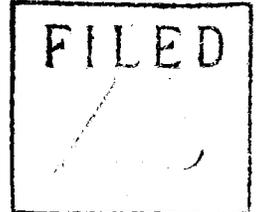


RECORDER OF DEEDS: Not required to record notice of levy on execution under Section 1343, R.S. Mo. 1939, until paid the recording fee therefor. Section 10975, R.S. Mo. 1939, was repealed by House Bill No. 469, Missouri Laws of 1945. Consequently, recorder not required to maintain "mortgage list" as required by said Section 10975.

June 12, 1947.

12/20



Honorable Joseph N. Brown  
Assistant Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Sir:

This is in reply to your letter dated May 15, 1947, in which you raised two questions, the first one of which involves the payment of costs for recording notice of levy on execution. Said letter reads in part as follows:

"I desire to say that the Recorder of Deeds of Greene County has propounded the following question:

"Is he required under the statute to collect the cost of recording the notice of levy on real estate on an execution?"

\* \* \* \* \*

"We have advised the recorder that it is our opinion that the recording fee for recording the notice of levy on an execution could be charged by his office and later collected as other costs; however the County Auditor insists that the office of recorder of deeds must be and is on a 'cash basis.'

\* \* \* \* \*

"Our recorder has also made inquiry as to whether or not he may discontinue the keeping of the record denominated 'mortgage list' which was required under Section 10975, R.S. Mo. 1939, which was repealed by House Bill 469, Laws of 1945."

Section 13185, R.S. Mo. 1939, provides:

"The recorder shall not be bound to make any record for which a fee may be allowed by law, unless such fee shall have been paid or tendered by the party requiring the record to be made."

In commenting on this above quoted section, a former opinion of this department rendered to Honorable Charles E. Murrell, Jr., Prosecuting Attorney of Adair County, under date of January 22, 1937, said:

"Under the last quoted section of the statute, it is therefore our opinion that one desiring to have an instrument recorded in the recorder's office which is entitled to record, the required fee must first have been paid or tendered by the person presenting same for record to the recorder of deeds, and if such payment is not made or tendered as provided by Section 11566, supra, (now Section 13185, R.S. Mo. 1939) the recorder of deeds would not be liable by civil action on his official bond under Section 11564, supra, nor to the penalties under Section 11565, supra, for failure to record such instrument so presented for record."

And likewise, an opinion rendered by this department to Honorable Conn Withers, Prosecuting Attorney of Clay County, Liberty, Missouri, under date of February 4, 1938, said:

"We are of the opinion that under the Missouri statutes, supra, it would be unlawful for any recorder of deeds in Missouri to record any written instrument without charging the legal fee provided by law, \* \* \* \* \*

From the above, therefore, it may be stated generally that, as the County Auditor said, the office of recorder of deeds is on a "cash basis." The problem still remains, however, whether the office must be on this cash basis as regards the recording fee for recording the notice of levy on an execution. Section 1343, R.S. Mo. 1939, provides in part as follows:

"\* \* \*whenever an execution shall be levied upon real estate, not then charged with the lien of the judgment, order or decree upon which such execution issued, it shall be the duty of the officer making such levy immediately to file with the recorder of deeds of the city or county in which such real estate is situated a notice of such levy, showing the date and style of the execution, the date of levy, the amount of the debt and costs, and a description of the real estate levied upon, which shall be recorded and indexed in a separate volume by the recorder, in the same manner that deeds to real estate are required to be recorded and indexed in a separate volume, and the recording fee therefor shall be charged and collected as other costs;\* \* \*"

C.J. Volume 53, page 1081, Sections 38 and 40, says:

"In the absence of contrary statutory provisions, the register may demand payment in advance of his fees for performing a given service."

"Mandamus will not lie to compel a register to perform a duty pertaining to his office without payment of his fee therefor in advance, even though the fee demanded is claimed to be excessive, where it appears that relator is able to pay the fee and can recover the alleged excess by ordinary action."

For the purpose of comparison and in an attempt to possibly ascertain the legislative intent as regards Section 1343, supra, it is interesting to note Section 1460, R.S. Mo. 1939, which deals with the notice of levy on an attachment. Said section says the officer shall:

"\* \* \*file in the recorder's office of the county where the real estate is situated and abstract of the attachment, showing the names of the parties to the

suit, and the amount of the debt, the date of the levy, and a description of the real estate levied on by the same, which shall be duly recorded in the land records and the recording paid for by the officer, and charged and collected as other costs; \* \* \* \* \*"  
(Underscoring ours.)

The corresponding wording in Section 1343, R.S. Mo. 1939, says the notice of the levy is to be filed with the recorder of deeds by the officer making such levy, and is to be:

"\* \* \* recorded and indexed in a separate volume, and the recording fee therefor shall be charged and collected as other costs;\* \* \* \* \*" (Underscoring ours.)

In other words, Section 1460, which in the above quoted provision is very similar to the corresponding provision of Section 1343, expressly provides that the recording fee is to be paid by the officer, and he is to charge and collect that as other costs.

