

Elliott Vs. Lessee of Piersol

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Appellant : Elliott

Respondent : Lessee of Piersol

Judgement :

Elliott v. Lessee of Piersol - 26 U.S. 328 (1828)

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Pet. 328

Elliott v. Lessee of Piersol

26 U.S. (1 Pet.) 328

ERROR TO THE CIRCUIT

COURT OF KENTUCKY

SYLLABUS

A letter from a deceased member of a family stating the pedigree of the family and sworn by the wife to have been written by her husband, who also swore in her deposition that the facts stated in the letter had been frequently mentioned by her husband in his lifetime is legal evidence, as is also the deposition of the witness in a question of pedigree.

The rule of evidence that in questions of pedigree, the declarations of aged and deceased members of the family may be proved and given in evidence has not been controverted.

In a case where a controversy had arisen or was expected to arise between parties concerning the validity of a deed against which one of the parties claimed but no controversy was then expected to arise about the heirship, a letter written stating the pedigree of the claimants was not considered as excluded by the rule of law which declares that declarations relating to pedigree, made *post litem motam* cannot be given in evidence.

Where the defendant had reserved a right to move the court to exclude any part of the plaintiff's evidence which he might choose to designate as incompetent, and it did not appear from the bill of exceptions that he designated any particular piece or part of the evidence as objectionable and moved the court to exclude the whole or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff, this could not be done on the ground of incompetency unless the whole was incompetent. The court is not bound to do more than respond to the motion in the terms in which it is made. Courts of justice are not obliged to modify the propositions submitted by counsel so as to make them fit the case. If they do not fit, that is enough to authorize their rejection.

The privy examination and acknowledgment of a deed by a *feme covert* so as to pass her estate cannot be legally proved by parol testimony.

In Virginia and Kentucky, the modes of conveyance by fine and common recovery have never been in common use, and in these states the capacity of a *feme covert* to convey her estate by deed is the creature of the statute law, and to

make her deed effectual, the forms and solemnities prescribed by the statutes must be pursued.

By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." This law was adopted by Kentucky at her separation from Virginia, and is understood never to have been repealed.

The provisions of the laws of Kentucky relative to the privy examination of a *feme covert* in order to make a conveyance of her estate valid.

It is the construction of the act of 1810, that the clerks of the county

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court of Kentucky have authority to take acknowledgments and privy examinations of *femes coverts* in all cases of deeds made by them and their husbands.

What the law requires to be done and appear of record can only be done and made to appear by the record itself or an exemplification of it. It is perfectly immaterial whether there be an acknowledgment or privy examination in form or not if there be no record made of the privy examination, for by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact which makes the deed effectual to pass the estate of a *feme covert*.

A deed from *Baron* and *feme* of lands in the State of Kentucky, executed to a third person, by which the land of the *feme* was intended to be conveyed for the purpose of a reconveyance to the husband, and thus to vest in him the estate of the wife, was endorsed by the clerk of Woodford County Court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11, 1816," and was certified as follows:

"Attest, J. McKinney, Jr. Clerk, Woodford County, ss., September 11. 1813. This deed from James Elliott and Sarah G. Elliott his wife to Benjamin Elliott, was this day produced before me and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded. John McKenney, Jr., C.C.C."

Held that subsequent proceedings of the Court of Woodford County, by which the defects of the certificate of the clerk to state the privy examination of the *feme* (which, by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal) were intended to be cured upon evidence that the privy examination was made by the clerk, will not supply the defect or give validity to the deed.

If the court of a state had jurisdiction of a matter, its decision would be conclusive, but this Court cannot yield assent to the proposition that the jurisdiction of a state court cannot be questioned where its proceedings were brought collaterally before the circuit court of the United States.

Where a court has jurisdiction, it has a right to decide any question which occurs in the cause, and whether its decision be correct or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

The jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings of the former are relied on and brought before the latter by a party claiming the benefit of such proceedings.

The jurisdiction and authority of the courts of Kentucky, are derived wholly from the statute law of the state.

