

RECORDER OF DEEDS)
BILLS OF SALE)

A Recorder may refuse to record a purported Bill of Sale unless it is acknowledged in compliance with Section 3416, R. S. Mo. and if attempted to be recorded by proof, then Sections 3418, 3419 and 3420, R. S. Mo. 1939, must be complied with.

February 24, 1944



Honorable Oliver Senti
Associate City Counselor
The City of St. Louis
St. Louis, Missouri

Dear Mr. Senti:

We are in receipt of your request for an opinion under date of February 7, 1944, which reads as follows:

"An instrument, a photostatic copy of which is enclosed, was submitted to the Recorder of Deeds with a written demand that it be recorded. The instrument which imposes obligations, both on the grantee and the grantor, is not signed by the grantee and the signature of the grantor, instead of being acknowledged, is merely certified to by a notary public.

"The Recorder submitted an inquiry to this Department as to whether the law requires her to record the instrument. She was informed that after an examination of the authorities, it was our offhand opinion (1) that the law imposed no obligation upon her to record the instrument; and (2) that if she did, it would give no constructive notice to subsequent purchasers and would not subject her to any liability. As the Recorder of Deeds is a State officer we told her that she ought to act on the advice of the Attorney General.

"Will you advise this Department if the instrument is a proper one to record so that we can advise her accordingly.

"Thanking you in advance, I am,"

The instrument reads as follows:

"Bill of Sale.

"KNOW ALL MAN BY THESE PRESENTS,

"That Raymond T. Hayes of the City of Saint Louis,

February 24, 1944

State of Missouri, for and in Consideration of the Sum of Two Thousand Dollars (\$2,000.00), to be paid as hereinafter stipulated, the receipt of Five Hundred Dollars (\$500.00) of said amount is hereby acknowledged, has bargained, sold, and delivered, and by these presents does sell, bargain and deliver unto Moses V. Wiley and Hortense Wiley, all of the following goods, chattels and property, to wit:

"One (1) Mercury Cleaning Machine
One (1) Three Horse Power Boiler
One (1) Steam Iron
One (1) Sewing Machine
Three (3) Fluorescent Lights four feet long
Six (6) Light Bulbs
All Cleaning Supplies and Fluids and Materials
All Counter Supplies such as tags, brushes, etc.
All Steam Pipes, Racks, Check and Shut Off Valves
All Electric Wiring Boxes and Switches"

"To HAVE AND TO HOLD THE SAID GOODS And Chattels and Property unto the said Moses Wiley and Hortense Wiley, their heirs and assigns, administrators and executors forever.

"And the said Raymond T. Hayes does vouch himself to be the true and lawful owner of the said goods, chattels and property and that he has full power to sell and dispose of said property in the manner as aforesaid. And he does for his heirs, executors, administrators and assigns covenant and agree to and with the said Moses Wiley and Hortense Wiley to warrant and defend the said goods, chattels and property against all the lawful claims and demands of any and all persons.

"It is further agreed by and between the Said Raymond T. Hayes and Moses V. Wiley and Hortense Wiley that the delivery of said Articles, Goods, Chattels, and Property shall be made on or before February 6, 1944; that on or before that time Moses V. Wiley and Hortense Wiley agree to have paid the Sum of One Thousand Dollars (\$1,000.00); that the other One Thousand Dollars (\$1,000.00) plus Interest of \$116.00 will be paid in 24 equal Monthly Installments, evidenced by Promissory Notes and secured by a Chattel Mortgage.

"IN WITNESS WHEREOF, all of the parties have hereunto set their hands this 19th day of January, 1944.

"WITNESSES:

R. L. Witherspoon

Raymond T. Hayes

Subscribed and sworn to before me this 19th day of January, 1944.

(Notary Public Seal)

Robert L. Witherspoon
NOTARY PUBLIC

My Comm. Exp. 2-11-1947"

We wish to first call attention to Section 13161, R. S. Mo. 1939, which reads in part 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; * * *"

It will be noted from the reading of the above quoted portion of the Section, that the law requires that before a recorder shall receive an instrument for recording that such instrument must either be proved or acknowledged according to law. With this duty in mind, we make the observation that the instrument attached to the opinion request, designated as "Bill of Sale" contains in part the following:

"IN WITNESS WHEREOF, all of the parties have hereunto set their hands this 19th day of January, 1944.

WITNESSES:

R. L. Witherspoon

Raymond T. Hayes

Subscribed and sworn to before me this 19th day of January, 1944.

