

1592.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR SALE OF MIAMI AND ERIE CANAL LAND IN CITY OF CINCINNATI, HAMILTON COUNTY, OHIO.

COLUMBUS, OHIO, March 6, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication under date of February 17, 1930, submitting for by examination and approval a transcript of your findings and proceedings relative to the proposed sale and conveyance to The Atkins and Pearce Manufacturing Company of a parcel of land contiguous to the old Miami and Erie Canal, in the city of Cincinnati, Ohio, which parcel is a tract of land deeded by Alexander H. Ewing and Mary P. Ewing, his wife, under date of July 5, 1836, and designated as Lot No. 29 in the Jacob Baum allotment, and which tract is more particularly described as follows:

“Beginning at a point in the westerly line of Lock Street in the city of Cincinnati, Hamilton County, Ohio, that is fifty-three (53) feet north of the southwesterly corner of Fifth and Lock Streets in said city, and running thence North 50 Deg. West with the westerly line of Lock Street seventy (70) feet to a point; thence South 36 Deg. 42' West seventy (70) feet, to a point in the easterly line of Eggleston Avenue; thence South 53 Deg. East with the easterly line of Eggleston Avenue seventy (70) feet to a point; thence North 36 Deg. 42' East seventy feet to the place of beginning, and containing forty-nine hundred (4900) square feet.”

From the transcript presented and other authentic information at hand it appears that on March 26, 1836, the State of Ohio entered into a certain lease contract in writing by which it agreed to lease to one Clark Williams and his assigns for a term of ninety-nine (99) years, renewable forever, the surplus water in the Miami and Erie Canal between the east side of Broadway, in the city of Cincinnati, and the Ohio River, such water to be used by said lessee and his assigns for hydraulic purposes. This lease contained the provision that said lessee should be entitled to a lease for any and all ground which might be necessary for the use and occupancy of the adjacent water power provided for in said lease, as soon as the right to such ground should be vested in the State, and that said lessee should pay to the State a yearly rent therefor in addition to the rent of water power at the rate of six per centum (6%) per annum on the actual cost to the state of said ground, said rent to become chargeable on and after the date of the lease therefor, and to be payable semi-annually on the first day of November and May each year. Said lease contained the following further provision:

“It is further agreed that whenever the party of the second part shall pay to the State, the sum of which the rent herein stipulated is the legal interest, the party of the second part shall be entitled to receive a deed of conveyance absolute to said party of the premises and privileges hereby leased, reserving, however, the right of reserving the water as hereinbefore specified, and the State shall moreover be exempt from any claim of drawback or deduction on account of any partial deficiency in the stipulated supply of water.”

Thereafter, as above recited, the State of Ohio purchased of Alexander H.

Ewing and wife the tract of land here under consideration for the sum of eleven hundred (\$1100.00) dollars and received a conveyance therefor. On January 1, 1839, the State, pursuant to the terms of the hydraulic lease above mentioned, leased and demised to said Clark Williams and his assigns said above described tract of land for the term of ninety-nine (99) years, renewable forever. On June 21, 1843, both of the leases above mentioned were assigned and transferred by Clark Williams to one James Pearce. Thereafter by assignment said leases came into the ownership of The Atkins and Pearce Manufacturing Company, which company now holds the same.

Some time after the leases came into the ownership and possession of James Pearce, the provision in said lease with respect to the rental to be paid on the lease of the tract of land above described was changed so as to provide that said rental should be 6% upon an assumed valuation of \$1,666.67, instead of the sum of \$1,100.00, which, as above noted, was the price paid by the State for the said tract of land. The present owner and holder of said lease, entitled to exercise the rights provided for therein to said lessee and assigns, has now made application to the Superintendent of Public Works for a deed to be executed on behalf of the State in the manner provided by law conveying the above described tract of land to said corporation.

Some time in the year 1863, the city of Cincinnati, acting in pursuance to an act of the General Assembly passed March 24, 1863, (60 Ohio Laws, 44), entered upon and to some extent improved for street and sewer purposes that part of the Miami and Erie Canal from the east side of Broadway to the Ohio River. As a part of this improvement and as a condition of the right of the city to enter in and upon this section of said canal land for the purpose of making said improvement, the city constructed an aqueduct under Eggleston Avenue for the purpose of serving as an outlet for the surplus water of the canal north and west of Broadway in said city.

Thereafter, on May 15, 1911, the Legislature passed an act (102 Ohio Laws, 168), authorizing the execution of a lease to the city of Cincinnati for that part of the Miami and Erie Canal between a point three hundred (300) feet north of Mitchell Avenue and extending east and south to the east side of Broadway in said city. By this act of the legislature and the lease executed pursuant thereto, the city was authorized to use this part of the Miami and Erie Canal for street, sewerage, boulevard and subway purposes, and as a part of said improvement the city was required to and did construct an outlet for the water of the canal by which said water was turned into Mill Creek.

By reason of the acts of the Legislature above mentioned, and the improvements made by the city of Cincinnati under authority of the same, that part of the Miami and Erie Canal between Broadway and the Ohio River was effectually abandoned for hydraulic purposes.

