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RELEASE OF ASSIGNED LIENS

LEO CARLIN*

A proper execution of a release of a lien upon reality may be as important to the debtor and those who claim under him as the creation of a lien is to a creditor, or as the execution of a deed of conveyance is to a grantee. Yet, the writer is led by observation to believe, there prevails in practice a laxity in conforming to the requirements of the law governing the execution of releases that would not be tolerated in the execution of a mortgage, a deed of trust, or a conveyance of reality. Perhaps the attitude encouraging such a laxity may be attributed to a psychology arising from a combination of circumstances.

The general circumstances surrounding the execution of a release tend to encourage an assumption that the process is a very simple matter and of minor importance. The statute1 prescribes a form for each variety of release. These forms are preeminently (possibly inadequately) simple and abbreviated in their phraseology, dispensing with formality and detail to the very minimum. Each clerk's office contains a variety of printed forms the use of which, by merely filling blanks, serves to lend a mechanical atmosphere to the process. When the lien has not been assigned, the execution of a release is, in substance, a brief matter involving no complications. In the case of assigned liens, the requirements of the statutes and the requisites of the prescribed forms, as will be emphasized later, seem always to have been designed with a consciousness only of the simplest situation — where there has been only one assignment of the lien — thus failing to suggest the latent difficulties of the task under circumstances that require amplification of the forms. Yet, notwithstanding implications to the contrary, perhaps few matters involving property rights have caused as much trouble to the legislature, in its attempts to deal with the conflicting and apparently irreconcilable demands of the situation, and as much annoyance and perplexity to the careful practitioner who insists upon adequate compliance with the law, as the problems of devising and following an adequate procedure

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1 W. VA. REV. CODE (1931) c. 38, art. 12, § 4.
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for executing a release of an assigned lien. The difficulty in finding an adequate solution of the legislative problem is plainly implied from the varied policies of the successive statutes which have dealt with the subject.

It is the object of this discussion to call attention to some of the difficulties involved and the reasons for their existence, rather than to suggest a remedy. This will call for a brief analysis of some of the general principles applicable; a historical review of the statutes; consideration of a few of the decisions which have supplemented the operative effect of the statutes; and, finally, an attempt to interpret the effect of the provisions in the latest statute, enacted as part of the Revised Code.

The difficulties involved in the functioning of a lien have resulted principally from the fact that two different rights are always involved — (1) the debt and (2) the lien which secures the debt — with the resulting misfortune that the incidents involved in the exercise of these rights, respectively, although largely independent and to a great extent contradictory in their operational effect, are called upon to operate in harmony. An assignment of the debt and an assignment of the lien, as separate entities, are subject to different formalities. Upon the whole, the debt may be looked upon as a thing endowed with much greater agility than the lien which secures it. Commercial transactions demand that it shall have such a quality. The debt itself is not trammeled by any requirements of the recording statutes; but the whole efficacy of the lien may depend upon some sort of recordation. While the efficacy of the debt is generally something wholly independent of the lien, and the debt, simply as a debt, in its commercial peregrinations, may wander independently of the lien without losing its virtues; yet the lien, in order to serve its purpose, should in some way keep pace with the debt, an activity to which, from its nature, it is ill adapted. The problem with which the legislature has been confronted is to satisfy the demands of recordation required by the lien and, at the same time, not to interfere with the mobility of the debt.

A few principles have been recognized as fundamental and have not varied in the course of legislative experiment with the statutes. It seems always to have been assumed that the ultimate assignee of the lien, because he is the owner, is the proper person
to execute a release. Hence he has always been required to execute it, although the mechanics designed for the purpose of insuring its efficacy have varied, and, at different times, have been concerned with different functions. The difficulty which has caused vacillation in the statutes has been, not to determine who is the proper person to execute the release, but to devise a practicable means by which it will appear on the record that the person assuming the authority is entitled to do so to the exclusion of others; or else to devise some other means by which possible claimants of the lien will be precluded from questioning the releasing assignee's authority. It will be observed that one or both of two different methods have at various times been resorted to in the statutes for the purpose of accomplishing one or the other of these objects: (1) an assignment of the lien has been required to be recorded with the assignee's release; or (2) the assignor has been required to join in the release.

