

2968.

DISAPPROVAL, DEED FORM OF DEED BY THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY, TO THE STATE OF OHIO.

COLUMBUS, OHIO, July 28, 1934.

*The Ohio State Archaeological and Historical Society, Columbus, Ohio.*

GENTLEMEN:—This is to acknowledge the receipt of your recent communication with which you submit for my examination and approval a deed form of a deed to be executed by The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and by The New York Central Railroad Company, conveying to the state of Ohio, as the grantee named therein, two parcels of real estate in the Village of North Bend, Hamilton County, Ohio, and containing 6.5 acres and 6,775 square feet respectively.

The deed here in question is one to be executed by the railroad companies, above named, in exchange for a parcel containing 11,939 square feet of land which the State by the hand of the Governor, is to convey to The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, pursuant to the authority of Amended Senate Bill No. 58, enacted by the 90th General Assembly in second special session under date of May 2, 1934, which enactment as an emergency act became effective as a law upon its approval by the Governor under date of May 4, 1934. This act which is entitled an act "authorizing the Governor to convey certain real property in exchange for other property for the use of The Ohio State Archaeological and Historical Society in connection with the William Henry Harrison Memorial State Park, in Hamilton County, and to declare an emergency," provides in the first section thereof, for the conveyance by and in the name of the State of the parcel of land containing 11,939 square feet, above referred to, to The Cleveland, Cincinnati, Chicago and St. Louis Railway. Section 2 of this act describes the two parcels of land to be conveyed by the railway company, to the state of Ohio and in this connection provides that "prior to the execution and delivery of the deed provided for in Section 1 of this act, there shall be executed and delivered to the Governor, a deed approved by the Attorney General, whereby The Cleveland, Cincinnati, Chicago and St. Louis Railway Company conveys or causes to be conveyed to the state of Ohio in fee simple and free from all encumbrances," the two parcels of land first above mentioned.

The form of the deed to be executed by the above named railroad companies conveying these two parcels of land to the state of Ohio, is that of a quit claim deed; and there is in this deed form no warranty against encumbrances. Inasmuch as the act of the 90th General Assembly, above referred to, expressly requires the property of the railroad company which is to be conveyed in exchange for state property, to be so conveyed "free from all encumbrances," it is quite clear that a quit claim deed in the form submitted does not meet the requirement of the statute.

It is further noted that in the deed form submitted, there is a provision that the property therein described shall be held by the grantee (the state of Ohio)

its successors and assigns forever, for memorial park purposes, subject to the condition subsequent that in the event the premises described in the deed or any portion thereof shall cease to be used for such purposes, the same shall revert to said railroad companies, as the grantors in the deed, and to their successors and assigns. In view of the provision of the act of the legislature above referred to, that this property of the railroad company shall be deeded to the state free from all encumbrances, and in view of the uniform requirement that all property purchased or otherwise acquired by the state for a consideration paid by it shall, except as is otherwise provided by law, be by full and unrestricted fee simple title, it may well be questioned whether there is any warrant for inserting in this deed the above noted condition subsequent relating to the use to be made by the state of the property therein described.

It is recognized, of course, that not every condition imposed by the provisions of a deed upon the grantee named therein with respect to the use of the property conveyed, is an encumbrance upon such property; for in many instances such conditions are a mere covenant of the grantee. *Parish vs. Whitney*, 3 Gray 516. However, there is a strong implication in this case and in other cases that might be cited to the point that a condition of this kind providing as it does, for a right of reentry upon a condition broken is an encumbrance. In this connection, it is to be observed of course, that there is no thought of any intention on the part of the state and its authorized agents, to use this property for other than memorial park purposes. On the contrary, this act of the legislature expressly provides that this property of the railroad company to be conveyed to the state of Ohio shall be under the authority and control of The Ohio State Archaeological and Historical Society "for public park purposes." And the whole tenor of this act is to the effect that the property thus acquired by the state shall be for the William Henry Harrison Memorial State Park, and shall be used for that purpose. In this situation it would seem that no condition of the kind here in question is necessary in this deed. Upon the considerations above noted and for the reasons assigned, I am unable to approve the deed form of the deed to be executed by the above named railroad companies, conveying the property therein described to the state of Ohio; and I herewith return the same without my approval endorsed thereon.

With the deed form of the deed to be executed by the railroad companies, you likewise submitted deed form of a deed to be executed by the state of Ohio, by the hand of its Governor, conveying to the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the parcel of land therein described.

There is nothing in the act of the 90th General Assembly, above referred to, or in any other statutory enactment prescribing or otherwise relating to my official duties, which requires or authorizes me to approve this deed. It is noted that this deed form is likewise that of a quit claim deed. As to this, it may be observed that although deeds of the state of Ohio executed by its Governor do not take the form of warranty deeds, the effective words of conveyance in such deeds are those of grant and not of release. Again it is noted that this deed form provides for an acknowledgment by the Governor and the Secretary of State, with respect to the execution of a deed. No objection on legal ground can be made to an acknowledgment by these officers of their voluntary action in executing the deed. However, such acknowledgment is not necessary; for, as observed by the Supreme Court of this state in its opinion in the case of *Emmitt vs. Lee*, 50 O. S. 662, "there is no statute requiring state officers to

acknowledge deeds and other like instruments by them executed in the performance of their official duties; and no good reason can be given, why a state officer should go before a justice of the peace or notary public, and make an acknowledgment to the effect that he has performed his official duties voluntarily." However, as above indicated, no duty or authority is imposed or conferred upon me with respect to this deed, and the deed form of the same together with that of the railroad companies above referred to, is herewith enclosed.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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2969.

APPROVAL, NOTES OF MARSHALL RURAL SCHOOL DISTRICT,  
HIGHLAND COUNTY, OHIO—\$3,675.00.

COLUMBUS, OHIO, July 30, 1934.

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

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2970.

APPROVAL, NOTES OF BRUSHCREEK CONSOLIDATED No. 4  
RURAL SCHOOL DISTRICT, HIGHLAND COUNTY, OHIO,  
—\$4,932.00.

COLUMBUS, OHIO, July 30, 1934.

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

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2971.

APPROVAL, NOTE OF BRIGHTON TOWNSHIP RURAL SCHOOL  
DISTRICT, LORAIN COUNTY, OHIO—\$4,400.00.

COLUMBUS, OHIO, July 30, 1934.

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