RECORDER OF DEEDS 1) When a paper writing proporting to be a last will & testament may be refused for recording.
2) Four questions dealing with the releasing and cancelling of notes and releasing of deed of trust securing same of record in the recorder's office.
3) a) Three day waiting period for issuing marriage license may be dispensed with on order of circuit or probate court or judge thereof in vacation giving authority to recorder.
3) b) Applicant who is pregnant may dispense with certificate of serological test for syphilis by presenting certificate of licensed physician so stating, to the recorder.

February 8, 1944

FILED
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Honorable Roy G. Skillman
Circuit Clerk and Recorder
Fayette, Missouri

2-11

Dear Mr. Skillman:

We are in receipt of your request for an opinion from this Department, which opinion request reads as follows:

"Of course, as we understand Instruments dealing with the transfer of real estate, must be proved or acknowledged before they can be recorded. Now we have a Will that is several years old, it has not been proved by its regular course through probate Court and same is now offered for recording. Is the fact that this Will has been witnessed enough proof to enable us to record it? Please advise, also:

"We are confused and are in need of a definite course to pursue, in regards to releasing notes, thus we are asking your opinion.

"1st. Not marked paid on face of note and on the back we find this, For release of record only, without recourse, and no endorsement.

"2nd. Not marked paid on face of note and on the back we find this, For release of record, without recourse, and an endorsement. For an endorsement, I mean a signature of Mortgagees name.

"3rd. Now we have had this, the holder presents note with no markings whatsoever, no paid, nor endorsement and still insists that same be released, in particular a beneficiary has been insistent on this procedure.

"4th. Then we have had this matter, Note is not marked paid on face of same, but does bear an endorsement on the back. Thus can holder demand

a release of record?

"Also, may we digress a bit; suppose we are issuing a marriage license because the Lady is Pregnant are they subject to the three day waiting period.

"Thanking you again for your many kind favors, we are."

We call attention to Section 549, R. S. Mo. 1939, which reads as follows:

"In all cases where lands are devised by last will, a copy of such will shall be recorded in the recorder's office in the county where the land is situated, and if the lands are situated in different counties, then a copy of such will shall be recorded in the recorder's office in each county within six months after probate."

It will be noted from the reading of the last section, supra, that it is provided that in all cases where lands are devised by last will, a copy of such will shall be recorded in the recorder's office, etc. On review of the preceding section contained in Article 20, Chapter 1, R. S. Mo. 1939, our attention is called to Section 546, R. S. Mo. 1939, which reads as follows:

"All wills shall be recorded by the clerk of the probate court, in a book kept for that purpose, within thirty days after probate, and the originals shall be carefully filed in his office."

It will be noted from the last section, supra, that all wills must be recorded in the book kept for that purpose within thirty days after probate, in the office of the probate court. Under the rules of statutory construction it is our duty to read sections 546, and 549, R. S. Mo. 1939, in pari materia. For it is said in the case of State ex inf. V. Koeln, 102 S.W. 748; 270 Mo. 174, l.c. 191:

"* * *It is a well established rule of statutory construction that statutes in pari materia, even though enacted at different dates, are to be construed together and if possible given such construction as will harmonize and give effect to all the provisions."

Therefore, it is our view that through the use of the word "copy" in Section 549, R. S. Mo. 1939, it is meant that a certified copy of the will that was recorded under Section 546, R. S. Mo. 1939, is intended.

We further wish to call attention to Section 553, R. S. Mo. 1939, which reads as follows:

> "Any will admitted to probate in any state, territory or district of the United States, together with the order admitting the same to probate therein, certified according to act of congress, shall be admitted to probate in this state in any county where real estate is affected thereby, or filed in the office of the recorder of deeds in such county, and all such wills so certified, heretofore admitted to probate in any such county, or filed for record in any such recorder's office, shall give notice thereof, and they, or certified copies thereof, shall be admitted as evidence in all courts in this state, and when any will is admitted to probate in this state, as aforesaid, a certified copy thereof, under official seal, made by the judge or clerk of such court, or the recorder of deeds, in case the same is filed in the recorder's office, of the record of any such will, and order admitting it to probate, may be filed in any other county in this state where real estate is thereby affected, with like effect as if originally filed therein."

