

3059.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE BALTIMORE AND OHIO AND THE CHESAPEAKE AND HOCKING RAILWAY COMPANIES FOR THE ELIMINATION OF GRADE CROSSING IN ROSS COUNTY, OHIO.

COLUMBUS, OHIO, December 24, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract by and between the State of Ohio acting by and through Harry J. Kirk as Director of Highways and the Baltimore & Ohio Railroad Company and the Chesapeake & Hocking Railway Company.

This contract pertains to the elimination of a grade crossing over the tracks of the Baltimore & Ohio Railroad Company and the proposed tracks of the Chesapeake & Hocking Railway Company, in Ross County, Ohio.

I have carefully examined said contract, and finding it in proper legal form, I hereby approve and return the same to you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3060.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF ROBERT J. PRATT, IN NILE TOWNSHIP, SCIOTO COUNTY, OHIO.

COLUMBUS, OHIO, December 24, 1928.

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

DEAR SIR:—This is to acknowledge receipt of your communication of recent date enclosing for my examination and opinion an abstract of title, warranty deed, encumbrance estimate and Controlling Board certificate relating to a certain tract of land in Nile Township, Scioto County, Ohio, and which is owned of record by one Robert J. Pratt. Said tract of land is more particularly described as follows:

“Being the West Half of the following described premises, and being a part of Ohio State University Lot No. 12, described as follows:

Beginning at the S. E. corner of said Lot No. 12, at a stone marked “E” and three hickories in the line of Surveys Nos. 15834 and 15878; thence with one line thereof N. 85 poles to a stake in the East line of said Lot No. 12; thence West 310 poles to a stake in the West line of said Lot No. 12 and at the S. W. corner of a 120 acre tract sold to Nate Iddings; thence S. 85 poles to a stone marked “D” and hickory corner to Lot No. 15; thence East with the South line of said Lot No. 12, to the place of beginning, containing 164 acres, more or less.”

An examination of the abstract of title submitted shows that under date of May 6, 1904, one George W. Stewart, being then the owner of a tract of 164 acres

of land including that here under investigation, executed and delivered a mortgage on said tract of land to one V. J. Reinke, to secure the payment of a promissory note of even date therewith for the sum of \$1,500.00, payable five years from the date thereof. There has not been a sufficient lapse of time from the due date of the obligation secured by said mortgage to bring the same within the provisions of Section 8546-2, General Code; and apart from the effect of a forfeited land sale deed thereafter executed, said mortgage is a lien upon the premises here under investigation.

The forfeited land sale deed referred to was one executed and delivered by the Auditor of Scioto County to one Clarence A. Crabtree under date of February 18, 1915. Said deed was one executed and delivered by the County Auditor under the provisions of Section 5762, General Code, which provides that such deed shall be prima facie evidence of title in the purchaser, his heirs or assigns. If valid said deed had the effect of investing said Clarence A. Crabtree with a new and perfect title to said lands discharged from all previous liens and encumbrances. (*Kahle vs. Nisley*, 74 O. S. 328.)

Thereafter said Clarence A. Crabtree, being the owner of said land under the forfeited land sale deed above mentioned, allowed said tract of land to again become delinquent for taxes and in February, 1916, the Treasurer of said county sold the same at delinquent tax sale to one W. C. Schaeffer, who bid to pay the taxes, interest and penalty assessed, for said tract, being the whole amount of the tract of land upon which said taxes, interest and penalty were assessed. A tax title certificate was at said time issued to W. C. Schaeffer, pursuant to said sale under the authority of the then provisions of Section 5715, General Code. After the lapse of more than two years, to wit, on February 27, 1916, the Auditor of said county executed and delivered to one John Schaeffer, the assignee of said tax title certificate, a delinquent tax deed for said tract of land, which included those here under investigation. In this connection it will be noted that said tax deed was executed and delivered under the assumed authority of Section 5719, General Code, which together with the other sections of the General Code relating to delinquent lands was repealed by an Act of the Legislature, under date of March 21, 1917, which went into effect on the 3rd day of July in that year. In this situation it is apparent that there was no statutory authority for the execution and delivery of said tax deed, unless the sale of said property by the County Treasurer and the execution and delivery of the tax title certificate pursuant to said sale under the then provisions of Sections 5711 and 5715, General Code, constituted a pending proceeding relating to the sale and conveyance of said land under the provisions of Section 26 of the General Code, so as to thereby preserve in full force and effect for the purposes of subsequent conveyance the provisions of Section 5719, General Code, above referred to. I am inclined to the view that such was the effect of the sale of the lands, at the delinquent tax sale and the execution and delivery of a tax title certificate therefor, and that so far as the validity of said tax deed depends upon the question whether the provisions of Section 5719, General Code, were in force for the purpose of authorizing the execution and delivery of such tax deed, the same is to be considered as having been legally executed and delivered.

