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THE DOCTRINE OF CONSTRUCTIVE NOTICE AS APPLIED TO CONVEYANCES OF REAL ESTATE

A system of accurate, certain, convenient and equitable rules of law as to the transfer of title to real estate is of the utmost importance not only to the parties dealing in such property but also to the general public.

Conveyancing in Early Times

Various modes of conveyancing have been in vogue since the dawn of history. These systems though differing widely in methods have possessed more or less similarity in their essential characteristics. We find the earliest record of a transfer of land in the twenty-third chapter of Genesis.

The elaborate ceremony of Mancipatio used in the early days of Rome, wherein a transfer was effected in the presence of six Roman citizens, of full age, one of whom acted as Libripens, or balance holder, and the other five as necessary witnesses, was calculated to give dignity and publicity to the transaction and to preserve reliable evidence of the same. Somewhat similar to Mancipatio though differing materially from it, was the method of "livery of seisin" used by our ancestors. Neither of these transactions required the perfecting evidence of a written record, or enrollment, in order to effect the full purpose for which they were designed.

Early Recording Laws

The Statute of Enrollments was passed, A. D. 1535 (27 Henry VIII. Chapt. 16). It required all conveyances by bargain and sale of a freehold interest in land, in order to be valid, to be made by deed,—that is, a writing under seal,—enrolled within six lunar months after its execution in a court at Westminster, or in the county wherein the land was situate, by certain officers specified in said statute. This law did not apply to conveyances by covenant to stand seised. The statute has usually been regarded as not in force in this country. The act provided that the title to the land should not pass until enrollment but on and after enrollment, within six lunar months, the title of the bargainee related back to the time of the execution of the deed. The statute did not require an acknowledgment of the deed by the bargainor. Later it was enacted that the deed should be acknowledged by the person, or persons, who executed it, either in court where the deed was enrolled or before the public officer whose duty it was to make the enrollment.

In the colony of Massachusetts Bay in 1641, when the colony had been formed into counties, an ordinance was passed making the clerk of the county court, recorder, and directing him to enter all grants and sales of land with the names of the grantors and grantees and the estate granted together with the date thereof in the records of his office. This was to give notoriety to transfers of real estate, but the conveyance was not to be recorded till it was proved that it had been duly executed, and this was to be done by its being acknowledged before the recording officer. The acknowledgment authorized the recording, and recording was to take the place of livery of seisin, as giving equal or greater notoriety and constructive notice to all interested in the transaction.[1]

What is Constructive Notice

Constructive notice is a legal inference from established facts. The question whether under a given state of

[1]Pidge v. Taylor et al., 4 Mass. 541; Higbee v. Rice, 5 Mass. 344.

facts, the law will impute constructive notice to any person is not a matter for the jury to consider.[2] Constructive notice exists when the party by any circumstance whatever is put upon inquiry, or when certain acts have been done which the party interested is presumed to have knowledge of on grounds of public policy. In order to give constructive notice through the recording office it is necessary that there be recorded a deed which is executed with sufficient accuracy to transfer title. Such a deed to be recordable must be executed and acknowledged in accordance with the *lex loci rei sitae,* and the recording of a deed not executed in conformity with the recording laws is notice to no one.[3]

A record, it has been said, is a "written memorial made by a public officer, authorized by law to perform that function and intended to serve as evidence of something written, said or done."[4]

Legal Requisites as to Deeds

There are two general requisites to the validity of a deed:—First, that it be sufficient in law on which the court decides; Second, that certain matters of fact, as sealing and delivery, be duly proved, on which it is the province of the jury to determine.

As to the requirements concerning a seal we find only three states where the law provides that a common law seal must be attached to a deed—They are Maine, New Hampshire, and Massachusetts.

A "scroll" or "scrawl" of the pen or the word "seal" or the letter "L. S." will answer for a seal in the states of Delaware, Illinois, North Carolina, Oregon, Vermont, Florida, Maryland, New Jersey, Pennsylvania, West Virginia, Georgia, Michigan, New York, Virginia, Wisconsin and in the District of Columbia.

In the thirty other states and in the territory of Alaska, no seal nor any substitute therefor is required.

[2]Berdsall v. Russell, 29 N. Y. 249.
[3]Galpin v. Abbott et al., 6 Mich. 17.
[4]6 Call 78; 1 Dana 595.

The above statements only refer to deeds given by a private, or natural person, for in the case of a corporation. a corporate seal should be used.

Concerning attesting witnesses to the grantors' signature, one is required by the statues in Delaware, Maryland, Nebraska and Wyoming; while two are required in Alabama, Connecticut, Michigan, Oregon, Alaska, Florida, Minnesota, South Carolina, Arizona, Georgia, New Hampshire, Vermont, Arkansas, Louisiana, Ohio and Wisconsin.

In the remaining states in case the deed has been duly acknowledged no witnesses are required.

In ten states it is necessary that the acknowledgement of a wife should be taken separate and apart from her husband; they are as follows, to wit: Delaware, Louisiana, South Carolina, Florida, North Carolina, Tennessee, Wyoming, Kentucky, New Jersey and Texas.

Our system of registration in the United States is unknown to the common law and is essentially a creation of the statutes; hence in order that the record of a deed may give constructive notice both the record and the deed must be made agreeably to statutory requirements.

