

Recorder of deeds:

It is the duty of the recorder of deeds to record all instruments when properly proved or acknowledged according to law and authorized to be recorded in his office.

May 26, 1941

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Mr. John P. Sherrod
Recorder of Deeds
Jackson County
Kansas City, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of May 23, 1941, which reads as follows:

"I am enclosing herewith photostat copy of a 'release deed' tendered by the Union Central Life Insurance Company, through their representatives Hamilton and Crawford Realty Company, of this city.

"After discussing the deed in question with several attorneys, I have declined to accept it for record pending your instructions. You will kindly note letter by L. Miller of the Union Central Life Insurance to the Hamilton-Crawford Realty Company, and their comments on this subject, also their request that in the event of my unwillingness to accept the same for record, I consult your office.

"The point in question is on page #2 of the deed, (Photostat Copy) and is that portion of the paragraph beginning, quote: 'Whereas, the Sedgely Investment Company, a Missouri Corporation,' etc., which reads, quote: 'note is cancelled, but not paid, a new note and deed of trust securing the same debt having been given.'

"I am, of course, not asking your office to pass upon the soundness

of the document in any sense, but I am merely asking that you instruct me as to its acceptance for record. I will appreciate your early advice and instructions."

Section 3465, Article 2, chapter 23, R. S. Missouri 1939, partially reads as follows:

"(If any mortgagee, cestui que trust or assignee, or administrator of the mortgage, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof) (or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further, that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record

and attested as above provided. * *
* * * * *

Under the above partial section it will be noticed there are two forms of procedure for the releasing and satisfaction of mortgages and deeds of trust. The first procedure is the presentation of the note secured by the mortgage or deed of trust and acknowledgment of the satisfaction of the mortgage or deed of trust on the margin of the record of the deed of trust. The other procedure for satisfaction and releasing of mortgages and deeds of trust is by way of a deed of release. This section provides that when a deed of release is given and not a satisfaction of the deed of trust on the margin of the recorded deed of trust the recorder of deeds should note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. It also provides that when a full deed of release is offered for record the note or notes secured shall be produced and canceled in the presence of the recorder who shall enter that fact on the margin of the record and attest the same with his official signature.

It will be noticed in case of a deed of release the word "canceled" is used and not "satisfaction" as used in the first procedure. This section further provides that no deed of release shall be admitted to record unless the note or notes are so produced and canceled and that fact entered on the margin of the record and attested as provided in said section. The wording of this section is unambiguous. It clearly states that under the first procedure, which is a release, by way of acknowledging satisfaction on the margin of the record containing the deed of trust the word "satisfaction" is used, where under the second procedure the release or satisfaction is made by way of a deed of release. All that is necessary is that the notes shall be presented, produced and canceled, the word "satisfaction" not appearing in that second class of procedure.

According to the photostatic copy of the deed of release in question, the deed of release specifically said: "canceled but not paid, a new note and deed of trust securing the same debt having been given." This deed of release follows exactly the wording of the second procedure of satisfaction and release under Section 3465, supra. Also, the

photostatic copy shows the cancellation of the note. I am presuming the cancellation of the note was in the presence of the recorder as provided under Section 3465, supra. The production and cancellation of the notes secured by the deed of trust for which the deed of release was given is a prerequisite to the recording of the deed of release, and unless the notes are produced and canceled in the presence of the recorder of deeds it is not mandatory upon the recorder of deeds to record the deed of release.

Section 13161, R. S. Missouri 1939, partially 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; * * "

It will be noticed under the above partial section that it is the duty of the recorder to record several described papers, "which shall be proved or acknowledged according to law and authorized to be recorded in their offices; * * " This partial section is mandatory, the word "shall" being used instead of the word "may" and does not leave the recording in the discretion of the recorder of deeds if the instrument is proved or acknowledged according to law. As to the meaning of the phrase "proved or acknowledged according to law" the acknowledgment must be made in accordance with Section 3408, R. S. Missouri 1939, which provides and reads 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."

