

nificance of all these proceedings relating to this property. I think the insolvency proceedings must necessarily have been explained to Craig. The petition appears to have been presented to the superior judge, John K. Alexander, who was the attorney that prepared and was familiar with the original conveyance and the other instruments connected with that transaction. The certificate attached to the petition indicates that it must have been brought to the attention of the judge, who, knowing the character of the original transaction, would hardly have permitted Craig to go on record with a document that was untrue, and particularly where it contained declarations against his interest. If, therefore, Craig's declarations in the insolvency proceedings are true, there is no question but that he understood that the deed was an absolute sale, and that this property was owned by Cowell after November 17, 1879.

The next circumstance to be considered is that of the tender. This document was prepared by Mr. Rodgers as attorney for Craig, and is dated December 30, 1882. It seems to be as strongly in favor of the claim that the conveyance was an absolute deed as the proceedings in insolvency. It seems to me that in these latter proceedings Craig and his attorney, Rodgers, looked upon the conveyance as a deed, and treated it as a deed absolute, and that Craig's rights under it were such that they could only be secured by acting in accordance with its express terms, as a sale, and not as a mortgage.

Upon all these facts, and others which might be referred to, but which I will not now recite, I have arrived at the conclusion that the evidence in this case establishes the fact that this conveyance, a deed absolute on its face, was in fact a deed of conveyance, and that the transaction was a conditional sale of the property, and was not a mortgage. I will therefore direct judgment to be entered in favor of the plaintiff.

UNITED STATES v. SIERRA NEVADA WOOD & LUMBER CO. SAME
v. HIGGINS et al. SAME v. BOYINTON et al. SAME v.
KIELY et al. SAME v. RICE.

Nos. 609-613.

(Circuit Court, D. Nevada. April 5, 1897.)

CANCELLATION OF LAND PATENTS—FRAUD—BONA FIDE PURCHASERS.

To a bill in equity by the United States to cancel a patent, upon the ground that it was obtained by fraud, the fact that the defendants are bona fide purchasers for value, without notice of the fraud, constitutes a complete defense.

These were bills in equity brought by the United States against the Sierra Nevada Wood & Lumber Company and others to cancel a patent for certain lands.

The facts stipulated, omitting the names of the defendants and the description of the lands in each suit, are as follows:

"It is hereby stipulated and agreed by and between the United States of America, plaintiff, and * * *, defendants, through their respective attorneys, that the following statement is and shall be considered the facts at

Issue in the above-entitled case, and the whole thereof, and that upon this statement of facts the same shall be presented to the above-entitled court for consideration, determination, and decree: That * * * defendants, and each of them, are citizens of the district and state of Nevada, and are resident therein, and that the land and real property hereinafter more particularly described is situated within said district and state of Nevada. That one Charles Musso is a Sioux half-breed Indian, and on, to wit, July 17, 1854, was a resident and occupant of the Sioux half-breed Indian reservation, in the state of Minnesota. That under and by virtue of an act of congress approved July 17, 1854, the said and identical Charles Musso, Sioux half-breed Indian, as aforesaid, was entitled to have scrip, known as 'Sioux Half-Breed Indian Scrip,' to wit, for 480 acres of land, which said scrip was, by the terms thereof, locatable by the said Charles Musso upon any unoccupied lands subject to pre-emption and private sale, or upon any other unsurveyed lands not reserved by government, upon which he has made improvements; and, under and in pursuance of the provisions of said act, there was issued to the said Charles Musso, and in his name and for his use and benefit, five pieces of said Sioux half-breed Indian scrip, to wit, number 301, A, B, C, D, and E, for 480 acres of land in the aggregate; and the said Charles Musso then and there became, and was, and ever since has been, the legal owner of said five pieces of scrip, number 301, A, B, C, D, and E, for said 480 acres of land in the aggregate. That said five pieces of scrip, number 301, A, B, C, D, and E, were never delivered to said Charles Musso, or to any one, with authority to act for him, or to receive or to have the same; and the said Charles Musso never did receive or have the same, or any part thereof, nor did he assign, transfer, or dispose of the same, or authorize any one to do so for him.

