

Note from the Attorney General's Office:

1962 Op. Att'y Gen. No. 62-3513 was overruled by
1963 Op. Att'y Gen. No. 63-219.

3513

PROPERTY—ENCUMBRANCE OF—FINANCING STATEMENT FORMAL REQUISITES—COUNTY RECORDER MAY REFUSE TO FILE UNTIL CONFORMS WITH PROVISIONS OF §1309.39, R.C.—A FINANCING STATEMENT IS AN ENCUMBRANCE OF PROPERTY AND MUST CONFORM TO FORMAL REQUISITES OF §1309.39, R.C.—UNDER §317.111, R.C., A COUNTY RECORDER MAY REFUSE TO FILE SUCH STATEMENT UNTIL IT CONFORMS TO §317.111, R.C.

SYLLABUS:

A financing statement described in Section 1309.39, Revised Code, is an instrument by which the title to real estate or personal property is encumbered, and pursuant to the provisions of Section 317.111, Revised Code, a county recorder is under a clear duty to refuse to accept a financing statement for filing unless the provisions of such Section 317.111, Revised Code, have been met.

Columbus, Ohio, December 28, 1962

Hon. Roy J. Gilliland, Prosecuting Attorney
Jackson County, Jackson, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

“There appears to be some conflict between the provisions of the Ohio Revised Code Section 1309.39 and Ohio Revised Code Section 317.111 relating to placing the words ‘this instrument prepared by’, upon financing statements filed under the Uniform Commercial Code.

“What is your Opinion concerning whether or not the words ‘this instrument prepared by’ is or is not required to be placed upon financing statements filed under the Uniform Commercial Code in order to make them in conformity with the recording statutes pertaining to county recorders offices?”

Section 317.111, Revised Code, reads, in part, as follows:

“No instrument by which the title to real estate or personal property, or any interest therein or lien thereon, is conveyed, created, encumbered, assigned or otherwise disposed of, shall be

received for record or filing by the county recorder unless the name of the person who, and governmental agency, if any, which prepared such instrument appears at the conclusion of such instrument and such name is either printed, typewritten, stamped, or signed in a legible manner. An instrument is in compliance with this section if it contains a statement in the following form: 'This instrument was prepared by (name).'

“* * * * * * * * *”

The provisions of Section 317.111, Revised Code, were involved in the case of *Bown & Sons, v. Honabarger et al.*, 171 Ohio St. 247, wherein the Supreme Court considered the question of whether the failure to comply with said statute (name of person preparing the instrument did not appear on instrument) caused a duly filed mechanic's lien to be invalid. Judge Bell, writing for the majority of the four determining said question in the negative, stated, beginning at page 249 of the *Honabarger* decision:

“It is contended by Honabarger that Section 317.111, Revised Code, although in the chapter of the code dealing with the duties of the county recorder, must nevertheless be read *in pari materia* with the sections of the Code dealing with mechanics' liens. And with this contention we are generally disposed to agree. Clearly, in speaking of the creation of liens, the General Assembly had the mechanic's lien sections in mind.

“* * * * * * * * *”

“It is clear, we think, that the provisions of Section 317.111, Revised Code, authorize the county recorder to refuse to accept for record or filing an included instrument which does not comply with the requirement of the statute. *In fact, his clear duty under the statute is to refuse to accept it.* But having violated this duty and placed the instrument on record, how has the action of the recorder in so doing prejudiced the landowner? He has received, as has the world, notice of the claim against him in terms and amounts that are unchangeable. *Macklin, Recr., v. Miller Improved Gas Engine Co.*, 13 C.C. (N.S.), 94, affirmed, 86 Ohio St., 354, 99 N.E., 1130. He still has available to him all the means accorded by statute to resist the lien or to require its discharge if it is not timely enforced. The identity, or lack of identity, of the person who prepared the affidavit can hardly be of any concern to him.

“But the presence of the requirement in the statute indicates that it must be the concern of someone. And the clue to the source of that concern is readily apparent from the report of the Unauthorized Practice of Law Committee made to the Council of Delegates of the Ohio State Bar Association and appearing in 27 Ohio Bar, 963 (issue of November 1, 1954):

“As an aid in the fight against the unauthorized practice of law, and to assist local committees in this respect, the Unauthorized Practice Committee unanimously recommends to the Council of Delegates that every effort be made to secure the enactment of a statute which would provide as follows: * * *

“The suggested statute was subsequently enacted in substantially the same terms by the General Assembly as Section 317.111, Revised Code.

