Chicago-Kent Law Review

Volume 14 | Issue 4 Article 1

September 1936

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CHICAGO-KENT REVIEW

VOL. XIV SEPTEMBER, 1936 No. 4

CONSTRUCTIVE NOTICE AFFORDED BY THE RECORDS OF INSTRUMENTS RELATING TO REAL PROPERTY

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IN land titles, a person's lawful claim or interest in or to real property is binding on and enforceable against all persons who deal with the property and who have notice of such lawful claim or interest. Such notice may be classified as either actual or constructive. It is actual when a person has actual knowledge of the claim or has actual knowledge of facts which would put a reasonably prudent man upon inquiry as to the claim that the facts suggest.[1] Constructive notice, on the other hand, need not be actually brought home to the person affected thereby. The law conclusively presumes that one has such notice of claims or interests of persons in possession which would have been revealed on inquiry of such persons[2] and of instruments which have been recorded in the manner provided by law.[3] This latter notice, which may be termed as constructive notice from the record, will be the subject of this article, and reliance will be had on Illinois cases reported thereon. No attempt will be made to treat of actual notice or notice afforded by possession.

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1 46 C. J. 539, 540.

2 Noyes v. Hall, 97 U. S. 34, 24 L. Ed. 909 (1878).

3 Chicago P. & St. L. Ry. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113 (1903).

Constructive notice from the record arises by statute only.[4] The Illinois statutes thereon provide:

Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this State, shall be recorded in the county in which such real estate is situated. . . .[5]

All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record.[6]

These statutes do not require that the instruments be recorded in order to make them valid[7] but that they be recorded in order to be effective as against "creditors and subsequent purchasers without notice." Thus an instrument properly recorded is notice to such creditors and subsequent purchasers whether or not these creditors and subsequent purchasers actually know of the instrument, whether they have actually seen the record thereof or not, if the instrument is one entitled to record. Similarly, when the instrument is not recorded, the creditors and subsequent purchasers without notice may safely treat it as though it never in fact existed.[8]

The word "creditors" in the statute cited[9] has been held to mean judgment creditors.[10] The expression "subsequent purchasers" has been construed to include mortgagees[11] and purchasers at judicial sales,[12] and means subsequent in time to the time of recording of the instru-

[4] In re Atlantic Beach Corp., 244 F. 828 (1917).

[5] Ill. State Bar Stats. (1935), Ch. 30, par. 29.

[6] Ibid., Ch. 30, par. 31.

[7] Irwin v. Brown, 145 Ill. 199, 34 N. E. 43 (1893).

[8] Dewitt v. Shea, 203 Ill. 393, 67 N. E. 761 (1903); Booker v. Booker, 208 Ill. 529, 70 N. E. 709 (1904).

[9] Ill. State Bar Stats. (1935), Ch. 30, par. 31.

[10] Crawford v. Logan, 97 Ill. 396 (1881).

[11] Schroeder, Admr. v. Wolf, 227 Ill. 133, 81 N. E. 13 (1907).

[12] McNitt v. Turner, 83 U. S. 352, 21 L. Ed. 341 (1873).

ment of which the purchaser is required to take notice.[13] The statute does not, therefore, apply to prior purchasers; that is to say that a prior purchaser in a recorded deed need not take notice of a subsequent purchaser or incumbrancer as far as his own prior lien or interest is concerned.[14] "Subsequent purchasers" has also been held to apply to subsequent purchasers from the heirs of a deceased grantor in an unrecorded deed as well as to purchasers from the grantor himself. That is, where a grantee has failed to record his deed, a subsequent purchaser from the same grantor or from the heirs of that grantor, if the grantor had since died, gets a good title, provided that he has not had some other notice of the unrecorded deed and provided he recorded his deed before the prior grantee has recorded his.[15]

Although the statute hereinbefore cited[16] refers to creditors (meaning judgment creditors) as well as to subsequent purchasers, this article will not attempt to consider the notice afforded by judgments and decrees,[17] nor will it take up lis pendens notice,[18] notice of mechanics liens,[19] notice of probate proceedings or records of wills or proceedings thereon,[20] notice of general and special taxes and assessments,[21] or notice under the Torrens system.[22]

In considering constructive notice from the record, our first query, suggested by the broad wording of the statute above set forth,[23] is whether or not the records

[13] Montague & Co. v. Aygarn, 164 Ill. App. 596 (1911).
[14] Schultze v. Houfes, 96 Ill. 335 (1880); Elder v. Derby, 98 Ill. 228 (1881).
[15] Kennedy v. Northup, 15 Ill. 148 (1853).
[16] Ill. State Bar Stats. (1935), Ch. 30, par. 31.
[17] Ibid., Ch. 77, pars. 1, 6, 82; Ch. 22, pars. 44, 45; Ch. 79, pars. 125, 136, 137; Ch. 37, pars. 456, 527.
[18] Ibid., Ch. 22, par. 57.
[19] Ibid., Ch. 82, par. 1-40.
[20] Ibid., Ch. 30, par. 34; Ch. 3, par. 99; Ch. 148, pars. 2, 9, 10, 11, 12.
[21] Ibid., Ch. 120, par. 268; Ch. 24, par. 182.
[22] Ibid., Ch. 30, pars. 49-153.
[23] Ibid., Ch. 30, par. 31.