Another principle which has been recognized by the decisions and uniformly applied is that a lien may be assigned by either one of two different methods: (1) by an express assignment of the lien itself; or (2) by operation of law through assignment of the debt which the lien secures. No small measure of the mischief growing out of the lien-debt association arises from situations due to the informal methods by which debts are normally assigned.

The original statute, continuing without change from the Code of 1868 until 1917, provided for execution of a release of an assigned lien by the assignee thereof and recordation of the assignment with the release.


In Meyers v. Washington Heights Land Co., 107 W. Va. 632, 149 S. E. 819 (1929), there are statements from which it may be inferred that a release may be validly executed by an assignor on verbal authorization by the assignee.

"Where the assignor of notes secured by a vendor's lien executes a release of such lien and undertakes to justify the said release on the ground that the assignee gave verbal authority to the assignor to make such release, the proof to sustain such alleged authority must be clear and convincing."

3 Tingle v. Fisher, 20 W. Va. 497 (1882); Citizens National Bank of Connellsville v. Harrison-Doddridge Coal & Coke Co., 89 W. Va. 659, 109 S. E. 892 (1921). This principle has been recognized to the extent of holding that one entitled to subrogation through payment of the debt is entitled to the lien as assignee by operation of law. Huggins v. Fitzpatrick, 102 W. Va. 224, 135 S. E. 19 (1926).

4 C. 76, § 2.
"Every assignment of such a lien must be acknowledged by the assignor in the same manner as a release of a lien is acknowledged; and when such lien is released by the assignee thereof, such assignment must be recorded with the release."

Forms were prescribed for execution of an assignee’s release. No provision was made for joinder by the assignor in the release.

Superficially, this would seem to be a very simple statute and compliance with its terms would seem to be easy. In fact, such is true with reference to the simplest case that may come within its scope. If there has been only one assignment, which is an express assignment of the lien itself and not a mere assignment of the debt, and the debt is evidenced only by the lien instrument, no complications or difficulties could arise. The assignment is merely recorded with the release and that is the end of the matter. But the problem is not always so simple. Beyond this simple situation, circumstances may be involved which not only complicate the mechanical processes of executing the release, but may impose conditions extraneous to the release and its record in order that reliance may be placed on the release.

It is conceivable that recordation of the assignment may be required for two different purposes, not altogether easy to distinguish: (1) merely to show authority in the assignee to execute the release at the time when it is executed; or (2) to preclude some other person from executing a valid release (for example, the original lienor or a prior assignee) or taking a subsequent valid assignment of the lien. If the object of requiring the assignment to be recorded is merely to show authority in the assignee to execute the release, it will be sufficient if the assignment is recorded at the time when the release is recorded; but if the object of the recordation is to protect the assignee against the contingencies mentioned above, recordation may be delayed only at the risk of the assignee. All indications seem to lead to the conclusion that the object of the statute quoted was to require recordation of the assignment merely for the purpose of showing authority in the assignee to execute the release."

6 The assignment was required to be recorded "with the release". If it is not recorded until the release is recorded, it could perform no function of giving notice to creditors or purchasers prior to the execution of the release.

In 1917, as will be noted later, the legislature substituted for the statute quoted a provision requiring the assignor to join in the assignee’s release, with no requirement for recordation of the assignment. It is reasonable to
However, there were then, and always have been, instances where, under other statutes, the assignee, in order to protect himself against subsequent purchasers for value without notice, must record his assignment. If the lien assigned is a mortgage or a deed of trust covering realty, and the assignment results from an express assignment of the lien itself and not merely by implication of law from assignment of the debt, in order to be protected, the assignee must record his assignment, because the assignment is considered to be a conveyance of an estate in realty, and, as such, is required to be recorded by the statutes requiring recordation of such conveyances. However, whatever the present status of the law may be, if such a lien were assigned merely by implication of law through assignment of the debt, no recordation would be required under either of the statutes mentioned above, because the mere assignment of the debt, although it operates as an assignment of the lien, would not be recordable.