It will be noted that the last section, supra, provides any will admitted to probate in any state, territory or district of the United States, together with the order admitting the same to probate therein, certified to according to the act of congress, shall be admitted to probate in this state in any county where real estate is affected thereby, or filed in the office of the recorder of deeds in such county. It will be noted by this language that it is clearly meant that the paper writing offered for record in the recorder's office must show by proper certification that such paper writing has been probated, and fully proved up as the last will and testament of the proported testator in the jurisdiction from whence it came. In other words, the last section is clear that a proported will which does not bear the proper certificate should not be recorded when the same came from a foreign jurisdiction. Therefore, it is our opinion that when we read Sections 546, 549 and 553, R. S. Mo. 1939, together, we must conclude that a recorder of deeds should not receive and record any paper writing

proporting to be a last will and testament, whether such paper writing devises real estate or not, unless such paper writing bears a certificate showing that such paper writing has been admitted to probate, and that said paper writing is a certified copy of the last will and testament of the therein named testator or testatrix, and that such paper writing is recorded in the record provided for such purpose in the office of the probate court.

Now turning to the last portion of your opinion request.

In your first question you give the following statement of fact:

> "1st. Not marked paid on face of note and on the back we find this, For release of record only, without recourse, and no endorsement."

In answer to this question we call attention to Section 3465 R. S. Mo. 1939. Because of the length of the section we only copy a portion of it:

> "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, * * * * *. 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; * * *"

It will be noted from the reading of the portion of the aforementioned section that when the holder of a note shall at the request and the cost of the person making the same, acknowledge satisfaction of the mortgage securing said note or notes, and it is further provided that in case it is acknowledged by the payee or assignee the note or notes shall be produced and canceled in the presence of the recorder. We understand by your first question that the holder of the note, whom we presume is the payee or assignee of said note, in due course has failed to place

his signature under the statement which appears on the back of the note. Therefore, unless he appeared personally, it is our view that you would not have authority to allow this release of the deed of trust securing said note or to cancel the note, for the reason the holder of the note does not designate or give authority by way of assignment to any person to sign the deed of trust marginal release in your office or to sign the cancellation of the note which is placed upon the note by the recorder. It is our view that this note should be sent back to the person who sent it, stating to him that he should appear in person with the note and fulfill the requirements of the statutes by signing the marginal record and notification on the note. Then the note should be delivered by him to the maker thereof. The maker thereof should defray the cost of release. If some other person is to appear in his stead then the holder of the note should place an endorsement which is in substance as follows:

"I assign the within note to _____
(name of person

_____
to appear at your office with the note)
for the purpose of cancelling this note and satisfaction of deed of trust securing same in the Recorder's office,_____
County."

_____
(Signature of holder of note.)

The words "without recourse" are not necessary for the reason by the foregoing statement he would make a limited endorsement and such words be merely precautionary words. Of course the words in a regular endorsement are necessary if the holder or assignor desires to protect himself from future liability on the note in the hands of subsequent assignees. If he made the endorsement to some person then when such person appeared in your office, the above endorsement on the back of the note would be your authority to allow such person to sign the marginal release on the deed of trust record, providing the deed of trust only secured this one note and cancel the referred to note. In other words, you would follow your regular procedure. If the holder of the note appeared in person of course he could do this without any endorsement on the back of the note, if the note showed on the face that he was the payee or if there was an assignment on the back of the note from the preceding payee or assignee showing that he was the holder thereof in due course.

In your second question, you give the following statement of fact:

> "Not marked paid on face of note and on the back we find this, For release of record, without recourse, and an endorsement, For an endorsement, I mean a signature of Mortgagees name."