charge the creditors and subsequent purchasers with constructive notice of any and every instrument that may or might affect the real estate in which such creditor or purchaser is interested. Manifestly, that would be unreasonable and impracticable, especially in our large cities where volumes of instruments affecting real property are recorded daily. Admittedly, there must be some limitation as to which records of instruments should be held to give constructive notice. Constructive notice has accordingly been held to be limited to recorded instruments within the chain of title of the piece of property in question, which chain of title is defined as "the successive conveyances commencing with the patent from the government or some other source and including the conveyance to the one claiming title."[24] The patent from the government is the first link in a chain of title. That link would consist of the period of time during which the patentee held title, that is, until he executed and delivered a deed to another. Then with the new owner a new link begins, and so on, the process continuing on through the successive conveyances. Thus, any instrument executed by a person during the time that he had title, affecting the property, would be within the chain of title, and, if properly recorded, would afford constructive notice to creditors and subsequent purchasers. Therefore, when a record owner executes a mortgage[25] or deed[26] covering the property, and the instrument is recorded, any creditor or subsequent mortgagee or grantee will take with notice of such prior mortgage or deed.

With the definition and illustration of the chain of title as a starting point, let us review cases applying the definition to sets of actual facts. Probably the best case on this subject is that of *Capper* v. *Poulsen*,[27] decided in

[24] Capper v. Poulsen, 321 Ill. 480, 152 N. E. 587 (1926).
[25] Schroeder, Admr. v. Wolf, 227 Ill. 133, 81 N. E. 13 (1907).
[26] Dewitt v. Shea, 203 Ill. 393, 67 N. E. 761 (1903).
[27] 321 Ill. 480, 152 N. E. 587 (1926).

1926. There one Poulsen, being the owner of certain real estate, in 1916 conveyed the property by a warranty deed to one Barnett. At the same time Barnett was alleged to have given Poulsen a writing which was either an option to repurchase or an acknowledgment of the right to redeem. This writing was not recorded although the warranty deed was then recorded. Thereafter in 1917 Poulsen recorded his own affidavit wherein he stated that the warranty deed given by him to Barnett was intended as a mortgage to secure a debt and not as a conveyance of the fee. Subsequently, in 1920, Barnett conveyed to Amerman, who later conveyed to the complainant. The latter then brought this action to quiet his title. The question is whether the Poulsen affidavit was a cloud on the complainant's title. The court held that it was not, for the reason that the affidavit was not within the chain of title to the property and was, therefore, not constructive notice to him, and he had had no other notice thereof. The affidavit did not come within this chain, since, at the time it was recorded, the affiant, Poulsen, no longer had any title to the property of record. The record then showed that he had conveyed all his title away in 1916 and it would be burdensome to charge subsequent grantees with any statements he made subsequent thereto about the property, of which they did not know. As far as Poulsen was concerned, the chain ended as to him with his deed to Barnett and any conveyances or admissions as to the property that he made thereafter could not, when recorded, be constructive notice. The doctrine here applied is well stated in the case of *Thorpe* v. *Helmer*,[28] where it is said that "the record of a deed is constructive notice only to parties holding in the same chain of title, and a purchaser is not required to examine every record that might by some possibility affect real estate before he can safely take the title."

[28] 275 Ill. 86, 113 N. E. 954 (1916).

The same holding results when a mortgage is executed and recorded by one who the record shows did not have title at the time the mortgage was recorded.[29] A purchaser is not required to search the records prior to the time that an owner acquired title to discover acts that he may have done to impair that title before it was vested in him as disclosed by the records. A person is within a chain of title from the date a deed to him as grantee is recorded. His deeds made as grantor and recorded prior to that date are not within the chain and therefore do not afford constructive notice.

The ruling applies still more forcibly where the instrument of record is executed by one whom the record does not show ever to have had title. In the case of *Rohde* v. *Rohn*,[30] in a contest between two mortgagees for priority, it was held that the mortgage executed by a certain Dimond, who by the record appeared never to have had title, was not constructive notice and therefore was not binding as against a subsequent mortgage executed by one who, the record indicated, did have title. Instruments executed by a stranger to the title, that is, by one not connected to the chain as grantee in some deed within the chain, are not in the chain of title and therefore cannot give constructive notice.

In another case of an unrecorded deed, *Booker* v. *Booker*,[31] a husband purchased property for his wife with her money but took title in his own name and recorded the deed. He then executed a deed of the property to his wife, but this deed was not recorded. The wife later executed a mortgage of the property to a third party and had the mortgage recorded. The court held that as to subsequent purchasers without notice, the husband had a good title, and the recorded mortgage executed by the

[29] Lesser v. Kibort, 243 Ill. App. 258 (1927).
[30] 232 Ill. 180, 83 N. E. 465 (1907).
[31] 208 Ill. 529, 70 N. E. 709 (1904).

wife was not constructive notice of an unrecorded deed from the husband to the wife. The mortgage was outside of the chain of title and therefore a prudent searcher of the record would not find it in his search of the record.