Under the statute quoted, persons relying upon a release would be protected against assignee claimants of the lien in different ways, depending upon the person, the nature of the lien, and the status of the debt as disclosed by the lien instrument. It follows from what has been said in the preceding paragraph that, if the lien is a mortgage or a deed of trust, a purchaser of the property for value without notice will be protected against a prior express assignment of the lien unless the assignment has been recorded, and therefore may rely upon a release executed by the assignor of the lien. Likewise, a purchaser of such a lien for value without notice will be protected against a prior unrecorded express assignment. If the lien instrument mentions no written evidence of the debt (for example, a promissory note or a bond) which may be the subject of negotiation or assignment, a purchaser of the property, unless having notice to the contrary, may assume that there has been no assignment of the debt and that the original

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assume that the new provision was intended to serve the same purpose as the old, which could not have been to give notice to creditors or purchasers, because under the later provision there would have been nothing on the record to indicate the existence of an assignment until recordation of the release.

When the legislature deemed it advisable to give notice of the assignment to creditors and purchasers, it was considered necessary to enact the elaborate statutes of 1821, hereinafter quoted, for the purpose.


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lienor had authority to execute a release.\textsuperscript{10} Apparently, the hazards which the assignee of the debt assumes in such cases must seek justification in the fact that, when he takes an assignment of a debt so secured, he must understand that he is assuming the risk of being deprived of his lien by a release executed by the original lienor; the law permitting the purchaser of the property to indulge in his assumption because he has no practicable means for determining whether the debt has been assigned, or, if so, to whom.\textsuperscript{11} However, if the lien instrument mentions extraneous written evidence of the debt, a purchaser of the property is not permitted to assume that the debt has not been assigned, because he can demand inspection of the evidence of the debt (for example, the bond or the note) and thus determine who had title to the debt and whether it has been discharged.\textsuperscript{12} In such cases, the assignee of the debt, in the absence of conduct on his part amounting to an estoppel, will be protected against release of the lien by merely holding the evidence of the debt.

The debtor (owner of the property) is in a situation somewhat different from that of a purchaser of the property. If the debt is evidenced by a promissory note or a bond, he, having been a party to the original lien transaction, is aware of the fact, whether or not the bond or note is mentioned in the lien instrument. Wherefore, in such a case, regardless of the fact that the lien instrument is silent as to the existence of the bond or note, the debtor should not be permitted to assume that there has been no assignment of the debt; but, as a condition to relying upon a release executed by the original lienor, should be required to demand inspection of the evidence of the debt in order to determine its status. However, if the lien instrument is the only evidence of the debt, the debtor is in no better position than a purchaser of the property to determine whether the debt has been assigned, and, like a purchaser, in the absence of notice to the contrary, should be permitted to assume that there has been no assignment, and so to rely upon a release executed by the original lienor without any inquiry as to assignments of the debt.

It would seem that enough has been said in the preceding paragraphs to discourage indulgence in the time-honored and savory ceremony of burning the mortgage notes when the mortgage

\textsuperscript{10} Ibid.
\textsuperscript{11} Ibid.
\textsuperscript{12} Ibid.
has been discharged and the notes have been surrendered. Although the notes are not recordable, it may be advisable for the debtor to preserve them in order to satisfy a prospective purchaser of the property, who knows that circumstances extraneous to the record of a release may affect its validity, that the releasor had authority to execute the release.

An explanation of the reasons why an assignment of a lien may be required to be recorded would seem to answer any question as to what assignments require recordation. Of course, no problem can arise when there has been only one assignment; but if there has been a series of assignments, it is necessary to determine whether all the assignments, or, if less than all, what ones require recordation. The proper answer to this question would seem to be so obvious that an attempt to justify it would seem superfluous, if it were not for the fact that there seems to be a tendency, possibly due partly to the language of the statute and the prescribed forms and partly to rebellion against inconvenience, to abridge the requirements of recordation. The tendency is manifested by way of a temptation to assume that recordation of only one of the assignments in a series is necessary, either the first assignment made by the original lienor (possibly by analogy to canceling the intermediate endorsements on a negotiable instrument) or the last assignment under which the releasing assignee immediately claims title (in the latter instance, possibly because that is the assignment in which the releasor is named as assignee). To attempt to justify any curtailment of recordation on either one of these considerations would be to ignore the manifest purpose for which any recordation at all is required by the statute; that is, to show authority in the assignee to execute the release, which must require recordation of all the assignments.

