

2232.

APPROVAL—BONDS, CUYAHOGA COUNTY, OHIO, \$9,000.00,
PART OF ISSUE DATED OCTOBER 1, 1936.

COLUMBUS, OHIO, April 5, 1938.

State Employes Retirement Board, Columbus, Ohio.

GENTLEMEN :

RE: Bonds of Cuyahoga County,
Ohio, \$9,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above county dated October 1, 1936. The transcript relative to this issue was approved by this office in an opinion rendered to the Industrial Commission under date of October 2, 1936, being Opinion No. 6141.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said county.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2233.

DIRECTOR OF PUBLIC WORKS—DIRECTOR OF HIGHWAYS
—ABANDONED CANAL LANDS—USE FOR HIGHWAY
PURPOSES — LEGISLATIVE ENACTMENT — NELSON-
VILLE—SUBSEQUENT DEED FOR SAME LANDS TO
THIRD PERSON—MISTAKE—VOID—TRANSFERS NO
TITLE TO PURCHASER—REMEDY—MAY BE THROUGH
BOARD OF SUNDRIES CLAIMS.

SYLLABUS:

1. *The Director of Public Works and Director of Highways having designated certain abandoned canal lands, in pursuance to an act passed by the Legislature authorizing the same, as necessary in the contemplated scheme of public highways for highway purposes, a subsequent deed for the same lands to a third person is void and of no effect and transfers no title to the purchaser of such lands.*

2. *The only remedy in such cases is the presentation of the alleged claim by the purchaser to the Board of Sundries Claims for whatever action that may be taken thereon toward reimbursement of the purchaser in the amount of the purchase price.*

COLUMBUS, OHIO, April 5, 1938.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: This is to acknowledge receipt of your letter of recent date, together with enclosures, which letter reads as follows:

"Enclosed find copy of letter received from the State Highway Department, relative to a parcel of land that was sold to Mr. Henry Hutchison of Nelsonville; also copy of journal entry relative to this section of canal land. A copy of the deed is also enclosed.

A short history of this transaction is as follows: Mr. Hutchison called in person at this office relative to the purchase of a tract of land. He was told that the finances of the department did not warrant the expenditure for a survey of the canal land he wished to purchase. It was suggested to him that he have a Registered Engineer or Surveyor make a survey and plat of the tract he wanted to purchase, a copy of which is also enclosed. The plat does not give a true picture, as the land used for highway purposes is included, even a part of the pavement.

I also find that a previous application was on file in this office for purchase of the remaining land not used for highway purposes, from a Mr. Alonzo Coakley, the abutting land owner, who now has no outlet to the highway.

In view of the above facts, and since the majority of the land is needed for highway development, can this deed be revoked and the purchase price returned to Mr. Hutchison?"

Section 14152-3, General Code, provides in substance that the Director of Public Works be and he is authorized to lease or sell as he may deem for the best interests of the State those portions of the abandoned Hocking canal lands in Fairfield, Hocking and Athens Counties, Ohio, that are still owned by the State, in strict conformity with the provisions therein set forth for so doing.

Section 14152-3A, General Code, provides as follows:

"There is hereby excepted and reserved from the provisions of this act any portion of said abandoned Hocking canal

that is now occupied by state highways, or that may be designated, within one year from the date at which this act becomes effective by the director of highways as necessary in any scheme of highway improvement adjacent to said abandoned canal lands."

Sections 14152-3 and 14152-3A, *supra*, became effective July 25, 1929.

On July 23, 1930 (being within one year from the date at which Section 14152-3A, General Code, became effective) the Director of Public Works entered into an agreement whereby the Division of Highways designated that subject to existing leases, all of the canal lands in Athens County were required as necessary for highway purposes. Said designation for highway purposes is evidenced by the following excerpt from your journal photostatic copy of which you enclosed in your letter, and from which I quote the pertinent parts thereof as follows:

"July 23, 1930.

Transfer and Relinquishment of abandoned Hocking canal lands to the Department of Highways of the State of Ohio for highway purposes.

