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No. _____

Supreme Court of Illinois

Thomas

vs.

Eckard et al

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SUPREME COURT.

Central Grand Division.

JANUARY TERM, 1878.

WILLIAM THOMAS,

Impleaded with J. M. Ruggles,

VS.

MOSES ECKARD,

SAMUEL C. CONWELL.

APPEAL FROM MASON.

APPELLEE'S BRIEF & ARGUMENT.

1878 :

C. B. KETCHAM.

Havana, Ill.

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We are compelled in order to give the Court an understanding of this case, to give a brief statement of facts, as the abstract of appellant is so very incomplete, that the court cannot fully understand the facts therefrom; and the appellant admits—ab. p 5—that the “abstract was made from the imperfect record heretofore filed, and from memory. It is in most respects substantially correct, though some explanation is necessary, to the proper understanding of the case.” This so called abstract of appellant is more of an agreement than anything else.

FACTS:

The record shows that the case was commenced by Wm. Thomas and James M. Ruggles, against appellees, at the February term 1876, of Mason County Circuit Court, at which term a trial was had, resulting in a judgment in favor of the defendants, and that the plaintiff took a new trial under the Statute. That the case was again tried at the November term 1876, of said court, and on the second trial the plaintiff's recovered a part of the lots, in controversy, and the defendants found not guilty as to a part ; that from this judgment rendered on this last trial, the plaintiff, William Thomas, alone prosecuted the appeal, Ruggles not praying an appeal or signing the appeal bond; so that Thomas is the only appellant in this court.

To maintain the issues, and establish title, on the trial, the plaintiff's relied on the following evidence:

First:—Affidavit of common source of title.

Second:—A deed in substance, after reciting that the Illinois River railroad company has located its road on certain lands in Mason county, etc., that the grantors conveyed to William Thomas, James M. Ruggles and Richard S. Thomas, their heirs and assigns, certain lots, naming them, among which are the lots in controversy; “To have and to hold the said real estate, unto the said William Thomas, James M. Ruggles and Richard Thomas, and their assigns, in fee simple forever, as joint tenants, and not as tenants in common; in trust, with authority to sell and dispose of said lands and lots as they in their discretion shall think will best promote the object of the trust, hereby conferred on them, to-wit: The payment of the floating debt and other debts of said company not otherwise secured. * * * This conveyance shall not take effect until the plat of the town of Topeka shall be recorded.”

Which deed when offered in evidence was objected to, because it did not take effect as a conveyance, until the plat of the town of Topeka is recorded, and no such plat or record thereof is shown, and the plat has never been recorded. (But the court permitted it to be read in evidence, subject to the objection.)

The plaintiff then offered in evidence, what they claimed to be a record of the plat of the town of Topeka, in substance a map showing streets and blocks; the statement and acknowledgement of which is as follows: .

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“State of Illinois, Mason county, ss.—We, Richard S Thomas. of Cass county, and Moses Eckard of said county of Mason, have laid out a town, on part of the following lots of land, in said county, to-wit: The north-west quarter, and part of the south-west quarter, of the north-east quarter, and part of the north-east quarter of the north-west quarter, of section thirty, township twenty-two, north range seven, west of the third principal meridian, the name of which is Topeka, and caused the same to be surveyed, and this plat or map thereof to be made by the surveyor of said county, which describes truly the boundaries and number of the lots, and the position and width of the streets and alleys of said town.

Given under our hands and seals, this — day of December, 1860.

R. S. THOMAS, [seal]

MOSES ECKARD, [seal]

State of Illinois, Tazewell county, ss —The foregoing plat or map, and statement, acknowledged by the said Moses Eckard and Richard S. Thomas, they being personally known to me to be the same persons whose names are subscribed to the
• foregoing statement.

Given under my hand and seal of office, at Pekin, the 4th day of December 1860.

THOMAS KING JR.,

(seal)

Notary Public.”

Which record of the plat was objected to, because it was not acknowledged and certified to, as the Statute required.

But the court overruled the objection, and allowed the

record of the plat to be read in evidence, to which the defendants at the time excepted.

This is the substance of the plaintiff's case.

The defendants then gave in evidence,

1st. A judgment of the Mason County Circuit Court, in favor of Adam Shock, vs Illinois River Railroad Company, rendered at the October term, 1864, for \$195,92. The execution issued on said judgment to the Sheriff of Mason county, the levy of the same by said sheriff on the property in controversy, and the return showing that the property sold to Adam Shock, on the 18th day of July, A. D. 1865.

