positive decisions of United States appellate courts, clearly expressed in learned and elaborate opinions.

The facts in the case now before us on trial are few and simple, as there is no conflict, and only slight and immaterial diversity, in the testimony. The deceased, at the time the injury was sustained, was not engaged in the actual service of the company at the time and place of his usual employment; and his mode of transportation was controlled by himself and fellow servants under well-known circumstances of danger and hazard. He had gone to Salisbury, to receive payment of his wages, and was detained until about 9 o'clock at night. He was desirous of attending a social party at a place near the railway about five miles distant. Before he started on the hand car, he had made inquiry at the station, and knew that the fast mail train was due at Salisbury, and was behind the schedule time of arrival. In his daily business of repairing the track he was constantly exposed to the danger of passing trains, and well knew the hazard of entering upon the track with a hand car when a fast train was due and expected, and had the right of way. His conduct in going upon the hand car with full knowledge of the peril may well be held to have been a voluntary assumption of the risk of injury. When he saw the headlight of the rapidly approaching mail train, he stopped the hand car, and he and his fellow servants got off in safety, and the others escaped injury. His attempt to remove the hand car from the rails was the proximate cause of the disaster. This attempt was made in obedience to a hasty request or order of the section foreman to "save the hand car." In the face of such obvious and imminent danger he was under no obligation to obey the impulsive order of the foreman. He did not exercise reasonable care and caution to secure safety, and his hazardous attempt, under the circumstances, may well be held to be contributory negligence. Even if he thought that he was bound to obey the order, the act of the section foreman was the negligence of a suitable and competent fellow servant in the same line of employment under a common master. Kirk v. Railroad Co., 94 N. C. 625; Thom v. Pittard, 10 C. C. A. 352, 62 Fed. 232; Coulson v. Leonard, 77 Fed. 538; Railroad Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269.

It was insisted by counsel of plaintiff that the injury was caused by the negligence of the conductor and engineer of the mail train in not ringing the bell at crossings, and running at a greater rate of speed than was allowed by an ordinance of the city of Salisbury. The rule and regulation for ringing the bell at crossings are intended to give notice to persons passing along the highway, and enable them to avoid danger. The right of a railway train to pass over its track is paramount, but persons have a right to pass over crossings made for highways at suitable times and in proper manner, and, if any injury results to a careful and observant traveler by failure to ring the bell of a passing train, the company would be responsible in damages sustained. The ordinance of the city of Salisbury limiting the rate of speed of passing railway trains was intended to guard against danger and injury to citizens pass-

ing along or across the track for their pleasure or business, and not for the protection of railroad employés, who may well be presumed to know their duties and dangers. But, conceding that the conductor and engineer of the mail train were guilty of negligence in the matters mentioned, they were fellow servants of the deceased, engaged in the same common employment of operating the railway, and securing the safe and prompt passage of trains on the track. State and federal courts have made decisions announcing the doctrine that a conductor, having exclusive control of the management of a train, is a vice principal in relation to other employés of the company, subject to his orders, and acting under him on the same train. As to other employés in the operating department of the company who are not under his orders and control, he is a fellow servant in such a sense as exempts the railroad company from liability for an injury caused by his negligence. Mason v. Railroad Co., 114 N. C. 718, 19 S. E. 362; Railroad Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983.

The counsel of plaintiff, in their argument, called the attention of the court to the recent statute of this state changing and modifying the legal doctrines in regard to fellow servants established in the federal courts and some state courts by judicial decisions founded upon the general principles of the common law. They confidently insisted that, as such statute was manifestly remedial in its nature, and conformed in some degree to the law on the subject announced by the supreme court of this state, it should be construed to have a retroactive effect in this case, at least to the extent of carrying into application the principles of the common law as declared by the supreme court of the state as to the relations of fellow servants. The statute may be expedient, just, and salutary in its objects and purposes, and it shows a manifest legislative intent to remedy what was regarded as existing evils arising from extra state judicial decisions; but, as the statute contains no express provision for retrospective operation, I must conclude to observe the general and sound rule for the construction of statutes, and give this state statute only prospective operation. I may well presume that, if the state legislature had intended to make this important statute retroactive, the purpose would have been clearly, directly, and positively expressed in the body of the statute. If the legislature, in express terms, had given this statute a retrospective operation, then questions of law as to its constitutionality would have been presented to the courts. I will not consider such questions further than to say that, in my opinion, a retrospective operation of the statute in this case would clearly and injuriously affect vested rights acquired by contract, and impose new liabilities, which were not in existence, and were not contemplated by the parties, when they entered into the relation of master and servant for the operation of the railway. At the time this cause of action arose the nonresident corporation defendant was entitled by the laws of the United States to have its obligations, duties, and liabilities passed upon in a federal court, and be

determined by the principles of law declared and established by the supreme court of the United States.

Upon careful consideration of the questions of law and fact involved in this case I am of opinion that the defendants are entitled to an instruction to the jury to render a verdict in their favor on the issues submitted to them.

After the opinion of the court was announced, but before the verdict was formally rendered and entered of record, the counsel of plaintiff asked leave to enter of record a nolle prosequi as to the North Carolina Railroad, defendant. In the course of their argument they stated that plaintiff sought no verdict, and would not further prosecute the suit, as to said defendant, but no leave was asked to enter a nolle prosequi of record. The motion was disallowed upon the ground that it was not made in apt time, as the announcement of the opinion of the court in this case was equivalent to a rendered verdict.