In this connection it is to be noted, however, that the most that can be said for either the forfeited land tax deed or the delinquent land tax deed above referred to in the chain of title to this land, is that the same is only prima facie valid, depending upon the regularity of the proceedings leading up to the execution and delivery of said respective deeds. If valid each of said deeds constituted a new and independent source of title, and had the effect of investing the purchaser with a fee simple title to said lands, free and clear of all previous liens and encumbrances.

In addition to the suggestion above made that said forfeited land tax deed and delinquent land tax deed in the chain of title to the land here in question may be invalid by reason of irregularities in the proceedings of the officers of said county leading up to the execution and delivery of said deeds, it may be here noted as an exception to the title to these lands that some of the deeds in the chain of title were executed by the then owners of said lands in the State of Illinois, under a form of conveyance which did not contain words of perpetuity, which at that time, under the laws of Ohio, were necessary in order to convey a fee simple title to lands in this state. In the execution and delivery of such deeds, however, it is apparent that the persons executing and delivering the same intended to convey to their respective grantees all their right, title and interest in said lands; and as I have observed in other opinions where this question was involved, the possibility of any question being made with respect to the title under which said lands are now held, is so remote that the risk involved in the purchase of the lands here in question would be very slight. In a measure the same observation may be made with respect to the probability of anyone in interest raising any question with respect to the regularity of the proceedings preliminary to and leading up to forfeited land tax deed and the delinquent tax land deed above referred to.

In this situation the question of going through with the purchase of the land here in question and procuring a deed therefor to be executed and delivered to the State of Ohio is, I apprehend, a question to be determined by your department; and this office assumes no responsibility in the matter of the proposed purchase of these lands other than to point out the legal questions involved relating to the title to the same.

Under date of March 29, 1920, Thomas D. Moore and William J. Moore, being then the owners of the land here in question, conveyed to one Edward Cunningham a right of way over said land to a larger tract of land then owned by Cunningham. This easement is one of perpetuity and runs with the land.

The taxes on said land for the year 1928, the amount of which is not stated in the abstract, are a lien.

I have examined the warranty deed of Robert J. Pratt conveying this property to the State of Ohio, and find the same to be properly executed and acknowledged and in form sufficient to convey to the State of Ohio a fee simple title to said lands, subject only to the following exceptions:

1. In said deed this property is described as "a part of Ohio University Lot No. 12", whereas in fact the same is a part of Ohio State University Lot No. 12.

2. In said deed there is a recital that the premises thereby conveyed are the same as those "conveyed by William Roberts to Robert J. Hart, the grantor herein", whereas in fact said premises were conveyed by William Roberts to Robert J. Pratt, the grantor in the deed to the State of Ohio.

I have examined Encumbrance Estimate No. 4712 relating to the purchase of the above described lands and find the same to be properly executed and the same shows that there are unencumbered balances in the appropriation act sufficient to pay the purchase price of said lands.

I likewise note a copy of the certificate over the signature of the Secretary of the Controlling Board showing that said board has approved the purchase of the lands here in question for the purchase price therein stated.

I am herewith returning to you said abstract of title, warranty deed, encumbrance estimate and Controlling Board certificate.

Respectfully,
EDWARD C. TURNER,
Attorney General.