

the former ruling which would warrant a different conclusion, I am of the opinion, in specific answer to your question, that county commissioners have no authority to donate and convey county real estate to the state for the site of an armory.

Being of the opinion that your question may be decided upon the ground of want of authority, I find it unnecessary to discuss any constitutional questions which may be involved.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3215.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF HAROLD R. HUKILL AND RUTH L. HUKILL IN FRANKLIN TOWNSHIP, ROSS COUNTY, OHIO.

COLUMBUS, OHIO, May 11, 1931.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—I have in hand your letter submitting for my examination and approval an abstract of title, copy of real estate option, deed, encumbrance estimate No. 815, authority of the controlling board, plat, and tax receipts for 1930, relating to the proposed purchase of 439 acres of land in Franklin Township, Ross County, Ohio, from Harold R. Hukill and Ruth L. Hukill, his wife, said land being composed of two tracts, the first tract being approximately 64 acres found in Virginia Military Survey No. 10634, and the second tract being approximately 375 acres found in Virginia Military Survey No. 13381-13382.

Prior to the time of both of these tracts coming into the hands of one John C. Hewitt, the chain of title to each of these tracts had a separate and distinct history; and subsequently they have had a common chain of title having been conveyed together. I should like first to consider several defects which are peculiar to the first tract alone, they having arisen in the separate history of the first tract prior to the time of its being owned by John C. Hewitt.

From the abstract (p. 4 of the last continuation), it appears that the county tax duplicate indicates that Survey No. 10634, of which the first tract is a part, was listed in the name of Governor Duncan McArthur from 1826 to 1841, and that it was then transferred to the name of Allen C. McArthur, his son. Governor McArthur died leaving a will in which he gave the land in question to executors and trustees and made a provision whereby the income therefrom was to be distributed to his children during their lives and whereby, upon the death of his children, the land was to be divided among the governor's grandchildren. See *McArthur vs. Scott*, 113 U. S. 340. Governor McArthur's will was probated in 1839, but shortly thereafter a suit, which appears to have been collusive, was brought by his children to have the will annulled. The will then having been set aside, the children of Governor McArthur had his lands partitioned among themselves, as heirs, Survey No. 10634 being awarded to Allen C. McArthur, a son. From said Allen C. McArthur the title to the first tract is traceable down to the present time.

However, probably some question arises as to the sufficiency of this title because years later a bill was brought in equity by five children of said Allen C. McArthur who were born subsequent to the time of the annulment of said will, to enforce a trust to establish their rights in this land under the will of their grandfather. In 1885 the United States Supreme Court, in the case of *McArthur vs. Scott*, 113 U. S. 340, upheld the claim of these five grandchildren to a right in the land, saying:

“ * * * as these plaintiffs were neither actually nor constructively parties to the decree setting aside the will of their grandfather, it follows that the decree is no bar to the assertion of their rights under the will
* * *

The subsequent partition among the heirs at law, and the conveyances by them to third persons for valuable consideration, can not affect the title of these plaintiffs.”

Nowhere does the abstract of title show that the rights of these five grandchildren were conveyed away. Before approving the title to this first tract, I desire more information concerning the disposition by these five grandchildren of their interests. It seems improbable that, after having carried this case all the way to the United States Supreme Court to establish their rights, they would have abandoned them completely. The power of attorney, which appears on page 9 of the original abstract, incidentally leads me to believe that said five grandchildren did take some steps to secure possession of the land. On page 7 of the original abstract appears a quit claim deed to D. H. McDaniel, one of the successors in the chain of title started by Allen C. McArthur, from seven grantors, five of whose names are Anderson and two of whose names are Olds. It does not appear from whence these grantors purport to receive the rights which they attempt to convey. From the case above mentioned, one learns that Governor McArthur had a daughter who married a man by the name of Anderson, so it is inferrable that these grantors are grandchildren of Governor McArthur. However, they are not the five grandchildren whose rights were upheld in the case above cited, inasmuch as the latter grandchildren were children of Allen C. McArthur. Of course, some 45 years have passed since the rights of said five grandchildren were upheld by the United States Supreme Court, and it is altogether possible that their rights may have been lost in the meantime by the adverse possession for over a period of 21 years by those who are the successors in the chain of title started by Allen C. McArthur. More information must be furnished concerning this matter before my decision can be reached.

I call your attention to another defect which appears in the title of the first tract. By a deed dated January 17, 1899 (p. 21, original abstract), one Sarah Ann McDaniel made a conveyance of a 40 acre strip of land which was a part of the first tract. But the abstract indicates that the grantor's husband neither joined throughout the instrument, nor released his dower. If the husband is still living, therefore, he probably has a right of dower in this 40 acre strip of land.

I next call your attention to a possible defect which relates only to the second tract of the caption land. By a deed dated July 1, 1899 (p. 55, original abstract), one Milton Lee Clark conveyed said land to one Frederick B. Bowers, but no mention is made of the grantor's wife or of the fact that the grantor was unmarried. Inasmuch as there is a possibility of said grantor having been married to a woman who may still be living and who therefore may be entitled to dower, I deem it wise to ascertain the actual facts.

