No. 14018

Supreme Court of Illinois

Marston

vs.

Nokes

Stephen N. Marston
vs
Hansom Wakes

Supreme Court.
Dec. Term 1853

Ejectment brought by Marston against Wakes: Jury waived and trial by the Court.

Pff gave in evidence
1. Patent from U. States to Phillips N. Hackett dated June 3. 1818
2. Deed from Hackett to pff bearing date December 15. 1818 and recorded February 4. 1820 in Madison County.

Possession of the defendant was admitted.

Def. gave in evidence
1. Patent from U. States to Phillips N. Hackett, dated June 3. 1818.
2. Deed from Hackett to Romulus Riggs, dated April 22. 1818 and recorded December 30. 1821 in Pike County.

It was admitted by the counsel on both sides that neither of the foregoing deeds was ~~executed~~ acknowledged in conformity with the laws of Illinois in force at the date of such acknowledgments, but that both deeds were executed & acknowledged in conformity with the laws of Massachusetts in force at the date of said deeds — both of said deeds having been executed in Massachusetts.

It was further admitted that ~~that~~ three years before the commencement of the suit — that is in the year 1849 — the defendant took possession of the premises under a contract of purchase from said Romulus Riggs and has held possession of the same under said Riggs ever since.

It was further admitted that said premises had always been vacant until possession was taken under Riggs in 1849, and that all the taxes levied on

said land since 1825 to the commencement of the suit had been paid by both Riggs and Marstin – each party having paid all the taxes during each year, and each party producing the proper tax receipts from 1825 to 1852.

On this evidence and there admissions the Court gave judgment for the plf. and the defendant appealed.

William Lawrence
Atty for appellant.

Marstin
vs
Walker
Appeal

Martin

vs

Noakes

Plfs title. Deed from patentee to plf. bearing date Dec. 15. 1818 and recorded July 4. 1820 in Madison County.

Defs. title. Deed from patentee to Riggs dated April 22, 1818 and recorded December 30, 1821 in Pike County.

Taxes paid by both parties from 1825 to 1849 during all which time land was vacant.

Both deeds were executed under the Territorial act of ~~Sept~~ Sept. 17, 1807: Peoples Statutes, page 459 sects. 8 and 13.

Sect. 8 provides for deeds executed within this State, directs that they shall be recorded and gives one year for the recording.

Sect. 13 provides for deeds executed without the State — directs how the deed shall be executed and acknowledged, and enacts that when thus executed and acknowledged the deed shall be as valid and effectual as if executed within the State according to the provisions of Sect. 8.

Both these deeds were executed in Massachusetts and neither of them in conformity with the 13th section of said act. That section is the only one in the act relating to such ~~deeds~~ extra-territorial deeds and therefore there is nothing in the act which applies to these deeds. They are not made valid and effectual by it, and there being no provision of the statute affecting them in any way, it follows that as between themselves they take effect under the common law according to their priority

of date.
Although both deeds were actually spread upon the record, yet neither of them was legally recorded, and are to be considered as if neither had been reduced to record.

Chotteau v. Jones 11 Ills. 220

Thus the matter stood — neither deed being considered as recorded — until the passage of the act of Dec. 30, 1822. Purples Statutes 465.
By force of this act both deeds were recorded by operation of law on the 30th December 1822, the day when the act took effect.

Chotteau v. Jones 11 Ills. 322.

As the act operated upon both deeds at the same moment, and reduced them to registry together, and as the act does not attempt to change the effect of the deeds, the oldest must prevail.

A similar construction has been applied to the registry act of 1833

Doyle v. Teas 4 Scam. 252

It was held in this case that the deed first recorded must prevail and as there is here no priority of record, the priority of date must prevail.

11. Admitting that the 8th section of act of 1807 applies to deeds made out of the State how stands the matter.
Each party was entitled to one year in which to record his deed. The defendants deed bears date April 22. 1818; the plfs Dec. 15, 1818. Plf to April 22, 1819 ~~had the~~ both the defendant had the better title, and from April 22, 1819 to December 15. 1819 the ~~dft~~ plf had the better title. if he legally recorded his deed.

~~according~~ Who had the better title after that date? Neither having recorded in the time allowed by law, both deeds stand as if the act had never been passed and the eldest deed takes. This is fully settled in principle by Ex parte Penn Iron Co. 7 Conn. 540-1, 559