In regard to the body of the deed we find that a deed is not invalid if in the description figures and well known abreviations are used.[5] If an instrument is to be executed by an attorney in fact, it should be made out in the name of the principal and executed and acknowledged as the act of the principal.[6]

There must be certainty as to the grantee or such words must be used as will indicate with certainty who was intended. So a deed to the heirs of a living person is void for uncertainty as it would be impossible in such case to ascertain the intention of the grantor, for there is nothing to indicate with certainty who was intended. Does it mean heirs at law, or heirs presumptive? There seems to be no case in which such uncertainty has been supplied by parol

[5]Harrington v. Fish et al., 10 Mich. 415.
[6]Fowler v. Shearer, 7 Mass. 19; Elwell v. Shaw, 16 Mass. 42.

evidence. The intention must appear in the deed itself.[7]

On the other hand a deed made to the heirs of a deceased person is valid and will give constructive notice when duly recorded for the deed gives the means by which the grantee can be certainly ascertained[8]; and that is certain which can be rendered certain. *Certum est quod certum reddi potest.*

If a conveyance is made to a person with the middle initial of the grantee's name omitted and he is well known by the name used, such conveyance will be valid and upon being recorded will give constructive notice in favor of the grantee, for the law knows but one christian name.[9]

So a grant to Henry Earl, where his name is Robert, was held good, he being known by both names, and a grant to the wife of "A" is valid, he having but one wife, she is thereby sufficiently designated.[10] In a Mass. case a man by the name of Germain Sivris, who was also sometimes called John Keever, signed an instrument under the name Joseph Cyr, which name he signed by mark and this deed was duly recorded. There was no intention to mislead anyone by the wrong name; it was simply a mistake and the instrument after being recorded was held valid.[11] *Qui haeret in litera haeret in cortice.* (He who considers merely the letter of an instrument goes but skin deep into its meaning). A date is not essential to the validity of an instrument of conveyance, as it takes effect from delivery, and even if the date of the deed is subsequent to that of the acknowledgment it is not conclusive and may be controlled by other recitals in the deed. The certificate of acknowledgment is presumed to be correct.[12]

[7]Hall v. Leonard et al., 1 Pick. 27.

[8]Shaw et al. v. Loud, 12 Mass. 447.

[9]Gillespie et alii. v. Rogers, 146 Mass. 610; Gilbert et al. v. Stiles, 14 Peters 322.

[10]Hall v. Leonard, 1 Pick. 30.

[11]Onimet v. Sivris, 124 Mass. 162.

[12]Dressel v. Jordan, 104 Mass. 407.

An instrument which is not acknowledged and witnessed (where witnesses are required) is an unrecordable instrument, and if placed on record does not give constructive notice to anyone, although an unacknowledged conveyance is good between the parties to the same.[13]

Concerning Acknowledgments

Acknowledgment is a proceeding provided by statute whereby a person who has executed an instrument may by going before a competent officer, or court, and declaring it to be his act and deed, entitle it to be recorded. The term is also used to designate the certificate of the officer, or court, showing the performance of such act. In the several states Justices of the Peace and Notaries Public take acknowledgements of deeds and in a few states a Special Commissioner, or some other officer, may be designated to perform that act.[14] Unless the statutes of a state require evidence of the official character to accompany the official act which is authorized, none is necessary.[15]

Where the name of the grantor is not stated, or is defectively stated, in the certificate of acknowledgement if it appears from the whole instrument that it was acknowledged by the grantor it is sufficient.[16] Mere false description does not make the instrument inoperative. *Falsa demonstratio non nocet, cum de corpore (persona) constat.* (False description does not injure or vitiate, provided the thing, or person, intended has once been sufficiently described). An officer who takes the acknowledgment may act as one of the attesting witnesses to the signature of the grantor,[17] but an acknowledgment of a deed taken by an officer who is also one of the grantees named in the deed, or

[13]Bogan v. Bowland, 52 Miss. 546; Cooley v. Rankin, 11 Mo. 642; Pingle v. Dunn et al., 37 Wis. 449; Blood v. Blood, 23 Pick. 80; Caldwell v. Head et al., 17 Mo. 561.

[14]See Statutes.

[15]Carpenter v. Dexter, 8 Wall 513.

[16]Chandler v. Spear, 22 Vt. 390; Wilcoxon v. Osborn, 77 Mo. 621.

[17]Baird v. Evans, 53 Ga. 350.

has some substantial interest in the granted premises, is void.[18]

The acknowledgment of a conveyance by a trustee, administrator, guardian, or executor, who signs the same in his fiduciary capacity, is not void because the certificate describes him simply by his individual name without adding his title.[19]

If the official character of the magistrate who takes an acknowledgment appears either in the certificate of acknowledgment, or as appended to his signature, the same is valid, and it has been held that initial letters of an official title may be used to designate such character.[20] Only purchasers for value can take advantage of a defective acknowledgment, and equity will interpose for the relief of one who has taken a defective conveyance.[21] When a person who takes an acknowledgment does not state his official character in his certificate, or subscription, the acknowledgment is insufficient and the record of the deed irregular, and a certified copy of it cannot be given in evidence.[22]

The acknowledgment by a husband who has a right of curtesy in land owned by his wife, where the husband and wife both join in the conveyance, is sufficient in some states, to authorize the deed to be recorded.[23]

A deed signed by the president and cashier of a corporation and sealed with the corporate seal and acknowledged by only one of them was held to be a sufficient acknowledgment to entitle it to be recorded and to give constructive notice.[24]

If the name of the county is omitted in the caption it is a mere informality which does not vitiate the certi-

[18]Leonard v. Flood, 56 S. W. 781 (Ark. 1900); Hubbele v. Wright, 23 Ind. 322.

[19]Dail v. Moore, 51 Mo. 589; Groesbeck v. Seeley, 13 Mich. 345.

[20]Lessee of Livingston v. McDonald, 9 Ohio 168; Colby v. McOmber, 71 Iowa 469.

[21]Mastin v. Halley et al., 61 Mo. 196.

[22]Clark v. Boyd, 2 Ohio 56.

[23]Palmer v. Paine, 9 Gray 56.

[24]Merrill v. Montgomery, 25 Mich. 76.

ficate, it appearing sufficiently in the same that the acknowledgment was taken by a proper officer.[25]

The certificate of acknowledgment of a deed made by a Justice of the Peace *de facto*, is valid as to the parties to the same, and it authorizes the registration upon the public records of deeds, and such registry constitutes public legal notice to all persons.[26]

Where a deed for land in Ohio was made in Connecticut and there acknowledged before one of the Justices of the Court of Common Pleas of the Northwestern Territory, such acknowledgement was held sufficient.[27] The registry of a deed of land executed by two persons but acknowledged by one only, is notice to creditors and subsequent purchasers of the other and whether the grantees were seised in joint tenancy, or as tenants in common of the whole land, or respectivly seised of distinct parts is immaterial.[28] In case the statute of the particular jurisdiction requires all the grantors to acknowledge, this rule would probably not apply.

