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MORTGAGE RELEASED BY NOTATION THEREON OR ON MARGIN OF RECORD—SIGNED BY MORTGAGEE—NOTATION NOT SUFFICIENT TO DECLARE PAPER AN “INSTRUMENT”—NO REQUIREMENT UNDER SECTION 317.111 RC TO DISCLOSE NAME OF PERSON WHO “PREPARED” NOTATION.

SYLLABUS:

Where a mortgage is released by a notation thereon, or on the margin of the record thereof, signed by the mortgagee, such notation is not an “instrument” within the meaning of Section 317.111, Revised Code, and there is no requirement under this section of the disclosure thereon of the name of the person who “prepared” such notation.

Columbus, Ohio, October 5, 1955

Hon. Samuel L. Devine, Prosecuting Attorney
Franklin County, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, whether Section 317.111, Revised Code, enacted by the recent General Assembly, will

require a release of a mortgage endorsed thereon or on the margin of the record, to contain the name of the person who prepared such release. The statute in question, so far as pertinent, reads 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 will be in compliance with this section if it contains a statement in the following form: ‘This instrument was prepared by (name).’” * * **
(Emphasis added.)

It will be observed that the statute refers to the authorship of an “instrument” by which the title to real estate or personal property or any interest therein or lien thereon is conveyed or otherwise disposed of. Every such “instrument” must contain at the conclusion thereof the name of the person who prepared it. The real question, therefore, is whether words of release endorsed on the mortgage itself, and signed by the mortgagee, or written on the margin of the record of the mortgage and signed by the mortgagee, constitute an “instrument” within the intent of the statute, the authorship of which must be set forth at the conclusion of such endorsement in order to entitle the release to be filed and to authorize the recorder to enter the same on the mortgage record.

It is a matter of common knowledge that on the back of practically every printed mortgage form there appears the following, or a sentence of similar import:

“The conditions of the within mortgage having been complied with, hereby Cancel and Release the same, this day of, 19.”

In the average recorder’s office will be found a rubber stamp containing precisely the same language, and when that stamp is affixed to the margin of the record and the mortgagee signs his name to it, the recorder attests his signature, and that is a complete cancellation of record of the mortgage. If I answer your question in the affirmative, then I must hold that those endorsements or any abbreviation thereof that might indicate an intention on the part of the mortgagee to cancel

the mortgage constitute "instruments" the authorship of which must be ascertained and added at the conclusion of the endorsement. On the face of it, it appears preposterous that the legislature should have intended to require the authorship of such a stereotyped sentence as I have quoted to be traced and identified with the name of the person who prepared it. Plainly, the mortgagee does nothing in executing this informal release but sign his name and insert the date. He could hardly be said to have prepared the endorsement, and certainly no one else has prepared it specifically for his use.

Turning to the statutes relative to the execution, recording and cancellation of real estate mortgages, we find in Chapter 5301, of Title LIII, provisions relative to the formalities required in the preparation and execution of deeds, mortgages, liens and other instruments affecting the title to real estate. It is provided by Section 5301.01, Revised Code, that these instruments must be signed by the grantor, mortgagor or lessor, and such signing must be acknowledged by the grantor, mortgagor or lessor, in the presence of two witnesses who shall attest the signing and subscribe their names to the attestation; and that such signing must be acknowledged by the grantor in the presence of a judge of a court of record or a clerk thereof, a county auditor, county engineer, notary public, mayor or justice of the peace, who shall certify the acknowledgment and subscribe his name to the certificate of such acknowledgment. Thus it is manifest that the law regards an instrument of this character as a serious matter and therefore prescribes all of these formalities in order to give it validity and entitle it to record.

Coming to Section 5301.31 and 5301.32, Revised Code, we find explicit provisions as to the assignment or partial release of a mortgage. Section 5301.31 reads as follows:

"A mortgage may be assigned or partially released by the holder thereof, *by writing such assignment or partial release on the original mortgage, or upon the margin of the record thereof, and signing it.* Such assignment or partial release need not be acknowledged or witnessed, but if written upon the margin of the record, the signing must be attested by the county recorder. Such assignment, whether it is upon the mortgage, or upon the margin of the record thereof, *or by separate instrument,* shall transfer not only the lien of said mortgage, but also all interest in the land described therein.

"For entering such assignment or partial release upon the

margin of the record, or for attesting it, the recorder shall be entitled to the fee provided by section 317.32 of the Revised Code for recording the assignment and satisfaction of mortgages.” (Emphasis added.)

Here it will be noted that the assignment or partial release may be accomplished (a) by writing such assignment or partial release on the original mortgage, or upon the margin of the record thereof, and signing it, in which case such assignment or partial release need not be acknowledged or witnessed, but if written upon the margin of the record, the signing must be attested by the county recorder; or (b) may be accomplished by a “separate instrument,” executed with due formality.

