

2857.

COUNTY RECORDER — EXECUTORY CONTRACT FOR CONVEYANCE OF REAL PROPERTY — RECORDABLE INSTRUMENT — TO ACCEPT FOR RECORD MUST BE EXECUTED IN CONFORMITY WITH ALL STATUTORY REQUIREMENTS — NO AUTHORITY FOR PERSON WHO FILES RECORDABLE INSTRUMENT TO DESIGNATE METHOD FOR FILING—DUTY OF RECORDER UNDER SECTION 2757 G. C.—WHEREIN GOOD FAITH, RECORDER REFUSES TO ACCEPT AN INSTRUMENT, NO LIABILITY INCURRED UPON HIM AND HIS BOND.

SYLLABUS:

1. *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.

2. *A person filing a recordable instrument for record has no authority to designate the set of records in which the same shall be recorded. After having determined the nature of the instrument, it is the duty of the county recorder to record such instrument in the appropriate set of records according to the classifications designated in Section 2757, General Code.*

3. *When an instrument is presented to the county recorder for record and the recorder upon examining the same, in good faith determines that it is not a recordable instrument, either by reason of the purpose sought to be accomplished or its defective execution or both, he is justified in refusing to accept the instrument and thereby incurs no liability upon himself and his bond.*

Columbus, Ohio, October 4, 1940.

Hon. Robert E. Fuller, Prosecuting Attorney,
Findlay, Ohio.

Dear Sir:

This will acknowledge your request for my opinion which reads as follows:

"An attorney for a party thereto has presented to and requested our County Recorder to record in the record of mortgages a 'contract' under the terms of which the first party 'agrees to give' certain real estate to second parties 'for his keeping and maintenance and also his burial is to come out of the estate after his death.' There was an apparent effort to execute and acknowledge this instrument as would be required in the case of a conveyance of real estate, although the wording is so defective that it is questionable any purpose was accomplished. It bears the signatures of the parties, two witnesses and the notary. There are no words any place in the contract, aside from those above quoted, which import a conveyance or agreement to convey. The contract is dated some two years prior to the time it was presented for record and, presumably, has been partially executed.

The attorney in question feels that this instrument, in spite of all its defects, creates some sort of an enforceable equitable lien against the premises and for that reason, is entitled to be indexed and recorded as if it were a mortgage. It seems to me that it is more in the nature of a land contract and as such not entitled to

record under our statutes either as a deed or mortgage. (See *Kessler v. Bowers* 23 O. A. 194 and 1934 O. A. G. No. 2633 in connection with which the *Bowers* case is cited.)

QUESTION: 1. In what record book should the Recorder record the type of instrument above described? 2. Does the Recorder have any discretion to refuse to record such an instrument in the place requested by the parties? 3. Would he be personally liable for an error in judgment under such circumstances? We will greatly appreciate your opinion in these regards."

County recorders are ministerial officers having only such powers and duties as are expressly given them by statute and such as are naturally and necessarily implied therefrom. The duties respecting the recording of instruments affecting the title to realty are found in Section 2757, General Code, which is 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 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."

While there are several other sections relating to the recording of various instruments, none of them appears to be pertinent to the subject of your inquiry.

The "contract" described in your inquiry being for a transfer or for a conveyance of property which the first party "agrees to give," is an executory contract and is not included in the provisions of Section 2757, General Code. The recording of written instruments having been unknown at common law, there must be a statutory authority before any instrument may be recorded. In Ohio, no provision having been made for the recording of executory contracts, they are not entitled to be recorded. In *Churchill v. Little*, 23 O. S., 301, Judge Stone said on page 308:

"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."

The second branch of the syllabus of *Kessler v. Bowers*, 23 O. App., 194, reads:

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

The first branch of the syllabus of *Standard Oil Company v. Moon*, 34 O. App., 123, reads:

"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."

See also *Wood Sash Door and Paint Company v. Burrows*, 2 O. C. C. (N. S.) 213, 25 O. C. C., 781, affirmed without opinion, 73 O. S., 372; *Stanton v. Schmidt*, 45 O. App., 203; and *Brunner v. Isom*, 33 O. C. D., 415, 21 O. C. C. (N. S.), 543.

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. In 35 O. Jur., page 82, section 90, it is said:

"A provision in the General Code prescribes the manner in which an instrument conveying any estate or interest in land must be executed. It has long been the rule in Ohio that any such instrument defectively executed, i. e., which fails to conform in all respects to this provision, is not entitled to record, and derives no efficacy from its admission to record. This rule has been applied to deeds and mortgages, as well as to leases."

In answer to your first question it is therefore my opinion that 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.

