

Winn Vs. Patterson

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SooperKanoon Citation : sooperkanoon.com/79517

Court : US Supreme Court

Decided On : 1835

Appeal No. : 34 U.S. 663

Appellant : Winn

Respondent : Patterson

Judgement :

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Winn v. Patterson

34 U.S. (9 Pet.) 663

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF GEORGIA

SYLLABUS

Georgia. Ejectment for a tract of land in Franklin County, Georgia, held under a grant to Basil Jones, and conveyed by the attorney of Basil Jones to the defendant in error. See [24 U. S. 11](#) Wheat. 380, [30 U. S. 5](#) Pet. 233. A copy of the grant

was produced in evidence, and a copy of a power of attorney, dated 6 August, 1793, to Thomas Smith, authorizing him to sell the land, executed in the presence of Abram Jones, J.P., and Thomas Harwood. This copy was certified from the records of Richmond County, Georgia, and recorded 11 July, 1795. The original power of attorney was lost, and evidence of the loss, to introduce the copy, was given.

What evidence is sufficient to introduce secondary proof.

The Deputy Clerk of the Richmond County Court, who as such had recorded the original power of attorney, swore that he was well acquainted with Abram Jones, esquire, and his handwriting, during the year 1793, &c.; That the record of the power of attorney from B. Jones to T. Smith, made by himself, while clerk of the court, is a copy of an original power of attorney, which he believes to have been genuine, for that the official signature of Abram Jones, must have induced him to commit the same to record, and that the copy of that said power of attorney, the one offered in evidence, had been compared with the record of the original made by himself, and is a true copy. Upon this evidence the

plaintiff offered the copy in evidence, and it was admitted by the circuit court. *Held* that there was no error in admitting this evidence.

At the time of the admission of this evidence, it was forty years old. Abram Jones, the subscribing witness to the original, was long since dead, and it did not appear that the other witness was alive. The original power did not exist, so that no evidence of the handwriting of the other witness could be given. After the lapse of thirty years from the execution of a deed, the witnesses are presumed to be dead, and this is the common ground for dispensing with the production of them, without any search for them, or proof of their death when the original deed is before the court for proof. This rule applies not only to grants of land, but to all other deeds where the instrument comes from the custody of the proper party claiming under it, or entitled to its custody.

The case of [*Patterson v. Winn*](#), 5 Pet. 233, [30 U. S. 244](#) , cited.

The rule is admitted, that a copy of a copy is not evidence. This rule properly applies to cases where the copy is taken from a copy, the original being still in existence, and, capable of being compared with it, for then it is a second remove from the original, or when it is a copy of a copy of a record, the record being in existence, and deemed by law as high evidence as the original, for then it is also a second remove from the original. But it is a quite different question whether it applies to cases of secondary evidence where the original is lost, and the record of it is not deemed in law as high as the original, or when the copy of a copy is the highest proof in existence. (In this case, the power of attorney was recorded in Richmond

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County, and the land in controversy was in Franklin County.) *Held* that this is not the case of a mere copy of a copy verified as such, but it is the case of a second copy verified as a true copy of the original.

If a certified copy of a duly recorded deed is evidence, it is not necessary to produce the original book in which the same was recorded.

There are cases when grants and securities made contrary to the prohibitions of a statute, in part, are, upon the true construction of the intent of the statute, void *in toto*. But it is very different in cases standing merely on the common law. And therefore, at the common law, in order to make a grant void *in toto* for fraud or covin, the fraud or covin must infect the whole transaction or be so mixed up in it as not to be capable of a distinct and separate consideration.

A grant may be good for part of the land granted and bad as to other parts of the same. The case of [Patterson v. Jenks](#), 2 Pet. 216, [27 U. S. 235](#), cited.

In February, 1820, an action of ejectment was instituted in the circuit court by the lessee of William Patterson against Elisha Winn and others, to recover a tract of land in the County of Franklin, in the State of Georgia. The case has been twice before this Court on a writ of error. [24 U. S. 11](#) Wheat 380, 6 Cond. 355, and 8 Pet. 233. Many of the material facts in the case will be found in the reports referred

to.

