"The majority rules, and when that has been ascertained in a lawful method the result cannot be defeated by the arbitrary ruling of the presiding officer; or by the mistaken holding of the council that no valid action had been taken by it, or by their vote to defer action, as what they actually did, not what they thought, controls. After a valid election by ballot no resolution declaring the party elected is necessary, nor after announcement of the result of the vote can the lawful result be defeated by a resolution declaring a different result."

Numerous cases are cited in support of the foregoing text. These principles have been adhered to in this state. The case of *State* vs. *Miller,* 62 O. S. 436, held as set forth in the syllabus:

"1. Where all of the members of a city council, in a city of the second class, vote to elect a city clerk, and one of the candidates voted for receives a plurality of the votes cast, such candidate is duly elected, and a formal declaration of the result is not necessary to fix his right to the office; and thereafter it is not within the power of any member of the council to change the result by changing his vote.

2. When a choice has been made on such vote, it is not essential that the mayor as the presiding officer of the council shall declare the result. In such case the mayor has no duty whatever to perform as to the election. He can take part only in case of a tie vote."

In view of the foregoing, the conclusion seems apparent that the subsequent vote of the Senate upon the question of how many votes were necessary and the announcement of the chair pursuant thereto had no legal effect upon the action theretofore taken.

Summarizing, it is my opinion that:

1. The action of the Senate in advising and consenting to the appointment of an officer may be taken by a majority of a quorum in the absence of any constitutional provision, statute, or rule requiring some other vote thereon.

2. After a majority of a quorum has voted favorably upon the question of advising and consenting to the appointment of such officer and the chair declares that the Senate has advised and consented to the appointment, a subsequent vote on a ruling of the chair, which followed such declaration, to the effect that a majority of a quorum is sufficient, is of no legal effect.

It is my opinion, in specific answer to your question that the Senate has advised and consented to the appointent of Col. John A. Hughes as Director of the Department of Liquor Control.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2633.

COUNTY RECORDER—RECORD OF MORTGAGES—EASEMENT FOR LIMITED TIME ON PROPERTY OWNERS AGREEMENT LIMITING USE AND OCCUPANCY RECORDED THEREIN.

SYLLABUS:

1. *Easements for a limited period of time, such as twenty-five years, should be recorded in the record of mortgages.*

2. *An agreement among property owners restricting their real estate against use or occupancy by enumerated businesses should be recorded in the record of mortgages.*

COLUMBUS, OHIO, May 10, 1934.

HON. DONALD J. HOSKINS, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "I wish to submit the following questions to you for your opinion:
>
> How should or in what book should the following instruments be recorded by the county recorder:
>
> (1) An easement for a limited period such as twenty-five (25) years.
>
> (2) An agreement among property owners restricting their real estate against use or occupancy by enumerated businesses.
>
> G. C. No. 2757 provides that the recorder shall keep four separate sets of records: a record of deeds, a record of mortgages, a record of plats and a record of leases.
>
> The question is, on what record should such instruments as above stated be recorded."

Sections 2757 and 8543, General Code, read as follows:

> Section 2757.
>
> "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 attorney, 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."

> Section 8543.
>
> "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, and until so recorded or filed for record they shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such former deed or instrument."

In connection with your first question, I call your attention to an opinion to be found in Opinions of the Attorney General for 1933, Volume I, page 344. The syllabus of that opinion reads as follows:

> "There is no statutory authority for the county recorder to keep a separate book for recording instruments creating easements.
>
> Easements may be created by instruments in writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments. Under Section 2757 of the General Code, it is the county recorder's duty to record such instruments in the record of deeds."