Inasmuch as the tract of land here in question was leased to Clark Williams and his assigns as ground necessary for the use and occupancy of the adjacent water power provided for by said lease, as above mentioned, and apparently the use of said tract of land under the lease therefor was only incident to the use of the surplus water in that section of the Miami and Erie Canal for hydraulic purposes, it would seem that Clark Williams and his assigns did not take or have any rights under said lease with respect to this tract of land that would survive the abandonment of this part of the Miami and Erie Canal for hydraulic purposes. (See Opinions of the Attorney General, 1927, Vol. 2, page 1382). Apparently, however, this question has been foreclosed by the judgment and decree of the Common Pleas Court of Hamilton County in registration case No. 336 on the dockets of said court. This case was one filed by The Atkins and Pearce

Manufacturing Company, the present owner and holder of the leases above referred to, some time in the year 1924 for the purpose of having its title in and to this tract of land registered under the provisions of Sections 8572-1, et seq., General Code, commonly known as the "Land Title Registration Law."

In as much as The Atkins and Pearce Manufacturing Company, the applicant in said registration proceedings, held a perpetual leasehold contract and lease for the premises it was entitled under the provisions of Section 8572-5, General Code, to have its interest under said lease determined and registered under the provisions of said act. In these proceedings, the State of Ohio was made a party defendant under the provisions of Section 8572-8, General Code, which are that:

"If the State of Ohio or any political subdivision thereof or public authority or public body corporate will in any way be affected by a decree of the court determining or ordering to be registered the title of the plaintiff or owner, the State or such political subdivision, public authority or body corporate, shall be made a party defendant to the application and proper allegations made as to its interest in the case."

Summons was served upon the governor and the State was represented in said proceedings by the Attorney General through the special counsel having the matter in charge. It does not appear that the State filed any answer or other pleading in said case, or that the State in any way contested the right of the petitioner to have its title and interest and that of the State as party defendant determined in said proceedings.

In said action a default decree was entered by the court, the entry of which was approved by the Attorney General, through special counsel. In said default decree of the court in this case, which related as well to tracts of land other than that here under consideration, the court made a finding that all the persons named or described as defendants in the petition or any amendment thereof had been properly and legally served with process of the court or had voluntarily entered their appearances therein, that all necessary and proper parties to a complete determination of the cause had been made and properly brought before the court, that the proceedings in the case had all been regular and according to law, that the defendants are all in default for answer or other plea to the petition, and that the statements and allegations thereof were confessed by them to be true.

The court further found upon the pleadings and the evidence that the plaintiff, The Atkins and Pearce Manufacturing Company, was the owner of a perpetual leasehold estate in and to the tract of land here under consideration, which is referred to in said decree and in other proceedings in said court as tract "B". The court making its finding with respect to the title of the Atkins and Pearce Manufacturing Company with respect to the tract in said entry found as follows:

"In and to tract 'B', a perpetual leasehold estate with privilege of purchase, created and granted by two leases from the State of Ohio, to Clark Williams, one dated March 26, 1836 and recorded April 6, 1836 in Deed Book 56, page 646, and the other dated January 1, 1839 and recorded June 3, 1839, in Deed Book 70, page 601, Hamilton County, Ohio Records;

"The rent reserved thereunder having afterwards been increased to one hundred dollars (\$100.00) per annum by a contract between the State of Ohio and Carlos H. Gould, James Pearce and Henry Pearce executed in the year 1854 and not of record."

The court in said entry further found that the foregoing estate of the said petition-

er in said tract of land was subject only to the following lesser estates, interests therein and liens, as follows, to-wit:

“* * * * *

An estate in reversion in fee in Tract ‘B’ of said body or parcel of land in favor of the State of Ohio, and an annual ground rent of one hundred dollars (\$100.00) reserved in the two leases from the State of Ohio to Clark Williams, one dated March 26, 1836, and recorded in Deed Book 56, page 646, and the other dated January 1, 1839 and recorded in Deed Book 70, page 601, which leases were modified as to rental only and the amount of rent fixed at one hundred (\$100.00) dollars per annum by contract between the State of Ohio, and Carlos H. Gould, James Pearce and Henry Pearce, executed in 1854 and which leases contain a privilege of purchase from the State of Ohio, upon the payment of the sum of sixteen hundred sixty-six and 67/100 dollars (\$1666.67) and also subject to all the terms, conditions and covenants in said leases and contract contained in favor of the State of Ohio.”

The default decree of the court above referred to was followed in due course by a final decree of registration, the entry of which was likewise approved by the then Attorney General, through special counsel, by which final decree the title and interest of the plaintiff and of the State of Ohio in this tract of land were determined and registered in terms identical to that employed in the default decree.

In this situation it would seem that inasmuch as the State of Ohio in a cause of this kind where it is properly made a party defendant and appears for any purpose in the proceedings occupies the same position therein as would any other suitor or party defendant (*State vs. Buttles*, 3 O. S. 309, 310), the decree of the court entered in said registration proceedings effectually fixed the rights of the petitioner and the State of Ohio in and to this land, however erroneous the said decree may have been. The court had jurisdiction of the parties and of the subject matter, and this being so its judgment is final in the absence of appropriate proceedings to reverse or vacate the same.

I am of the opinion, therefore, that you are authorized to sell and convey the tract of land here in question to The Atkins and Pearce Manufacturing Company upon payment to the State of the sum of \$1,666.67, the amount found by the court as the sum to be paid for said conveyance. I am, therefore, approving as to legality and form the transcript of your findings and proceedings relative to the sale and conveyance of this property to The Atkins and Pearce Manufacturing Company, as is evidenced by my approval endorsed upon said transcript and upon the duplicate copy thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1593.

APPROVAL, BONDS OF HOWLAND TOWNSHIP RURAL SCHOOL
DISTRICT, TRUMBULL COUNTY—\$60,000.00.

COLUMBUS, OHIO, March 6, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.