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ASSIGNMENTS—RENTS, PROFITS AND ROYALTIES INCIDENT TO ESTATES IN LANDS ARE HEREDITAMENTS—RECORDABLE INSTRUMENTS—SECTIONS 2757, 8543 G. C.—IF SUCH ASSIGNMENT ABSOLUTE AND UNCONDITIONAL CONVEYANCE, RECORDED IN RECORDS OF DEEDS—IF CONDITIONAL, RECORDED, IN RECORD OF MORTGAGES.

SYLLABUS:

Rents, profits and royalties incident to estates in lands are hereditaments and by virtue of sections 2757 and 8543, General Code, instruments in writing constituting assignments thereof are recordable instruments.

If such an assignment is an absolute and unconditional conveyance of rents, profits and royalties, it should be recorded in the record of deeds; if conditional, the assignment should be recorded in the record of mortgages.

Columbus, Ohio, February 17, 1940.

Hon. Frank T. Cullitan, Prosecuting Attorney,
Cleveland, Ohio.

Dear Sir:

This will acknowledge receipt of your recent communication, which reads as follows:

“The County Recorder has had presented to him for record written instruments as follows:

1. An assignment of the rents, profits or royalties to be derived from a described parcel of real estate.

2. An assignment of the rents, profits or royalties to be derived from a described parcel of real estate, and conferring upon the assignee the right, upon default in the making of such payments, to enter into possession of the premises, rent and manage the same, and collect the rents therefrom.

3. An assignment of royalties becoming due from an oil or gas lease.

The County Recorder is in doubt as to whether there is any duty on him to receive or record instruments of the above character, and also, if it is his duty so to do, in which of the records provided by law to be kept by him, should they be recorded?

Section 2757, General Code, 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. This section does not provide for a separate volume in which to keep a record of the above instruments.

Section 8543, General Code, provides for the recording of 'all other deeds and instruments of writing for the conveyance or encumbrance of lands, tenements, or *hereditaments*.' There is a conflict of opinion as to whether an assignment of future rents is such a conveyance or encumbrance of realty as to come within the operation of registration and recording laws. The determination of the question seems to depend on the view taken as to the nature of an assignment of future rents. Some authorities hold that it is a hereditament. See 35 O. J., p. 72; 75 A. L. R., 261 and annotation on page 270. The question arises whether assignment of future rents are 'hereditaments' within the meaning of section 8543, General Code, and therefore entitled to be recorded?"

It is provided in section 2757, General Code that:

"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; *** Fourth, a record of leases, in which shall be recorded all leases and powers of attorney for the execution of leases.***" (Emphasis the writer's.)

Failure to record any of the instruments in the above section, including conveyances and incumbrances of hereditaments, causes such instruments to be regarded as fraudulent so far as they relate to bona fide purchasers without knowledge. This is provided in section 8543, General Code, which provides:

"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."

If, then, the assignments described in your inquiry are hereditaments they

are entitled to be recorded. In *Ralston Car Co. v. Ralston*, 112 O. S. 306, Marshall, C. J., said on page 315:

“A hereditament comprehends anything which may be inherited, whether corporeal or incorporeal, and includes both lands and tenements.”

In *Tiffany on Real Property*, Volume I, page 14, section 5, it is said:

“Hereditament’ includes whatever, upon the death of the owner, passes, in the absence of disposition by will, by the act of law, to the heir, and not to the executor. The term is more extensive in its significance than the word ‘tenement’, which it generally, though not always, includes, and it may, in England at least, include things of a personal character.”

Since real property descends immediately to the heirs, it follows that rentals derived therefrom also go to the heirs rather than to the administrator. In 14 O. Jur. page 246, it said:

“It is generally conceded that rents accruing on realty in the lifetime of the ancestor go to the administrator; but rents, issues, and profits of land accruing after the death of the intestate go to the heirs.”

In *Overturf v. Dugan*, 29 O. S. 230, it was held:

“The lands of an intestate descend at once to his heir, and the legal title vests in him, subject to the right of the administrator to sell the same for the payment of the debts of the intestate, in the manner prescribed by law.”

It is thus seen that rentals derived from realty must be regarded as hereditaments. The same may be said of “profits” as used in conjunction with rents. The meaning of the word “profits” was discussed in the case of *In Re Vedder’s Will*, 15 N. Y. S. 798, 805:

“The word ‘profits’, when applied to real estate, means ‘the produce of lands,’ and is, as used in the phrase ‘rents, issues, and profits,’ synonymous with ‘rents’. *Burrill Law Dict.* p. 344. ‘Rents and profits’ of real estate means ‘the sum annually yielded’ by the same. *Delaney v. Van Aulen*, 84 N. Y. 23.”

In *Traer v. Fowler*, 144 Fed. 810, 816, “rents and profits” were said to be:

“The coal and other materials derived from the ordinary and reasonable operation of opened coal mines, iron mines, lead mines,

gravel banks, clay pits, stone quarries, slate quarries, salt works, oil wells, and other property of this character which diminishes in quantity and value by use, constitute the 'rents and profits' thereof, and not the body of the property, and belong to the owners of the former and not to the owners of the latter."

