JESTINA GOOD-WESLEY, by and through her husband, REGINALD A. WESLEY, and CHARLES ALEXANDER GOOD, sole surviving heirs of JULIA CLARK-GOOD, Appellants, *v.* DWALUBOR, alias LARSANNAH, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued May 1, 1969. Decided June 13, 1969.

1. An affirmative defense, such as adverse possession, being a plea in confession and avoidance, admits the truthfulness of allegations made, by implication or expressly, but sets forth facts which tend to avoid the legal consequences attendant upon bare admission.
2. Color of title is title in appearance only, and is a semblance of title, not constituting a claim of right, such as adverse possession, hence, they may be simultaneously pleaded, free from attack as duplicity in pleading, for color of title merely asserts the manner in which adverse possession commenced.

Plaintiffs brought an action of ejectment, alleging they held title to acreage wrongfully in possession of the defendant. The defendant set up the defense of adverse possession, alleging he had occupied the site for thirty-four years, to the time when plaintiffs' mother, from whom the property descended to them, was alive, to her knowledge and the knowledge, as well, of plaintiffs. In furtherance of the defense of adverse possession, the defendant, though admitting to the legal title of the plaintiffs as they alleged, averred his occupancy of the premises had resulted from the sale of the realty to his grantor by a co-owner of the property, during the lifetime of plaintiffs' mother, and to her knowledge; the deed was then duly probated. The trial judge struck down the affirmative defenses of the defendant, on the ground that possession by color of title and adverse possession were inconsistent, and held the defendant to a general denial. The jury found for the defendant, and plaintiffs appealed from the judgment. The *judgment* was *re-*

versed and the *case remanded* for reargument on the issues of law, and for trial of the issues of fact thereafter.

Nete Sie Brownell for appellants. The Simpson law firm, by *G. P. Conger-Thompson* and *Momo F. Jones,* of counsel, for appellee.

MR. JUSTICE SIMPSON delivered the opinion of the court.

On February 14, 1967, an action of ejectment was filed in the Circuit Court of the Sixth Judicial Circuit, Montserrado County, by Jestina Good-Wesley, *et al.,* against Dwalubor, alias Larsannah, of the Township of Caldwell, in Montserrado County. The plaintiffs substantially alleged that their grandfather, the late Thomas Henry Clark, of Caldwell, had died seized of, among other things, a 200-acre tract of land situated, lying and being in the aforesaid Settlement of Caldwell, and that this property had, in fact, become his by virtue of a deed executed by the Republic through its then President, J. J. Cheeseman, in 1892, in consideration for certain services performed during the Bassa Expedition of 1889.

The plaintiffs in the court below further showed that the above-alluded-to ancestor had died testate and that in his testamentary document, particularly the third paragraph thereof, he devised the usufruct in rights to the aforesaid property to his infant daughter, Charlotte, for her maintenance and support until reaching adulthood or becoming espoused. He further said in the same paragraph that it was his desire "that my native folks" now residing on the above-described premises should not be molested by his heirs or executor so long as they behaved properly, as they had done during his natural life.

Since there was no specific devise of the fee by the testator, the codicil dated August 11, 1911, in disposition of the residual estate, also disposed of the said fee.

Therein, the testator evidenced his desire to have his executors convey to his heirs the residue of his estate not theretofore made the subject of a specific devise.

The complainants further alleged that the property had devolved upon them via their mother, Julia Clark Good, daughter of Thomas Henry Clark. They thereupon made recitals of unlawful detainer and their alleged right of recovery, and requested in their prayer for relief that they be awarded possession of the property together with damages for its unlawful possession by the defendant herein.

After being served with the complaint and other documents, the defendant, through his counsel, the Simpson law firm, filed a formal appearance on February 17, 1967, and thereafter, on the 24th of the same month, filed a two-count answer, denying the right of plaintiffs' recovery. The answer stated that the defendant admitted that the plaintiffs were co-owners of the disputed property as described in the complaint and supporting document, but contended that defendant's father, Dwalubor, alias Larsannah, had purchased the property from Charlotte D. Dunson, co-owner of the land with plaintiffs' mother, Julia Clark Good, in 1933, and the deed evidencing this transaction had been duly probated and registered according to law on October 19, 1933, approximately 34 years prior to the institution of the present action. In buttressing this contention, the defendant maintained that this transaction was conducted during the lifetime of the plaintiffs and their mother, and in the circumstances the statute of limitations precluded and forever barred them from asserting rights in and to the property in question.