At November term, 1833, of the circuit court, in pursuance of the mandate of this Court, a new trial of the case took place, and the plaintiff gave in evidence a grant from the State of Georgia to Basil Jones for 7,800 acres of land, including the lands in controversy in this suit, dated 24 May, 1787, with a plot of the survey of the said land annexed; a copy of a power of attorney from Basil Jones to Thomas Smith, Jr., purporting to be dated 6 August, 1793, authorizing Smith, *inter alia*, to sell and convey the tract of 7,800 acres, which power purported to be signed and sealed in the presence of Abraham Jones, J.P. and Thomas Harwood, Jr., and the copy was certified to be a true copy from the records of Richmond County, Georgia, and recorded there on 11 July, 1795, and to account for the loss of the original power of attorney of which they copy was offered and of the use of due diligence and search for the same, the plaintiff read the depositions of William Patterson and others, the particulars of which, and all the evidence in the case, are stated in the bill of exceptions. The defendant objected to the evidence, and

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the court overruled the objection and allowed the paper to be read to the jury. To this decision of the court the defendant excepted, and the court sealed a bill of exceptions. In the further progress of the case, further evidence was offered, and certain instructions thereon asked of the court, which were refused, and the refusal of the court to give such instructions was the subject of another exception.

The jury, under the charge of the court, found a verdict for the plaintiff upon which judgment was entered, and the defendants prosecuted this writ of error.

The bills of exceptions were as follow.

The plaintiff, to maintain the issue on his part, gave in evidence a copy of a grant from the State of Georgia to Basil Jones, for seven thousand three hundred acres, bearing date on 24 May, 1787, together with a plat of survey of the said land thereto annexed (a copy of which plat and grant was in the record), and further offered to give in evidence to the jury a paper writing purporting to be a copy of a

power of attorney from Basil Jones to Thomas Smyth, Jr., executed on 6 August, 1793, by Basil Jones, in the presence of Abram Jones, J.P., and Thomas Harwood, on which copy there was a certificate under the official seal of John H. Mann, Clerk of the Superior Court of Richmond County, stating that it was a true copy from the record in his office, entered on book, &c.;, on t11 July, 1795. A certificate from John H. Montgomery, one of the judges of the superior court, was annexed, stating that the officer who certified the copy was the clerk of the superior court, that his signature was entitled to full faith and credit, and that the attestation was in due form. The power of attorney authorized Thomas Smyth, Jr., to sell and dispose of seven thousand three hundred acres of land granted to Basil Jones, part of which is the land for which this ejectment was brought.

To account for the loss of the original power of attorney, the plaintiff below produced his affidavit stating his belief that the said original grant to Basil Jones had been lost or destroyed, This affidavit was made on 23 July, 1833; also the deposition of Andrew Fleming stating numerous and particular acts which he had performed to discover the said

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originals. This deposition set forth diligent examinations for the lost papers in various places, and by inquiries of all such persons where and with whom the said papers might probably have been found, if they had not been altogether lost or destroyed.

Also the answers to interrogatories of Anna Maria Smyth, the widow of Thomas Smyth, relative to the lost papers, and stating that she had not been able to find them among the papers of her deceased husband, nor had she ever seen them, although she had the custody of all the papers left by her deceased husband.

And further to account for the loss of the said original power, Richard H. Wilde, Esq., was examined on interrogatories propounded to him, who stated that he had made diligent search for the said power of attorney with the assistance of the clerk in the clerk's office of the Superior Court of Richmond County, without success.

That he had applied to the widow of Basil Jones for the paper and for the original grant, who was unable to find the same, and had advertised for the same for some months in two newspapers in Georgia; he had inquired for the same at the office of the Secretary of State at Milledgeville, and had searched the clerk's office at Columbia, where Basil Jones formerly resided, and also had made numerous other searches and inquiries. A copy of the advertisement for the lost papers was inserted in the examination.