The same result was reached in 1934 in a case wherein the plaintiff showed a connected chain of title, while the defendant, whose chain started with a sale by an assignee in bankruptcy, was not in the chain of title, because, at the time of the said sale, the bankrupt, according to the records, no longer had title to the property, but had conveyed it away about a year prior to that time.[32]

In another case on the same point, a mortgage executed by a certain Moore, appeared of record, but the record did not show any deeds by which Moore acquired title or which connected him to the chain of title. It was held that this mortgage was not constructive notice and not binding on the property as against creditors and subsequent purchasers without notice; that a purchaser without notice is not constructively charged with everything which may appear on record but that he is only charged with instruments within the apparent chain of title; that to require more of such a purchaser would be unreasonable and impracticable.[33]

As to instruments within the chain of title, it may here be noted that it is not necessary to record within the state the patents issued by the government on lands within the state. The original record in the general land office at Washington, D. C., from which patents are issued is notice to the world of their existence.[34]

The holdings in regard to the chain of title thus far discussed may be more readily appreciated if it is understood that the only indices to the records required by law, and therefore the only ones to be noticed, are the

[32] Manson v. Berkman, 356 Ill. 20, 190 N. E. 77 (1934).
[33] Irish v. Sharp, 89 Ill. 261 (1878).
[34] Lomax v. Pickering, 173 U. S. 26, 43 L. Ed. 601 (1899).

grantor's and grantee's indices.[35] It is almost impossible to locate all instruments that one must take notice of with only these indices as an aid, unless the doctrine of chain of title is applied. In applying the doctrine, the searcher will start with the present owner and trace back in the grantee's index to the time a deed is reached wherein he is grantee. Then that grantee will be dropped and the grantor in that deed will be traced back in the grantee's index from the date the deed is recorded until a deed is reached wherein he is the grantee. This process will be repeated until some source, like a patent from the government, will be reached. The search will then be reversed and the grantor's index will be traced for instruments executed by the patentee down to the time a deed of the fee executed by the patentee is reached. The patentee will then be dropped and the grantor's index will then be traced from the date appearing on the last deed, for instruments executed by the grantee in that deed until a deed is reached wherein the same grantee conveys the fee. The process is repeated down through the latest grantee for any instruments executed by such latest grantee. If the search thus made, leads link by link to the source and back to the same present owner, the latter is within the chain of title. Furthermore, all instruments located by this search, relating to the property, will be within the chain of title and will give constructive notice.

Summarizing the matters we have so far considered, we may make the following generalizations:

1. Not every instrument of record relating to real estate is held to be constructive notice to persons subsequently dealing with that property, but only the instruments within the apparent chain of title afford such notice.

[35] Ill. State Bar Stats. (1935), Ch. 115, par. 13; Lesser v. Kibort, 243 Ill. App. 258 (1927).

2. A chain of title consists of the successive conveyances from the government or some other source to the one claiming title, each link consisting of the period of time during which a person has title, the link beginning with a deed wherein that person is grantee and ending with a deed wherein he is grantor.

3. Instruments are in the chain of title and afford constructive notice when they are executed by a person who is the grantee in a deed within the chain of successive conveyances from the source to him, if the instruments executed by him are recorded during the interval of time between the date of the recorded deed wherein he is such grantee and the date a deed is recorded wherein he is the grantor. Instruments that are recorded at any other time are not within the chain of title and therefore do not afford constructive notice to creditors and subsequent purchasers without notice.

Having considered the question of when an instrument is or is not within the chain of title, we may now review cases touching on constructive notice from the records under the following headings: (1) Recitals in the record as constructive notice of unrecorded instruments. (2) The notice afforded by the record of deeds with defective or erroneous descriptions. (3) Constructive notice of the contents of recorded instruments within the chain of title. (4) Notice of latent defects and secret equities. (5) Constructive notice afforded by unauthorized or fraudulent releases. (6) Constructive notice afforded by records of irregularly, defectively, or invalidly executed instruments. (7) Constructive notice afforded by the record of a forged deed. (8) Constructive notice afforded by destroyed or mutilated records.

Recitals in the Record as Constructive Notice of Unrecorded Instruments

We have seen that a record of an instrument not in the chain of title will not give constructive notice that the

grantor therein may hold an unrecorded deed. The same is true where a recital as to an unrecorded deed appears in a recorded deed that is not in the chain of title. In the case of *Kerfoot* v. *Cronin*[36] it was held that a recital in a trust deed of record, not in the chain of title, executed by one Hansbrough, which described the note secured by the trust deed as payable to the order of one Samuel J. Walker (then the owner of the land of record) and as being "given for the purchase money to be paid for the premises hereinafter described . . ." did not give notice of an unrecorded deed from Walker to Hansbrough. Mr. Justice Mulkey there said for the court on rehearing: "Where one is not chargeable with notice of the record of a deed because apparently between strangers to his title, he will not be deemed to have constructive notice of any recitals contained in it."

But where the instrument containing the recital is within the chain of title, a different holding results. In the case of *Crawford* v. *The Chicago Burlington & Quincy Railroad Company*,[37] a trust deed was executed but was not recorded. Later a contract to sell the property was recorded and was in the chain of title. That contract provided that it was subject to an incumbrance of $130,000, due in four years, from "October next, with interest at 7 per cent, payable semi-annually." The court held that this provision was sufficient constructive notice of the trust deed, that the purchaser would be required to pursue this notice to its source—in this case to interview the parties to this contract and obtain whatever information he could get from them, and failing to do this, he would be charged with all that would have been learned had he pursued and investigated the matter to the full extent to which it lead.

