RECORDERS: Recorder of Deeds of St. Louis City has no
MORTGAGES: authority to release deed of trust which secures notes not mentioned in the deed of trust.

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March 14, 1947

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Mrs. Ruby Koelling
Recorder of Deeds
City of St. Louis
St. Louis, Missouri

Dear Mrs. Koelling:

We have received your request, which is as follows:

"Enclosed find forms of Deed of Trust Note, Deed of Trust, and proposed rider to-gether with a letter from the Prudential Insurance Company of America.

"One of my deputies, Mr. Dueringer, talked to Mr. Hayward relative to this rider and at the time explained that if the original identified note described in the Deed of Trust was endorsed by the payee and marked paid our office would release the Deed of Trust on the margin. This, of course, would relieve the Recorder of any responsibility, however, I am not sure that if a rider such as the one suggested were attached to the original deed of trust, that we could legally release a deed of trust without knowing definitely that there were no supplementary notes of advances unpaid.

"I request an opinion of your office as to the legal position in my acceptance of this rider. Would it not open a way to concealing indebtedness? As it now stands new deeds of trust would have to be made and recorded subject to the prior deed of trust on record."

You have also enclosed a proposed additional clause which someone contemplates inserting in their deed of trust.

Your question comprehends the method that may be lawfully used to release of record a deed of trust, and is based on the following:

The deed of trust secures a note described therein for a stated amount and interest. It is proposed that an addition be made to the deed of trust by inserting another clause to provide: "That upon request of the mortgagor the mortgagee may hereafter, at its option, at any time before full payment of this mortgage, make further advances to the mortgagor, and the same, with interest, shall be secured by this mortgage."

In considering your authority as Recorder of Deeds, the law is stated thus in 53 C. J., page 1072, par. 11:

> "A register of deeds can be compelled to perform only such duties or services as are imposed on him by law. * * *"

We know of no provision of the Constitution creating the office of Recorder of Deeds, but on the contrary the office and its duties spring from laws enacted by the Legislature. Section 13147, R.S. 1939, creates the office. It says:

> "There shall be an office of recorder in each county in the state containing 20,000 inhabitants or more, to be styled, 'The office of the Recorder of Deeds.'"

Subsequent sections of Chapter 89 of the 1939 Revision confer certain duties and rights on the office of Recorder of Deeds, but said chapter is silent as to the duties of said office or the person holding the same with reference to cancellation of notes when releases of mortgages are executed.

Chapter 23 of the 1939 Revision, and particularly Article 2 thereof, appears to be the sole statutory authority of the Recorder of Deeds in making releases of deeds of trusts or mortgages, and for the purpose of this opinion the term "mortgage" is used to include also deeds of trusts, and the

provisions of said chapter related to the subject should be considered together in order to determine the meaning of a particular section therein. The general section therein is 3465, which provides:

> "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 a 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. If such note or notes are not presented for cancellation for the alleged reason that they have been lost or destroyed, the recorder, before allowing any entry of satisfaction to be made on the record or any deed of release to be placed on the file or record, shall require the cestui que trust named in the mortgage or deed of trust desired to be released or his legal representatives, to make oath, in writing, stating that the

> note or other evidences of debt named in the mortgage or deed of trust sought to be released have been paid and delivered to the maker thereof or his representative, and the recorder shall also require the maker of such note or notes, or his legal representative, to make affidavit, in writing, that the note or notes in question have been paid, and cannot be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same: Provided, however, that, if such note or notes shall not have been delivered to the maker or his legal representative, the affidavit so required of the cestui que trust or his legal representative shall recite that the note or other evidence of the debt named in said mortgage or deed of trust has been paid and cannot be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same, and the term legal representatives as used in this section shall include the assigns; and the affidavit of the maker of such note or notes or his legal representative shall recite that said note or notes have been paid; the affidavits so required shall be recorded in the same manner as deeds, in a permanent record, and the recorder shall make a notation upon the margin of the mortgage so satisfied giving the number of the book and page wherein said affidavit has been recorded: Provided, that nothing in this article shall be so construed as to require that any interest coupon notes shall be produced and canceled in the presence of the recorder, but that all such interest coupon notes shall conclusively be taken and be deemed to have been paid in full, when the principal note described in the mortgage or deed of trust shall have been produced and canceled in the presence of the recorder as provided for in this article."

It will be observed that said statute places the duty (on request of the mortgagor and at his cost) on the "mortgagee,

cestui que trust or assignee," or administrator of any of them, after having received payment of the mortgage debt, to "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." It further provides that when the mortgage is satisfied by a release deed the recorder shall note on the margin of the record of such deed of trust the book and page where the release deed is recorded. Then it says this: "In case satisfaction be acknowledged by the payee or assignee," which evidently refers to the marginal release, "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."