While the conclusion reached in this opinion was that the conveyances in question were to be recorded in the deed book, obviously the opinion was meant to be dispositive of only perpetual easements. The opinion is based upon a former opinion to be found in Opinions of the Attorney General for 1928, Volume IV, page 2808. The syllabus of that opinion reads as follows:

> "An instrument of writing in which it is stated that the grantor grants, bargains, sells, conveys and warrants to the grantee, its successors and assigns forever, a right of way and easement with the right, privilege and authority to said grantee, its successors, assigns, lessees and tenants, to construct, erect, operate and maintain a line of poles and wires for the purpose of transmitting electric or other power, including telegraph or telephone wires, in, on, along, over, through or across properly described lands for a consideration stated, and containing the statement that the grantee is to have and to hold an interest in said land unto said grantee, its successors and assigns, properly signed and acknowledged in the presence of witnesses, and duly acknowledged before an officer authorized in the premises, is an instrument of writing for the absolute and unconditional sale and conveyance of an interest in lands, tenements or hereditaments and should under the provisions of Section 2757, General Code, be recorded in the record of deeds."

The factor of perpetualness was important in the rendition of the 1928 opinion. In support of this contention, the following language at page 2812 is important:

> "It seems clear that the interest in the land herein conveyed comes within the terms of the statutes, namely, lands, tenements or hereditaments. It is also noted that the habendum clause reads as follows: 'To Have and to Hold the same unto said party of the second part, its successors and assigns.' It is a conclusive grant of a right in and to the land granted and said grant is perpetual. The conveyance, therefore, comes within the provisions of Section 2757, General Code, being a deed or instrument of writing for the absolute and unconditional sale or conveyance of an interest in lands, tenements and hereditaments."

You do not inquire about the recording of a perpetual easement but one for a limited period, such as twenty-five years. It is well established that an easement may be granted for a definite number of years. In 2 Tiffany Real Property (2d ed.) 1229, the following is stated:

"An appurtenant easement may also, as well as an easement in gross, be for life, as having been intended to endure only so long as the grantee's life estate in the dominant tenement endures, or as having been created by one having only a life estate in the land in which it is created. *The easement may be for years only.*" (Italics the writer's.)

In 15 O. Jur. 81, the following appears:

"Where the duration of an easement is not limited by the terms of the instrument creating it, it is perpetual. The duration of an easement may, however, be fixed by the terms of the instrument creating the easement."

Certainly, a properly executed easement for a period of twenty-five years is "a conveyance or incumbrance of lands" within the meaning of Section 8543, General Code, supra, and therefore entitled to be recorded. While there is statutory authority for the county recorder to keep certain books other than the four enumerated in Section 2757, General Code, supra, there is no authority to keep a separate book for recording instruments creating easements. Opinions of the Attorney General for 1933, Volue I, page 344, supra. An examination of the statutes relative to the recording of instruments compels the conclusion that the instruments in question should be recorded under the provisions of Section 2757, General Code, supra. A careful analysis of this section leads me to believe the instruments should be recorded in the record of mortgages. I do not believe that easements for a term of years should be recorded in the deed book, since the conveyance is not absolute and unconditional within the meaning of that section. However, the instruments are legal encumbrances upon the land and it is my opinion, in specific answer to your first question, that the instruments in question should be recorded in the record of mortgages.

In answering your second question, I assume that you do not have in mind a situation where a common grantor is laying out a subdivision and in each conveyance of a parcel of land inserts a restriction relative to the use of the land, such as a provision that nothing but a residential house shall be erected upon the land, or a provision as to the height of any buildings to be erected upon the land. It is well settled that such instruments, since they are conveyances of the fee, are to be recorded in the deed book. The restrictions are merely incidental to the absolute conveyance of the land. Instead, I assume you have in mind a collateral agreement whereby the owners of property who hold the land free from restrictions voluntarily agree to restrict the use of their property. This agreement is properly executed and purports to bind the owners in question as well as the heirs, successors and assigns. Such agreements have been often referred to as covenants, restrictions, equitable servitudes, easements, etc. Before determining the proper book in which to record these agreements, it is necessary to first ascertain whether or not they are entitled to be recorded under the laws of Ohio. The recording of any instruments was unknown at common law. Hence, there must be statutory authority before an instrument is entitled to record. See note in 26 A. L. R. 1546. It is well established, both in and out of this state, that the recording of an instrument not entitled to be recorded is of no legal effect. *Ramsey* vs. *Riley*, 13 Ohio 157; *Churchill* vs. *Little*, 23 O. S. 301; *Kessler* vs. *Bowers*, 23 O. A. 194. It is significant to point out that executory contracts for the sale of real estate are not entitled to record in the State of Ohio. The syllabus of the case of *Kessler* vs. *Bowers, supra,* reads as follows:

