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Property--Effects of Alteration of Recordable Instruments

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Stull,[17] the West Virginia court indicated that an opinion of speed based on the damaged condition of a vehicle is a proper subject matter for expert opinion. The court affirmed the trial court's refusal to permit a conclusion by a witness whether an automobile was traveling at a high rate of speed when it struck a rock ledge. The court stated that "the opinion of a witness, who had merely observed an automobile after it had come to rest against an obstruction, as to its speed at the moment of impact, was properly excluded *where there was no attempt to qualify such witness as an expert.*"[18]

Thus, the interesting question arises whether the West Virginia Supreme Court would allow an expert such as a "traffic accident analyst"[19] to give his opinion of speed based on the damage to the car and its position against an object after impact. Its most recent decision indicates that it might be willing to recognize that this area is a proper subject matter for expert testimony. Such a view, however, would be contrary to that of Virginia and the majority of jurisdictions.

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Property—Effect of Alteration of Recordable Instruments

X signed a deed granting property to *D*. Although not signed in *S's* presence, *S*, notary public and secretary for *D's* attorney, acknowledged the signature after inquiry of *X* and other witnesses. Upon the return of the three page executed deed to *D's* attorney, the words "and appurtenances thereunto belonging" were added to the deed, the first page being retyped and inserted in place of the original first page, the other two pages, containing the signature and acknowledgment, remaining intact. This draft was returned to *X*, who orally reacknowledged her signature, although no new notarial certificate was added. The notary left the deed in possession of *X*. Later, *D's* attorney received the deed from *D*, and had the deed properly recorded. *Ps*, heirs-at-law of *X*, sought to have this deed declared void because of lack of execution or delivery.

[17] 140 W. Va. 31, 82 S.E.2d 278 (1954).
[18] *Supra* note 17, syl. 4. (Emphasis added.)
[19] Lester v. Rose, 147 W. Va. 575, 595, 130 S.E.2d 80, 94 (1963).

The trial court held that the deed should be set aside because at no time did *X* execute or deliver this deed to the *D*. *Held:* Reversed and remanded. The alteration of a deed of conveyance does not revest the title of the land in the grantor. As the words added caused no material change in the deed, it was effective as between the parties, providing a valid execution and delivery could be found. From the evidence that the grantee had possession of the deed, and that it was submitted for recordation, and accepted and recorded, it was concluded that the necessary delivery was present, and, thus, all the requirements of a valid deed between the parties were met. *Evans v. Bottomlee,* 148 S.E.2d 712 (W. Va. 1966).

In the principal case, the West Virginia Supreme Court approved an alteration of a deed after execution, because the words added were superfluous and all the necessary elements of a valid transaction were present. The decision raises some perplexing and rather interesting questions. When will the court allow altered instruments to survive? Now that the altered deed is recorded, does it posses a lawful acknowledgment that serves as constructive notice to third parties without notice of such deed? Did the court use language that is in accordance with the weight of authority concerning these questions?

The court did not dwell on the subject of the materiality of an alteration. It simply held that the words added were immaterial and that were they not added, they would be implied by statute, which states that "every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the lands therein embraced."[1] The court allowed this deed to be operative in its revised form. It is well settled, as this decision holds, that an immaterial change in an instrument does not nullify the instrument or affect any interest transferred thereby.[2]

The question of materiality merits a close examination. A material alteration can be defined as one that changes the meaning of the instrument, so that the legal effect of the instrument and

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[1] W. VA. CODE ch. 36, art. 3, § 10 (Michie 1961).
[2] Fisherdick v. Hutton, 44 Neb. 122, 62 N.W. 488 (1895) (mechanic's lien).

the legal rights of the parties become altered.[3] Conversely, an immaterial alteration is one which does not affect the legal meaning of the instrument.[4] It is obvious that the principal case follows the definition of the latter, and is in line with cases that hold an alteration to be immaterial when it merely incorporates into the instrument terms which tend to clarify provisions that would be implied from the language therein used.[5]

