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SALE OF LAND—CONTRACT—EXECUTORY—MAY OPERATE TO CONVEY TO VENDEE VESTED EQUITABLE ESTATE—MAY CREATE LIEN ON LAND IN FAVOR OF VESTEE—EXTENT OF PORTION OF PURCHASE PRICE PAID—CONTRACT NOT ENTITLED TO BE RECORDED IN OFFICE OF COUNTY RECORDER—SECTION 317.08 RC.

## SYLLABUS:

Notwithstanding an executory contract for the sale of land may operate to convey to the vendee a vested equitable estate in the land described therein, and may create a lien on such land in favor of such vendee to the extent of the portion of the purchase price paid by him, such contract is not entitled to be recorded in the office of the county recorder in any of the records which the recorder is authorized and required by the terms of Section 317.08 of the Revised Code, to keep.

Columbus, Ohio, April 14, 1955

Hon. Mary Nicholson Snyder, Prosecuting Attorney  
Jackson County, Jackson, Ohio

Dear Mrs. Snyder :

I have before me your request for my opinion on the question whether or not the county recorder is required or permitted to record land contracts. The powers and duties of the county recorder with respect to the record of instruments affecting real estate are found in Section 317.08, Revised Code, which, in so far as pertinent, reads as follows :

“The county recorder shall keep five separate sets of records as follows :

“(A) A record of deeds, in which shall be recorded all deeds and other instruments of writing for the *absolute and unconditional sale* or conveyance of lands, tenements, and hereditaments ;

“(B) A record of mortgages, in which shall be recorded all mortgages or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged *or otherwise conditionally sold, conveyed, affected, or encumbered* ;

“(C) A record of powers of attorney ;

“(D) A record of plats, \* \* \*

“(E) A record of leases, \* \* \*.”

It is very clear that a land contract is not such an instrument as falls within paragraph (A) of this statute, because it is not an absolute or unconditional sale or conveyance of lands. If it is entitled to record it must be pursuant to the provisions of paragraph (B) which as you will note authorizes the recording not only of mortgages but also of "*other instruments of writing* by which lands, tenements or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected or encumbered."

The one question before us, therefore, is whether a land contract is such an instrument as evidences a conditional sale, or *affects* in any way the title to the land. If it does have that effect, then it is clearly entitled to be recorded.

The question of the right to record such instrument and the effect of such recording have been the subject of considerable discussion and the decisions are by no means in full accord. The Ohio case on which principal reliance has been placed, is *Churchill v. Little*, 23 Ohio St. 301, decided in 1872. The facts in the case are rather complicated but, briefly stated, it appears that in 1853 John Black made a contract with a railroad company for the purchase of certain premises, one-fourth of the purchase price being paid in advance and the balance to be paid in deferred installments. The railroad company agreed to convey the premises upon the payment of the balance of the purchase money. Black took possession of the property. Thereafter, he assigned and delivered his duplicate copy of the contract to the defendant Little. Sometime later Black, being indebted to plaintiff Churchill, represented to him that his copy of the contract had been accidentally destroyed, and gave Little a mortgage on the property, executed in due form, and it was duly recorded.

Little paid to the railroad company the balance of the purchase money, received a deed and went into possession. *No effort was ever made to have the land contract recorded.*

The case arose out of the effort of the plaintiff holding such mortgage, to have it foreclosed and his mortgage to be adjudged a preferred claim. The district court ordered the premises to be sold, and in marshalling the liens, the indebtedness of Black to the defendant Little, as well as the amount paid by Little to the railroad company were preferred to the mortgage claim of the plaintiff.

Since no effort was made to record the land contract it would appear that the court had no occasion to deal with the subject of the right to make such record or the effect of the same, if made. However, Stone, J., did comment on it at length, saying:

“The act of February 22, 1831, to provide for the execution and recording of deeds, etc. (S. & C. 458), has reference to instruments by which lands, tenements, or hereditaments are ‘conveyed or otherwise affected or incumbered *in law*.’ (Emphasis by the court.) 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.” (Emphasis added.)