It is our view that this note should be returned to the mortgagee who placed the assignment on the back of the note directing that he designate a person's name in the endorsement or that a new endorsement be made to read in substance as follows:

> "I assign the within note to _____ (name of person whom you designate shall have the authority to produce the note to your office and sign the record) for the purpose of cancelling this note and satisfaction of deed of trust securing same in the Recorder's office, _____ County."
>
> _____ (Signature of holder of note)

In other words, it will be noted by your statement in question two, that the mortgagee or payee of said note though he signed the statement placed on the back thereof, he does not designate who shall have the authority of releasing the note and the security of the note. For that reason you would not know who held the valid assignment of the note for that particular purpose; in truth and fact the wording does not constitute a valid assignment of such note for any purpose as stated in your second question.

Question Number Three reads as follows:

> "Now we have had this, the holder presents note with no markings whatsoever, no paid, nor endorsement and still insists that same be released, in particular a beneficiary has been insistent on this procedure."

If we are to understand by this question that the named payee in the note presents the note himself to your office then in that event there need not be any notification on the face of the note that it has been paid nor need there be any statement on the back of the note in the way of an endorsement. For such person would have the authority to sign the marginal satisfaction of the deed of trust securing the note and would also have the authority to sign under the notification that you

place on the note, that the same was produced and cancelled in your presence. On the other hand if we are to understand that the person who produces the note and claims to be the legal holder thereof, but that such note does not show that the payee therein had made an assignment on the back thereof that the note has been assigned to him for a valuable consideration, then you should refuse to satisfy the record until the proper authorization is made by the payee for you would have no way of knowing with certainty that such person was the holder of said note in due course for value.

Question Number Four reads as follows:

> "Then we have had this matter, Note is not marked paid on face of same, but does bear an endorsement on the back. Thus can holder demand a release of record?"

We assume by your question Number Four that a substantial statement appears on the back of the note placing the ownership of said note in the holder thereof who appears in person in your office, but that such note does not have marked across the face "paid" or "paid in full". It is our view that these words are not necessary on the face of any note for from the reading of a portion of section 3465 heretofore set forth, that the law requires that the legal holder of the note if the same be paid, shall at the request of the maker thereof, appear and satisfy the deed of trust and cause said note to be cancelled by you in your office. The whole question that presents itself to you in every case is whether or not the person who presents the note is the holder of the note in due course or the note has been assigned to him for a limited purpose, namely; to satisfy the deed of trust record and cancel the note in your office. Of course there are situations where notes are produced and the security is partially released and the note is shown to have been produced and not cancelled. We do not go into this question for the reason that you do not ask any question of this nature. Further, we do not cover situations where notes have been lost or destroyed. A reading of Section 3465, supra, will afford that information.

Now turning to your final question which reads as follows:

> "Also, may we digress a bit; suppose we are issuing a marriage license because the Lady is Pregnant are they subject to the three day waiting period."

Section 3364, Laws of Missouri, 1943, page 640, reads in part as follows:

> "* * *Before applicants for a marriage license shall receive a license, and before the Recorder of Deeds shall be authorized to issue a license, the parties to the marriage must, at least three days before the date they desire such license to be issued, present an application for the license to the Recorder of Deeds. * * *Provided, however, that said license may be issued on order of the Circuit or probate court or a judge thereof in vacation of the County in which said license is applied for, without waiting three days as herein provided, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable."