CITY OF LA CROSSE v. CAMERON.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 100.

1. LIMITATION—ADVERSE POSSESSION—COLOR OF TITLE.
Under Rev. St. Wis. 1878, § 4211, providing that possession of land shall be deemed adverse, for the purposes of limitation, where the occupant entered "under claim of title, exclusive of any other right, founding such claim upon some written instrument," an instrument is sufficient to give color of title however defective its execution or acknowledgment, and however insufficient upon its face to convey title, provided it purports to convey title and pretends conformity to the law.

2. SAME.
Though the possession, to be adverse, is required by the statute to be "exclusive of any other right," title to an estate which is less than the fee may be acquired by adverse possession, provided the claim thereto is exclusive of every other right to the same estate, and therefore a city's possession of land under an instrument purporting to dedicate it as a "public square" may be adverse as to the right claimed, though the right of another to the fee be recognized by the city.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

This suit is in ejectment by Daniel Cameron, plaintiff below, defendant in error here, brought on the 3d day of February, 1890, to recover of the city of La Crosse the possession of an undivided five-sixths of certain premises in the city of La Crosse.

The defendant below pleaded: (1) A denial of the plaintiff's title; (2) that the land demanded was dedicated to public use as a public square by a plat made and recorded by the owners of the land in the year 1851, accepted by the public, and ever thereafter so used to the commencement of the action; (3) twenty years' continuous use and occupation by the defendant prior to the suit; (4) that neither the plaintiff nor his grantors were in possession of the premises demanded, or any part thereof, within 20 years before the commencement of the suit, but that the defendant, during 20 years and more before the suit, held the land in trust for the public, and for the uses and purposes of the public square, and exclusive of any other right; (5) that the defendant entered into

possession of the demanded premises under a claim of title thereto exclusive of any other right, founding such claim upon a certain plat known as "C. and F. J. Dunn, H. L. Dousman, and Peter Cameron's Addition to the Town of La Crosse," recorded in the office of the register of deeds of La Crosse on the 19th day of November, 1851, in volume 1 of Deeds, on page 165, upon which plat the demanded premises are described, marked, and designated by the words "Public Square" in writing thereon, and that they had been in continuous occupation and possession of the premises of the defendant for 10 years and more last past before the suit under such claim of title by virtue of that plat and exclusive of any other right; and (6) the general issue.

The premises in question are part of fractional lot 1 in section 6, township 15 N., of range 7 W., in La Crosse county, and otherwise described as the "North half of the northeast quarter" of that section. This fractional lot 1 was patented by the United States to Peter Cameron, of La Crosse, who on May 10, 1850, conveyed an undivided one-half thereof to Francis J. Dunn, Charles Dunn, and Hercules L. Dousman. By deed dated September 18, 1850, recorded November 19, 1851, Peter Cameron conveyed the other undivided one-half to his brother, Daniel Cameron, the defendant in error. On September 11, 1851, Daniel Cameron executed to his brother, Peter, a power of attorney, by which he authorized his brother to execute deeds of partition to his co-tenants, and to receive like deeds from them before or after such partition, and in conjunction with his co-tenants to plat and lay off the whole or any part of the tract into lots, and in so doing to make such reservation or reservations thereof "for public streets, alleys, and landings, and for charitable, religious, and educational purposes as he, or he and they, shall think fit and proper," to sell and convey for such purposes and upon such consideration as he may deem proper all the interest of his principal in the tract or the village lots if platted. Peter Cameron united with the Dunns and Dousmans in platting this fractional lot 1 into lots. The plat was executed on the 17th day of November, 1851. It is entitled "C. and F. J. Dunn, H. L. Dousman, and Peter Cameron's Addition to the Town of La Crosse." The surveyor's certificate, dated November 6, 1851, recites that he surveyed the property for C. and F. J. Dunn, H. L. Dousman, and Peter Cameron. Following that certificate is this certificate of acknowledgment:

"State of Wisconsin, La Crosse County—ss.:

"We, Francis J. Dunn, Charles Dunn, and Daniel Cameron, by Peter Cameron, his attorney in fact, do hereby acknowledge the annexed plot of our addition to the town of La Crosse, in said county, as and for our act and deed, for the uses and purposes expressed on the same and contemplated by the law authorizing the laying out of towns and platting and recording the same."

This certificate was dated the 17th day of November, 1851, and was executed by the parties mentioned under their respective hands and seals; the execution by Daniel Cameron being "Daniel Cameron, by Peter Cameron, His Attorney in Fact."

This certificate is followed by another certificate by a notary public, which is as follows:

"State of Wisconsin, Crawford County—ss.:

"This seventeenth day of November, 1851, personally came before the undersigned, notary public in and for said county of Crawford, in the state of Wisconsin, Hercules L. Dousman, Francis J. Dunn, Charles Dunn, and Peter Cameron, attorney in fact for Daniel Cameron, known to me as the identical persons who have laid out the addition to the town of La Crosse and made the annexed plat thereof, and the persons who have signed and sealed the above acknowledgment thereof, and acknowledged the annexed said plat as and for their act and deed, for the uses and purposes expressed on the same and contemplated by the law authorizing the laying out of towns and platting and recording the same, and desire that the same should be certified and made public preparatory to recording the same. In testimony whereof I have hereunto set my hand and notarial seal at Prairie du Chien in said county the day and year last aforesaid.