What is meant by “separate instrument” might be a question for argument. Someone might claim that these words are contrasted with the notation on the mortgage itself, or upon the margin of the record; that those acts would constitute one instrument and that another formal paper would constitute a separate instrument. I do not consider that that is what is meant by a “separate instrument.” I think this section refers to the mortgage as the *original instrument* and the formal release as a *separate instrument*. This conclusion is strengthened by the language of Section 5301.32, which reads as follows:

“A mortgage may be *assigned or partially released by a separate instrument* of assignment or partial release, acknowledged and witnessed as provided by section 5301.01 of the Revised Code. Such separate instrument of assignment or partial release shall be recorded in the book provided by section 5301.34 of the Revised Code for the recording of satisfactions of mortgages, and the county recorder shall be entitled to charge the fee for such recording as provided by section 317.32 of the Revised Code for recording deeds.” (Emphasis added.)

There it appears to me that the meaning of the statute is made very clear, that the mortgage which is an instrument, may be assigned or partially released by another instrument which is called a “separate instrument,” which will be recorded in a special record provided for the satisfaction of mortgages. Reading these two sections together, it appears to me that there is nothing in them which could give rise to the claim that the release endorsed on the margin of the mortgage record was to be regarded as an instrument.

Going on to the statutes relating to the complete release of a mortgage we find in Section 5301.28, the following language:

“When the mortgagee of property within this state, or the party to whom the *mortgage* has been assigned, *either by a separate instrument, or in writing on such mortgage, or on the margin of the record thereof*, which assignment, if in writing on such mortgage or on the margin of the record thereof, need not be witnessed or acknowledged, receives payment of any part of the money due the holder of such mortgage, and secured by the mortgage, and *enters satisfaction* or a receipt therefor, *either on the mortgage or its record*, such satisfaction or receipt, when entered on such record, or copied thereon from the original mortgage by the county recorder, will release the mortgage to the extent of such receipt. * * *”
(Emphasis added.)

The use of the words “separate instrument” in the section strengthens my conclusion that the informal release on the mortgage is not to be regarded as a “separate instrument.”

The alternative method of releasing a mortgage is provided by Section 5301.34. This section again contemplates an instrument prepared and executed with all the formality required for a deed or mortgage and recorded in a special record kept for that purpose. For recording such an instrument the recorder is entitled to the same fees as allowed for recording a deed or mortgage. But for recording the informal satisfaction signed by the mortgagee either on the mortgage or on the record he is entitled merely to a fee of 25c, as prescribed by Section 317.32, Revised Code.

Certainly, the legislature in enacting Section 317.111, was aware of the provisions of law relative to the cancellation of mortgages and the two widely different methods prescribed—the one highly formal, by an instrument whose execution is carefully set forth, and the other by a simple act on the part of the mortgagee, stating that the mortgage was satisfied. As to this simpler procedure, let it be noted that it is accomplished by the person who either has the mortgage in his possession, or can go in person to the recorder’s office, and may sign his name to a simple notation on the original instrument or on the margin of the record thereof. If he sees fit not to adopt a stereotyped form it would be quite sufficient for him to endorse on the mortgage or on the record the words “this mortgage satisfied,” or possibly merely the word “paid,” and signing his name.

If he adopts the language printed on his mortgage or contained on a recorder's stamp, it would appear that he has accomplished the same purpose, and in my opinion it would be nothing short of an absurdity to ascribe to the legislature an intention to compel him, in order to entitle his release to be recorded, to set forth the name of some person who was alleged to have prepared that inscription. It would seem to be a reasonable assumption that it was merely the intention of the legislature to see to it that instruments of a formal nature, which are on a par with instruments intended to convey lands or an interest therein, should be prepared by someone competent to understand the essential portions of a deed or other conveyance and, for the purpose of seeing to it that this is accomplished, to require the authorship of an instrument of that character to be disclosed. To impute to the legislature an intent to require someone to be presented as the author of a simple notation of the character under consideration, would appear to me to charge the legislature with an attempt to require a frivolous and burdensome formality where none is required by the character of the transaction, and with which it would usually be impossible to comply.

What has been said above relative to cancellation of mortgages on real property will apply equally to chattel mortgages, since it is provided in Section 1319.03, Revised Code, that they may be "assigned, released and satisfied as provided in Sections 5301.28 to 5301.42, inclusive, of the Revised Code."

Accordingly, in specific answer to your question it is my opinion that where a mortgage is released by a notation thereon, or on the margin of the record thereof, signed by the mortgagee, such notation is not an "instrument" within the meaning of Section 317.111, Revised Code, and there is no requirement under this section of the disclosure thereon of the name of the person who "prepared" such notation.

Respectfully,

C. WILLIAM O'NEILL

Attorney General