

OPINION NO. 90-103

Syllabus:

A county recorder is without authority to delete from the records of the county recorder a document recorded without statutory authority.

To: David E. Bowers, Allen County Prosecuting Attorney, Lima, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 31, 1990

I have before me your request for my opinion concerning the recording of common law liens. Your first question addressed the county recorder's authority to record an instrument denominated as such. Shortly after your letters of request I issued 1990 Op. Att'y Gen. No. 90-061, wherein I stated, at syllabus three, "[a] 'notice of common-law lien' is not recognized in Ohio by statute and is not among the 'notices of liens' described in R.C. 317.08(E). As such, a 'notice of common-law lien' is not an instrument of writing required or authorized to be recorded under R.C. 317.13."¹ Having directly answered the question raised, I need not readdress it here. Your sole remaining question is whether a county recorder is authorized to remove from the county records a "common-law lien" accepted for recording without authority.

The county recorder is a ministerial officer, having only those duties granted by statute, either expressly or necessarily implied therefrom. 1990 Op. Att'y Gen. No. 90-068; Op. No. 90-061; *see also State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 173 N.E.2d 758 (1961); 1986 Op. Att'y Gen. No. 86-006; 1940 Op. Att'y Gen. No. 2857. The office of county recorder exists to record instruments, Op. No. 90-068, with "recording" being "the copying of [an instrument] into the public records kept for that purpose, by or under the direction or authority of the proper public officer." *Green v. Garrington*, 16 Ohio St. 548, 550 (1866). The ministerial nature of the office of recorder is further reinforced by the lack of precedent for the office or its duties in the common law. Op. No. 90-068; Op. No. 90-061; 1940 Op. No. 2857, at 913. A county recorder may, therefore, not exercise any powers unless statutorily authorized to do so.

A careful review of R.C. Chapter 317 reveals that county recorders are not expressly granted the power to remove from the record an instrument recorded without authority. Instead, the recorder's duties are primarily limited to the recordation of data, *see, e.g.*, R.C. 317.13; R.C. 317.14; R.C. 317.24, the indexing of such records, *see, e.g.*, R.C. 317.18; R.C. 317.19; R.C. 317.20, the copying of recorded records, *see, e.g.*, R.C. 317.27; R.C. 317.32(C), and the preservation of the records of the office, *see, e.g.*, R.C. 317.07; R.C. 149.351; R.C. 149.43.

The power to record, as applied to a particular document, however, lasts only until the recorder has executed the duty to record. "It is not competent for a [recorder] 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." *Doe v. Executors of Dugan*, 8 Ohio 87, 107 (1837); *accord Youtz v. Julliard*, 10 Ohio Dec. Repr. 298, 300 (C.P. Stark County 1888); *see also* 1934 Op. Att'y Gen. No. 3251. A county recorder, therefore, has no authority to change a record after it has been accurately copied from the documents presented for recording. 1934 Op.

¹ A copy of such a recorded instrument entitled "common law lien" was provided with Prosecutor Bowers' letter of request. It prominently includes the word "notice" in its caption. Both letters of request also refer to the recorded instrument as a "common law lien." Since 1990 Op. Att'y Gen. No. 90-061, at syllabus two, states "[a]n instrument of writing is required or authorized to be recorded when statutory authority expressly provides for the recording of such an instrument" and no statutory authority regarding recordation of "common law liens" exists, in R.C. 317.13 or elsewhere in the Revised Code, an instrument denominated as a "common law lien" is not capable of being properly recorded by a county recorder.

No. 3251. The lack of authority to change a recorded record necessarily includes a lack of authority to delete a document from the records of the county recorder. Therefore, despite a lack of authority to record a "common law lien," once it is accurately recorded, the lien may not be removed from the record.

The apparent concern is that although the "common law lien" already filed in the records of the county recorder is not recognized under Ohio law, it may be perceived as creating a cloud on the title to the real property purportedly covered and may affect the marketability of the title. A cloud upon a title is "an apparent defect...that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership." *Novogroder v. Di Paola*, 11 Ohio App. 374, 378 (Cuyahoga County 1919). A title is marketable if it "appear[s] reasonably certain that the title will not be called in question in the future, so as to subject the purchaser to the hazard of litigation with reference thereto. It must in any event embrace the entire estate or interest sold, and...[be] free from the lien of all burdens, charges, or incumbrances which present doubtfully questions of law or fact." *McCarty v. Lingham*, 111 Ohio St. 551, 558 146 N.E. 64, 66 (1924).

While an erroneously recorded "common law lien" may not be lawfully removed from the record by the recorder, the owner of the real property may take action regarding the perceived cloud on the title. Two possible options for such owner are the filing of an "affidavit on facts relating to title" pursuant to R.C. 5301.252 and the filing of an "action to quiet title" under R.C. 5303.01.

An affidavit on facts relating to title may be filed for record with the court recorder if the facts in the affidavit affect title to real estate and further relate to specified matters enumerated at R.C. 5301.252(B). "Title" has been judicially defined to mean "ownership." *Langmede v. Weaver*, 65 Ohio St. 17, 37, 60 N.E. 992, 997 (1901). As used in R.C. 5301.252, any fact that affects any portion of the ownership of real property is capable of being included in an affidavit of fact relating to title, if it falls within one of the categories set out in R.C. 5301.252(B).

The only category in R.C. 5301.252(B) that appears to apply to an owner against whom a "common law lien" has been filed is subdivision (B)(3), which allows an affidavit to be filed if it relates to "[t]he happening of any condition or event that may create or terminate an estate or interest." To determine the appropriateness of the filing of an affidavit countering a "common law lien," the meaning of the terms "estate" and "interest" as used therein must be ascertained. An "estate" in land is "the degree, quantity, nature or extent of interest which a person has in it.... As applied to land, it does not necessarily import a fee or even a freehold, but merely the quantity of interest a person has from absolute ownership to naked possession." *Black v. Sylvania Producing Co.*, 105 Ohio St. 346, 348, 137 N.E. 904, 905 (1922). "Interest" as applied to real property includes "any right in the nature of property, but less than title." *Black's Law Dictionary* 812 (6th ed. 1990). "Interest" may refer to rights, privileges, powers or immunities regarding real property or any combination thereof. Restatement of Property §5. The phrase "estate or interest" as used in R.C. 5301.252(B)(3), thus, broadly includes any right that constitutes part of the ownership of the real property. Therefore, to the extent that an affidavit of facts under R.C. 5301.252 rebuts an erroneously recorded "common law lien," the affidavit serves to discredit the interest in the title to the subject real property purportedly created by the lien. As such, R.C. 5301.252 authorizes the filing of an affidavit.

A second possible option to remove the cloud upon a title created by the erroneous recording of a "common law lien" is an "action to quiet title" authorized by R.C. 5303.01 to determine the respective interests of adverse claimants to an interest in real property. An action to quiet title may be filed to remove a cloud from the title to real property. See generally, *Myers v. Hewett*, 6 Ohio 449 (1847) (to remove cloud upon the title by judgment liens); *Baird v. Ramsey*, 2 Ohio C.C. (n.s.) 492 (Monroe County 1903) (to remove cloud upon the title by mortgage). Inasmuch as the improperly recorded "common law lien" may create a cloud upon the title with its implicit assertion of a right or interest in the real property adverse to the title holder, an action to quiet title under R.C. 5303.01 may be filed.

Based on the foregoing, it is my opinion and you are hereby advised that a county recorder is without authority to delete from the records of the county recorder a document recorded without statutory authority.