In the case of *Sidwell* v. *Wheaton*,[38] a recital in a deed

[36] 105 Ill. 609 (1882).
[37] 112 Ill. 314 (1884).
[38] 114 Ill. 267, 2 N. E. 183 (1885).

within the chain of title that the conveyance was made subject to two certain trust deeds, describing them, was held to make these trust deeds a charge on the land in question, when as a matter of fact the trust deeds, through mistake, had not included this land although the parties thereto intended to include it. The trust deeds and the deed in question were executed by the same grantor. And in the case of *Gallagher & Speck* v. *Chicago Title & Trust Company,*[39] where property had been conveyed to the Chicago Title & Trust Company "as Trustee, under the provisions of a trust agreement dated the 12th day of September, 1916, and known as Trust Number 6624," it was held that this recital gave notice that the company was holding as trustee only and that someone else was the beneficial owner thereof.

The Notice Afforded by the Record of Deeds with Defective or Erroneous Descriptions

Another question on constructive notice of record arises as to the notice given by instruments with defective or erroneous descriptions. In the case of *Thorpe* v. *Helmer,*[40] the description was otherwise correct except that it placed the land in section 16 instead of section 26, and the court held that the record did not give constructive notice of the trust deed. The fact that there was only one such subdivision named in the description in the county, was held not to aid the matter, as a purchaser would not necessarily know this. The court held that the record of an instrument affecting the title to land is constructive notice only so far as the land is correctly described, unless it is apparent from the record itself that there is a misdescription. The same result occurred where the land was described as in the north half of the northwest quarter instead of the south half of the north-

[39] 238 Ill. App. 39 (1925).
[40] 275 Ill. 86, 113 N. E. 954 (1916).

west quarter;[41] or as in Range 1 west instead of Range 1 east;[42] or as in section 11 instead of section 17;[43] or as in section 24 instead of section 13;[44] or as lot 5, also five feet off the entire west side of lot 6 instead of lot 5, also five feet off the entire east side of lot 6;[45] or as in section 35 instead of section 26;[46] or as in block 20 in West Joliet instead of in block 16 in West Joliet.[47] In these cases it was immaterial that there was no other subdivision of the same name in the county or that the record nowhere indicated that the grantor ever owned the land described although it did show that he owned the land intended to be described. As to the contention that the record nowhere indicated that the grantor ever had title to the described land, the court suggested that purchasers might well assume an unrecorded deed. The same result occurred where the description by mistake covered a parcel of land of 40 acres not owned by the grantor nor intended to be included, and failed to include a 40 acre parcel owned by the grantor and intended to be conveyed.[48] It was held not to cover the 40 acres not included in the description, as far as constructive notice was concerned. In all of these cases the deeds may have sufficiently described the land as between the original parties thereto and persons with actual notice, but the question was whether they were sufficient to give constructive notice to creditors and subsequent purchasers that there was a conveyance of the land intended to be conveyed.

Where the misdescription is in a deed, which on its

41 Snyder v. Partridge, 138 Ill. 173, 29 N. E. 851 (1891).
42 Yarnell v. Brown, 170 Ill. 362, 48 N. E. 909 (1897).
43 Slocum v. O'Day, 174 Ill. 215, 51 N. E. 243 (1898).
44 Lesser v. Kibort, 243 Ill. App. 258 (1927).
45 Carpenter v. Young, 280 Ill. App. 116 (1935).
46 Yeck v. Crum, 122 Ill. 267, 14 N. E. 3 (1887).
47 Rodgers v. Cavanaugh, 24 Ill. 583 (1860).
48 Wait v. Smith, 92 Ill. 385 (1879).

face seems sufficient to convey the land described, a purchaser can assume that it actually is intended to cover the land it describes and may therefore disregard it as to other land. But where it is apparent on the face of the deed that there is an error in the description and there is enough description to convey the land, a different result is obtained. In the case of *Merrick* v. *Wallace,*[49] the land was described as in section thirteen-four instead of thirty-four and it was held that since it was apparent on the record that an error had been made in the deed, purchasers had constructive notice of the deed. This error also indicated that section 34 was probably intended. In the case of *Myers* v. *Perry,*[50] the description was otherwise correct except that it left out the township altogether. The court held that it was apparent on the record that there was an error in the description and purchasers were placed on notice of the instrument. In the case of *Citizens' National Bank* v. *Dayton,*[51] the trust deed purported to describe a part of lot 25 by metes and bounds, but the beginning was placed in the southwest corner of lot 25 instead of in the southeast corner of the lot, so that the description bounded a piece of land in an adjoining lot and not in lot 25. It was held that as the record showed that the mortgagor intended to describe land in lot 25, although description did not do so, and did own land in lot 25 and none in the adjoining lot, the error was apparent on the record, and purchasers were placed on notice. A similar result was reached where the description read in part, "commencing 50 feet 9 inches and 30 feet east of the northwest corner of the southwest quarter of section 21" instead of "commencing 50 feet 9 inches south and 30 feet east of the northwest corner," etc. It was held that with the word "south" omitted, the

[49] 19 Ill. 486 (1858).
[50] 72 Ill. App. 450 (1897).
[51] 116 Ill. 257, 4 N. E. 492 (1886).

description on its face indicated error and put purchasers on notice.[52]

Where the description in the recorded deed seems regular but does not in fact describe the land intended and there is some other statement in the deed showing this error, the deed is held to give constructive notice of the land intended. In the case of *Coleman* v. *Mulcahey*,[53] the land was described as in section 21 instead of in section 22 as intended, but the instrument also contained the recital, "All being lands now occupied by the mortgagors, and all lands owned by them." The mortgagors owned and occupied the land in section 22 and none in section 21. It was held that the recital put purchasers on notice since the mortgagors were in possession of land in section 22 and the record indicated that they did not own any land in section 21.

