

**SPURGEON
vs.
HUGHES**

No. 3018

SUPREME COURT OF NEW MEXICO

1927-NMSC-041, 32 N.M. 436, 258 P. 350

May 26, 1927

Appeal from District Court, Catron County; Owen, Judge.

Rehearing Denied August 23, 1927.

Action by G. S. Spurgeon against Levi A. Hughes, receiver of the Livestock & Agricultural Loan Company of New Mexico. From an adverse judgment, defendant appeals.

SYLLABUS

SYLLABUS BY THE COURT

Under Laws 1915, c. 71, as amended by Laws 1917, c. 74, recording a chattel mortgage, without filing or minuting, is sufficient for constructive notice.

COUNSEL

Marron & Wood, of Albuquerque, and J. O. Seth, of Santa Fe, for appellant.

J. G. Fitch, of Socorro, for appellee.

JUDGES

Watson, J. Parker, C.J., and Bickley, J., concur.

AUTHOR: WATSON

OPINION

{*437} {1} OPINION OF THE COURT This suit is a contest for priority between two chattel mortgages. Appellee's mortgage was sent to the county clerk for recording, and

the fee paid. It was recorded in full in a record of chattel mortgages, and indexed in the usual manner of indexing instruments of record. It was not minuted or indexed in the special chattel mortgage minute record prescribed by section 5, chapter 71, Laws of 1915. After being recorded, the instrument was returned to appellee, and no copy was left with the clerk. Appellant subsequently took a mortgage upon the same property. Having no actual notice of appellee's mortgage, it claims that the procedure above described did not constitute constructive notice, and that its mortgage, to the filing and minuting of which there is no objection, is entitled to priority.

{2} The question requires interpretation of chapter 71, Laws of 1915, as amended. Great carelessness is manifest in the enacting and amending of that chapter. Its lack of clearness has perplexed all who have had occasion to consult it. It is well that it has finally been repealed. Laws 1925, chapter 25.

{3} Prior to 1915, chattel mortgages were to be recorded "in the same manner as conveyances affecting real estate," and, when recorded, "the party in whose favor the mortgage is executed shall have the right to withdraw the same." Code 1915, § 567. The facts in this case were stipulated. As we understand them, appellee fully complied with the foregoing requirements. In 1915 (chapter 71) this section was repealed. The manner {438} of recording conveyances of real estate was still prescribed by statute, however, and was generally understood.

{4} The difference between counsel is this: Appellee contends that, while chapter 71 introduced a new system of filing and minuting, the old procedure of recording was left optional with the mortgagee. Appellant contends that, though the mortgagee chose to record his mortgage in the old fashion, he must also have it minuted in the chattel mortgage record newly prescribed, and must leave on file the original or a copy of the instrument.

{5} The original provisions of chapter 71, as bearing upon the present question, were: Section 3 required that the chattel mortgage or a copy thereof be filed in the office of the county clerk, "provided, that such chattel mortgage * * * may also be recorded in the same manner as an instrument affecting real estate." Section 4 required the clerk to indorse upon the instrument, or the copy, the time of receiving it and to retain it in the files of his office, "provided, that in case of recording as hereinbefore provided," the mortgagee might "withdraw the original if filed whenever a true copy thereof is filed with such county clerk." The section further provided that when a mortgage "is acknowledged and filed, or recorded in the manner herein prescribed," and it is shown to the court that the same is lost or not in the possession of the party wishing to use the same, "a copy thereof or of the record thereof," duly certified, may be received in evidence without further proof. The section further provided that a certified copy of any original mortgage, or of any copy thereof, "filed as aforesaid," shall be received in evidence; but only as to the fact of receiving and filing according to the clerk's indorsement thereon. Section 5 required the clerk to keep a book in which he should minute certain prescribed facts regarding "all such instruments." Section 6 provided that every chattel mortgage "filed in accordance with the provisions of this act, shall have the

full force and effect given to the recording of an instrument {**439*} affecting real estate." Section 7 provided that "whenever any such chattel mortgage * * * shall have been paid or satisfied," and upon the filing of an acknowledged satisfaction thereof, the clerk shall enter in the record book in which the instrument is minuted the word "satisfied" and the date; and then provides:

"In case any such chattel mortgage * * * is also recorded, it shall be the duty of the county clerk to make the same entry on the margin of the page where such instrument is recorded."

Section 8 provided that a chattel mortgage "filed as herein provided" should be void as against creditors, etc., after six years. Section 9 provided that the clerk should charge and collect in advance for the filing and entry of a chattel mortgage 25 cents, and that "in case any such chattel mortgage * * * is recorded as aforesaid," he should "in like manner charge and collect the fee provided by law for the recording of instruments affecting real estate."