The recorder of deeds is largely a ministerial officer and does not pass upon the legality of instruments proved and acknowledged according to law. It is not for the recorder of deeds to say whether or not the instrument offered has been drawn up according to law but the recorder of deeds may require certain prerequisites required under our state law to be complied with and which are set out in Section 3465, supra, before it becomes mandatory that he record the instrument.

The State of Missouri has not passed directly on the question as to the recorder of deeds being merely a ministerial officer, but in the State of Iowa the Supreme Court of that state in *Weyrauch v. Johnson*, 208 N. W. 706, 708, pars. 5, 6, 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.

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

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

"* * * As has already been decided by the court of appeals of this state in regard to provisions of the previous revenue law, the congress of the United States cannot control the rules of evidence in courts of this state, nor the legality of contracts made, executed, and to be performed within its borders, except such contracts as relate to subjects over which the United States have jurisdiction. The responsibility of seeing that the proper stamp is affixed rests upon the parties to the instrument; and the register is no more required to determine the validity under the United States revenue law of an instrument offered for record than he would be to determine whether a deed offered for record contravened some statute of the state, or was offered for the purpose of defrauding creditors, or, for any other reason, was invalid and void. To hold that such a duty rested upon the register would be to constitute him a judicial instead of a ministerial officer. The

relator having complied with the provisions of the law of this state as to the statement which he desired to have filed, and having tendered the necessary fees for such filing, it was the duty of the register to accept the same for recording."

Since the Supreme Court of this state has not declared either way whether or not the recorder of deeds is a ministerial officer or a judicial discretionary officer, one must look to the statutes to determine that point. Under Section 13161, supra, it specifically states, "shall" and in accordance with the decisions of other courts there is no question but that the recorder of deeds is a ministerial officer. Corpus Juris states the theory of the law on this question as follows in Volume 18, par. 186, page 247:

"The question as to what instruments are entitled to record must as a general rule depend in each case upon the express provisions of law in respect thereto; and resort thereto must also be had in determining whether a deed is sufficient in its form and requisites to entitle it to record. Again, if certain conditions precedent are imposed by statute as a prerequisite to the registration of a deed, there should be a compliance therewith. A deed, though void on its face, may be entitled to record."

You do not state in your request the point involved as to your reason for not recording the deed of release, but I am presuming that you are objecting to the words, "Note is cancelled, but not paid, a new note and deed of trust securing the same debt having been given," and that you believe the note should be canceled as paid, but Section 3465, supra, does not provide that when a deed of release is given that the notes should be canceled as satisfied or paid but merely states canceled in the presence of the recorder of deeds.

Section 13162, R. S. Missouri 1939, reads as follows:

"The several classes of instruments of writing mentioned in the several subdivisions of the preceding section shall be recorded in separate

books, according to their classification therein."

Section 13163, R. S. Missouri 1939, reads as follows:

"Instruments in writing, conveying chattels or personal property alone, which by any law of this state are required to be recorded or admitted of record in any recorder's office in this state, shall be recorded in a series of volumes separate from those used for recording conveyances of real estate."

By virtue of the above two sections the deed of release, which relates to land, should be recorded in the separate book regarding lands.

CONCLUSION

It is the opinion of this department that when a deed of release of a mortgage or deed of trust is offered for recording, which is properly proved and acknowledged according to law as set out in Section 3408, supra, it is mandatory that the recorder of deeds record the same providing all prerequisites have been complied with.

It is also compulsory under Section 3465, supra, when a full deed of release of mortgage or deed of trust is offered for recording the note or notes secured must be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature. Unless the note or notes are so produced and canceled and that fact entered on the margin of the record and attested by the recorder's official signature, the deed of release of the mortgage or deed of trust should not be admitted to record.

It is further the opinion of this department under the above authorities that when a release or satisfaction of a mortgage or deed of trust is made by a deed of release, it is not necessary that the note or notes be marked paid

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or satisfied as it is sufficient to merely cancel the note or notes in the presence of the recorder of deeds. Therefore, it is the opinion of this department that the deed of release, from which the photostatic copy attached was made, should be recorded by the recorder of deeds providing the note or notes have been produced and canceled in the presence of the recorder of deeds, and for the further reason that the deed of release has been properly acknowledged by an officer qualified to take the acknowledgment under the laws of this state.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

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