

RECORDER: Recorder not to destroy original deeds and marriage licenses after they have been recorded. He must retain in his office -(only exception being chattel mortgages five years old.)

April 8, 1943

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Dear Sir:

This will acknowledge receipt of your letter of April 3, 1943, requesting an opinion on the following matter:

Whether original deeds, marriage licenses, etc., remaining in the office of the recorder of deeds, after having been recorded, may be destroyed by the recorder.

The following sections are cited, and not set out in detail, for the purpose of putting before you the provisions in our statutes relating to the duties of the recorder of deeds.

Section 13161 R. S. Missouri, 1939, relates to the matters to be recorded under his duty as a recorder.

Sections 13162, 13163 and 13164 R. S. Missouri, 1939, provide for the manner and form, and how the records are to be kept in this office.

Section 13167 R. S. Missouri, 1939, requires a certificate on the instrument recorded, and in a subsequent paragraph this section will be quoted entirely.

Section 13183 and Section 13184 R. S. Missouri, 1939, are the penalty statutes imposing penalties for the neglect of duty of this officer.

Now turning to the statutes concerning marriage licenses, we find Section 3364 R. S. Missouri, 1939, states that licenses must be obtained.

Section 3365 R. S. Missouri, 1939, requires a recorder to issue the same.

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Section 3366 R. S. Missouri, 1939, requires this officer to record marriage licenses and, under Section 13167, supra, is also required to certify same. Sections 3367 and 3369 R. S. Missouri, 1939, provide a penalty for failure to issue, record and certify marriage licenses.

Examining the statutes and authorities for the provisions relating to the description of instruments in the office of the recorder of deeds, we find the following:

Section 3490 R. S. Missouri, 1939, provides as follows:

"Every such mortgage or deed of trust, where the original or a copy shall have been filed, as herein provided, shall cease to be valid as against the mortgagor or the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of five years from the filing of the same, and the recorders of the several counties are hereby authorized to destroy any and all such mortgages remaining on file in their respective offices after the expiration of five years from the filing of the same: Provided, that when any such mortgage shall be destroyed, as herein provided, the recorder shall note such destruction and the date thereof upon his chattel mortgage register: Provided further, that this section shall apply only to chattel mortgages or encumbrances upon chattels, which are merely filed but are not recorded at length. As to chattel mortgages or encumbrances on chattels which are recorded at length in the recorder's office the limitation of the lien and validity thereof shall be governed by the general statutes of limitations pertaining to written instruments."

Section 13178 R. S. Missouri, 1939, provides for the retention of certain deeds and we quote that portion of the statute useful to our purpose. This portion reads

as follows:

"Whenever the recorder of deeds, or any other person acting as recorder of deeds, in any county in this state, shall record any instrument of writing affecting real estate, which purports to have been signed and acknowledged more than twelve months prior to the time the same is presented for record, he shall retain such instrument of writing in his office, subject to the inspection of all parties interested, for one year next succeeding the time such instrument shall be recorded: * * * * *."

Further research and examination reveals that in Section 4598 R. S. Missouri, 1939, no original instrument may be destroyed and this statute of course applies not only to recorders of deeds, but to all persons. This section provides, as follows:

"If any person shall unlawfully, willfully and maliciously tear, cut, burn, or in any way whatever destroy any will, deed or other instrument of writing, the falsely making, altering, forging or counterfeiting of which is hereinbefore declared to be a punishable offense, he shall, on conviction, be punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Turning now to the further duties of the recorder we find that at Section 13167, supra, the following mandatory duties are imposed upon this officer. Our examination now is directed to other authorities and decisions for the purpose of determining the intent of the legislature and the judiciary as to an expression of their ideas of the nature of this office. We quote from 53 C. J. p. 622, par. 38, which provides as follows:

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"A public officer, by virtue of his office, is the legal custodian of all papers, books, and records pertaining to his office, and is responsible for their safekeeping and protection against alteration, injury, or mutilation. Correlative with that duty is his right to exercise a reasonable discretion in the care, management, and control of such records and their preservation. The law presumes that a public officer will properly perform this duty, * * * * ."