The 1st section of the act of N. York concerning judgments passed April 2. 1813 (1 R.L. 505) provides that judgments shall be a lien on lands, "provided that no judgment hereafter rendered shall be or remain a lien on any real estate or in any manner encumber the same against bona fide purchasers or subsequent incumbrancers by mortgage judgment or otherwise for any longer time than ten years from and after the 9th day of April 1811." This act is identical in principle with the above registry act. One required the deed to be consummated by record in one year. The other required the lien of the judgment to be consummated by sale in ten years. One provided that unless the deed was thus consummated it should be void as against subsequent purchasers. The other provided that unless the judgment lien was thus consummated it should be void as against subsequent incumbrances. Neither act provides that the deed or judgment should be void as to prior ~~incumbrancers~~ purchasers or incumbrancers. By the mere letter of the acts a subsequent deed, though not recorded in time, would hold as against a prior unrecorded deed, and the lien of the ~~judgments would~~ subsequent judgment would continue as against a prior judgment. But in the above case the Supreme Court of N. York held that where two judgments were rendered against the same person, and ten years had expired from the rendition of the last, then

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the elder judgment again took precedence.
On principle this decision is directly in point and decides that the elder deed, while both remained unrecorded, and after the time for recording both had expired, had priority. Then came in the curative act of 1822 which restored them both to record at the same instant, without attempting to change their effect.
Whether if at the time of the passage of the curative act, the defendant had the title under the elder deed, the legislature could not by the passage of that act divest.

This exact question came up under the recording acts of Kentucky and in a very well considered case was settled by the Supreme Court of that State in favor of the elder deed, the time for recording both having expired
See Taylor v. McDonald 2 Bibb 421

See also Coleman v. Talbott 2 Bibb 129.

III. The 1st deed was recorded in Madison County. When the curative act of 1822 was passed, Pike County had been organized, and the land lying in Pike, the deed could not be recorded in Madison.

IV. Both parties had paid the taxes. The land was vacant till 1849. The defendant had a clear color of title, his title being good on its face. The second section of the act of 1839 for quieting possession and confirming titles provides that a person paying taxes on vacant land for seven successive years

and confirming titles provides that a person paying taxes on vacant land for seven successive years

~~shall be~~ under color of title shall be held and adjudged the legal owner of said land. The defendant is in the precise words of the law, ~~and attempts~~. He has color of title and he has payed all the taxes for seven years, and although the plff has also paid them, yet the defendant is in possession and the Courts will not disturb him. "Melior est conditio possidentis."

See 2 Bibb 129 Coleman v. Talbot

Marston
v
Noakes

Brief

C. B. Lawrence

Alanson Stokes Appellant
vs Brown
Stephen N. Manston Appellee

Eject. Brown Circuit Court to Oct. term 1852 for
N. W. 29 15. 4 W.
Trial April term 1853 taken under advisement to October term 1853 when court found for plff. and rendered judgment.

Testimony for plff.
Patent to Philipps N. Hackett date 3rd. January 1818.
Deed Philipps N. Hackett to S. N. Manston plaintiff date 15th Dec. 1818 acknowledged same day.
Recorded in Madison Co. 4th Feb. 1820
Admitted that deed acknowledged in conformity with laws of Massachusetts in force at time of acknowledgment. and not of Illinois.

Defendants testimony patent to Hackett.
Deed from Hackett to Romulus Riggs date 22 April 1818.
Acknowledged 22 April 1818
Recorded in Pike Co. 30 Dec. 1821.
~~acknowledged~~
admitted that deed was not acknowledged in conformity with laws of Illinois but in conformity with laws of Massachusetts in force at time of acknowledgment.

Statute Aug. 1. 1795-
Provided Mode of acknowledging deeds within the territory-
to be recorded within twelve Months after execution, or to be void as to subsequent purchaser or Mortgagee for value, unless recorded before deed of subsequent purchaser or Mortgagee.
Real Estate Stat. 452.

Act of Jan. 20. 1802
§1. Provides for recording deeds previously or afterwards ~~to be~~ acknowledged in Conformity with laws of other State or County, to be as valid as if acknowledged according to Territorial laws, if recorded within two years from passage of law.
§2. Deeds acknowledged out of State not to be recorded unless accompanied by certificate of Clerk, Prothy. or Notary, that acknowledgment was before Competent authority and according to laws of place where taken, then to have like effect with deeds acknowledged in territory.
§ To be recorded within one year or deemed fraudulent as to subsequent bona fide purchasers.
§ 5. Repeals former acts within provision.
Real Estate Stat. 457

Act of Sept. 17th 1807

§ 8. Provides mode of acknowledgment within the State - to be recorded within twelve months in recorders office of County, or to be void against subsequent purchaser or Mortgagee for value, unless deed recorded before deed of subsequent purchaser or Mortgagee

§ 13. Provides mode of acknowledging by persons not residing in the ~~State~~ territory, them to have like effect as tho acknowledged in territory.
No repealing Clause.
Real estate Stat. 460.

Act of 19th Feb. 1819

§ 8 Provides Mode of acknowledging deeds within and without State. To be recorded within twelve months after execution, or to be void against subsequent purchaser or Mortgagee for valuable Consideration unless such deed &c be recorded before recording deed of subsequent purchaser &c
Laws. 1819 p. 19.
Act. 30th March 1819 repeals laws of 1802 & 1807 Laws 1819 p. 351

Act. Dec. 30th 1822.