WHEREAS, Robert N. Waid, Director of the Department of Highways of the State of Ohio, has filed his written application with the Superintendent of the Public Works of Ohio, designating the following described abandoned Hocking Canal Lands, in Athens and Hocking Counties, Ohio, as necessary in the contemplated scheme of the Department of Highways, to relocate and improve State Highway No. 360, Sections D and F, Hocking County; State Highway No. 155, Sections A, I, E and J, Hocking County, State Highway No. 155, Section H, Nelsonville, and D, Athens County, as shown by the plats of Bruce Doughton's survey of the Hocking Canal, made under the direction of the Board of Public Works in 1912, copies of which are on file in the office of the Superintendent of Public Works, at Columbus, Ohio. The parcels so designated thereon are described as follows:

* * * * * * * *

Descriptions of lands in Athens County to be transferred by the Department of Public Works to the State Highway Department, Columbus, Ohio.

ELEVENTH PARCEL.—Being all of that portion of the abandoned Hocking Canal lands now owned by the State of Ohio, situated in Sections 35-36-30-24-23 and 17, of York Town-

ship, Athens County, Ohio, as shown and included in the boundary lines on the plats of the Bruce Doughton survey, pages 23-24-25 and 26, and extending from the Athens-Hocking County line at Station 1997 plus 25.4, southeasterly to Station 2216 plus 59 and being all the canal land now owned by the State of Ohio in Athens County, Ohio, and,

WHEREAS, Said Director of Highways has requested the Superintendent of Public Works to formally relinquish the control and use of the parcels of abandoned Hocking Canal lands described above, to the Department of Highways for highway purposes, and

WHEREAS, Superintendent of Public Works of the State of Ohio, having duly considered the foregoing request of the Director of Highways, found that said Director of Highways is duly authorized under the provisions of Section 2 of House Bill No. 417, as passed by the 88th General Assembly of Ohio (O. L. 113, p. 552,) to designate for highway purposes, any portion of said abandoned Hocking Canal lands that are necessary in any scheme of contemplated highway improvements adjacent to said abandoned canal lands.

NOW, THEREFORE, for the purpose of making proper notations in the official records and upon the plats of the Department of Public Works of Ohio, showing the portions of said abandoned Hocking Canal lands that are taken from the control of the Department of Public Works and transferred to the Department of Highways for highway purposes, the said Superintendent of Public Works of the State of Ohio therefore assigned and transferred to the Department of Highways of the State of Ohio, full control and use, for highway purposes, the seven parcels of abandoned Hocking Canal lands hereinbefore described, subject, however, to all the rights of the owners of existing leases that were in force on the 19th day of April, 1929.

It was mutually agreed and understood between the Director of Highways of the State of Ohio and the Superintendent of the Public Works of said state, that any portion of said abandoned Hocking Canal lands that has not been improved for highway purposes, or a highway is in process of construction thereon, by the 25th day of July, 1933, shall immediately revert to the control and management of the Superintendent of the Public Works of Ohio, as Director thereof, and said Director of Highways shall, from time to time, advise the Superintendent of Public Works as to those portions of said abandoned Hocking Canal property that will not be used for highway purposes,

giving the station numbers of Bruce Doughton's survey of said abandoned canal property between which such tracts lie, and thereafter the same may be disposed of by said Superintendent of Public Works the same as if this assignment had never been made.

It was further mutually understood and agreed between the said Director of Highways and the said Superintendent of Public Works that the foregoing transfers and assignments are made subject to the rights of the owners of existing leases for portions of said abandoned Hocking Canal.

The terms of the foregoing transfer and assignment were accepted on behalf of the Department of Highways, by Robert N. Waid, Director of said Department of Highways, on the 23rd day of July, 1930."

Said minutes on the journal were examined, found correct and duly approved by the Superintendent of Public Works and secretary as shown on said journal.

The parcel of land which you state in your letter was sold to Mr. Henry Hutchison is a part of the parcel described in the journal in the excerpt from your journal as "ELEVENTH PARCEL".

