

*Richard  
Carter*

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## ARIZONA ATTORNEY GENERAL

August 14, 1953  
Opinion No. 53-155

**TO:** The Honorable Barry DeRose  
Gila County Attorney  
Gila County Court House  
Globe, Arizona

**RE:** Recording unacknowledged  
instruments.

**QUESTION:** Is it the duty of a county recorder  
to record instruments that law  
requires to be acknowledged when  
presented to him without being  
proved or acknowledged?

The duty to record imposed upon county recorders by law is set forth in Section 17-801, A.C.A. 1939, as amended, which states in part:

"17-801. Recording of instruments and keeping records.--\* \* \* He shall record separately, in typewriting, in a fair and legible hand, or by use of photostatic or photographic machines, such instruments or writings as are by law required or permitted to be recorded. \* \* \*" (Emphasis supplied) ✓

The extent and definition of the recorder's duty in this regard must necessarily be found in other applicable laws, which authorize or permit instruments or writings to be recorded.

All instruments affecting real property to be valid against subsequent purchasers without notice must be recorded, as stated in Section 71-414, A.C.A. 1939:

"71-414. Invalid against bona fide purchasers unless recorded.--No instrument affecting real property is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded in the office of the recorder of the county in which the same lies, as provided by law." ✓

and the instrument is not lawfully recorded unless it has been acknowledged, in accordance with Section 71-415, A.C.A. 1939:

"71-415. Acknowledgment necessary for recording.--  
Such instrument shall not be deemed lawfully re-  
corded unless it has been previously acknowledged  
in the manner hereinafter prescribed."

to the same effect are Sections 71-423, A.C.A. 1939, and 71-426,  
A.C.A. 1939, as amended, which require an acknowledgment of the  
enumerated instruments before the recording shall give the protec-  
tion provided by the statutes, which read in part as follows:

"71-423. Unrecorded instruments void as  
against purchasers and creditors.--All  
bargains, sales and other conveyances  
whatever, of any lands, tenements and  
hereditaments, whether they may be made  
for passing any estate of freehold or  
inheritance or for a term of years; and  
deeds of settlement upon marriage, whether  
land, money or other personal thing, and  
all deeds of trust and mortgages whatsoever,  
which shall hereafter be made and executed,  
shall be void as to all creditors and sub-  
sequent purchasers for valuable consideration  
without notice, unless they are acknowledged  
and filed with the recorder to be recorded,  
as required by law, or where record is not  
required, deposited and filed with the  
recorder; \* \* \*" (Emphasis supplied)

"71-426. Recording constitutes constructive  
notice--Mortgages.--The record of any grant,  
deed or instrument of writing authorized or  
required to be recorded, which has been duly  
acknowledged and recorded in the proper county,  
shall be taken and held as notice to all per-  
sons of the existence of such grant, deed or  
instrument; \* \* \*" (Emphasis supplied)

The above statutes are all found under the title "Deeds and Convey-  
ances".

Other sections of the Code authorize instruments or writings  
to be filed or recorded without referring in terms to their being  
proved or acknowledged. In the case of NATIONAL CASH REGISTER CO.  
v. BRADBURY, 12 Ariz. 99, 95 P. 180, an instrument authorized and  
permitted to be recorded by statutes not requiring acknowledgment  
was presented for recording. It was held that the county recorder  
could not refuse to record the instrument because the signatures  
were not acknowledged. The court said, l.c. 181:

"We do not construe the provisions of our statutes which we have quoted above (same as set out, supra) as found under the title 'Conveyances,' as excluding from record all documents unless they be acknowledged. Whatever may be the rule with respect to chattel mortgages, or the requirements to be observed as to them, a document in terms a conditional sale, such as the instrument in question, is we think clearly entitled to be filed and recorded in the manner provided by said paragraph, when subscribed by the parties thereto, although the instrument be not acknowledged by them. We do not think the provisions found in the statutes relating to conveyances, though otherwise perhaps broad enough in their terms, are to be construed as authorizing the recorder to refuse for filing and record instruments such as agreements for conditional sales, mechanics' liens, and other similar instruments, where the statutes relating thereto provide for such filing and record, but do not require such documents to be acknowledged. Furthermore, in the chapter of our Code relating to the duties of the recorder, we find specific authority for the recording of such instruments, as follows: 'He (the recorder) must upon the payment of the fees for the same, record separately in large and well bound separate books. \* \* \* (13) Such other writings as are by law required or permitted to be recorded.' Rev. St. 1901, par. 1135. \* \* \*' (Parenthetical material and emphasis supplied)

It would appear, therefore, and it is the opinion of this office that when the law authorizing and permitting an instrument to be recorded also requires the instrument to be acknowledged, the recorder may refuse to accept it for recording. If, however, the law does not require the writing or instrument to be acknowledged, but authorizes filing or recording, then the recorder would be subject to the liability of Section 17-813, A.C.A. 1939, if he refused to accept the instrument, said section reads in part:

"17-813. Liability for neglect or misfeasance.---  
If any recorder to whom an instrument, proved or acknowledged according to law, or any paper or notice which may by law be recorded, is delivered for record, neglects or refuses to perform the duties required of him by the law relating to the

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recording or filing of instruments and papers;  
\* \* \* he is liable to the party aggrieved for  
three (3) times the amount of the damages which  
may be occasioned by such neglect or refusal, or  
by such incompleteness or defect in the searches  
and certificate." (Emphasis supplied)

It would appear that the above stated rule is what is meant  
by the phrase "an instrument; proved or acknowledged according to  
law, or any paper or notice which may by law be recorded," in the  
above statute.

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