Additionally, the defendant alleged that he had enjoyed physical, open, and notorious occupation of said property from the time of purchase up to the present without any molestation from plaintiffs' mother when she was alive. For the salient reasons mentioned by defend-

ant in his answer, he contended that the plaintiffs were without a right of recovery.

In their reply, the plaintiffs held that since the defendant had averred the existence of a deed given to his father, and, therefore, by privity, to him, he should have made profert of the same in his answer, and his failure to do so constituted prejudicial error. Further replying to defendant's answer, the plaintiffs contended that a deed purportedly executed by their mother in 1933 was of necessity fictitious, for their mother was already dead in the year 1932 and, therefore, could not have been a signatory to any such document. We should interject at this point that since there are two plaintiffs it is a determinable question of fact as to whose mother had been alluded to in the answer, since all plaintiffs do not have a common mother.

The other vital issue joined by the parties had to do with whether or not the defendant, having pleaded title, should have made profert of the deed, and whether his failure to do so constituted a proper defense in the answer. In ruling on the issues of law, the trial judge maintained that the plea of the statute of limitations as made by the defendant constituted a bad plea, in that he had also mentioned the existence of a deed, and a party may not at the same time rely upon paper title and the statute of limitations. Predicated upon this, the judge dismissed the entire answer and supporting pleadings as filed by the defendant. The defendant was thereupon ruled to trial on the bare denial of the facts contained in the complaint.

After the evidence was presented, the jury was charged, and returned a verdict in favor of the defendant, finding him entitled to the 200-acre tract described in the complaint. Exceptions to the verdict were taken, and a motion for a new trial duly filed and thereafter denied. Consequently, final judgment was rendered in favor of the defendant, to which exceptions were taken and duly

noted. Thereafter a 16-count bill of exceptions was prepared, approved and filed in the clerk's office.

In endeavoring to resolve the several issues that have been brought before us, we have determined to first review the judge's ruling on the issues of law raised in the pleadings.

Since both the answer which the judge dismissed and the ruling itself are relatively short, we shall include them here in *toto*.

"Answer

"1. Because defendant says that while it is true that plaintiffs are co-owners of the two hundred acres of land as described in their complaint and supported by their exhibits, 'A' and 'B,' yet defendant's father, Dwalubor, alias Larsannah, purchased the said parcel of land from Charlotte Dunson, co-owner of the said parcel of land with plaintiffs' mother, Julia Clark-Good, in the year 1933, which deed was probated and registered according to law on the 19th day of October, 1933, approximately thirty-four years before the institution of this action by plaintiffs and said transaction was made during the lifetime of plaintiffs' mother. Defendant maintains that under the statute of limitations, plaintiffs are forever barred and estopped from instituting any action against him for the recovery of the said parcel of land.

"2. And also because defendant says that he has enjoyed physical, open, and notorious occupancy of said property from the time of the purchase up until now without molestation from plaintiffs' mother who was living at the time of the transaction, and plaintiffs themselves, a period of over thirty-four years. Defendant maintains that plaintiffs are, therefore, barred under the statute of limitations from ever claiming and/or asserting their right to property.

"The Court's Ruling

"This suit of ejectment was filed on the 14th day of

February, 1967; the defendant appeared, answered; the pleadings rested on the 3rd day of April, 1967. Throughout the pleadings, that is, from the answer to the surrebutter, is this one contention, whether or not the defendant is pleading the statute of limitation or setting up a defense under the color of a title referred to in his answer but not made profert therein.

"While it is true that the defendant relies upon counts 1 and 2 of his answer to a title which he said he purchased in 1933, yet he made no profert of it under notice; his attention was called to this error in the reply and even though plaintiffs put defendant on his guard, yet in the rejoinder the defendant insists that this plea, being in the nature of statute of limitations, proferts of the deeds referred to in the answer were not necessary.

"The plea of statute of limitation is held to be a plea and an unequivocal one in which the rule of confession and avoidance applies; whenever defendant raises this issue he must firstly confess, either in plain language or by implication, that plaintiffs are owners of the property sued for. Now when defendant sets up another paper title, he naturally does not invoke the title [*sic*] of limitations, but sets up a plea which by this title shows better title in him, the defendant.