It will be noted from the reading of the aforementioned portion of Section 3364, that at least three days before the date they desire such license to be issued, they must present an application for the license to the Recorder of Deeds. Provided, however, that said license may be issued on order of the circuit or probate court or judge thereof of the county in which said license is applied for. We call attention to the fact that at no other place in the law is authority given to any other person to make orders which have the effect of dispensing with a three day waiting period. Therefore, we must conclude that a person who falls under the situation set forth in your question must wait the three day period unless such person procures an order from the circuit or probate court or judge there in vacation of the county in which said license is applied for. Or in other words, a recorder of deeds can only dispense or accelerate the time after an application has been presented to his office for a license to a lesser time of issuing the license than three days where he has in his hands an order of a circuit or probate court or judge thereof in vacation ordering that such license shall be immediately issued or at the time indicated in the order. In connection with your question we further wish to call attention to Section 3364a, which reads in part as follows:

> "It shall be unlawful for the Recorder of Deeds of any County or City to issue a marriage license, to any person, unless such person presents and files with such Recorder of Deeds a report of a negative laboratory serological test for syphilis and an affidavit signed by the applicant that to his or her best knowledge and belief he or she is free from syphilis; * * * * or unless a duly licensed

> physician presents a certificate stating that one of the applicants for a license to marry is on his or her deathbed and unlikely to consummate the marriage or that an applicant is pregnant."

It is our opinion from the reading of the portion set forth of section 3364a that the person referred to in your question can dispense with the requirement of said section of a certificate of a serological test for syphilis if she presents a certificate of a duly licensed physician that she is pregnant.

CONCLUSION.

1) It is the opinion of this department that a recorder of deeds may refuse to record a paper writing proporting to be a last will and testament, unless such paper writing authentically shows that it is a certified copy of a will, duly recorded in the book kept for that purpose in the probate court's office of a Missouri county, or such paper writing has been admitted to probate in some other state, territory, or district of the United States with the order admitting the same to probate therein, and bears an authentic certificate.

2) It is the opinion of this department that a note on which the following notation is found: "Not marked paid on face of note and on the back we find this, For release of record only, without recourse, and no endorsement.", can only be cancelled and the security securing same satisfied of record by the named payee of the note or one who is shown to be an assignee through proper endorsement on the back of the said note as the notation above set forth is a nullity.

3) It is our opinion that a note on which the following notation is found: "Not marked paid on face of note and on the back we find this, For release of record, without recourse, and an endorsement. For an endorsement, I mean a signature of Mortgagees name." can only be cancelled and the security securing same satisfied of record by the original payee of said note or his assignee through proper endorsement on said note appearing in person at the recorder's office. The above referred to notation on the note does not authorize any named person for the limited purpose stated in said proported endorsement as the assignee, and for that reason said proported endorsement is a nullity.

4) It is the opinion of this department that a note on which the following notation is found: "Now we have had this, the holder presents note with no markings whatsoever, no paid, nor endorsement and still insists that same be released, in particular a beneficiary has been insistent on this procedure." can only be cancelled and the security securing same satisfied of record by the named payee on the face of the note appearing at the office, in person, with the original note or a copy of the same as is provided for in Section 3465 R. S. Mo. 1939.

5) It is the opinion of this department that a note on which the following notation is found: "Then we have had this matter, Note is not marked paid on face of same, but does bear an endorsement on the back. Thus can holder demand a release of record?" can only be cancelled and the security securing same satisfied of record by the holder of said note in due course (assuming that the endorsement on the back of the note is sufficient to place the title of said note in said person) then such person may appear in your office, present the note, and have the same cancelled of record, and the security duly satisfied on the margin of the record. It is further our opinion that whether or not a note is marked "paid" or "paid in full" across the face of the note is not controlling. But the question to determine is whether or not the person presenting the same is a holder thereof in due course, or is the holder of said note for a limited purpose, with power to do a limited thing. For example, for the purpose of cancelling the note and satisfying deed of trust securing same of record in the recorder's office in which said note is presented.

6A) It is the opinion of this department that the three day waiting period for the issuance of a marriage license after the application is filed therefor , can only be dispensed with through the procurement of an order from a circuit or probate court or judge thereof in vacation of the county in which said license is applied for, giving such authority to the recorder of deeds of said county.

6B) If an applicant is pregnant she may dispense with the requirement of a certificate of a serological test for syphilis by presenting to the recorder of deeds a certificate from a duly licensed physician stating that she is pregnant.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney_General

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