Michigan Law Review

Volume 50 | Issue 5

1952

REAL PROPERTY-NOTICE-RECITALS IN UNRECORDED DEEDS IN CHAIN OF TITLE

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REAL PROPERTY—NOTICE—RECITALS IN UNRECORDED DEEDS IN CHAIN OF TITLE—The plaintiff, Eiring, owner of all rights in a tract of land, attempted to convey certain mineral rights to Earnest by deed. The alleged rights passed from Earnest by subsequent mesne conveyances to McMillan, and, on the death of McMillan, to the defendant as trustee. Eiring brought an action against the defendant in statutory trespass to try title to the land. In the deed from Eiring to Earnest blank spaces were left in the granting clause. *Held,* the blank spaces rendered the deed void, and the deficiency was not cured by reference to another indefinite deed. After holding this, the court went on to dispose of the other points in the defendant's case, as a matter of "academic interest," and in a dictum said that "a grantee of land is chargeable with notice of the facts appearing in all the deeds in his chain of title, whether recorded or not."[1] *Republic National Bank of Dallas v. Eiring,* (Tex. Civ. App. 1951) 240 S.W. (2d) 414.

The general proposition that a grantee of land is charged with notice of all the recitals in the instruments on record which form his chain of title, and are

[1] Principal case at 417.

material thereto, is universally accepted by both the courts[2] and text writers.[3] This proposition is often extended to charge the grantee with notice of all the recitals in the unrecorded deeds making up his chain of title.[4] It is submitted that this extension places an undue hardship on the grantee in that it requires that he take notice not only of the recitals in recorded deeds, to which he has access by looking at the public record, but also to those in unrecorded deeds which may be entirely out of his reach.[5] This rule had its roots in England,[6] where it was customary for the grantor to turn over all the title deeds in his chain of title to the grantee at the time of the conveyance of title.[7] If for any reason the grantor did not turn them over, the grantee was not bound to complete the purchase.[8] It is not difficult to understand that, under such circumstances, with the title deeds in his actual possession, the grantee was charged with notice of what they contained, and in view of the English doctrine of equitable mortgage,[9] if one of the deeds was missing, it would seem reasonable to charge him with notice of an outstanding equitable interest. However, in this country, the recording acts have supplanted the English custom of physically transferring title deeds, and original title deeds are not necessary muniments of title.[10] If the deed containing the recital is not on record, there would appear to be no reasonable way, if indeed any way at all exists, for the grantee to discover the nature of the recitals in it. Any finding of constructive notice of such recitals ignores reality,[11] unless there are sufficient extrinsic facts to put

[2] Sweet v. Henry, 175 N.Y. 268, 67 N.E. 574 (1903). "There is no principle of law more elementary or better founded in reason than that all persons claiming an interest in . . . real estate are bound to take notice of the recitations in a duly recorded instrument in the chain of title of their grantor." Old Line Ins. Co. v. Stark, 126 Neb. 96 at 101, 252 N.W. 616 (1934). See also McKay v. Williams, 67 Mich. 547, 35 N.W. 159 (1887).

[3] 2 POMEROY, EQUITY JURISPRUDENCE, 5th ed., §626 (1941); 5 TIFFANY, REAL PROPERTY, 3d ed., § 1293 (1939).

[4] Runge v. Gilbough, 99 Tex. 539, 91 S.W. 566 (1906). It will be noted that the court pointed out in that case that the plaintiffs were guilty of great negligence for failing to "use the means which the law provides, to inform themselves of the state of title they seek to acquire." See also Baker v. Mather, 25 Mich. 51 (1872); 2 POMEROY, EQUITY JURISPRUDENCE, 5th ed., §628 (1941).

[5] Care should be used to distinguish between cases in which the deed or instrument recited is unrecorded [e.g., Texas Co. v. Aycock, 190 Tenn. 16, 227 S.W. (2d) 41 (1950)] and those in which the instrument containing the recital is unrecorded [e.g., cases cited in note 2 supra].

[6] Bacon v. Bacon, Toth. 133, 21 Eng. Rep. 146 (1639); Moore v. Bennett, 2 Ch. Cas. 246, 22 Eng. Rep. 928 (1687).

[7] 55 AM. JUR., Vendor and Purchaser §178 (1946).

[8] Barclay v. Raine, 1 Sim. & St. 449, 57 Eng. Rep. 179 (1823). In England, the mere deposit of title deeds with another as security for a debt establishes an equitable mortgage on the land in favor of the one possessing the deed. Thus, if one of the deeds of the grantor's chain of title is missing, it is notice to the grantee that there may be some outstanding equitable interest, and in such a case he cannot be a bona fide purchaser. Ex parte Langston, 17 Ves. Jr. 115, 34 Eng. Rep. 88 (1810).

[9] See note 8 concerning equitable mortgage.

[10] 55 AM. JUR., Vendor and Purchaser §178 (1946).

[11] It is clear that the recording acts do not give the grantee constructive notice of the recitals in an unrecorded deed, since those acts are designed merely to provide notice of what

the grantee on inquiry, in which case he may properly be held to have notice of whatever he could have discovered by reasonable inquiry.[12] It is submitted that the present rule, founded upon good reason in England, is without reason in the United States. At least one court has rejected it, and instead adopted what is submitted to be the more realistic approach to the problem, namely, no constructive notice is given to the grantee when a deed containing the recitals is not on record.[13]

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appears in the record. In Ebling Brewing Co. v. Gennero, 189 App. Div. 782, 179 N.Y.S. 384 (1919), the court pointed out that since the English doctrine of equitable mortgage does not prevail in the United States, the fact that a deed was missing from the record would not warrant the assumption that there was an equitable charge outstanding, and the grantee was held not to have constructive notice of the recitals in an unrecorded deed. See also Old Line Ins. Co. v. Stark, supra note 2; Hubbard v. Knight, 52 Neb. 400, 72 N.W. 473 (1897); Smith v. Huntoon, 134 Ill. 24, 24 N.E. 971 (1890). In these cases, the deeds containing the recitals were all on record, and the courts emphasized that fact, giving rise to the inference that perhaps they would not find constructive notice to the grantee if they had not been on record.

[12] As to what facts are sufficient in the ordinary case, see generally 55 AM. JUR., Vendor and Purchaser §§696-703 (1946).

[13] Ebling Brewing Co. v. Gennero, supra note 11.