The testimony of John H. Wilde, Esq., was also introduced, who proved, that by reputation Abram Jones was dead long since; that he compared the copy of the power of attorney offered in evidence with the record in the clerk's office of Richmond Superior Court, and it is a true copy. William Patterson, the plaintiff in the circuit court, he believed had never been in Georgia.

William Robertson deposed that he was deputy clerk and acted as such, of Richmond County in the year 1794, and clerk of the said court in 1795, and continued in that office till 1808 or 1809; that he was well acquainted with Abram Jones, Esq., and his handwriting, during the years 1793, 1794 and 1795, and before and afterwards. The deponent further states that the record of a power of attorney from B. Jones to Thomas Smyth, Jr., made by himself while clerk

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of that court, is a copy of an original power of attorney which he believes to have been genuine, for that the official signature of Abram Jones must have induced him to commit the same to record, and that the copy of said power of attorney transmitted with deponent's depositions has been compared by himself with the record of the original made by himself in Richmond County and is a true copy.

The plaintiff then offered the paper purporting to be a copy of the power of attorney in evidence, which was opposed by the counsel for the defendants as not admissible evidence.

The counsel for the lessor of the plaintiff, further to prove the original power of attorney was made and executed, gave in evidence a deed executed by Thomas

Smyth, Jr., alleging himself to be the attorney in fact of Basil Jones, dated 18 November, 1793, which conveyed to William Patterson, the lessor of the plaintiff, seven thousand three hundred acres of land in Franklin County, originally granted to Basil Jones, May 24th 1787; which deed also conveyed, or purported to convey, four other tracts of land situate in Franklin County, and contained the following recital:

"Whereas, the said Basil Jones, by a certain writing or letter of attorney, dated 6 August last past, did empower and authorize the said attorney (Thomas Smyth, Jr.) in his, the said Basil Jones', name, to sell and dispose of five certain tracts or parcels of land hereinafter mentioned, situate in Franklin County and State of Georgia aforesaid."

And the plaintiff offered in evidence proof that Abram Jones, who signed the original power of attorney, was, at the time he signed the same, a justice of the peace, of the County of Richmond, which was admitted by the defendants' counsel.

The plaintiff's counsel then insisted that the copy of the power of attorney was admissible in evidence, and should go to the jury, which was opposed by the defendants' counsel, but the court admitted the same, and the counsel for the defendants excepted to the said admission.

The plaintiff also offered three witnesses before the jury to prove the identity of the land in dispute, with a plat of the same given in evidence, and that the defendants were in possession of the part for which this suit was brought, and also the location of the land, which witnesses also proved that part of

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the said land, which lay on the south and west of the said Appalachee River, was not, at the time of issuing the said grant, situate in the County of Franklin, as the grant purported it to be, but was without the then County of Franklin, and beyond the then temporary boundary line of the State of Georgia. Whereupon the attorney for the said defendants prayed the said justices to instruct the said jury that if the

jury believed that Basil Jones, the deputy surveyor and grantee under whom the lessor of the plaintiff claims, by designating the stream marked in the original plat as

"the branch of the south fork of the Oconee River, instead of the south fork of the Oconee River, and by stating that the land was situate in the County of Franklin, when a large part of it lay without the County of Franklin and without the temporary boundary line of the State of Georgia, practiced a deception upon the governor of the state, and thereby induced him to issue the grant; that such grant is fraudulent and void, and cannot entitle the plaintiff to recover,"

which instruction the said justices refused to give to the said jurors. And the said attorney further prayed the said court to instruct the said jurors that a grant of land is an entirety, and that a grant void in part is void for the whole, which instruction the said justices also refused to give to the said jurors. And they further prayed the said court to instruct the said jurors that a concealment or misrepresentation of material facts, calculated to deceive the governor issuing the grant, renders the grant null and void in law, which instruction the said justices also refused to give to the said jurors, and the jurors gave their verdict against the said defendants upon the issue aforesaid.

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MR. JUSTICE STORY delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the District of Georgia. The cause, which is an ejectment, has been twice before this Court, and the decisions then had will be found reported in [24 U. S. 11](#) Wheat. 380, and [30 U. S. 5](#) Pet. 233, to which we may therefore refer as containing a statement of many of the material facts.

