

The above purchase of bonds appears to be part of an issue of bonds of the above city dated April 1, 1931. The transcript relative to this issue was approved by this office in an opinion rendered to the Teachers Retirement System under date of August 27, 1936, being Opinion No. 6006.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

570.

APPROVAL—DEEDS, CONTRACT ENCUMBRANCE RECORD,
CERTIFICATE OF TITLE RELATING TO PROPOSED
PURCHASE EXECUTED BY THE OHIO GUARANTEE
TITLE COMPANY OF AKRON, OHIO.

COLUMBUS, OHIO, May 8, 1937.

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

DEAR SIR: You have submitted for my examination and approval certificate of title No. 56863 executed by The Northern Ohio Guarantee Title Company of Akron, Ohio, certain deeds, hereinafter referred to, contract encumbrance record No. 27 and other files relating to the proposed purchase of Lots Nos. 1, 2 and 3 in C. C. McCue's Little Farms Allotment in the west half of the northwest quarter of Section 19, Green Township, Summit County, Ohio, as surveyed by S. C. Swigart and Son and recorded in Plat Book No. 36, page 7, Summit County Records, together with all hereditaments and appurtenances thereof, but subject to all legal highways and easements of records.

From the certificate of title submitted to me, which certificate of title was executed under date of March 2, 1937, it appears that said lots were formerly owned and held by one Augusta M. McCue, as the sole devisee of C. Clifton McCue who owned these lots at the time of his death December 18, 1928; that thereafter on June 26, 1930, these lots were sold by Augusta M. McCue, as executrix of the last will and testament of C. Clifton McCue, to one Martin Istok for the sum of \$2,000.00, of which sum the sum of \$300.00 was paid in cash at the time of the sale, the balance of the purchase price being

payable in monthly installments of \$20.00 each. This sale was made by said Augusta M. McCue, executrix, pursuant to the order of the court in a certain cause and proceeding then pending in the Probate Court of Summit County which had theretofore on January 31, 1929, been filed in said court by her for the sale of the above described property owned by C. Clifton McCue at the time of his death for the purpose of paying the debts of his estate. The sale of the lots here in question to Martin Istok was confirmed by an order of said court on June 26, 1930, said order further providing that said executrix "on payment of the entire purchase price of each one of said lots hereby is authorized and directed, in each instance, to execute a proper deed conveying the same to the purchaser." It appears further in this connection that said Augusta M. McCue died on February 18, 1937, but that shortly prior to her death, to wit, on February 12, 1937, she executed a deed as executrix of the estate of C. Clifton McCue conveying the above described lots to said Martin Istok who by the warranty deed hereinafter referred to is conveying this property to the State of Ohio for the use of your department in the construction of the Nimisila Creek Basin Reservoir.

In the deed executed by Augusta M. McCue, as executrix of the estate of C. Clifton McCue, to Martin Istok, as well as in the deed tendered by Martin Istok to the State of Ohio, there is excepted from said lots as therein described a certain right of way of The Canton, Massillon and Akron Railroad Company extending through this property. In this connection, it appears that on August 14, 1901, one Charles A. Smith was the owner of a larger tract of eighty acres of land, more or less, which included the lots here in question, and that on said date he, together with his wife, Matilda Smith, executed a warranty deed in and by which he granted and conveyed to The Canton, Massillon and Akron Railroad Company by apparent fee simple title a strip of land sixty feet wide extending in a northerly and southerly direction through said eighty-acre tract of land and through the smaller tracts which are now Lots Nos. 1, 2 and 3 in C. C. McCue's Little Farms Allotment. From information which comes to me otherwise than from this certificate of title, I am advised that this sixty-foot strip of land which has been excepted from the lots above described is now owned and held by The East Ohio Gas Company and that arrangements are to be made whereby the State of Ohio is to acquire the interest of The East Ohio Gas Company in this strip of land extending as it does now throughout the whole length of the C. C. McCue's Little Farms Allotment.