"That, after said scrip was issued, it was taken possession of by the special commissioner of the United States, appointed under the act of July 17, 1854, whose duty it was to secure a deed of relinquishment from the said Charles Musso, and to deliver to him, upon the execution of said deed, the said scrip. That the said Charles Musso was not found by the said commissioner, and did not apply for said scrip, but was at the time, about July 17, 1854, upon the said reservation in the state of Minnesota, and was not advised of the issuance of said scrip to him, or of his right to have the same, otherwise than by the said act of congress and the proceedings had thereunder, and did not execute to the said commissioner his deed of relinquishment; and the said commissioner did not deliver said or any part of said pieces of scrip before mentioned to the said Charles Musso, or to any one for him having authority to receive the same. On the contrary, the said commissioner returned said pieces of scrip to the Indian office. That afterwards, and on or about December 10, 1860, the said five pieces of scrip number 301, A, B, C, D, and E were sent to the superintendent of Indian affairs at St. Paul, Minnesota, with instructions to give public notice that the same were in his possession, and held by him for delivery. That the said superintendent of Indian affairs, at St. Paul, Minnesota, did give notice that he held said scrip for delivery. That one person, falsely pretending to be Charles Musso, a Sioux half-breed Indian, a resident of the state of Minnesota, represented himself to one W. S. Chapman as the genuine Charles Musso, and as being entitled to said pieces of scrip, and made claim to the same, and, so pretending, made, executed, and delivered in due form of law a power of attorney, creating and appointing one W. S. Chapman his attorney in fact to receive, receipt for, and have the said scrip. That afterwards, on or about January 1, 1864, the said superintendent of Indian affairs at St. Paul, Minnesota, reported said scrip as delivered; and the same was delivered to said W. S. Chapman, who claimed then to be the attorney in fact of said Charles Musso, and who then presented to the said superintendent of Indian affairs a paper in writing, purporting to be the power of attorney, and purporting to be executed by said Charles Musso, on, to wit, January 9, 1863, in the county of Hennepin, Minnesota. That the said W. S. Chapman presented said paper, purporting to be a power of attorney, claiming to be acting as the attorney in fact for the said Charles Musso; and the said W. S. Chapman, under and by virtue of the said paper, purporting to be a power of at-

torney of the said Charles Musso, executed a pretended relinquishment of said Charles Musso's interest in the said Indian reservation to the United States of America, and under and by virtue of said paper, purporting to be a power of attorney of said Charles Musso, demanded and received the said pieces of scrip, number 301, A, B, C, D, and E. That W. S. Chapman was not the attorney in fact for said Charles Musso, nor had he any authority to act for or bind the said Charles Musso of and concerning the said five pieces of scrip, or any thereof; on the contrary, that said paper, purporting to be the power of attorney of said Charles Musso, and purporting to nominate and appoint the said W. S. Chapman as the attorney in fact of and for said Charles Musso, was not the power of attorney of said Charles Musso, and was not executed by him, but was in fact the said other person falsely pretending to be Charles Musso, who was in no manner entitled to said scrip, nor was he interested therein. That the said Charles Musso never having made or executed the same, and never having authorized the same to be made or executed in his name, or for any purpose whatsoever. That the said Charles Musso had no knowledge of the existence of said false, fraudulent, and pretended power of attorney, and was in no wise a party to the same. That afterwards, and on or about the 1st of March, 1864, the said W. S. Chapman, as the pretended agent and attorney in fact of the said Charles Musso, and claiming to act as the attorney in fact for said Charles Musso, and without the knowledge, authorization, or consent of the said Charles Musso, located one of the said pieces of scrip, to wit, number 301, * * * at the United States land office at Carson City, Nevada, upon lands in the said district of Nevada, to wit, * * *; and afterwards, and on the 15th day of September, 1864, upon the aforesaid location, and without the knowledge, authorization, or consent of the said Charles Musso, a United States patent was issued upon said piece of scrip for said above-described lands, in the name of said Charles Musso, which said patent was afterwards, and on the 15th day of September, 1864, delivered, upon said Chapman's demand, to said W. S. Chapman, claiming to be the agent and attorney in fact of said Charles Musso, and upon his receipt as such attorney in fact. That each and every of said acts were without the knowledge, authorization, or consent of said Charles Musso, and were false, fraudulent, and void as to said Charles Musso, and as to plaintiff, the United States of America.