The statute and the prescribed forms are not very specific in their definition of assignors and assignees. In fact, it might be surmised that the draftsman was not wholly conscious of the complications of his task. It may be suspected that, in framing the statute and the forms, he made no attempt to cover any but the simplest situation — where there has been only one assignment of the lien. However, it can be argued that the statute itself, by using the words “every assignment”, requires recordation of all the assignments in a series, although, without entering into a detailed analysis of other language in the statute and in the forms, it can be asserted that, if such was the intent, it could have been
made more specific without much effort. Upon the whole, it would seem that the legislative intent can be ascertained much more reliably by reference to the policy which requires any assignment at all to be recorded.

It has already been suggested that the object in requiring an assignment to be recorded under this statute is to show authority in the assignee to execute the release. If there have been several assignments, so that the releasing assignee is not the immediate assignee claiming directly from the original lienor, it is difficult to understand how this object could be accomplished except by recollection of all the successive assignments in the assignee's chain of title. Recollection of only the first assignment would have a contrary effect — to show that the first assignee, and not the releasing assignee, had title to the lien. Recollection of only the last assignment would, in effect, accomplish no more than if the release were recorded without recollection of any assignment at all. In such a situation, the releasor would be guilty of the absurdity of recording an assignment to show that he had authority to execute the release, when, in fact, there would be nothing on the record to show that the assignor had authority to execute the assignment. Hence, however uncomfortable the situation may be when a multitude of assignments is involved, it would seem necessary to conclude that, in order to accomplish the object of the statute, it is essential to record all assignments necessary to show title to the lien in the releasing assignee, in order to show his authority to execute the release.

After the necessity of recording assignments has been determined, more troublesome problems remain — to determine how, under various circumstances, the necessities of recollection may be satisfied. The necessities may be simple or complicated, depending upon the circumstances.

As has already been noted,18 if there has been no express assignment of the lien of which a purchaser who would rely upon execution of a release has actual or constructive notice, and the lien instrument does not mention any extraneous evidence of the debt, the purchaser may assume that the original lienor had authority to execute a release, in spite of the fact that the debt may have been assigned. In such a case, any assignment of the lien is simply inoperative and there is no question concerning its recollection. If

18 See note 10 supra.
the lien has been assigned, and all the assignments are express assignments of the lien itself, the requirements of recordation will be satisfied simply by recording the assignments with the ultimate assignee’s release. The recordation involves no mechanical impediments; merely the inconvenience of recording possibly numerous assignments. But if the lien has been assigned merely by operation of law, through assignment of the debt, there is no assignment which may be the subject of recordation. As has already been noted, at the time when the statute now under discussion was in force, the assignment of a mere debt or chose in action was not recordable. Moreover, even if it were recordable, it usually would not be in such a form as to be recordable, as when a promissory note is negotiated or assigned by endorsement. However, if the debtor recognized a person as assignee of the debt, it would seem that he must also recognize him as assignee of the lien, and so must rely upon him as the proper person to execute the release. In such a situation, there would seem to be no recourse for satisfaction of the statute requiring an assignment of the lien to be recorded with the assignee’s release, except to require the assignor of the debt to execute further a formal assignment of the lien for purposes of recordation; and it would seem necessary to resort to such a device in each instance where, in a series of assignments, the lien is assigned merely by assignment of the debt.

In 1917, the statute requiring an assignment of a lien to be recorded with a release executed by the assignee was superseded by the following provision.

“If any such lien shall have been assigned, when the same is released, the assignee thereof shall unite with the assignor in the release.”

No provision was made for recording an assignment of the lien, although the forms prescribed for the execution of releases contained phraseology for the purpose of reciting the fact of the assignment, when the release was executed by an assignee, as under the former statute. Whether this phraseology was purposely retained in the forms in order to provide some sort of substitute for the recorded assignment formerly required by the statute, or whether it survived because of inadvertence, is left to surmise.

