BURKE *vs.* HALE.

A tenant cannot dispute the title of his landlord.

The limitation section of the forcible entry and detainer law (*Digest, chap.* 71 *sec.* 18) must be construed in connection with the third section, giving the remedy to landlords against tenants, so as to give effect to both sections.

Under such construction, the limitation section does not commence running in favor of one in possession under a lease, until the expiration of the lease.

The lessor has no cause of action against the lessee, or an under-tenant, until the expiration of the lease, and a construction of the 18th section that would make it bar the action of the lessor before it accrues, would be absurd.

Appeal from the Hot Spring Circuit Court.

On the 27th day of April, 1846, John C. Hale commenced an action of unlawful detainer against Charles Burke, in the Hot Spring Circuit Court, and the cause was tried at the March term, 1847, before the Hon. C. C. SCOTT, then one of the circuit judges.

The action was brought to recover possession of improvements, consisting of several cabins, situate in the Hot Springs valley. The declaration alleges, in substance, that, on the 1st day of Sept., 1844, Burke came into possession of the improvements in question under the contract with one F. L. Udy, the lessee of the plaintiff: that the lease from plaintiff to Udy, under whom Burke held, expired on the first of November, 1845, when plaintiff was entitled to possession, but that Burke refused to deliver up the premises to plaintiff after demand in writing.

The defendant pleaded, 1st, not guilty, and 2d, "that he had been in the peaceable and uninterrupted possession of the said premises for three years immediately preceding the filing of the complaint of the said plaintiff." The cause was submitted to a jury, on issues to these pleas, and verdict for plaintiff.

Defendant excepted to the decisions of the court in giving and refusing instructions to the jury, and took a bill of exceptions setting out the evidence, &c., from which it appears:

Plaintiff proved that, on the 7th March, 1846, he made a demand, in writing, upon defendant, of the premises in question, and that he refused to surrender the possession. He then read to the jury, after proving the execution thereof, a written agreement made between F. L. Udy and himself, on the first day of August, 1842, by which plaintiff leased to said Udy a certain lot of ground situated in the Hot Springs valley, and described in the declaration, for the term of three years and three months from the date of the agreement, on conditions that Udy would erect thereon a dwelling-house and such necessary out-houses as he might think proper, and return the same to plaintiff at the

expiration of the lease. To this agreement defendant was a subscribing witness. It was then proven that, in pursuance of the above agreement, Udy erected the improvements in controversy in the fall of 1842: that defendant Burke assisted him in the erection thereof; and about the time the buildings were completed, and after Udy had gone into them, defendant went into them as a partner of Udy in a cake shop: that Udy and defendant occupied the improvements jointly until some time in the year 1844, when Udy went out of them, and defendant continued sole occupant until the suit was brought. This was the substance of all the evidence introduced on the trial.

At the request of plaintiff, the court instructed the jury as follows:

"1st. That, if the jury believe, from the evidence, that Udy leased the premises in question from plaintiff, and that the defendant entered under Udy, and continued to hold until demand, and that the demand in writing was made upon the defendant before the commencement of this suit, they are bound by law to find for the plaintiff upon the first plea in this case.

"2d. If the jury believe, from the evidence, that the defendant entered upon the premises in question under Udy. that, in ascertaining whether the defendant had peaceable and uninterrupted possession for three years, they can only compute from the time of the expiration of the term for which Udy leased the premises, and that unless they believe that the defendant has had such possession for the term of three years after the expiration of Udy's lease, and before the commencement of this suit, they are bound by law to find for the plaintiff on the second plea.

"3d. That, unless the jury believe, from the evidence, that the defendant had adverse possession in his own right, for the period of three years next before the commencement of this suit, they are bound by law to find for the plaintiff on the second plea.

"4th. That if the defendant entered under Udy, who held under the plaintiff, he cannot dispute the plaintiff's right.

"5th. That if Udy held possession of the premises in question

under the lease, which has been read to the jury, such possession is in law deemed to be the possession of Hale.

"6th. That it is not necessary that Hale should show any title to the land in question; it is sufficient for him to prove that he is entitled to the possession, and that he can be entitled to the possession of the improvements notwithstanding the legal title to the land is in the United States."

The defendant's counsel moved the following instructions:

"1st. If the jury believe, from the evidence, that the defendant, Burke, had three years peaceable and uninterrupted possession of the property in question immediately preceding the filing of the complaint in this case, they should, by law, find a verdict for the defendant.—[Refused.]

"2d. If the jury believe, from the evidence, that the plaintiff, Hale, was not in possession of the premises in controversy at some time within three years next before the filing of the complaint in this case, they should by law find for the defendant.—[Refused.]

"3d. That, unless the plaintiff, Hale, has proved his right to the possession of the premises in controversy, he is not, by law, entitled to a recovery in this case.

"4th. That, unless it has been proved to the satisfaction of the jury that the defendant, Burke, came into the possession of the premises under Udy, they must presume that he took possession in his own right, and adverse to the plaintiff, Hale.

"5th. That the plaintiff, Hale, in order to entitle him to a verdict in this case, must have proved to the satisfaction of the jury that he had the right to the possession of the property in controversy at some time within three years next preceding the filing of the complaint in this case.

"6th. That the legal title to the Hot Springs, the lands upon which the improvements in controversy are situated, was reserved to the United States by an act of Congress before the date of the lease read to the jury, and every one has equal rights to settle thereon, unless some person previously had actual possession

within enclosures or buildings, in which case such persons would have the better right."

The court refused the first and second instructions asked by defendant, and gave the others; and to the giving of the instructions moved by the plaintiff, the defendant excepted. Defendant appealed.