"That as to plaintiff, the United States of America, the said paper, purporting to be the power of attorney of said Charles Musso, and the said deed of relinquishment made, executed, and delivered by the said W. S. Chapman under the pretended authority of said pretended power of attorney, and the said delivery of the said pieces of Sioux half-breed Indian scrip to the said W. S. Chapman, and the location of the same by the said W. S. Chapman, under said false and pretended power of attorney, and the issuance and delivery of said patent, were, and each and every of said acts were and are, fraudulent and void. That the said defendants * * * are in the possession, use, and occupancy of the aforesaid and above-described land, claiming under the patent of the United States granted and issued upon and in satisfaction of said piece of scrip, and deraign their title from the United States, under and in virtue of said patent, and have no other claim or title to the said land. That at the time the said pretended power of attorney to the said W. S. Chapman, purporting to make the said W. S. Chapman the attorney in fact of said Charles Musso, and at the time said deed of relinquishment was made by the said W. S. Chapman, pretending to act as the attorney in fact of the said Charles Musso, under said false and fraudulent power of attorney, and at the time said scrip was located as aforesaid, and a patent to the said land was issued and delivered as aforesaid, said Charles Musso was absent from the state of Minnesota, and from the state of Nevada, and had no knowledge of said acts or either of them; and that the said Charles Musso left the state of Minnesota in June, 1855, and did not return to said state until the year 1885, and when informed touching his rights in the premises, and of and concerning the said pieces of scrip, and the said pretended power of attorney, and the delivery of said scrip to the said W. S. Chapman, under the said pretended power of attorney, and of the location of the scrip, the said Charles Musso did, on, to wit, the — day of

April, 1892, make, execute, and tender to the United States, and to the proper officers of the United States, a formal deed of relinquishment of his interest in said Sioux Indian reservation, and did then demand of the United States, and of the proper officers thereof, the issuance and delivery to him of certificates of Sioux half-breed Indian scrip, under the provisions of the aforesaid act of July 17, 1854, for 480 acres of land, in exchange for and in satisfaction of his interest as a Sioux half-breed Indian in said Sioux Indian reservation, in the said state of Minnesota. That not until on or about the said day of April, 1892, did said Charles Musso or plaintiff have knowledge that said power of attorney was false and fraudulent. That after said patent was issued by the United States, and after the same was delivered and recorded to the said W. S. Chapman, alleged attorney in fact as aforesaid, and long prior to the commencement of this suit, said defendants, * * * and each of them, or their grantors, became and were bona fide purchasers of a portion of said land described in said patent, and paid a valuable consideration in money therefor, and afterwards entered into and took possession of the same, and made valuable and expensive improvements thereon; and ever since then, and for more than twenty-five years, defendants and their grantors have been in the actual and exclusive possession and use of the said lands, and are now in such possession and use. That defendants had no knowledge nor information, nor had their grantors any knowledge or information, nor had they or their grantors any means of acquiring any knowledge or information, of the alleged wrongful or fraudulent acts heretofore set forth; nor did they, or either of them, know, or have reason to know, that said power of attorney was false or fraudulent, or was not the power of attorney of said Charles Musso named in the complaint. That neither the defendants nor their grantors in any manner participated in said alleged unlawful or wrongful acts, or any of them."

Charles A. Jones, U. S. Atty.

T. V. Julien and Robert M. Clarke, for defendants.

HAWLEY, District Judge. These are bills in equity to cancel a patent issued September 15, 1864, by the United States to W. S. Chapman, as the agent and attorney in fact for one Charles Musso, upon the ground of fraud. The five cases were tried together. The principles of equity applicable thereto are the same in each case.

Has the government, upon the facts stated, shown such a superior equitable right to that of the defendants to the lands in question as to entitle it to recover? From the stipulated facts it is apparent that the controlling question in each case is whether the defendants, being bona fide purchasers of, and having the legal title to, the lands herein involved, without knowledge of the fraud committed upon the government in obtaining the patent through which they derived their title, are entitled to a decree. This question, in the light of the adjudicated cases, is too well settled in favor of the defendants to require any extended discussion. The undisputed facts affirmatively show that a fraud was committed upon the United States, sufficient in equity, as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patent. But it is manifest that the fraud that was committed was not such as prevented the passing of the legal title by the patent. This being true, it necessarily follows that, to a bill in equity to cancel the patent upon this ground, the defense of a bona fide purchaser, for value, without notice, is perfect. *Boone v. Chiles*, 10 Pet. 177, 209; *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. 131; *U. S. v. California & O. Land Co.*, 1 C. C. A. 330, 49 Fed.

496; *Id.*, 148 U. S. 31, 41, 13 Sup. Ct. 458; *U. S. v. Dalles Military Road Co.*, 2 C. C. A. 419, 51 Fed. 629, 638; *Id.*, 148 U. S. 49, 13 Sup. Ct. 465; *U. S. v. Winona & St. P. R. Co.*, 15 C. C. A. 96, 67 Fed. 948, 960; *U. S. v. Southern Pac. R. Co.*, 76 Fed. 134, 137.