At the new trial had in November term, 1833, in pursuance of the mandate of this Court, the plaintiff, to maintain the issue on his part, gave in evidence a copy of a grant from the State of Georgia to Basil Jones for seven thousand three hundred

acres, including the lands in controversy, dated 24 May, 1787, with a plat of survey thereto annexed. He then offered a copy of a power of attorney from Basil Jones to Thomas Smyth, Jr., purporting to be dated 6 August, 1793, and to authorize Smyth, among other things, to sell and convey the tract of seven thousand three hundred acres so granted, which power purported to be signed and sealed in the

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presence of "Abram Jones, J.P., and Thomas Harwood, Jr.," and the copy was certified to be a true copy from the records of Richmond County, Georgia, and recorded therein, on 11 July, 1795. And to account for the loss of the original power of attorney, of which the copy was offered, and of the use of due diligence and search to find the same, the plaintiff read the affidavit of William Patterson, the lessor of the plaintiff, which in substance stated that he had not in his possession, power, or custody the original grant, and that he verily believed the original power of attorney and grant have been lost or destroyed. He also read for the same purpose the deposition of Andrew Fleming, which stated in substance the searches made by him among Thomas Smyth's papers and the information received by him leading to the conclusion that the same has been lost or destroyed. Also the deposition of Mrs. Smyth, the widow of Thomas Smyth, for the same purpose. Also the deposition of Richard H. Wilde, which stated several searches made by him for the original power in the office of the Clerk of Richmond County and in other places, and an application to the wife of Basil Jones, and to the son of Thomas Smyth, for the like purpose, and an advertisement in two Georgia newspapers for information respecting the same, all of which proved ineffectual. The same witness also stated that Abram Jones, the supposed subscribing witness, was, by public reputation, long since dead. It was admitted that Abram Jones was, at the time of the supposed execution of the power, a justice of the peace.

The plaintiff also read in evidence the deposition of William Robertson, who stated that he was Deputy Clerk of the Court of Richmond County in 1794, and Clerk in 1795, and continued in office until 1808 or 1809; that he was well acquainted with Abram Jones and his handwriting during the years 1793, 1794, and 1795, and

before and afterwards. That the record of the power of attorney from B. Jones to Thomas Smyth, Jr., made by himself while clerk of the court is a copy of an original power of attorney, which he believes to have been genuine, for that the official signature of Abram Jones must have induced him to commit the same to record, and that the copy of the said power of attorney transmitted with the deponent's depositions (the copy before the court)

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had been compared with the record of the original made by himself in Richmond County, and is a true copy.

The plaintiff also gave in evidence a deed executed by Thomas Smyth, Jr., as attorney in fact of Basil Jones, dated on 18 November, 1793, conveying as such attorney to William Patterson, the lessor of the plaintiff, certain tracts of land, and among others the tract of seven thousand three hundred acres, which deed contained a recital that Basil Jones, by his certain writing or letter of attorney dated 6 August, 1793, did empower and authorize his said attorney in his, Basil Jones', name, to sell and dispose of the tracts mentioned in the deed, which deed was recorded in the records of Franklin County on 25 July, 1795.

Upon this evidence the plaintiff offered the copy as evidence in the case. It was objected to by the defendants, and the objection was overruled by the court, and the copy was admitted in evidence to the jury. And this ruling of the court constitutes the first ground in the bill of exceptions upon which the defendants now rely for a reversal of the judgment of the circuit court, which was in favor of the plaintiff.

In the consideration of the admissibility of the copy, two questions are involved. In the first place, whether there was sufficient evidence of the genuineness and due execution of the original power of attorney. In the next place, if its genuineness and due execution are established, whether the copy was, by the principles of law under all the circumstances, admissible proof.