The Clerk of Woodford County Court has no authority to alter the record of the acknowledgment of a deed at any time after the record is made.

William Peirsol, and Lydia Peirsol, his wife, Ann North, Jane North, Sophia North, Elizabeth F. P. North, and William

North, citizens of Pennsylvania, heirs of Sarah G. Elliott, commenced their action of ejectment against James Elliott the younger and others, the plaintiffs in error, in the Circuit Court for the District of Kentucky to recover the possession of 1,200 acres of land, part of 2,000 acres patented to Griffin Peart.

The plaintiffs proved that upon the division of the whole body among the heirs of Griffin Peart, the 1,200 acres in contest was allotted to Sarah G. Peart, one of the heirs, and that she was seized thereof in severalty. Sarah G. Elliott, formerly Peart, she having intermarried with James Elliott, died about 1822, without issue; Francis Peart, and Le Roy Peart, brothers of Sarah Elliott, died shortly before her, also without issue. The boundaries of the 1,200 acres and the possession by the defendants were not controverted.

The plaintiffs below claimed the premises as the heirs of Sarah G. Elliott, formerly Sarah G. Peart, and they sought to establish their heirship by the deposition of Mrs. Braugh, widow of Robert Braugh, who swears that the letter annexed to her deposition, addressed to William Peirsol, Philadelphia, is in the handwriting of her deceased husband. She also states that she frequently heard him speak of his family connections, and has always understood from him, that the late Mrs. Mary North, formerly Mary Peart, and the late Mrs. S. G. Elliott were cousins, both on the side of the father and mother; and that the statements in the letter correspond with the other statements she heard him make upon the subject of the pedigree of the two ladies, which letter proves the present plaintiffs to be the only heirs of Mrs. Sarah G. Elliott at the time of her death. Other depositions were read to the same effect.

On 12 June, 1813, James Elliott and Sarah G. Elliott executed a deed by which the premises in question were expressed to be conveyed to Benjamin Elliott, under whom the plaintiffs in error claimed to hold the same.

The defendants below moved the circuit court to instruct the jury that the evidence adduced by the plaintiffs to establish their heirship to Sarah G. Elliott was insufficient and that the same ought to be excluded. The court refused so to do, but on the contrary instructed the jury that the said evidence, if believed by the

jury, was *prima facie* testimony that the lessors of the plaintiffs were the legal heirs of the said Sarah Peart, alias Sarah G. Elliott.

In relation to the deed of 12 June, 1813, to Benjamin Elliott, it was contended below that Sarah G. Elliott never did execute the same in the manner described and required by law, and that the fee simple estate of Mrs. Elliott, did not pass thereby. The provisions of the law relative to the privy examination

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of a *feme covert* by the officer, the clerk of the court, or in open court, and to the recording thereof were alleged not to have been complied with, and consequently the estate of Mrs. Elliott did not pass by the conveyance to Benjamin Elliott. It was also claimed on the part of the plaintiffs in error that if a privy examination and acknowledgment were made, it was not recorded, and unless recorded, no title passes to divest the title of the *feme covert*. The circuit court decided this point in favor of the defendants in error, and the case was brought up upon a bill of exceptions.

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MR. JUSTICE TRIMBLE delivered the opinion of the Court.

This is an action of ejectment, brought in the Circuit Court for the District of Kentucky by the lessors of the defendant in error and against the plaintiffs in error, who were defendants in the court below.

The lessors of the plaintiff, in that court, claimed the land in controversy as heirs at law of Sarah G. Elliott, formerly Sarah G. Peart, deceased, who in her lifetime had intermarried with the defendant, James Elliott. The defendants claimed by virtue of a deed of conveyance, made by James Elliott and Sarah G. Elliott his wife in her lifetime to Benjamin Elliott and a deed reconveying the land from Benjamin Elliott to James Elliott.

