taken subject to the prior mortgages executed by Stout upon the property.

The mortgage to Webster provides for an "attorney's fee of ten per cent. of the amount" thereby secured, and the decree allows an attorney's fee of $300, "to be taxed as costs." This action of the court is assigned for error. The decree, in this respect, is erroneous. Gray v. Havemeyer, 53 Fed. Rep. 174. In all other respects the decree is affirmed, without costs to either party in this court. The cause is remanded to the circuit court, with directions to modify the decree by striking out the clause allowing an attorney's fee of $300.

AMERICAN MORTG. CO. OF SCOTLAND, Limited, v. HOPPER et al.

(Circuit Court, D. Oregon. May 20, 1893.)

No. 1,916.

1. PUBLIC LANDS—PRE-EMPTION—CANCELLATION OF CERTIFICATES.
   The certificate of payment issued to a pre-emptor of public lands may be canceled by the proper officers of the land office when it is found that his entry was made for the benefit of a third person, and was hence fraudulent and void, under Rev. St. § 2262. Smith v. Ewing, 23 Fed. Rep. 741, and Wilson v. Fine, 40 Fed. Rep. 52, disapproved. U. S. v. Steenerson, 50 Fed. Rep. 504, followed.
2. SAME—BONA FIDE PURCHASERS.
   The interest vested in a pre-emptor who has made his payment and received the certificate is merely an equitable one, and a purchaser from him before a patent issues cannot claim to be protected as a bona fide purchaser from cancellation of the certificate, on the ground that it is fraudulent and void under Rev. St. § 2262. U. S. v. California & O. Land Co., 13 Sup. Ct. Rep. 458, distinguished.

In Equity. Suit by the American Mortgage Company, Limited, of Scotland, against Thomas R. Hopper and others, to recover land. Bill dismissed.

Zera Snow, for plaintiff.
Raleigh Stott, for defendants.

BELLINGER, District Judge. This is a suit to have the defendant Thomas R. Hopper decreed to hold the legal title to the S. W. ¼ of section 4, township 2 N., of range 31 E. of the Willamette meridian, acquired by him under a patent from the United States, in trust for the plaintiff, and to compel said defendant to convey such title to the plaintiff, and to surrender to it the possession of the said premises. The plaintiff's claim is through a pre-emption entry by one George Waddel, while the defendant claims under a homestead title. The facts in the case are stipulated and are as follows:

On October 10, 1882, George Waddel made a final cash entry under the pre-emption laws of the United States of the land in dispute. He paid thereon $400, and received a duplicate receiver's receipt therefor. On the following day (October 11th) this receipt was duly recorded in the records of deeds of Umatilla county. On May 5, 1885, the defendant Thomas R. Hopper made application in the local land office to enter the same land under the home-

stead laws of the United States, and filed a contest against the entry of Waddel. Thereupon, on November 30, 1885, Waddel's entry was canceled in the local office, and thereafter such cancellation was approved by the commissioner of the general land office, and the defendant Hopper was permitted to make his homestead entry, which he did. In the regular course of proceedings had under this homestead entry, a patent was issued to the defendant Hopper for the land on June 12, 1891, which patent was duly recorded in the proper records of Umatilla county on the 4th day of the following August. The money paid by Waddel is still retained by the government. The cancellation of Waddel's entry was on the ground that it was fraudulently made for the benefit of another person.

On the 11th day of October, 1882, before the cancellation of Waddel's entry, he executed his mortgage upon the land in question to the Oregon & Washington Mortgage Savings Bank of Oregon for $850. In making this loan the savings bank acted as the agent of the complainant, to which it duly assigned the Waddel mortgage and note on October 25, 1882. The mortgage and assignment were both duly recorded on the respective dates of their execution. On September 10, 1885, the complainant brought suit against Waddel and his successors in interest to foreclose this mortgage. A decree of foreclosure was had on February 13, 1886, and on the 1st of May following the property was sold under this foreclosure to the complainant for $1,250. The sale was confirmed on May 11th, and on October 24, 1887, the sheriff executed his deed to the complainant, which was then recorded. Neither the savings bank nor the complainant was made a party in the defendant's proceedings to contest the Waddel entry, and neither had actual knowledge of any failure by Waddel to comply with the laws of the United States under which the entry was made, nor was the defendant a party in the foreclosure suit, although he was in possession of the premises at the time.

The plaintiff bases its claim for relief upon the ground that when Waddel paid the money under his entry, and received the receiver's receipt, he acquired a vested right or interest that could not be affected by the subsequent action of the land office in canceling such entry; that, in fact, the title became vested in him, and can only be divested by judicial decree; that the right to cancel the entry and certificate of its grantor involves the power to declare a forfeiture under section 2262 of the Revised Statutes, which can only be worked by judicial process. The plaintiff concedes that, notwithstanding the rule, as thus claimed by it, this court would not grant relief to an entryman who had in fact been guilty of acts constituting a ground of forfeiture in a proper proceeding, and as to this feature of the case it contends that the burden is upon the defendant to prove such acts; that the receipt of the register and receiver to Waddel makes a prima facie case in his favor upon the equities; and, finally, that if the register and receiver had authority to cancel Waddel's entry, the plaintiff stands in the relation of a bona fide purchaser for a val-

uable consideration, and is entitled on that ground to the relief prayed for.