"1. Recorded contract for subdivision and sale of land, unless entitled to be recorded, is not notice to purchaser of land of any rights which party to contract might have.

2. Recording acts do not apply to executory contract for sale of realty.

3. Purchaser of land in good faith is not bound to take notice of contract to subdivide and sell land, though recorded, and is not bound by claimed acts of possession in subdividing land, unknown to purchaser, and hence may have title quieted against party to contract."

However, the weight of authority is contrary to the view as expressed by the Ohio courts. See 26 A. L. R. 1546, supra. Also, see 2 Tiffany Real Property (2d Ed.) 2183. Whether or not the agreements in question are entitled to be recorded, depends upon an interpretation of Section 8543, General Code, supra. It is to be noticed that the statute makes use of the words "including hereditaments." The following statement is to be found in 2 Tiffany Real Property (2d ed.) 1440:

"If, however, the agreement is contained in a conveyance which is not in the chain of title, but which was made by a prior owner of neighboring land, the question of its record may be material for the purpose of charging a purchaser with notice of the agreement, and such may also be the case when the agreement is not contained in a conveyance of land, but is incorporated in an independent instrument. The former case, that of an agreement contained in a conveyance not in the chain of title of the person against whom it is sought to enforce it, is elsewhere discussed, and the question of the record of an independent restrictive agreement will here alone be referred to. Whether such an agreement is entitled to be recorded, so that its record will affect the purchaser with constructive notice thereof is obviously a question to be determined by the language of the state recording law."

The author then quotes cases both for and against the recording of such instruments. The prime consideration is, of course, the statutory language of the particular state.

In determining whether or not it is a mere personal covenant or one that runs with the land, many elements have been taken into consideration and harmonious results have not been reached by the courts. The following is to be found in 7 R. C. L. 1115:

"* * * Covenants restricting the use of property are generally held to be covenants running with the land, provided, however, they create some interest therein. Accordingly, where parties owning adjacent lots entered into an agreement, covenanting for themselves and their respective heirs, successors, assigns, lessees and tenants, that the lots should never be used or occupied for any business or public purpose whatsoever, and the defendants took title expressly subject to that agreement, it was held that such a covenant was valid, and that it was binding upon the successors in interest to the parties, although there was no privity of estate between the original parties. Restrictions are very frequently

embodied in covenants relating to the sale of intoxicating liquors on granted or demised premises. While the rule in some American jurisdictions and in England is that such a covenant is personal, the majority rule in the American states and that supported by the best reason is that they may very properly run with the land."

One of the leading cases upon this subject is the case of *Trustees of Columbia College* vs. *Lynch,* 70 N. Y. 440. The first three branches of the syllabus of that case read as follows:

"Adjoining owners of land in a city may, by grant, impose mutual and corresponding restrictions upon the lands belonging to each, to secure uniformity in the structure and position of buildings upon the entire premises, or to reserve the land for, and confine their use to certain purposes, as for private residences.

The mutuality of the covenants in such case furnishes a good consideration, and the agreement itself is not void, as in restraint of trade, or as imposing undue restrictions upon the use of property.

Mutual covenants imposing such restrictions in perpetuity, and by their terms binding the heirs and assigns of the respective covenantors, are, in effect, grants of reciprocal easements, the right to the enjoyment of which will pass as appurtenant to the premises, in respect of which they were created; and in equity the premises are charged with the observance of the covenant in the hands of all subsequent grantees taking title with notice of its existence."