On the trial of the general issue between the parties, the defendants took a bill of exceptions to certain opinions of the court in overruling motions made by the defendants for instructions, &c.;, and in granting instructions to the jury, moved by the

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plaintiff in the progress of the trial, and, a verdict and judgment having been rendered against the defendants, they have brought the case before this Court by writ of error.

The bill of exceptions states

"That upon the trial of this case, the plaintiffs read as evidence a patent from the commonwealth to Griffin Peart, dated 1 May, 1781, covering the land in controversy, (which patent is made part of the bill of exceptions) and sundry depositions taken and filed in the cause (also made part of the bill of exceptions) and proved that upon a division of the land granted to Griffin Peart by said patent, the part in contest was allotted to the late Sarah G. Elliott, formerly Sarah G. Peart, and that she was seized thereof in severalty; that the said Sarah G. Elliott died before the institution of this suit, about the year 1822, without issue, and that the defendants were in possession of the land allotted to her as aforesaid. And after the plaintiffs had closed their evidence, touching their derivation of title, the defendants, as they had reserved the right to do, moved the court to instruct the jury that the evidence adduced on the part of the plaintiffs was insufficient to prove title in the lessors of the plaintiffs, and that the same ought to be rejected, but the court refused so to instruct or to exclude the evidence, and on the contrary instructed the jury that the said evidence, if believed by them, was *Prima facie* evidence that the lessors were the legal heirs of the patentee, Griffin Peart, &c.; To which opinion of the court in all its parts the defendants except."

"The defendants then gave in evidence the deed of conveyance from Sarah G. Elliott and her husband to Benjamin Elliott, dated 12 June, 1813, for the land in contest and the deed from Benjamin Elliott to the said James, together with all the

endorsements upon and authentications annexed to the first mentioned deed, which endorsements and authentications are in the following words and figures, to-wit:"

" Acknowledged by James Elliott & Sarah G. Elliott. September 11, 1813."

"Attest -- J. Mc KINNEY, JR., Clerk"

"Woodford County, sct. September 11, 1813"

" This deed from James Elliott and Sarah G. Elliott his wife to Benjamin Elliott was this day produced before me and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded."

"JOHN Mc KINNEY, JR. C.W.C.C."

" Woodford County, sct. November County Court, 1823"

" On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the court by the endorsement on the deed from James Elliott and wife, to him under date of 12 June, 1813, and by parol proof that said deed was

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acknowledged in due form of law by Sarah G. Elliott, before the clerk of this court, on 11 September, 1813, but that the certificate thereof was defectively made out, it is ordered that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate, as amended, be again recorded. Whereupon said certificate was directed to be amended, so as to read as follows, to-wit:"

" Woodford County, sct. September 11, 1813"

" This day the within named James Elliott and Sarah G. Elliott, his wife, appeared before me, the clerk of the court of the county aforesaid, and acknowledged the within indenture to be their act and deed, and the said Sarah, being first examined privily and apart from her husband, did declare that she freely and willingly sealed

the said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded. The said deed, order of court, and certificate, as directed to be amended, are all duly recorded in my office."

"Attest -- JOHN Mc KINNEY, JR., C.W.C.C."

" It was proved by John McKinney, a witness examined on the part of the defendants, that the endorsement made on the back of the deed, from Elliott and wife, to Benjamin Elliott, in these words, to-wit: 'Acknowledged by James Elliott and Sarah G. Elliott. September 11, 1813.'"

"Attest -- J. Mc KINNEY, Clerk"

" Was in the handwriting of the said clerk of the Woodford County Court, and was the minute made by him at the time said deed was acknowledged, and it was also proved that the certificate of the acknowledgment and recording of the said deed, endorsed on said deed, was at some subsequent time written and drawn out by a deputy of said clerk from the said minute. And the clerk deposed that although he had not a particular recollection of all the facts, that he remembered the circumstance of James Elliott and his wife coming to his office to acknowledge said deed; that he knew what his duty required in such cases, and that the acknowledgment and privy examination and an explanation of the instrument to her, was requisite in order to its being recorded as to her. And that he did not doubt he had done his duty in this instance, and that said deed had been acknowledged by Mrs. Elliott in all respects. Other parol evidence was given conducing to prove that in point of fact the said deed from Elliott and his wife was regularly acknowledged by the wife before the clerk, upon his privy examination of her."

