

Board's Release; Workmen's Compensation Certificate showing a compliance by H. W. Holt with the laws of Ohio relating to Workmen's Compensation; Form of proposal containing the contract bond signed by the Seaboard Surety Company; its power of attorney for the signer; its certificate of compliance with the laws of Ohio relating to surety companies.

Finding said contract in proper legal form, I have noted my approval thereon, and same is transmitted herewith to you, together with all other papers submitted in this connection.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

958.

COUNTY RECORDER—WHERE DEED, ABSOLUTE CONVEYANCE OF LAND, DOES NOT BEAR ENDORSEMENT OF COUNTY AUDITOR AND IS PRESENTED WITHOUT FILING FEE—RECORDER WITHOUT AUTHORITY TO ACCEPT FOR FILING AND RECORDING; TO MAKE ENTRY ON REGISTER AND RETURN INSTRUMENT TO PRESENTER; NO OBLIGATION TO DELIVER SUCH DEED TO AUDITOR FOR TRANSFER—REFUSAL—NO LIABILITY, SUIT ON OFFICIAL BOND.

SYLLABUS:

1. *If a deed of absolute conveyance of land which does not bear the endorsement of a county auditor is presented to the county recorder with the proper filing fee, the latter is without authority to accept such deed for filing and recording.*

2. *The county recorder has no authority to accept such deed, endorse a file number thereon, enter same in his daily register and then return the instrument to the presenter with the understanding at a later date it will be properly endorsed by the county auditor and returned for recording.*

3. *Whenever such deed is presented to a county recorder, he is under no obligation to accept and take same to the county auditor for transfer.*

4. *The refusal by a county recorder to accept such deed which does not bear the county auditor's endorsement would not render him liable to suit on his official bond.*

COLUMBUS, OHIO, July 28, 1939.

HON. NORTON C. ROSENTRATER, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion on the following:

"A question has arisen in this county relative to the duties and obligations imposed upon the County Recorder in the matter of registering and recording instruments, particularly deeds. An opinion was prepared by this office but we have been requested to also request an opinion from your office on this matter.

The questions involved are: If a deed is presented to the Recorder with the proper fee, before transfer by the Auditor, can or must the Recorder stamp thereon his file number, enter the same in his register and return it to the presenter with the understanding that the same is to be transferred and at a later date returned for recording?

Also under the said circumstances could or should the Recorder number and register this deed and then himself take it to the Auditor for transfer, by which it might possibly be said the instrument was kept constructively in the Recorder's possession although it would not be actually in his files?

The third question submitted is what if any *liability* would the Recorder be subjected to in the event he refused to number and register a deed before transfer and then, while the deed was in the process of transfer or at least before it was transferred and returned for proper recordation, the original grantor deeded all or a portion of the premises to an innocent party or some third party intervened and perfected a judgment or other lien against the original grantor?

An opinion was rendered by your office in 1934, known as No. 2667, on the question of mortgages which we feel has considerable bearing in the present case. We also find that General Code Section 2768 provides, in substance and in part, that the County Recorder shall not record any deed of absolute conveyance until the County Auditor has indorsed it either 'transferred' or 'transfer not necessary'. At the same time General Code Section 2758, in substance and in part, provides that the Recorder shall indorse upon a deed or other instrument the date and precise time of day of its presentation for record and a file number, from which it has been argued that he might make those indorsements even though the deed was not ready for recordation according to Section 2768. However, it is provided in Section 2758 that 'until recorded each instrument shall be kept on file in the same numerical order'".

The powers and duties of public officers, such as county recorders, are derived from and limited by the provisions of the general law. As a general rule, such officers have only such powers as are expressly delegated to them by statute and in addition thereto, by implication, such additional

powers as are necessary for the due and efficient exercise of those powers expressly granted. See 32 O. J. 933, 936, and authorities cited.

The statutory provisions governing the office of county recorder are contained in sections 2750 to 2781, inclusive, General Code, to which I direct your attention, to the extent they are applicable to your inquiry concerning the recordation of deeds.

Section 2757, General Code, provides in part 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.”

Section 2758, General Code, reads as follows:

“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.” (Italics the writers.)

Section 2759, General Code, provides as follows:

“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 2765, General Code, is as follows:

“The county recorder shall keep a daily register of deeds and a daily register of mortgages, in which he shall note, as soon as filed, in their alphabetical order according to the names of the grantors, respectively, all deeds and mortgages affecting real estate, filed in his office. He shall keep such daily register in his office, and open to the inspection of the public during business hours.”

By virtue of the above quoted sections, whenever a deed is presented for record to the county recorder, he is required to endorse thereon the date and precise time of its presentation and a file number; and further, he must note same in his daily register. He is then under duty to keep such instrument on file in numerical order until such time as it can be recorded in the permanent record of the office. Section 2759, *supra*, specifically provides that the deeds shall be recorded in regular succession according to priority of presentation as evidenced by the file number endorsed thereon.

