

2965.

## APPROVAL, THREE GAME REFUGE LEASES.

COLUMBUS, OHIO, December 4, 1928.

HON. CHARLES V. TRUAX, *Director of Agriculture, Division of Fish and Game, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 28, 1928, in which you enclose the following leases, in duplicate, for my approval:

<i>No.</i>	<i>Lessor</i>	<i>Acres</i>
1175	The Ohio Oil Co., Wood County, Montgomery County.....	100
1176	The Y. M. C. A. of Medina County, Medina, Hinckley Township .....	62
1177	R. W. Gunn, Hardin County, Lynn Township.....	291.75

I have examined said leases, find them correct in form, and I am therefore returning the same with my approval endorsed thereon.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

2966.

LAND CONTRACTS—TORRENIZED LAND—NOT RECORDED BUT  
FILED UNDER TERMS OF SECTION 8572, GENERAL CODE.

## SYLLABUS:

*Although land contracts relating to land registered under the Land Registration Act are not instruments entitled to record, they are instruments which should be filed and registered under the provisions of Section 8572, General Code.*

COLUMBUS, OHIO, December 5, 1928.

HON. CHARLES B. COOK, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication asking my opinion on the question therein stated as follows:

“I am in receipt, today, of a letter from R. A. S., County Recorder, asking an opinion as to whether or not land contracts on torrenized land in this county should be received for record, and if so, where they should be indexed. I am enclosing herein a copy of Mr. S.’s letter to me, and would request an opinion from your office as to this matter.”

The question here presented is one with respect to the matter of recording contracts for the sale of real property, the title to which has been registered under the provisions of the Torrens Law so-called, Sections 8572-1, et seq., General Code.

So far as the general statutes relating to the record of written instruments affecting real property are concerned, I am unable to see how the question here presented is affected by the fact that the title to property sold on land contract has been registered under the provisions of said law. The sale of real property on a land contract has the effect of creating an equity in the vendee in such real property to the extent of the purchase money paid by the vendee under such contract. *Coggsall vs. The Marine Bank Co.*, 63 O. S. 88, *Bank vs. Logue, Trustee*, 89 O. S. 288.

Where an application is made for the registration of the title to real property in the name of the owner of the fee, against which property or any part thereof there is an outstanding contract of sale, it would be entirely proper, if the applicant for such registration has knowledge of such land contract, to set out the interest of the vendee under such contract or the fact thereof, in the application or petition for the registration of the title to such property.

This follows from Section 8572-8, General Code, which among other things, provides that the application or petition for the registration of title to the lands shall set out whether any person to the knowledge or information of the applicant, or as shown by the records, has or claims any estate or interest in the lands, buildings or improvements thereon, either in law or equity, apparent or real, in possession, remainder, reversion, expectancy or otherwise.

Further to this point, Section 8572-5, General Code, provides that if the estate of the person making application for registration "is subject to any outstanding lesser estate, including life estates, estates for years, conditional limitations, executory devises or uses, springing or shifting uses, or other future estate, interest or limitation whether vested or contingent, or any private easement or other estate or interest of any kind, or is subject to any mortgage, lien or charge, each and every of the same, except taxes not due and leases for less than three years, shall be noted on the certificate of title \* \* \*."

However, this is not the question here presented. From the facts stated in your communication it appears that the title to the lands in question have been registered in the name of the owner of the fee who now desires to sell such lands or a part thereof on land contracts, and the question is whether such land contracts are entitled to record.

In consideration of this question, contracts for the sale of lands, the title to which had been registered in the name of the owner, stand on the same footing as contracts for the sale of other lands.

Under the provisions of Section 8621, General Code, no action may be brought to charge any person upon a contract for the sale of lands, tenements, or hereditaments, or any interest in, or concerning the same, unless such contract is in writing and signed by the party to be charged therewith, or by some other person lawfully authorized. Such contract, however, is not required to be acknowledged or witnessed, nor are there any other formalities prescribed by law with respect to the execution of such contract other than those stated in the statute above noted.

Touching the question here presented it will be noted that Section 8510, together with Sections 8542 and 8543 are a part of Chapter I, Title VIII of the General Code, relating to the conveyance and encumbrance of real property.

Section 8510, General Code, provides how a deed, mortgage or lease of any estate or interest in real property shall be executed.

Section 8542, General Code, provides that mortgages executed according to the provisions of said chapter shall be recorded in the office of the recorder of the county in which the mortgaged premises are situated, and that they shall take

effect from the time they are delivered to the recorder of the proper county for record.