“The obvious purpose of this enactment was to give the bar of this state a ready weapon in its fight to protect the public of Ohio from the unauthorized practitioner. We do not conceive it to have been intended as a means whereby one otherwise obligated to a lienor could escape that obligation.

“We are of the opinion, therefore, that an affidavit for a mechanic’s lien, which in all other respects complies with the statutory requirements for the creation of a lien, is not rendered invalid by the fact that it is accepted for record and filing by a county recorder without the name of the person who prepared it being noted thereon, and the lien created by such affidavit is not for that reason destroyed. (Emphasis added)

“* * * * * * * * *”

The dissenting opinion of Weygandt, C. J. in the *Honabarger* case, found on page 253 thereof, states:

“According to the pronouncement of the majority, a county recorder is free to ignore or comply with the provisions of Section 317.111, Revised Code. If he chooses to ignore the statute and files a claimant’s affidavit for a mechanic’s lien, it is valid. If he observes the statute and refuses to file the affidavit, the claimant is remediless to obtain a lien.

“Is it likely that the General Assembly intended to vest a county recorder with this unbridled power?”

While the action of a county recorder in accepting or refusing a document for filing or record which does not comply with Section 317.111, *supra*, would, as far as the parties thereto are concerned, have the effect described by Chief Justice Weygandt above, that the recorder has a duty to refuse such instrument is plainly stated in Section 317.111, *supra*, and clearly recognized by the majority as well as the dissenting opinion in *Honabarger*, *supra*. Thus, the county recorder can not be required to accept for record or filing an instrument which is so defective and should not, in the exercise of his statutory duty, accept such an instrument. Although, in accordance with the *Honabarger* decision, *supra*, the county

recorder's failure to comply with his statutory duty to reject an instrument does not invalidate the instrument, such fact does not excuse or release the recorder from his obligation to reject such instruments. The obligation most certainly could be enforced by an order of a court of competent jurisdiction.

As to your specific question regarding the words "This instrument was prepared by (name)," it appears that this is the form which the legislature intended to be used in affixing the name of the person who prepared the instrument.

Section 1309.39, Revised Code, to which you refer, establishes the requirements for a valid financing statement. Certainly, a financing statement encumbers the title to the real or personal property covered thereby; thus, the general provisions of Section 317.111, *supra*, are applicable to financing statements. The fact that division (C) of Section 1309.39, Revised Code, sets forth a recommended form for a financing statement, which form does not contain provisions for the language required by Section 317.111, *supra*, does not eliminate the requirement of such latter statute. Section 317.111, *supra*, imposes a duty upon the county recorder with regard to the filing of instruments in his office, while Section 1309.39, Revised Code, deals with those provisions which are necessary to create a valid financing statement.

Furthermore, Section 1309.38, Revised Code, provides the proper place for filing financing statements. The filing officers named therein are the county recorders and the secretary of state. Section 317.111, *supra*, is binding only upon the county recorder, thus language satisfactory to meet its provisions is not necessary on financing statements filed with the secretary of state.

In Opinion No. 3072, Opinions of the Attorney General for 1962, issued June 15, 1962, I discussed the duties of the county recorder under Sections 1309.39 and 1309.40, Revised Code, and stated:

"* * * * *

"Considering the above quoted statement of the court and the provisions of Sections 1309.39 and 1309.40, *supra*, I am of the opinion that the county recorder is not required to determine whether financing statements presented to him for filing are legally sufficient in that they substantially comply with the Uniform Commercial Code, but the duty of the county recorder is to accept purported financing statements presented to him for

filing if such instruments appear to be what they are purported to be.

“* * * * * * * * *”

In that portion of Opinion No. 3072, *supra*, quoted above, only the obligation imposed upon the county recorder by the statutes referred to therein was considered, and said language was not intended to dispose of all of the duties of the county recorder in connection with the handling of financing statements.

In accordance with the foregoing, I am of the opinion and you are advised that a financing statement described in Section 1309.39, Revised Code, is an instrument by which the title to real estate or personal property is encumbered, and pursuant to the provisions of Section 317.111, Revised Code, a county recorder is under a clear duty to refuse to accept a financing statement for filing unless the provisions of such Section 317.111, Revised Code, have been met.

Respectfully,

MARK MCELROY

Attorney General