RECORDER OF DEEDS: Lease of real estate should be recorded.
RECORDING LEASES:

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August 6, 1943

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Hon. John E. Clarke
Prosecuting Attorney
Elsberry, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement and request:

> "Will you kindly advise me with respect to the following:
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> "When the Recorder of Deeds is offered a written lease of a farm by the land owner to be filed and not recorded, is it the duty of the Recorder of Deeds to accept the instrument and file the same; or should he collect the fee for recording and record the instrument?
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> "In the case of Faxon vs. Ridge, 87 Mo. App., page 299, the Kansas City Court of Appeals when considering a written lease with a chattel mortgage feature, which was recorded in the real estate records, held that a two-year lease of real estate is a chattel and was therefore not properly put on the real estate record and should have been on the chattel record alone.
>
> "The recorder is demanding that the instrument be recorded while the landlord is demanding that the instrument be filed. Any help that you can give me in straightening out this matter will be genuinely appreciated."

In the case of Lamar Township v. City of Lamar, 261 Mo. 171, 189, the court in speaking of the powers and duties of public officers said:

> "Officers are creatures of the law, whose duties are usually fully providdd for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. * * * * The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

Looking to the statute which prescribes the powers and duties with respect to recording and filing instruments, we find that Section 3468 R. S. Mo. 1939 provides as follows:

> "In case any person desires to release any part of the property described in any deed of trust or mortgage by marginal record or deed of release, he shall be permitted to do so by the recorder on presentation to the recorder of the notes or other obligations evidencing the principal of the debt secured thereby, or accounting for them by affidavits or otherwise as now or hereafter provided by law in the case of full release, and the recorder shall note the fact of such partial release on the margin of the record of such deed of trust or, if such release is made by deed of release, shall note the fact of the filing for record of such partial release, and of the presentation of such notes or other obligations, or accounting therefor, on such notes or obligations in substantially the following form: 'See partial release dated ______________ Recorder' and on the margin of the record of such deed of trust or mortgage, but shall not cancel such notes or other obligations; and nothing in this section shall be construed as making it necessary for

> any trustee named in the mortgage or
> deed of trust to join in such partial
> deed of release."

This section applies to personal property. In your letter you refer to the opinion in the case of Faxon v. Ridge, 87 Mo. App. 299, wherin the court held that a leasehold interest was a chattel real. At l.c. 308 the court in discussing the interest conveyed by a lease said:

> "The interest conveyed by the lease being a chattel and the drugstore fixtures also being chattels, it may, therefore, be said that the lease conveyed only one kind of property, viz.: personalty, and therefore it was not properly put on the real estate record at all, and should have been placed on the chattel record alone. But a lease, while a chattel, is a chattel real and there is a difference between it and chattels personal. Besides, the statute influences the situation at this juncture. It reads 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.' R. S. 1899, sec. 923. The lease paper, though a chattel, was certainly an instrument which 'affected' real estate in the sense of that statute. It was therefore necessary to the protection of the lessor, that it be recorded in the real estate records and being thus properly recorded for that purpose, it, as we have already seen, made a sufficient recording of the personal chattels proper."

Section 3426 R. S. 1939 is in the same language as Section 923 R. S. 1899 which is quoted in the Ridge case, supra.

In the case of Kelvinator St. Louis v. Schader, 39 S. W. (2d) 385, 389, in discussing this section, the court said:

> "It will be observed that section 3039 of our statute not only requires that every instrument in writing that conveys real estate shall be proved or acknowledged and certified in the manner prescribed and shall be recorded in the county in which such real estate is situated, but it also requires that every instrument in writing, whereby any real estate may be affected, shall likewise be proved or acknowledged and certified and recorded in the office in the county in which such real estate is situated. * * * *"

These cases hold that the lease which affects real estate should be recorded.

CONCLUSION.

From the foregoing, it is the opinion of this department that a duly executed lease to farm land should be recorded when presented to the recorder.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

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ROY McKITTRICK
Attorney General

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