Section 8543, General Code, provides that:

"All other deeds and instruments of writing for the conveyance or incumbrance of lands, tenements, or hereditaments, executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the premises are situated. \* \* \*"

Section 2757, General Code, provides as follows:

"The recorder shall keep four separate sets of records, namely: First, a record of deeds, in which shall be recorded all deeds, powers of attorney, and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments: Second, a record of mortgages, in which shall be recorded all mortgages, powers of attorneys or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged, or otherwise conditionally sold, conveyed, affected, or incumbered in law; Third, a record of plats, in which shall be recorded all plats and maps of town lots, and of the sub-divisions thereof, and of other divisions or surveys or lands; Fourth, a record of leases, in which shall be recorded all leases and powers of attorney for the execution of leases. All instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record."

There is nothing in the chapter of the General Code above referred to providing for or otherwise relating to the execution of contracts for the sale of real property; and likewise there is nothing in said chapter providing for recording such contracts.

With respect to the question presented in your communication the provisions of Sections 8510, 8542 and 8543, General Code, above noted, are substantially in the same form as originally enacted in the act of February 22, 1831, entitled: "An Act—To provide for the proof, acknowledgment and recording of deeds, and other instruments of writing." 29 O. L. 346.

Construing the provisions of this act the Supreme Court in the case of *Churchill vs. Little*, 23 O. S. 301, at page 307, said:

"The act of February 22, 1831, to provide for the execution and recording of deeds, etc., (Sec. 458), has reference to instruments by which lands, tenements, or hereditaments are 'conveyed or otherwise affected or incumbered in law.' All such instruments, executed with the prescribed formalities, are required to be recorded; and when so executed and recorded, are within the protection the statute was designed to afford. An executory contract for the purchase and sale of land is not an instrument of that character. It is a legal instrument, and forms the basis of legal as well as equitable remedies; but it does not convey, or purport to convey, or legally to incumber or affect any estate or interest in the land. The vendor, suing upon it, may recover the price of the land contracted to be sold, and he, failing on his part to perform it, may be compelled, at the suit of the purchaser, to respond in damages for his default. It constitutes also, in favor of the purchaser, a claim to the title to the land, which, in a proper case, may be specifically enforced through the agency

of a court of equity. This right to compel a specific performance of the contract constitutes the purchaser's equity in the land, the vendor being, in equity as to the land, regarded as the trustee of the purchaser; but in either aspect, whether regarded as the basis of a legal or equitable claim, the right of the purchaser rests in action, and the contract is therefore essentially a chose in action. \* \* \* ”

Sections 8510, 8542 and 8543, were formerly Sections 4106, 4133 and 4134 of the Revised Statutes.

In the case of *The Wood Sash, Door & Paint Co. vs. Burrows*, 2 C. C. (N. S.) 213, affirmed without opinion 73 O. S. 372, it was said:

“The statute now in force (Section 4106) provides how ‘a deed, mortgage, or lease of any estate or interest in real property’ shall be executed and there can be no question that the chapter of the statutes treating on conveyances and incumbrances makes no provision for the execution of land contracts.

In said chapter Sections 4133 and 4134 provide that all mortgages and all other deeds and instruments of writing for the conveyance or incumbrance of any lands, tenements or hereditaments, ‘executed agreeably to the provisions of the chapter,’ shall be recorded, etc.

There being no provision in the chapter regulating the execution of land contracts, it follows that such contracts are not entitled to record.  
\* \* \* ”

In the case of *Kessler vs. Bowers*, 23 Ohio App. 194, it was held as stated in the headnote in the report of the case that recording acts do not apply to executory contracts for sale of realty. In the opinion of the court in this case it was said:

“\* \* \* Unless the contract between Kessler and the Reces was one entitled to be recorded, it would not be notice to Bowers of any rights which Kessler might have. That the recording acts do not apply to an executory contract for the sale of real estate has been directly decided in *Wood Sash, Door & Paint Co. vs. Burrows*, 15 C. D., 781, 2 C. C. (N. S.), 213. The case cited follows a decision of the Supreme Court entitled *Churchill vs. Little*, 23 Ohio St. 301. \* \* \* ”

In the case of *Weir vs. Saw Mill Co.*, 88 O. S. 424, it was held that no rights could be asserted under an informal instrument signed by the owner of lands, but not witnessed or acknowledged, purporting to effect a sale of standing timber on such lands, against a bona fide purchaser of such lands at a judicial sale. The decision of the court in this case was grounded on the reason therein stated that said written instrument was not recorded; the court thereby apparently holding that the instrument there in question was one entitled to record under the provisions of Section 8543, General Code. The case of *Weir vs. Saw Mill Co.* was distinguished in the later case of *Kessler vs. Bowers*, supra, where it was said:

“It is contended by counsel for plaintiff in error that the case of *Weir vs. Snider Saw Mill Co.*, 88 Ohio St., 424, controls the case at bar,

but in view of the fact that the instrument involved in that case was not recorded, and was an executed contract for the sale of growing timber, construed by the court to be a conveyance thereof, we are unable to see that it controls the case at bar."