In regard to the first question, we are to consider that the original instrument (supposing it to be genuine) is of an ancient date, having been executed in the year 1793 and recorded in the public records as a genuine instrument in 1795, so that at the time of the trial it was forty years of age. Abram Jones, one of the subscribing witnesses, was long since dead, and it does not appear that Thomas Harwood, the other subscribing witness, was alive or that the plaintiff had any means of identifying him or tracing out his residence. The original power did not exist, so that the plaintiff could not, by an inspection of his handwriting, ascertain who he was or where he lived.

After the lapse of thirty years from the time of the execution of a deed, the witnesses are presumed to be dead, and this is

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the common ground in such cases for dispensing with the production of them without any search for them or proof of their death when the original deed is before the court for proof. It is a rule adopted for common convenience and founded upon the great difficulty of proving the due execution of a deed after an interval of many years. And the rule applies not only to grants of land, but to all other deeds where the instrument comes from the custody of the proper party claiming under it or entitled to its custody. 1 Phillips on Evidence, ch. 8, sec. 2, 406, and cases there cited; 1 Starkie on Evidence, part 2, sec. 143, 144, 145, and cases there cited. If, therefore, the original power were now produced from the custody of the plaintiff, it would not be necessary to establish its due execution by the production of the subscribing witnesses. It would be sufficient to establish it by other proofs. This view of the matter disposes of that part of the argument which denies that the proof of the original instrument can be made without the production of the subscribing witness, Harwood, or accounting for his nonproduction.

Then what is the proof of the genuineness and due execution of the original power of attorney? Mr. Robertson swears that he was acquainted with the handwriting of Abram Jones (one of the subscribing witnesses) at the time of its date as well as before and afterwards; that he recorded it in the county records; that the record is

a copy of an original power of attorney, which he believed to have been genuine, for that the official signature of Abram Jones must have induced him to commit the same to record. Now what is to be understood by the "official signature" in the language of the witness? Clearly his genuine handwriting, and the annexation of his official title, "J.P." -- that is, Justice of the Peace -- establishing that he verifies the instrument, not merely as an individual, but as a public officer. It is impossible that it could be his official signature unless it was also a genuine, and not forged, signature of his name. So that here we have from Mr. Robertson direct proof of his belief of the genuineness of the signature of a subscribing witness, from his knowledge of his handwriting, his examination of the original instrument, and his having recorded it upon the faith of such belief. It seems to us perfectly clear, upon the received principles of the

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law of evidence, that this was sufficient *prima facie* proof of the genuineness and due execution of the original power to be left to the jury for its consideration of its weight and effect.

The next question is whether sufficient ground was laid in the evidence to establish the loss or destruction of the original power, so as to let in secondary proof of its contents. We think there was, considering the lapse of time since the original transaction, the diligence which had been used, the searches which had been made, and the other attendant circumstances stated in the depositions, to fortify the presumption of such loss or destruction. This was the view of this point taken by this Court in the former decision in [30 U. S. 5](#) Pet. 233, [30 U. S. 242](#) , though it was not then so directly before us, and having heard the new argument addressed to us on the present occasion, we see no reason for departing from our former opinion.

The remaining question, then, is whether the copy now produced was proper secondary proof, entitled by law to be admitted in evidence. The argument is that it is a copy of a copy, and so not admissible, and that the original record might have been produced in evidence. By the laws of Georgia, act of 1785, deeds of bargain

and sale of lands are required to be recorded in the county where the lands lie. Prince's Dig. 112. Powers of attorney to convey lands are not required by law to be recorded in the same county, though there seems to be a common practice so to do. The act of 1785 provides that all bonds, specialties, letters of attorney, and powers in writing the execution whereof shall be proved by one or more of the witnesses thereto before certain magistrates of either of the United States where the same were executed and duly certified in the manner stated in the act, shall be sufficient evidence to the court and jury of the due execution thereof. Prince's Dig. 113. The present power was not recorded in the County of Franklin, where the lands lie, but in Richmond County, and therefore a copy from the record is not strictly admissible in evidence, as it would have been if powers of attorney were by law to be recorded in the county where the lands lie, and the present power had been so duly recorded. It is certainly a common practice to produce, in the custody of the clerk, under a subpoena