"[Official Seal.] D. H. Johnson,

"Notary Public, Crawford County, Wis."

This plat and the certificates were recorded in the office of the register of deeds of La Crosse county, in volume 1 of Deeds, on pages 164 and 165, on November 19, 1851.

On the date of such acknowledgment, November 17, 1851, the Dunns, Dousman, and Daniel Cameron, by Peter Cameron, his attorney in fact, executed to each other deeds of partition; Daniel Cameron releasing to Dousman and the Dunns 84 lots and the others releasing to Daniel Cameron 81 lots. These deeds conveyed all the defined and numbered lots upon the plat, "according to the plat laid out and recorded by Dousman, Francis J. and Charles Dunn, and Cameron." There were also given in evidence 24 deeds, which were severally executed by Daniel Cameron, the plaintiff below, between January 13, 1857, and January 25, 1890, all of which conveyed described lots in Dunn, Dousman and Cameron's addition to La Crosse, "according to the plat of said addition now of record in the office of the register of deeds in and for said county of La Crosse."

The principal contention of fact touching the plat in question is with respect to the designation thereon of the demanded premises. The plaintiff below contended that upon the plat the premises in controversy were left without exterior lines, were not divided into lots, and had no designation upon them. The defendant below contended that the premises upon the plat were left without exterior lines, and were undivided into lots, and had written across the space the words "Public Square." The record of the plat in volume 1 of Deeds, which was introduced in evidence at the trial, shows that upon such record exterior lines had been drawn around this space, and other lines produced, corresponding to the alleys through the blocks in the plat, and that they had been erased, and the words "Public Square" written across the space, and evidence was given tending to prove that these lines were drawn through misprision, and were so drawn and erased at the time of the copying of the plat in volume 1 of Deeds, and that the words "Public Square" were written at the same time, in the same handwriting and with the same ink as the other writings on record; but upon that subject there was dispute. It was also proven that before the month of June, 1858, there was in the office of the register of deeds of La Crosse county no special book provided for recording plats, and that plats left for record prior to that time were transcribed in the books of deeds, or kept in a drawer in the office. On June 5, 1858, the county of La Crosse purchased of John A. Walker, the then register of deeds, a book prepared by him of the plats which had theretofore been recorded or filed in that office. Such book was thereafter kept in the register's office and denominated "Book 1 of Plats," and certified copies of the records of plats were thereafter made from that book as from an original record. This book of plats, made in 1858, shows the plat of Dunn, Dousman & Cameron's addition without the words "Public Square" on the north half of block 15, being the demanded premises. The plat is designated in this book as "C. and F. J. Dunn, H. L. Dousman, and Peter Cameron's Addition to the Town of La Crosse." The evidence tended to show that the record of the plat in the book of plats was copied from the earlier record in volume 1 of Deeds, and is not a new and independent record copied from the original plat, and it was left uncertain at what time the original plat was taken from the office of the register; but the evidence tended to show that such original plat had, before the suit, been destroyed in a fire. The property in question has never been assessed by the city of La Crosse, or taxed for any general or special tax since the year 1851, and has been left unlisted and undescribed upon all assessment rolls and tax lists of the city, except for certain years, in which the premises were entered upon such assessment rolls and designated thereon, either as a "public square" or as a "park," and were not valued or assessed in any such year. In the year 1867 the common council of the city refused permission for the use of the premises as a baseball ground, and in the year 1868 caused certain filling to be done upon the premises. In the year 1870 the common council caused the removal of certain fences which were alleged to encroach upon the demanded premises. In the same year the city laid sidewalks upon Fourth and Fifth streets adjoining the land in question, and graded both of the streets, the expense thereof being paid out of the general fund of the city. In the year 1871 the premises were graded, leveled, and

fenced, and in the year 1872, at the expense of the city, trees were set out upon the premises, and are now growing thereon, a band stand was erected, and thereafter and continuously down to the time of this suit the premises had been looked after, improved, grass sown, and trees trimmed and watered under the authority of and at the expense of the city, and the premises have been used as a public square or park.

The defendant below requested the court to instruct the jury as follows: "If you find, from the evidence, that the defendant, the city of La Crosse, in or about the year 1871, entered into possession of the premises described in the complaint under a claim of title exclusive of any other right, founding such claim upon the recorded plat contained in volume 1 of Deeds, pages 164, 165, as being a conveyance of the premises, protected the same by a substantial inclosure, and has been in continuous occupation and possession of these premises, and usually cultivated and improved them for and during 10 years prior to February 3, 1890, then your verdict should be for the defendant." This instruction was refused by the court, and an exception to such ruling saved, and such refusal is assigned for error.