The same decision was reached in *Bowen* v. *Galloway*,[54] where the description read in part, "Lot No. 4 in Block 13," and as a matter of fact this block contained two different lots No. 4, one being the original lot 4 and the other being sub-lot 4 of a resubdivision of lots 1 and 2 in the same block. The description also stated that the land had "a frontage of 24½ feet and a depth of 80 feet. Also one two-story and basement frame dwelling house thereon." The sub-lot was intended, it complied with the dimensions, and it had a two story and basement frame dwelling thereon, while the original lot 4 did not meet these dimensions, nor did it have any two-story frame dwelling thereon. The court stated that the description need not be of any particular kind as long as it in fact identifies the property, that in this case in investigating the recital as to dimensions and the building on the lot,

[52] Russell v. Ranson, 76 Ill. 167 (1875).

[53] 242 Ill. App. 462 (1926), affirmed on other grounds in 334 Ill. 64, 165 N. E. 189 (1929).

[54] 98 Ill. 41 (1881).

it was apparent that there was an error in the description, and purchasers of sub-lot 4 had constructive notice of the instrument as affecting that lot.

Constructive Notice of the Contents of Recorded Instruments Within the Chain of Title

In the case of *Simonson* v. *Goldberg,*[55] the owner of two adjoining lots had built an apartment house on one and placed the sidewalk for said building wholly in the adjoining lot. He subsequently sold the apartment, retaining the adjoining lot. The deed contained the following provision: Nothing contained in this deed shall be construed as a conveyance of or a lien upon or over any premises adjoining the premises hereby conveyed.'' Subsequently, the plaintiff purchased the premises with the apartment building, and the defendant purchased the adjoining lot. The court held that the provision last above quoted negatived the easement for the sidewalk and since it was in a recorded deed within the chain of title, subsequent purchasers without notice were bound thereby. Similarly, in a case[56] where the grantors only had a life estate by a recorded deed, and a purchaser from them, relying on an abstract which failed to set out their interest as merely life tenants, and purchasing, as he thought, a fee simple estate, was held to have constructive notice of the extent of the interest of his grantors. It is also held that recitals in recorded deeds to the effect that the deed is made subject to the payment by the grantee to the grantor of a certain sum per annum during the grantor's life [57] give constructive notice and are binding upon subsequent purchasers without notice. In the case of *Thompson* v. *Maloney,*[58] the subdivider filed

[55] 338 Ill. 420, 170 N. E. 252 (1930).
[56] Hagan v. Varney, 147 Ill. 281, 35 N. E. 219 (1893).
[57] Powell v. Powell, 335 Ill. 533, 167 N. E. 802 (1929); Gallaher v. Herbert, 117 Ill. 160, 7 N. E. 511 (1886).
[58] 199 Ill. 276, 65 N. E. 236 (1902).

his plat and sold lots by a reference to this plat. Although the plat was not a statutory one because it did not fully comply with the statute, yet the plat amounted to a common law dedication of the streets and alleys in the subdivision, and since the descriptions in the recorded deeds referred to the subdivision by name, and since the plat was recorded, the creditors of the subdivider had constructive notice of the dedication and were bound thereby.

In another case[59] the property was subject to a recorded trust deed containing a power of sale. The power of sale was exercised and the land sold to one Coates. The mortgagor then sold his equity in the land to another before the Coates' deed was recorded, and the deed of the mortgagor's grantee was recorded before the Coates deed was. The court held that since the trust deed was of record unreleased and contained the power of sale, it gave constructive notice of whatever might be done in the exercise of the power of sale, and therefore gave notice of the Coates deed.

In the case of *Black & Farwell* v. *Hills & Gammon*,[60] a minor conveyed his land during minority by deed, which was duly recorded, and later, after majority executed a contract to convey to the same grantee, but before the contract was recorded conveyed to another who recorded his deed before the contract was recorded. It was held that the deed executed and recorded during minority was not constructive notice of any interest of the grantee therein in the land, nor that the minor might ratify it after majority, for as a matter of law the execution of the later deed amounted to a disaffirmance of the earlier one.

Again in the case of *Babcock* v. *Lisk*,[61] where a mortgage recited that it was given to secure a $70 note and

[59] Mansfield v. Excelsior Refinery Co., 135 U. S. 326, 34 L. Ed. 162 (1890).
[60] 36 Ill. 376 (1865).
[61] 57 Ill. 327 (1870).

later recited that it was also in consideration of $500 paid to the mortgagor, the court held that a subsequent purchaser must take notice of all recitals in recorded instruments in the chain of title and in this case was put on notice whether the amount of the mortgage was $70 or $570. In the case of *Bullock* v. *Battenhousen*[62] it was held that where a mortgage fails to state the consideration or the amount of the debt it secures or fails to give sufficient information so that the amount may be ascertained, the record of the mortgage does not afford constructive notice of the mortgage to subsequent purchasers, because a mortgage is merely a security for a debt, and cannot exist without such a debt; therefore a mortgage must set out the consideration in order to give constructive notice thereof to subsequent purchasers. And where a mortgagor subsequently conveys his equity to the trutee in the recorded trust deed, a merger does not necessarily result, as the conveyance may have been made for some other purpose, or it may have been intended to keep the mortgage alive to retain a prior lien thereon as against incumbrances subsequent to the mortgage.[63] A subsequent purchaser takes with constructive notice that a merger was not intended.