"The said McKinney, upon cross-examination, further proved that after the said deed and certificate of the acknowledgment

thereof had been recorded, and in the lifetime of Mrs. Elliott, he had, at the instance of her counsel, made out a true copy of the record of said deed and certificate of the acknowledgment thereof by Elliott and wife as they were then upon the record, which copy the plaintiff gave in evidence; that after the death of Mrs. Elliott, application was made to him by the counsel of the defendants to alter the certificate of the acknowledgment of the deed from Elliott and wife to Benjamin Elliott so as to state her privy examination, but which he declined. It was also proved that the deed had remained in the possession of the clerk from the time of its first acknowledgment till after the certificate ordered by the county court was made upon it."

"After the defendants had closed the evidence on their side, which was as above stated, the court, upon the motion of the plaintiffs' counsel, instructed the jury that the parol evidence which had been given on the part of the defendants conducing to show a privy examination of Mrs. Elliott was incompetent for that purpose; that a privy examination and acknowledgment of a *feme covert*, so as to pass or convey her estate could not legally be proved by parol testimony, but by record, and that although they might believe from the parol evidence that said deed had been acknowledged by Mrs. Elliott in all due form of law upon her privy examination and all proper explanations given to her, yet it constituted no defense to the action unless such privy examination had been duly certified and recorded."

"The court further instructed the jury that the certificate of the acknowledgment of said deed by Elliott and wife and the after certificate, by order of the county court, of her privy examination were not sufficient in law, to pass her estate because the first shows no privy examination, and the county court had no jurisdiction to order the second to be made. To all which opinions and decision of the court the defendants except, &c.;"

It is argued by the learned counsel in this Court that the motion of the defendants to exclude the evidence adduced on the part of the plaintiffs or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff ought to have been granted. The argument in this Court has not put the question on the ground that, taking the whole of the plaintiff's evidence together touching the derivation of the

title of the lessors of the plaintiff, it is insufficient to deduce the title to them down from the patentee, though Sarah S. Elliott, who was seized thereof in severalty.

We have, however, reviewed the evidence with a view to that question, and are satisfied it is sufficient for that purpose.

The ground of argument relied on here is that a part of the

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evidence was incompetent and inadmissible. It is said that so much of the depositions as detail Mrs. Elliott's conversations concerning the manner of her acknowledgment of the deed and so much of Mrs. Braugh's deposition as speaks of the letter of her deceased husband, and the letter itself, made part of her deposition were incompetent and ought to have been rejected, and that the reservation of the right to move to reject the evidence, admitted in the bill of exceptions, shows that the defendants' counsel had the right to insist upon the rejection of any part of the evidence as incompetent. The argument admits of several answers deemed satisfactory. Mrs. Elliott's conversation, detailed in some of the depositions, in relation to the defendant's deed can by no fair construction be brought within the motion. It related not to the title of the lessors of the plaintiff, but to supposed defects in the title of the defendants, and to use the language of the bill of exceptions, it was the plaintiff's evidence "touching the derivation of the title of the lessors of the plaintiff" which the defendants moved to exclude. Besides, at that stage of the case, the defendants had not introduced the deed, and when we come to consider the defendants' title after the deed was introduced, it will appear that Mrs. Elliott's declarations could in no manner have influenced the verdict, and were therefore harmless. We are not prepared to admit that Mrs. Braugh's letter on the subject of the family pedigree, proved by her evidence and made part of her deposition, was not competent evidence to be left to the jury upon a question of pedigree or heirship. She was an aged member of the family, and traces back the pedigree, and several branches of the family, for about seventy years.

