## STEFFIAN *et al.* v. MILMO NAT. BANK.

(*Supreme Court of Texas.* January 20, 1888.)

1. DEED—DELIVERY—FRAUD IN OBTAINING—BONA FIDE PURCHASERS.
One who obtains possession of a deed of land after its execution, but, without a delivery thereof by the owner of the land and maker of the deed, acquires no title to the land; and one who takes an absolute deed from him for the security of a debt, without knowledge of the want of delivery, is not a *bona fide* purchaser for value.
2. SAME—EVIDENCE—RES GESTÆ.
In an action by one claiming title to land on the ground that possession of the deed to the land was obtained by fraud, and that the delivery was for another purpose than that for which it was used, a witness may testify as to what was said by the grantor at the time he permitted the deed to go out of his possession, for the purpose of showing his intention.

Appeal from district court, Webb county; JOHN A. RUSSELL, Judge.

Action by the Milmo National Bank against A. C. Hunt and Peter Steffian, on a promissory note. Defendant Steffian died, and Refugia Steffian, as his executrix, was substituted. Judgment for plaintiff, and defendant Steffian appeals.

*Lane & Atlee* and *C. Upson*, for appellant. *W. Showalter* and *J. O. Nicholson*, for appellee.

GAINES, J. This suit was originally instituted in the court below by the appellee against A. C. Hunt to recover on a note for about $10,000, made payable to it by Hunt, and to foreclose a mortgage executed by him to secure the note. The petition alleged that Peter Steffian was setting up a claim to the land conveyed by the mortgage, and he was also made a party defendant. Steffian having died before the trial, appellant, as executrix of his will, made herself a party defendant. Upon the trial the court gave judgment for the amount of the note, and decreed a foreclosure of the mortgage. From this judgment the executrix alone appeals.

The nature of the controversy sufficiently appears upon the conclusions of fact found by the court below, which are as follows: "*First.* That on the twenty-eighth of February, 1882, Peter Steffian, deceased, executed a general warranty deed to the defendant, A. C. Hunt, for the lands in controversy in this suit; that the consideration of sixteen thousand dollars mentioned therein was recited to have been paid; that the deed was signed by said Steffian in the presence of two subscribing witnesses; that there was an understanding between said Steffian and Hunt that said deed should remain in the possession of said Steffian until the full amount of said consideration was paid; that on May 29, 1882, said Hunt paid eleven thousand dollars of the said consideration, and afterwards, on the ——— day of ———, 1883, the further sum of $1,500. *Second.* That on the twenty-ninth day of March, 1883, said A. C. Hunt was indebted to the Milmo National Bank, plaintiff herein, in the sum of ten thousand three hundred and thirty-seven dollars and ninety-six cents, which was on that day past due; that, in order to get an extension of time on said indebtedness, he offered to give the bank a lien on the land described in the aforesaid deed of Steffian to Hunt, and placed or caused to be placed in possession of the plaintiffs the deed of Steffian to Hunt; that it was at that time generally known and understood in the community that said Steffian had sold said land to said Hunt; that plaintiff, in consideration of said lien on said land, granted to said Hunt an extension of ninety days on his said indebtedness, whereupon said Hunt, on the said twenty-ninth day of March, 1883, executed and delivered to said bank his note for said indebtedness and a deed to said land; that, while said deed was an absolute conveyance on its face, it was understood by and between said Hunt and said bank that it was only intended as a security for said debt; that at the date of the execution and delivery of said note and deed by said Hunt to said bank, its officers or agents had no

knowledge or notice, either actual or constructive, that said Hunt had not paid all the purchase money for said land. *Third.* That said Peter Steffian placed his said deed to said Hunt in said Hunt's possession before the execution and delivery of the note and deed from said Hunt to said bank, upon representation of said Hunt to said Steffian that he, the said Hunt, wanted the same for the purpose of copying the field-notes of the land therein described. *Fourth.* That plaintiff, its officers or agents, did not, at the time of the execution and delivery by Hunt of said note and deed to said plaintiff, have any notice or knowledge that said Steffian had not delivered his said deed to said Hunt as an evidence of his sale of the said land to said Hunt."

From these findings the court concluded, as a matter of law, that appellee was a *bona fide* purchaser, for a valuable consideration without notice, and that its claim was therefore entitled to priority over that of appellant, and this is assigned as error.

If the law of innocent purchaser be applicable to appellee's case, we have no doubt it must be deemed a purchaser for value. This court has held that where the consideration of a deed is an antecedent debt only, or where a mortgage is taken merely to secure indebtedness, this is not sufficient to support the claim of a *bona fide* purchaser for a valuable consideration. *McKamey* v. *Thorp*, 61 Tex. 648; *Spurlock* v. *Sullivan*, 36 Tex. 511. There being no new consideration, should the grantee or mortgagee loose the land or his lien upon it, he still has his debt; and for that reason is held to have parted with nothing of value. But should the mortgagee give time upon his debt as a consideration for the security, his case is different. By extending the time of payment, he yields up, for a season, his right of action, which is a privilege deemed value in law. This is accordingly held, by the controlling weight of authority, sufficient to support the claim of an innocent purchaser. *Schumpert* v. *Dillard*, 55 Miss. 348; *Port* v. *Embree*, 54 Iowa, 14, 6 N. W Rep. 83; *Cary* v. *White*, 52 N. Y. 138; *Gilchrist* v. *Gough*, 63 Ind. 576; *Cook* v. *Parham*, 63 Ala. 456; *Thomas* v. *Rembert*, Id. 561.

