No. 14826 A

Supreme Court of Illinois

J. J. Wallenton

vs.

Doolittle

71641

Mr. Chief Justice Walker delivered the opinion of the Court:

Walker v. The United States Court of Claims to the title in controversy, based upon two conveyances made by the same person, at different times to different persons. Murat, in 1844, conveyed the lots to Bodisco, the father of the intestate, who died soon, however, not to exist until the 22nd day of September, 1858. He made a deed to Bailey, on the first day of November, 1858, and this letter was not delivered the following day. Bailey obtained the premises to Nid on the 23rd day of October 1858, and the deed was recorded on the same day. Nid conveyed to Pretty-man by deed dated the first day of February 1859, which was recorded on the succeeding day. Pretty-man sold the premises to Priddy by deed of the date of the 17th of May 1859, which was recorded on the 26th of that month. Priddy conveyed to plaintiff on or on the 6th of December 1860, and his deed was recorded on the following December.

[illegible] the title [illegible] the three years [illegible] settlement [illegible] the [illegible] to the city

= ceate of acknowledgment of the notary
Public, before whom it was attempted
to be executed. To prove its execution
Minard, the grantor, was called as a
witness. It was objected that he was in-
= competent as a witness because the
deed contained covenants of warranty
but the court, against the objection,
admitted him and allowed him to
testify, which is now assigned as
error. We are aware of no case wh-
= ere most decidedly, of permit-
= ting the grantor by deed containing
covenants of title, to give evidence
in a case, in which the validity of
the title is involved. Such a person
has, it is believed, always been held to
have a disqualifying interest in the
event of the suit.

It is insisted in this case, that the
witness is called against his interest.
That it was his interest to invalidate
the deed, and thereby avoid his cove-
= nants. This is not the true attitude of
the grantor. It is certainly his in-
= terest to support the title which
he covenants to make good. It does
it follow, that he is not a competent
the deed is set aside at the time of

liability on his covenants. A failure
to record deeds fix the failure of
title, which deeds not disputed.
Held it would appear a material link
in the chain of evidence to establish
his liability. Nor could he in an action
on a covenant on the deed establish
the deed to have been paid, by showing
that the land could not be recovered
to him. This difficulty arises when it is shown
that no title passed by the execution
and delivery of the deed, then liability
is established under his covenants. It does not follow, that because
the deed was not registered, prior to
the time that parties, that if the agreement
was not between the parties
to the instrument, as between them
and as a covenant, it might be proved as any other written instrument,
and, while it is to be read in evidence.
In an action of covenant it would
require a higher degree of proof, than as
a deed executed upon valuable consideration.
Thus it will not be necessary to bring a
witness to prove the deed not a
party to the agreement as a covenant.

It was also urged, that the question

in possession thereof to retain, that he gave Bailey notice, at the time he executed the quit claim deed to him, that he had sold all the lots he had formerly owned in Pekin, and had no property at that time in the city. Each fact of this evidence was to defeat the title of plaintiff, in every thing showing that he had notice at the time he purchased. He was incompetent to prove this fact to the jury and for the same reason, that he could not prove the execution of his deed to Bailey. He therefore does not controvert the further assignment of this question unnecessary.

It is again urged, that Durand was not liable on his covenants, because it appears that he had title at the time he entered into them, and that he could not become liable, for a failure of title subsequently occurring. This would no doubt be true, if the title, into [illegible] from the acts or omissions of the grantee or other parties; but it cannot avail the heirs, where the title was paid by the ancestor himself. He covenanted that he would forever warrant and defend the title against

all persons ~~claiming~~ claims as persons rch
= under him. And this must embrace any
claim which he might assert, or rig
= ht warrant to any other person by
the execution of which the title was
created or derived. The operation of a
covenant of this character, surely can
= not be so narrow, that because the
grantor has title when the conveyance
was made, that he may, in spite of
his covenant, convey absolutely, and
= by the process so as to defeat the ti
= tle he has covenanted to defend. Nor
could he with propriety, defeat the
title of the grantee into escape liability
on his covenants by disposing of
other property or voluntarily acknowl
edge the title, that after entering
into such a covenant that he may
in spite of the rights of his grantee
defeat the title and escape liability on
his covenants. The object of his grant
= to be vested his deed does not authori
= ze him to ~~[illegible]~~ [illegible] he has a
[illegible] which is [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible]