Later on in the opinion the court said:

“It seems necessarily to follow that where, as in this case, such executory contract, or the mere equitable interest thereby created, is alone the subject of transfer, the recording act has no application. It will not be claimed that it has any application to the contract itself. The instrument by which the contract is assigned stands necessarily upon the same ground. By neither is the land, *in law*, conveyed, affected, or incumbered.” (Emphasis by the court.)

The emphasis placed by the court on the words “in law” shows that the court was thinking only of a conveyance of the legal estate and was not considering the conveyance of the equitable title which as I shall show by later decisions of the Supreme Court, is a *vested estate*.

The syllabus of that case lends color to my conclusion that the recording or failure to record the contract of sale in question, had nothing to do with the issues or the decision. The syllabus reads as follows:

“When an executory contract for the purchase of land is assigned by the purchaser, either absolutely or as a collateral security, and the assignor subsequently mortgages the contracted premises, the relative rights of the assignee and mortgagee are not determined by the fact that the mortgage was duly executed and recorded. In such case, and between parties thus situated, the act providing for the execution and recording of deeds, etc. (S. & C., Vol. 1, 458), has no application.”

Notwithstanding that the language of the court appears to be entirely obiter dictum, yet it seems to have been accepted by later decisions of courts and an opinion of this department as a binding authority denying the right and duty of the recorder to accept such an instrument for record and against its potency as notice to subsequent purchasers or encumbrances. For instance, in the case of *Standard Oil Company v. Moon*, 34 Oh. App., 123, it was held as shown by the headnotes :

“1. Executory contract for purchase and sale of land is not an instrument entitled to be recorded, thereby giving notice to prospective purchasers of equity owned or claimed under such contract.

“2. Purchaser’s right under executory contract rests solely in action under contract, and therefore is essentially a chose in action.”

In the course of the opinion the court said :

“It is well settled that an executory contract for the purchase and sale of land is not an instrument entitled to be recorded, like deeds, mortgages, or leases, thereby giving notice to prospective purchasers of the equity owned or claimed under such contracts. *Churchill v. Little*, 23 Ohio St., 301.”

An examination of the facts in this case discloses that the decision of the court as embodied in the headnotes above quoted, was entirely obiter, because the controversy was not between the vendor and the vendee but rather between the mortgagee of the *vendor* and a person to whom the *vendor* had assigned his copy of the contract of sale. The vendee, meantime, was in possession of the property, and his rights under the land contract were not affected, whether his contract of purchase was or was not recorded.

Again, in the case of *Grant v. Hickock*, 84 Ohio Ap., 509, it is stated by the fourth headnote :

“Section 8543, General Code, authorizing the recording of deeds and instruments for the conveyance or incumbrance of lands, does not apply to land contracts, and where such contract is recorded, the record thereof is not constructive notice of any restrictive covenants therein.”

This case was a suit for an injunction to prevent the owner of Lots Nos. 181 and 182, in a certain subdivision from placing a gasoline station on his lots, on the ground that such use was contrary to the conditions in a general plan of the subdivision whereby the property was restricted to residences. The controversy was between certain other lot owners in the subdivision and the owner of said Lots Nos. 181 and 182. In the course of the opinion it was said :

“Some evidence was tendered and received that certain lots were sold on land contracts with restrictive covenants therein ‘for the protection of the seller and of the various purchasers of lots in said Leesdale Extension \* \* \*.’ The contracts provided that restrictive covenants would be effective until January 1, 1950, and among other things limited the use of the property for private residence purposes. It further appears some of these contracts were filed for record and recorded in the deed records of this county. \* \* \*”

The court, noting that some of these contracts had been recorded and filed in the deed records of the county, said that the statute authorizing the recording of these instruments for the encumbrance of lands does not apply to land contracts and the recording of such contract is not constructive notice. In support of this proposition the court cited *Churchill v. Little*, and *Standard Oil Company v. Moon*, *supra*, and one or two other decisions of inferior courts. I submit that the case under consideration did not in any way concern those lots embodied in the land contracts and that the reference to them and to the *Churchill* case was wholly gratuitous.

