

Opinion No. 185.**Contracts for Deed—Filing and Recording—County Clerk and Recorder—Duties.**

HELD: The county clerk and recorder is not required to accept a contract to sell or convey real property for filing unless it is also to be indexed and recorded.

October 29, 1937.

Mr. Homer A. Hoover
County Attorney
Circle, Montana

Dear Mr. Hoover:

You have asked if it is the duty of the county clerk and recorder to accept a duly signed and acknowledged contract for a deed for filing only, without also recording it.

Section 6901, R. C. M. 1935, provides that "the duties of county clerks, in respect to recording instruments, are prescribed by the Political Code."

Section 4796 of that Code says:

"He must, upon payment of his fees for the same, record, or correctly copy, separately, in large and well-bound, or to be bound, separate books, either in a fair hand or by printing or by typewriting, or by the use of prepared blank forms:

1. Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney to convey real estate, and leases which have been acknowledged or proved;
* * *

15. Such other writings as are required or permitted by law to be recorded; * * *"

And Section 4799 provides:

"Every county clerk, as ex-officio recorder, must keep:

"1. An index of deeds, grants, and transfers, and contracts to sell or con-

vey real estate, labeled 'Grantors,' each page divided into four columns, headed respectively: 'Names of grantors,' 'Names of grantee,' 'Date of deeds, grants, transfers, or contracts,' and 'Where recorded';

"2. An index of deeds, labeled 'Grantees,' each page divided into four columns, headed respectively: 'Names of grantees,' 'Names of grantors,' 'Date of deeds, grants, transfers, or contracts,' and 'Where recorded'; ***

"27. A miscellaneous index, in which must be indexed papers not hereinbefore stated."

There the duty in each statute is to file and record, rather than only to file. There is a well defined distinction between filing and recording, in that filing consists of leaving an instrument with the proper officer to be kept in his care or custody for the purpose of record, while offering an instrument for record is to leave it to be entered upon the books for record. (Chapin v. Kingsbury, 138 Mass. 194.)

Filing carries with it the idea of permanent preservation of the paper so delivered and the idea of the custody of a public officer, in order that it may be a public record. (53 C. J. 607.) Generally, it is the duty of the recorder to receive and file, or to receive and record such instruments as by law are entitled to be filed or recorded. (Weyrauch v. Johnson, County Recorder, 208 N. W. 706.) All officers are creatures of the law and bound to obey it. The powers of each are limited and while some exercise powers which are defined in the fundamental law, the larger portion of them are statutory creation with duties and powers limited. When a duty is prescribed by legislative enactment, it must be executed in the way directed by the law. (22 R. C. L., Section 114, page 455.)

The county clerk, by Section 4796, subdivision 1, must record deeds, grants, transfers and contracts to sell or convey real estate. Subdivision 15 provides for a miscellaneous record but only for such other writings as are required or permitted by law to be recorded. Section 4799 requires that indices be kept, indexing such instruments, and one of the column heads is "Where recorded." In the light of these two sections, and the general rules of statutory interpretation, it would seem that the county clerk could

only proceed in the manner set forth in the Code after receiving one of the instruments enumerated. The recording statutes were unknown at common law and are purely statutory in origin. Such statutes are designed to give constructive notice of the existence of liens and encumbrances derogating from the title of property. The object of such laws which require or permit instruments to be filed, registered or recorded in a public office, is that the general public may proceed to the proper office and find the instrument so filed or recorded in the customary place, and, after reasonable search, be able to ascertain the state of the title and the liens or encumbrances against the property in which they are interested. (53 C. J. 607; Lewis v. State, 256 Pac. 1048, 32 Ariz., 182.)

One of the purposes of the recording acts is the avoidance of secret liens and the consequent frauds attendant upon them (Benner v. Scandinavian American Bank, Ann. Cas. 1914D, 702, 131 Pac. 1149, 73 Wash. 488), and the intent is to give constructive notice, equally accessible to all subsequent parties. (Chamberlain v. Bell, 6 Am. Dec. 260, 7 Cal. 292; Flynn v. Garford Motor Truck Co., 270 Pac. 806, 149 Wash. 264.)

The doctrine of constructive notice is solely of statutory origin and while necessary in the commercial activity of modern affairs, is a harsh doctrine and should be cautiously and carefully administered. The application of the constructive notice doctrine in cases of recording in the wrong book, is analogous, and sheds light on the problem here. A better rule is stated in R. C. L., that a person is chargeable with notice of every instrument which a proper search would discover in the chain of title. (23 R. C. L., Section 92, page 229.)

Hence, to carry out the intent of the recording statutes, it is the duty of the recorder to record an instrument in that place where a reasonable search will bring it to light. A deed or a contract for a deed, though merely filed, becomes a part of the public record and has sufficient weight to impart notice; yet, it cannot be indexed and the instrument can only be found by searching in an unfamiliar and unexpected place. A reasonable search would entail looking through the statutory indices where such instruments

are bound to be recorded but a search through all the records in the archives should not be required.

In view of the statutes directing the county clerk, as ex-officio recorder, to file and record this type of instrument, and in view of the intent of the recording act, it is my opinion that such a departure from habitual and customary usage as permitting the filing of a deed, grant, transfer, or contract to sell or convey real estate, without also recording and indexing it, as required by law, would not only be improper and illegal but would also be extremely dangerous from a viewpoint of sound public policy, and would open opportunities for fraud and mistake, tending to render the public records open to suspicion, doubt and uncertainty.