But it appears, in this case, that at the time of the agreement between Steffian and Hunt for the sale of the land, it was understood between them that, though the deed was signed in the presence of two subscribing witnesses, that it should remain in possession of the grantor until the entire consideration was paid; and it further appears that the purchase money was never fully paid, and that the instrument was never delivered to the grantee with the intention that it should take effect as a deed. Can the bank, under these circumstances, be considered a *bona fide* purchaser? It is elementary law that the delivery of a deed is requisite to its validity as a conveyance. To take effect, it is quite as necessary that it should be delivered as that it should be signed. To complete a delivery in its legal sense, two elements are also essential. The instrument must not only be placed within the control of the grantee, but this must be done by the grantor with the intention that it shall become operative as a conveyance. It follows from these first principles that an instrument which passes into the possession of the grantee, without such intention on part of the grantor, is wholly inoperative; and that a purchaser from the former acquires in law no title to the property which it purports to convey. It is accordingly held that even a vendee from the grantee, who has paid value without knowledge of the facts, is not an innocent purchaser in such a case. *Tisher* v. *Beckwith*, 30 Wis. 55; *Everts* v. *Agnes*, 4 Wis. 356, 6 Wis. 453; *Henry* v. *Carson*, 96 Ind. 412; *Van Amringe* v. *Morton*, 4 Whart. 382; *Fitzgerald* v. *Goff*, 99 Ind. 28; *Stanley* v. *Valentine*, 79 Ill. 548; *Harkreader* v. *Clayton*, 56 Miss. 383; *Miller* v. *Fletcher*, 27 Grat. 403.

The courts say that a deed delivered without the consent of the grantor is of no more effect to pass title than if it were a forgery. *Henry* v. *Carson*, *supra*; *Hadlock* v. *Hadlock*, 22 Ill. 384. We conclude, therefore, that the court was in error in holding appellee a *bona fide* purchaser for a valuable

consideration without notice. It does not follow, however, that appellee may not make out a case entitling it to judgment, although no effective delivery of the deed is shown. But in order to do this he must bring himself within the rules applicable to an equitable estoppel, and must show that appellant's testator was grossly negligent in permitting the deed to pass into the possession of Hunt, and also that, as a result of this, some substantial injury has accrued to the bank, by reason of the transaction, which it entered into upon faith of the deed. The determination of these questions is not involved in the conclusions of the court below, and the state of the evidence is such that we do not deem it proper to decide them here. Should it appear, upon another trial, that Peter Steffian never delivered the deed to Hunt with the intention that it should take effect, then, in order for the plaintiff corporation to recover, it will be necessary to show that he parted with the possession under such circumstances as would have deterred any prudent man from doing the act; and plaintiff must prove not merely that it has been delayed in the collection of its debt, but that by reason of its having extended the time for the payment of the obligation it has lost the opportunity to collect it, or some part of it.

We think, also, that the court erred in excluding the testimony of the witness A. L. McLane. What Steffian said to the witness when he gave him possession of the deed was calculated to show the purpose with which the act was done, and the injunction to return the paper tended to prove care on part of the grantor to prevent the grantee getting possession of it and claiming a legal delivery. Article 2248 of the Revised Statutes, upon which the objection was based, does not apply to such a case. *Gilder* v. *Brenham*, 67 Tex. 345, 3 S. W. Rep. 309. What Steffian said after the deed was recorded was not a part of the *res gestæ*, and was inadmissible; and the exclusion of their declaration would have been correct had the objection been placed upon the proper ground.

For the errors pointed out, the judgment is reversed, and the cause remanded.

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## PHŒNIX INS. CO., OF BROOKLYN, *v.* WILLIS *et al.*

(*Supreme Court of Texas.* January 20, 1888.)

1. GARNISHMENT—ISSUE OF WRIT—AGAINST INSURANCE COMPANY AFTER LOSS AND BEFORE PROOF.
   A process of garnishment is not premature which was served on an insurance company, for the purpose of attaching the amount due on a policy, after the loss had occurred, although the due proof of loss required by the policy had not at the time of service been made; the process not being in the nature of an action for the recovery of a debt, but of a bill of discovery.
2. INSURANCE COMPANY — CONDITION OF POLICY — CONSENT TO ASSIGNMENT OBTAINED BY FRAUD—KNOWLEDGE OF AGENT.
   An insurance company was induced to give its consent to an assignment of a policy, upon the representation that the assignor had sold his interest in the property insured to the assignee. The assignee was the local agent of the company, and the transfer of the property proved to be fraudulent as to creditors. *Held*, that the insurance company, under a provision in the policy for its invalidity in case of fraud or misrepresentation of interest in the property, was not liable for the loss which followed after the transfer, notwithstanding its agent was aware of the fraud and a party thereto.
3. SAME—OFFER TO RETURN PREMIUM.
   An insurance company need not offer to return the premiums paid on a policy before insisting upon its invalidity by reason of breach of conditions contained in it.
4. SAME—RIGHTS OF CREDITORS OF INSURED.
   When an insured has violated the conditions of a policy, the creditors of the insured have no better right to compel the payment of the policy under a process of garnishment against the company than he himself.

Commissioners' decision. Appeal from district court, Lampasas county; W. A. BLACKBURN, Judge.

P. J. Willis & Bro., appellees, brought suit, by attachment, against one G. W. Scott, in the district court of Lampasas county, on seventeenth of