

OPINION NO. 66-080**Syllabus:**

1. A financing statement which mentions fixtures or crops involving registered lands shall be filed by the county recorder pursuant to Section 1309.40, Revised Code.
2. A financing statement is not an instrument of encumbrance as defined in Section 5309.47, Revised Code.
3. A security agreement constituting an interest, claim, or lien involving registered land is entitled to recordation if in conformity with the requirements of Section 5309.47, Revised Code.

To: Fred V. Skok, Lake County Pros. Atty., Painesville, Ohio
By: William B. Saxbe, Attorney General, April 26, 1966

I have your request for my opinion where you ask the basic question; how should the county recorder file a financing statement which covers crops, growing or to be grown, or goods, which are or are to become fixtures, or registered land.

The Ohio Uniform Commercial Code, Section 1309.40, Revised Code, provides in part:

"(D) * * * In addition to the indexing required in the previous sentence, statements covering crops growing or to be grown or goods which are or are to become fixtures shall also be indexed in the real estate mortgage records by the filing officer according to the name of the owner or lessee given the statement."

Although the drafters of the Ohio Uniform Commercial Code apparently did not consider the problem of filing financing statements which affect registered land, it is our duty to make the provisions of these two laws consistent, if this is possible.

The matter of filing financing statements was commented on in Opinion No. 65-113, Opinions of the Attorney General for 1965, page 2-243; the syllabus reads as follows:

"The county recorder as the filing officer shall file consecutively all instruments purported on their face to be financing statements, which contain the name and address of the debtor. If such statement purports to cover crops or fixtures and names an owner or lessee, whether or not

such status is distinguishable, such name shall be indexed in the real estate mortgage index as the grantor. (Opinion No. 668, Opinions of the Attorney General for 1963, distinguished.)"

It is stated in your County Recorder's letter, as follows:

"Upon receiving requests on this matter I have advised using Section 5309.72 'Proceedings by Adverse Claimant,' thereby putting a memorial on the 'Owner's Duplicate Certificate of Title.'"

I infer from this statement the suggestion, that Section 5309.72, supra, is germane on the apparent theory that a financing statement may amount to a lien or encumbrance upon the property described, since Section 5309.72, supra, provides in part as follows:

"Any person asserting any interest, claim, or lien, not shown upon the register, in or against registered land adverse to the title of any registered owner, when no provision is made by sections 5309.02 to 5310.21, inclusive, of the Revised Code, for registering such interest, claim, or lien in the county recorder's office, may make affidavit thereto, setting forth his interest, right, title, claim, lien, charge, or demand, and how and under whom derived, and the character and nature thereof. * * * When such affidavit is filed in the recorder's office, the recorder shall enter forthwith a memorial thereof, upon the registered certificate of title, stating the exact time when said affidavit was filed and the purport * * *"

You are advised that a financing statement, per se, does not constitute a lien or encumbrance upon the property described. In Opinion No. 219, Opinions of the Attorney General for 1963, I stated in pertinent part as follows:

"1. Opinion No. 3513, Opinions of the Attorney General for 1962, issued December 28, 1962, is overruled and of no further force and effect;

"2. The financing statement created under Chapter 1309, Revised Code, is the device to perfect the security interest in personal property and fixtures against third party creditors and when filed the financing statement must comply in form only with the requirements of Section 1309.39, Revised Code, and

"3. The security agreement is the device that creates the security interest and

encumbers personal property and fixtures and if the agreement is filed to perfect the security interest the agreement must comply in form with Section 1309.39, Revised Code, and Section 317.111, Revised Code.
(Emphasis added)

A financing statement does not encumber property; the security agreement does.

Section 1309.39, Revised Code, contains the formal requisites of a financing statement, and provides, in part:

"(A) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.* * * When the financing statement covers crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned and the name of the record owner or record lessee thereof. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties."
(Emphasis added)

Section 1309.40 (D), Revised Code, provides the duty of the county recorder upon presentation of a financing statement. The recorder upon presentation of a financing statement and the tender of the filing fee has a duty to file the statement, without regard to its legal or practical significance. However, this is not to say that the County Recorder should not, as a favor to any prospective encumbrancer without knowledge of the fact that a financing statement purports to perfect a security interest involving a registered land title, advise him that said Recorder does not possess a mortgage index of mortgages on registered lands in which the same is required by law to be entered.

A favorable analogy to the rule required to be followed in the problem at hand was defined in headnote No. 3 in Mizner v. Paul, 40 C.D., 484, which reads as follows:

"3. Mechanics' Lien Law and Torrens' Act not Incompatible.

"The mechanics' lien law and the Torrens law are not incompatible; but the privilege granted by the former of acquiring liens is restricted in its exercise by the latter law. The Torrens law will therefore be given effect as an exception to the mechanic's lien law."

The court further said at page 493:

"We approve of the language of the attorney-general of Ohio in this respect as taken from the reports of the attorney-general of 1914, page 1195:

"As the land registration act is the later enactment, and is furthermore a special statute, I think that instead of calling for the doctrine of implied repeal, this state of affairs justifies the application of the theory that where the same statute, or different statutes upon the same subject, contain incompatible provisions, one of which is general and the other special, the latter shall be held and treated as an exception to the former."

Therefore, it follows that there is no statutory provision for the filing of financing statements to perfect a security interest in registered lands.

Section 5309.47, Revised Code, provides, in part:

"Whenever any registered land or interest therein is intended to be charged or made security in favor of any mortgagee, the mortgagor shall execute a mortgage deed. Whenever any such land is intended to be charged with, or made security for the payment of an annuity, rent charge, sum of money, or any other charge or lien, in favor of any encumbrancer or lien holder, the encumberer shall execute an instrument of encumbrance. Every mortgage deed and instrument of encumbrance shall contain a pertinent description of the land and an accurate statement of the interest intended to be mortgaged, charged, or encumbered, and when registered shall operate as a lien or charge upon and bind the land covered thereby * * *"
(Emphasis added)

I believe that an entry upon registered certificate of title of a security agreement itself would amount to an "instrument of encumbrance" pursuant to Section 5309.47, supra. Of course, if a financing statement itself constituted the security agreement, the requirements of Section 1309.47, supra, would be satisfied. See also Section 5309.48, Revised Code.

Therefore, you are advised as follows:

1. A financing statement which mentions fixtures or crops involving registered lands shall be filed by the county recorder pursuant to Section 1309.40, Revised Code.
2. A financing statement is not an instrument of encumbrance as defined in Section 5309.47, Revised Code.

3. A security agreement constituting an interest, claim, or lien involving registered land is entitled to recordation if in conformity with the requirements of Section 5309.47, Revised Code.