

2064.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF E. W. LONG, IN
CADIZ TOWNSHIP, HARRISON COUNTY, OHIO.

COLUMBUS, OHIO, May 5, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of a communication from you under recent date, in which you submit for my examination and opinion an abstract of title, certified by the abstracter, under date of July 2, 1927, and a warranty deed executed by E. W. Long, covering certain property situated in Cadiz Township, Harrison County, Ohio, and bounded and described as follows:

Being a part of Out Lot No. 8 of Olmstead & Dewey's Subdivision of Lots as recorded in the Plat Book No. 1 of the plat records of Harrison County, Ohio, and being a part of Section 5, Township 10, and Range 5. Beginning for the same at a point in the center of the road in the west line of said Lot No. 8, 226.87 feet, S. 5° 30' W. of the Northwest corner of said Lot No. 8, where an iron pin bears S. 76° 15' E. 20 feet; thence S. 76° 15' E. 300 feet to an iron pin; thence S. 5° 30' W. 125 feet to an iron pin; thence N. 76° 15' W. 300 feet to a point in the center of the road and in the west line of said Lot No. 8, and where an iron pin bears S. 76° 15' E. 23 feet; thence N. 5° 30' E. 125 feet to the place of beginning, containing 852/1000 of an acre more or less.

Being a part of the same premises as conveyed to the grantor by S. B. McGavran, by deed, as recorded in Vol. 66, page 123 of the deed records of Harrison County, Ohio.

A good and sufficient line fence to be erected and maintained by the grantee or its assigns, on the south and east lines of the above described tract.

The south line of the above described tract to be the center line of a sixteen foot alley, extending from the southwest corner to the southeast corner a distance of 300 feet. The grantor reserves the right-of-way over said alley, and hereby conveys the right-of-way over said alley to the grantee.

My examination of the abstract submitted discloses only one question of any consequence touching the title of E. W. Long, the present owner of record of the premises above described.

On January 7, 1905, one M. I. Grimes, being then the owner in fee simple of two certain parcels of land aggregating 5½ acres and including the premises here under investigation, executed a warranty deed conveying said two parcels of land to one S. B. McGavran, "Chairman of the Executive Committee of the Cadiz Board of Trade, his successors, heirs and assigns." On September 18, 1907, said S. B. McGavran, individually, together with his wife, Jennie E. McGavran, executed a quit claim deed, and thereby conveyed said two parcels of land above mentioned to E. W. Long, the present owner of record of the same. The form of the deed first above mentioned carries the implication that the stated consideration for said conveyance, to-wit, the sum of \$975.00, was furnished by the Cadiz Board of Trade or the Executive Committee thereof, and that said S. B. McGavran, in taking said deed as Chairman of the Executive Committee of the Cadiz Board of Trade, received the legal title to the two parcels of land conveyed as trustee for the Cadiz Board of Trade or the Executive Committee thereof, as the case may be.

The further question here suggested is whether said E. W. Long in accepting the legal title to said lands in and by the quit claim deed executed by said S. B. McGavran and wife took the same subject to any outstanding equity in favor of the Cadiz Board of Trade or the Executive Committee thereof. The stated consideration in the deed from S. B. McGavran and wife to E. W. Long was \$1,150.00, and inasmuch as the abstract does not show any mortgage executed by E. W. Long to S. B. McGavran at the time, I assume that the consideration for said conveyance was paid to said S. B. McGavran at the time of the conveyance. The abstract does not, of course, show what disposition S. B. McGavran made of the purchase price of said lands upon the conveyance thereof to E. W. Long. There is nothing in the deed from M. I. Grimes and husband to S. B. McGavran, Chairman, as abstracted, to indicate or define the nature of the trust, if any, upon which such S. B. McGavran received title to said lands. Touching the question of the obligation of E. W. Long under these circumstances to see as to the application of the purchase price paid by him for said lands, it may be noted that the rule is that "where the trust or charge is of a defined and limited nature, the purchaser must see to the application of the purchase money; otherwise, when it is general and unlimited." *Clyde vs. Simpson*, 4 O. S. 447. It seems, however, that in either case when the purchaser has notice that the trustee is committing a breach of trust, or that the purchase money is not to be properly applied by the trustee, the purchaser will be held to hold the property subject to the trust. I note, however, that it was held in the case of *Cogswell vs. Seymour*, 16 O. C. C. (N. S.) 365, that "when one receives a deed to certain real estate 'in trust,' without any explanations in the deed itself as to terms and conditions of the trust, and later sells and conveys the property to a third person those who claim to have been the beneficiaries of the trust have no interest in the property in the absence of any evidence showing that the purchasers had knowledge of the terms of the trust or that the trustee failed to account for the proceeds."