The rule of evidence that in questions of pedigree the declarations of aged and deceased members of the family may be proved and given in evidence has not been controverted. But it is argued that this rule is qualified by this exception -- that declarations made *post litem motam* cannot be given in evidence, and it is insisted this case comes within the exception, for although no suit had been commenced, yet a controversy had arisen or was expected to arise.

We doubt the application of the exception to this case. A controversy had arisen or was expected to arise between the heirs of Mrs. Elliott and the defendants concerning the validity of the deed of Mrs. Elliott, made while she was a *feme covert*. But it does not appear that any controversy had arisen or was expected to arise about who were her heirs. The *lis mota*, if it existed, was not who were heirs, but whether Mrs. Elliott's deed made a good title against the heirs, whoever they might be. It is not necessary, however, to give any

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positive opinion on this point, as other grounds exist upon which the motion was rightfully overruled.

It is conceded that the defendants' counsel had a right to move the court below to exclude any part of the plaintiff's evidence which he might choose to designate as incompetent, but it is not admitted that he exercised that right. It does not appear from the bill of exceptions that he designated any particular piece or part of the evidence as objectionable and moved the court to exclude it. But on the contrary, resting his case upon the assumption that the whole evidence of the plaintiffs, taken together, was either incompetent or insufficient, he moved the court either to exclude the whole or to instruct the jury that the whole was insufficient to prove title in the lessors of the plaintiff. This could not be done on the ground of incompetency unless the whole was incompetent, which is not pretended; the court was not bound to do more than respond to the motion in the terms in which it was made. Courts of justice are not obliged to modify the propositions submitted by counsel so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. We have already said the evidence, taken all together,

was sufficient to prove title in the lessors of the plaintiff. If any part of it was incomplete, the court might, on a general motion to exclude the whole, have excluded such parts, but the court was not obliged to do so. There is therefore no error in the decision of the circuit court overruling the motion of the defendants nor in the instructions given to the jury upon that motion.

We now proceed to an examination of the questions arising out of the instructions given to the jury on the motion of the plaintiffs in relation to the deed of James Elliott and Sarah G. Elliott his wife to Benjamin Elliott, set up by the defendants in their defense.

The general question involved in the first instruction is can the privy examination and acknowledgment of a deed by a *feme covert* so as to pass or convey her estate be legally proved by parol testimony? We hold that they cannot.

By the principles of the common law, a married woman can, in general, do no act to bind her; she is said to be *sub potestate viri*, and subject to his will and control. Her acts are not like those of infants and some other disabled persons, voidable only, but are in general absolutely void *ab initio*.

In Virginia and Kentucky, the solemn modes of conveyance by fine and common recovery have never been in common use, and in those states the capacity of a *feme covert* to convey her estate by deed is the creature of statute law, and to make her deed effectual, the forms and solemnities prescribed by the statutes must be pursued.

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The Virginia statute of 1748, ch. 1st, after making provisions to enable *femes coverts* to convey their estates by deed, upon acknowledgment and privy examination, according to prescribed forms, in the 7th section, U.S. has these words:

"Whereas it has always been adjudged that where any deed has been acknowledged by a *feme covert* and no record made of her privy examination,

such deed is not binding upon the *feme* and her heirs."

The 8th section enacts and declares "That the law herein shall always be held according to the said judgments, and shall never hereafter be questioned," &c.;

This law was adopted by Kentucky at her separation from Virginia, and is understood never to have been repealed.

The 4th section of the Kentucky statute of 1796, see 1 Litt.Laws 569, provides for the privy examination and acknowledgment of *femes covert* in open court, and where they cannot conveniently attend authorizes a commission to issue to two justices to take and certify the acknowledgment and privy examination, and declares that

"In either case, the said writing acknowledged by the husband, and proved by witnesses to be his act, and recorded, together with such privy examination and acknowledgment, &c.;, shall not only be sufficient to convey or release any right of dower, &c.;, but be as effectual for every other purpose as if she were an unmarried woman."