Defects in the certificate of acknowledgment which are clearly clerical errors, as the misplacement of a word or the use of the wrong date, will not invalidate the acknowledgment.[29] *Noscitur a Sociis.* (The meaning of a word is or may be known from the accompanying words. It is known from its associates).

As to the Constitutionality of Certain Legislative Acts

A legislature has power in the absence of any inhibiting constitutional limitations and except as against prior vested rights, to cure by retroactive legislation, defective acknowledgments of deeds, in all cases where the purpose

[25]Chiniguy et al. v. The Catholic Bishop of Chicago, 41 Ill. 149.
[26]Brown v. Lunt, 37 Me. 423.
[27]Kinsman v. Loomis et al. 11 Ohio 475.
[28]Shaw et al. v. Poor, 6 Pick. 85.
[29]Watkins et al. v. Hall, 57 Texas 1; Fisher v. Butcher, 19 Ohio 406; McCordin v. Billings, 10 N. D. 373; Scharfenberg v. Bishop, 35 Iowa 60.

of the acknowledgment is the admission of the instrument acknowledged to record, or its use in evidence. Incorrect registration cannot avail a party who is not misled thereby.[30] A statute which makes the record of a tax deed, which is properly executed, prima facie evidence of the legality of the proceedings in making the conveyance is not unconstitutional.[31]

Is the Act of Taking an Acknowledgment a Judicial Act?

The act of taking an acknowledgment is in some states held to be a mere ministerial act,[32] hence in those states relationship of the magistrate to one of the parties does not disqualify him from performing the act and it has been held that a Justice of the Peace may take the acknowledgment of a mortgage running to his wife.[33] The act however involves the determination of the identity of the party appearing to acknowledge, as the one who signed the instrument; moreover, the finding and certificate are held valid as against the unsupported testimony of an interested party[34] and the Pennsylvania court holds, with apparent reason, that the taking of an acknowledgment of a deed is a judicial act and that the certificate of acknowledgment in the absence of fraud is conclusive as to the facts therein contained.[35]

Of the Reformation of Deeds and Correction of the Record

In an action to reform a deed on the ground of mistake, the lower court ordered that certain words should be erased from the instrument and that the record of such deed should be in like manner corrected. Held that "this

[30]Summers v. Mitchell, 29 Fla. 179; Gaskill v. Badge, 3 Lea (Tenn.) 144.

[31]Groesbeck v. Seeley, 13 Mich. 345.

[32]Lynch et ux. v. Livingston, 6 N. Y. 422.

[33]Kimball v. Johnson et. alii. 14 Wis. 674.

[34]Oliphant v. Liverside, 142 Ill. 160; Calumet and Chicago Canal and Dock Co. v. Russell, 68 Ill. 426.

[35]Cover et ux. v. Manway, 115 Pa. St. 338.

was not the proper mode of reforming an instrument. The court should have found that there was a mistake and in what it consisted. If words had been omitted which the parties intended to have inserted, the court should have so found and adjudged. The court possessed no power to order words to be erased from the deed, or to order the Recorder of the County to change his record when he had correctly copied the deed. As between the parties to the record, a decree of the court ordering the reformation of a deed is binding, and they are required to take notice thereof, although the deed has not in fact been corrected in accordance with the decree."[36]

While it is true that the courts cannot supply words to fill a blank in a certificate of acknowledgment to sustain a deed, the converse of that doctrine, which is just as unquestionably law, prohibits the supplying of words to fill the blank to defeat the deed.[37] A release, assignment, or extension of a mortgage made by mistake in the margin of the record thereof may be set aside in equity.[38]

Constructive and Actual Notice Compared

The existence of actual notice is a question of fact, while on the other hand, constructive notice is a matter of law presumed from established facts, although there is no difference between them in regard to the legal consequences.[39] The doctrine of constructive notice is a harsh necessity, and laws which create it should always be subject to rigid construction.[40]

The rules of equity as to constructive notice are not changed by the statutes in relation to record, or constructive notice through the recording office,[41] and notice

[36]Troops v. Snyder, 47 Ind. 92.

[37]Hathorn v. Dawson, 79 Ill. 108.

[38]Bruce v. Bonney, 12 Gray 107.

[39]Tufts v. King, 18 Pa. St. 157; Bradbury v. Falmouth, 18 Me. 65; McMeehan v. Griffin, 3 Pick. 149; Knap v. Bailey, 79 Me. 195.

[40]Call et al. v. Hastings, 3 Cal. 179.

[41]Borland v. Peoria, 16 Ill. 588.

in other ways will be imputed when it is a reasonable and just inference from known facts.[42]

As to the Record

A conveyance is considered as recorded at the time noted thereon by the recording officer as having been received for record,[43] and a deel may be recorded before delivery.[44] The recording of a deed in Massachusetts is conclusive presumption of delivery in favor of purchasers for value, without notice, who claim thereunder.

If a deed of real estate is acknowledged before the Register of Deeds and handed to him to be recorded and at the same instant a creditor of the grantor attaches the real estate, the attachment has the priority, inasmuch as the deed cannot be placed on record without a certificate of the acknowledgment, and some time must elapse before the certificate can be written out.[45]

A grantee finding a good title in his grantor is not bound by the record of conveyances outside his line, or chain, of title, and it is not exactly true that the recording of a deed gives constructive notice *"to all the world."*[46] The contrary opinion of the Louisiana court seems unreasonable.[47]

When the statutes require a lease of land to be recorded if the term of the lease is seven years, or more, a lease of land made to commence *in futuro* must be acknowledged and recorded, if it is to endure more than seven years from the making thereoef.[48]

While the record gives constructive notice to a pur-

[42]Pomeroy v. Stevens, 11 Met. 244; Dooly v. Walcott, 4 Allen 406; Jackson v. Elston, 12 Johns. 425.

[43]Gillespie et alii v. Rogers, 146 Mass. 610; Tracy v. Jenks, 15 Pick. 465.

[44]Parker v. Hill et alii., 8 Met. 447.

[45]Sigourney v. Larned, 10 Pick. 72.