14 See note 9 supra.
15 As will be noted later, the rule was different under W. Va. Acts 1921, c. 61, which was repealed in 1923, and is now different under the Revised Code.
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However, since it does not within itself purport to constitute an assignment, but merely to recite the fact that an assignment has already been made, it may be surmised that the assignor was required to join in the release, not for the purpose of then executing any informal assignment of the lien and thus showing authority in the assignee to execute the release, but in order that he might be estopped if he afterward undertook to assert any interest in the lien. Here, again, the statute and the forms seem to have been drafted with the possibility of only a single assignment in mind. This fact, coupled with the inconvenience of seeking numerous assignors for the purpose of having them join in the release, may offer a temptation, as under the former statute, to ignore assignments; but the object to be accomplished by the joinder of assignors in the release would seem to require all of them to join in the release.

One of the reasons why this statute was substituted for the former one was perhaps to dispense with the recordation of assignments. It should be noted, however, that there were still instances where, if an express assignment of the lien itself had been executed, recordation of the assignment was necessary for protection of the assignee against subsequent purchasers for value without notice. As heretofore stated, an express assignment of a mortgage or a deed of trust has been adjudicated to be a conveyance of an estate in realty, and, as such, comes within the operation of the general recording statutes.

The statute last quoted continued in operation only four years. In 1921, it was superseded by the two enactments quoted below. The first was enacted as an additional section to chapter 74 of the Code, dealing with acts void as to creditors.

"Any assignment of a judgment lien or vendor's lien, or note secured by a vendor's lien retained in the deed of conveyance or by (sic) a note secured by a deed of trust or mortgage on land or chattels shall be void as to creditors and subsequent purchasers of such land or chattels for a valuable consideration without notice until and except from the time such assignment is duly admitted to record in the county wherein the property effected (sic) by any such lien so assigned is situate.

"All such assignments before being admitted to record must be acknowledged by the assignor in the same manner as a release of a lien is acknowledged and the clerk of the county

27 See notes 7 and 8 supra.
court shall record all such assignments admitted to record in his office in a book kept for that purpose and to be known as the "Book of Assignments" and index the same in the name of all the parties, and he shall also note the fact of the assignment on the margin of the record of such judgment lien, deed or deed of trust or mortgage, with a reference to the book of assignments and page where the assignment is recorded; Provided, however, the pledging of any such judgment or note, mentioned herein, as collateral security for a debt or loan shall not be held or treated as an assignment thereof until the same is actually sold or transferred in payment of the pledge for which it was given as surety.”

The second enactment was an amendment of section 2, chapter 76, of the Code, dealing with the release of liens. All but the last paragraph of the section was a reenactment, without change, of the statutory forms prescribed in prior statutes. The last paragraph, which follows, stood as a substitute for the provision enacted in 1917 requiring the assignor to join in a release executed by an assignee.

"Every assignment of any such lien must be acknowledged by the assignor, before it can be recorded, in the same manner as a release of the lien is acknowledged."

The enactment of these sections resulted in a return to the original method of executing releases of assigned liens. The assignment was again required to be recorded, and the assignee was no longer required to join in the release. It is significant, however, that, in lieu of requiring the assignment to be recorded "with the release", as did the former statute, these statutes required it to be recorded in an independent record, the Book of Assignments. Obviously, recordation of the assignment was now required, not merely to show authority in the assignee to execute the release (although it would serve that purpose), but primarily to give notice to creditors and subsequent purchasers of the property. The general purpose actuating the change in policy, with reference to the liens and debts coming within the operation of the statutes, seems to have been to compel the assignee to resort to a recordation that would permit a creditor or a purchaser to consult the records alone for the purpose of determining the status of the lien. The shift, it will be observed, was away from the policy of prior statutes, which may perhaps be considered as giving preponderant weight

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19 Id. at c. 62.
to the functioning of the debt as a mere chose in action, to a policy which was primarily concerned with the functioning of the lien. The object intended to be accomplished was wholly meritorious, if practicable; but compliance with the statutes would have involved difficulties which the draftsman possibly did not contemplate.