The reason for protecting innocent purchasers holding the legal title is that a court of equity only acts upon the conscience of the party, and, if he has done nothing which taints it, no demand can attach upon it, so as to give jurisdiction in equity. Clear and strong as the equity of the United States in these cases must be admitted be, it is self-evident that it is no clearer or stronger than that of the innocent purchasers of the legal title to the lands, who paid a valuable consideration therefor, and have made many valuable improvements thereon in good faith, without any notice of the illegal acts committed by the person or persons who wrongfully and fraudulently obtained the patent from the United States. Justice and equity demand that they should have protection and relief. They committed no fraud. They have acted with a clear conscience, and are not guilty of any wrong. They relied, and had the right to rely, upon the patent issued by the government in a case where it had the unquestioned jurisdiction and right to issue the patent. The fact that the government was imposed upon is not their fault. They cannot be held responsible for the fraud of others, of which they had no notice. The United States has no equitable title to the lands which is superior to the rights of the defendants and bona fide purchasers thereof. A decree in each case will be entered in favor of the defendants.

ALLEN v. AMERICAN LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

No. 317.

MORTGAGES—AFFIDAVIT OF GOOD FAITH—RECORDING—RIGHTS OF CREDITORS.

A statute of Washington provides that "a mortgage of personal property is void as against creditors * * * unless it is accompanied by the affidavit of the mortgagor that it is made in good faith * * * and it is acknowledged and recorded." *Held*, that under this statute a mortgage of real and personal property, which, when executed and recorded as a mortgage of realty, is not accompanied by the affidavit required by the statute, is not for that reason absolutely void as against creditors, but upon the affidavit being subsequently attached to it, and its being recorded as a mortgage of personal property, it acquires validity as such, except as against intervening rights and liens, or creditors who may have become such on the faith of the property's being unincumbered.

Appeal from the Circuit Court of the United States for the Western Division of the District of Washington.

Hudson & Holt and T. N. Allen, for appellant.

George Donworth, James B. Howe, and John P. Judson, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. On December 31, 1891, the Olympia Light & Power Company executed a mortgage of all its property, both real and personal, to the American Loan & Trust Company, to secure an issue of bonds amounting to \$150,000. This mortgage was duly acknowledged as required by law, but did not have attached to it at the time of its original execution the affidavit required by the statute of Washington in order to constitute it, as to creditors, a valid chattel mortgage. It was recorded January 20, 1892, in the records of mortgages of real estate, but not in the book of chattel mortgages. On June 1, 1893, the intervener became an unsecured creditor of the mortgagor in the sum of \$8,000. On November 16, 1893, the mortgagor, while perfectly solvent, caused to be attached to the mortgage the affidavit requisite to constitute it a perfect chattel mortgage, and on November 17, 1893, it was duly recorded as such in the chattel mortgage records. Thereafter the American Loan & Trust Company instituted suit in the circuit court of the United States for the district of Washington to foreclose said mortgage, and in said foreclosure suit a receiver was appointed, who qualified and took possession of all the property of the mortgagor. Subsequently the intervener recovered judgment against the Olympia Light & Power Company, the mortgagor therein, upon his debt contracted as above stated. He intervened in this suit, and now claims the right to have his judgment satisfied out of the proceeds arising from the sale of the personalty covered by the mortgage before said proceeds are applied to the satisfaction of the mortgage indebtedness. A demurrer to the petition for intervention was interposed upon the ground that it did not state facts sufficient to entitle the intervener to the relief prayed for therein. The demurrer was sustained, and petition for intervention dismissed, and judgment entered against him for costs. From that judgment this appeal is taken.

Did the court err in sustaining the demurrer? The answer to this question depends upon the construction to be given to the statute of Washington which reads as follows:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property." 1 Hill's Code Wash. § 1648.

This statute, it will be observed, makes a distinction between creditors and subsequent purchasers and incumbrances; but, while it protects only purchasers and incumbrances "for value and in good faith" against the operation of a mortgage not properly executed and recorded, all classes of creditors come within its provisions. *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190, 194, 40 Pac. 729. The contention of appellant is that the mortgage was void as to him when his debt was contracted, and that no subsequent action in supplying the defect of the absence of the affidavit required by law could in any manner impair or affect his rights. Can this contention be maintained? It is true that at the time the debt to the intervener accrued the mortgage was void as to all creditors. Why?

Because it did not have attached to it the affidavit of the mortgagor that it was "made in good faith, and without any design to hinder, delay or defraud creditors." For the want of this affidavit, the mortgage could not be recorded as a chattel mortgage. It imparted no notice to any one. It was not of any binding force. It created no lien upon the property. To all intents and purposes, as a chattel mortgage, it was invalid as to creditors. Being invalid and void in its then condition, could it be made valid by the subsequent act of the mortgagor in supplying the affidavit which the law required, and the act of the mortgagee, of having it, in its corrected form, recorded in the book of chattel mortgages?

