

Monger *v.* Shirley.

"The combination claimed in the second claim of the patent No. 3747, Exhibit A, is substantially embodied in the lantern, Exhibit 1, unless the claim embraces the guard *a*, removable, leaving an entire lantern.

"There is a loose globe in Exhibit 1, and it therefore substantially embodies the third claim; but there is a difference in construction between the lantern guards."

This testimony seems to us to be corroborated by the patents and other exhibits; and from this it sufficiently appears that both the second and the third claims of Westlake's patent are exemplified in Evans's lantern. It has the combination of the disc, the band and the fastenings specified in the second claim, and that of the guard, the disc, the fastenings and the globe, specified in the third claim. Whilst, therefore, it may be true that none of the lanterns referred to are equal to Westlake's in beauty of form or convenience of adaptation to the purpose for which it is intended, yet every part has been anticipated and used in some form or other for the very purposes and uses to which it is applied in Westlake's; and in Evans's lantern all the essential parts are brought together and used in the combinations claimed by the patentee. Of course the combination might be new; and if productive of new and useful results, and not a mere aggregation of results, might be the subject of a patent, though all the parts were used before. But here, the combinations patented, as well as their separate elements, had been anticipated. The decree is, therefore,

Affirmed.

Mr. L. L. Bond for appellants. No appearance at the argument, and no brief, for appellee.

MONGER *v.* SHIRLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 129. October Term, 1874. — Decided January 18, 1875.

On the facts reviewed in the opinion, *Held*, that the title of the appellant to the premises in dispute whether derived through the sale on execution, or acquired under the confiscation act, is void for fraud.

THE case is stated in the opinion.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal in equity from the Circuit Court of the United States for the Eastern District of Tennessee.

Cases Omitted in the Reports.

Shirley was the complainant in the court below. His bill alleges that Monger instituted proceedings against him by attachment in the Circuit Court of Hamilton County, Tennessee, upon a promissory note purporting to be executed by Shirley to John W. Westmoreland, for the sum of ten thousand dollars, dated December 15, 1863, payable three months from date, and indorsed by the payee to Monger; that a judgment was rendered against Shirley by default; that a large and valuable farm belonging to him was sold under the judgment and bought in by Monger; that Shirley was then absent from Tennessee and was ignorant of the proceedings; that the note and indorsement were forgeries, and that the whole proceeding culminating in the sale of the farm was a gross fraud upon Shirley perpetrated by Monger. It is further alleged that Monger, in certain proceedings in confiscation in the District Court of the United States for the District of East Tennessee, had fraudulently acquired a title to the life estate of Shirley in the farm. The prayer of the bill is that Monger's titles may be annulled, that he may be compelled to account for the rents and profits of the property, and for general relief.

Monger answered and denied all the material allegations of the bill.

Testimony was taken upon both sides.

The court below sustained the bill and decreed accordingly. Monger thereupon removed the case by appeal to this court.

The power of a court of equity to annul judgments and decrees, and all titles acquired under them, for fraud, where the rights of bona fide purchasers have not intervened, is too well settled to require discussion. *Freeman on Judgments*, §§ 486, 489, 490, 491; *1 Story Eq. Jur.* § 252.

The facts alleged by Monger are as follows: Shirley sympathized with the rebel cause, and early in the war removed to Georgia, within the insurgent lines. While he was there, a man claiming to be John W. Westmoreland came to Tennessee, passed through the lines of the Union Army, and offered to sell the note to Monger for its face in Confederate paper, which was then and there worth ten cents on the dollar. Monger bought the note, under-due, and paid for it accordingly.

The deposition of David Westmoreland was taken in December, 1868. He testified that about three months before that time a man claiming to be John W. Westmoreland came to his house and said

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the object of his call was to ascertain whether they were related. He mentioned that he had sold the note of Shirley to Monger. The witness had never seen him before, and never saw him afterwards. The note disappeared from the files of the court and could not be found. There is no proof of any consideration for giving the note, and none of its execution, as to time, place, or circumstances. The testimony of John W. Westmoreland was not taken, and there is no proof that a person of that name was or had been in existence, except the testimony of the David Westmoreland before mentioned, and his further testimony that he had a brother so named who lived and died in Missouri before the war.

According to Monger, the seller of the note came secretly and departed secretly. There is no proof that at that time he saw any one but Monger. There is no trace of his residence or presence anywhere before or afterwards. The deposition of David Westmoreland in nowise identifies the stranger who called on him as the person he assumed to be. The testimony is injurious to Monger. That person, whoever he was, was living in the fall of 1868, while this suit was pending, and more than four years after the alleged transfer of the note to Monger. He was willing to give Monger the benefit of his declarations to David Westmoreland for whatever they were worth. His disappearance and subsequent non-appearance can be accounted for only on the ground that he was afraid to put himself within the reach of the law by appearing as a witness.

Shirley's deposition was taken. He swears positively that he never executed the note and that he never knew any one of the name of the payee.

Richey, a witness in his behalf, testifies that Campbell and Monger conspired together and forged the note. The character of Shirley for truth is shown by a host of witnesses to be very bad. The character and testimony of Richey are destroyed by the witnesses called to impeach and contradict him. There is proof that at the date of the note Shirley was very ill, and if not then unable to execute a note, certainly gave none.

The effect of this evidence is much weakened by the adverse depositions taken by Monger. We have, therefore, laid the testimony of all these witnesses out of view. There is no evidence of the slightest weight that the signature to the note was in Monger's handwriting. The whole superstructure of the case as regards the note rests upon the unsupported declarations of Monger.

Cases Omitted in the Reports.

It is unnecessary to pursue the subject further. The facts of this branch of the case are as free from doubt and difficulty as the law. They fill the largest measure of conviction in the mind that the note was a forgery, that Westmoreland, if not a myth, was a party to the crime, and that he has wisely shrunk back and since remained in guilty concealment.

But it is insisted that Monger has a valid title to the life estate of Shirley in the farm derived from the confiscation proceedings, and that, therefore, the complainant's case must fail. The life estate was sold in those proceedings, and Monger bought it in for seven hundred dollars. Before the sale was confirmed, Monger intervened and represented that before the libel of information was filed he had attached the premises, and he insisted that his lien thus acquired was paramount as well as prior to that of the government. The court decreed that the money he had paid, less the costs, should be refunded to him, and that the marshal should execute a deed conveying to him the life estate of Shirley. Both were accordingly done. The latter order was an extraordinary feature in the case. The proceedings in behalf of the United States were thus used to pass a title for which they received nothing, and it was conveyed to Monger, who paid nothing for it. If the attention of the court had been called to the error in the entry, it would doubtless have been corrected. *Fay v. Wenzel*, 8 *Cush.* 315.

The same learned judge who made the order, enjoined Monger in this case perpetually from asserting the title.

This shows that he attached no importance to it. But, conceding that the marshal's deed did pass the legal title to the life estate, the answer to the objection is, that under the circumstances, Monger must be held to have taken it, as he took his title under the attachment proceedings, in trust — *ex maleficio* — for Shirley, and subject to all his equities. It would be a reproach upon the administration of justice if such a title thus acquired could avail to defeat the rights of the complainant and give triumph to the iniquity which has been practised upon him.

The decree of the Circuit Court is

Affirmed.

Mr. Horace Maynard for appellant. *Mr. John Baxter* for appellee.