{6} To comment upon the many inconsistencies and some seeming absurdities of this chapter would be profitless. It is superfluous to say that its meaning is dubious. It may well be argued that all of the provisions taken together manifest an intent that every chattel mortgage must thereafter be minuted in the new record book and left on file, even though the mortgagee has chosen to have it recorded at length. Reasons may also be suggested to support a contrary conclusion, based, not only upon the language of the chapter, but upon the manifest uselessness of incumbering the files of the county clerk with the original or copy of an instrument which has been spread in full upon his records. One reading section 3 might well conclude that he had the right to have his mortgage recorded as he would record a real estate mortgage, and that if he was willing to do so and pay the expense thereof, he need not concern himself with the further and new provisions of the act.

{7} In 1917 (chapter 74) section 2 of the act was amended to read as follows:

"Sec. 2. That hereafter all chattel mortgages, * * * {**440*} shall be acknowledged by the owner or mortgagor in the same manner as conveyances affecting real estate, **and the same shall be filed or recorded as hereinafter required. The failure to so file or record any such instrument in writing shall render the same void as to subsequent mortgages in good faith, purchasers for value without notice, and subsequent judgment or attaching creditors without notice; and as against subsequent general creditors without notice, such unrecorded instrument shall not be valid until the same shall be duly filed or recorded as hereinafter provided.**"

{8} The amendment goes far beyond the scope of the original section 2, which provided merely that chattel mortgages should be acknowledged. The part italicized is not germane to the original section, but affects other sections of the act. Before amendment, it could well be urged that section 3 required every chattel mortgage to be

filed in the clerk's office, and that section 4 required that it, or a copy of it, should be retained therein. The amendment did not touch these provisions; but it placed ahead of them a provision that chattel mortgages should be "filed or recorded." Section 6 provided that a chattel mortgage filed in accordance with the provisions of the act should have the force and effect given to the recording of an instrument affecting real estate. This provision was undisturbed. But amended section 2, by necessary implication, provided that either filing or recording should have such effect.

{9} It cannot be supposed that the 1917 Legislature intended, by an amendment of section 2 of the Act of 1915, to put in effect provisions quite inconsistent with those of other sections of the act. The 1917 Legislature must have interpreted the 1915 act as appellee did; that is that if a chattel mortgage were recorded in the same manner as real estate mortgages were to be recorded, it was unnecessary to comply with the provisions for filing and minuting.

{10} The Legislature of 1923 (chapter 8) also seems to have construed chapter 71 in the same manner. Desiring that the provisions thereof should be made to apply to conditional sales contracts, etc., as well as to chattel mortgages, it provided that every such instrument {441} "shall be either recorded or filed * * * in accordance with the provisions of chapter 71 of the Session Laws of 1915." And desiring (chapter 14) to provide for the recording of partido contracts, it required that they should be "either recorded or filed * * * in accordance with the provisions of chapter 71 of the Session Laws of 1915." These 1923 acts, of course, are of no importance except as showing that that Legislature construed the act as we construe it.

{11} Perhaps the greatest difficulty arises out of section 4, the provisions of which were not changed. It is to be inferred therefrom that, even though the instrument had been actually recorded, the original might be withdrawn only on substituting a copy. This, however, is merely permissive in form, and occurs rather, as we think, because of a misconception, than because of any positive legislative intent to incumber the clerk's files with useless documents. Section 4 discloses, not only a looseness of language, but a confusion of ideas; and we do not think that a merely permissive provision thereof should be allowed to control the whole act and lead to an unreasonable construction contrary to that which the Legislature itself has several times put upon it.

{12} Counsel for appellant seems to consider the interpretation of the statute settled by *Nations v. Lowenstern*, 27 N.M. 613, 204 P. 60. The effect of the statute was there summarized, and in so doing the court said:

"If the original is filed, it may be withdrawn only when recorded and upon filing a true copy in its stead."

{13} That was not interpretation, however. It was mere summarization of the language. No such question was before the court, and no decision was given upon it. It was expressly stated that the instrument there in question was not recorded. The case involved an attempt to file and minute. The attempt was held insufficient compliance

with the statute to effect constructive notice. The present case is one of full compliance with an alternative and optional method of giving such notice. {**442*} It follows that the recording of appellee's mortgage was constructive notice to appellant, and that the judgment should be affirmed, and the cause remanded.

{*14*} It is so ordered.