(Notary Public Seal)

Robert L. Witherspoon
NOTARY PUBLIC

My Comm. Exp. 2-11-1947

It will be noted from the reading of the above portion that the signature of Raymond T. Hayes is witnessed by R. L. Witherspoon, and also the notation "Subscribed and sworn to before me this 19th day of January, 1944" and signed by Robert L. Witherspoon, Notary Public, whom, we presume, is the same person as the R. L. Witherspoon who witnessed the signature.

Section 3408 R. S. Mo. 1939, provides as follows:

"The proof or acknowledgment of every conveyance or instrument in writing affecting real estate in law or equity, including deeds of married women, shall be taken by some one of the following courts or officers: First, if acknowledged or proved within this state, by some court having a seal, or some judge, justice or clerk thereof, notary public, or some justice of the peace of the county in which the real estate conveyed or affected is situated; second, if acknowledged or proved without this state, and within the United States, by any notary public or by any court of the United States, or of any state or territory, having a seal, or the clerk of any such court, or any commissioner appointed by the governor of this state to take the acknowledgment of deeds; third, if acknowledged or proved without the United States, by any court of any state, kingdom or empire having a seal, or the mayor or chief officer of any city or town having an official seal, or by any minister or consular officer of the United States, or notary public having a seal."

Section 3416 R. S. Mo. 1939, provides in part as follows:

"The certificate of acknowledgment shall state the act of acknowledgment, and that the person making the same was personally known to at least one judge of the court, or to the officer granting the certificate, to be the person whose name is subscribed to the instrument as a party thereto, or was proved to be such by at least two witnesses, whose names and places of residence shall be inserted in the certificate; and the following forms of acknowledgment may be used in the case of conveyances or other written instruments affecting real estate; and any acknowledgment so taken and certified shall be sufficient to satisfy all requirements of law relating to the execution or recording of such instruments:

(Begin in all cases by a caption, specifying the state and place where the acknowledgment is taken.)

"1. In case of natural persons acting in their own right:

"On this _____ day of _____, 19 _____, before me personally appeared A B (or A B and C D), to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed."

"2. * * *"

We do not quote the remaining portion of the section for the reason that it is lengthy, and we do not think applicable to the situation confronting us. It will be noted from the reading of Sections 3408 and 3416, Supra, that through the use of the words "Subscribed and sworn to before me this 19th day of January, 1944" can certainly not be said to be an acknowledgment, and does not meet the requirements of the statutes for the following reasons:

- 1) Does not contain the caption and residence thereof as is provided in Section 3416, Supra.
- 2) It does not state the act of acknowledgment.
- 3) That the person making the same, namely; Raymond T. Hayes, was personally known to the Notary Public, Robert L. Witherspoon, or that he personally appeared before the Notary Public. However, the instrument shows that it was witnessed by R. L. Witherspoon, and from this we presume that Raymond T. Hayes did personally appear, and further, it does not appear that Raymond T. Hayes was personally known to the Notary Public, and due to the fact that the statute with particularity sets out what the requirements are, and what must be stated in order to constitute an acknowledgment by a natural person acting in his own right and the absolute failure of the instrument designated as a Bill of Sale, to in anywise meet this requirement, we must conclude that the words "subscribed and sworn to before me this 19th day of January, 1944" does not constitute an acknowledgment of the instrument.

It is our thought that through the use of the words "which shall be proved or acknowledged according to law," used in Section 13161, Supra, that Sections 3408 and 3416, Supra, are controlling as to what is necessary to be contained in an acknowledgment in all instruments described in Section 13161. For the reasons stated heretofore, it is our opinion that the proposed Bill of Sale is not acknowledged according to law, being not in compliance with Section 3416, Supra.

Now turning to the question of whether or not such instrument is proved within the meaning of Section 13161, Supra. At the outset we wish to call attention to Section 3486, R.S. Mo. 1939, which reads in part as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, * * *"

It is our view that in absence of a specific statute governing Bills of Sale that the words "which shall be proved or acknowledged according to law" contained in Section 13161, as well as the wording of the portion of Section 3486, Supra, places the burden upon a person who intends to rely upon proving an instrument instead of having the same acknowledged. He must resort to other sections of the statute wherein such term namely, "which shall be proved" as contained in Section 13161, Supra, is found. Therefore, resorting to the sections of the statute we call attention to Sections 3418, 3419 and 3420, where the method of making proof is set forth and such sections read as follows:

Section 3418. "No proof by a subscribing witness shall be taken, unless such witness shall be personally known to at least one judge of the court, or to the officer taking the proof, to be the person whose name is subscribed to the instrument as a witness thereto, or shall be proved to be such by at least two credible witnesses."