FOWLER, for the appellant, relied upon the twelfth section of the act of January 10th, 1845, (*Digest, sec.* 18, *p.* 538,) and argued that in the form of action adopted in this case, the possession need not be adverse to enable the defendant to avail himself of the statutory bar.

ENGLISH and WATKINS & CURRAN, contra, contended that the three years peaceable possession contemplated by the act must commence from the expiration of the lease, and be adverse to the claimant, and referred to *vol.* 2, *United States Digest,* title *Limitation, p.* 802, *art.* 2. 3 *J. J. Marsh.* 363, that the tenant nor those claiming under him can dispute the landlord's title. *Arch. Nisi Prius, vol.* 2, *marg. p.* 304.

SCOTT, J. Not sitting.

WALKER, J. The solution of a single question will determine this case. Are three years peaceable and uninterrupted possession of lands and tenements next before the commencement of the action, whether held as tenant under the plaintiff or by adverse title, a bar to the plaintiff's action?

The material facts in reference to this point are, that the plaintiff, on the first of August, 1842, leased to one Udy the premises in dispute for the term of three years and three months, by virtue of which Udy entered and occupied the premises for a time: that thereafter the defendant entered upon and occupied the premises with Udy: that the defendant and Udy were partners in a cake shop on the premises: that Udy removed from the

premises before the lease had expired, leaving defendant sole occupant, who continued to occupy the same until the commencement of this suit. The issue was not guilty and limitation. At the instance of the plaintiff, the court, leaving the facts to be weighed by the jury, instructed them "that if Udy held as tenant under the plaintiff, and defendant entered and held under Udy, he cannot dispute the plaintiff's right to the premises; that in such case they should consider the statutory limitation as commencing at the termination of the lease; and that the three years possession must be adverse possession, or it is no bar to the action." The court refused to instruct, at defendant's instance, that three years peaceable and uninterrupted possession next before the commencement of the suit was a bar to the action.

We are of opinion that a tenant cannot dispute the title of his landlord.

The other branch of the instructions given by the court presents more difficulty, and must be determined by the terms used, and the proper application of the limitation intended to be imposed upon the different classes of cases embraced under the statutory remedy. The statute says "three years peaceable and uninterrupted possession of the premises immediately preceding the filing of the complaint, may be pleaded in bar of the action." These terms, taken literally, embrace every cause of action provided for by the statute, and if this literal construction be found not to conflict with the other provisions of the act it should prevail. If, however, upon examination of the act, a literal construction would defeat the remedy designed to be afforded, such construction, if practicable, should be given to this section as will afford a remedy for every class of cases designed to be embraced under the statute. By reference to the statute it will be found that the second section gives a remedy for tortious entry and detainer of every grade, and for cases of peaceable entry and forcible dispossession, whether by actual force or otherwise. The third section provides for a distinct class of cases unattended with force, and is designed as a summary possessory remedy

for forcible detainer alone. It provides that "when any person shall wilfully and with force hold over any lands, tenements, or other possessions, after the termination of the time for which they were demised, or let to him, or the person under whom he claims, or shall lawfully or peaceably obtain possession, but shall hold the same unlawfully by force and after demand made in writing for the delivery of possession thereof by the person having a right to such possession, his agent or attorney, shall refuse or neglect to quit such possession, such person shall be deemed guilty of a forcible detainer." Here is a distinct class of cases, where the defendant acquires possession lawfully and perhaps most frequently under contract, and holds over after the term of his lease has expired (as in the case now before the court.) If this limitation clause be literally construed, its effect will be to render the third section of the statute inoperative in most instances which will arise under it. To demonstrate this, suppose A. lease to B. his farm for one year, B. enters and at the close of each year pays A. his rent, and renews his covenant for four successive years, at the end of which time A. declines renting, and demands possession. Here, B. had four years peaceable, uninterrupted possession, and, although the third section expressly embraces his case, by a literal construction of the eighteenth section, the plaintiff is barred of his remedy. For further illustration, we will state a still stronger case, it is the case before us: A. leases to B. his lot of land for three years and three months, B. has a right to retain it under his lease for that time, and A. is bound by his contract to leave him in quiet possession; on the day the lease is out A. demands possession, B. (if this construction be allowed) would reply, your right of action under the law has expired three months since.

In addition to the palpable inconsistency which must arise between the sections giving the right of action and limiting the time for its commencement, this construction conflicts with all the principles upon which the statutes of limitation rest for their existence. "The law of nature," says Vattel, "orders all to respect the right of property in him who possesses it, because

it is for the peace, safety, and advantage of human society. For the same reason nature requires that every proprietor who, for a long time and without reason, neglects his right, should be presumed to have entirely renounced and abandoned it." So limitation in debt rests upon the presumption from lapse of time that payment has been made: and in actions for real estate, on the presumption of title from long acquiescence in possession. But how is it in these cases? Here the landlord leases his land and receives the rent annually, or his house and receives a monthly rent, or his farm for a term of years, and on the day the lease expires he asserts title surely no presumption can arise of acquiescence in either title or possession; and yet it is contended, for the appellant, that they are embraced within the provisions of this statute: we are clearly of opinion, not; and that a more liberal construction should be indulged, such as will leave the remedy intended to be afforded by this statute unimpaired. This can be done, according to Blackstone, by examining "the effects and consequences, and consulting the spirit and reason of the law." The statute, according to its literal construction, was designed to apply to all the cases enumerated in the second section, as well as all those in the third section, except in cases where the defendant enters under contract or agreement with the plaintiff, or one who holds under him; in all of which last mentioned cases the statute is to be considered as beginning to run from the day when the lease or contract terminates.

We are, therefore, of opinion that there is no error in the judgment of the circuit court, and the same is affirmed with costs.