The terms of these statutes as printed in the official acts, particularly the terms of the first paragraph of the longer section quoted, are not clear; but it seems to have been the intent to require recordation, not only of express assignments of the liens enumerated therein, but also of any assignment of a note secured by a vendor’s lien, mortgage, or deed of trust. The statutes do not purport to cover assignments of a bond, or of any other writing, not a note, evidencing a debt; nor do they cover assignments of debts not evidenced by a writing; but as to a note secured by a vendor’s lien, mortgage, or deed of trust, the former rule that a mere assignment of a debt or a chose in action is not recordable seems to have been reversed.

Under these statutes, an assignee taking title by express assignment of a judgment lien, vendor’s lien, mortgage, or deed of trust, could not safely defer recordation of the assignment until recordation of his release; and he was under the same compulsion as to recordation of an assignment of a note secured by a vendor’s lien, mortgage, or deed of trust, although there had been no express assignment of the lien, in spite of the fact that, as heretofore noted, the assignment of the note would not ordinarily be in such a form as to be recordable.

The longer section quoted continued in operation only two years, when it was repealed. It is said that it was found to be impracticable in its operation, because it interfered too radically with the negotiation of promissory notes and with banking activities. One may hazard a query as to whether those in the commercial world who objected to the operation of this statute are aware that, in spite of its repeal, there are still instances where its effect is partly duplicated by other statutes now in force. It may not be realized that, if there has been an express assignment of a mortgage or a deed of trust, it is still necessary, under the general

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20 Apparently, the word “of” should be substituted for the word “by” secondly occurring near the beginning of the first paragraph; and the word “affected” should be substituted for the word “effected” near the end of the paragraph.
21 See note 9 supra.
recording statutes, to record the assignment in order to protect the assignee against subsequent purchasers for value without notice.\footnote{23}{See notes 7 and 8 supra.} A further query may be offered as to whether, in such cases, it might be more advantageous for the assignee of such a lien to take his assignment by operation of law through assignment of the debt, which does not require recordation, (unless possibly under provisions of the Revised Code to be noted later), rather than to take an express assignment.

While the longer section quoted above was repealed, it should be noted that its companion section was permitted to stand, providing that

"Every assignment of any such lien must be acknowledged by the assignor, before it can be recorded, in the same manner as a release of the lien is acknowledged."\footnote{24}{Note 19 supra.}

Although recordation of the assignment is not expressly required by this provision, as it was in the original statute first quoted herein,\footnote{25}{Note 5 supra.} it is plainly contemplated. Moreover, if recordation is not required by implication, there would have been nothing to take the place of the former statute\footnote{26}{Note 16 supra.} which, in lieu of requiring recordation of the assignment, required the assignor to join in the release. It may be safely assumed that, after the repeal, recordation of the assignment was no longer required for the purpose of giving notice to creditors and purchasers (except under the general recording statutes as relating to mortgages and deeds of trust), but still was contemplated for the purpose of showing authority in the assignee to execute the release.

Between 1923 and the adoption of the Revised Code, the situation was controlled by the provision last quoted. In 1931, this provision was superseded by the following provision adopted in the Revised Code.

"When such lien is released by the assignee thereof, the assignment thereof, whether of the lien or of the debt secured thereby, must be acknowledged in the same manner as the release, and recorded with the release; \emph{Provided}, That if any such lien, or the debt secured thereby, shall have been assigned, the same may always be released by the assignee who receives satisfaction thereof, upon the assignor joining therein, without the recordation of the assignment as aforesaid."\footnote{27}{W. VA. REV. CODE (1931) c. 38, art. 12, § 4.}
Very plainly, this statute intends to prescribe recordation of the assignment merely for the purpose of showing authority in the assignee to execute the release. In this respect, it is subject to all the observations heretofore applied to the original statute first quoted herein.\(^{26}\) That such is the intent is further indicated by the fact that joinder of the assignor in the release is an alternative to recordation of the assignment. Joinder of the assignor in the release could not be a substitute for recordation of the assignment for the purpose of affecting the rights of intervening creditors or purchasers, because the fact that there had been an assignment would not appear of record from the joinder until recordation of the release. It should be observed, however, that there is nothing in the present statute that would abrogate the effect, hereinbefore noted, of the general recording statutes as requiring express assignments of mortgages and deeds of trust to be recorded, as constituting conveyances of estates in land.