The 1st section of this act authorizes clerks of the county courts, general court, and court of appeals to take, in their offices, the acknowledgment or proof of the execution of deeds and to record them upon acknowledgments or proofs so taken by themselves, but did not authorize them to take the acknowledgment and privy examination of *femes coverts*.

But by a subsequent statute, clerks are authorized to take in their offices the "acknowledgment of all deeds, according to law." And the act of 1810, 4 Litt.Ky.Laws, 165, which authorizes the clerk of one county to take and certify the acknowledgment of a deed to be recorded by the clerk of another county where the land lies, &c.;, declares that

"if the due acknowledgment, or privy examination of the wife, &c.;, shall have been taken, &c.;, by the clerk receiving the acknowledgment of the deed, &c.;, and that being duly certified with the deed, and recorded, shall transfer such wife's estate,

&c.;"

as fully, as if the examination had been made by the court, or the clerk in whose office the deed shall be recorded.

It is by construction of these last recited laws that the clerks are held in Kentucky to be authorized to take the acknowledgments and privy examinations of *femes covert*s in all cases of deeds made by them and their husbands.

The Kentucky statutes above recited show clearly that the legislature of that state has never lost sight of the principle

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declared by the Virginia statute of 1748: "That when any deed has been acknowledged, by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs."

What the law requires to be done and appear of record can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment or privy examination in fact or not if there be no record made of the privy examination, for by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact which makes the deed effectual to pass the estate of a *feme covert*.

It is now only necessary to state the second instruction given to the jury on the plaintiffs' motion to manifest its entire correctness. It was

"that the first certificate of the acknowledgment and recording of the deed of Elliott and wife was not sufficient in law to pass her estate, because it showed no privy examination of the *feme*. "

The last instruction given by the court to the jury presents a question of more difficulty. It is

"That the after certificate made by order of the county court of her privy examination is insufficient in law to pass her estate, because the county court had no jurisdiction or authority to order the said second certificate to be made."

It is argued that the circuit court of the United States had no authority to question the jurisdiction of the County Court of Woodford County, and that its proceedings were conclusive upon the matter, whether erroneous or not.

We agree that if the county court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition that the jurisdiction of the county court could not be questioned when its proceedings were brought collaterally before the circuit court. We know nothing in the organization of the circuit courts of the Union which can contradistinguish them from other courts in this respect.

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising

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authority over a subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.

It is well known that the jurisdiction and authority of the county courts of Kentucky are derived wholly from the statute law of the state. In argument, we were referred to no statute which was supposed, either in terms or by fair construction, to confer upon the County court any supervising or controlling power over the acts of the

clerk in taking, in his office, the acknowledgment of a deed or in recording it upon an acknowledgment there taken by him. We have sought in vain for such a provision, and it is believed none such exists. No such supervising and controlling power can result to the court, from the general relations which exist between a court and its clerk, for in this case the statutes confer upon the clerk in his office a distinct, independent, personal authority to be exercised by him upon his own judgment and responsibility. We think, therefore, with the circuit court that the county court had no jurisdiction or authority to order the after certificate of Mrs. Elliott's privy examination to be made and recorded.

But the argument, which seemed to be relied on most confidently by the learned counsel is that the order of the county court may be disregarded, and the amendment considered as an amendment made by the clerk, of his own authority, and that the clerk was authorized to amend his own certificate and record at any time.

It would be difficult to maintain that the second certificate, or amendment as it is called, could rightfully be regarded as the clerk's own act, independent of the order of the county court, it appearing that he refused to do the act until the order was made. But be it so.

Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed at any time after the record was made? We are of opinion he had not.

We are of opinion he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was in its nature but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was *functus officio* as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable, and the remaining powers and duty of the clerk were only to keep and preserve the record safely.

If a clerk may, after a deed together with the acknowledgment

or probate thereof have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it.

The doctrine that a clerk may at any time, without limitation, alter the record of the acknowledgment of a deed made in his office would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this Court.

It is the opinion of this Court that there is no error in the judgment and proceedings of the circuit court, and the same are

Affirmed with costs.