

RECORDER: If instrument is a recordable one under Section 11543 and is properly acknowledged recorder must record same regardless of other defects.

November 28, 1938



Hon. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Mr. Long:

We have received your letter of October 14, 1938, which reads as follows:

"The Recorder of this County has asked me to secure for him the following ruling:

Does he have the authority to refuse to record a refusal to act as trustee in a mortgage when such refusal has not been notarized but has been witnessed by two witnesses?

Does he have the authority to refuse to record any deed which is in his opinion improperly drawn?"

We are enclosing a copy of an opinion written by this office on January 26, 1935 and addressed to Lemuel R. Mead, Recorder of Deeds, Marshall, Missouri. The holding in the enclosed opinion is that when a deed is presented for record and it bears no acknowledgment, then it is the duty of the recorder to refuse to record the same; that no instrument, paper or writing which is not regularly proved or acknowledged or which does not come within the purview of Section 11543 R.S. Missouri 1929, should not be recorded.

Section 11543 R.S. Missouri 1929, reads as follows:

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

It will be noted that it is the duty of the recorder to record certain instruments which are "proved or acknowledged according to law." As to the meaning of the term "proved or acknowledged according to law" Section 3021 R.S. Missouri 1929, provides as follows:

"The proof or acknowledgment of every conveyance or instrument in writing affecting real estate in law or equity, including deeds of married women, shall be taken by some one of the following

courts or officers: First, if acknowledged or proved within this state, by some court having a seal, or some judge, justice or clerk thereof, notary public, or some justice of the peace of the county in which the real estate conveyed or affected is situated; second, if acknowledged or proved without this state, and within the United States, by any notary public or by any court of the United States, or of any state or territory, having a seal, or the clerk of any such court, or any commissioner appointed by the governor of this state to take the acknowledgment of deeds; third, if acknowledged or proved without the United States, by any court of any state, kingdom or empire having a seal, or the mayor or chief officer of any city or town having an official seal, or by any minister or consular officer of the United States, or notary public having a seal."

It follows that "proved or acknowledged" means that the same must be taken by certain designated courts or officers. Witnesses only will not suffice. Consequently any deed or instrument in writing affecting real estate, in order to be recordable, must be proved or acknowledged by a court or officer set out in Section 3021 supra. For the purposes of this opinion we are not deciding but we are assuming that an instrument drawn by a trustee by which he refuses to act as a trustee in a deed of trust, sufficiently concerns "lands and tenements" to be recordable under the provisions of Section 11543.

You also ask whether a recorder has the authority to refuse to record any deed which is in his opinion improperly drawn. We said above that a recorder must refuse to record an instrument if it is not properly or regularly acknowledged or if it does not come within the purview of Section 11543. We assume then that this question relates to a situation where the acknowledgment is proper and regular and the instrument is a recordable one, but it appears to the recorder that the instrument is otherwise defective or is otherwise improperly drawn.

As far as we have been able to determine the Missouri courts have not passed on this exact question. However, other states have. In the case of Weyrauch vs. Johnson, 208 N.W. 706, the Supreme Court of Iowa said:

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

In the case of People ex rel. Consumers' Brewing Company of New York vs. Fromme, 54 N.Y.S. 833, the Court said:

"The duty of the register is to record or file in his office those instruments or papers which, by the laws of the state, are entitled to be recorded or filed. Whether, in the making or execution of such instruments, the parties thereto have made a valid instrument or not, is not his province to determine."

A perusal of the statutes relating to the powers and duties of a recorder show that he is largely a ministerial officer. There are no provisions in the statutes which clothe a recorder with judicial powers to determine the validity and effect of every instrument tendered to him for record. If the instrument is recordable and if the same is proved and acknowledged according to law the recorder has no alternative. He must record any such document when properly tendered to him even though he believes it to be otherwise defective.

CONCLUSION

When any instrument recordable under the terms of Section 11543 R.S. Missouri 1929 is properly presented to a recorder for record and the same is proved or acknowledged according to law the recorder must record it. However, such instrument must be proved or acknowledged and the signatures of two witnesses alone will not suffice. A recorder is largely a ministerial officer only and he has no authority to determine whether an instrument is otherwise defective or if it has been otherwise improperly drawn.

Respectfully submitted,

APPROVED:

J. F. ALLEBACH
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

JFA:MM