

November 25, 1946.

Mr. Oliver Phillips
County Attorney
Lincoln County
Libby, Montana

Dear Mr. Phillips:

You have inquired whether a clerk and recorder must accept for recording an instrument which has previously been recorded by him. The instrument involved in the factual situation you present has apparently been altered or changed in the interim between the first recording and the offer to re-record.

Section 4805, Revised Codes of Montana, 1935, sets out the duty of the county clerk and recorder on receipt of an instrument to be recorded:

"When any instrument, paper, or notice, authorized by law to be recorded, is deposited in the office of the county clerk, as ex-officio recorder, for record, accompanied by the required fee, he must indorse upon the same at the time it was received, noting the year, month, day, hour and minute of its reception, and must record the same without delay, together with the acknowledgment, proofs, and plats, surveys, schedule, and other papers thereto annexed, in the order and as of the time when the same was received for record, and must note at the foot of the record the exact time of its reception. The county clerk shall not receive for recording, any deed, mortgage, or assignment of mortgage unless the post office address of the grantee, mortgagee or assignee of the mortgages, as the case may be, is contained therein, provided that this requirement shall not affect the validity of the record of any instrument which has been or may be recorded."

Our Supreme Court has never passed upon the question you present, and there is but scant authority on the topic available from other jurisdictions.

The Supreme Court of Iowa—in the case of *Weyrauch v. Johnson*, (1926) 208 N. W. 706, 708—did make this statement:

"We may observe that the county recorder is largely a ministerial offi-

Opinion No. 224.

Records and Recording—County Clerk and Recorder—Clerk and Recorder Copy, Defined.

Held: 1. Alteration or change of an instrument after recording creates a new instrument which must be recorded by the clerk and recorder as set out in Section 4805, Revised Codes of Montana, 1935.

2. The county clerk and recorder is a ministerial officer and it is not his province to pass upon the legality of instruments presented to him for recording.

3. To record or correctly copy, the county clerk must make for his records an exact duplication of any instrument deposited with him for recording and entitled to record under our laws.

cer. It is a matter of common knowledge that many instruments that are technically defective are recorded, and the record of such instruments may be insufficient to impart constructive notice. There seems to be no provision in the statute which clothes the county recorder with the judicial power to determine the legal validity and effect of every instrument tendered to him for record, or the effect of such recording. He cannot arbitrarily refuse to record instruments which are in proper form and eligible to record, under our recording acts, where a reasonable request for recording is made and the fee is duly tendered."

The Appellate Division of the Supreme Court of New York asserted in the case of *People v. Fromme*, (1898) 54 N. Y. S. 833, 834:

"... The duty of the register is to record or file in his office those instruments or papers which, by the laws of the state, are entitled to be recorded or filed. Whether, in the making or execution of such instruments, the parties thereto have made a valid instrument or not, is not his province to determine..."

In 1928 the question was presented to Attorney General Foot whether a county clerk could question his duty to accept a chattel mortgage which had been irregularly executed. The Attorney General ruled it is not the province of the county clerk to pass upon the legality of mortgages presented to him for filing. See Volume 21, Report and Official Opinions of the Attorney General, page 282.

You also inquire whether—if the clerk must again record the instrument which has been previously recorded—he must show the endorsement of the previous recording as a part of the new record.

Section 4796, Revised Codes of Montana, 1935, relates to what is to be recorded by the clerk and provides in part:

"He must, upon payment of his fees for the same, record or correctly copy..."

Webster defines the verb "copy" to mean: "to duplicate; reproduce; transcribe." (Webster's New International

Dictionary, Second Edition, 1941.) Our court has had occasion to consider the word "copy" used as a noun; and has said "a 'copy' must ordinarily be a transcription or exact duplication of the original." (In re *Kostohris' Estate*, (1933) 96 Mont. 226, 29 Pac. (2d) 829.)

The Supreme Court of Idaho has declared the meaning of the verb "record" in this language:

"To record an instrument means to transcribe it, repeat it, or recite it in a book of record kept for the purpose of perpetuating the terms and recitals contained in the instrument or document so recorded..." (Lincoln County v. Twin Falls North Side Land and Water Company, (1913) 23 Idaho 433, 139 Pac. 788.)

Recording laws are designed to give publicity to certain facts, to provide notice to the public of certain acts and transactions (53 C. J. 606-607). It is, therefore, reasonable and proper interpretation of the words used by our legislative assembly in Section 4796, supra, to say the clerk must make for his records an exact duplication of any instrument deposited with him for recording and entitled to record under our laws. Thus, he must show the endorsement of a previous recording when an instrument entitled to record is presented to him for recording a second time.

In the problem which you present it would appear a new instrument has been created if actual alteration has been made of the previously recorded instrument. Hence, the provisions of Section 6893, Revised Codes of Montana, 1935, would have to be obeyed before recording could be effected.

It is my opinion:

1. Alteration or change of an instrument after recording in effect creates a new instrument which—if an instrument entitled to record under our laws and if acknowledged in accordance with Section 6893, Revised Codes of Montana, 1935—must be recorded by the clerk and recorder as set out in Section 4805, Revised Codes of Montana, 1935.

2. The county clerk and recorder is a ministerial officer and it is not his province to pass upon the legality of instruments presented to him for re-

ording, so long as the requirements of the statutes relating to his function are met.

3. To record or correctly copy, as required by Section 4796, Revised Codes of Montana, 1935, the county clerk must make for his records an exact duplication of any instrument deposited with him for recording and entitled to record under our laws, including endorsements of previous recordings, if any.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General