I note further than in an opinion by one of my predecessors, being Opinion 2857, Opinions of the Attorney General for 1940, p. 911, it was held :

“A county recorder is not required to accept for record an executory contract for the conveyance of real property, nor is he required to accept for record a recordable instrument unless and until the same has been executed in conformity with all statutory requirements.”

That opinion dealt only with the recording of an instrument which apparently had not been duly acknowledged and witnessed and for that

reason alone was not eligible for recording. That being the case it would seem that the opinion relative to the right to record it, if it had been duly executed, becomes entirely obiter. As to that proposition, however, it appears that the opinion was rested on the case of *Churchill v. Little*, supra, and several other cases which follow it. The then Attorney General said:

“Even if an instrument such as you have described would be entitled to record, the recorder would be justified in refusing to accept it if it be defectively executed.”

He described “defectively executed” as failing to conform to the provisions of the statute regarding the acknowledgment and witnessing of an instrument for the conveyance of lands.

Accordingly, I do not feel bound by the remarks of Judge Stone in the *Churchill* case nor the holdings of other authorities based thereon, and I do not feel that I am presuming to override them. I am wholly unable to find a sound basis for their assertions than an executory land contract is not entitled to record. They seem to overlook entirely the well established doctrine of the courts of our state as well as the authorities generally, as to the effect of an executory contract for the sale of land. It is well settled that such a contract in writing, whether recorded or not, and whether or not it is witnessed and acknowledged, has the effect of *conveying* to the vendee an equitable estate in the land which upon his death will not pass to his administrator as a chose in action but will descend to his heirs, and that such contract leaves the vendor as holder of the legal estate, but wholly in trust for the vendee, and under obligation to convey such legal estate to him upon performance by him of his obligations under the contract. Those results do certainly affect the title to the land.

In 26 A. L. R., at page 1546, the subject of recording executory contracts of sale of real estate is treated with the citation of cases from many jurisdictions. It is there said that since the recording of any instruments was unknown at common law, there must be statutory authority before any instrument is entitled to be recorded. In support of that proposition there is cited *Churchill v. Little*, 23 Ohio St., 301. The commentator said further:

“The courts, however, treat the recording statutes with favor, and so, in interpreting the recording acts, take a liberal view as to the kinds of instruments which the statutes authorize to be recorded, so that a recording statute which, in general terms,

provides for the recording of conveyances of land, or of instruments affecting title, is generally held to authorize the record of an executory contract for sale of real property. *Keese v. Beardsley* (reported herewith) ante, 1538; *Brotherton v. Livingston*, 1842, 3 Watts & S., Pa. 334; *McBee v. O'Connell*, 1911, 16 N. M. 469, 120 Pac. 754; *Bailey v. Coffin*, 1916, 115 Me. 495, 99 Atl. 447; *Bernard v. Benson*, 1910, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439."

In the case of *Keese v. Beardsley*, Cal., 213 Pac., 500, and reported in 26 A. L. R., p. 1538, it was held:

"An agreement to convey the equity of redemption of land subject to a deed absolute, intended as a mortgage, is a conveyance or transfer of the property within the meaning of the statute requiring conveyances and transfers to be recorded in the book of deeds, and it cannot, therefore, be recorded in the miscellaneous records."

In the case of *Bailey v. Coffin*, 715 Me., 495, 99 Atl., 447, it was held:

"While at law, a contract for the sale of land is executory and until it is executed gives the purchaser no interest in the land, in equity a purchaser is regarded as the owner of the land and the vendor is the owner of the consideration, and a trust arises in favor of the purchaser which follows the legal title until it comes into the hands of an innocent purchaser for value."

In *Bernard v. Benson*, 58 Wash., 191, 108 Pac., 439, it was held:

"Contracts for the sale of real estate are not expressly mentioned in the recording statutes, but we think they are included within the meaning of the words 'deeds, grants and transfers of real property.'

Their proper registration imports constructive notice."

Commenting on such contracts the court said in the course of its opinion:

"They are, within the spirit of the statute, the recording statute, liberally interpreted. \* \* \* The construction contended for by the respondents would be productive of great mischief."

