

Opinion No. 16-1898

November 6, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Mr. Frank J. Sager, Cashier, Exchange Bank of Carrizozo, Carrizozo, New Mexico.

Release of realty mortgages.

OPINION

{*440} Yesterday, which was Sunday, I received your letter of the 3rd instant in which you say that since the passage of Chapter 71 of the Laws of 1915, it seems to be understood by some persons that section {*441} 7 thereof applies to the release of realty mortgages as well as chattel mortgages. Any such belief is entirely erroneous. Chapter 71 relates to chattel mortgages, and to nothing else. If there could be found in it any language which appeared to refer to any other subject, it would be to that extent invalid. The title of that chapter is "An act relating to chattel mortgages." Section 16 of Article IV of the Constitution provides that the subject of every bill shall be clearly expressed in its title, but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void. In view of this constitutional provision you can readily see that said Chapter 71 cannot, with validity, contain anything on any subject except chattel mortgages.

You also say that it has been a common practice for the mortgagee to release realty mortgages by noting on the margin of the record, over his or her signature, the fact that the conditions of the mortgage had been fully complied with and was thereby released, and you say that it is your recollection that you have seen an opinion rendered by me that this was a sufficient release, and you ask for my opinion on this matter, adding that you are requested to file a formal, acknowledged instrument, releasing a realty mortgage, which at the time of its payment was released by marginal notation.

I cannot find in this office any record of any opinion on this subject, nor have I any recollection of giving one. I know that for many years it has been a practice to make such marginal notations, but I never have felt entirely satisfied with that method. I know that I have advised people to secure a formal release and satisfaction, signed and acknowledged like any other instrument in writing affecting title to real estate, so that the same would be entitled to record. I have some recollection of advising the recorder in Bernalillo county, in addition to recording such a release and satisfaction of mortgages, to make a note opposite the record of the mortgage and upon the index of mortgages, showing the fact of the release and where it had been recorded. Prior to 1909 I believe there was no statutory provision on the subject of how mortgages should be released and satisfied, but in that year the legislature passed an act, which re-appears in Sections 4776 and 4777 of the Codification of 1915. The practice of mere marginal notations probably grew up on account of the absence of any statutory provision. That

statute of 1909 provides that when the debt shall be fully satisfied, it is the duty of the mortgagee or trustee to cause "full satisfaction thereof to be entered of record in the office of the county clerk of the county where such mortgage or deed of trust is recorded." The other section imposes a penalty on any person guilty of violating the preceding section. Any instrument of writing affecting the title to real estate cannot be placed of record unless it is duly acknowledged and certified, as you will see by reference to Section 4795 of the Codification. Although it has been held by our Supreme Court that the legal title of mortgaged property remains in the mortgagor, yet I think it must be admitted that the release of a mortgage is an instrument which affects the title, and if that is so then it should be signed, acknowledged and certified in the manner prescribed in the statute, so as to be entitled to record.

{*442} It does not seem to me, however, that the mortgagee should be compelled to bear the expense of executing and recording such a release and satisfaction, unless he has distinctly agreed to do so in the mortgage which he has taken. The expense of preparation, execution, acknowledgement and recording of such an instrument ought to be considered as a part of the expense of the mortgagee or trustee, the burden of which should be borne by the property affected.