Notice of Latent Defects and Secret Equities

In *Ogden Building & Loan Association* v. *Mensch*,[64] a mortgage to the association was acknowledged before a notary public who was also a stockholder and director of the association. A second mortgage was executed to a third party. Although the acknowledgment was void because taken by an officer of the grantee in the mortgage, and although the homestead rights were not, therefore, waived, yet since the defect was a latent one and not

[62] 108 Ill. 28 (1883).
[63] Edgerton v. Young, 43 Ill. 464 (1867).
[64] 196 Ill. 554, 63 N. E. 1049 (1902).

apparent on the face of the recorded mortgage, the mortgage afforded constructive notice of itself to subsequent purchasers.[65] Thus latent defects do not destroy the constructive notice given by apparently regularly executed instruments to subsequent purchasers.

The question of secret equities was before the court in the case of *McNab* v. *Young*.[66] The holder of a mortgage indebtedness authorized his agent to foreclose the mortgage for him. The agent did so and bought in the property in his own name. Several years later the agent conveyed the property to an innocent purchaser without notice, and never accounted for the proceeds to his principal. It was held that the purchaser took free of this secret equity since the record nowhere gave any notice thereof. The same decision was given in a case where the patent was issued to one party when another was rightfully entitled to it.[67] Since the record did not give notice of the equitable claim of the one entitled to the patent, subsequent purchasers from the patentee, not having any other notice, where protected in relying on the record and took free of the equity. Defects and irregularities in the exercise of a power of sale in mortgages, which irregularities do not appear affirmatively on the face of the record, as, for example, that the premises were offered for sale as a whole and not in separate parcels or that the amount of the debt was overstated, are latent defects, and subsequent purchasers without notice take free of them.[68]

In the case of *Dickerson* v. *Evans*,[69] it was claimed that a grantor was induced to execute the deed by reason of

[65] An officer or shareholder of a building and loan association can now take acknowledgments of mortgages executed to the association. Ill. State Bar Stats. (1935), Ch. 32, par. 393(1).

[66] 81 Ill. 11 (1875).

[67] Robbins v. Moore, 129 Ill. 30, 21 N. E. 934 (1889).

[68] Hamilton v. Lubukee, 51 Ill. 415 (1869); Gibbons v. Hoag, 95 Ill. 45 (1880); Fairman v. Peck, 87 Ill. 156 (1877).

[69] 84 Ill. 451 (1877).

the fraud practiced upon the grantor by her son, the grantee. The court held that if there was fraud in the inducement it was a secret equity which did not affect subsequent purchasers without notice. In *Curtis* v. *Root*,[70] in order to make the recorded mortgage a prior lien to that of the judgment creditors of the mortgagor, it was alleged that it was a purchase-money mortgage, but since the mortgage bore a date nine days later than that on the deed to the mortgagor and the mortgage recited that it was given to indemnify the mortgagee for his signing an appeal bond, it was held that as to creditors and subsequent purchasers the mortgage here could not be claimed a purchase-money mortgage. The creditors and subsequent purchasers without notice may rely on the date of the instrument and the consideration stated therein to be the true date and consideration unless the instrument on its face shows that such may not be the fact. Subsequent purchasers without notice are not affected by secret equities.

In the case of *Smith* v. *Willard*,[71] the husband bought property in his own name, though with the wife's money, but she did not know that he had taken title in his own name and did not discover it for about seven years, within which time a creditor of the husband recovered a judgment against him. The court held that as the title remained in the husband's name of record for seven years and the creditor did not have notice of the wife's equity, the creditor took free of such equity. A judgment creditor under the Illinois law is treated in the same manner as a subsequent purchaser as far as notice of prior liens is concerned.[72] Again where a tenant, by agreement with his landlord of record title, was accepted as tenant

[70] 28 Ill. 367 (1862).

[71] 174 Ill. 538, 51 N. E. 835 (1898).

[72] German-American Nat. Bk. v. Martin, 277 Ill. 629, 115 N. E. 721 (1917).

from month to month, when in fact this landlord had conveyed to another, although that deed had not yet been recorded, the court held that the tenant had a right to deal with his old landlord since he did not have any notice of the secret equity of the grantee under an unrecorded deed.[73] And in the case of *Manson* v. *Berkman,*[74] where several forty year old recorded deeds in the plaintiff's chain of title were claimed to be fraudulent because made to hinder and delay creditors of which plaintiff had no notice, the court held that the plaintiff took free of these latent defects since the records in the chain of title to his property gave no notice thereof.

But where the record does give notice of fraud or does show facts suggesting fraud, the purchaser cannot disregard such notice. So that where a guardian wished to obtain for himself the ward's estate by sham court proceedings and sale, had his brother buy at the sale and convey to the guardian, and both deeds were recorded on the same day, a purchaser was placed on notice of the fraud. A guardian cannot purchase at his own sale nor have another purchase for him.[75] A similar result was had where a widow, by sham proceedings in the Probate Court to sell real estate to pay debts, tried to obtain for herself property that had been devised to her and her children, but the proceedings were void because the minor children were not properly served with summons and because the petition was brought after the court had lost jurisdiction of the estate. Subsequent purchasers were required to take notice of the irregularities and were thus put upon notice as to the fraudulent character of the whole proceeding.[76]

[73] West Chicago Street R. R. Co. v. Morrison Adams & Allen Co., 160 Ill. 288, 43 N. E. 393 (1896).