In your second question you asked if the recorder may refuse to record an instrument in a particular set of records requested by the party filing the same. As I have already suggested, the common law made no provision for recording. Recording being a statutory innovation, the statutory provisions must be followed in determining what instruments are entitled to record and in what set of records they should be recorded. Section 2757, General Code,

provides for four sets of records. The first for absolute conveyances; the second for conditional conveyances; the third for plats and the fourth for leases. A person desiring to record an instrument is not given any right to select the set of records having the greatest appeal to him. Nor is it optional with the recorder. Being a ministerial officer, it is the recorder's duty to follow the law. If he finds the instrument to be a deed, power of attorney, or other instrument of writing for the absolute and unconditional sale or conveyance of lands, tenements or hereditaments, it must be recorded in the records of deeds. If the instrument is a mortgage, power of attorney or other instrument of writing by which lands, tenements or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected or encumbered in law, it must be recorded in the records of mortgages. In the same manner plats are recorded in the records of plats and leases in the records of leases. I must therefore conclude and it is my opinion that a person filing a recordable instrument for record has no authority to designate the set of records in which the same shall be recorded. After having determined the nature of the instrument, it is the duty of the county recorder to record such instrument in the appropriate set of records according to the classifications designated in Section 2757, General Code.

Coming now to a consideration of your last question, it will be noted that Section 2751, General Code, provides that the county recorder in order to qualify must give bond in the sum of two thousand dollars "conditioned for the faithful discharge of the duties of his office." The circumstances under which the recorder and his bond become liable are found in Section 2781, General Code, which reads:

"If a county recorder refuses to receive a deed or other instrument of writing presented to him for record, the legal fee for recording it being paid or tendered; or refuses to give a receipt therefor, when required; or fails to number consecutively all deeds or other instruments of writing upon receipt thereof; or fails to index a deed or other instrument of writing, by the morning of the day next after it is filed for record; or neglects, without good excuse, to record a deed or other instrument of writing within twenty days after it is received for record; or demands and receives a greater fee for his services than is allowed by law; or knowingly indorses on a deed or other instrument of writing a different date from that on which it was presented for record, or a different date from that on which it was recorded; or refuses to make out and certify a copy of any record in his office, when demanded, his legal fee therefor being paid or tendered; or purposely destroys, defaces or injures any book, record, or seal belonging to his office, or any deed or other instrument of

writing deposited therein for record, or negligently suffers it to be destroyed, defaced, or injured; or does or omits any other act contrary to the provisions of this chapter, he shall be liable to a suit on his bond, at the instance and for the use of the party injured by such improper conduct."

The phrase "or other instrument of writing presented to him for record" must be understood as referring to other *recordable* instruments in writing. As has been previously discussed herein, only such instruments as come within the statutory provisions of the recording acts are entitled to be received for record. The recorder and his bond "are liable for the malfeasance, misfeasance or nonfeasance in the conduct of his office." *Green v. Garrington*, 16 O. S., 548 and 35 O. Jur., page 95, section 109. When an instrument is presented for record, if the recorder upon examination finds that the same is not entitled to be recorded, it is his duty to refuse the same. If he has acted fairly and honestly, his refusal is not malfeasance, misfeasance or nonfeasance. As said in 11 O. Jur., page 425, section 170:

"The rule has been laid down that a recorder cannot be held responsible for recording an instrument which is not such as the law entitles to record, if in doing so he exercised his judgment in good faith and according to the best of his ability."

The rule as to the liability of the recorder is clearly stated in *Ramsey v. Riley*, 13 Ohio, 157, where Judge Read said on page 166:

"There is, therefore, nothing in this case to take it out of the operation of the ordinary rule, that an officer acting within the scope of his duty, is only responsible for an injury resulting from a corrupt motive. It is the duty of the recorder to enter of record all deeds, mortgages, and other instruments of writing, required by law to be recorded, and which are presented to him for that purpose. *Swan's Stat.* 778. It is not his duty to determine the validity of such instruments as may be presented for record, or to ascertain whether they be genuine or forged. But even if it were, and he should act honestly and fairly, according to the best of his ability, he would not be responsible. Yet, undoubtedly, if regardless of his duty, he should wilfully and maliciously, with full knowledge, enter a false and forged instrument upon record, whereby some person was misled and injured, he would be responsible."

Answering your third question specifically, it is my opinion that when an instrument is presented to the county recorder for record and the recorder upon examining the same, in good faith determines that it is not a recordable instrument, either by reason of the purpose sought to be accomplished or its

defective execution or both, he is justified in refusing to accept the instrument and thereby incurs no liability upon himself and his bond.

Respectfully,

THOMAS J. HERBERT,
Attorney General.