It is likewise insisted, that the terms of Mercer's ~~deed to Bass~~ quit claim deed to ~~Abbott~~ Bailey, do not embrace the lots in controversy. The language employed is this; "All lots, Blocks, lots and fractional Blocks, or any interest therein, in the town of Peking, County of Tazewell, said State of Illinois, that I have, also all my right and interest, or in anywise appertaining, together with the right of Wash. Mercer is intended to convey all the interest the said Wm. Mercer had in the town of Peking, now city, in said ~~the~~ county." ~~was intended.~~ The language used clearly manifests the intention of the grantor, to limit the operation of the conveyance to such lots as ~~he~~ Wm. Mercer owned, and the title to which was still in him. Whilst a quit claim deed is effectual to pass title as a deed of bargain and sale, still it, like all other contracts and agreements must be expounded and enforced according to the intention of the parties. As this is the intention of Mercer appears to have been ——— to sell such lots as ~~he~~ he had not been compelled by ~~him~~ to the parties to convey, ——— other ~~lots~~ title.

In Dunlap's Reporter's Abstract, 1 Volume, 444; Wilkinson vs Ross, 4 Scam 117.

Ante Buttrick vs Smith, 11 Ill. 485. It was held that qualifying clauses, in which sim-
ilar language was used, did not operate
to pass the title as against prior unrecord-
ed deeds. That the deed limits the operation
of the conveyances to bars the grantor
and his heirs not previously conveying
or, and that the words took the deed
subject to the reservation and vested
lands by its terms.

The question then presents itself,
whether Marsh's insufficiently recited
deed is embraced in the reservation. By
fair construction the language must
be restricted to previous conveyances,
legally executed and operative as such.
A deed to be conveyance within the lan-
or even valid as the time of executing
the subsequent conveyance could not
be held to be embraced within the reser-
vation. It not unfrequently happens, that
the subsequent deed is designed to avoid
a prior one, which the grantor has the le-
gal right to avoid, and such conveyances
are expressly excepted out of the reservation
as the deed before us. Again, the language
is restrictive in not to embrace any
deed. The word is interpret-
ed by every

given it effect as such a conveyance of it
by it has been so recited that it cannot
be proved so, as to be admitted in evidence
as a conveyance, it can not have effect
as, and cannot be held to constitute a
conveyance. If for want of ~~conveyance~~
proof, or from other defect it cannot
be used in the assertion of the right to
hold the title, it cannot be held to be
a conveyance of the title to the land.
In such a case the title legal title ~~and~~
~~never passes~~ from the does not pass from
the vendor, but remains in him at the
time the subsequent conveyance is
made, and falls fully within the oper-
ation of the ~~conveyance~~ such a deed.
At law the title at the time
it must be ~~conveyed~~ by the language
~~in the deed~~ in the deed. This deed is intended
to convey all the interest of the said
Chamberlain was in the town of Fairview, and
being the legal title at the time, it was
an interest that passed by the conveyance
to Bailey.

This view of the case makes it unnecessary to discuss the question of notice at this time. Both parties in error claim under deeds executed by a legal conveyance they are not in a position

to call upon plaintiff in error to pro-
duce any evidence of title. The first step
they were bound to take to entitle a
recovery was to show that Mercado's title
was passed to and vested in them. By un-
able to show that they ~~had legal title~~ had no remedy
at law, they must, if they have any rights,
be left to assert them in a court of equi-
ty, where the questions of notice as well
as all other equitable questions would be
considered.

The judgment of the court below is
reversed and the cause remanded.

Judgment reversed.

J. J. Hamilton

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M. D. Hamilton

1826

Quincy

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