

RECORDER OF DEEDS:  
WHAT INSTRUMENT SHALL  
BE RECORDED:

Instruments of writing affecting real estate shall be recorded only when they have been duly acknowledged or proven by the grantor named in such instrument.

April 21, 1939

Mr. Forrest Smith  
Circuit Clerk and Ex-Officio Recorder  
Putnam County  
Unionville, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an official opinion from this department on the question of whether or not it is your duty as recorder to record a certain affidavit, a copy of which you included with your letter. Since the affidavit is so long we will not copy in full here but will give the substance of it, which is as follows:

The maker of the affidavit states that he owns oil and gas leases covering certain lands in your county. He sets out the number of the leases, the form, the name of the lessor, the description of the lands leased, the date of the lease, and the term of years for which the lease is to continue. He also states that he is the lessee of the mineral rights of said lands. He states that he has paid a valuable consideration for these leases and that they have been delivered to him and that he is now holding them as the owner. He also states that he has not filed these leases for record for the reasons that he is checking the descriptions and as soon as they are verified he expects to place them on the record. The affiant makes the affidavit and acknowledges it in due form. As stated above your question is: Are you required to record this instrument?

The office of the recorder of deeds is statutory and we must look to the Missouri Statutes for his powers and duties. Section 11543, R. S. Missouri, 1929, refers to the powers and duties of the recorder of deeds, and is

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."

Sections 11529 and 11535, Laws of Missouri, 1933, pages 360 and 361, require the recorder of deeds to give a bond for the faithful performance of his official duties. On the question of what conveyance affecting real estate shall be recorded, we find that Section 3039, R. S. Missouri, 1929, applies and provides as follows:

"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."

The purpose of recording such instruments is to give

a notice to the world that such a contract exists. This purpose is stated in Section 3040, R. S. Missouri, 1929, which as follows:

"Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice."

In speaking of recording acts, we find the subject is treated in Volume 23 R. C. L., page 170, section 24:

"The recording of deeds and other instruments affecting the title to land is purely a system of legal institution, and not of common right or abstract justice. \* \* \* \* \*"

At section 28, page 174 of the same Volume, the subject is also treated as follows:

"The recording acts require all deeds and other instruments relating to or affecting the title to real property to be recorded; and a deed transferring land for the benefit of creditors under an insolvent law must be recorded the same as any other deed. Only the original instrument is entitled to record, and therefore a copy of a deed will not be admitted to record, even though it has indorsed on it a receipt signed by the grantor acknowledging that he had received a deed, of which it was a true copy, for the purpose of procuring it to be recorded. \* \* \* \* \*"

Referring to this section we think it is important to call particular attention to the statement that only the original instrument is entitled to record, and therefore a copy of a

deed will not be admitted to record, even though it has indorsed on it a receipt signed by the grantor and acknowledging that he had received a deed.

We think the rule stated in the foregoing section is very applicable to the question which you have submitted. If only the original instrument is entitled to be recorded, then certainly such an instrument as has been tendered to you for recording would not be entitled to be recorded.

In speaking of our recording act, we find that the Springfield Court of Appeals in *Hellweg v. Bush*, 74 S. W. (2d) 89, 93, par. 9, said:

"It is urged, however, that, because the State Life Insurance Company recorded its assignment, and neither plaintiff nor his assignor filed for record any assignment of their note and mortgage, the State Life Insurance Company therefore has the superior equity. Many cases from other states are cited in favor of this theory. An examination of those cases shows, almost without exception, that they are based upon statutes of those particular states providing for or requiring the recording of assignments of mortgages. We have no such statute in this state. Section 3039, R. S. Mo. 1929 (Mo. St. Ann. section 3039, p. 1879), provides for the recording of all instruments conveying real estate. The simple assignment of a note or deed of trust securing same is not required to be recorded, and the recording thereof cannot be regarded as constructive notice of the contents thereof. \* \* \* \* \*

We find the rule stated in Volume 74 A. L. R. at page 351, as follows:

"An instrument purporting to be a copy of an original instrument held in trust, without revealing anything as to the

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execution or delivery of the original, if there was one, or giving any information as to where it could be found, is not entitled to record, and its actual record is ineffectual to impart constructive notice."

From an examination of the instrument which you have submitted, it will be seen that the person who has made the purported oil and gas lease has not signed it or acknowledged it. The only assurance that the recorder has that the original instrument has been acknowledged is the statement made by the affiant. At the most it could only be treated as a self-serving statement, and we do not think that it comes up to the requirements of Section 3040, supra, in giving a notice that such a lease exists.

The recorder of deeds has some liability on the bond which he is required to give. The bond is conditioned on the faithful performance of his official acts. An instrument, such as you have enclosed with your request, if it is a notice, then it affects the title to the real estate described therein. If such affidavit did not state the truth as to there being leases on the lands described therein, then the titleholder to the premises would have a cause of action against all parties who participated in the wrongful act and this might include the recorder of deeds.

We think that was one of the purposes why the lawmakers, by Section 3039, supra, required that conveyances affecting real estate should not be recorded until they were duly acknowledged by the party conveying the real estate.

#### CONCLUSION.

From the foregoing it is the opinion of this department that under the statute you are not required to record the affidavit a copy of which was enclosed with your request and the substance of which is hereinbefore set out.

Respectfully submitted,

APPROVED:

TYRE W. BURTON  
Assistant Attorney General

J. E. TAYLOR  
(Acting) Attorney General

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