[74] 356 Ill. 20, 190 N. E. 77 (1934).

[75] Blake v. Blake, 260 Ill. 70, 102 N. E. 1007 (1913).

[76] Heppe v. Szczepanski, 209 Ill. 88, 70 N. E. 737 (1904).

Constructive Notice Afforded by Unauthorized or Fraudulent Releases

Where a recorded release of a trust deed or mortgage is authorized by the holder of the indebtedness, the release is binding in favor of subsequent purchasers without notice, even though the consideration subsequently fails,[77] for a release is valid as to such persons unless they are in some manner put on notice that it is unauthorized. A release executed several years after the due date of the debt it secures, as shown by the recorded mortgage, is binding in favor of subsequent purchasers without notice even though it is unauthorized and the debt is outstanding in the hands of innocent persons. An extension agreement will not change the result unless it is recorded.[78] The same decision is reached where the trustee wrongfully releases the trust deed three days after the debt becomes due,[79] or even on the very day that the instrument falls due.[80] In these cases where the debt is due, the fact that the purchaser is not shown the cancelled notes, is not material. He may assume that the debt has been paid, since it is due, and that the recorded release is authorized. The same holding results where a note is due "on or before five years after date" and the trustee releases the trust deed securing the note before the five years have expired.[81] Since the note could be paid at any time before maturity, the fact that it was released before maturity was not a suspicious circumstance.

On the other hand, where a trust deed appeared to be released about three years before the maturity of the notes it secured, it was held that this fact together with

[77] Seymour v. Mackay, 126 Ill. 341, 18 N. E. 552 (1888).
[78] Mann v. Jummel, 183 Ill. 523, 56 N. E. 161 (1900); Sundquist v. Rubin, 276 Ill. App. 347 (1934).
[79] Bier v. Weiler, 203 Ill. App. 144 (1916).
[80] Marsh v. Stover, 363 Ill. 490, 2 N. E. (2d) 559 (1936).
[81] Lennartz v. Quilty, 191 Ill. 174, 60 N. E. 913 (1901).

the fact that the cancelled notes were not surrendered by the trustee was sufficient to put the purchaser on inquiry as to the authority of the trustee to execute the release.[82]

Where the records show that the payee of the note secured by the trust deed has obtained the fee to the land, a release of the trust deed before maturity, will not be a suspicious circumstance indicating that the note may be outstanding and uncancelled, for the purchaser may assume that the title and debt were merged, and his questioning the trustee or payee cannot reveal any more than the release already states, as both the trustee and payee in that case are interested in having the release state exactly what it purports to state.[83] The same decision results where there is a mortgage instead of a trust deed, and the mortgagee subsequently acquires the equity of the mortgagor and releases the mortgage of record before maturity, leaving the note uncancelled in the hands of a third party who has not recorded his assignment. A subsequent purchaser of the premises may assume that the mortgage and the equity of redemption are merged, since an inquiry of the mortgagee could not help as he would be interested in stating that the debt is paid as the release purports to state.[84] And where, as in the case of *Vogel* v. *Troy*,[85] the trustee on some pretext induces the mortgagor to execute a duplicate set of notes, and later before maturity, the trustee releases the trust deed and cancels one set of notes and the property passes to subsequent purchasers without notice who are shown the cancelled notes and rely thereon as showing that the release was authorized, the suspicious circumstance of the release before due date being overcome by the presen-

[82] Kennell v. Herbert, 342 Ill. 464, 174 N. E. 558 (1931).

[83] Havighorst v. Bowen, 214 Ill. 90, 73 N. E. 402 (1905). See also In re Buchner, 202 F. 979 (1912), and Williams v. Jackson, 107 U. S. 478, 27 L. Ed. 529 (1883).

[84] Ogle v. Turpin, 102 Ill. 148 (1882).

[85] 232 Ill. 481, 83 N. E. 960 (1908). See also, Doyle & Fleming v. Barnard, 271 Ill. App. 579 (1933).

tation of the cancelled notes, the subsequent purchaser of the property without notice takes the property free of the mortgage.

CONSTRUCTIVE NOTICE AFFORDED BY RECORDS OF IRREGULARLY, DEFECTIVELY, OR INVALIDLY EXECUTED INSTRUMENTS

As to irregular, defective, or invalid execution of instruments and the constructive notice given by them, it is held that a bond for a deed, although not acknowledged, is entitled to record and is constructive notice,[86] and a mortgage or deed executed by a married woman prior to the Married Woman's Act of 1874,[87] was held to give constructive notice of the grantee's claim when recorded.[88] Likewise, a recorded deed lacking a seal, although passing no title, gives constructive notice.[89] Aside from these decisions, the Illinois statute provides that an unacknowledged deed, mortgage, or other instrument in writing affecting real estate is constructive notice from the time it is filed for record as to creditors and subsequent purchasers.[90] On the other hand, an unsigned copy of a contract is not entitled to be recorded and therefore does not give constructive notice.[91]