2d. The certificate of purchase issued by the sheriff to Shock on said sale, under the assignment thereof to Couwell and Eckard, by Shock. The certificate of purchase shows that the lots were sold separately.

3d. Sheriff deed in the usual form, from the sheriff of Mason county to Conwell and Eckard, on said certificate of purchase for the property. Deed dated 31st day of October, A. D. 1866, and recites the judgment obtained by Shock, the issuing of the execution, the levy, the sale to Shock, the issuing of a certificate of purchase to him, and his assigning the same to Eckard and Conwell, and is duly acknowledged and recorded.

To all of which the plaintiff objected, but the court allowed the same in evidence, for the purpose of showing color of title, as well as title.

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4th. The judgment of the County Court of Mason county, rendered at the June term, 1864, against the property in controversy, for taxes, and the sale thereunder on June 29, 1864, and plaintiff's certificate of purchase, the assignment thereof to Conwell and Eckard. The notice of affidavit required for the purpose of obtaining a deed, and a tax deed from the sheriff of Mason county to Conwell and Eckard for the property in controversy on said certificates deed, dated first day of Nov., A. D. 1866. Which was offered and read in evidence, for the purpose of showing color of title.

Defendants also proved by Conwell and Eckard, that all of the property in the declaration mentioned, was vacant and unoccupied at the time of the date of the above deeds which they had introduced in evidence, and had from the dates of their deeds to the time of the commencement of this suit, remained vacant and unoccupied, and that they, the defendants, had paid all the taxes assessed on the property from the date of their deeds and before, until the commencement of this suit.

BRIEF AND ARGUMENT.

Appellant says in his Brief that "the decision of this case depends on two deed, by force of which defendants claim title to the lots not recovered." As he has commenced at that branch of the case we will do the same.

First.—Of the sheriff's deed on the sale under judgment

and execution, of Shock vs. the Railroad Company.

It is insisted by appellant, that the judgment, execution, sale and deed, are void, because it was shown that the railroad company had ceased to exist, prior to the date of the judgment, and for the further reason, that the property sold did not belong to the railroad company.

We would respectfully suggest, that by the terms of the deed to Thomas, Ruggles and Thomas, if it ever became operative, and took effect as a conveyance, which we by no means admit, for reasons which the court will see further on in our argument, that they only held the land in trust for the benefit of the unsecured creditors of the railroad company, and that Shock being an unsecured creditor of the company, had the right to have his unsecured claim satisfied, out of the trust fund, and the levy upon and sale of the property, was only one mode of getting it.

As to their objection, that the corporation had ceased to exist prior to the judgment, and that you cannot have a judgment against a dead man or a dead corporation, there is no evidence in the record to support the appellant that the corporation was dead.

The only evidence which appellant relies on to support this assertion, is the testimony of appellant Thomas himself, and is as follows, viz:

In July 1862, the directors of the Illinois River Railroad Company, held a meeting, and surrendered to the trustee of

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the bondholders of the road, the railroad with all its appurtenances and property, of every kind that could be passed by delivery of possession, and said trustee took possession of the same. This possession was taken by virtue of the trust deed given to secure the bonds, default having been made in the payment of its interest. We have yet to learn that the possession of the property of a corporation, under a trust deed, extinguishes the corporation, or renders invalid a judgment of a court of competent jurisdiction, against such corporation.

II.

It is also insisted that this deed was not good, as color of title, for which purpose it was introduced as well.

The reasons assigned why it is not good as color of title, are: that it appears on the face of it to be a void deed.

The deed on its face bears no such proof, on the contrary, it complies with the law in every respect.

Gross' Stat. ch. 57, sec. 22.

While a substantial compliance is all that is necessary, and a mere clerical error, or erroneous statement, not going to the substance, would not render it void, there is no such error in the deed.

No reason is assigned why it is void on its face. What we presume counsel intended by that statement, was that the deed was void, because the judgment and sale, as he insists, were void. But that if true, would not render the deed void on its face, so as to render it inoperative as color of title.

When a deed purporting to convey title, is executed under a decree of court of general jurisdiction, and by a person having power to execute the deed, it is color of title, though the decree may have been erroneous and even void.

Huls vs. Burton, 47 Ill. 396.

Hasset & Ridgely 49 Ill 197.

A person relying on color of title need not go back of the instrument which constitutes this color, nor can it be defeated by previous defects. If the instrument purports to convey title and is taken in good faith, it is sufficient, and the law presumes that all acts are done in good faith, until then is evidence to the contrary, and color of title is presumed to have been thus acquired, until it is shown that it has been acquired otherwise.

