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1. RECORDER, COUNTY—NOTICE, RETURN, SURETY BOND—FILED—CONSTITUTE SINGLE LEGAL INSTRUMENT—INDEXED AND RECORDED IN SAME MANNER AS RELEASES OF MORTGAGES AND OTHER LIENS—SECTION 8319 G. C.
2. SUCH INSTRUMENTS SHOULD BE RETAINED IN PERMANENT FILES OF COUNTY RECORDER.
3. RELEASE OF SURETY—EFFECTED BY OPERATION OF LAW—NO FORMAL ACTION REQUIRED ON PART OF COUNTY RECORDER.

SYLLABUS:

1. A notice, return and surety bond filed with the county recorder under the provisions of Section 8319, General Code, should be deemed to constitute a single legal instrument, and should be indexed and recorded in the same manner as provided by law for the indexing and recording of releases of mortgages and other liens.

2. Such notice, return, and surety bond should be retained in the permanent files of the county recorder.

3. The release of a surety, under the provisions of Section 8319, General Code, is effected by operation of law as provided therein; and no formal action in connection therewith is required on the part of the county recorder.

Columbus, Ohio, April 7, 1952

Hon. Alva J. Russell, Prosecuting Attorney
Summit County, Akron, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“We have this day received a communication from our County Recorder requesting that we submit to your office for an opinion the questions contained therein. The communication reads as follows:

“I refer you to Section 8319 of the General Code, which provides among other things the filing of a notice to commence suit with the County Recorder and a bond in double the amount of the claim. This section, however, does not state the duties of the Recorder in connection with the filing of the bond. I would therefore like to have an answer to the following questions:

“Shall the Recorder keep this bond in file not recorded? Or, shall he record the bond and keep it on file? If so, where shall it be recorded? Where shall the Recorder index the bond? Shall the bond be recorded and returned to the party filing it? Or, shall it be returned to the Lien Claimant? How can the Recorder release the bond once it is filed with him? Shall he do so upon notice of the Lien Claimant, or shall he require an order of the court to release it? If so, who shall obtain the order of the court for the release of the bond?”

Section 8319, General Code, prior to the enactment of Amended Substitute House Bill 418, 99th General Assembly, read as follows:

“The owner of any real estate or any interest therein upon which a lien has been taken may notify the person then owning said lien or his agent or attorney to commence suit thereon. If such property owner shall desire to have the giving of such notice appear of record, he shall deliver to the sheriff of the county in which the property upon which such lien has been taken is situated, a written notice addressed to the person then owning said lien, or his agent or attorney, notifying such addressee to commence suit upon the said lien. The sheriff shall thereupon serve said notice upon the person then owning said lien, or his agent or attorney mentioned in said notice, in the same manner provided by law for the service of summons in civil actions, and shall thereupon certify upon such notice his return of such service in the same manner provided by law for the returns of service of summons, and deliver the notice with said return endorsed thereon to the owner of said property upon the payment of the same fees and mileage provided by law for the service of summons. The owner of such property may then file such notice, with the return of the sheriff endorsed thereon, with the recorder of the county in which such property is situated, and the recorder shall thereupon index and record the same in the same manner as releases of mortgages and other liens are indexed and recorded, receiving therefor the same fees that are provided by law for the recording of releases. If the owner of such lien fails to commence suit within sixty (60) days after receiving such notice, or in case such notice shall have been served by the sheriff as above provided, within sixty (60) days after such service, the lien shall be wholly null and void and the property wholly discharged therefrom. But nothing herein contained shall preclude the collection of the claim upon which such lien was based, in the manner in which any claim may be collected.”

This section was amended effective September 7, 1951, by the addition of the following provisions:

“Provided, further, that a lien shall be wholly null and void and the property wholly discharged therefrom if the owner of such

property shall file with the recorder, notice to commence suit, as herein provided, with the return of service by the sheriff endorsed thereon and a bond in double the amount of the claim upon which such lien is predicated, in favor of the lien claimant executed by sufficient surety and approved in writing by a judge of the court of common pleas of such county, conditioned upon the payment of such claim, the payment of any judgment upon such claim or settlement of such claim, plus costs.

“The surety shall be released upon the failure of claimant to commence suit within sixty days after service of notice by the sheriff as herein provided, or if claimant shall commence suit within such period, upon the dismissal of such suit or the satisfaction of such judgment as may be entered in favor of the claimant.”

It is obvious that the bond for which provision is thus made in the amended statute fulfills a function of precisely the same nature, although not with the same legal effect, as does the notice endorsed with the sheriff's return, provision for which had been made in the original statute. The general function here involved is, of course, the discharge or release of a lien on real property.

Moreover, it is clear that in order to effect the immediate discharge or release of such a lien, none of these three instruments, standing alone, would suffice, but rather that all three must be filed together. It may well be said, therefore, that in legal effect the notice, return and bond comprise a single instrument. In this view of the matter it would appear to be the intent of the General Assembly that the bond is to be filed, recorded, and indexed in the same manner as required by the statute in the case of the notice and return, i.e., “in the same manner as releases of mortgages and other liens are indexed and recorded.” In such case, the release of the lien being accomplished by a separate instrument, the statutory procedure relative to the recording of releases of mortgages by separate instrument, as set out in Section 8547, General Code, would be applicable.

A further question which you present relates to the disposition of the original of such bond after it has been recorded. It is, of course, the accepted practice, in the case of deeds and mortgages, that the originals be returned, after recording, to the person who has presented them for record. However, it will be noted that the statutes relative to recording

such instruments make no reference to *filing* them in the recorder's office, but rather require merely that they be *recorded* therein.

In Section 8319, *supra*, on the other hand, there is an express provision that the notice, return, and the bond are all to be *filed* with the recorder. Moreover, there being no provision in the statute for the return of any of these instruments to the person filing them, it must be concluded that they are all to be retained permanently on file in the recorder's office.

As to your question on the release of such bond, your attention is invited to the language of the final paragraph of Section 8319, *supra*, as amended. Here it is provided that the surety shall be released upon (1) failure of claimant to commence suit within sixty days after service of notice by the sheriff, or (2) upon dismissal of such suit, if brought, or (3) upon satisfaction of such judgment as may be entered in favor of the claimant. It is thus to be observed that no provision is made which would require formal action to release the surety such as is provided, for example, in Sections 13435-6 and 13435-7, General Code, in the case of real property bail bonds in criminal cases. In the absence of any such provision, therefore, we must conclude that the release of the surety is accomplished by operation of law, and that no formal action in this connection is required of the county recorder.

Respectfully,

C. WILLIAM O'NEILL
Attorney General