

6400

MORTGAGE—COUNTY RECORDER, MINISTERIAL OFFICER—UNDER DUTY TO RECEIVE AND RECORD IN THE RECORD OF MORTGAGES ANY INSTRUMENT IN WRITING WHICH PURPORTS TO EFFECT CONDITIONAL CONVEYANCE OF AN INTEREST IN REAL PROPERTY—SECTIONS 317.12, 317.13 RC.

## SYLLABUS:

The county recorder is a ministerial officer only and as such is under a duty, under the provisions of Sections 317.12 and 317.13, Revised Code, to receive and record in the record of mortgages any instrument in writing which purports to effect the conditional conveyance of an interest in real property.

Columbus, Ohio, March 28, 1956

Hon. James H. DeWeese, Prosecuting Attorney  
Miami County, Troy, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“I am enclosing herewith a blank form Construction Contract and Mortgage Deed, which has been received by our county recorder with the request that he advise the contractor as to the possibility of recording such contract after it has been executed.

“This appears to be a construction contract and provides that it shall be filed in the recorder’s office and upon such recording that the agreement then shall act as a mortgage deed, but that prior to recording it is merely a contract, and I request your opinion as to whether or not such an instrument, after proper execution as a mortgage, is an instrument subject to record, and if so in what record it should be recorded.”

The duty of the recorder in the matter of keeping records relative to mortgages and other conditional conveyances of lands is set out in Section 317.08, Revised Code, as follows:

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

“\* \* \* (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; \* \* \*

The duty of the recorder to receive such conveyances for record is set out in Section 317.12, Revised Code, as follows:

“Upon the presentation of a deed or other instrument of writing for record, the county recorder shall indorse thereon the date, the precise time 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 mortgage, which shall have a separate series of file numbers and be filed separately, as provided by sections 1319.01 to 1319.05, inclusive, of the Revised Code. Until recorded, each instrument shall be kept on file in the same numerical order, for easy reference. If required, the recorder shall, without fee, give to the person presenting such instrument a receipt naming the parties thereto, the date thereof, and a brief description of the premises. When a deed or other instrument is recorded, the recorder shall indorse on it the time when recorded, and the number or letter and page of the book in which it is recorded.”

The duty actually to record the instruments thus received is set out in Section 317.13, Revised Code, in the following language:

“The county recorder shall record in the proper record, in legible handwriting, typewriting, or printing, or by any authorized photographic process, all deeds, mortgages, plats, or other instruments of writing required or authorized to be recorded, presented to him for that purpose. \* \* \*”

The legislative purpose in providing for the record of conveyances of interests in real property is evident from the following provisions in Section 5301.25, Revised Code:

“All deeds and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in section 5301.23 of the Revised Code, shall be recorded in the office of the county recorder of the county in which the premises are situated, and until so recorded or filed for record, they are 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.”

Here it will be seen that the record of conveyances of interests in real property serves to establish priority as among conflicting title claims.

Accordingly, if in any case it can be established as a matter of law that a recorded instrument is so defective or insufficient that it does not establish such priority, the parties principally interested are the disputing claimants concerned; and in the resolution of such a controversy any "decision" or "ruling" that the recorder may have made as to the sufficiency of the instrument involved would be a matter of no persuasive moment. Pertinent to this concept of the recorder's function is the following language found in Opinion No. 4531, Opinions of the Attorney General for 1932, page 906, 909:

"\* \* \* In the case of *State vs. Guilbert*, 56 O. S. 575, the court held that the county recorder was a ministerial officer, and as such, was incompetent to receive a grant of judicial power from the legislature and his attempt to exercise such power was a nullity. See also *Irvin vs. Smith*, 17 Ohio, 226.

"I doubt whether any court would hold that any duty has been imposed upon the county recorder to determine the legal sufficiency of a deed as an instrument of transfer other than to determine that it was executed according to the provisions of the statute and that it bore the endorsement of the county auditor concerning transfers.

"It is well to bear in mind that it is not the record of a deed which transfers the title to real property but rather the delivery of the instrument making such conveyance from the grantor to the grantee except under the provisions of the so-called Torrens Act. The date of delivery is the date of passing title and not the date of filing the deed for record. Such date is the date of the manual act of handing the deed to the grantee by the grantor. \* \* \*"

In the instrument accompanying your inquiry I fail to note the words of conveyance more commonly used in mortgages and other conditional conveyances of interest in real property, but such instrument does contain the following provision:

"10. In consideration of the covenants herein provided for to be kept by the parties, it is further agreed that this agreement shall be filed in the office of the Recorder of the County wherein the lots described above are situate, under authority of Ohio Revised Code Section 317.08, and upon such recording, this agreement shall constitute, act as and be a MORTGAGE DEED, by the express terms of which *Owner hereby conveys* to Contractor, its successors and assigns, *all of Owner's estate, title and interest in the lots described above*, to have and to hold, provided, however, that the CONDITION of this mortgage shall be the faithful performance by the Owner of the covenants by it to be kept, and to

effectuate said condition, Contractor, for itself, its successors and assigns, agrees to release from the lien and operation of this mortgage each lot upon which a house that has been constructed has been paid for, and at such time as every such lot has been so released, this mortgage shall be void. Grantee, for itself, its successors and assigns, further agrees that this mortgage shall be subordinate to any construction loans that Owner shall obtain on any or all of the lots above described, and a waiver of priority shall be furnished upon request, to any lending institution making any such construction loans.” (Emphasis added.)

Although I must refrain from the expression of any opinion as to the legal efficacy of this language to effect a conditional conveyance of an interest in real property, it is quite clear that such language *purports* to effect such conveyance. In this situation, therefore, it would clearly be beyond the scope of the recorder’s functions as a purely ministerial officer to determine its legal sufficiency to accomplish that result. Hence that officer would be without authority to refuse the instrument for record, but should accept it for what it purports to be, a conditional conveyance of an interest in land, receive it for record, and record it in the record of mortgages, leaving for subsequent determination by interested parties the question of its legal effect.

Accordingly, in specific answer to your inquiry, it is my opinion that the county recorder is a ministerial officer only and as such is under a duty, under the provisions of Sections 317.12 and 317.13, Revised Code, to receive and record in the record of mortgages any instrument in writing which purports to effect the conditional conveyance of an interest in real property.

Respectfully,  
C. WILLIAM O’NEILL  
Attorney General