McCagg vs Hancock, 34 Ill. 476, 479.

Brooks vs Bruyn 35 Ill. 392.

Morrison vs Norman, 47 Ill. 477.

Chickering vs Failes, 26 Ill. 508.

Dickenson vs Breeder, 30 Ill. 280.

There is nothing in this case, showing, or tending to show that this deed was not taken in the utermost good faith, and in fact, it was so taken. It is executed by the sheriff, who was the proper officer to execute it, it purports to convey to appellees the title to the property, they being the assignees of the Shock certificate of purchase. We therefore insist that it was good as color of title, even if not as paramount title.

What has been said in reference to this first as color of

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title, is equally applicable to the tax deed, which was given in evidence, as color of title alone; and the objection urged by counsel are not well taken. They might be well founded if the tax deed was offered as paramount title, but error and defect in the proceeding which would vitiate it as paramount do not vitiate it as color of title.

Bowman vs. Wettig, 39 Ill. 416.

And the tax deed was color of title, under the seven years limitation act.

Bailey vs. Doolittle, 24 Ill. 579.

That Conwell and Eckard paid all the taxes from 1866 to 1876, a period of ten years, is not denied. Their evidence on that is clear and explicit that they did, and that during all that time, all of the property, to recover which the plaintiff brought this suit, was vacant and unoccupied.

That being true, the defendants establish a complete defence, under the ninth of the conveyance act. See Gross' statute, chapt. 24, sec. 9.

III.

We now ask the court's attention to another branch of this case: Appellee's have assigned two cross errors, viz:

1st. That the the circuit court admitted improper evidence on the part of the plaintiffs, that is to say, the deed to Wm. Thomas, James M. Ruggles and Richard Thomas, and and also the purported record of the platt of the town of Topeka, ought not to have been admitted, and

2d. The finding and judgment of the court should have been for the defendants, for all of the property.

It is a well established rule of law, that the plaintiff in ejectment must recover, if at all, on the strength of his own legal title.

Pitkin vs Yaw, 13 Ill. 251.

Joy vs Beedell 25 Ill. 537.

We insist that plaintiff's did not make out a legal title in themselves.

The deed upon which they rely, never went into effect by the terms of its own litigation, viz: "This conveyance shall NOT take effect UNTIL the plat of this town of Topeka shall be recorded, but shall take effect from such recording." The plat of the town was never recorded as is claimed.

There is nothing said in the deed how, when, or where, the plat shall be recorded, but the statute fixed that.

The statutes in force at the time when plaintiff's claim the plat was recorded, viz. 1860, provides: "The plat or map after having been completed, shall be certified to, by the surveyor and county commissioners, and every person whose duty it may be to comply with the forgoing requisitions, SHALL at, or before the time of offering said plat or map, FOR RECORD, ACKNOWLEDGE the same before a JUSTICE OF THE SUPREME COURT, JUSTICE OF A CIRCUIT COURT, OR A JUSTICE OF THE PEACE IN THE COUNTY WHERE THE LAND LIES, a certificate of such acknowledgement, shall be by the officers taking the same, indorsed on

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the plat or map, which certificate of the surveyor, and acknowledgment shall also be recorded and form a part of the records."

Gross Statute, chap. 25, sec. 38.

Before the plat could be recorded this plain requirement of the statute must have been complied with, and there could be no record until it was acknowledged as required by the statute.

Sample vs Miller, 2 scam. 315.

Shehard vs Caniel, 19 Ill. 313.

There was no authority for King, a Notary Public, of Tazewell county, to take the acknowledgment, it could only be done by one of the three officers, especially provided by the statute, viz: A Justice of the Supreme Court, a Justice of the Circuit Court, or a Justice of the Peace in the county where land was situated:

It seems unnecessary to spend further time on this point, for, until the plat was properly acknowledged, it could not be recorded, and the deed could not take effect until the plat was legally recorded. The acknowledgement is also further deficient, as it does not state what Eckard and Thomas acknowledged, nor for what purpose.

We ask this court to consider our whole brief and argument, not only as a reply to what appellant has said, but also in support of our cross errors, and we ask that the question raised may be fully considered, and passed upon by the court and that the judgment be reversed on our cross-errors, at the cost of appellant.

By E. A. WALLACE, & S. C. CONWELL,

Attorneys for Appellees.