In addition to the observations made by the court in the case of *Kessler vs. Bowers*, supra, with respect to the case of *Weir vs. Saw Mill Co.*, supra, it should be said that the case of *Weir vs. Saw Mill Co.* should be applied as controlling authority only in a case presenting substantially the same facts as were before the court in said case.

In none of the cases above cited were the statutory provisions now incorporated in Section 2757, General Code, above quoted, referred to. This circumstance was doubtless due to the fact that in each of the cases the court entertained the view that the provisions of this section had nothing to do with the determination of the question whether the particular instrument there under consideration was one entitled to record. Likewise, I am inclined to the view that it is not the intent and purpose of the provisions of Section 2757, General Code, to prescribe what instruments are entitled to record, but the provisions of said section expend their force in requiring the county recorder to provide record books for the recording of such instruments as are entitled to record under other statutory provisions. In this connection, it will be noted that Section 2757, General Code, contains the following provisions:

"All instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record."

In any view as to this question, I do not think that a land contract is an instrument for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments within the first clause of said section, and, as such, required to be recorded in the record of deeds; neither is it an instrument "by which lands, tenements or hereditaments are or may be mortgaged, or otherwise conditionally sold, conveyed, affected or incumbered in law," within the second clause of said section, and, as such, required to be recorded in the record of mortgages.

These views lead to the conclusion that so far as the general laws relating to the record of written instruments pertaining to real property are concerned, a land contract is not an instrument entitled to record; and that so far as those laws are concerned, the question is not affected by the fact that a particular land contract is one relating to registered lands or otherwise.

In the further consideration of the question presented in your communication, which is one with respect to land contracts for the sale of registered lands, or a part thereof, there should be here noted such provisions of the Land Registration Act (Sections 8572-1 to 8572-118, G. C.) as may touch upon this question.

Section 8572-32, General Code, provides as follows:

"Deeds and other instruments relating to registered land creating or declaring trusts or containing unusual or exceptional covenants, restrictions or conditions or creating unusual or exceptional estates or interests, may, upon the demand of a party in interest and the payment of the proper fees, be recorded by the recorder in books to be kept for that purpose in his office and known as the 'record of trusts and exceptional estates in registered land.' The number of the page of the record shall be noted on

the folium of the register of land titles in which the land affected is entered, and such reference made thereto in the certificate of title or memorial thereon as the case may require."

Although it may be a matter of some difficulty to state just what instruments relating to registered lands are included within the purview of this section, I am inclined to the view that an ordinary land contract is not an instrument "containing unusual or exceptional covenants, restrictions or conditions or creating unusual or exceptional estates or interests" within the meaning of this section, and that, therefore, there is nothing in the provisions of this section which requires land contracts to be recorded.

However, the fact that a land contract relating to registered lands is not an instrument required to be recorded does not argue that the instrument is not one which may be registered under the provisions of the Land Registration Act.

Touching this question, Section 8572-35, General Code, provides as follows:

"Each recorder shall keep an entry book in which he shall enter and number in the order of their reception all deeds and other voluntary instruments and all involuntary instruments and copies of writs or other papers filed with him which relate to registered land. He shall note in such book the year, month, day, hour and minute of reception of all instruments or papers in the order in which they are received, and shall also at the same time enter the number of the instrument or paper in the appropriate blank space on the registered certificate of title for the land to which it relates. They shall be regarded as registered and become effective for the purposes intended from the time they are so filed and noted and certificates of title and the memorials of each instrument when made on the registered certificate or duplicate certificate of title to which it relates shall bear the same date, except as otherwise in this act (G. C., Secs. 8572-1 to 8572-118) provided.

Every deed or other instrument, voluntary or involuntary, and every paper which is so filed with the recorder, shall be numbered and indorsed over the official signature of the recorder with the time of filing and entered and indexed with a reference to the proper certificate of title. All records and papers relative to registered land in the office of the recorder shall be open to the public in the same manner as other public records, subject to such reasonable regulations as the recorder, under the direction of the court, may make."

It will be noted that this section requires the recorder to enter and number, in the order of their reception, all deeds and other voluntary instruments filed with him which *relate* to registered land. The provisions of this section, to my mind, quite clearly comprehend land contracts within the designation of voluntary instruments relating to registered land; and, by way of specific answer to your question, I am of the opinion that although land contracts relating to lands registered under the Land Registration Act are not instruments entitled to record, they are instruments which should be filed and registered under the provisions of Section 8572-35, General Code, above quoted.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*