The above case was cited with approval in the following New York cases: *Miller* vs. *Clary,* 210 N. Y. 127, 135; *Bristol* vs. *Woodward,* 251 N. Y. 275; *Evangelical Lutheran Church* vs. *Sahlem,* 254 N. Y. 161. The following appears in the case of *Codman* vs. *Bradley,* 201 Mass. 361 at page 368:

"It is plain from the language of the indenture that the parties intended a restriction upon each of the five lots in favor of the owners of lots 176 and 177, and their heirs and assigns, which should be for the benefit of the lots, whoever might be the owners of them. It is equally plain that equity will enforce such a restriction. It is not important to determine whether the instrument created a legal estate in the five lots, or precisely what legal estate is created, if any. It created a right enforceable in equity against all persons taking with notice of it, actual or constructive, and this equitable right is in the nature of an easement, even if it rests on no broader principle than that equity will enforce a proper contract concerning land, against all persons taking with notice of it."

The modern trend of legal thought is to treat such restrictions, though equitable in origin, as creating interest in the land itself, like easements at common law. Pound, Progress of the Law, 33 Harvard Law Review 813.

From the above principles of law, it would appear that the agreements in question are incumbrances of land within the meaning of Section 8543, General Code, supra, despite the fact that executory contracts for the sale of land are not entitled to be recorded in Ohio.

Having reached this conclusion, it is necessary to determine in which one of the four books kept by the county recorder, by authority of Section 2757, General Code, supra, the instruments should be recorded. An important case in this connection is that of *Stanton* vs. *Schmidt,* 45 O. A. 203 (Motion to certify, overruled by the Supreme Court). The syllabus of that case reads as follows:

"1. Purchaser taking property without notice of existence of restrictions in contract executed by prior owner cannot be bound thereby.

2. Evidence established that purchaser took property without actual notice of restrictions contained in contract executed by prior owner.

3. Recording of instrument does not constitute notice thereof unless its record is provided by statute (Section 2757, General Code).

4. Record of contract whereby owners of property covenanted not to sell to nor permit use of property by any one not member of Caucasian race *held* not constructive notice to purchaser, since contract was not 'deed, power of attorney or instrument of writing for absolute and unconditional sale or conveyance of lands, tenements and hereditaments,' entitled to be recorded in deed records (Section 2757, General Code).

5. Whether property owners' contract not to sell to nor permit use of property by any one not member of Caucasian race was 'incumbrance' entitled to be recorded in mortgage record will not be determined where contract was recorded only in deed records (Section 2757, General Code)."

The following appears at page 208:

"A casual reading of the contract clearly discloses that the paper writing in question is not a deed, is not a power of attorney, and is not an instrument in writing for the absolute and unconditional sale or conveyance of lands, etc. It clearly does not fall within the description of the instruments which shall be recorded in the deed records, and the recording of which therein constitutes notice to the world.

Counsel for defendant Schmidt insists that it falls within the class designated as incumbrances, which are to be recorded in the mortgage record. It is unnecessary for us to determine whether it does or does not fall within the class of instruments which are to be recorded in the mortgage record, as it was not so recorded."

Since I am of the opinion the agreements in question should be recorded, it is necessary to determine in which one of the three remaining books they should be recorded. It should be noticed that Section 2757, General Code, in defining the instruments that shall be recorded in the record of mortgages, makes use of the following language: "instruments of writing by which lands * * * are * * * conveyed or affected or incumbered in law." Clearly, the language is sufficiently broad to include the instruments in question.

Without further prolonging this discussion, it is my opinion, in specific answer to your second question, that an agreement among property owners restricting their real estate against use or occupancy by enumerated businesses should be recorded in the record of mortgages.

Respectfully,
JOHN W. BRICKER,
Attorney General.