In view of the principles of law above noted and the great lapse of time since the execution of the deed from S. B. McGavran to E. W. Long, I am inclined to the view that there is very little reason to fear any adverse action by or on behalf of the Cadiz Board of Trade or the Executive Committee thereof by reason of any trust imported by the former deed from M. I. Grimes and husband to S. B. McGavran; but in this connection I suggest that an investigation be made of the minutes, if any, of the Cadiz Board of Trade or the Executive Committee thereof, authorizing said S. B. McGavran to convey this property to E. W. Long.

It is noted that in the year 1904, while said M. I. Grimes was the owner of said 5½ acres of land, including the lands under investigation, she, together with her husband, executed two oil and gas leases. One of these leases was for a term of one year and so much longer as oil and gas could be produced in paying quantities, or the rent or royalty therein provided for was paid. The other of said leases was for a term of two years and as much longer as oil or gas was produced in paying quantities. Neither of said leases are released of record, and no facts appear which show that said leases, or either of them, have been abandoned. It is suggested that before the transaction relating to the purchase of the premises here in question is closed, that you investigate the status of said leases and determine whether or not the same have been abandoned or not, and if they have not been abandoned whether said leases will interfere with your enjoyment of the premises which you desire to purchase. Said tract of 5½ acres, now owned by E. W. Long, is also subject to the right of way, contract and easement executed by said E. W. Long & Sons to "The State of Ohio, Division of Highways." I assume that this property is now held under lease for the purpose for which you desire to purchase the same.

The lands here in question as of the date when said abstract of title was certified, to-wit, July 2, 1927, was free and clear of all other encumbrances except taxes

for the last half of the year 1926, amounting to \$3.08, and taxes for the year 1927, then undetermined as to amount. Since this time the taxes for the year 1928, undetermined as to amount, have become a lien upon said premises.

Inasmuch as, for the reasons hereinafter stated, the deed submitted with said abstract is disapproved and a new deed will have to be executed by said E. W. Long and wife, it is suggested you call upon said E. W. Long to furnish you an additional abstract of the title to said premises from July 2, 1927, down to date, which will be submitted to this department for examination and approval.

An examination of the warranty deed executed by said E. W. Long and Alberta B. Long, his wife, shows that the same is made to "The Division of Highways of the State of Ohio," as the named grantee therein. This form of deed is incorrect and the deed should be made to "The State of Ohio," its successors and assigns forever, without addition or qualification of any sort.

The encumbrance estimate and certificate of the action of the Controlling Board with respect to the purchase of the above described property are in proper form and the same, together with said abstract, deed and other files, are herewith returned.

When you receive the corrected deed and additional abstract above requested, you will please again submit the corrected abstract, deed and other files to this department for approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2065.

MORTGAGE AND NOTE—GIVEN TO SECURE FINE—MORTGAGEE ESTOPPED FROM DENYING VALIDITY.

SYLLABUS:

1. *Where a defendant in a criminal case has been found guilty and sentenced to pay a fine, and such defendant executes a note and mortgage to secure such fine, if the collection of the fine were postponed, and the benefit thereof accrued to one bound to pay the fine or go to jail in lieu of payment, such note and mortgage would be enforceable, on the ground that those signing such note and mortgage, after securing the benefits thereof, were estopped from denying the validity of the note and mortgage given by them, even though it should be held that a magistrate is without authority to accept security of this nature to secure the payment of a fine.*

2. *Opinion No. 1349, dated December 12, 1927, considered and discussed in light of opinion of the Court of Appeals of the Third Appellate District in the case of Williams, Mayor, vs. Shiveley, 22 O. App. 52.*

COLUMBUS, OHIO, May 7, 1928.

HON. EARL D. PARKER, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—This will acknowledge your letter which reads as follows:

"The Court of Common Pleas, Pike County, Ohio, assessed a fine of three hundred (\$300.00) dollars and costs against a person upon a plea of guilty, for possessing articles designed to be used in the illegal manufacture of intoxicating liquors.