In Smith v. Ewing, 23 Fed. Rep. 741, this court held that a certificate of purchase in favor of a pre-emptor cannot be canceled by the land department for alleged fraud in obtaining it, but that in such case the government must seek redress in the courts, where the matter may be judicially determined; and that a purchaser in good faith and for a valuable consideration takes the land purged of any fraud that might have been committed in obtaining such certificate. This case is followed by this court in Wilson v. Fine, 40 Fed. Rep. 52. The case of Brill v. Stiles, 35 Ill. 309, adopts the same view, following earlier decisions of that court. The cases of Smith v. Ewing and Wilson v. Fine are claimed by the plaintiff to establish a rule of decision which, under the doctrine of stare decisis, this court should not depart from. The cases cited in Smith v. Ewing in support of the doctrine laid down therein are, with some exceptions, cited by plaintiff in the case on trial. These cases, with others to the same effect, were relied upon in support of the same view in the case of U. S. v. Steenerson, in the circuit court of appeals for the eighth circuit, (50 Fed. Rep. 504,) the most recent case involving this subject. In this case the court, referring to these authorities, says:

"The principles on which these decisions are based is that when a homesteader or pre-emptor has, in good faith, performed all the acts which, under the provisions of the statutes of the United States, are necessary to complete his right to the land, then he becomes equitably the owner of the same, and the United States holds the naked legal title as a trustee for his benefit. For the protection of rights thus acquired it is held that in a contest involving the title of the land an established right to a patent will be deemed the equivalent of a patent. This rule, however, has been adopted solely as a means for the protection of those who have, in good faith, established a right to a patent by performance of the requisite conditions. The final certificate or receipt acknowledging payment in full, and signed by the officers of the local land office, is not, in terms, nor in legal effect, a conveyance of the land. It is merely evidence on behalf of the party to whom it is issued. In a contest involving the title to land, wherein a person claims adversely to the United States, it is open to such claimant, notwithstanding the legal title remains in the United States, to prove that by performance on his part of the requisite acts he has become the equitable owner of the land, and that the United States holds the legal title in trust for him; but, as the claimant in such case has not received a patent or formal conveyance, and has not become possessed of the legal title, he is required to show performance on his part of the acts which, when done, entitle him, under the law, to demand a patent of the land. When evidence of this kind is offered on behalf of the claimant it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty. If it be true, in a given case, that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land, and that the United States is merely a trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist. The Amistad, 15 Pet. 518; League v. De Young, 11 How. 185."

This decision by the circuit court of appeals of the eighth circuit is an authoritative interpretation of the cases cited in sup-

port of Smith v. Ewing, and of the law applicable in the case on trial. Those cases do not question the right of the land department to cancel a receipt fraudulently obtained. On the contrary, they expressly or impliedly recognize such right. Thus, in Simmons v. Wagner, 101 U. S. 260, it is held that when lands have been once sold, they are no longer subject to entry; that "a subsequent sale and grant of the same land to another person would be absolutely null and void so long as the first sale continued in force;" and the decision is that, "where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued." The court cite Wirth v. Branson, 98 U. S. 118, one of the cases relied upon by plaintiff here, where the rule is stated to be "that, where public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location;" that the public faith has become pledged to such person, and that "any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside."

In Johnson v. Towsley, 13 Wall. 72, the court, speaking of a case where the register and receiver hear the application of a party to enter land, decide in his favor, receive his money, and give him a certificate, says:

"Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate and grants the land thus sold to another person, it is of the essence of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy."

This language is urged upon the attention of this court in support of plaintiff's contention. The point involved in that case was as to the finality of the action of the secretary of the interior on appeal in issuing a second patent to a contesting pre-emptor. The complainant maintained the authority of the courts to determine the question as to who was rightfully entitled to the land, or as to which patent should prevail. The register and receiver had decided in favor of the complainant upon a contest with the person who subsequently obtained a second patent. This decision was affirmed by the commissioner of the general land office, and a patent was issued to the complainant. Upon appeal to the secretary of the interior the action of the land office was reversed, and a second patent issued to the contestant. The decision of the secretary of the interior, adverse to the complainant, was on the ground that previous to the filing by him upon the land in question he had filed upon other lands, which had not yet been offered at public sale, and thus rendered subject to private entry. There was no question as to the jurisdiction of the secretary of the interior to hear and determine the appeal taken. The objection was, not that he had acted without jurisdiction, but that in the exercise of jurisdiction he made an errone-