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THE COUNTY RECORDER SHALL NOT ACCEPT A PHOTOSTAT OR COPY OF A DEED OR INSTRUMENT FOR RECORD EXCEPT WHERE HE IS SPECIFICALLY INSTRUCTED TO DO SO BY STATUTE, HE MAY USE A COPY—§§317.08, R.C., 5301.47, R.C., 5301.56, R.C., 317.13, R.C. OPINIONS 5369, OAG, 1942, OPINION No. 7573, OAG, 1957.

SYLLABUS:

Copies of instruments specified in Sections 317.08 and 317.13, Revised Code, should not be accepted by the county recorder for record; however, where a statute specifically states that a copy of a particular instrument may be filed for record in the office of the county recorder (Section 1701.80, Revised Code, for example) the recorder is required to accept such copy for record.

Columbus, Ohio, March 2, 1962

Hon. Thomas A. Beil, Prosecuting Attorney
Mahoning County, Youngstown, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"We have received a communication from William D. Holt, Recorder of Mahoning County, in which he asks whether there are any certain recordable instruments which can be accepted by his office for record in lieu of the original document.

"This office is aware of the ruling of the Attorney General in 1942, No. 5369, which states that an instrument purported to be a photographic or photostatic copy of a *deed* to real estate is not

entitled to record * * * and the county recorder has neither the right nor duty to either receive or record it.

"Mr. Holt's office would appreciate your interpretation as to whether other instruments are to be similarly treated, and if not, what instruments may be recorded in photostatic form in lieu of the original document."

Section 317.08, Revised Code, provides:

"The county recorder shall keep five separate sets of records as follows:

"(A) A record of deeds, in which shall be recorded all deeds and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements, and hereditaments; and all notices, as provided for in sections 5301.47 to 5301.56, inclusive, of the Revised Code;

"(B) A record of:

"(1) All mortgages or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered;

"(2) All executory installment contracts for the sale of land executed after the effective date of this section which by the terms thereof are not required to be fully performed by one or more of the parties thereto within one year of the date of such contracts;

"(C) A record of powers of attorney;

"(D) A record of plats, in which shall be recorded all plats and maps of town lots, and of the subdivisions thereof, and of other divisions or surveys of lands, and any center line survey of a highway located within the county, the plat of which shall be furnished by the director of highways or county engineer;

"(E) A record of leases, in which shall be recorded all leases.

"All instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record. The recorder may index, keep, and record unemployment compensation liens, federal tax liens, personal tax liens, mechanics liens, notices of liens, discharges of recognizances, and excise and franchise tax liens on corporations in one volume."

It might be observed that the 104th General Assembly made two not unimportant changes in Section 317.08, *supra,* as now existing; the words

"and all notices, as provided for in sections 5301.47 to 5301.56, inclusive, of the Revised Code' dealing with "Marketable Titles,' were added to division (A) and entirely new is division (B) (2) pertaining to the recording of land contracts.

Section 317.13, Revised Code, reads:

> The county recorder shall record in the proper record, in legible handwriting, typewriting, or printing, or by any authorized photographic process, all deeds, mortgages, plats, or other instruments of writing required or authorized to be recorded, presented to him for that purpose. Such instruments shall be recorded in regular succession, according to the priority of presentation, entering the file number at the beginning of such record. At the foot of the record of each instrument he shall record the date and precise time such instrument was presented for record. All records made, prior to July 28, 1949, by means authorized by this section or by section 9.01 of the Revised Code, shall be deemed properly made."

It will be noted that under Section 317.13, *supra,* the duty imposed upon the county recorder is to record "in legible handwriting, typewriting, or printing, or by any authorized photographic process, all deeds, mortgages, plats, or other instruments of writing required or authorized to be recorded presented to him for that purpose." Looking at this provision, it is plain that the instruments he "shall" record are those specified in Section 317.08, *supra.* Also, in light of the fact that the recording may be done, among other ways, in any authorized photographic process, and that the provision relating to Section 9.01, Revised Code (which authorizes public officials generally to use reproduction processes therein specified) is expressly mentioned, the natural conclusion must follow that the recording refers to original papers specified in Section 317.08, *supra,* and not to copies of such original papers. The grant of authority to use methods of reproduction specified in Section 9.01, Revised Code, necessarily presupposes the existence of original instruments which are the subject of Sections 317.08 and 317.13, *supra.*. The word "copy" is defined in *Webster's Third International Dictionary* as:

> "To make a copy: write, print, engrave or paint *after an original;* duplicate, reproduce, transcribe; specif.: to duplicate (a document) by pressing in a *copying* press." (Emphasis added)

I note your reference to Opinion No. 5369, Opinions of the Attorney General for 1942, page 559, holding that a purported photographic or photostatic copy of a deed to real estate is not entitled to record in the deed of records of a county, and that the county recorder has neither the right nor the duty to receive it and record it. In that opinion, it is stated at page 562:

> "The conclusion is irresistible that the law regards photostatic or photographic processes merely as a means of producing a copy."

More in point, however, is Opinion No. 7573, Opinions of the Attorney General for 1957, (appearing in volume of Opinions of the Attorney General for 1956, page 917) where it was held in the syllabus:

> "The county recorder is required to accept for recording certificates of merger of corporations, *including certified photostatic copies thereof.*" (Emphasis added)

In support of the conclusion just cited, the pertinent part of Section 1701.80, Revised Code, is quoted in Opinion No. 7573, *supra,* reading:

> "(C) A copy of such agreement, certified by the secretary of state, may be filed for record in the office of the county recorder of any county in this state, and for such recording the county recorder shall charge and collect the same fee as in the case of deeds. Such copy shall be recorded in the records of deeds."

The fact situation shown in Opinion No. 7573, *supra,* may be considered as a pertinent illustration of when and under what circumstances the county recorder, in the language of Section 317.13, *supra,* is "required or authorized" to accept for record instruments in writing not specified in Section 317.08, *supra.* In this respect, it is stated in *45 American Jurisprudence,* Records and Recording, Section 110, at page 483:

> "The recording of a copy of an instrument instead of the original, which itself might have been properly recorded, *is invalid if not authorized by statute, and the record so made is therefore not notice to third parties:* * * *." (Emphasis added)

It might be observed in passing that while Section 317.13, *supra,* speaks of instruments the county recorder is "required or authorized" to accept for record, it would seem that if he were to accept for record an instrument, or a copy of an instrument not specified by a statute, the

only consequence flowing out of it would be the invalidity of such recording, for the reason that a county recorder is essentially a ministerial officer. See Opinion No. 4531, Opinions of the Attorney General for 1932, page 906, where *State v. Gibbert,* 56 Ohio St., 575, and *Irvin v. Smith,* 17 Ohio, 226, are cited as supporting authorities; and to the same effect is *Rhem v. Reilly* (Supreme Court of Washington), 297 Pac. 147, 74 A.L.R. 350. However, this observation should not be construed as an encouragement of irresponsible practice, for it is self-evident that acceptance of instruments not entitled to record would create in persons who presented them to the county recorder the illusion that the recording is notice to third parties, while as a matter of law such would not be the case.

Summing up and in answer to your specific question, it is my opinion and you are advised that copies of instruments specified in Sections 317.08 and 317.13, Revised Code, should not be accepted by the county recorder for record; however, where a statute specifically states that a copy of a particular instrument may be filed for record in the office of the county recorder (Section 1701.80, Revised Code, for example) the recorder is required to accept such copy for record.

Respectfully,
MARK MCELROY
Attorney General