§ 1. Deeds acknowledged according to laws when made, declared good and

Act of Sept. 17th 1807

§ 8. Provides mode of acknowledgment within the State - to be recorded within twelve months in recinders office of County, or to be void against subsequent purchaser or Mortgagee for value, unless deed recorded before deed of subsequent purchaser or Mortgagee

§ 13. Provides mode of acknowledging by persons not residing in the ~~State~~ territory, them to have like effect as tho ~~acknowledged~~ in Territory. No repealing Clause.
Real estate Stat. 460.

Act of 19th Feb. 1819

§ 8 Provides Mode of acknowledging deeds within and without State. To be recorded within twelve months after executions, or to be void against subsequent purchaser or Mortgagee for valuable Consideration unless such deed &c be recorded before recording deed of subsequent purchaser &c
Laws. 1819 p. 19.
Act. 30th March 1819 repeals laws of 1802 & 1807 Laws 1819 p. 351

Act. Dec. 30th 1822.

§ 1. Deeds acknowledged according to laws where made, declared good and

available in law and to be recorded as if executed in pursuance of law of this State.

§2. Deeds heretofore executed and acknowledged and recorded declared duly executed.

Laws. 1822. p. 85. Purple 465—

The act of 1807 was in force at time of execution of deed offered by plaintiff; under its provisions twelve months having passed between date of ~~deed~~ deed to Riggs and time it was recorded the deed to Riggs became void by operation of law so far as rights of plaintiff are concerned.

The title therefore passed to plaintiff by the execution & delivery of deed to him he being a subsequent purchaser.

No Conveyance subsequent to that to plaintiff being in evidence, the clause of act of 1807 as to recording within a year does not operate on deed to plaintiff.

Northrups lessee vs. Brehmer 8 Ohio 392.
McCaskle vs Amarine 12 Ala. 23.
× Orth vs. Emmings 8 Black. 425.
× Johnson vs. McGee & Thomas 1 Ala. N. Series 191
Steeles lessee vs Spencer et als. 1 Peters 5-5-2.

Deed not being recorded concerns no one but a purchaser from same grantor by deed of subsequent date
Roe vs. Doe et als. Dyallers Reports 170
Whittington vs. Doe 7 Georgia 29

Recording act of N. Y. 1848 makes
unrecorded deed void from
time of recording of subsequent
deed and not before
Strong vs Dullner 2 Land. Sup. Ct. R. 444
444

Two deeds from same person to different
grantees, neither recorded within sixty months
the oldest deed was after the sixty months
first recorded – held that first recorded
deed passed the title – possession under
second deed subsequent to making first
did not affect question 10 Watts
Lightner vs. Mooney 10 Watts 407. 411

The deed to plaintiff was an operative Conveyance to pass title to him so far as respects the prior deed to defendant which had become void by operation of law.

It becomes then a mere question of evidence as between plaintiff with the legal title, and defendant an occupant of the land as to whether or not the deed of plaintiff is properly authenticated so as to be admissible in evidence.

Dye vs. Kelsey
Ashworth vs
3. McLean 385

We insist that the act of 1822 makes the deed of plaintiff admissible in evidence if it was acknowledged according to laws of Massachusetts in force at time acknowledgments were taken.

See act 1822 p. 85—

The admission in record shows that acknowledgment was taken according to laws of Massachusetts.

Notary

Under the act of 22 Jan 1829 Real estate Stat. $1 p. 487 all deeds which have been or may be acknowledged or proved before a Notary Public &c under seal shall be good and valid as if acknowledged according to §9 of act 1827.

We insist that this deed is admissible in evidence under that act of 1829. Whether recorded or not there being no subsequent purchaser.

Act of 1837 Real estate Statutes p. 496
Deeds are to be taken as notice to
subsequent purchasers from time of
recording whether acknowledged or
proved in conformity with laws of State
or not.
Cannot be read in evidence unless
execution proved. This act applies to
deeds before as well as after act.
The necessity of proof of execution is
obviated by admission that it is
acknowledged according to laws of
Massachusetts.

Act of 22. Feb. 1847 Session Laws 1847
p. 37. in connexion with ad-
mission of Conformity with Laws
of Massachusetts would entitle
this deed to be read in evidence.

The law of 1839 cannot avail defendant
he does not pretend to seven years pos-
session - but under the Clause applicable to
vacant land Real estate Stat 426
Both parties having paid taxes, such
payments offset each other - any
rights derived under that act must
accrue equally to both parties, & they
are thrown back onto the strength of
their respective titles without reference
to this act of 1839.

The plaintiff is within the saving clause - the major includes the minor, having paid seven years he certainly has at least equal claim under that law as if he had paid one or two years.

The deed of Patentee to Riggs after expiration of a year and failure to record and subsequent conveyance to Marston was not colour of title in Riggs hands.

Aukes
vs
Marston

Brief
J. Grimshaw
for Appellee

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