It will be observed that the statutes contemplate two separate operations by the county recorder when accepting a deed presented for record, to-wit, first, a temporary filing in consecutive numerical order, and second, a permanent recording in the identical order.

Section 2768, General Code, places a limitation upon the county recorder with respect to the recording of deeds. Said section provides in part as follows:

“The county recorder shall not record any deed of absolute conveyance of land or any conveyance, absolute or otherwise, of minerals or mineral rights until it has been presented to the county auditor, and by him indorsed ‘transferred’, or ‘transfer not necessary.’ ”

Under the provisions of the above section, a county recorder cannot record any deed which has not been presented for transfer to the county auditor and properly endorsed by that officer. To record such instrument would be beyond the scope of the county recorder’s authority.

In light of the sections referred to, you inquire whether or not a deed presented to the county recorder with the proper fee before transfer by the county auditor, may be given a file number by such recorder, entered in the daily register and returned to the presenter with the understanding it will be transferred and returned for recording at a later date? After the county recorder has made the necessary endorsements on a deed presented for recording and has noted same in his daily register, section 2758, *supra*, requires that until recorded each such instrument shall be

kept on file. It might well be argued the phrase "kept on file" contemplates a physical presence in the county recorder's office. Upon acceptance by the recorder the instrument becomes a part of the official county records and may not be withdrawn from his file. Therefore, I am of the view that the county recorder has no authority to return a deed to a person presenting the same after such instrument has been given a file number and noted in the daily register; the recorder may only place such instrument on file in his office until such time as it can be entered in the permanent record of deeds.

You inquire further whether the county recorder might number and register such deed and then himself take it to the county auditor for transfer. In Opinion No. 2667, Opinions of the Attorney General, 1934, Vol. I, page 676, to which you refer, the then Attorney General considered a question similar to the one above propounded by you. At page 678 of the 1934 opinion we note the following statement:

"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."

The language above quoted may be applied with equal force to the instant case in view of the fact that the duty of the county recorder to endorse, file and record written instruments under sections 2758 and 2759 is the same with respect to mortgages and deeds. In line with the reasoning of the 1934 opinion, it would follow that the county recorder is under no legal obligation to take deeds to the county auditor for transfer. Such obligation rests with the one who presents the deed for record at the office of the county recorder. Moreover, section 2768 specifically prohibits the county recorder from recording any deed of absolute conveyance of land until it has been presented to the county auditor and properly endorsed by him. It would be a useless act for the recorder to give an unendorsed deed a file number and to keep same on file in his office because when the time arose to record such instrument in regular succession according to the priority of presentation, the provisions of section 2768 would prevent the recorder from so doing. In other words, it is my opinion that the phrase "shall not record" as used in section 2768 includes the acts of numbering and registering. To say otherwise would place the recorder in the ridiculous position of having a deed in his temporary files which he could not legally record in the permanent volumes.

Your third question is concerned with the liability of a county recorder

for failing to accept a deed which has not been first presented to the county auditor for the latter's endorsement. The instances in which a county recorder is liable to suit on his bond are contained in section 2781. Briefly, said section permits suit whenever the county recorder fails to perform his official duties or performs same in a negligent manner. In view of the position which I have taken in the instant opinion, to the effect that a county recorder is under no duty to accept a deed which has not been endorsed by the county auditor, my answer to your third question is that the recorder would not be subjected to any liability under the circumstances set forth in your inquiry.

In view of the foregoing and in specific answer to your inquiries, I am of the opinion:

1. If a deed of absolute conveyance of land which does not bear the endorsement of a county auditor is presented to the county recorder with the proper filing fee, the latter is without authority to accept such deed for filing and recording.

2. The county recorder has no authority to accept such deed, endorse a file number thereon, enter same in his daily register and then return the instrument to the presenter with the understanding at a later date it will be properly endorsed by the county auditor and returned for recording.

3. Whenever such deed is presented to a county recorder, he is under no obligation to accept and take same to the county auditor for transfer.

4. The refusal by a county recorder to accept such deed which does not bear the county auditor's endorsement would not render him liable to suit on his official bond.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

959.

ROAD IMPROVEMENTS—DEPARTMENT OF HIGHWAYS—
WHERE APPROACH OR DRIVEWAY OF ABUTTING PROP-
ERTY OWNER DESTROYED—COMPENSATION—RECON-
STRUCTION AT PUBLIC EXPENSE—STATUS WHERE
APPROACHES OF OWNERS OF ABUTTING REAL ESTATE
MADE UNSUITABLE THROUGH IMPROVEMENT.

SYLLABUS:

1. *Where the approach or driveway of an abutting property owner is destroyed as a result of any road improvement by the Department of Highways, such department must compensate such abutting property*