The court charged the jury upon this subject as follows: "Another question of much importance has been argued, which is whether the 10-years statute of limitation provided for by the statutes of Wisconsin can be pleaded in bar of the action. That statute, in substance, is that when the occupant, or those under whom he claims, entered into possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument as being a conveyance of the premises in question, the premises shall be deemed to have been held adversely. In such case the action to recover must be brought within 10 years. The evidence shows that the city fenced up this property, built sidewalks, graded, and planted trees in 1871, and occupied it as a public square and park continuously up to 1890,—a period of about 18 or 19 years; so that, if the 10-year limitation is applicable to the case, it should be submitted to the jury whether the city has not held the land adversely to the plaintiff 10 years immediately preceding the commencement of the action. The question I have found one of much difficulty, and upon the consideration I have been able to give it I cannot say that it is free from doubt. Still the best judgment I have been able to form is that the instrument under which the city went into possession, claiming title, is not one giving color of title and upon which this statute would run. 'Color of title' is what appears on the face of the instrument to be a good title, but is not in fact. The instrument on the face of it is, in the judgment of the court, not good to convey title. It is apparent from the record, including the power of attorney from Daniel Cameron to Peter Cameron, that Daniel Cameron is a part owner of the land with the two Dunns and Dousman, but the instrument does not profess to be a conveyance by Daniel Cameron." To this portion of the charge the plaintiff in error duly excepted, and assigns the giving of such charge as error.

The court also charged the jury as follows: "The record of the plat is not a conveyance, and does not profess to be a conveyance, except so far as the statute makes it such by a strict compliance with its provisions. All the owners must execute and acknowledge in order to make it binding upon any. Daniel Cameron did not execute. He did not acknowledge before an officer as required by law, so that, while it appears on the face of the record that he was a part owner, it also appears that he did not execute or acknowledge the instrument; and in this case it seems clear that the acknowledgment stands in the place of an execution, as it is all the execution that is provided for. As it appears on the face of the record that Daniel Cameron, being a part owner, did not join in the conveyance, the instrument, while it discloses his interest, does not profess to convey it, and therefore cannot give color of title." To this charge an exception was reserved, and the giving of it is assigned for error.

The court also charged the jury as follows: "The statute could not run upon the instrument as a conveyance of the Dunns, Dousman, and Peter Cameron as the part owners interested, because it appears from the record that Daniel Cameron had an interest, and that Peter Cameron is only acting as attorney without an interest in himself. In order that the statute should run,

it should appear that the city might take possession in good faith under the instrument as a conveyance of the premises. This it could hardly do with the disclosure in the record in regard to the title, and the failure of Peter Cameron to acknowledge for and in the place of his principal." The plaintiff in error excepted to the giving of such charge, and assigns error thereon.

There was much evidence upon the question of common-law dedication and of 20 years' adverse occupation by the city, and there were many exceptions to the introduction of evidence, to the giving of charges requested, to the refusal to give instructions demanded, and to various provisions of the charge as given, which in view of the judgment of this court it is not material to specify. The jury returned a verdict for the plaintiff below.

G. M. Woodward, for plaintiff in error.

J. V. Quarles, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge, upon this statement of the case, delivered the opinion of the court.

The trial court held that under the power of attorney executed by the defendant in error no authority existed to reserve grounds for a public square, that such a use is not included within the designation of "charitable purposes," and that the enumeration of the cases for which reservation was authorized was in exclusion of all others. The court also ruled that the lawful execution of a plat required by the statute (Rev. St. Wis. 1849, c. 41) is the acknowledgment by the proprietor before the proper officer, and that, failing strict compliance with the statute, there arises no statutory conveyance. It was held that the acknowledgment here was invalid, upon the ground that it purports to be the acknowledgment of the attorney in fact with respect to his own act, and not his acknowledgment of the plat as the act and deed of his principal. Because of these two defects,—the want of authority to reserve land for a public square, and the defective acknowledgment,—the court ruled that the record of the plat does not constitute a conveyance within the provisions of the statute, and is not an instrument giving color of title under which adverse possession for a period of 10 years prior to suit would bar an action by the rightful owner.

The statute as it then stood contains no requirement for any certificate or writing by the proprietors, or any requirement for any execution of the plat by them, other than as therein expressed. The survey and the certificate thereof by the surveyor, the making of the plat, its acknowledgment and the certificate thereof by the officer indorsed thereon, and the record of the plat, are the things required by the statute. It is not doubted that the peculiar mode of conveyance provided for by the statute must be substantially complied with to render the plat operative to vest title. We do not, however, stop to consider the correctness of the ruling that the plat in question was defectively executed or acknowledged, and that it did not therefore pass title, for the reason that, upon the assumption of the correctness of those rulings, we have reached the conclusion that the instrument is one giving color of title within the statute respecting the limitations of actions. These provisions (Rev. St. Wis. 1878, §§ 4211, 4213, 4215) are as follows:

"Sec. 4211. Where the occupant, or those under whom he claims, entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the judgment of some competent court, and that there has been a continual occupation and possession of the premises included in such instrument or judgment, or of some part of such premises, under such claim, for ten years, the premises so included shall be deemed to have been held adversely; except that when the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed the possession of any other lot of the same tract."

"Sec. 4213. When there has been an actual continued occupation of any premises under a claim of title, exclusive of any other right, but not founded upon any written instrument, or any judgment or decree, the premises so actually occupied, and no other, shall be deemed held adversely."

"Sec. 4215. An adverse possession of ten years, under sections 4211 and 4212, or of twenty years under the two last preceding sections [4213 and 4214], shall constitute a bar to an action for the recovery of such real estate so held adversely, or of the possession thereof."