Another factor to consider for the purpose of noticing the effect of an alteration is the lack of consent of both parties to any alteration made. There is no need to consider an immaterial alteration, such as in the principal case, because if the instrument is held to be unchanged and unaffected by the addition of the words, the consent of the parties to such alteration is itself of no materiality. The courts are divided, however, upon the question of the effect of consent on a material alteration. It is generally accepted that no alteration, when made with or without the consent of both parties to the instrument, can divest an estate previously vested by the original deed; that is, the terms of the deed as originally executed are not voided.[6] It is also held that a deed, where materially altered without the knowledge or consent of one of the parties to it, is not binding as altered.[7] The split of authority occurs in ruling upon the effectiveness of the instrument in its altered condition, where such alteration is made with the consent of all parties to it. Some authorities feel that the most just principle is to hold the parties to the instrument bound in its altered form, that the deed remains valid, and the change is effective without requiring a new delivery or new

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[3] Morehead v. Parkersburg Nat'l Bank, 5 W. Va. 74 (1871) (words inserted to make promissory note negotiable); Hershman v. Stafford, 58 W. Va. 459, 52 S.E. 533 (1905); Fitzgerald v. Lawson, 96 N.H. 447, 78 A.2d 527 (1951) (change of date in agency agreement).

[4] Blenkiron v. Rogers, 87 Neb. 716, 127 N.W. 1062 (1910) (change of name in contract of sale); Douglass v. Lockhart, 168 S.W. 382 (Tex. Civ. App. 1914) (insertion of words "or bearer" in note); Stiles v. City State Bank, 56 Okla. 572, 156 Pac. 622 (1916) (words adding to description in mortgage deed).

[5] Bruegge v. State Bank, 74 S.W.2d 835 (Mo. 1934) (addition of description in trust deed); Stiles v. City State Bank, *supra;* John Kindler Co. v. First Nat'l Bank, 61 Ind. App. 79, 109 N.E. 66 (1915) (addition of rate of interest which would have been implied); Fisherdick v. Hutton, 44 Neb. 122, 62 N.W. 488 (1895) (mechanic's lien).

[6] Waldron v. Waller, 65 W. Va. 605, 64 S.E. 964 (1909); Woods v. Hilderbrand, 46 Mo. 284 (1870); Burgess v. Blake, 128 Ala. 105, 28 So. 963 (1900); 1 DEVLIN, DEEDS § 460 (3d ed. 1911).

[7] Hollis v. Harris, 96 Ala. 288, 11 So. 337, (1891-92).

acknowledgment.[8] Other cases require a new delivery, holding this to be effective as a new execution, so as to bind the parties.[9] Yet, two early West Virginia cases hold that for the materially altered instrument to be effective between the parties to it, there not only should be a new execution and delivery, but also a new acknowledgment.[10] But the West Virginia holding is refuted emphatically by cases holding that no acknowledgment is necessary for a deed to be valid between the parties to it and that title passes by execution and delivery and not by acknowledgment.[11] This is also in accordance with the laws of West Virginia requiring an acknowledgment for eligibility for recordation, but not as a prerequisite to the validity of a deed.[12] It must be emphasized that this discussion refers only to the validity of the deed as to the parties to it; the effectiveness of the deed as to creditors and subsequent purchasers in good faith for valuable consideration will be considered subsequently.

From the foregoing discussion one can see that West Virginia law is confused concerning whether acceptance of the altered portion of a deed makes it valid between the parties to it. A logical position to take would be to combine the views, holding that the new version, with its material alteration, should be re-executed and redelivered, but not reacknowledged, in order to be valid as to the parties to the instrument. By following this rule, no questionable practice of forcing an acknowledgment by the grantor to pass title is required, yet all the necessary formalities in the execution and delivery of the deed are met.

The next area to investigate is the effect of the altered deed on third parties, in both its original and altered forms. The primary concern in questioning the effect of an altered deed on third parties is the presence of an acknowledgment, or the necessity of a reacknowledgment. Until duly admitted to record, all deeds are void as to creditors and subsequent purchasers for valuable

[8] Starks v. Loftus, 248 S.W. 1090 (Tex. Civ. App. 1922); Walkley v. Clarke, 107 Iowa 451, 78 N.W. 70 (1899).

[9] Abbott v. Abbott, 189 Ill. 488, 59 N.E. 958 (1901); Krechel v. Mercer, 262 N.C. 243, 136 S.E.2d 608 (1964). See 67 W. VA. L. REV. 87 (1964).

[10] Moelle v. Sherwood, 148 U.S. 21 (1893); Waldron v. Waller, 65 W. Va. 605, 64 S.E. 964 (1909).