Thus far I have mentioned defects which related alone to either one or the other of the two tracts of caption lands. I now come to a discussion of a possible defect which relates to both tracts.

On September 1, 1922, J. R. Coty and Ethel P. Coty, the then owners of the caption lands entered into a contract with one Glen R. Fishpaw, providing that the latter was to take possession of and manage the land, having in mind its possibility for farming, selling of timber and drilling of oil, and that the parties were to divide the profits therefrom (p. 7 of the continuation of this abstract made by Claude B. Schaeffer). This contract was to be in force for a period of 5 years, and Mr. Fishpaw was accorded the privilege of renewing the same for an additional 5 years. The original 5 year period has expired. The record does not show that the contract was renewed. But in case the contract was renewed for the additional 5 year period, the latter period is still existing. Although such a renewal contract is not on record, still, if it does exist and if Mr. Fishpaw is in possession of the land thereunder, anyone purchasing the land will be held to have constructive notice of his rights. *Schloss vs. Brown*, 13 O. A. R. 294, 296. Therefore, before consummating any purchase, I advise you to see if Mr. Fishpaw is still in possession of this land claiming a right therein.

Further, I call to your attention the fact that on April 10, 1928, one Ida Howell, who was then the owner of the caption lands, granted to the Ohio Utilities Company the right to construct, operate and maintain its lines for the transmission of electric current, including the necessary poles, towers, cross-arms, wires, cables and fixtures, upon, over and across that part of the caption land which lies in Survey No. 10634, that is, the first tract (p. 9-A, of last continuation of abstract). The grant to said utilities company also includes the right to trim any trees along said lines so as to keep the wires cleared at least 48 inches, to erect and set the necessary guy and brace poles and anchors and to attach thereto and to trees the necessary guy wires; also the right to enter upon said premises from time to time for the aforesaid purposes, together with the right to trim or remove such trees as interfere or may interfere with said line.

The taxes for 1930 have been fully paid, but the taxes for 1931 are now a lien upon this property.

In the abstract certified under date of February 23, 1931, I find no defects in or encumbrances upon the title other than those pointed out above.

Encumbrance estimate No. 815 is in proper form and shows that there remains in the proper appropriation account a sufficient balance to pay the purchase price of said land.

The proposed deed executed by Harold R. Hukill and Ruth L. Hukill, his wife, to the said state of Ohio, contains several slight errors which should be corrected. In the first place, in describing the first tract, the deed says: "Being a part of Virginia Military No. 10634." The word "Survey" has been omitted and this should be changed to read therefore: "Being a part of Virginia Military Survey No. 10634." Next, I notice that the deed, in describing the second exception to the first tract of land, says: "A 15 acre tract off of the south end thereof conveyed D. H. McDaniel, etc." The preposition "by" has inadvertently been omitted and this should be changed to read: "conveyed by D. H. McDaniel." Thirdly, the seventh call in the description of the second tract reads: "thence N. 55 deg. E. 93 poles, etc." Here the 55 degrees is erroneously inserted in place of 5½ degrees. Hence this should be changed to read: "thence N. 5½ deg. E. 93 poles, etc."

Said deed is executed in proper form with the release of dower, purporting

to convey to the state a fee simple title, but it expressly excepts the right of way for power line granted by Ida Howell to the Ohio Utilities Company, above mentioned.

I am herewith returning to you all of the papers enumerated above as having been received.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3216.

APPROVAL, QUIT CLAIM DEED TO LAND OF BELLE BAINTER, IN
BENTON TOWNSHIP, HOCKING COUNTY, OHIO.

COLUMBUS, OHIO, May 12, 1931.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for my examination and approval a quit claim deed executed by one Belle Bainter, former wife of one Jacob C. Bainter of Lancaster, Ohio, by the terms of which deed, upon delivery thereof, there is remised, released and quit claimed to the State of Ohio all the right, title and interest which said Belle Bainter has in certain real estate situated in Benton Township, Hocking County, Ohio, and more particularly described as follows:

“FIRST TRACT. Being the south-west quarter of the south-west quarter of section number eleven (11), Township number eleven (11) range eighteen (18), containing forty (40) acres of land more or less.

SECOND TRACT. Being the north half of the east half of the north-east quarter of section number fifteen (15), Township number eleven (11) range eighteen (18), containing forty (40) acres of land more or less.

THIRD TRACT. Being the west half of the north-west quarter of section number fourteen (14) Township number eleven (11) range eighteen (18) excepting therefrom the following premises to wit: Commencing at the north-east corner of the west half of the north-west quarter of section number fourteen (14), Township number eleven (11) range eighteen (18), there being a spruce tree at the corner; thence south along the line to the south-east corner; thence north along the line to the top of the rocks; thence east following the meandering of the rocks to where it intersects the north line running east and west; thence east to the place of beginning, said excepted tract containing fifteen (15) acres of land more or less, and the residue thereof conveyed herein being sixty six (66) acres of land more or less, and being the same premises and lands conveyed to the said The State of Ohio by Jacob C. Bainter and Lavona Bainter by deed dated December 29th, 1924, and recorded in Vol. 59 at page 276, Hocking County Ohio Deed Records.”

The purpose of said quit claim deed is to release to the State of Ohio the