[46]Carbine v. Pringle, 90 Ill. 302; Maul v. Rider, 59 Pa. St. 171; Corbin v. Sullivan, 47 Ind. 356; Crockett v. Maguire, 1 Mo. 34; Garber v. Gianelle. 98 Cal. 527.

[47]Hollingsworth v. Wilson, 32 La. Ane. 1012.

[48]Chapman v. Gray, 15 Mass. 439.

chaser, whether seen or not, and it is immaterial whether such person have actual notice,[49] still the record is not notice of any fraud that may have been perpetrated in the execution of any conveyance,[50] nevertheless a purchaser must look to all parts of the record and not content himself with so much as will by itself give him no notice, when the remainder contains statements which would put him upon further inquiry,[51] but when a deed of land from a person who has no title to the same is placed on record the true owner is not charged with notice, that such a conveyance has been made.[52] The recording of a paper not required to be recorded, and not entitled to be placed on record does not create constructive notice.[53]

A duly recorded deed purporting to convey the whole land or estate by one or more of several joint tenants, or tenants in common, of said land, does not give constructive notice to the remaining co-tenants of the existence of such deed and of the claim of the grantee to oust them of their legal seisin in the land.[54]

As to records or entries on the margin of the record, if the recording officer neglects to make cross references between certain records as required by law this is immaterial, the law is directory and if the requirement is neglected it does not invalidate the record.[55]

When a paper is left at a recording office, but not left for record, it gives no constructive notice[56] and the filing of an unrecorded conveyance among the papers in a suit is not constructive notice of its existence to one not a

[49]Peck v. Conway, 119 Mass., 546; Barnard v. Campau, 29 Mich. 162.

[50]Godbold v. Lambert et alii., 8 Rich (S. C.) 155.

[51]Carter v. Hawkins, 62 Texas 397.

[52]Bates v. Norcross, 14 Pick. 224.

[53]First African Methodist Episcopal Society v. Brown, 147 Mass. 296.

[54]Roberts v. Morgan, 30 Vt. 320; Leach v. Beattie, 33 Vt. 195.

[55]Hayden et alii v. Peirce, 165 Mass. 359; Chase v. Bennett, 58 N. H. 428.

[56]Hunt v. Allen, 73 Vt. 322.

party.[57] When an execution is extended upon land the officer's return upon the writ should be deposited with the clerk in order, to complete the title so that the return can be admitted in evidence.[58]

Is the Index a Part of the Record

As to whether the index in the recording office is a part of the record there is a difference of opinion. In a Wisconsin case where the record by mistake gave the wrong number of a lot mortgaged, and the index of the record gave the correct one, it was held that "the index gave constructive notice of the proper description and placed a lien on the lot really mortgaged."[59] This decision would make the index of as much importance as the extended record which does not seem reasonable. The index is for the convenience of the public in searching the records and is not designed to be a part of the official record. The records are indexed, in most cases, in several different ways and it might indeed be possible that one item of the index out of several would give the correct description, while the record and all the other items of the index were wrong, but according to this Wisconsin decision constructive notice would be given in such a case as to the property really conveyed. Indeed a person might find the record without the use of the index. We think the better opinion is that the index is no part of the record and does not give constructive notice.

Conclusions

Constructive notice is for the benefit of the public as well as for the parties to a conveyance, and it would seem that public policy would call for a correct record, but the courts in many states hold that as a

[57]Ward v. League, 24 S. W. 986.

[58]Welsh v. Anderson, 135 Mass. 65.

[59]Shove v. Larsen et al., 22 Wis. 142; but see Chatham v. Bradford, 50 Ga. 327.

deed is considered to be recorded as soon as a note is made on the instrument by the recording officer "that the same has been received for record," it matters not that afterwards the officer fail to do his duty in copying the instrument incorrectly or by omitting portions of it or even altogether neglecting to copy the deed into the record book. These courts hold in such cases of erroneous copying, or of failure to copy, that the parties to the deed, or other instrument, have the full benefit of the recording laws the same as though the instrument had been copied in full and that the whole world has constructive notice of the full contents and tenor of such instrument left for record,[60] while as a matter of fact they neither have notice nor have they at their command the data from which they may acquire notice. What the statutes mean as to the instrument being consdered as recorded at the time received for record is probably, that when a permanent copy of the same exists in the recording office the record dates as of the time the paper is received for record. So if the instrument remains in the recording office till fully and completely copied there is from the time of the receipt of the same, either the instrument itself, or a complete copy thereof in the office for the use of the public. As will be seen, in this view of the law, the instrument itself serves the purpose of the record till copied.

In the case of a mortgage where the amount copied in the record was less than the full amount of the mortgage, the public were charged with constructive notice to the full extent and amount of the mortgage,[61] and where a conveyance was transcribed into the wrong book the record was still held to give constructive notice.[62] These opinions do not appear to conform to the maxim. *Salus Populi Suprema Lex.* (The welfare of the people is the supreme law) nor with the maxim, *De non apparentious, et non*

[60]Mangold v. Barlow, 61 Miss. 593; Throckmorton et al. v. Price et al., 28 Texas 605; Gillespie v. Rogers, 146 Mass. 610.

[61]Mims v. Mims, 35 Ala. 23.

[62]Clader et al. v. Thomas et al., 89 Pa. St. 343.

existentibus, eadem est ratio (As to things not apparent, and those not existing, the rule is the same.

The law as to constructive notice is a harsh necessity,[63] consequently it should not be made to apply too strictly and so as to extend it beyond what the records actually show,[64] in fact only so far as the land is aptly or intelligibly described therein,[65] and that a mortgage of land erroneously recorded in the wrong book should not give constructive notice to a subsequent purchaser of the land,[66] nor that the record of a mortgage when made for a less amount than it is given to secure should give constructive notice of the larger amount.[67]

On the principle that the record of a defective acknowledgment, or unduly witnessed instrument should not give constructive notice,[68] it would appear that the Michigan court recognized the correct doctrine when it held that "an equitable construction cannot be put upon the recording laws when they are made to embrace cases not within them, or by means of which they may be made to give constructive notice of things the records do not show."[69]

Furthermore, if by such holding a party to a conveyance appears to be injured he still has his appropriate legal remedy.