By the above acts of the Director of Highways and the Director of Public Works on July 23, 1930, pursuant to the statutory authority therefor, the control and custody of all abandoned Hocking Canal lands in Athens County passed to the Director of Highways as such and have remained with the Director of Highways as such up to the present time, irrespective of the conditional clause contained in the agreement of designation between the Director of Public Works and the Director of Highways, specifying that any of this canal land not improved or not in the process of construction for highway purposes by July 25, 1933 would immediately revert to the control and management of the Department of Public Works and that the Director of Highways should from time to time advise the Director of Public Works as to those portions that will not be used for highway purposes giving the station numbers of Bruce Doughton's Survey after which said Director of Public Works may dispose of the same, the same as if the assignment had never been made. This mutual agreement clearly calls for affirmative action by the Director of Highways releasing unused lands as hereinafter more fully set forth.

As hereinbefore stated, on July 23, 1930 all of such lands became state highway lands and will so remain until an affirmative action is taken by the Director of Highways under whose custody and control the land reposes showing that a portion of said lands will not be needed

for the purpose of any existing or contemplated highway improvement. The Director of Highways must make an entry on his office journal of such finding and such journal entry must further release said portion of said lands to the custody and control of the Director of Public Works before the Department of Public Works will have any jurisdiction over any of said lands for any purpose; and then such custody and control of the Department of Public Works will apply only to lands specifically designated in an affirmative finding of the Director of Highways as above indicated.

Coming now to a consideration of the deed to Henry Hutchison, as grantee, dated November 10, 1937, a copy of which is enclosed in your letter, this deed purports to be in accordance with the provisions of Sections 13971 and 14152-3 of the General Code. Said sections, in substance, provide for the sale of canal lands and canal lands only under the custody and control of the Department of Public Works and set forth the method whereby such sale may be made. They do not apply to the lands under the custody and control of the Department of Highways where the same are owned in fee simple, nor can such sections or any other sections of the General Code be read to confer jurisdiction for a deed such as this one transferring title to property of the State of Ohio and under the custody and control of the Director of Highways for highway purposes.

Having found all of the lands in question now under the jurisdiction, custody and control of the Director of Highways for highway purposes, there is no title to this property described in the deed transferred to Henry Hutchison by this deed.

Before determining the proper remedy in the situation presented, it is well to consider the facts surrounding and leading up to the present status of the parties and if possible, thereby to determine the cause for this unusual situation.

From the information contained in your letter including the enclosures, oral discussions with the Department of Public Works and the Department of Highways and oral discussions with Mr. Hutchison, I assume the following to be the correct statement of facts.

At the request of the Department of Public Works, Mr. Hutchison employed one James E. Lee, a professional engineer, to make a survey and plat of the lands that Mr. Hutchison desired to purchase. I have at hand the description furnished by Mr. Lee and bearing his seal as professional engineer. This description is by metes and bounds and expresses the contents of the tract to be 0.96 acres more or less. It is apparent that Mr. Lee, as surveyor, only obtained the information for this description from plats and maps filed in the Athens County courthouse; that he disregarded Section 14152-3A of the General Code, the action taken thereunder by the Director of Highways and Director of

Public Works in 1930 and the maps, plats and records of the two departments pertaining thereto; that he did not determine the result of this metes and bounds description applied to the land itself; or that if he did attempt to apply the metes and bounds description to the land itself, he wholly ignored the actual physical facts existing on the land.

This is apparent from the fact that along the west corporation line of the City of Nelsonville, measurement in the description is 80 feet. Eighty feet north from the intersection of the southerly line of the canal and the west corporation line of the City of Nelsonville extends to a point within a very few feet of the center line of the existing brick pavement. This is taken as the place of beginning in the description prepared by Mr. Lee. This description was carried into the deed delivered to Mr. Hutchison with the following pertinent provisions added to said description, to-wit:

“and likewise subject to all existing streets and highways.”

The deed then cannot be said to be technically incorrect. It just does not transfer any property. All of the land is existing highway lands, that is, lands under the custody and control of the Department of Highways for highway purposes in fee simple. The description stating as it does “subject to all existing streets and highways” and all of said lands described in the deed being a part of the state highway system, leaves nothing described as transferred.

Relying on the recommendation of Mr. Lee that the lands deescribed were subject to sale by the Department of Public Works, the deed was duly executed and delivered and the agreed consideration therefor was received and paid.