"Royalties", as applied to oil and gas leases and as used in conjunction with rents and profits, is said to be the most appropriate word to apply to rental based on the quantity of coal or other mineral that is or may be taken from a mine. See *Reynolds v. Hanna*, 55 Fed. 783, 800. In *Bellport v. Harrison*, 225 Pac. 52, it was said:

"The ordinary and legal meaning of the word 'royalty', as applied to an existing oil and gas lease, is the compensation provided in the lease for the privilege of drilling and producing oil and gas, and consists of a share in the oil and gas produced. It does not include a perpetual interest in the oil and gas in the ground."

The many definitions of the words "rents," "profits" and "royalties" also signify that these terms refer to rights enjoyed by those having title to leased realty by virtue of such ownership. Since the title to realty both legal and equitable descends directly to the heirs, the heirs and not the administrator are entitled to possession thereof. If the right of possession has been transferred to a lessee, then, by virtue of their ownership, the heirs are entitled to receive the rents, profits and royalties, as well as the remainder. Rents, profits and royalties passing directly to the heirs come within the definitions of hereditaments and, under the provisions of sections 2757 and 8543, *supra*, assignments or conveyances thereof are recordable instruments. In discussing the recordability of rent assignments, it is said in 35 O. Jur., page 72:

"The few cases dealing with the subject show a conflict of opinion as to whether an assignment of rents to accrue from the leasing of realty is such a transfer of an interest in realty as to come within the operation of registration and recording laws. The determination of such ultimate question depends on the view taken as to the nature of an assignment of future rents."

I have been unable to find any cases in Ohio that are directly in point, but in *Schmid v. Baum's Home of Flowers* (Tenn.) 37 S. W. (2d) 105, the first headnote reads:

"The right to future rent being a hereditament, an assignment thereof is within the operation of an act requiring registra-

tion, in order to be effective as to persons without actual notice, of 'all deeds for the absolute conveyance of any lands, tenements, of hereditaments;' but if it does not include rents to accrue beyond a period of three years from its date, it is within the exception from the requirement of registration made in the case of leases for less than three years."

In discussing the necessity of recording assignments of rent in the above case, after holding that the right to future rents is an incident to an estate in land and therefore a hereditament and that an assignment thereof is a recordable instrument, the opinion then states:

"A contrary conclusion, we think, would be disastrous to the policy and intent of the registration laws. The lease here involved is for a term of fifteen years. Other leases are made for much longer periods, and the existence of a lease providing for a fair rent will often enhance the sale value of the property in the view of investors. To hold that an undisclosed assignment of the rent for such a term is valid against an innocent purchaser of the reversion, as being outside the scope and application of the registration laws, would open the door to fraud in unlimited degree. Instances readily occur to mind in which the rents for the term of a lease, by reason of its length or other considerations, represent the entire value of the reversion, and a conveyance of assignment of the rents would be equivalent to a conveyance of the land itself."

In deciding the above case the court relied greatly upon the case of *Winnisimmet Trust v. Libby* (1919) 232 Mass. 491, 122 N. E. 575. In the *Winnisimmet* case the court said:

"Rent, that is, the right to recover future installments of rent as they become due under the lessee's covenant to pay rent in the future, is not a chose in action, but is an incorporeal interest in land which can be assigned only by an instrument under seal. ***

In this commonwealth a lease for less than seven years from the making thereof is valid against bona fide purchasers without actual notice. *** A like exemption from the operation of the recording acts attaches to that incorporeal interest in real estate denominated rent when severed from the reversion to which it is an incident."

In *John McMenemy Investment and Real Estate Co. v. Dawley*, (Mo.) 165 S. W. 829, it was held.

"Rent *** is an incorporeal hereditament, and consists of a certain profit issuing out of the lands or tenements. Such rent is a chattel real, and may be sold or assigned as such. In this view, it

may be severed entirely from the real estate, and pass to another wholly independent of the reversionary interest."

While there are several holdings, a careful examination of these cases shows that in several instances either the recording acts involved were not so broad as those of Ohio, or the failure to record was held to be immaterial for the reason that notice must be taken of the rights of the tenant in possession including the rights of the person to whom the tenant pays rent. See *White v. First National Bank (Ala.)* 183 Southern 875, and *Bullard v. Turner*, 269 Ill. App. 369.

It being the duty, as I have pointed out, for the county recorder to receive and record assignments of rent, profits and royalties, you inquire in which set of records these assignments should be recorded. In section 2757, supra, two sets of records are required to be kept in which instruments dealing with hereditaments may be recorded. First, a record of deeds in which shall be recorded all instruments of writing for the absolute and unconditional conveyance of hereditaments; second, a record of mortgages in which shall be recorded all instruments of writing by which hereditaments are or may be conditionally conveyed. It thus appears that if the assignment of rents, profits and royalties is an absolute and unconditional conveyance thereof, it should be recorded in the record of deeds. If they are but conditionally conveyed, they should be recorded in the record of mortgages.

Answering your questions specifically, it is my opinion that rents, profits and royalties incident to estates in lands are hereditaments and by virtue of sections 2757 and 8543, General Code, instruments in writing constituting assignments thereof are recordable instruments.

If such an assignment is an absolute and unconditional conveyance of rents, profits and royalties, it should be recorded in the record of deeds; if conditional, the assignment should be recorded in the record of mortgages.

Respectfully,

THOMAS J. HERBERT,
Attorney General.