In the case of Farris v. Smithpeter, 180 Mo. App. 466, the court, in referring to Section 10690, R.S. Mo. 1909, which is now Section 13398, R.S. Mo. 1939, said at l.c. 470:

"\* \* \* Section 10690, Revised Statutes 1909, expressly provides that fee bills shall issue to sheriffs, who shall collect the same, 'and if the person or persons and their sureties for costs properly chargeable with such fees shall neglect or refuse to pay the amount thereof, and costs for issuing and serving the same, within thirty days after demand of said sheriff or other officer aforesaid, the same shall be levied of the goods and chattels, moneys and effects of such persons or their sureties, in the same manner and with like effect as on an execution.' A fee bill is the proper process to collect fees in favor of officers and witnesses against the party for whom the services are rendered (Hoover v. Railroad, 115 Mo. 77, 21 S. W. 1076),

and that case quotes from Newkirk v. Chapron, 17 Ill. 343, 353, holding that a fee bill 'becomes, for this purpose, like an execution against the cost debtor.' \* \* \* \* \*

At page 471 the court continued:

"\* \* \* A fee bill does not need a judgment for its basis but it does need a proper taxation of costs.\* \* \* \* \*

In view of the fact that it has been held by this office, as pointed out above, that the recording fee must be paid or tendered to the recorder before the instrument is entitled to be recorded; and because of the analogy between Section 1343 and Section 1460 where it was expressly provided that the recording fee is to be paid by the officer and charged and collected as other costs; and because of the authority above referred to which allows the recovery of costs by officers, we feel that it is the duty of the officer to pay the recording fee when he files the notice of the levy, and the recorder of deeds is not bound to make any record of the levy on execution as provided in Section 1343, supra, until he shall have been paid the recording fee therefor.

The next question you present for an opinion is whether the recorder may discontinue the keeping of the record designated "mortgage list" which was required under Section 10975, R.S. Mo. 1939, and which was repealed by House Committee Substitute for House Bill No. 469, passed by the 63rd General Assembly.

Said H.C.S.H.B. No. 469 is to be found in Missouri Laws of 1945 at page 1782. Section 1 provides:

"That Sections 10943 to 10969, both inclusive, and Sections 10971 to 10995, both inclusive, and Sections 10997 to 11000, both inclusive, Article 2, Chapter 74, Revised Statutes of Missouri, 1939, relating to assessors and assessments of property, be and the same are hereby repealed and forty-three new sections enacted in lieu thereof, relating to the same subject matter, and to read as follows:" (Underscoring ours.)

59 C.J., page 900, says:

"An express repeal is the abrogation or annulment of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated. A statute, or portion thereof, may be repealed directly by an express provision or declaration in a subsequent statute, \* \* \* \* \*

Section 10975, R.S. Mo. 1939, would be then expressly repealed by H.C.S.H.B. No. 469, Laws of Missouri, 1945. In the case of Christ Diehl Brewing Co. v. Schultz, 117 N.E. 8, the Supreme Court of Ohio said at l.c. 9:

"If the language of a statute is ambiguous and its meaning doubtful, a court, in construing such statute, will endeavor to ascertain and give effect to the intent of the law-making body which enacted it; but when the language employed is clear, unambiguous, and free from doubt, it is the duty of the court to determine the meaning of that which the Legislature did enact, and not what it may have intended to enact.

"Where an existing statute is specifically repealed, a court will not inquire whether the Legislature intended its repeal. If it be true that a statute was unintentionally or inadvertently repealed, the remedy is by legislative action, and not by judicial declaration that the General Assembly has done that which it did not intend to do.\* \* \*"

Likewise, the New York Court of Appeals, in Smith v. The People, 47 N.Y. 330, said at l.c. 338:

"If the repeal of a statute is by express and positive terms, and there is no legitimate evidence in or out of the act of an intent to qualify and restrict the operation, that is, no limitation or qualification, express or implied, the only question is as to the effect of the repeal, and the rule is that for all purposes the law repealed is as if it had never existed. \* \* \* \* \*

Although, as indicated from a reading of the cases, courts do attempt to interpret the intention of the legislature in the construction of statutes, when, as here, there is an unambiguous repeal of a particular section and nothing to indicate that such a repeal was not intended, we feel that the wording of the two above quoted cases would be applicable to our case at hand, and that Section 10975, R.S. Mo. 1939, was repealed by H.C.S.H.B. No. 469, Laws of Missouri, 1945, page 1782. It follows that the county recorder is not required to maintain a "mortgage list" as required by said Section 10975.

CONCLUSION

Therefore, it is the opinion of this department that it is the duty of the officer to pay the recording fee when he files the notice of levy on execution, such fee to be collected by the officer as other costs, and the recorder of deeds is not bound to make any record of such levy as provided in Section 1343, R.S. Mo. 1939, until he shall have been paid the recording fee therefor.

It is further the opinion of this department that Section 10975, R.S. Mo. 1939, was repealed by H.C.S.H.B. No. 469, Laws of Missouri, 1945, and consequently the county recorder of deeds is not required to maintain a "mortgage list" as required by said Section 10975.

Respectfully submitted,

Wm. C. COCKRILL  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

WCC:LR