

2667.

COUNTY RECORDER—UNAUTHORIZED TO RECEIVE FOR RECORD OR RECORD MORTGAGE EXCEPT AS PROVIDED BY SECTIONS 2758 AND 2759, GENERAL CODE—FEDERAL LAND BANK MORTGAGES.

SYLLABUS:

1. *A county recorder has no legal authority to receive for record, or record a mortgage indenture in any other manner than as set forth in Sections 2758 and 2759, General Code.*

2. *A county recorder as such officer, may not legally receive from a mortgagee a mortgage indenture, endorse thereon his file number, the date of filing, and the precise time of filing, and by agreement between the mortgagee and himself withhold such mortgage indenture from record until he receives from such mortgagee further instructions as to the time for recording such indenture. (Sections 2758 and 2759, General Code.)*

COLUMBUS, OHIO, May 16, 1934.

HON. RUSSELL V. MAXWELL, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion concerning the authority and duty of the county recorder with reference to Federal Land Bank Mortgages, in which you set forth a request received from the county recorder of Williams County, from which I quote:

“The instructions of M. C. L., Secretary-Treasurer of the Williams County NFLA are, that these mortgages should not be recorded when brought into this office but merely filed for record to be stamped as to the time of filing, and not to be recorded until further instructions are received from him. Then the mortgages are to be recorded and mailed direct to the Federal Land Bank of Louisville.

You will see that by this method of procedure it may be two or three weeks between the date of receiving for record and the date of recording. By this procedure the mortgages received will not be recorded in the order in which they are received.”

It should be borne in mind that a county recorder is an officer whose powers, rights, duties and liabilities have been created or imposed by the legislature. Being such officer, he has such rights, powers and duties only, as are expressly imposed or granted by the language of the statutes creating his office or are necessarily inferred therefrom. *State ex rel. vs. Medical Board*, 107 O. S. 20.

The statutes are quite specific as to the duties of the county recorder with reference to the recording of mortgages. Sections 2758 and 2759, General Code, setting forth such duties, read:

“Sec. 2758. Upon the presentation of a deed or other instrument of writing for record, the county recorder shall indorse thereon the date and the precise time of day of its presentation, and a file number. Such file numbering shall be consecutive and in the order in which the instrument of writing is received for record, except chattel mortgages which

shall have a separate series of file numbers, and be filed separately, as provided by law. Until recorded each instrument shall be kept on file in the same numerical order for easy reference, and, if required, the recorder shall, without fee, give to the person presenting it a receipt therefor, naming the parties thereto, the date thereof with a brief description of the premises. When a deed or other instrument is recorded, the recorder shall indorse thereon the time when recorded, and the number or letter and page or pages of the book in which it is recorded.

Sec. 2759. The county recorder shall record in the proper record in a fair and legible handwriting, typewriting, or printing, all deeds, mortgages, or other instruments of writing required by law to be recorded, presented to him for that purpose. *They shall be recorded in regular succession according to the priority of presentation, entering the file number at the beginning of such record.* At the foot of the record of each instrument he shall record the date and precise time of day when it was presented for record." (Italics, the writer's.)

Section 2759, General Code, quoted above, sets forth not only the manner in which mortgages shall be recorded, but also the *order* in which they shall be recorded. "They shall be recorded in regular succession according to the priority of presentation * *", is the plain language of the statute. From the language of such Sections 2758 and 2759, General Code, it would seem that the legislature was determined to make the requirement as to the order of record so clear that it could not be misconstrued, for it requires:

First, that the county recorder stamp on the instrument not only the date on which the instrument was presented, but also the "precise time of day".

Second, that the instruments be numbered consecutively as they are filed.

Third, that they be kept in numerical order until recorded.

Fourth, that they be recorded in the order in which they are received for record.

A mortgage is valid as between the parties thereto even if it is never recorded. *Stewart vs. Hopkins*, 30 O. S., 502.

It is thus evident that the purpose of recording a mortgage is to notify persons desiring to acquire an interest in the mortgaged premises or advancing money on security thereof, as to the condition of the owner's title therein. *Siddell vs. Maxwell*, 4 O. S., 236; *Fosdick vs. Barr*, 3 O. S., 497.

Except as between the parties a mortgage indenture does not create a lien on the property until filed for record.

Bloom vs. Noggle, 4 O. S. 45

Magee vs. Beatty, 8 Oh. 396

Stansell vs. Roberts, 13 Oh. 148

Fosdick vs. Barr, *supra*

Siddell vs. Maxwell, *supra*

Rider vs. Crobaugh, 100 O. S. 88.

As to third persons, neither at law nor in equity, has a mortgage any effect until filed for record.

Building Association vs. Clark, 43 O. S. 427

Betz vs. Snyder, 48 O. S. 492

Mayham vs. Coombs, 14 Oh. 428

The effective date of a mortgage except as between the parties, is set forth in Section 8542, General Code, as follows:

“All mortgages, executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the mortgaged premises are situated, and take effect from the time they are delivered to the recorder of the proper county for record. If two or more mortgages are presented for record on the same day, they shall take effect from the order of presentation for record. The first presented must be the first recorded, and the first recorded shall have preference.”

As above pointed out, a mortgage, as between the parties, is valid even before record. It would thus appear that there could be no purpose of filing the mortgage with the recorder except for the purpose of establishing the priority of its lien. *Schwartz vs. Leist*, 13 O. S. 420; *Mayham vs. Coombs, supra*. If, by reason of an agreement between the mortgagee and a county recorder, the mortgage is not recorded in the proper order after being filed with him, there is some question as to whether it would not lose its priority in favor of a mortgage filed after such filing date but before it was actually recorded. However, I do not herein consider such question nor do I express any opinion thereon.

My examination of the statutes of Ohio fails to disclose the grant of any power, or the imposition of any duty on the part of the county recorder to receive mortgage deeds for the purpose of safekeeping, to be recorded at a later date which may be convenient or advisable to the mortgagee, nor does it disclose any grant of authority to accept them for any purpose except for recording, pursuant to the provisions of Sections 2758 and 2759, *supra*; or as to lands the title to which is registered pursuant to the Land Title Registration Law (Sections 8572-1 to 8572-118, General Code) for the purpose of filing, pursuant to the provisions of Section 8572-44, General Code, and of entering a memorial thereof on the certificate of title of lands so registered.

Specifically answering your inquiry, it is my opinion that:

1. A county recorder has no legal authority to receive for record, or record a mortgage indenture in any other manner than as set forth in Sections 2758 and 2759, General Code.

2. A county recorder as such officer, may not legally receive from a mortgagee a mortgage indenture, endorse thereon his file number, the date of filing, and the precise time of filing, and by agreement between the mortgagee and himself withhold such mortgage indenture from record until he receives from such mortgagee further instructions as to the time for recording such indenture. (Sections 2758 and 2759, General Code.)

Respectfully,
JOHN W. BRICKER,
Attorney General.