In stating that nothing was received by Mr. Hutchison for his consideration paid, I wish to illustrate to make that statement clear. For instance, assume that Mr. Lee had described all of the lands within the right of way lines of said Route No. 31 leading through Athens County; that a deed was executed and delivered therefor for a valuable consideration in exactly the same manner and form that this deed was executed and delivered. Is it not clear that no title would pass to the purchaser by such deed? The situation at hand is analogous thereto.

In *Cleveland Terminal, etc. R. Co. vs. State, ex rel*, 85 O. S. 251 it was held:

“The State may convey in fee, property which it has acquired as a part of its canal system; but a deed executed by the Governor pursuant to a statute, is valid and effective only as far as authorized by the Legislature or as ratified thereby.”

This deed of the Governor to Mr. Hutchison could not, of course, rise above the act authorizing it and could not convey property not au-

thorized by said act. In brief, it is my opinion that the alleged deed is void. However, as suggested by the copy of letter from the Director of Highways, should Mr. Hutchison desire and agree to accept a deed containing the proper description executed and delivered to him *after* the Department of Public Works would have authority to execute such deed and after proper action taken by the Department of Highways releasing certain lands, the State to retain the consideration already paid by Mr. Hutchison, such a compromise agreement would be satisfactory. The land to be conveyed would be only such lands as may be released by the Director of Highways to the Department of Public Works as above designated and no more.

On April 15, 1932, the Department of Highways placed under contract a construction improvement which occupied a considerable portion of this ELEVENTH PARCEL in excess of the amount theretofore occupied by the highway. The plans for said construction improvement designated the right of way line of the highway to be 50 feet from the center line of said improvement across said abandoned Hocking canal lands. The center line referred to is the present center line of the existing brick pavement at that location.

The letter from the Department of Highways in substance suggests that the Department of Highways is willing, if sanctioned by the Attorney General, to relinquish to the Department of Public Works all canal lands lying outside of the 50 foot right of way line, if such action would help to solve the situation and would satisfy the purchaser. This suggestion is made only upon consideration that the same would entirely satisfy Mr. Hutchison and would avoid any further contention in the matter. This would be accomplished by a new deed executed in proper form and would be based upon the consideration heretofore paid into the State Treasury by Mr. Hutchison. Unless such compromise agreement can be consummated with Mr. Hutchison and wholly satisfactory to him, the only remedy is for Mr. Hutchison to file his claim with the Sundries Claims Board for whatever action might be taken for reimbursement to himself of money paid. The deed being void and of no effect in law, there is no action that need be taken concerning the same by the State of Ohio or by your department. Mr. Hutchison has no title, legal or equitable in the land described in the deed.

The law is well settled in Ohio, as disclosed by the following citations:

Quoting from 37 O. Juris. at p. 246:

“The law seems to be that in making purchases from the state the individual is bound to inquire for himself as to the title of the state and its power to convey. One who purchases and re-

ceives a deed of land from the state after it has been sold and conveyed to another, though the purchase was made in good faith and without actual notice, takes no title to the land against the former purchaser, although the deed of the latter is not at the time on record in the county where the land is situated. A purchaser from the state takes such title as the agents of the state are authorized to convey; and, by way of indemnity, the justice of the state has, through its legislature, provided for the return of the purchase money to the subsequent purchaser with interest from the time of the illegal sale; he has no title to, and cannot recover, the land. * * *

“Justice of the state, has, through its legislature” above, refers to the allowance of sundry claims by the Legislature.

In the opinion of Judge Kenyon in the case of *Roseberry vs. Hollister*, 4 O. S., p. 297, at p. 306 we find the following:

* * * * * * * * *

The sale in this case was made to the defendant (probably at private sale) after the state had parted with all her equitable interest in the lot, and was made by the superintendent professing to act as agent of the state, authorized as such by a law of the state. The defendant contracted with this agent of the state, knowing that the agent was not authorized to make a sale of any lot which had previously been sold to any other person. The defendant did not, as averred by his plea, know that this lot had been sold to the ancestor of complainant; but he did know that, if such sale had been made, the power of the agent of the state had thereby been exhausted. The authority of the state's agent depended on the fact of whether he had made a previous sale of this lot. If he had not, then he could sell to the defendant; if he had, then he was not authorized to sell. The superintendent having, according to the authority conferred on him by the state, offered at public auction, and sold, this very lot, he had no authority from the state to afterward sell the same lot, at private or public sale, to any-body; and, therefore, the second sale was wholly unauthorized by law, without any authority as the agent from the principal to make the sale.

