

DEEDS OF TRUST:) Person must release within thirty days after date
AND MORTGAGES:) of payment of deed of trust or mortgage, after
request; and failing to do so penalty attaches.

January 20, 1937. 121



Honorable Robert D. Swezey
Attorney
Legal Department
Home Owners' Loan Corporation
Washington, D. C.

Dear Sir:

This is to acknowledge your letter as follows:

"A recent review of the statutes of Missouri has brought to our attention Section 3085, Annotated Statutes (1932) providing for a penalty of 10% of the amount of a mortgage or deed of trust payable to the mortgagor plus any other provable damages for failure on the part of a mortgagee to acknowledge satisfaction of a mortgage within thirty days after tender of payment.

"In certain cases the Corporation has, subsequent to the taking of its first mortgage, advanced additional monies to the borrower for reconditioning of the property and has taken as security for such advance a second recorded lien. It has occurred to us that in such cases a payment in full of the second lien might escape our notice and we unwittingly fail to enter a proper discharge of record. The failure to discharge is likely to arise, as indicated, only in those cases where the Corporation has both a first and second mortgage, since after payment in full has been made of the second mortgage the Corporation's books will still show the borrower indebted to the Corporation. In cases

where there is only a first mortgage there is very little likelihood of our neglecting to release immediately.

"Will you be kind enough to advise whether, in your opinion the statute cited would apply to a Federal instrumentality such as the Home Owners' Loan Corporation, the stock of which is wholly owned by the United States; and whether a Missouri court will invoke the penalty provided if through inadvertence the Corporation fails to discharge its second lien promptly."

Section 3085, R. S. Mo. 1929, has been on our statute books in its identical form for many years. It was Section 2850 of the Revised Statutes, 1909. Section 3085, supra, reads as follows:

"If any such person, thus receiving satisfaction, do not, within thirty days after request and tender of cost, acknowledge satisfaction on the margin of the record, or deliver to the person making satisfaction a sufficient deed of release, he shall forfeit to the party aggrieved ten per cent. upon the amount of the mortgage or deed of trust money, absolutely, and any other damages he may be able to prove he has sustained, to be recovered in any court of competent jurisdiction."

In *Wing v. Insurance Company*, 181 Mo. App. 381, the Kansas City Court of Appeals, in referring to Section 3085, supra, said (p. 385):

"Section 2850 (R. S. 1909) is highly penal and must be strictly construed. (*Wing v. Central Life Insurance Co.*, 155 Mo. App. 356; *Snow v. Bass*, 174 Mo. 149.) When the basis of an action is a statute which is highly penal, the statute must not only be strictly construed but must be applied only to such

cases as come clearly within its provisions and manifest intent. Eddington v. Telegraph Co., 115 Mo. App. 93, 1. c. 98; Bradshaw v. Telegraph Co., 150 Mo. App. 711; Rixke v. Telegraph Co., 96 Mo. App. 406.)" (Underscoring ours.)

You will note that Section 3085, supra, requires a request on the part of the party desiring acknowledgment of satisfaction before the penalty applies, and, further, the release or satisfaction may be executed within thirty days after the request. You state that if the Home Owners' Loan Corporation fails to release or discharge a lien, it would be through inadvertence. In other words, the corporation does not evince a desire not to release but would fail to release only through neglect. Section 3085, supra, is for the failure to release after the demand or request is made. The failure to release must be after request.

A case which we believe decisive of your question is Wing v. Life Insurance Company, 155 Mo. App. 356, wherein the Kansas City Court of Appeals said (pp. 357, 358):

"The statutes, sections 2844 and 2850, Revised Statutes 1909, require that a request or demand be made and provide that the mortgagee or cestui que trust shall acknowledge satisfaction on the margin of the record or deliver to the person making satisfaction a sufficient deed of release 'within thirty days after request and tender of costs.' The request is essential and no cause of action to recover the penalty can arise until the lapse of thirty days from the date of the request. The petition does not give the date, nor does it allege that the demand was made more than thirty days before the institution of the suit. This omission to allege one of the constitutive facts of the cause is fatal to a recovery. The statute is highly penal, must be strictly construed and the plaintiff invoking it must plead and prove all of the elemental facts. (Kingston v. Newell, 125 Mo. App. 389; Snow v. Bass, 174 Mo. 149; Grant v. Telegraph Co., 154 Mo. App. 279, 133 S. W. Rep. 673.)

"Nothing must be left to inference. 'It might be argued that plaintiffs would not have been guilty of the folly of tendering the costs and demanding an entry of satisfaction of the deed before the payment of the notes, but the facts which constitute plaintiffs' cause of action must be alleged and the court should not be left to infer unpleaded facts.' (Scott v. Robards, 67 Mo. 289.)

"Nor could such vital matter be cured by the verdict. It is not a case of defective statement but a case where facts necessary to a cause of action are not alleged.' (Kingston v. Newell, supra.)

"The petition being fatally defective we cannot inquire into the merits of the judgment rendered for defendant. Accordingly the judgment is affirmed. All concur."

From the above it is our opinion that a person after request for satisfaction in full of a deed of trust, failing to within thirty days release and acknowledge satisfaction thereof, is liable for the penalty. The Home Owners' Loan Corporation, no doubt, will within thirty days after request, if the debt is paid, acknowledge satisfaction. Consequently, we do not deem it necessary to write on the subject of whether or not said statute "would apply to a Federal instrumentality such as the Home Owners' Loan Corporation."

Yours very truly,

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Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.