While the law as to the construction of deeds is that where the intention can be discovered the court will carry the same into effect if possible,[70] there is also that more exacting rule *Verba chartarum fortius accipiuntur* (The words of charters, or deeds, are to be received more strong-

[63]Call et al. v. Hastings, 3 Cal. 179.

[64]McLouth et al. v. Hunt et al., 51 Texas 115.

[65]Wait v. Smith, 92 Ill. 385.

[66]Cady v. Parser et al., 131 Cal. 552.

[67]Farrell v. Andrew County, 44 Mo. 309; Frost v. Beckman, 1 Johns Ch. 288.

[68]Lessee of Heister v. Fortner, 2 Binney 40; Parrott et alii v. Shaubhut et alii., 5 Minn. 323.

[69]Barnard v. Campau, 29 Mich. 162.

[70]Bridge v. Wellington, 1 Mass. 226.

ly against the grantor).[71] Applying this principle to the recording officer, should not the words of the record be received more strongly against him?

With the exception of two or three states our system of recording conveyances is what may be called the county system. In a few New England states the town system is in vogue. Both have their advantages and their disadvantages, the enumeration of which would hardly be within the scope of a paper on constructive notice. It may not be out of place however to suggest that a combination of the two methods might produce results which would have a tendency to lessen the harshness of the doctrine of constructive notice. This could easily be done by requiring that the record made by the county recorder be a printed record, in which case a copy of each record might be sent to the clerk of the municipality in which the real estate is located for use and preservation in his office. A copy might also be deposited for like purposes in the office of the Recorder of the Land Court, in those states that have adopted the Torrens system of land registration. This method would bring the Land Court into more intimate relation with the land records which would seem to be desirable. Another advantage would be attained in the increased security of the land records from the inestimable loss which not infrequently results from their destruction by fire or otherwise, for in case one set of records were destroyed there would be duplicate sets which could be used in their place. Then, too, as the destruction of the records in such cases would cause but slight damage there need be no expensive fire proof buildings (so called) in which to house them.

Would it not also be possible, and advantageous, to unite the deeds and probate offices and thus bring all records of land transfers into one office?

Should it be desirable to unite the Probate and Land Courts this could easily be done as the procedure in the

[71]Adams v. Frothingham, 3 Mass. 361; Worthington v. Hyler, 4 Mass. 205.

two courts is somewhat similar. Then encourage the recording of land titles by making the expense of the same as reasonable as possible, and finally bring all records as to land titles under the Torrens system.

In order that the law as to constructive notice may not work hardship, and that the best results may be obtained from the methods designed to create notice, it would seem that the recording laws should be such as to extend to a reasonable degree the notice which the records actually give.

ROBERT WORTHINGTON LYMAN

MOOT COURT

HARKNESS v. ADAMS

Negotiable Instruments Act—Section 57—Holder in Due Course

OPINION OF THE COURT

INGRAM, J. From the facts of this case we gather that the promissory note in question, is in the hands of Harkness, who is an innocent holder for value, of the note after its maturity; and that he received the note from Harris, purchaser for value and without notice of a fraud, and holder of the note before maturity Harkness then brings an action of assumpsit against Adams, the maker of the note.

As this is a negotiable note we must first consider the Negotiable Instrument Act of May 16, 1901 P. L., 202 Sect. 57, which reads: "A holder in due course holds the negotiable instrument free from any defects of title of prior parties among themselves, and may enforce payment of note for full amount thereof against all parties liable thereon."

From this act it seems that if Harkness is a holder of note in due course he can recover. Under the Act of May 16, 1901 to become a holder in due course, four conditions are essential. (1) Note must be complete and regular on its face; (2) Holder must have received note before it became overdue and without notice that it had been previously dishonored; (3) In good faith and for value; (4) That at time it was negotiated to him he had no notice of any infirmity in instrument or defect in title of person negotiating it. Reviewing the facts of this case, we find that Harkness does not meet with the second requirement because he received the note after maturity. Hence Harkness cannot recover as a holder in due course.

Now the next question which presents itself is whether he can recover as a holder of note other than a holder in due course.

Act May 16, 1901 P. L. 202, Sect. 58, reads: "In hands of any holder other than a holder in due course, a negotiable instrument is subject to same defenses as if it were non-negotiable; but a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality, affecting instrument, has all rights of such former holder in respect to all parties prior to latter."

If this note is to be regarded on same fooling as a non-negotiable note then Harkness cannot recover because it is declaratory of existing law that "The holder of a non-negotiable instrument takes it subject to equities subsisting between original parties at time of trans-

fer." Cases to support this doctrine are Edgar v. Kline, 6 Pa. 327; Thompson v. McClelland, 29 Pa., 475; Howie v. Lewis, 14 Super. 232.

The case of Snyder v. Riley states "An indorsee of an overdue note takes it exclusively on credit of endorser and subject even without proof of mala fides, to all intrinsic considerations which would affect it between original parties.

This doctrine is also laid down in Haldeman v. Bank of Middletown, 28 Pa. 440; McCruden v. Jones, 173 Pa. 507.

A person who takes a bill or note after it is due, takes it subject to all objections in respect to want of consideration or illegality, and all other objections and equities affecting the instrument itself and to which it was liable in hands of the person from whom he takes it. Peale v. Addiers, 174 Pa. 549.

Riorden for plaintiff.

Fanseen for defendant.

OPINION OF SUPERIOR COURT

Assuming, as did the learned court below, that Harris was a bona fide holder for value, we are constrained to reverse the decision in this case. Sec. 28 of the Uniform Negotiable Instrument law provides that "a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of a holder in due course." Harkness derives his title through a holder in due course, Harris, and was "not a party to any fraud or illegality affecting the instrument."

