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COUNTY RECORDER—TORRENS ACT—§5309.52 RC; OUTSTANDING ENCUMBRANCE INSTRUMENT LOST—RECORDER MAY MAKE ENTRY OR MEMORIAL OF SATISFACTION AFTER NOTICE AND HEARING.

SYLLABUS:

1. Under the provisions of Section 5309.52, Revised Code, the county recorder, if after notice and hearing he is convinced of the satisfaction claimed, shall make the entry and memorial of satisfaction therein prescribed even though the original instrument of encumbrance or a certified copy thereof is not produced.

2. Under the provisions of Section 5309.52, Revised Code, when the original, a certified copy, or an original duplicate of an outstanding instrument of encumbrance has been lost, the county recorder, if after notice and hearing he is convinced of the satisfaction claimed, shall make the prescribed entry or memorial of satisfaction.

Columbus, Ohio, July 29, 1957

Hon. John S. Ballard, Prosecuting Attorney
Summit County, Akron, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Summit County Recorder has been asked to make entry of the release and satisfaction of certain encumbrances against registered land in Summit County. In these cases the original duplicate and/or mortgagee’s certified copy of the instrument have been lost or mislaid.

“The Recorder would like your opinion on the following questions:

1. May a person authorized or entitled to request satisfaction or release of a mortgage lease or other encumbrances which has been recorded with a county recorder, record with the county recorder such satisfaction or release without the production of the original instrument and/or certified copy of such instrument.

2. Where the original and/or certified copy of a recorded instrument has been lost or mislaid may the recorder make entry or memorial of satisfaction of the encumbrances after notice and a hearing held by him; or must the hearing be had by the Probate Court or Court of Common Pleas.

3. Where an original duplicate of an encumbrance which has been filed with the recorder as distinguished from an encumbrance which has been filed and recorded with the recorder, is outstanding, having been lost or mislaid, may the recorder, upon notice and a hearing held by him, make entry or memorial of such satisfaction or release or must such hearing be had by the Probate Court or Court of Common Pleas."

Initially I invite your attention to Section 5309.52, Revised Code, which reads as follows:

"When any registered mortgage, encumbrance, lien, charge, or lesser estate, vested, contingent, expectant, or inchoate, is satisfied, released, extinguished, or terminated, in any manner in whole or in part, the mortgagee, encumbrancer, assignee, owner of lesser estate, or his legal representative, holder of lien, or other person authorized to discharge or release such encumbrance, shall forthwith file with the county recorder or deliver to the encumberer or owner such satisfaction, release, or discharge, in whole or in part. The recorder shall enter such satisfaction, release, or discharge upon the registered certificate of title, upon the original instrument on file or the margin of the record thereof, if recorded, and properly note such cancellation in all the indexes of such mortgage, encumbrance, lien, or charge. *If an original instrument, or one of the original duplicates thereof, or a mortgagee's certified copy, indorsed by the recorder, is outstanding in the hands of the encumbrancer or his assigns, no entry or memorial of satisfaction of such instrument shall, except upon notice and a hearing, be made by the recorder without the production of said original instrument or original duplicate or mortgagee's certified copy.* If the encumbrancer, owner of a lesser estate or his legal representative, or other person, fails to file such satisfaction or release with the recorder or deliver it to the encumberer, or if such satisfaction or release has been delivered to the encumberer or transferor and become lost or destroyed or from any other cause cannot be produced, then the encumberer,

transferor, or other person entitled to such discharge or release may present proof of the same before the recorder, ten days' notice having been given to the person holding the security or lesser estate or to his personal and legal representatives and all persons in interest as shown by the records, or as known. *When the recorder is convinced that such mortgage, encumbrance, or other charge has been satisfied, or that said lesser estate has been extinguished or terminated as claimed, he shall enter such satisfaction, release, extinguishment, or termination on the instrument on file with him or the record thereof, if recorded, and indorse the same upon the registered and also on the owner's duplicate certificate of title; or application in such cases may be made to the probate court or the court of common pleas by petition and the court upon notice and hearing shall make such order as is appropriate and the recorder shall act in accordance therewith, and the entry of such discharge, satisfaction, release, extinguishment, or termination by the recorder pursuant to his finding or the order of the court, subject to proceedings on appeal, is conclusive evidence thereof.*" (Emphasis added.)

The rather involved language of that section may be summarized as follows. When any of certain types of encumbrances or lesser estates have been satisfied or released, the instrument of satisfaction or release shall be filed with the county recorder, who shall make the appropriate entry upon the certificate of title, upon the mortgage or other instrument of encumbrance, and in the indexes. Then there are prescribed the procedures to be followed if an outstanding instrument of encumbrance is **not produced** or if the instrument of satisfaction or release is not filed. When, as suggested in your letter, the instrument of incumbrance is **not produced**, no entry of satisfaction may be made except upon notice and hearing. When after notice and hearing the recorder is convinced that the encumbrance has been satisfied, or a lesser estate extinguished, he shall make appropriate entries, particularly on the certificate of title. A somewhat different procedure is prescribed when the instrument of satisfaction or release has not been filed.

Finally there is provided an alternative procedure. Application can be made to a probate court or court of common pleas for a hearing and a court order for appropriate entries. You will note that the order of a court, subject to appeal, is conclusive evidence of the satisfaction, release, *etc.*, whereas any act or failure to act on the part of the recorder is, under Section 5309.83, Revised Code, subject to appeal to a court of common pleas.

In specific response to your first question, the statute provides, as just noted, the procedure whereby a satisfaction or release may be recorded **without the production of the original instrument of encumbrance.**

As to your second question, application to a probate court or court of common pleas is, as noted above, an *alternative* procedure, but the statute clearly provides that the recorder may himself hold the hearing after notice, and if convinced upon the facts he shall make the appropriate entries. His determination is, of course, subject to the appeal provided in Section 5309.83, Revised Code.

As to your third question, the statutory language on which the answer to your second question is based speaks also of the non-production of original duplicates, and the answer must accordingly be the same.

I must emphasize that it is not my intention to render an opinion or advice as to the determination of any pending factual question or any which may be presented.

It is my opinion, and you are advised, that :

1. Under the provisions of Section 5309.52, Revised Code, the county recorder, if after notice and hearing he is convinced of the satisfaction claimed, shall make the entry and memorial of satisfaction therein prescribed even though the original instrument of encumbrance or a certified copy thereof is not produced.

2. Under the provisions of Section 5309.52, Revised Code, when the original, a certified copy, or an original duplicate of an outstanding instrument of encumbrance has been lost, the county recorder, if after notice and hearing he is convinced of the satisfaction claimed, shall make the prescribed entry or memorial of satisfaction.

Respectfully,

WILLIAM SAXBE

Attorney General