Section 3419. "No certificate of such proof shall be granted, unless such subscribing witness shall prove that the person whose name is subscribed thereto as a party is the person who executed the same; that such person executed the instrument, and that such witness subscribed his name as a witness thereof."

Section 3420. "The certificate of such proof shall set forth the following matters; First, the fact that such subscribing witness was personally known to at least one judge of the court, or to the officer granting the certificate, to be the person whose name is subscribed to such instrument as a witness thereto, or was proved to be such by at least two witnesses, whose names and places of residence shall be inserted in the certificate; second, the proof given by such witnesses of the execution of such instrument, and of the facts that the person whose name is subscribed to such instrument as party thereto is the person who executed the same, and that such witness subscribed his name to such instrument as a witness thereof."

We wish to point out that when we apply Sections 3418, 3419 and 3420, Supra, to the statement of a Notary Public which appears at the bottom of the Bill of Sale, we must conclude 1) that there was no intention on the part of either the Notary Public or the person who executed the Bill of Sale to resort to proving the instrument, as that term is used in Section 13161, Supra, as distinguished from acknowledging the instrument. 2) the Notary Public does not state that the subscribing witness was either himself or was personally known to him. 3) it was not witnessed by two persons as is provided by Section 3420, neither does the place of their residence appear. 4) no proof was given of the execution of the instrument as is provided in said section. 5) that the person who subscribed his name is the person who executed the same. Therefore, we must conclude that the recorder may refuse to record the reported Bill of Sale on the second ground that it is not proved within the meaning of Section 13161, Supra.

These sections, however, as well as Section 3416, are contained in Article 1, Chapter 23, R.S. Mo. 1939.

We have dispensed with the necessity of quoting cases for the reason that it is our view that the statutes have so well defined the term "acknowledged and proved" and the requirements under each definition. We therefore, conclude that because of the fact that the instrument fails to meet the requirements of the statutes that there is no duty upon the recorder to accept the instrument for the purposes of recording same. We note in your opinion request that you make observation as to the contents in the body of the instrument. In view of what we have heretofore said we do not consider it necessary that we go into the contents of the body of the instrument. By way of reference we call attention to the case of Weyrauch v. Johnson, 208 N.W. 706, 708, pars. 5, 6, wherein the court said:

"We may observe that the county recorder is largely a ministerial officer. It is a matter of common knowledge that many instruments that are technically defective are recorded, and the record of such instruments may be sufficient to impart constructive notice. There seems to be no provision in the statute which clothes the county recorder with the judicial power to determine the legal validity and effect of every instrument tendered to him for record, or the effect of such recording. He cannot arbitrarily refuse to record instruments which are in proper form and eligible to record, under our recording acts, where a reasonable request for recording is made and the fee is duly tendered.

"We find no error in the record appealed from, and it must be, and is, affirmed."

Also in the case of People v. Fromme, 54 N. Y. Supplement, 833, 834, the court said:

"* * *As has already been decided by the court of appeals of this state in regard to provisions of the previous revenue law, the congress of the United States cannot control the rules of evidence in courts of this state, nor the legality of contracts made, executed, and to be performed within its borders, except such contracts as relate to subjects over which the United States have jurisdiction. The responsibility of seeing that the proper stamp

is affixed rests upon the parties to the instrument; and the register is no more required to determine the validity under the United States revenue law of an instrument offered for record than he would be to determine whether a deed offered for record contravened some statute of the state, or was offered for the purpose of defrauding creditors, or, for any other reason, was invalid and void. To hold that such a duty rested upon the register would be to constitute him a judicial instead of a ministerial, officer. The relator having complied with the provisions of the law of this state as to the statement which he desired to have filed, and having tendered the necessary fees for such filing, it was the duty of the register to accept the same for recording."

CONCLUSION.

It is the opinion of this Department that a recorder of deeds may refuse to record a purported Bill of Sale which attempts to transfer the title and interest to personal property, unless on said instrument there appears an acknowledgment which strictly complies with Section 3416, R. S. Mo. 1939, or, if the instrument is to be proved, instead of acknowledged, then there must be a strict compliance with Sections 3418, 3419 and 3420, R. S. Mo. 1939.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney General

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