The law of caveat emptor, in such cases, applies with all its force to the purchaser. He buys at his peril. If the land had not been previously sold, he acquires title; if it had, he gets no title.

The state can act only by its agents, duly authorized by law; and where such agents, being (as in this case) mere ministerial

officers, transcend their authority, their acts are void, or at least voidable by the state.

* * *

* * *

* * *"

Mr. Hutchison in his oral statements to this office has raised the question concerning the fact that nothing in the records of Athens County disclose the status of this land and that he had a right to rely on such records. I believe that contention has been answered by our Supreme Court in the case of *Webster vs. Clear*, 49 O. S., p. 392, decided May 10, 1892.

In that case both parties claim title to certain lands from the State to whom the lands belonged in 1853, as canal lands. In that year Charles Elliott purchased the lands for a valuable consideration and in 1854 received a deed therefor, executed by the Governor in due form, which as required by law, was duly recorded in the record of deeds of canal lands kept in the office of the auditor of state. It was not, however, recorded in the recorder's office of the county of Paulding where the land is situated. The plaintiff in the case derived his title from Elliott by deed duly executed. In 1871 the defendant, without actual notice of the deed to Elliott for a valuable consideration purchased the same lands from the State and received a deed therefore in due form of law. Defendant's purchase was made under the provisions of an act passed April 5, 1866, providing, "for the sale of the remaining canal lands belonging to the State". In that case it was held, as disclosed by the syllabus thereof, as follows:

"One who purchases and receives a deed of land from the state, after it has been sold and conveyed to another, though the purchase was made in good faith and without actual notice, takes no title to the land against the former purchaser, although the deed of the latter is not at the time on record in the county where the land is situate. A purchaser from the state takes such title as the agents of the state are authorized to convey; and, by way of indemnity, the justice of, the state has, through its legislature, provided for the return of the purchase money to the subsequent purchaser with interest from the time of the illegal sale; he has no title to, and cannot recover, the land."

We find the following in the opinion of Minshall, Judge, applicable hereto as follows:

" * * * The principle seems to be, that in making purchases from the state, the individual is bound to inquire for himself as to the title of the state, and its power to convey; and can

acquire no rights against a previous purchaser of the same lands from the state. He stands in the shoes of the state and takes such title as it had power and right to convey. In *Gouverneur's Heirs vs. Robertson*, 11 Wheat, 332, it is said, 'The state never intends to grant the lands of another; and where the grantee is ignorant of the previous patent, the maxim, caveat emptor, is emphatically applicable to this species of contract.' Again, in *Best vs. Polk*, 18 Wal. 112, it was said by Justice Davis, in delivering the opinion, 'It has repeatedly been held by this court that a patent is void, which attempts to convey lands that have been previously granted, reserved from sale, or appropriated.' *Stoddard vs. Chambers*, 2 How., 284 *United States vs. Arredondo* 6 Pet., 728; *Richart vs. Felps*, 6 Wal. 160. And in *New Orleans vs. United States*, 10 Pet., 731 it is said. 'It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative.' * * *

In conclusion, and in specific answer to your question, it is my opinion that the Director of Public Works and Director of Highways having designated certain abandoned canal lands in pursuance to an act passed by the Legislature authorizing the same as necessary in the contemplated scheme of public highways for highway purposes, a subsequent deed for the same lands to a third person is void and of no effect and transfers no title to the purchaser of such lands. The only remedy in such cases is the presentation of the alleged claim by the purchaser to the Board of Sundries Claims for whatever action that may be taken thereon toward reimbursement of the purchaser in the amount of the purchase price.

Respectfully,

HERBERT S. DUFFY,

Attorney General.