Sections 4212 and 4214 prescribe the requisites of possession. The plat in question had upon it a certificate or declaration executed by the proprietors under their respective seals. It was executed by and in the name of Daniel Cameron, by Peter Cameron, his attorney in fact. This certificate acknowledges the plat as the act and deed of Daniel Cameron "for the uses and purposes expressed on the same and contemplated by the law authorizing the laying out of towns and platting and recording the same." It is followed by the certificate of the notary, which states that "Peter Cameron, attorney in fact for Daniel Cameron," and the other proprietors mentioned, are known to him as the identical persons who laid out the addition to the town of La Crosse and made the annexed plat thereof, and the persons who signed and sealed the above acknowledgment thereof (referring to the certificate executed by the proprietors) and acknowledged the plat as and for their act and deed.

It is true that the statute with respect to the execution and recording of plats as it then stood did not require this written declaration by the proprietors. It did not, however, forbid it. It prescribes certain acts the doing of which should be effectual to convey the title; but, to determine whether the instrument in question furnishes color of title, we must look to the whole and to every part of the instrument to see if upon its face it purports to convey a title, and this whether the things apparent upon the instrument are or are not required by the statute. The question is not whether the instrument in law conveys title. If that were the question, the statute of limitations would here have no function and need not be considered. These statutes of repose presuppose defects in or total want of title, and are enacted to establish the claim of one in adverse possession under defective title, or under an instrument which in law conveys no title. The question is, therefore, whether this instrument purports to dedicate this land for a public square, not whether it was in the law effective to dedicate. The acknowledgment was, perhaps, informal, and therefore the execution was in a sense defective. It probably should have appeared that Peter Cameron acknowledged the plat as the act and deed of his principal. Notwithstanding, if we find here the substance of the requirements

of the statute, we need not be concerned with respect to defects in the instrument, for the law required no particular form of acknowledgment. State v. Schwin, 65 Wis. 207, 213, 26 N. W. 568. "It is the policy of the law to uphold certificates when substance is found, and not suffer conveyances or the proof of them to be defeated by technical or unsubstantial objections." Carpenter v. Dexter, 8 Wall. 513, 526. If this defective execution of the plat be not validated by the curative act (Sanb. & B. Ann. St. Wis. § 2216c), it is clear to our minds that, apart from legal subtlety, the instrument purports to be made in pursuance of and in conformity with the statute, and to be the act of and to be acknowledged by Daniel Cameron, through his attorney, for the purposes therein expressed. It is clear that Daniel Cameron, by his attorney in fact, joined with the other proprietors in the making of the plat. It is also clear that his attorney in fact undertook to acknowledge it for him before the notary, as he had by that attorney acknowledged it in writing under his seal upon the face of the plat. If, upon strict construction or technical reading of the notary's certificate, it must be held that the attorney in fact acknowledged it as his own act and deed, and not as the act and deed of his principal, it is none the less true that so to read it is to sacrifice substance to form. To deny this instrument the quality of color of title, because of this manifest misprision of the notary, would be, we think, to render abortive the statute of limitation under consideration, which only requires possession under claim of title founded upon some written instrument as being a conveyance of the premises in question. The instrument need not be validly executed or acknowledged for the purposes of adverse claim thereunder. It is sufficient if upon its face it purports to conform to the law, and to convey the dedicated premises described therein. Thus, in Williams v. Association, 79 Wis. 524, 48 N. W. 665, the objection was made that the plat there in question was void because the acknowledgment was not certified by the officer under his hand and seal, as required by the statute. The court held that the seal of the officer was necessary, and could not be dispensed with, but that (page 530, 79 Wis., and page 666, 48 N. W.) "the plat was certainly an instrument in writing purporting to convey real estate," and that the defect was cured by the act (Sanb. & B. Ann. St. Wis. § 2206a) which validated every instrument in writing theretofore made which purported to convey real estate, which had not been sealed. And so, also, in Cawley v. Johnson, 21 Fed. 492, 493, it was ruled that a receiver's receipt upon entry of land was sufficient color of title, under the statute of Wisconsin, to support an adverse possession thereunder; the court saying, "Under the statute, it is not essential that the written instrument should constitute in itself an actual title or conveyance, but only one upon which may be founded a claim of adverse possession as being a conveyance." It is immaterial that the grantor had no title to convey, or had no authority in law or in fact to convey one, or that the instrument was defectively executed. The instrument gives semblance or color of what its effect would be if all necessary requisites of a perfect title and a good conveyance were present. It should be borne in mind that it is not "the instru-

ment which gives the title, but adverse possession under it for the requisite period with color of title." McMillan v. Wehle, 55 Wis. 685, 693, 13 N. W. 694. The only quality demanded of the instrument is that it should purport to convey or to dedicate; that it exhibits sufficient upon which a claim of title may in good faith be rested as warrant for entry into possession, for color of title excludes the idea of rightful title. The fact of possession, and the quo animo it was commenced or continued, are the only tests. Smith v. Burtis, 9 Johns. 175, 180.