Looking to other jurisdictions we find, in Lum v. McCarty, 39 N. J. Law Rep., l. c. 290, the court held:

" * * * The clerk is the lawful custodian of the records, and indexes thereof, and is responsible for safe keeping thereof. His powers over them are such as are necessary for their protection and preservation. To that end, he may make and enforce proper regulations consistent with the public right for the use of them * * * * * ."

For a definition as to the nature of this office see 53 C. J. p. 1070, par. A, which reads as follows:

"A register of deeds is a public officer authorized and required by law to keep records in the manner directed by law, of instruments in writing, especially instruments affecting the title to real property. Such an officer is in some jurisdictions designated as a recorder of deeds, a county recorder, etc., and in other jurisdictions his duties are imposed upon other specific ministerial officers, such as county clerks, clerks of court, etc."

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Concerning the filing and recording of instruments in his office we find in 53 C. J. 1072, the following expression:

"Generally, the duty of the register is to receive and file, or receive and record, as the case may be, such instruments as by law are entitled to be filed or recorded, and to file or record them in such manner as to serve all the purposes of the law, and whether the parties have made valid instruments is not his province to determine. * * * * * ."

Occupying ourselves with the liabilities we find in 53 C. J. 1074, this expression, together with citation of two Missouri cases:

"A register of deeds is liable personally to the party aggrieved for the damages resulting from an omission to perform a duty imposed on him by law, or from a performance of such duty in a negligent manner. But it must appear that the damages resulted from the register's official default, and not from any fault or laches of the party damnified. Where a statute imposes civil liability for willful violation of the recording officer's duty he is not liable where it is shown that there was no such willful violation."

The two Missouri cases cited are Bishop v. Schneider, 46 Mo. 472 and State v. Green, 112 Mo. App. 108.

53 C. J. 1075, par. 20, provides:

"To Whom. The liability of a register for breach of official duty inures only in favor of the person to whom the duty

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was owed and who was prejudiced by the breach thereof. A register who goes out of office without having recorded deeds for which he was prepaid is liable to an action by each person by whom a deed was filed."

A recorder of deeds has been declared to be a ministerial officer whose duty requires him to execute mandates lawfully issued by his superiors. This authority may be found in Bouvier's Law Dictionary; Mechem on Public Officers, par. 733, and Luther v. Banks, 111 Ga. 374.

Thus far in our examination, in respect to original instruments such as deeds and marriage licenses at the time they are offered for recording, filing and indexing, it would seem that the duty of the recorder is purely ministerial. That is, he is to execute an act in the prescribed manner in obedience to the statutes or the mandates of legal authority, without regard to the exercise of his judgment as to the propriety of his acts.

Observing the Missouri decisions touching upon this point, for your information and guidance we cite, Williams v. Elliott, 76 Mo. App. 8, Edwards v. Ferguson, 73 Mo. 686, Ewing v. Vernon County, 216 Mo. 681, 1. c. 694. We think this latter case is of sufficient importance to quote that portion of a decision directly bearing upon the question under consideration. This portion reads as follows:

" * * * The evidence further discloses in this case that the county furnished no vault room to keep and preserve recorded instruments. In this condition of things, plaintiff returned them by mail after recording. He seems to have made a distinction between non-residents and residents of the county. As to non-residents he presumably required postage in advance of redelivery by mail. It is stoutly argued that it was not his statutory

duty to return recorded instruments at all, even when requested to do so. It is shrewdly (and sourly) suggested in oral argument that if he obliged the general public by the courtesy of the return of a recorded instrument, such act was self-serving and must be referred to future political ambition in currying favor with voters. He is likened to a sower, who sows that he may reap at seed time. But we shall not take this view of it. The legal duty of an officer is to be obliging and courteous. The general welfare of the public demands the application of the idea that noblesse oblige. Not only so, but by section 9069 he is required to deliver the deed and its certificate of record, when recorded, 'to the party or his order.' By section 9089 he is required in certain instances to transmit deeds from one county to another. * * * * *

A research now leads us to believe that the liability of the recorder in the instance of original documents in his office after same have been recorded has a three-fold aspect. His responsibilities under the duties imposed on him place him under these obligations:

1. Duty to the Public.

The obligation arising under his official duty as imposed by law, governed also by the common law, and tempered by judicial decisions place him in a position of a ministerial officer. As such, his duties are prescribed by law. He is compelled to act in a prescribed manner, without regard to the exercise of his own judgment as to the propriety of his acts.

