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RECORDER, COUNTY—WITHOUT STATUTORY AUTHORITY TO CANCEL OR EXPURGE RECORD OF A SOLDIER'S DISCHARGE WHICH HAD BEEN RECORDED UNDER SECTION 2770 G. C.—DISCHARGE WAS ERRONEOUSLY ISSUED AND RECORDED AFTER SOLDIER'S DEATH.

SYLLABUS:

The county recorder is without statutory authority to cancel or expunge the record of a soldier's discharge which has been recorded in his office under Section 2770, General Code, although the discharge was erroneously issued and recorded after the soldier's death.

Columbus, Ohio, March 28, 1947

Hon. Robert M. Betz, Prosecuting Attorney, Gallia County
Gallipolis, Ohio

Dear Sir:

This will acknowledge receipt of your letter relating to the authority of a county recorder to cancel the recording of a soldier's discharge which has been recorded in his office. Your letter reads as follows:

“Will you please advise me as to the authority of a county recorder, under the following state of facts:

On January 30, 1947, 'X', a former soldier, was accidentally killed in this county. At the time of his death 'X' had not received his original Discharge Certificate, but the same was received by his family a few days after his death. Thereupon, some member of decedent's family brought the said Original Discharge Certificate to the Recorder's Office and the same was recorded on February 10, 1947, in the Discharge Records.

On February 21st, the army advised the county recorder that 'X's' original discharge certificate had been recalled, 'so that all records will reflect his (X's) death while on active duty in the Army of the United States,' and requested the recording of said discharge be cancelled.

Under these circumstances, will you advise me as to whether any legal authority for the cancellation of this discharge exists, and, if such authority does exist, what steps must be taken by the recorder to effectuate the same.

Inasmuch as this information is necessary for a proper determination of the soldier's dependents claims, I would appreciate your opinion at your very earliest convenience."

The recording of soldier's discharge in the office of the county recorder is provided for in Section 2770, General Code, which reads as follows :

"Upon request of any discharged member of the armed forces and presentation of his discharge, the county recorder shall record such discharge in a book to be furnished by the county commissioners for that purpose. There shall be no fee for such recording. Such record, or a certified copy thereof, shall be received in evidence in all cases where the original discharge would be received."

While the statute just quoted makes provision for recording the discharge, neither it nor any other statute has made any provision for cancelling the recording, either by the recorder on his own motion, or at the request of any one who might be interested in having it expunged from the record. Having been recorded, the record becomes a public one, and the power of the recorder to alter or cancel it does not exist.

In 35 O. Jur., 93, §104, the law is stated as follows :

"It is incompetent for a public officer to undo what he has done; when he has done his duties, he is *functus officio* and has lost his power over the subject. * * * So, a recorder, as soon as he has recorded the instrument left with him for record, is powerless to change it, although he has been requested and authorized so to do by the parties to the instrument. Thus, an alteration on the record of a mortgage, made by a recorder after a mortgage was duly recorded, and a memorandum made by him on the margin of such record as to such alteration, are void."

In *Youtz v. Julliard*, 20 Weekly Law Bulletin, page 26, the court held that the recorder not only did not have authority to change the record of a mortgage after it had been recorded by him, but also that he was without authority to enter a memorandum on the margin of the record as to the circumstances under which an alteration had been made by him. In that case the mortgage involved had erroneously referred to a lot "B" instead of lot "A", and after the mortgage had been recorded and the error discovered, all of the parties to the mortgage requested the recorder to erase the letter B and insert the letter A in the record. The recorder made the alteration so requested by the parties, and at the same time wrote a memorandum on the margin of the record in which he stated

when, why and by what authority he had made the change. In the opinion the court had this to say:

“Had the recorder any authority to change ‘B’ to ‘A’, or to write his memorandum on the margin?? Was the written request an instrument subject to record? These questions must certainly be answered in the negative. The recorder as soon as he recorded the mortgage just as it was when left with him for record, was powerless to change it. As is said in the case of *Doe v. Dugan*, 8 Ohio, 108, it is incompetent for a public officer to undo what he has once done; when he has done his duties, he is *functus officio* and has lost his power over the subject.”

And speaking with reference to the written request which the recorder had received, and also with respect to the memorandum which the recorder had made on the margin, the court said:

“Again, he could not write the letter A in place of the letter B, for the reason that it was not a copy of any instrument subject to record; in fact it was not a copy of anything. The same may be said of the marginal memorandum; it was not a copy of anything, much less an instrument subject to record.”

In *Doe v. Dugan*, 8 O., 87, which is the case referred to in the *Julliard* case, *supra*, the recorder wrote a memorandum on the margin of a deed record explaining the circumstances under which the deed had been executed by the parties, and had been recorded by him, and in this memorandum it was, among other things, stated that it had been entered on the record by mistake of the recorder. In speaking of the marginal note, the court said:

“When it was made does not appear, but it must have been after registration. It is not competent for a public officer to undo what he has once done, and thus correct his errors; when he has executed his duties, he is *functus officio*, and has lost his power over the subject.”

The rule or principle of law announced and applied in the foregoing cases justify the conclusion that a county recorder is without authority to cancel or expunge the record which has been made on the records in his office of a soldier's discharge, even at the written request of the person who issued the instrument and was responsible for its existence, and also that the recorder is without authority to enter on the record a memorandum to the effect that the discharge is or has been cancelled of record at the request of the issuing authority.

Under the facts set forth in your letter it appears that the soldier in question had not been discharged from the Army at the time of his death, but was on active duty at that time. That being the case, it seems to me that the mere fact that a discharge was erroneously issued and mailed to him and also recorded after his death, could not alter the fact that he was alive and on duty at the time.

You are therefore advised that the county recorder is without statutory authority to cancel or expunge the record of a soldier's discharge which has been recorded in his office under Section 2770, General Code, although the discharge was erroneously issued and recorded after the soldier's death.

Respectfully,

HUGH S. JENKINS,
Attorney General.