Under the facts in this case, the question of appellant having been induced to give credit on the faith of the mortgagor having unincumbered personal property is eliminated from this case. If we correctly understand appellant's position, it is that if a new mortgage had on November 16, 1893, been drawn up in the language contained in the original, duly acknowledged, with the proper affidavit attached, and regularly recorded, it would have been valid as security for the debt for which the original mortgage was given; but he contends that inasmuch as the original mortgage was void at the time of its execution, as against creditors, no subsequent act could make it valid. This argument states a difference in fact, without any distinction in principle. The original mortgage, as acknowledged and recorded, was a valid real-estate mortgage. It was simply void as to the personal property. When the mortgagor attached the proper affidavit to it, and the mortgagee caused it to be recorded, it had the same force, vitality, and effect as if the instrument had then been again written, signed, and acknowledged. If any intervening rights or liens had been secured before the defect was cured, such rights would, of course, have priority over the mortgage; but the intervener is not in a position to urge this point. The legal principle here involved was presented and elaborately discussed by the supreme court of Kansas in *Cameron v. Marvin*, 26 Kan. 612, 627, as will be seen by the following statement of the court:

"Counsel for defendant in error seem to contend that where a chattel mortgage is not recorded immediately after it is executed, and the property is not immediately delivered to the mortgagees, it is absolutely void as to all creditors whose debts have been created subsequent to the execution of the mortgage, and prior to its being recorded, and prior to the delivery of the property, without reference to any lien procured upon the property by virtue of an attachment or an execution, or otherwise; that is, they claim that such a mortgage is so absolutely void as to general creditors whose debts have been created after the execution of the mortgage, and before the recording of the same, or before the delivery of the property, that they may obtain a lien upon the property after the mortgage is recorded, and after the property is delivered, by virtue of an attachment or other legal process."

The court, in answering this contention, after stating that an unrecorded mortgage of property not delivered to a mortgagee is void as against creditors without notice, and referring to other questions not specially important here, expressed its opinion upon this subject as follows:

"If the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage with the consent of the mort-

gagor, or takes possession of the property with the consent of the mortgagor, his mortgage then has the force and effect of the mortgage executed on the day on which it is filed for record, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the parties and recorded. The old mortgage is then given life and force and effect by the joint action of both the parties, and hence must be held to be valid from that time on as against all persons."

This conclusion is based upon the principle that a mortgagor who is indebted to several parties has the unquestioned right to mortgage his property to secure any of his debts, and to give preference to one creditor over others, so long as he acts in good faith, without any intention to hinder, delay, or defraud other creditors. Mr. Jones, in his work on Chattel Mortgages, says that:

"If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity. The subsequent delivery cures all such defects, and it also cures any defects there may be through an insufficient description of the property. * * * Delivery of possession under a mortgage before rights have been acquired by others will cure any invalidity there may be in the instrument, whether arising from an insufficient execution of it, the omission to record it, or from its containing a provision which makes it void except as between the parties." Jones, Chat. Mortg. § 178.

In *Reed v. Bank of Commerce*, 8 Wash. 539, 36 Pac. 484, the court held that where possession is taken under the mortgage the rights of the mortgagee do not depend upon the affidavit as to its execution having been in good faith. In *Willamette Casket Co. v. Cross Undertaking Co.*, supra, it does not appear that the mortgagor did anything after contracting the new indebtedness to make the mortgage operative in favor of the mortgagee as against debts contracted after the delivery of the mortgage. The court was not called upon to discuss, and did not express any opinion upon, the question which is directly involved in this case. There is no decision of the supreme court of Washington, to which our attention has been called, which, upon similar facts, announces any principle in opposition to the views we have expressed. The judgment of the circuit court is affirmed.

ALLEN et al. v. JONES et al.

(Circuit Court, E. D. Arkansas, W. D. April 10, 1897.)

1. INJUNCTION BOND—LIABILITY OF SURETIES.

The sureties in an injunction bond, where the prosecution of an action is restrained, are liable for the whole penalty, without credit for what has been paid on the judgment finally rendered in such action, it appearing that the unpaid balance of the judgment exceeds the penalty of the bond, and that the whole judgment could have been collected but for the delay caused by the injunction.

2. SAME.

Where the plaintiff in an action, which was delayed by temporary injunction, pressed the action to judgment with reasonable diligence on the termination of an appeal from a judgment dissolving the injunction, and he was unable, by reason of the insolvency of the defendants, to collect his judgment, the sureties in the injunction bond are liable, though the de-