We do not deem the question to be one which is now at large. As we read the decisions, it is the settled law of the state of Wisconsin that possession for the requisite period under an instrument absolutely void upon its face will draw to it the protection of the statute. Jones v. Billstein, 28 Wis. 225; North v. Henneberry, 44 Wis. 306; McMillan v. Wehle, 55 Wis. 685, 13 N. W. 694; Meade v. Gilfoyle, 64 Wis. 19, 24, 24 N. W. 413; Kelley v. McKeon, 67 Wis. 561, 565, 31 N. W. 324; Whittlesey v. Hoppenyan, 72 Wis. 140, 145, 39 N. W. 355. However groundless the supposed title may be, it is sufficient for the purpose of adverse possession that the entry be under color of title. However defective its execution or acknowledgment, and however insufficient upon its face to convey title, the instrument none the less purports to convey title, pretends conformity to the law, and is sufficient for color of title under the statute in question. Northrop v. Wright, 7 Hill, 476. This conclusion derives support from the language of the statute concerning that adverse possession which is not under a written instrument (Rev. St. Wis. § 4213). There, as under section 4211, the entry and occupation must be "under a claim of title exclusive of any other right." We take it that the phrase employed, "claim of title," means only a claim of right,—a claim to the right of possession,—since otherwise section 4213 would be abortive and without effect, because there can be no legal title to lands by parol. Mere possession is a degree of title, although the lowest and most imperfect. Bouv. Law Dict. "Title." Possession, as defined by the statute, and under claim of right thereto, satisfies the requirement of the law; and when that claim is founded upon a written instrument which purports, however imperfectly, to grant the possession claimed, there is color of title sufficient to support the claim and the possession thereunder.

It is, however, urged that the statute of limitations cannot be invoked by the plaintiff in error, because, as it is said, the entry and possession protected by the statute must be "under claim of title exclusive of any other right," which language is construed by counsel to mean that the claim must "usurp the entire dominion, and exclude every other title and every other right." If this construction be correct, the contention of counsel must be sustained, because the instrument under which possession was taken and is claimed purports to grant a qualified title only; and it is not disputed that the claim of the plaintiff in error is limited to the holding of the demanded premises in trust for the public, and for the purposes of a public square. Such possession is in subordination to the title in fee. The instrument under which it is claimed does not furnish color

of title beyond the estate which it purports to convey; for, to constitute adverse possession, entry must be made and the possession held with defined claim of title, and the title acquired cannot rise above the claim. Pepper v. O'Dowd, 39 Wis. 538. The claim here was that of an easement only,—not a corporeal interest, but an incorporeal right. This claim consists with, and is not adverse to, the claim of the owner that the right of soil remains in him, and that, when the use or enjoyment claimed is relinquished or abandoned, the property, with all its incidents and appurtenances, will revert to the owner. Gardiner v. Tisdale, 2 Wis. 153. Such a claim cannot, therefore, in a broad sense, be adverse to the title in fee. The question, however, still remains, whether the claim is not adverse to the owner of the fee, so far as respects the claim of right asserted. The claim of title must be exclusive of any other right; but does not this language mean that the claim must be in exclusion of any other right to that which is claimed, and not in exclusion of the right or title which is recognized by the claim? If one enter into possession of premises, claiming under an instrument which purports to convey a life estate, and hold possession thereunder for the prescribed period, may he not claim the benefit of the statute, as against any other claim to that life estate and possession thereunder? Such possession held in subordination to the title of one, it is ruled, may still be hostile and adverse to the title of all others. Hayes v. Martin, 45 Cal. 563; McManus v. O'Sullivan, 48 Cal. 15; Francoeur v. Newhouse, 43 Fed. 236; Railroad Co. v. Kranich, 52 Fed. 911; Furlong v. Garrett, 44 Wis. 111, 122. These decisions could not be upheld under the construction contended for by counsel, that the claim must usurp the entire dominion, and exclude every other title and every other right, because the claim and possession in the cases referred to were not in exclusion of every other right, nor hostile to the title of one. If then, as we think, the correct interpretation of the statute is that the claim must be in exclusion of any other right to that which is claimed, why may not one claim adversely with respect to qualified ownership against the owner of the fee title, who seeks possession in denial of the qualified ownership asserted? May not a tenant for years under an instrument purporting to be a lease executed by a stranger to the title hold adversely, as against the owner of the title seeking possession during the term specified in the instrument? Such claim is not hostile to the title in fee, but disputes the right of the owner of the fee title to the possession of the land during the period specified in the instrument; and a plaintiff in ejectment must not only have a valid, subsisting interest in the premises claimed, but must be entitled to their present possession.

Originally a prescriptive right could only be acquired by its enjoyment adversely during a period beyond the memory of man. The various statutes of repose with respect to lands, both in England and in this country, have been enacted chiefly for the purpose of regulating the period within which the prescriptive right must be exercised to allow the presumption of a grant, and they greatly abridge the period which formerly obtained within which a grant would be pre-

sumed. The history of these statutes of repose and of limitation, and of their effect, is thus accurately and well stated by Mr. Justice Orton in Scheuber v. Held, 47 Wis. 340, 349, 2 N. W. 779, 780:

