Recent Legislation: Real Property--Recording of Land Contracts--Constructive Notice

Alan B. Soclof

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Recent Legislation

REAL PROPERTY — RECORDING OF LAND CONTRACTS — CONSTRUCTIVE NOTICE

In the past, recording statutes were judicially construed in a manner which excluded the land contract as a recordable instrument.\(^1\) However, this was contrary to the established practice of county recorders, who in fact did record them.\(^2\) Obviously this conflict between practice and theory frequently proved troublesome to Ohio courts. Situations arose when the courts were confronted by one party, who claimed superior rights in the property by virtue of recording his land contract, as compared to his opponent, who argued that the recording was a nullity as far as his priority of claim was concerned.\(^3\)

A recent statutory enactment, Ohio Revised Code section 317.08 (B) (2), erases this problem and other conflicts. It provides that after August 11, 1961, all installment contracts for the sale of land which remain executory for more than one year must be recorded. Prior to its passage, the only assured method by which the vendee could impart notice of his equity to third parties was by his open possession of the property.\(^4\) At best, this means of communicating notice was fraught with dangers, and it subjected the parties concerned to needless inconvenience.

The new legislation does not primarily affect the relationship between the vendee and vendor. Rather, its deeper purpose is to protect the priority of the vendee's equity against third parties: lienors, mortgagees, judgment creditors, and subsequent purchasers.

Formerly, problems arose within the following factual framework. The property was sold under a land contract agreement. While the contract was in effect the vendor assigned his interest to a third party. Neither the original land contract nor the assignment were recorded. After the vendor's assignment, his judgment creditor filed a lien against the vendor's interest in the property.\(^5\) The courts settled this issue by logically

3. The confusion caused by the divergence between practice and judicial theory is reflected in Standard Oil v. Moon, 34 Ohio App. 123, 170 N.E. 368 (1930); 1955 OPS. ATT'Y GEN. (Ohio) 150; Gottsegen, Land Contracts — Are They Recordable?, 28 CLEVE. BAR ASS'N J. 103 (1957); Grimm, Recording of Land Contracts, 33 OHIO OP. 122 (1947).
5. See, e.g., Butcher v. Kagey Lumber Co., supra note 1; Williams v. Johns, 34 Ohio App. 230, 170 N.E. 580 (1930). See 40 MINN. L. REV. 738 (1946) and cases cited in text. The beneficial interest remaining in the vendor-assignor was measured by the amount of consideration paid to him by the assignee for the transfer. If the consideration exceeded or equalled the vendor-grantor's interest in the property, it was then concluded that he held no
deciding that the judgment creditor's lien attached only to the actual interest retained by the vendor in the property at the time the judgment was docketed.

Furthermore, the absence of a recording statute motivated the Ohio courts to indulge in an over-expansion of the doctrine of constructive notice in an attempt to protect the rights of the vendee in possession. Ohio, along with a small minority of other jurisdictions, had held that the vendor's open possession of the property could be utilized to charge the vendor's mortgagee, creditors, or assignees with constructive notice of past unrecorded assignments of or incumbrances on the property by the vendor. The rationale supporting this theory was that inquiry of the vendee would disclose to these subsequent parties not only the occupant's claim, but also the interest of any party, other than the vendor, to whom the vendee made his installment payments. The need to apply this dubious reasoning has been eliminated by the recording statute. The recording of both the original land contract instrument and the assignment will not charge the assignee and the judgment creditor with notice of the priority of the vendee's equitable interest and will apprise them of the merit of their own respective claims.

The new statute does not stand without support. A well-established line of precedent related to the recording of mortgages is available to assist in the judicial construction of the new legislation. In addition to the recording provisions, the legislature also amended other statutes. Ohio Revised Code section 5301.01 introduces the formalities of acknowledgement and attestation as prerequisites for the recordation of the land contract. Ohio Revised Code section 5301.331 authorizes the cancellation, release, and assignment of the land contract.

The recording statute and the statute providing for the requisite contractual formalities of the instrument represent the first affirmative step by the legislature to improve the stature of the land contract. This legislation, however, only partially accomplishes the needed reform in this area. If the land contract is ever to parallel the mortgage as a reliable

6. See Walker v. Fairbanks Inv. Co., 268 F.2d 48 (9th Cir. 1959); Frank Lynch Co. v. National City Bank of Chicago, 261 F. 480 (8th Cir. 1919). In Butcher v. Kagey Lumber Co., 164 Ohio St. 85, 128 N.E.2d 54 (1955), the vendee in possession had actual knowledge of the vendor's assignment. The court held that inquiry of him would presumably have revealed this fact to the judgment lien creditor. See also Jaeger v. Hardy, 48 Ohio St. 335, 27 N.E. 863 (1891).

7. The great majority of cases which have dealt with this problem have held that the vendee's possession does not charge subsequent parties with constructive notice of unrecorded assignments or incumbrances arising out of the vendor. Walker v. Fairbanks Inv. Co., 268 F.2d 48 (9th Cir. 1959). For a criticism of the minority view, see I. MERRILL, NOTICE § 118, at 144 (1952).

8. OHIO REV. CODE § 5301.331.
conveyancing-security instrument, broad statutory reforms are needed to deal directly with the peculiarities inherent in the facts surrounding the transaction itself.9

Fortunately, a committee composed of members of the Real Property Section of the Ohio Bar Association is considering this matter. It is in the process of drafting legislation directed specifically at eliminating the confusion and inequities that arise out of land contract sales of real estate.

ALAN B. SOCLOF

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