situate in the county of Baldwin and State of Alabama,to-wit:

The South west one fourth of sec. ten (10) Township seven (7) Range Two East of St.Stephens Meridian containing one hundred and sixty acres more or less.

TO HAVE AND TO HOLD the aforegranted premises to the said Oscar O.Kimmell his heirs and assigns forever. And we do covenant with the said Oscar O.Kimmell his heirs and assigns that we are lawfully seized in fee of the aforegranted premises; that they are free from all incumbrance;that we _____ a good right to sell and convey the same to the said Oscar O.Kimmell heirs and assigns and that we will warrant and defend the premises to the said Oscar O.Kimmell heirs and assigns forever against the lawful claims and demands of all persons.

In Witness Whereof we have hereunto set our hands and seals this the 19th day of Dec.in the year of our Lord one thousand nine hundred and four-

Signed,sealed and de- Joseph Keller (L.S.)

livered in presence of: Sarah Keller (L.S.)

V. A. Littlefield

C. E. Littlefield.

The State of Alabama,:

Baldwin County. ; I, C. E. Littlefield a Notary Public in and for the said county in said State, hereby certify that Joseph Keller whose name is signed to the foregoing conveyance,and who is known to me,acknowledged before me on this day,that being informed of the contents of this conveyance,he executed the same voluntarily on the day the same bears date.