

U. S. Rep.]

RUSSELL B. GRESS V. JAMES W. EVANS ET AL.

[Dist. Ct. Dakota.]

remove a cloud from its title caused by certain deeds executed and delivered to defendants for said real estate, and which were by them placed on record.

The land in controversy was entered by what is known as Indian half-breed scrip, in the name of Jane L. Titus.

Plaintiff claims title under deed, quit-claim in form, executed by Moses S. Titus and Jane L. Titus, his wife, to Byron M. Smith, dated March 21st, 1869, filed for record in Minnehaha county, May 14, 1872, and deed from Byron M. Smith and wife to plaintiff, dated April 7, 1870, and filed for record in Minnehaha county, May 18, 1875.

Defendants claim title under two certain deeds executed by Jane L. Titus and Moses S. Titus, her husband, in form quit-claim, with special covenants, one dated May 17, 1871, and filed for record May 23, 1871, and the other bearing date August 11, 1871, and filed for record September 18, 1871, and deed from Defendant Evans to Defendant Burbank, warranty, for the north half of said tract, executed September 2, 1871, and filed for record in Minnehaha county, October 4, 1871.

The deeds from Jane L. Titus and Moses S. Titus to Evans, and from Evans to Burbank, were executed and delivered subsequent to, but recorded before, the deeds to Smith, and from Smith to plaintiff, and defendants in their answers allege that they purchased for a valuable consideration, and without notice, either actual or constructive, of plaintiff's rights, and claim that they should be protected.

The deed from Jane L. and M. S. Titus to Evans, dated May 17, 1871, as before stated, is in form of a quit-claim: "By these presents, grant, bargain, sell, release and quit-claim, all their right, title, interest, claim or demand * * * to have and to hold the above quit-claimed premises, so that they, the said party of the first part, their heirs or assigns, shall not have any right, title or interest, in and to the aforesaid premises."

The second deed to Evans, dated August 11, 1871, is the same in form, with the exception of the covenants, which are as follows: "And the said party of the first part, doth covenant with the said party of the second part that they have not made, done, executed, or suffered any act or thing, whatsoever, whereby the above premises, or any part thereof, now, or at any time thereafter, shall or may be imperilled, charged or incumbered in any manner whatsoever." For what purpose was this second deed obtained? The evidence furnishes no explana-

tion; it certainly was not for the purpose of correcting any mistake in the names of the grantors or grantee, or description, or in the certificate of acknowledgement. The only apparent purpose seems to have been to obtain different covenants, such as would rebut any presumption of notice that might be implied from a quit-claim deed, and clothe the transaction in the garb of good faith, but it falls far short of accomplishing that end, and is in itself a very suspicious circumstance.

In order to defeat a title under a prior unrecorded deed, the subsequent purchase must be in good faith, without notice and for a valuable consideration.

One other point in connection with these deeds to Evans remains to be noticed. Being in form quit-claims, what right, if any, did Evans acquire under them as against the prior unrecorded deed of Smith? It is well settled that a quit-claim deed is sufficient to pass whatever right or title the grantor may have in the land. But it is insisted by counsel for plaintiff that if the grantor has parted with his title, then the grantee in a subsequent quit-claim deed can not be regarded as a purchaser of the same premises, in good faith and without notice, although the prior deed is unrecorded, and he has no other notice of it than that presumed from the form of his deed. The first intimation we have of this doctrine, so far as my examination extends, is as far back as 1818, in the case of *Brown v. Jackson*, 3 Wheaton, 450, in which the Court says: "A conveyance of the right, title and interest in land is certainly sufficient to pass the land itself, if the party conveying has an estate therein at the time of the conveyance; but it passes no estate which was not then possessed by the party." The doctrine which seems to be evolved from this decision is stated in the syllabus: "But as the earliest deed was operative between the parties if the second deed purports to convey only the right, title and interest which the grantor had at the time of its execution, it does not convey anything to the grantee."

Following this is the case of *Oliver v. Platt*, decided by the same Court in 1844, and reported in 3 Howard, 396. On page 410 the Court uses this language: "Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quit-claim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver, or