Resort to the first alternative under the present statute—recordation of the assignment—is subject to all the mechanical difficulties heretofore noted as involved in compliance with the original statute providing for recordation of the assignment; particularly, those involved when there has been only an assignment of the debt, and the lien is assigned merely by operation of law. Here, again, the draftsman, in framing the provisions of the statute and the forms, seems to have been concerned only with the simple situation where there has been but one assignment of the lien. However, for reasons hereinbefore stated, it would seem that recordation of all the assignments involved in the releasor's chain of title would be necessary in order to accomplish the purpose intended.

It will be observed that operation of the present statute is complicated by an innovation which, although in the section repealed in 1923, was not in the original statute. Not only an express assignment of the lien itself, but also an assignment of the debt, are made recordable. If an assignment of the debt should be in such a form as not practicably to be recordable, as usually would be the case in normal commercial transactions, it would seem to be necessary, in order to record an assignment, to execute and acknowledge an additional formal assignment of the debt; or, as a substitute therefor, to execute a formal assignment of the lien.

\(^{26}\) Note 5 supra.
A more serious problem may arise from the fact that the statute makes an assignment of the debt, in lieu of an express assignment of the lien, recordable at all. It will be recalled that, under prior statutes, except for a brief period under the section which was repealed in 1923, an assignment of a debt was not recordable. It was for this very reason that an assignee of a secured debt, where practicable, was protected in his lien rights without any recordation; while, if he had an assignment of the lien itself, which is recordable when it amounts to a conveyance of an interest in reality, he must record it in order to protect his rights. Is there now room for argument that, since the statute makes an assignment of a lien debt recordable, there is the same necessity for recording an assignment of the debt, when the lien is of such a nature (for example, a mortgage or a deed of trust) that an express assignment of it would be a conveyance of an interest in reality, that there is for recording an express assignment of the lien? If so, in such cases, the present statute is subject to the same objections that caused the repeal in 1923 of the section enacted in 1921. It will be observed that the present statute applies to any debt, whether or not evidenced by a writing. The section repealed in 1923, although it required recordation of express assignments of four different classes of liens, required recordation of an assignment of a debt only when it was evidenced by a promissory note.

The provision containing the second alternative in the present statute — joinder by the assignor in the assignee's release — is indefinite in its terms. Part of the phraseology would indicate that the draftsman was attempting to construct the statute with only the possibility of a single assignment in mind. Other language would indicate the contrary. For instance, the former statute, of which the present provision is an amplification, speaks merely of "the assignee" as the person to release the lien, while the present provision speaks of "the assignee who receives satisfaction thereof," the qualifying words, "who receives satisfaction thereof," possibly being used to differentiate the releasing assignee from other assignees who may have come before him.

The indefinite terms of this provision present opportunities for those who may seek to limit the number of assignors required

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29 Note 18 supra.
30 See note 9 supra.
32 Note 5 supra.
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to join in the release. Of course, no question arises when there has been only one assignment of the lien; but if there have been more assignments than one, there is a tendency to assume that only the first assignor, who is the original lienor, is required to join. The assumption may be based on different considerations. The first assignor is perhaps the only one who appears on the record as the owner of the lien at the time when the release is executed. The statute specifically mentions only one assignor as required to join. Finally, there perhaps is a tendency to confuse assignors and assignees, since all intervening assignees are likewise assignors, the conclusion being that assignors who are also assignees are not required to join, because the statute requires only the assignee "who receives satisfaction" to execute the release. However, considering any possible object of the statute, other than to construct a deceptive record, it would seem necessary for all the assignors to join in the release. Whether the object of the joinder is to produce estoppels or to verify a chain of assignments evidenced by the release, there would seem to be nothing that would make joinder of any one assignor more important than joinder of another.

Although it would seem that the provisions of the present statute are subject to improvement, it may perhaps safely be said that no statute can be drafted which will regulate satisfactorily all the details of the situation. Regulations required for a proper functioning of the lien will be opposed to a proper functioning of the debt, and vice versa. The best that can be attempted is to seek a medium, although it may not be altogether happy, designed to permit as much recordability as possible for purposes of the lien, but at the same time not to encroach too much upon the mobility of the debt.