The statute provides two methods by which the recorder may officially assist in making the record release; one being by the marginal release first above pointed out, and the other being by a release deed placed of record. In each instance, however, the statute requires that "the note or notes secured shall be produced and canceled in the presence of the recorder," and the official enters that fact on the record and officially attests the same.

The production and cancellation on the record of the notes secured appear to be a dominant thought of the statute. It then provides that if the note is lost or destroyed the recorder shall require the beneficiary or his legal representatives to make oath that the notes "named in the mortgage or deed of trust sought to be released have been paid and delivered to the maker thereof," and also a like affidavit from the maker or his legal representative that the note or notes have been paid and cannot be produced "because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same."

Then a later provision is that if such note or notes shall not have been delivered to the maker or his legal representatives, the affidavit required of the beneficiary shall state that the note or other evidence "of the debt named in said mortgage or deed of trust" has been paid and lost, etc., along with the affidavit of the maker of "such note or notes" that "said note or notes," etc.

We believe said statute is founded on the idea that the note secured by the mortgage or deed of trust shall be produced and canceled by the recorder as a part of the record

release of the encumbrance, and that the language used in said statute fairly interpreted means that the notes or debts secured by the mortgage shall be named in the mortgage itself. If the notes were not named in the mortgage and they were lost, it appears that the statute provides no method of making a release thereof even though they have been paid.

In a similar situation our Court, in Hollweg v. Bush, 228 Mo. App. 876, 74 S.W. (2d) 89 (1934), said, l.c. S.W. 93:

> "The statute requires that, if the notes secured by the deed of trust are not presented for cancellation for the alleged reason that they have been lost or destroyed, the recorder, before allowing any entry of satisfaction, 'shall require the cestui que trust named in the mortgage or deed of trust desired to be released or his legal representatives, to make oath, in writing, stating that the note or other evidences of debt named in the mortgage or deed of trust sought to be released have been paid and delivered to the maker thereof,' etc. Section 3078, R.S. Mo. 1929 (Mo. St. Ann. Sec. 3078, p. 1909). Therefore the release in this case was not in accordance with the provisions of the statute and, to say the least, was irregular. * * * *" (Emphasis ours.)

The statute first refers to "the note or notes secured." It next refers to them as "such note or notes." It next refers to them as "the note or other evidences of debt named in the mortgage or deed of trust sought to be released." It next refers to "such note or notes." It next refers to them as "the note or other evidence of the debt named in said mortgage or deed of trust."

As here above stated, the meaning of this section should be construed in the light of other associated or related sections. Section 3467, R.S. Mo. 1939, provides a method for releasing of record those encumbrances executed by railroads and public utility companies and it should be followed in releasing mortgages executed by them.

No provision is made therein for release on the margin by the recorder where the debt secured is not named or

described in the mortgage.

Section 3469, R.S. Mo. 1939, says "where a number of notes are named in any mortgage," that on payment of any one or more the maker may present the same to the recorder who shall cancel and so note on the margin of the record. But that section is based solely on the notes being described in the mortgage.

Section 3483, R.S. Mo. 1939, provides: "Hereafter when any mortgage * * * to secure the payment of any specific obligation is created on real estate * * * the instrument evidencing such debt * * * so secured may be presented to the recorder at the time of filing for record such mortgage * * *," and the recorder shall identify said notes to be the ones so secured. It further provides that on release thereof the recorder shall certify that these identified notes have been produced and canceled. This section evidently contemplates that all of the notes secured by the mortgage shall be named in the mortgage and shall be presented to the recorder when the mortgage is filed.

Section 3484, R.S. Mo. 1939, provides that in cities of over 600,000 population and counties of over 200,000 population and less than 400,000 population the unpaid notes shall be produced to the recorder when foreclosure occurs, and this is a condition precedent to acceptance by the recorder of the trustee's deed for record. How could he know when all of said notes had been so presented if they were not named in the mortgage?

We are not here dealing with the legality of the kind of mortgage considered, but it appears to us that even assuming the legality the proposed method of mortgage would be impractical; it would create confusion and uncertainty which might create a cloud on the land title which would require a suit and a decree of court to remove; and the virtues of such a provision are so scant, considering the many and serious difficulties which might ensue upon the using of such a provision, that the use thereof should not be encouraged in the State of Missouri, and this is especially true because these possible dangers would be obviated by following the usual form of mortgage. We make no observation as to the propriety of such a mortgage clause in other states, but because of the law, and particularly the statutory law in this state, we make the observations immediately here above.

Conclusion.

It is our opinion that you, as Recorder of Deeds of the City of St. Louis, do not have authority to execute a marginal release of a mortgage which secures or may by its terms secure notes that are not named or described in the deed of trust, but which notes were or may have been afterward, by mutual agreement of the mortgagor and mortgagee, executed as additional debts (within the limits of the amounts of the original debt) to be secured by the original mortgage, when the statutes from which you derive your authority to act do not provide for such a release and, in the writer's opinion, there is no statutory authority therefor.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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