The case of *Brotherton v. Livingston*, 3 Watts and Sergeants Reports, Pa., 334, was decided by the Supreme Court of Pennsylvania. It involved a contract for the sale of land and objection was made to its introduction as evidence on the ground that it was not a contract that was entitled to record. The court said in the course of the opinion:

“As an equitable conveyance then, why should not such a memorandum be recorded? There is nothing in the terms of the recording Acts to restrain their operation to specialties. They describe the documents to be recorded, as deeds, conveyances, or instruments concerning lands; and it cannot be said that these agreements are not instruments because they are not sealed, any more than it can be said that promissory notes, bills of exchange, or unwritten policies of insurance are not instruments. They fall within the very words of almost all the statutes on the subject; so there is no room for an objection to them on the first ground stated in the bill of exceptions.”

The case of *McBee v. O'Connell*, 16 N. M., 469, concerned a contract for the sale of land which was recorded under a statute which read:

“Every instrument in writing by which real estate is transferred or affected, in law or equity, shall be acknowledged and certified to in the manner hereinafter prescribed.”

It was further provided in the statute that:

“From and after the 1st day of January, 1888, no deed, mortgage or other instrument in writing, not recorded in accordance with Section three thousand nine hundred and fifty-three, shall affect the title or rights to, in any real estate, of any purchaser or mortgagee in good faith, without knowledge of the existence of such unrecorded instruments.”

The court held as shown by the headnotes:

“An executory contract for the sale of real estate is, when duly executed and acknowledged, a writing entitled to record within the meaning of Section 3953, C. L. 1897.”

The doctrine of “equitable conversion” enters here. The essence of that doctrine is that equity regards that as done, which is required or agreed to be done. It applies to a contract to convey land. In 19 American Jurisprudence, at page 11, we find the following statement:

“Thus, an executory contract for the sale of land works a conversion, since equity regards ‘things agreed to be done as actually performed’ and treats the vendor as holding the land in trust for the purchaser and the purchaser as a trustee of the purchase price for the vendor. *The vendee is, in the contemplation of equity, actually seised of the estate.* Hence, he is held liable for any loss which may occur to such estate between the agreement and the conveyance and will enjoy any benefit which may accrue in the same interval. Furthermore, he may sell or charge the estate before conveyance is executed, and the death of either



vendor or vendee, even before the time of completion of the contract, is held to be entirely immaterial. \* \* \*” (Emphasis added.)

In 16 American Jurisprudence, p. 793, it is said:

“Whatever real rights or claims an ancestor has \* \* \* under a contract to convey real estate to him \* \* \* descend as real property to the heirs.”

In 14 Ohio Jurisprudence, p. 240, it is said:

“Where an estate is contracted to be sold, equity considers it as converted into personality. In such case the vendor is a trustee for the purchaser; the purchase money goes to the personal representatives of the vendor, and the interest of the vendee descends to his heirs.”

In the case of *Raymond v. Butts*, 84 Ohio St., 51, it was held:

“A contract executed and delivered by the owner of real estate and binding himself, his heirs and legal representatives, to convey the real estate to the second party upon his fulfillment of conditions named, and providing that if the party of the second part shall die before completion of said agreement, then and in that case his estate shall have such equitable interest in the lands as the amount of his fulfillment is to the whole value of the land but in no event less than \$3,000, confers upon the party of the second part a substantial interest which is enforceable in equity and which is property which may be devised.”

Let it be noted that possession by the vendee did not enter into that holding. Possession only becomes a factor when the rights of third parties are concerned.

In the case of *Coggsall v. Marine Banking Company*, 63 Ohio St., p. 88, it was held:

“The interest of the vendee of land, before conveyance, is an equitable estate in the land, equal to the amount of the purchase money paid, and which, upon full payment, may ripen into a complete equity entitling him to a conveyance of the legal title according to the terms of the contract, and it is of these rights that notice is given to all the world by the possession of the vendee.”

