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Notice by Possession of Real Property v. Record Title

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COMMENT

NOTICE BY POSSESSION OF REAL PROPERTY
v. RECORD TITLE*Been Abrogated in Indiana?*

Has the Rule that Open and Notorious Possession of Real Estate under an Unrecorded Contract is Notice to Third Persons Been Abrogated in Indiana?

By HARVEY B. HARTSOCK *

The case of *Mishawaka, St. Joseph Loan & Trust Co., et al. v. Neu, et al.*, 196 N. E. 85 (Ind. Supreme Court, May 24, 1935), if followed, will be the historic case which, for Indiana, ended the rule that open and notorious possession of real estate under an unrecorded contract for acquiring title to, or interest in, the same is notice to third persons; the case which made it unnecessary for a purchaser, mortgagee or lessee to inspect the premises to ascertain whether anyone is in possession thereof claiming rights under unrecorded instruments and authorized one acquiring title to, or interest in, real estate to rely solely upon the record, in the absence of actual bad faith on his part.

Those interested in the Indiana history of the above-mentioned rule may find it in *Moreland v. Lemasters*, 4 Blackford 383; *Earle v. Peterson*, 67 Ind. 503; *Barnes v. Union School Township*, 91 Ind. 301; *South Side State Bank v. Snyder*, 92 Ind. App. 433, 176 N. E. 52.

The wide adoption of such rule throughout the United States is revealed by the following notes: 20 R. C. L. 342, 27 R. C. L. 726, 87 A. L. R. 1529; and by cases therein cited.

Through the ages prior to recording statutes, one's rights in property depended upon his acquiring and maintaining possession thereof. Much could be written about the adoption and development of statutes requiring recording of written instruments evidencing title to, or interest in, real estate in this and other countries. Even the history of the section of the statute cited in and governing the instant case, shows the tendency to rely more upon records and less upon possession. From 1852 to 1875, this statute gave 90 days for recording before the instrument would be "fraudulent and void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration." Between 1875 and 1913, such period was only 45 days. Since the amendment of 1913, "every conveyance, mortgage or lease shall take priority according to the time of the filing thereof, and such conveyance, mortgage or lease shall be fraudulent and void as against any subsequent purchaser, lessee or mortgagee in good faith and for a valuable consideration, having his deed, mortgage or lease first recorded." The elimination of the "45 days" provision, leaves the one

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who is tardy in recording his instrument only the remedy of proving absence of good faith or of consideration on the part of the one who has first filed his deed, mortgage or lease.

Until the Supreme Court's decision in *Mishawaka, St. Joseph Loan & Trust Company v. Neu*, one presenting a deed, mortgage or lease for recording, must at his peril know the rights of anyone then in open and notorious possession of the real estate involved and his failure to ascertain and know the same could be used as proof of his lack of "good faith" in an action to enforce his rights by the one in possession. In this case, a casual inspection of the premises by the mortgagee four days before the execution of the mortgage was deemed by the Supreme Court sufficient evidence of "good faith" on the part of the mortgagee in the absence of proof of its actual knowledge of any rights or interest in the property by plaintiffs who had contracted to purchase the property of the mortgagor, paid part of the purchase price and had moved into the premises two days before the mortgage was signed and was in open and notorious possession thereof when the mortgage was executed and recorded.

If the decision in this case remains the law of this state, it will simplify the questions involved in taking title to, or an interest in, real estate. The one acquiring the same need look only to the record in the absence of actual notice to him that there is one in possession of the same who may claim rights or interests therein contrary to his. But the plaintiffs in this case, who had to act without the benefit of the Supreme Court's decision therein, doubtless feel that although they acted under the law as it was, their case was decided under the law as the court thought it should be. Transitions are seldom made without injury to someone.