The fact that the note was indorsed to Harkness after maturity is immaterial. A person to whom a note is negotiated after maturity takes it subject to those defenses only which were available against the negotiator. "He stands in the negotiator's shoes and is invested with such rights as the latter may have had." 4 A. & E. Encyc. 314, Wilson v. Mechanics Savings Bank, 45 Pa. 488; Riegel v. Cunningham, 9 Phila. 177; 7 Cyc. 789; Leidy v. Tammany, 9 Watts, 353, "Where a party acquires paper after maturity from a bona fide holder, who took it before maturity for a valuable consideration, he is to all intents and purposes himself a bona fide holder. 7 Cyc. 939; Bigelow on Bills and Notes 253. Judgment reversed.

STAPLES v. HENDRICKS

Admissibility of Evidence of Character in Civil Action of Assault and Battery

STATEMENT OF FACTS

Civil action for assault and battery. Staples offered to prove that Hendricks had been in forty assaults and batteries during the

past year, having quarreled with nearly every man of his own age in the borough for the purpose of corroborating the allegation that Hendricks struck Staples, and that no provocation for the striking was given by Staples. The court admitted the evidence. Hendricks asks for a new trial.

McKone for the plaintiff.

Massinger for the defendant.

OPINION OF THE COURT

PANNELL, J. This was a civil action for assault and battery brought by Staples against Hendricks. The plaintiff in order to corroborate the allegation that Hendricks struck him and that no provocation for the striking was given, offered to prove that defendant, Hendricks, had been in forty assaults and batteries during the past year, having quarreled with nearly every man of his age in the borough. Hendricks now seeks a new trial because this evidence was admitted.

The questions which arise are whether this evidence of character can be received as competent in a civil action and whether it can be admitted where there was no provocation for the act, thus either aggravating or mitigating the damages. We believe that the main object and purpose of this disputed testimony was to enable the plaintiff to aggravate his damages.

The general rule of evidence is that in civil actions evidence of the character of either parties, except where their character is directly in issue, is not admissible. Greenleaf on Evidence, Vol. 1, page 41. In Pennsylvania, we find the courts invariably hold, that the moral character of a person is not relevant in determining the question of whether such person did or did not do a particular act. American Fire Ins. Co. v. Hazen, 110 Pa. 530; Porter v. Seiler, 23 Pa. 424; Anderson v. Long, 10 S. & R. 55; Atkinson v. Graham, 5 Watts 424. In Porter v. Seiler, 23 Pa. 424, we find "that the defendant's good character would have been legitimate evidence in his favor upon the trial of an indictment for assault and battery with which he was charged, and it is somewhat difficult to perceive why it should be received in the one case and excluded in the other, but such is the well settled rule and unless it is manifestly wrong, ought not to be disturbed. It does not follow because it is not in consonance with the rule in criminal evidence that it is entirely wrong. To exclude evidence of character in all civil suits where character is not directly in issue, makes the result depend rather upon the character of the circumstances attendant upon the transaction than upon that of the parties or either of them." There are some civil actions which bring into issue the character of the party or parties, either directly or indirectly and consequently evidence of character is then admissible. "The putting character in issue", says Tilghman, C. J. "is a technical expression

and confined to certain actions from the nature of which the character of the parties or some of them is of particular importance." (Anderson v. Long, 10 S. & R. 55). Therefore, in civil actions for breach of promise, seduction, criminal conversation, libel and slander and malicious prosecution, all of which put in issue either directly or indirectly the character of the party or parties, it would seem that it is pertinent to the issue to inquire whether the party had a good character, for if he did not, he could not lose it by the act of the defendant."

In view of the decisions both in Pennsylvania and elsewhere, we believe that the admission of the character evidence presented by the plaintiff was error. Although there seems to be no logical reason for the exclusion in this particular line of cases, yet it has been adhered to continuously and still is regarded as the criterion.

Even though the evidence could not be properly admitted when given as testimony to reflect some defect in the defendant's character; still it remains to be settled whether in would not be of some weight or of material importance in the assessment of damages. Will the fact that A, has been reputed to be a man of pugnacious inclinations and has been in some forty assaults and batteries during the past year, be of any benefit or cast any light upon the present issue? Can the jury more readily and justly arrive at the proper amount of damages because of this collateral testimony? It is undoubtedly an equitable rule which will give to the innocent sufferer, not only just, but even punitive or exemplary damages; likewise, a frequent breaker of the peace and offender of the law, should be made to realize its supreme authority and compelled to suffer accordingly. However, in this particular case, we do not deem it proper that the collateral acts, which happened previous to the one in question, should be given in evidence.

In Robinson v. Rupert, 23 Pa. 523, it was held that "all circumstances that are sufficiently proximate to be properly regarded as matters of provocation or excuse of the act complained of, may be given in evidence for the mitigation or aggravation of damages generally." "Any act of provocation, at the time of the assault and battery may be given in evidence in mitigation or aggravation of damages." 1 Ency. of Evidence 1002; Stetler v. Nellis, 60 Barb. (N. Y.) 524; Paul v. Bisset, 121 Mass. 170; Millard v. Truax, 84 Mich. 517. Here the acts took place over a space of one year and could not be considered "sufficiently proximate" to nor "at the time" of the assault and battery in issue to be admitted. However, suppose that these other acts were almost contemporaneous with the assault in question, still it was error to admit the evidence. For it is the general rule of evidence that only acts which are part of the res gestae are admissible. 1 Cyc. of Evidence 997; Elkins, Bly & Co. v. McKean, 79 Pa. 493; Devling v. Little, 26 Pa. 502; Tyson v. Booth, 100 Mass.

258. This res gestae is the term applied to circumstances, facts and declarations surrounding or occompanying the principal fact in question and which grow out of the main fact, are contemporaneous with it and serve to illustrate its character. May we infer that these assaults and reputation of the defendant had the remotest bearing upon the present action? Surely the law law gives adequate remedies to all those who desire them, but should the plaintiff be allowed to increase his damages by showing some collateral acts? Certainly this would be neither an equitable nor a logical rule and "according to the better doctrine neither the evidence of the bad character of the plaintiff nor the previous good character of the defendant is admissible for the purpose of mitigating or aggravating the damages." Porter v. Seiler, 23 Pa. 424; Bruce v. Priest, 5 Allen (Mass.) 100; Corning v. Cornign, 6 N. Y. 97.