"In view of the foregoing, the answer and all of its supporting pleadings, that is, the rejoinder and rebutter, are overruled; the supporting pleadings with the complaints sustained, and the case is ruled to trial on the complaint, and the defendant is ruled on a bare denial thereof. And it is hereby so ordered.

"To which ruling the defendant excepts."

Further reference to the answer shows that the defendant recognized ownership of the property in the plaintiffs but has contended that he has been in possession of the property under color of title. He has further contended that this color of title is predicated upon a pur-

ported paper title executed in his favor by ancestral privies of the plaintiffs.

In ruling on the issues of law, the judge has contended rightly that adverse possession constitutes a plea of confession and avoidance. And being an affirmative defense you must first set up the truthfulness of the claim of the plaintiffs and thereafter show valid reasons why this claim is no longer an exercisable legal right.

When this case was being argued before this Court, we endeavored to elicit from the appellants' counsel the legal import of the ruling when the judge stated that where a defendant sets up another paper title, he naturally does not invoke the title [*sic*] of limitations but sets up a plea which by this title shows better title in him, the defendant. It was contended that the mere mention of paper title negates the effect of the plea of statute of limitation and *a fortiori* invokes duplicity, thereby rendering the whole defense subject to dismissal.

We are of the firm opinion that this position is not in accord with the law, for there exists a distinct difference between "claim of right" and "color of title." Although the two may be legally exercised at one and the same time, they represent distinct legal niceties. The term "claim of right" when employed in an action wherein the defense of adverse possession is being invoked, means nothing more than the intention of the person to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right. *Bessler* v. *Power River Gold Dredging Company,* 185 P. 753; I AM. JUR., *Adverse Possession,* § 185, et seq.

"Color of title," on the other hand, is that which gives the semblance or appearance of title but is not title in fact. It is that which, on its face, professes to pass title but fails to do so because of a want of title in the person from whom it comes or the employment of an ineffective means of conveyance. It is a title in appearance only. If an in-

strument actually passes the title, it is clear that it is not color of title. The term implies that a valid title has not passed. *Barrett* v. *Brewer,* 42 L.R.A. (NS) 403; *Powers* v. *Malavazos,* 158 N.E. 654, 655.

"Color of title" is not a legal title at all, it is a void paper having the semblance of monument of title, to which, for certain purposes, the law attributes certain qualities of title. Its chief office is to define the limits of the claim under it. Nevertheless, it must purport to pass title. In form it must be a deed, a will, or some other paper instrument by which title usually and ordinarily passes. Such qualities as are imputed to it by law, for limited purposes are purely fictitious and are accorded to it only to work out just results. *State* v. *King,* 87 S.E. 170, LRA 1918 E, 1044; I AM. JUR., *Adverse Possession,* § 185.

From the above, it is readily seen that where the contention of a defendant claiming adverse possession in an action of ejectment finds him relying upon color of title as a means of establishing the extent of occupancy by construction rather than total occupancy in actuality, it is imperative that the plea include a provision relating to some sort of paper title, though ineffectual for the purpose of passing title. Therefore, it is not incompatible with the plea of adverse possession to make profert of monument of title irrespective of the actual invalidity of the same. In the circumstances, the judge erred in dismissing the answer and all subsequent pleadings of the defendant in the lower court, predicated upon what has been impliedly ascribed to duplicity in pleading.

A look at the record showing the evidence adduced at the trial clearly demonstrates that there were innumerable errors committed by the trial judge in respect to objections interposed during the course of trial. These all, however, pertained to matters of evidence and did not raise any issues relating to errors of a substantive nature committed by the trial judge. In the circumstances, we

find it unnecessary to pass upon these errors in singular fashion.

The ruling on the issues of law clearly contravened the law relating to the plea of adverse possession as a bar to recovery in an action of ejectment. Therefore, we deem it imperative that there be a reargument on the issues of law and a ruling made thereon, the trial thereafter to be conducted, since we are here involved with a mixed question of law and fact. The case is, therefore, remanded for a new trial commencing with arguments on the issues of law, costs to abide final determination of the case.

And it is hereby so ordered.

Reversed and remanded for trial, after reargument below on issues of law.