

OPINION NO. 69-143

Syllabus:

A county recorder is not required to file options to purchase real estate.

To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio
By: Paul W. Brown, Attorney General, October 28, 1969

Your request for my opinion presents the following question:

"Our County Recorder has had presented to him for filing, Options to purchase Real Estate and has been unable to find any authority for the filing of such options and is also in doubt as to which set of books such options should be filed in, if they are entitled to record."

Section 317.08, Revised Code, provides in substance that the following five separate sets of records shall be kept by the county recorder: "(A) A record of deeds * * *"; "(B) A record of mortgages * * *"; "(C) A record of powers of attorney"; "(D) A record of plats * * *"; and "(E) A record of leases * * *".

With the exception of (C), above, all of such records are concerned with an existing interest in real property. The same is true of the notice of a claimed interest in land which may be filed for record under Section 5301.51, Revised Code.

On the other hand, "An option has been defined to be 'an unaccepted offer to sell.' It transfers no title or right in rem, but creates a right in personam, and that right is to accept or reject a present offer within a limited or reasonable time in the future." Standiford et ex. v. Thompson, CCA 4th Cir. (1905), 135 F. Rep. 991, 996. The same principle has been enunciated in Ohio:

"3. A written optional contract for a nominal consideration given by the owner to sell his real estate is not a sale thereof, but only a standing offer to sell to the person, at the price named and within the time stated in the contract, and the holder of the option does not acquire any title to the real estate unless he accepts the offer prior to its expiration." Sause v. Ward, et al., 7 Ohio App. 446 (1917), Headnote, 3rd branch.

"* * *Such instruments are merely contracts by which one party in consideration of the payment of a certain sum to the other party, acquires the privilege of buying from or otherwise acquiring, or selling to such other party an interest in specified property at a fixed price within a stated time.* * *" Brewing Co. v. Maxwell, 78 Ohio St. 54, 63 (1908).

From the foregoing it is apparent that (1) the legislature intended that documents should be recorded which involve an existing interest in real property, and (2) that an option does not involve such interest.

It has been suggested that Section 317.08 (B), Revised Code, might well include options. This section details one of the five sets of records to be kept by a county recorder and provides:

" * * * * * * * * * * * * * * *"

"(B) A record of mortgages, in which shall be recorded:

"(1) All mortgages, including amendments, supplements, modifications, and extensions thereof, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered;

"(2) All executory installment contracts for the sale of land executed after September 29, 1961, which by the terms thereof are not required to be fully performed by one or more of the parties thereto within one year of the date of such contract;

" * * * * * * * * * * * * * * *"

In State, ex rel. v. Cullen, 5 Ohio App. 2d, 13 (1966), the court considered the foregoing section and held that even an executed contract to purchase is not entitled to recording.

I am aware that there is a rather general belief among attorneys that a recorder must file any document submitted to him if accompanied by the proffer of the appropriate fee. Also, I am advised that some recorders have so-called "Miscellaneous Records" in which are filed any documents which may be submitted and which do not fall within the categories of the records prescribed by statute. I do not here address myself to what a recorder may file for whatever value, if any, it may have, but rather to the sole question of whether he must file an option to purchase real estate.

It is therefore my opinion and you are hereby advised that a county recorder is not required to file options to purchase real estate.