2. The Duty to the County.

He is under a contractual obligation conditioned on his bond, in which he expressly contracts to perform his duties. His contract is conditioned upon the faithful performance of his duties enjoined on him as recorder and for the delivery of county property to his successor. Under this contract he agrees to perform certain acts as defined in the statutes unconditionally.

3. Duty to the Individual.

The recorder is responsible to the individual who offers a deed or marriage license for filing, recording indexing and certifying. He has under his care, custody and control, for the purpose of such recording, filing indexing and certifying original instruments, the property of others. A deed or a marriage license in such an instance is property, - a chattel - and under the duties imposed on him the recorder is required to return this chattel "to the party or to his order."

Without being tedious but to cover the subject completely and faithfully it will be necessary to refer to other cases on this subject. We have previously quoted *Ewing v. Vernon County*, 216 Mo. 1. c. 694, and Section 13167 R. S. Missouri, 1939, and now observe the decision in *York County v. Watson*, 15 S. Car. 1. c. 8, in which the court said:

"It was said in the case of *United States v. Thomas*, 15 Wall. 344: 'The basis of the common law rule is founded on the doctrine of bailment. A public officer having property in his custody, in his official capacity, is a bailee, and the rules which grow out of that relation are held to govern the case.' And in *Boyden v. United States*, where the officer was held responsible, this doctrine was not denied. On the contrary, it is said in that case: 'The contract of bailment implies no more, except in the case of common carriers, than ordinary care; and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution and attention which careful men usually bring to the conduct of their own affairs. * * * * *'"

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Further research along this same line shows the following:

46 Corpus Juris, 1035, par. 301, which reads as follows:

" * * * Public officials take their offices cum onere with all responsibilities attached, and in accepting office impliedly contract to perform the duties thereof. As a general rule the duties imposed by law on public officers are functions and attributes of the office, and not of the officer; they remain, although the incumbent dies or is changed, and are to be performed by the incumbent, although they may have been left undone by the predecessor."

And 46 Corpus Juris, 1044, par. 329, which reads as follows:

"Where a ministerial duty is owing solely to the public, an individual has no right of action against the officer for a breach thereof, but where, although he may owe a duty to the public, he in addition owes a ministerial duty to an individual, as where he is absolutely bound to render a service for compensation in fees or salary, he may be liable in damages for acts of misfeasance or nonfeasance to an individual specially injured. * * * * *"

CONCLUSION

From the above and foregoing, the conclusion at which this department has arrived may be stated as follows:

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The statutes now in effect and the opinions expressed by our courts reflect the intent of the legislature and the interpretation of those laws by our judiciary. Thorough and painstaking search of the statutes and decisions fail to disclose any authority, express or implied, whereby a recorder of deeds may destroy an original document in his office, other than those mortgages covered in Section 3490 R. S. Missouri, 1939. In addition, there is another reason why deeds, marriage licenses and other original documents remaining in the office of the recorder of deeds may not be destroyed, besides the interest of the general public in these documents, there is an individual interest.

Strictly speaking these documents (the originals after having been recorded) are chattels and as such are property. They belong to the person who offers them for recording, filing, indexing etc. Certainly an officer is without authority to destroy the property of another.

The object and purpose of recording deeds, marriage licenses, documents, etc., is to prevent fraud in certain transactions involving title to real estate and marriages by affording an accurate, certain and public record of such dealings. As a ministerial officer the recorder of deeds is required by Section 13167 R. S. Missouri, 1939, "to deliver to the party or his order original documents in his office after same have been recorded by him."

APPROVED BY:

Respectfully submitted

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