"First. Prescription at common law was strictly applicable only to incorporeal hereditaments, while, as to the land itself, the period of adverse possession and enjoyment was fixed by the statute of limitations. Second. The analogy between prescription and limitation was so close and perfect that the period of prescription has now come to depend upon and follow that of limitation, very generally, in this country. Third. Prescription for the requisite period presupposed a deed having been given anterior to the time of prescription, and established a presumption of a grant as a presumptio juris et de jure, while limitation raised no such presumption, but operated merely as an extinguishment of the remedy. The former conferred and established a right and title, while the latter only barred a recovery. This was the former distinction, but which has long since been lost by the decisions in this and other states; and now adverse enjoyment for the period of limitation extinguishes, not only the remedy but the title, of the former owner, in lands as well as hereditaments. It is said by Chief Justice Dixon in Knox v. Cleveland, 13 Wis. 246, 'that the right or title of a party to property which is adversely held and claimed by another is barred and cut off by his neglect to prosecute within the period prescribed by the statute of limitations, and that such neglect operated to divest and transfer it to the adverse claimant'; and the same principle is recognized in Sprecker v. Wakeley, 11 Wis. 432, Hill v. Kricke, Id. 442, Brown v. Parker, 28 Wis. 21, and in many other cases in this court. Fourth. The analogies between prescription and limitation, in this state, at least, not only establish the period of prescription, and cause them to operate alike in conferring title, but make them so near alike in qualities, principle, purpose, effect, and consequence, as to completely blend them together; and they are used interchangeably, as being substantially the same. In Smith v. Russ, 17 Wis. 227,—a case like the present, for flowing lands by means of a milldam,—what is pleaded in the answer as 'prescription,' as in this case, is called and treated as the 'statute of limitations' in the opinion; and in Haag v. Delorme, 30 Wis. 591,—a case of like flowage,—Mr. Justice Lyon says in his opinion: 'The nature, qualities, and duration of the user and enjoyment of an easement which will constitute a valid right thereto by prescription are precisely the same as are required by the statute of limitations to enable the occupant of lands to defeat the title of the true owner;' and then holds that 'the occupancy of the lands for such purpose must be continued, uninterrupted, and adverse for the length of time prescribed by the statute.' This clearly implies that the statute of limitations applicable to real actions affecting the title of the lands is equally applicable to an action like the present, and the language of the statute itself may well bear such an interpretation. The former statute in these respects is the same in the revision; and section 4206 provides that 'civil actions can only be commenced within the periods prescribed in this chapter,' clearly implying and comprehending all civil actions, including this action as well. Section 4208 provides that 'no defense or counterclaim founded upon the title to real property or to rents and services out of the same, shall be effectual,' etc. 'Real property' is defined by the statute 'to include lands, tenements and hereditaments, and all rights thereto and interests therein.' This language is certainly broad enough to include the rights and interests in lands involved in this action, and, as we have seen, this court, in Haag v. Delorme, supra, and in other cases, has given such a construction to it."

The court further observed:

"We conclude, then, that under the effect of said section 26, c. 138, Rev. St. 1858, the adverse possession and user of the lands in question, by means of the milldam, for more than twenty years, would be protected both by the statute of limitation and by prescription, and confer a title to the lands for such use upon the defendants, as against the state and other parties; and, if such

period had expired before the amendment of 1877, such right and title had become vested in the defendants."

See, also, Sabine v. Johnson, 35 Wis. 185, and Murray v. Scribner, 70 Wis. 228, 233, 35 N. W. 311.

We quote thus at length from the opinion of Mr. Justice Orton because in the consideration of the question presented we must look to the decisions of the supreme court of the state whose law we are considering, and must conform our judgment to the construction of the statutes held by that court, and because we think the case of Scheuber v. Held declares that the construction of the statute contended for by counsel cannot be sustained. The easement to flow the lands of another is not hostile to every other title, in the sense in which counsel would construe the language of the statute. The claim of such an easement recognizes the title in fee in another. It does not seek to divest the title of the owner of the land. It merely imposes a burden upon the land,—the right to flow the land acquired by exercise of the right during the period prescribed by the statute. It is, however, adverse to the owner of the fee, with respect to the claim asserted. It was ruled in Knox v. Cleveland, referred to in Mr. Justice Orton's opinion, that the right and title to property held adversely and claimed by another are barred and cut off by failure to prosecute within the prescribed period, and that such neglect operates to divest and transfer the title to the adverse claim. This language was strictly accurate as applied to the case then in hand; but in Scheuber v. Held the court was careful to limit the effect of that language in respect to easements acquired by adverse possession, and to say that such adverse user would confer a title to the lands for such use, thus clearly restricting the title acquired by adverse possession and use to the defined claim of title under which such use was asserted. It is true that in Scheuber v. Held the claim was not founded upon possession under a written instrument, but was rested upon 20 years' adverse user merely. It is, however, to be observed that whether the possession asserted be that of 10 years under, or of 20 years not under, a written instrument, in either case the entry and the possession must be under claim of title exclusive of any other right. If, therefore, the contention of counsel be correct, neither of these statutes would apply to the case of a claim for an easement. They were, however, as we know historically, enacted in regulation of prescriptive rights, and in modification of the common law. The construction claimed would declare erroneous the decision of the supreme court of the state in the cases referred to; for, if the prescriptive right cannot be acquired under the one, it cannot be acquired under the other, of the statutes of repose, since both require an entry and possession under the claim of title exclusive of any other right. Neither can we perceive any just reason, if, as has been held by the supreme court of the state, a prescriptive right may be acquired under section 4213, why it may not be acquired as well under section 4211. Both statutes are in regulation of the same subject-matter. Both require an entry under claim of title exclusive of any other right. The distinction is that the one contemplates an entry and possession under a written in-

strument purporting to be a conveyance of the right claimed, and the other an entry and possession not under any written instrument. We see no escape from the conclusion, as a logical consequence of the principle asserted in Scheuber v. Held, that an easement may be acquired against the owner of the fee by adverse possession for the period prescribed, whether under or without a written instrument, and that the title acquired by such adverse user is not the title in fee, but the title and the right to the use claimed.