[11] Rothwell v. Brice, 94 W. Va. 466, 119 S.E. 293 (1923); Gannaway v. Federal Land Bank, 148 Va. 176, 138 S.E. 564 (1927); Peatross v. Gray, 181 Va. 847, 27 S.E.2d 203 (1943).

[12] W. VA. CODE ch. 39, art. 1, § 2 (Michie 1961).

consideration without notice.[13] The West Virginia Code further provides that the county clerk shall record any deed, when entitled to be admitted, when all the signatures to it have been acknowledged, or proved by two witnesses, before such county clerk;[14] but, as an alternative, at the election of an interested party, such deed shall be admitted to record where the signatures are proven by a certificate of acknowledgment before a justice of the peace, notary public, or any one of other designated officers, and where such certificate of acknowledgment is attached upon the deed.[15] The basic premise to be derived from these recording laws is that a deed whose execution has not been properly acknowledged, or which has no certificate of acknowledgment attached thereto, is not entitled to recordation, and even though admitted to record by the county clerk, such deed is not considered duly admitted to record, and does not serve as constructive notice to creditors or subsequent purchasers for valuable consideration without actual notice of the deed.[16]

Now the altered instrument must be considered in light of these principles. First, consider a material alteration made by one of the parties, after the original deed has been executed and acknowledged. It is generally held that such a deed is not entitled to recordation and that to be effective as constructive notice to third parties, the altered deed must not only be re-executed and redelivered, but must be reacknowledged. Then, once it is recorded with its new certificate of acknowledgment, it serves as constructive notice of the altered instrument.[17] In *Citizens Bank v. Taylor*, after a deed was properly acknowledged, it was revised, changing the estates granted, and was then delivered and recorded with no new acknowledgment. In holding that this recorded deed was not constructive notice to a subsequent bona fide purchaser, the court said that the deed was materially altered, and as such should be considered as a new instrument, needing not only a re-execution and redelivery, but also a new acknowledgment, in order

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[13] W. VA. CODE ch. 40, art. 1, § 9 (Michie 1961).

[14] W. VA. CODE ch. 39, art. 1, § 2 (Michie 1961).

[15] W. VA. CODE ch. 39, art. 1, § 3 (Michie 1961).

[16] Cox v. Wayt, 26 W. Va. 807 (1884); Ihrig v. Ihrig, 78 W. Va. 360, 88 S.E. 1010 (1916); *In re* Atlantic Smokeless Coal Co., 103 F. Supp. 348 (S.D. W. Va. 1952).

[17] Wagle v. Iowa State Bank, 175 Iowa 92, 156 N.W. 991 (1916).

to be eligible for recordation and to serve as constructive notice to third parties.[18]

Where the court finds that the change made in the instrument is immaterial, as is the holding in the principal case, then the instrument is treated as valid in all its original aspects, with no new execution needed. In the principal case, the court was really not too concerned with the acknowledgment aspect after it concluded that the revision of the deed was immaterial, but concentrated on showing that there was an execution and delivery that had been carried through to completion. Although the language used seems to indicate that the court was searching for a redelivery, it hardly seems necessary when the court has decided that there is nothing changed about the deed or transaction. Likewise, the court mentions a new oral acknowledgment made by the grantor, as if necessary. Again, why should a new acknowledgment be needed where it is found that there is nothing new for which it should be taken? Understandably, a complete re-execution, redelivery and reacknowledgment is required before the materially altered deed becomes recordable and effective as constructive notice to third parties. The principal case intimates that such redelivery and reacknowledgment are also necessary in the case of an immaterial alteration. A possible alternative would be to hold that a deed, where immaterially changed, is not only valid as between the parties to the deed without being re-executed or redelivered, but is also recordable without the necessity of a new acknowledgment, and is constructive notice to creditors and subsequent purchasers for valuable consideration without notice when so recorded.