The court, in the course of the opinion, said:

“That, in such case, the vendee is the beneficial owner to the extent of the purchase money paid, and that the vendor holds the legal title in trust for the purchaser, subject to the duty of conveying the legal title on compliance with the terms of the contract by the vendee, is, we suppose, not disputed anywhere.”

In the case of *First National Bank v. Logue*, 89 Ohio St., 288, it was held:

“The interest of a vendee in the possession of real estate under a contract of purchase, the legal title being in the vendor, is a vested interest within the meaning of that phrase as used in Section 11655, General Code, and such interest is bound, under the provision of Section 11656, General Code, for the satisfaction of a judgment against such vendee.”

Since it is thus well settled that an executory contract for the sale of real estate does convey to the vendee the equitable title to the real estate, and that the estate thus conveyed is a vested estate, and gives him the right to enforce the conveyance of the legal title when he performs the contract on his part, how can it possibly be claimed that such contract does not amount to a conditional sale or that it does not affect the title? It is hard to conceive of any instrument outside of an absolute conveyance or a mortgage deed which could more clearly and effectually affect the title. If an instrument such as the one we are considering is not within the provision of the phrase “other instrument” etc., what, may we ask, did the legislature intend by inserting that language in the statute? Is it not fair to assume that the legislators were advised that equitable as well as legal estates could be conveyed by an instrument in writing?

Furthermore, it is well settled that a purchaser under a land contract who has paid a portion or all of the purchase money, acquires a lien upon the land for the security of his payment to the extent of his payments.

In the case of *Franklin Finance Company v. Bowden*, 36 Ohio App., p. 19, it was held, as shown by the headnotes:

“3. Lien of purchaser in possession under land contract of purchase, title being in vendor, continues to date of purchaser’s knowledge of vendor’s subsequently executed mortgage.

“4. Lien of purchaser exists as against subsequent purchasers or mortgagees with notice of payment by purchaser.”

The court in the opinion said:

“As a matter of fact we note that plaintiff admits this in its reply—that a lien of the purchaser exists as against subsequent purchasers or mortgagees with notice of payment. 39 Cyc., 2040; *Cogshall v. Marine Bank Co.*, 63 Ohio St., 88, \* \* \*”

If, then, the purchaser under a land contract has obtained by virtue of such contract, not only a conveyance of the equitable title, but in addi-

tion thereto, a lien on the land for the security of his payments, I think we are reinforced in the conclusion that such contract is an instrument "by which lands, tenements or hereditaments are or may be \* \* \* affected \* \* \*," within the purview of paragraph (B) of Section 317.08, Revised Code, and therefore by the express terms of the statute entitled to be recorded.

I note an article published in 33 Ohio Op. 122, by Hon. John C. Grimm of the Akron Bar, in which he argues persuasively that executory land contracts are entitled to record. He goes farther than I care to go, in claiming that such contracts, even though not witnessed and acknowledged as required by Section 5301.01, Revised Code, are entitled to be recorded. I am, however, in full sympathy with his closing statement, reading as follows:

"Commercially, in this state, a large percentage of land is sold by executory land contract and certainly it is not sound economic or social policy or the policy of the public generally that a purchaser of land under an executory contract should have no protection against prospective purchasers or third parties. It is not consonant with justice, reason or common sense, so why should it be the policy of the law?"

However thoroughly my research has convinced me that your request should be answered in the affirmative, I am fully aware that my conviction is out of line with the dictum of the Supreme Court and with the holdings of several lower courts which have accepted it, and with the understanding and long established practice of the bar of the state, and I can do no more than hope that the Supreme Court will find some occasion to pronounce what I believe to be a sound interpretation of the law, or that the General Assembly will be moved to enact clarifying legislation.

Accordingly, bowing to a situation which I do not feel authorized to alter, I must hold that notwithstanding an executory contract for the sale of land may operate to convey to the vendee a vested equitable estate in the land described therein and may create a lien on such land in favor of such vendee, to the extent of the portion of the purchase price paid by him, such contract is not entitled to be recorded in the office of the county recorder in any of the records which the recorder is authorized and required by the terms of Section 317.08 of the Revised Code, to keep.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General