Therefore, it was error for the court to admit character evidence of defendant because it was contrary to all established rules of evidence in civil actions. Even if it was presented to assist in the assessment of daamges or to aggravate the same, it was also improper because it violates another general and well established rule that evidence of character is inadmissible in the mitigation or aggravation of damages. Furthermore, these previous assaults were separate and distinct acts, being collateral to the assault and battery in issue and not part of the res gestae.

For these reasons, a new trial is granted.

OPINION OF SUPERIOR COURT

The effort was to show a habit of striking, or a tendency to strike others, on the part of Hendricks, in order to make more likely, or less unlikely, his having committed the alleged assault on Staples, without provocation from Staples.

That a habit of doing a thing makes the doing of it, on a particular occasion, less difficult to believe, cannot be doubted. However, evidence of a habit is excluded; Baker v. Irish, 172 Pa. 528, for no better reason than that one had done a thing before "would warrant no inference, or one so remote, that he had done the same" on the day in question.

A habit consists of repetitions of an act, or of the tendency, formed or at least strengthened by repetitions, to do the act again. Here the offer is to show not a habit, possibly, but forty assaults and batteries. If habit cannot be shown, neither can the several acts, whose repetition forms the habit. The conclusion of the learned court below is therefore approved. Affirmed.

HENDRICKS v. CHARLES ADAMS

Promissory Note—Section 63 of Negotiable Instruments Act—Necessity of Presentment to Bind Endorser

STATEMENT OF FACTS

A firm composed of Henry and Charles Adams made a promissory note to Hendricks, but before delivering it to Hendricks, endorsed the note in their individual names. The firm not paying the note at maturity, notice of default was promptly made to each of the endorsers by Hendricks who brings this suit on the endorsement against Charles Adams.

OPINION OF THE COURT

BONIN, J. According to the act of 1901, a negotiable promissory note is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. The promissory note in this case has a slight anomaly which alters the relationship of the parties considerably. The said firm members endorsed the note thus bringing themselves under the 29th Sec. of the act of 1901, i. e. the assumption of the liabilities of an accommodation party. The question then arises, whether the payer was vindicated in bringing this action against one of such endorsers?

The counsel for the defendant contends, first, that the makers should have first been charged to the extent of their assets, and second, inadequacy of presentment. Let us consider these two objections.

Sec. 44 of the act of 1901 states that where any person is under an obligation to indorse in arepresentative capacity, he may endorse in such terms as to negative personal liability. In the case at bar, the firm was under no obligation to endorse, but doing so their liability becomes personal. Having therefore signed in such capacity Charles become likewise an irregular endorser liable to the payee and all subsequent parties, sec. 64.

Second, was presentment necessary and was it satisfactory in this case? It seems somewhat preposterous to claim that the makers herein were not sufficiently informed of the default. Of course, they were not notified as a unit firm, but did they not each receive sufficient notification when they were informed individually. Since both the endorsers were the parties to the firm why cannot we say that the holder was justified in doing what he did, thus binding the said parties.

In Foster v. Collner, 107 Pa. 305; Kerr's Estate, 17 Pa. C. C. R. 193, the liability is held equal. An endorser might be proceeded against by the holder and then the former might bring an action against the maker.

Analogous cases hold "that an irregular endorsement by the president of the maker corporation makes him liable to the payee personally and individually. Birmingham Iron Co. v. Regner, 10 North. Co. 205; s. c. 2 Legh. Co., 88, 1906.

Act of 1901, Sec. 81, says that presentment is not required in order to charge an endorser where the instrument was made or accepted for his accommodations and he has no reason to expect that the instrument will be paid if presented.

Contending then that presentment was not necessary and the maker need not be charged primarily we think that the plaintiff's action must be sustained.

OPINION OF SUPERIOR COURT

Prior to the enactment of the Uniform Negotiable Instrument Law, there was great conflict among the authorities as to the liability of one, neither maker or payee, who endorsed a note before delivery to the payee. 7 Cyc. 664. The liability of such a person has been variously held to be that of (1) a maker; (2) endorser; (3) surety; (4) guarantor. 7 Cyc. 664. In Pennsylvania a destructive doctrine was adopted by which such person was liable as a "second endorser." Central Nat. Bank v. Dreydoppel. 134 Pa. 499; 7 Cyc. 666. See especially Stewart's Purdon, Vol. 3, page 3281-2 and notes.

Section sixty-three of the act of nineteen hundred and one, which is a section of the uniform act provides: "Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as an endorser in accordance with the following rules: (1) If the instrument is payable to the order of a third party, he is liable to the pavee and to all subsequent parties; (2) If the instrument is payable to the order of the maker or drawer, he is liable to all parties subsequent to the maker or drawer; (3) If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee."

Construing this section it has been uniformly held that such person is liable, when liable at all, only as an endorser and as such cannot be held unless there has been presentment, demand and notice. See cases collected 14 L. R. A. N. S. 842.

The defendant in this case was an anomalous or irregular endorser, i. e. he was a person, not otherwise a party to the instrument who had placed thereon his signature in blank before delivery, and his liability is therefore to be determined by the provisions of the section of the statute quoted. "Construing with accuracy the crucial words of this section, a person who as an individual endorses a promissory note is 'not otherwise a party' to that instrument. because liable thru membership in a firm whose name appears as maker. In the sense in which the word 'party' is used (in the statute) the partner-

ship which makes the note is the party liable as maker, altho there may flow as a subsidiary inference of law an individual liability of each partner in default of firm assets. In this aspect and for this purpose the partnership may be treated as personified and as an entity separate from the individuals who compose it." Fourth Nat. Bank v. Mead, 216 Mass. 521; 104 N. E. 377; See also Faneiul Bank v. Melon, 183 Mass 66.

The law presumes that the defendant endorsed the instrument for value, (see sec. 24, act of 1901) and therefore under the first clause of section sixty-three of the act of nineteen hundred and one, he was liable to payee as an endorser.

As a general rule presentment for payment and demand are essential to fix the liability of an endorser of a negotiable instrument. 7 Cyc. 959. The seventieth section of the act of nineteen hundred and one provides: "Except as herein otherwise provided presentment for payment is necessary to charge the endorsers." The present case is not embraced within any of the exceptional cases and therefore to bind the endorser, presentment should have been made.