The draftsman of the present statute apparently could find no better solution than to permit a choice between the first two methods which have prevailed in the past. Perhaps it was considered that, while neither alternative was perfect, the disadvantages of each in a particular situation might to a certain extent be avoided by permitting resort to the other. The first alternative involves more complications and, normally, should be more inconvenient and costly; but, on the other hand, it conforms more closely to the features of recordation always desirable when matters affecting the title to realty are concerned. Perhaps the second alternative will in most instances be adequate, although less formal.
Any person who joins in a release certainly will thereafter be estopped from asserting an interest in the lien. In most instances, the debt is evidenced by some sort of writing in the nature of a promissory note or a bond, the title to which in an assignee is evidenced by an endorsement or endorsements. When the evidence of the debt is presented for surrender, it should be easy to determine the assignors of the debt and require their joinder in the release.

The discussion heretofore has been confined to situations where the release is executed by the party entitled to the lien; that is, the original lienor or an assignee claiming under him. It remains to consider briefly an instance where the lien may be released by a party to the lien transaction who is not the owner of the lien.

Although not authorized by statute until 1931, it has been an ordinary practice in this state to provide in a deed of trust that the trustee shall have power to execute a release of the lien. In fact, some such device would seem to be necessary when the beneficiaries, who would otherwise be required to execute the release, are numerous or difficult to determine, as when a deed of trust is executed to secure numerous bond holders. Also, it will be recognized, a resort to this practice will avoid the complications and difficulties incidental to the release of assigned liens when releases are executed by assignees. However, it will be well to remember that the advantages indicated will be obtained at the expense of extra hazards to be assumed by the lienor.

Until the enactment of the Revised Code, such a power in a trustee was purely contractual and could be exercised only when authorized by the deed of trust. Since the power was contractual, the parties to the deed of trust could prescribe the terms under which it must be exercised. However, if a release executed by the trustee covered all the elements of the deed of trust and was as broad in its scope as the terms under which it was required to be exercised, its validity could not be questioned as against a purchaser for value without notice who relied upon it, in spite of the fact that the debt may not have been discharged. By participation in selection of the trustee, and by clothing him with power to execute the release, the lienor, in effect, guaranteed his reliability. If the trustee abused the lienor’s confidence, the lienor, and
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not the innocent purchaser, was the one who had to suffer, because it was he who had made possible the trustee's dereliction.\(^3\)

In 1931 a section was adopted in the Revised Code\(^4\) which prescribes four instances where a release of a deed of trust may be executed by the trustee.

"(a) When the trust deed authorizes the trustee to release the same;
(b) When the trust deed creates a lien to secure debts to persons not named in the trust deed;
(c) When a trust deed creates a lien to secure more than five creditors, even though such creditors be named in the trust deed;
(d) When a trust deed creates a lien to secure notes or bonds or other instruments payable to bearer."

It will be observed that, under this section, the trustee, in the last three instances enumerated therein, derives his power to execute the release directly from the statute, and not from any contractual consent of the lienor or any other party to the trust deed, except to the extent that voluntary execution of the trust deed automatically calls the statute into operation. Hence it might be argued that, since in these three instances the lienor no longer has an option as to whether he will consent to power in the trustee to execute the release, he should no longer be required to assume the risk of the trustee's dereliction, regardless of the fact that he may still participate in selection of the trustee. However, any doubt that there might have been as to such a question seems to have been settled definitely against the lienor by the final paragraph of the section.

"A release executed by the trustee in any of the cases mentioned herein, and properly recorded, shall, as to purchasers for value without notice, be valid and binding, whether the debt secured by such lien had in fact been paid or discharged or not."

\(^3\) Bluefield National Bank v. Bernard, 109 W. Va. 459, 155 S. E. 306 (1930). Note the strong dissenting opinion of Judge Maxwell, in which he argues that, when a purchaser relies upon a release executed by the trustee, he should be under the same obligation to seek inspection of the surrendered evidence of the debt as in a case where a release is executed by the lienor.