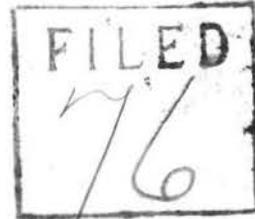


RECORDER: Duty and method of recording "Waiver of Priority Mortgage", not operating as a full release of mortgage.

June 8, 1936.



Honorable James S. Rooney
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

We acknowledge your request for an opinion dated May 22, 1936, which reads as follows:

"I am on today in receipt of a question from our Recorder of Deeds on which I shall be pleased to have an expression of your opinion. I enclose his letter herewith."

We also acknowledge receipt of your enclosure from Mr. Mosby, which reads as follows:

"I herewith enclose two instruments, one of which is referred to as 'Consent and Recognition of Lease', the other being referred to as 'Waiver of Priority of Mortgage.'

"Of course, in both instruments the holder of the mortgage or deed of trust is intending to partially release their security or make the mining lease prior to their mortgage or deed of trust.

"The question is this, should I ask that the note described in the mortgage or deed of trust be produced at the time of filing an instrument of this nature, just as we do in making any partial release in conformity with Section 3081 R.S. Mo. 1929 or would it be permissible to file it for record without the note being produced?

"

"I am very anxious to have an opinion on this at a very early date, so if you will forward this, along with anything you care to write, to the Attorney General I will certainly appreciate it."

We also acknowledge receipt of copies of papers offered for recording, which are entitled "Consent and Recognition of Lease" and "Waiver of Priority of Mortgage".

Section 3039 R. S. No. 1929, provides what instruments in writing are to be recorded by a Recorder and reads:

"Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

Section 11543, R. S. No. 1929, provides in part:

"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; * * *"

Section 11547 R. S. Mo. 1929, provides the manner of recording by the Recorder and reads:

"The Recorder shall record, without delay, every deed, mortgage, conveyance, deed of trust, bond, commission or other writing delivered to him for record, with the acknowledgment, proofs and certificates written on or under the same, with the plats, surveys, schedules and other paper therein referred to, and thereto annexed, in the order of time when the same shall have been delivered for record, by writing them word for word, in a fair hand, noting, at the foot of such record, all interlineations and erasures and words visibly written on erasures, and noting, at the foot of the record, the day and time of the day, month and year, when the instrument so recorded was delivered to him, or brought to his office for record; and the same shall be considered as recorded from the time it was so delivered."

Laws of 1933, p. 196, Sec. 3078, provides in part:

"If any mortgagee, cestui que trust or assignee, or administrator of the mortgagee, 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 of 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."

CONCLUSION.

We are of the opinion that it is the Recorder's mandatory duty to record the written instruments presented to him, as provided in Section 11547, supra. The facts submitted with your request show that said instruments in question are in writing, properly acknowledged and certified, and that they affect real estate.

The so-called "Waiver of Priority of Mortgage" operates as a partial deed of release, and it is the duty of the Recorder to "note on the margin of the record of the deed of trust the book and page" where the "Waiver of Priority of Mortgage" is recorded. Said Waiver of Priority of Mortgage not being a "full deed of release", the Recorder has no statutory right to demand that notes secured by said mortgage be produced and cancelled as in those cases where "full deed of release" is offered for recording, as prescribed in Laws of 1933, supra.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMANN, Jr.
(Acting) Attorney General.

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