To hold that the plaintiff cannot recover in this action works no great hardship. He may sue the partners jointly and, recovering judgment, he may levy upon the separate property of each. On the other hand if the plaintiff is allowed to recover in this action, the only right of the defendant against his partner will be to sue for contribution. If, however, the plaintiff is compelled to sue both partners as makers and the present defendant pays the judgment, he would be entitled to be subrogated to the judgment as a means of enforcing his right to contribution. Judgment reversed.

FLECK v. INSURANCE COMPANY

Fire Insurance—Stipulations in Policy Not to Keep Certain Articles on Premises

STATEMENT OF FACTS

The policy on Fleck's property stipulated that it was to be void if he kept benzine et cetera on the premises. For the space of one year, he kept benzine on the premises for sale, but two years before the fire he ceased to do so. He paid an annual premium to keep alive the policy. At the end of the two years the fire occurred which occasioned this suit. The defendant alleges that the insurance became, and continued ever after void, by reason of the keeping of the benzine on the premises.

Marshall for the plaintiff.

McKone for the defendant.

OPINION OF THE COURT

PIFER, J. This suit was brought on a fire insurance policy to recover for the loss caused by fire, and the defense is that the keeping of benzine on the premises two years before the fire avoided the policy.

The question is whether the policy was rendered void because benzine, one of the prohibited articles enumerated therein, was kept on the premises during the life of the contract. The policy was in full force at the time of the fire unless avoided by what occurred in the meantime. The plaintiff paid the annual premiums to keep alive the policy until the fire occurred and they were accepted by the defendant company without objection. Another question is whether the policy was rendered void or only suspended during the time the benzine was kept on the premises. Upon this question there is a conflict of authority, but the weight of decisions is against absolute forfeiture, and in favor of the doctrine that the policy, although suspended during the time the prohibited articles are kept on the premises, may be revived by a discontinuance of the keeping or use of such prohiibted articles. Upon this question we cite Sumter Tobacco Warehouse Co. v.Phoenix Ins. Co., S. C., 56 S. E. 654, 10 L. R. A. U. S. 741, and Troder's Ins. Co. v. Cotlin, 163 Ill., 256.

When a prohibited article had been kept or used on the insured premises, but the insurer had not declared a cancellation or forfeiture of the policy on that account, the following cases are authorities for the doctrine that if the breach is merely temporary, the effect thereof is only to suspend the policy during the breach, and not to forfeit it absolutely. Crete Farmers' Mut. Twp. Ins. Co. v. Miller, 70 Ill. App. 599; Mutual Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa., 407; Mears v. Humbold Ins. Co., 92 Pa. 15; Bentley v. Ins. Co., 191 Pa. 276; Silver Plate Co. v. National Fire Ins. Co., 170 Pa. 155; Krug v. German Fire Ins. Co., 147 Pa. 272.

In McClure v. Mutual Fire Ins. Co., 242 Pa. 59, we find a case in which the facts are similar to the one at bar, and it was held that "under these circumstances it is our conclusion, that the policy was not rendered absolutely void by what occurred, but was only suspended during the time the prohibited articles were kept on the premises, and that it was revived by a discontinuance of the prohibited use and by the payment of premiums and the issuance of renewal receipts after that time. * * * * If this rule has not already been adopted in Pennsylvania, it is time that it should be; and if anything said in our cases gives support to a different view, the decisions in those cases must be considered modified to the extent herein indicated. * * * * It is our conclusion therefore that the policy had not been rendered absolutely void, but that it was in full force and effect at the time of the fire, and that the defendant insur-

ance company is liable according to the terms of the policy for such loss as resulted." Judgment for plaintiff.

OPINION OF SUPERIOR COURT

The Supreme Court of Pennsylvania has on occasions affected a solicitude that the so-called freedom of contract of the individual should not be abrogated or abridged, and have declared statutes unconstitutional on the ground that they violated or abridged this right. See Godcharles v. Wigeman, 113 Pa. 431; Walters v. Wolf, 162 Pa. 153.

In spite, however, of the general and emphatic asseverations of the courts in these and other cases, it is not a universal principle that any contract which persons may choose to make must be enforced by the courts. In a very large number of cases of varying facts and circumstances, the courts have refused, for various reasons, to enforce contracts which parties have made. See 18 D. L. R. 91.

Should the court do so in this case? The policy stipulated that upon a certain contingency, which is admitted to have occurred, it should be void. The term void has been thus defined: absolutely null; without legal efficacy; ineffectual to bind parties; that which is incapable of enforcement and cannot be ratified or confirmed; of no legal effect, etc. 40 Cyc. 214. See also Pearsoll v. Chapin, 44 Pa. 15; Seylar v. Carson, 69 Pa. 87.

It is clear that if in the present case the word is to be so interpreted, the plaintiff is not entitled to recover. Is the word to be so interpreted? The authorities are in conflict. Many courts hold that in cases like the present the word is to be so interpreted and that therefore the removal of the situation constituting the breach of the condition does not operate to revive the policy. 19 Cyc. 709. Other authorities equal in number and force hold that the term means only "voidable" and that under this interpretation the policy revives when the cause of forfeiture no longer exists. 19 Cyc. 710; 10 L. R. A. N. S. 741.

The Supreme Court of Pennsylvania has recently adopted the latter view. McClure v. Ins. Co., 242 Pa. 59. It is true that from the report of this case it does not appear that the policy stated that upon a breach of the condition it should be void, but the court quoted with approval a number of cases in which, in spite of such condition, it was held that the policy revived upon the cessation of the wrongful user. Furthermore it is a fair assumption that the policy was of the standard form, which expressly provides that the policy shall be void if the conditions are broken.

In holding that the term void does not mean void, the court was not without authority. See Election Cases, 65 Pa. 34. Muller's Est., 16 Phila. 321.

Though we are inclined to the opinion that this is a case in which persons who are sui juris should "not be prevented from making their own contracts", we yield to the authorities cited and affirm the judgment of the learned court below.