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duces tecum, the original records of deeds duly recorded. But in point of law, a copy from such record is admissible in evidence upon the ground stated in *Lynch v. Clark*, 3 Salk. 154, that where an original document of a public nature would be evidence if produced, an immediate sworn copy thereof is admissible in evidence, for as all persons have a right to the evidence which documents of a public nature afford, they might otherwise be required to be exhibited at different places at the same time. See Mr. Leach's note to 11 Mod. 134; *Birt v. Barlow*, 1 Doug. 171; 1 Starkie on Evidence sec. 36, 37. If, therefore, the record itself would be evidence of a recorded deed, a duly attested copy thereof would also be evidence. The present copy does not, however (as is admitted), fall within the reach of this rule. But the question does arise whether the defendant can insist upon the production of the record books of the County of Richmond in court in this case as higher and more authentic evidence of the power of attorney not properly recorded there, to the exclusion of any other copy duly established in proof. We think he cannot. It is not required by any rule of evidence with which we are acquainted.

We admit that the rule that a copy of a copy is not admissible evidence is correct in itself when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original being still in existence and capable of being compared with it, for then it is a second remove from the original, or where it is a copy of a copy of a record, the record being in existence, by law deemed as high evidence as the original, for then it is also a second remove from the record. But it is quite a different question whether it applies to cases of secondary evidence where the original is lost or the record of it is not in law deemed as high evidence as the original, or where the copy of a copy is the highest proof in existence. On these points we give no opinion, because this is not, in our judgment, the case of a mere copy of a copy verified as such, but it is the case of a second copy verified as a true copy of the original. Mr. Robertson expressly asserts that the record was a copy of the original power made by himself, and that the present copy is a true copy which has been compared by himself with the

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record. In effect, therefore, he swears that both are true copies of the original power. In point of evidence, then, the case stands precisely in the same predicament as if the witness had made two copies at the same time of the original and had then compared one of them with the original, and the other with the first copy, which he had found correct. The mode by which he had arrived at the result that the second is a true copy of the original may be more circuitous than that by which he has ascertained the first to be correct, but that only furnishes matter of observation as to the strength of the proof, and not as to its dignity or degree. In each case, his testimony amounts to the same result, as a matter of personal knowledge, that each is a true copy of the original. We are therefore of opinion that there was no error in the court in admitting the copy in evidence under these circumstances.

In the further progress of the trial additional evidence was offered, and thereupon the defendants prayed the court to instruct the jury 1. that if the jury believed that Basil Jones, the deputy surveyor and grantee under whom the lessor of the

plaintiff claimed -- by designating the stream marked on the original plat as the Branch of the South Fork of the Oconee River, instead of the South Fork of the Oconee River, and by stating that the land was situate in the County of Franklin when a large part of it lay without the County of Franklin and without the temporary boundary line of the State of Georgia -- practiced a deception upon the Governor of Georgia, and thereby induced him to issue the grant; that such grant is fraudulent and void, and cannot entitle the plaintiff to recover; 2. that a grant of land is an entirety, and that a grant void in part is void for the whole; 3. that a concealment or misrepresentation of material facts, calculated to deceive the governor issuing the grant, renders the grant null and void in law. The court refused to give either of these instructions, and the question now is whether all or either of them ought to have been given.

The first instruction is couched in language not wholly unobjectionable or free from ambiguity. It assumes certain facts to be established in the case without referring them to the decision of the jury, and on them founds the instruction, which is certainly not a correct practice. It also uses the words

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"practiced a deception" without adding any qualifying words, whether the deception was knowingly and willfully practiced for the purposes of fraud or whether it was by mistake of law or fact, or by misplaced confidence in the representations of other persons. And it is certainly the duty of a party asking an instruction to use language of such a definite and legal interpretation as may not mislead either the court or jury in regard to the precise nature of the application.

But waiving this consideration, the instruction asked makes no distinction between the case of a fraudulent grantee and the case of a *bona fide* purchaser from such grantee without notice -- a distinction most important in itself, and in many cases decisive in favor of the purchaser, whatever may have been the fraud of the original grantee.

