

ADS: Under Sec. 11543 it is the duty of the Recorder of Deeds to record deeds which shall be proved or acknowledged according to law.

RECORDER OF DEEDS:

729  
July 26, 1935.



Mr. Lemuel R. Mead,  
Recorder of Deeds,  
Marshall, Missouri.

Dear Sir:

This department is in receipt of your letter of July 19th wherein you request an opinion regarding Section 11543, R. S. Mo. 1929. Your complete inquiry is as follows:

"I will appreciate it if your office will give me some information on the following matter:

"Have I any right to accept and record in my office, contracts, papers and writings affecting or concerning real estate which have not been acknowledged? If I do not have any right to record such papers which have not been acknowledged, should I record them if they do not affect or concern real estate.

Section 11543, Revised Statutes of Missouri for 1929, says:

"It shall be the duty of the recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any

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lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices.'

"This section does not say that I shall not record papers which have not been proved or acknowledged according to law. I do not want to record any paper if I have no right to do so, and will appreciate it if your office can advise me in this matter."

Section 11543, referred to in your letter, in its entirety is as follows:

"It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; second, all papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government; third, all marriage contracts and certificates of marriage; fourth, all commissions and official bonds required by law to be recorded in their offices; fifth, all written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father, and maiden name of the mother of such child or children."

As your request refers only to the first division of this section, the authorities herein referred to will be confined to the same.

Section 3039, R. S. Mo. 1929, relates further to the recording of deeds and other instruments which affect the title to real estate, and is as follows:

"Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

One of the early decisions relating to this question is the case of *Stevens v. Hampton et al.*, 46 Mo. 1. c. 407, wherein the court said:

"The want of a proper acknowledgment does not, however, invalidate the deed, but only goes to the effect of the record. If not acknowledged or proved, its record is not provided for by law, and the fact that it may be copied upon the book of records will not operate as constructive notice to subsequent purchasers. (*Dussaume v. Burnett*, 5 Iowa, 95; *Lessee of Schultz v. Moore*, 1 McLean, 520; *Barney v. Sutton*, 2 Watts, 31; *Hastings v. Vaughan*, 5 Cal. 315; *Price v. McDonald*, 2 Md. 403; *Johns v. Scott*, 5 Md. 81.) The deed, however, is good as between the parties, and should prevail against subsequent deeds to those who had actual notice of its existence. (*Dussaume v. Burnett*, supra; *Caldwell v. Head*, 17 Mo. 561; *Corby v. Rankin*, 11 Mo. 647.)

"In view, then, of the acknowledgment as affecting the right of record and the question of constructive notice,

the following would seem to be a reasonable rule: that when the recorded instrument shows upon its face that the acknowledgment was taken by a party, or party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face it is the duty of the register to receive and record it, and its record operates as notice notwithstanding there may be some hidden defect."

The rule laid down in the case quoted supra has been followed by later cases, enlarged and further explained.

In the case of Ammerman v. Linton, 279 Mo. 1. c. 453, the court said:

"In Stevens v. Hampton, 46 Mo. 1. c. 408, Judge Bliss, thus states the rule: 'In view, then, of the acknowledgment as affecting the right of record and the question of constructive notice, the following would seem to be a reasonable rule; that when the recorded instrument shows upon its face that the acknowledgment was taken by a party, or party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face it is the duty of the register to receive and record it, and its record operates as notice notwithstanding there may be some hidden defect.' The italics are ours.

"To like effect the rule is stated in 1 Cyc. p. 530, wherest it is said: 'But where an instrument bearing a certificate of acknowledgment or proof which is regular upon its face is presented to the recording office, it becomes his duty to record it, and the record thereof will operate as

constructive notice, notwithstanding there be a hidden defect in the acknowledgment.' The cases bearing upon the rule are collated by the learned author, and among them is *Stevens v. Hampton*, 46 Mo. 404, supra. In 1 C. J. 773, the same rule is announced, and a further collation of authorities given.

"The rule is a sensible one. The recorder of deeds cannot hold inquiry as to defects not apparent upon the face of the instrument. It follows that the recording of the deed of trust from Kirby and wife to Taylor was notice to the world. The contention of appellant must be ruled against him. He not only bought with notice of the prior deed of trust, but he bought after the foreclosure of Kirby's interest, and after the sale to plaintiffs herein, and after plaintiff's deed was of record. He was not a purchaser without notice, nor was the trustee from whom he bought."

The court further discusses this question more pointedly in the case of *Williams v. Butterfield*, 182 Mo. 1. c. 184:

"There is but one vital proposition involved in this cause, presented for our consideration. That is this: Was the record of the deed from Bohlicke and wife to Wolfenden, embracing the land in dispute, admissible in evidence in this cause for the purpose of fixing constructive notice upon plaintiff of the sale of the land prior to his (plaintiff's) purchase?"

"The record of this deed, as offered in evidence, does not show any certificate of acknowledgment by

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Henry Bohleke, the grantor in said deed. Under the statute, it must be conceded that this deed was not entitled to be recorded, by reason of the absence of such acknowledgment. (Sec. 2418, R. S. 1889.)

"It follows from this, if the general rule is applicable to this deed, that in the absence of the certificate of acknowledgment required by the statute, it had no place upon the land records of Stoddard county, and if improperly recorded, would not impart constructive notice to a subsequent purchaser in good faith, for a valuable consideration. (Secs. 2419 and 2420, R. S. 1889; Bishop v. Schneider, 46 Mo. 472; Terrell v. Andrew Co., 44 Mo. 309.)"

CONCLUSION

From the above decisions and in the light of the wording of the statute itself, we are of the opinion that when a deed is presented for record and it bears no acknowledgment or there is a patent defect in the acknowledgment, then it is your duty not to record the same, but if the deed, mortgage, etc., appears regular on its face, then it will be proper to record the same. You should not record any instrument, paper, or writing which does not come within the purview of Section 11543, quoted supra, regardless of the fact that real estate may not be involved.

Yours very truly,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,  
Attorney General.

OWN:HR