One more ramification of this case should be examined. To pose a hypothetical situation, suppose the alteration made in the principal case was one that changed the legal aspect of the deed materially. Then, after the change, the deed was re-executed and redelivered, so that the validity of the deed between the parties to it is restored, but it was subsequently recorded with no new acknowledgment or new certificate of acknowledgment. *Citizens Bank v. Taylor* and other cases, along with the West Virginia Code, show that for an instrument to be constructive notice

[18] Citizens Bank v. Taylor, 169 Ga. 203, 149 S.E. 861 (1929); see Annot., 67 A.L.R. 355 (1930).

to third parties, it must be properly acknowledged and have the certificate of acknowledgment annexed to it, and if the acknowledgment is lacking or is defective, it is not entitled to recordation, and recordation imparts no constructive notice.[19] In the hypothetical situation, then, there is no proper acknowledgment, so the altered deed as recorded would appear not to be constructive notice. But the problem could arise, where, as in the principal case, the certificate of acknowledgment looks regular on its face, there being no indication that there might have been an alteration or that there is need for a new acknowledgment.

The weight of authority holds that where the defect in the acknowledgment is latent, the recording of the instrument *should* be constructive notice to third parties.[20] The spirit of the registry laws favors this view since the county clerks are required to take instruments for recordation with regular notarial certificates, without regard to possible latent defects; and this view would further the public's right of reliability on the records to contain truly valid deeds when recorded.[21] But other authorities hold that a defectively acknowledged instrument is never entitled to recordation, whether the defect is apparent on the face of the instrument or not, and, if allowed on record, it is not constructive notice to third parties.[22] The reasoning of this view is that if a materially altered deed must be re-executed and redelivered to be valid as between the parties to it, then it naturally follows that such deed should be reacknowledged, no matter how valid the first acknowledgment seems, to be eligible for recordation.

The precise point of the manner in which a latent defect in an acknowledgment should be treated has never arisen in West Virginia in a case concerning an altered instrument. West Virginia has held, however, that a substantial compliance with the law concerning acknowledgments is all that is necessary in order for an instru-

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[19] Citizens Bank v. Taylor, *supra*; see 4 TUL. L. REV. 327 (1930); W. VA. CODE ch. 39, art. 1, §§ 2, 3 (Michie 1961); Reirdon v. Smith, 62 Okla. 48, 161 Pac. 798 (1916) (as to lease); Maguire v. Gorbalty Bros., 133 F.2d 675 (2d Cir. 1943) (as to conditional sales contract).

[20] Woolridge v. LaCrosse Lumber Co., 291 Mo. 239, 236 S.W. 294 (1921); Franklin Sav. & Loan Co. v. Riddle, 216 S.C. 367, 57 S.E.2d 910 (1950) (chattel mortgage).

[21] 45 Am. Jur. *Records & Recording Laws* § 108 (1943).

[22] LeBrun v. Prosise, 197 Md. 466, 79 A.2d 543 (1951) (deed of trust); Citizens Nat'l Bank v. Denison, 165 Ohio St. 89, 133 N.E.2d 329 (1956) (mortgage).

ment to be recordable.[23] But this substantial compliance test does not shed light on West Virginia's view, because these cases involved claims of some defect in the acknowledgment itself, not the questioning of an acknowledgment because the instrument acknowledged was altered. Such a case, then, would be one of first impression before the West Virginia court.

The principal case shows that an immaterial alteration of a deed is one leaving the legal effect unchanged, but the case seems contrary to the weight of authority in its implications that a re-execution or redelivery was needed subsequent to the immaterial change to bind the parties to the deed. The principal case also raises a problem that might be troublesome in the future concerning the effect of this recorded instrument as constructive notice to third parties. The majority view would probably consider any reacknowledgment unnecessary, that the original execution and delivery are valid and binding on the parties to the deed, and that the original acknowledgment is similarly binding on third parties. The court in the principal case points out the second oral acknowledgment by the grantor. However, as was noted, the finding that there was no material alteration of the deed made the discussion of this second oral acknowledgment pointless. In finding that the deed was effective with the original signature, the court implied that the original acknowledgment was also valid. The deed, then, was completely valid and effective in its altered form.

Robert Brand Stone

Pleading—Alternative Methods of Changing Theory of Action on Appeal

P, buyer of a mobile home, brought an action to rescind a purchase contract because of defects in the floor. D_1 (dealer) in turn initiated a third party complaint against D_2 (manufacturer). The Court of Common Pleas rendered judgments in favor of *P* against D_1 and in favor of D_1 against the third party D_2. The circuit court reversed both judgments and entered judgments in favor of D_1

[23] *In re* Atlantic Smokeless Coal Co., 103 F. Supp. 348 (S.D. W. Va. 1952); Blake v. Hollandsworth, 71 W. Va. 387, 76 S.E. 814 (1912).