It is unnecessary, however, to rely on this circumstance, for, stripping the instruction of its technical form, it comes to this -- that if any part of the land included in the grant lay within the Indian boundary, and the governor was deceived as to that fact, the grant is void for the whole land, not only for that within the Indian boundary, but for all that lying within the limits of the state. This proposition is attempted to be maintained by the doctrine that a grant void in part is void as to the whole. And certain authorities at the common law have been cited at the bar in support of the doctrine. We have examined those authorities, and are of opinion that they do not apply to cases like the present. There are doubtless cases where grants and securities, made contrary to the prohibitions of a statute in part, are, upon the true construction of the intent of the statute, void *in toto*. But Lord Hobart informs us that it is very different in cases standing merely upon the common law. For (to use his quaint but expressive language)

"the statute is like a tyrant; where he comes, he makes all void; but the common law is like a nursing father, and makes void only that part where the fault is, and preserves the rest."

See also *Norton v. Simmes*, Hob. 14; *Maleverer v. Redshaw*, 1 Mod. 35; *Collins v. Blantern*, 2 Wilson's 351. And therefore, at the common law, in order to make a grant void *in toto* for fraud or covin, the fraud or covin must infect the whole transaction or be so mixed up in it as not to be capable of a distinct and separate consideration.

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The case of *Hyslop v. Clarke*, 14 Johns. 458, was a case of fraud where both the grantors and grantees and assignees were privy to a meditated fraud against creditors, and therefore it was held void *in toto*. The case of *Butler v. Dorant*, 3 Taunt. 229, which is very shortly reported, seems to have proceeded upon the ground, that the statute avoided the security *in toto*. If it did not, it seems questionable in its doctrine.

In the present case, there is no statute of Georgia which declares all grants of land lying partly within and partly without the Indian boundaries to be void *in toto*. And the policy of the Legislature of Georgia on this subject is sufficiently vindicated by holding such grants void as to the part within the Indian boundary, leaving the grant good as to the residue. This very point was, in fact, decided by this Court in [Patterson v. Jenks](#), 2 Pet. 216, [27 U. S. 235](#) . One question there was, whether the whole grant (a similar grant) was a nullity because it contains some land not grantable. In answer to the question, MR. CHIEF JUSTICE MARSHALL, in delivering the opinion of the Court, said,

"In the nature of the thing, we perceive no reason why the grant should not be good for land which it might lawfully pass, and void as to that part of the tract for the granting of which the office had not been opened. It is every day's practice to make grants for lands which have, in fact, been granted to others. It has never been suggested that the whole grant is void because a part of the land was not grantable."

We are entirely satisfied with this doctrine as equally founded in law and reason. The land in controversy in the present suit is within the acknowledged boundary of Georgia and without the Indian boundary, and admitting the grant to be void as to the part within the Indian boundary, it is in our judgment valid as to the residue notwithstanding the supposed deception stated in the instruction, for that deception did not affect with fraud any part of the transaction except as to the land within the Indian boundary. The instruction therefore was rightly refused by the court.

The second instruction may be disposed of in a few words. It contains a proposition absolutely universal in its terms -- that a grant of lands is an entirety, and that a grant void in part is void for the whole. If this proposition were true, then a grant

of ten thousand acres, which was void for any cause whatever as a conveyance of one acre, although it might be for want of title in the grantor, would be void for the remaining nine thousand nine hundred and ninety-nine acres. It is sufficient to say that the instruction so generally framed ought not to have been given.

The third instruction admits of a similar answer. It is universal in its terms, and states

"that a concealment or misrepresentation of material facts [not stating whether innocently or designedly and fraudulently made] calculated to deceive the governor, issuing the grant [not stating whether he was actually deceived or not] renders the grant null and void in law"

as to all persons whatever, not stating whether the party is the original grantee or a *bona fide* purchaser under him without notice. For the reasons already stated, such an instruction, so generally stated, ought not to have been given.

Upon the whole, we are all of opinion that the judgment of the circuit court ought to be

Affirmed with costs.