The principle asserted finds support in other states. Thus, in Van Derzee v. Van Derzee, 30 Barb. 331, 337 (affirmed upon other ground in 36 N. Y. 231), a portion of the property had been held, possessed, and claimed for a long period as under a lease in fee. The court observed:

"It has been held adversely to the landlord,—that is, the interest of the tenant or lessee in fee, as such, has been so claimed and held,—and that makes as perfect a title by adverse possession as if the Van Derzees had claimed the whole title and the entire interest. It has been held as a lease or rent farm, and from the moment that the lease was made, or rent paid and received, the title of the tenant to the farm, as tenant, to the extent of the qualified ownership resulting from the relation of landlord and tenant, was as perfect and as adverse to the landlord's title or claim to the tenant's interest as is the title of the grantee in a deed perfect against, and hostile to, the title of the grantor, from the moment the deed is executed."

In Wilklow v. Lane, 37 Barb. 244, decided by Justices Gould, Hogeboom, and Peckham (the latter now of the supreme court of the United States), there was a paper writing, called a "lease," granting the privilege of turning a stream of water from its course, and using the same, executed long after the lessor had conveyed all his interest in the land, and which was absolutely void as against the grantee of the lands and those claiming under him. It was held that he who undertook to grant this right, by making the instrument, asserted a right to the thing granted, which assertion or claim passed by the instrument, and, being accompanied by actual enjoyment, was as effectual as an adverse claim as though it embraced the entire estate in the land. The court observes:

"This, so far as the lease is concerned, is not a claim of the entire title. It contemplates and acknowledges the legal title in another, but, to the extent of the rights under the lease, is as essentially a hostile claim, and as perfect an answer to the right to present possession, which is the foundation of an action of ejectment, as if the claim had been co-extensive with the entire title. To constitute an adverse possession, there need not necessarily be an exclusive claim to the entire title, nor one which necessarily excludes the idea of title in another person, although it must be accompanied in this case by a notorious disclaimer of the plaintiff's title to so much as is embraced in the plaintiff's claim."

Judge Elliott, in his recent valuable treatise on Railroads, asserting the right of acquisition of a right of way by adverse possession, observes:

"We suppose that, when the possession consists in the use of the land as a right of way, an easement and not the fee will be acquired." 2 Elliott, R. R. §§ 401, 402.

See, also, generally, Railway Co. v. Loring, 2 U. S. App. 310, 2 C. C. A. 546, and 51 Fed. 932; Quindaro v. Squier, 4 U. S. App. 569, 2 C. C. A. 142, and 51 Fed. 152; Blair v. Railroad Co., 24 Fed.

539; Hargis v. Railroad Co., 100 Mo. 210, 223, 13 S. W. 680; Moore v. City of Waco, 85 Tex. 206, 211, 20 S. W. 61; Sherlock v. Railway Co., 115 Ind. 22, 17 N. E. 171; Liddon v. Hodnett, 22 Fla. 442.

We are not referred to any decision of the supreme court of the state of Wisconsin which, in our judgment, militates against the position taken or against the principles announced in Scheuber v. Held. In Pinkum v. City of Eau Claire, 81 Wis. 301, 51 N. W. 550, the owners in fee of certain lands executed to the city a perpetual lease, which should become void upon failure by the city to maintain and operate a raceway upon the westerly shores of the Chippewa river, and a public highway along and contiguous to the westerly shore of the canal; the grantors reserving the right to cut trees and timber, quarry stone, and dig earth, and remove the same from the premises described. A bill in equity was filed by the assignee of the lessors for breach of conditions, and for damage occasioned thereby, with the prayer for a mandatory injunction to compel the lessee to comply with the conditions and pay the damages, or, in the alternative, that the lease might be canceled. The case came before the court upon demurrer to the bill, one ground of demurrer being that the suit was not brought within the time limited by law. In other words, the city claimed that its possession under the lease, being for a period of more than 10 years before suit, was adverse, and vested in it title to the possession. The claim was remarkable, and was briefly disposed of upon the ground that the possession was only such as was necessary to the easement conferred by the lease, and could not, therefore, be adverse, or constitute a defense to a charge of violation by the city of its obligations under the instrument by which it obtained and held possession. In City of Racine v. Crotsenberg, 61 Wis. 481, 21 N. W. 520, it was held that a city cannot maintain ejectment to recover possession of a public alley or street, and that, because its interest therein is a mere easement, it was not entitled to the possession of the premises, within the meaning of the statute respecting actions of ejectment. The court observed that ejectment lies only to recover things corporeal which may be the subjects of seisin, entry, and possession, and that there can be no seisin of an incorporeal hereditament, and it cannot be the subject of entry and possession. It "lyeth in grant and not in livery." It is an interesting question whether the easement which a municipal corporation acquires in the modern street ought ever to have been classed in the category of incorporeal hereditaments. They are rights issuing out of a thing corporate (whether real or personal), or surrounding or annexed to or exercisable with the same, while a corporeal hereditament includes that which is of a substantial, tangible nature. 1 Washb. Real Prop. (5th Ed.) p. 36. A right in a highway was originally classed, and rightly so, with incorporeal hereditaments, because there was granted a mere right of passing over, and it came about that the streets of a city have been placed in the same category; but the rights which a municipal corporation has in the streets of a city are very different from the rights of the public in a highway of the country. The easement is not confined to a mere passing over. The street may be graded and improved, the grade may be rais-