As to statutes curing certain defectively acknowledged instruments, where two parties claim from the same grantor by defectively acknowledged deeds, the statute, passed after the recording of such deeds, validates them on the effective date of the statute, and therefore both become effective at the same time; in which case neither of the instruments is prior to the other as far as the recording act is concerned, and the common law rule prevails, giving priority to the oldest deed.[92]

[86] Reed v. Kemp, 16 Ill. 445 (1855).
[87] Ill. State Bar Stats. (1935), Ch. 68, par. 9.
[88] Morrison v. Brown, 83 Ill. 562 (1876).
[89] Wilson v. Kruse, 270 Ill. 298, 110 N. E. 359 (1915).
[90] Ill. State Bar Stats. (1935), Ch. 30, par. 32.
[91] Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019 (1899).
[92] Noakes v. Martin, 15 Ill. 118 (1853); Deininger v. McConnel, 41 Ill. 227 (1866).

McCreight v. *Pinkerton*[93] involved a somewhat different situation. There the mortgagor executed two mortgages, the first of which was dated in 1914 but was not recorded until 1926, and the second of which was dated in 1919 and recorded the same year. The later mortgage, however, was acknowledged before a notary public who was a stockholder and officer of the mortgagee, and hence it was (at that time) latently defective. In 1929, a curative statute was passed.[94] The court held that while the later mortgage would be constructive notice to subsequent purchasers and creditors because the acknowledgment was regular on its face, it would not be entitled to priority over the prior mortgagee, when, as here, the prior mortgagee was first in point of valid recordation, and the later mortgage would be considered (as to prior parties) as validly recorded only from the effective date of the act.

Where a deed is recorded in a county other than that wherein the land is situated, and then a copy of that record is recorded in the proper county, the record does not afford constructive notice of the deed, as the copy is not entitled to record, and documents not entitled to record are held not to afford such notice.[95] But where land is situated in more than one county, a certified copy of the instrument may be recorded in the counties other than where the original is recorded, and such copies when recorded give constructive notice as to land situated in those counties.[96]

Constructive Notice Afforded by the Record of a Forged Deed

A forged deed or other instrument is void, is not entitled to record, and therefore does not afford construc-

[93] 258 Ill. App. 477 (1930).
[94] Ill. State Bar Stats. (1935); Ch. 30, par. 46(1).
[95] St. John v. Conger, 40 Ill. 535 (1866).
[96] Ill. State Bar Stats. (1935), Ch. 30, par. 30.

tive notice of itself.[97] An owner who discovers a forged deed of record against his property need not file any notice of record that such a deed is a forgery to warn those who might later claim through the forged deed. He is merely required so to notify anyone that might ask him.[98]

Although a forged instrument conveys nothing, yet when it is duly acknowledged before an officer designated by law, as a notary public, the acknowledgment cannot be impeached except on evidence of the "clearest, strongest and of the most convincing character, and by disinterested witnesses," it is an act of an officer, imports verity, and unless given such weight, the land titles would be thrown into chaos.[99]

Constructive Notice Afforded by Destroyed or Mutilated Records

Mutilation of the records does not effect the notice that they afford. So, where a record is destroyed by fire,[100] or is destroyed or marred in some other manner, it still is effective and subsequent purchasers have constructive notice thereof and of its contents.[101]

Summary

1. The record of an instrument affecting title to real estate is constructive notice of the instrument to creditors and subsequent purchasers without notice if the instrument is within the chain of title to the property it purports to affect.

2. A chain of title consists of the successive conveyances commencing with the patent from the government or some other source and including the conveyance to the one claiming title.

[97] Pry v. Pry, 109 Ill. 466 (1884); D'Wolf v. Haydn, 24 Ill. 526 (1860); Oswald v. Newbanks, 336 Ill. 490, 168 N. E. 340 (1929).
[98] Chandler v. White, 84 Ill. 435 (1877).
[99] Kerr v. Russell, 69 Ill. 666 (1873); Baird v. Jackson, 98 Ill. 78 (1881).
[100] Tucker v. Shaw, 158 Ill. 326, 41 N. E. 914 (1895).
[101] Dodd v. Doty, 98 Ill. 393 (1881).

3. An instrument is within the chain of title of a parcel of land if it is executed by one who at the time it is recorded has title of record by a deed connected by a chain of conveyances back to the patent from the government or some other such source.

4. Recorded instruments not within the chain of title, do not give notice of unrecorded instruments even though such recorded instruments specifically refer to the unrecorded instruments; while recitals in a recorded deed within the chain of title as to unrecorded instruments do give notice of such unrecorded instruments.

5. Recorded instruments with erroneous descriptions do not afford constructive notice unless it is apparent on the record that there is an error in the description.

6. A record of an instrument within the chain of title affords constructive notice of the contents of the instrument.

7. Latent defects and secret equities do not affect creditors and subsequent purchasers without notice, unless some fact or facts appear of record giving warning of such defects or equities.

8. Records of unauthorized or fraudulent releases are valid as to creditors and subsequent purchasers without notice unless there are suspicious circumstances suggesting lack of authority to release, such as the release of a trust deed before the due date of the debt secured thereby and a non-production of the cancelled notes.

9. Records of defectively executed instruments within the chain of title give constructive notice of the instruments unless they are so defective as to lack all evidentiary value, as for instance, unsigned deeds.

10. Records of forged deeds or releases are not constructive notice for any purpose.

11. Mutilation of public records does not affect the notice that they afford.