Upon examination of the certificate of title submitted to me, I

have noted the following exceptions to the title in and by which said Martin Istok now owns and holds said Lots Nos. 1, 2 and 3 of C. C. McCue's Little Farms Allotment, above described:

1. On March 16, 1907, Charles A. Smith, then the owner of the above described and other lands included within what is now the C. C. McCue's Little Farms Allotment, executed an instrument in deed form in and by which he conveyed to one Charles E. Wise an easement for the erection of a telephone line, together with the necessary poles, wires and other equipment, which was to be erected along the highway on the westerly line of the grantor's premises and along the easterly side of said highway. I am not advised by the certificate of title or otherwise as to what, if anything, was done by said Charles E. Wise or by his successors in interest under this easement with respect to the construction of a telephone line or otherwise. You or your engineers and agents in charge of the construction of this project are doubtless advised of this easement and of any telephone line construction pursuant to the same.

2. On November 13, 1908, said C. A. Smith, being the owner of the eighty-acre tract of land above referred to, executed an instrument in and by which he conveyed to The Tide Water Pipe Company, Limited, a right of way for the construction and maintenance of pipe lines and of a telegraph line over and through said lands. There is nothing in the certificate of title to indicate how the particular lots here in question and above described are affected by this easement or by any pipe line or telegraph line which may have been constructed pursuant to the same. With respect to this matter as with respect to that above noted, you and your designated engineers and agents in charge of this project are doubtless advised as to the situation in connection with the easement here referred to.

3. On August 16, 1928, C. Clifton McCue, who then owned the eighty-acre tract of land formerly owned by C. A. Smith and above referred to, executed an oil and gas lease to The East Ohio Gas Company in and by which there was granted to said company the right to the oil and gas in said eighty-acre tract of land for a term of five years and so much longer as oil or gas or their constituents might be found in and upon said premises. There is nothing in the certificate of title or in any of the other files submitted to me which indicates what, if any, developments for oil or gas have been made upon the above described lots which were and are included within the larger tract of land covered by this lease.

4. It appears from the certificate of title that on March 29, 1932, The Real Estate Mortgage Company of Akron, Ohio, recovered a judgment against Augusta M. McCue in the sum of \$971.88, plus

interest and costs, and at the same time secured a decree for the foreclosure of a mortgage on premises other than those above described. Later, on August 24, 1934, an execution was issued on said judgment which was directed to the Sheriff of Summit County and which was on August 25, 1934, levied by him on the premises above described and upon other lands standing in the name of Augusta M. McCue. In this connection, it will be recalled that C. Clifton McCue, who formerly owned this property and laid out C. C. McCue's Little Farms Allotment, of which the lots above described are a part, died on December 18, 1928, and that by his last will and testament he devised the lots here in question and all other real and personal property owned by him at the time of his death to his wife, Augusta M. McCue. However, it appears that at the time The Real Estate Mortgage Company recovered its judgment against Augusta M. McCue, as above noted, the lots here in question had been sold by Augusta M. McCue, as executrix of the estate of her deceased husband, on an order of the court made in the proceeding instituted by her in the Probate Court of Summit County for the purpose of selling this and other property owned by C. Clifton McCue at the time of his death, for the purpose of paying the debts of his estate. It appears that these particular lots were sold by said executrix to Martin Istok pursuant to said order of court, on March 4, 1930, which sale was confirmed by the court by an order duly made and entered by it on June 26, 1930.

However, as above noted, the deed conveying these lots to Martin Istok was not executed by the executrix until February 12, 1937, more than two years after the time The Real Estate Mortgage Company recovered its said judgment against Augusta M. McCue and caused an execution to be levied thereon against the above described lots and against other lots and lands then owned by her. In this situation, the question arises as to whether Martin Istok took his title to these lots on the deed of conveyance executed to him by Augusta M. McCue as aforesaid, subject to the lien of the judgment theretofore rendered in favor of The Real Estate Mortgage Company against Augusta M. McCue. I am of the opinion that this question is disposed of by the fact that the lots here in question were sold and conveyed to Martin Istok pursuant to the order of the court in a case and proceeding which was pending in the Probate Court of Summit County at the time The Real Estate Mortgage Company obtained its judgment against Augusta M. McCue and at the time of the levy of the execution of this judgment against these lots. In this connection, it does not appear that these lots were included in the mortgage which The Real Estate Mortgage Company held against Augusta M. McCue and which was fore-

closed in the action in which the judgment above referred to was rendered, but that as to these lots the judgment was one for money only. This being true, the proceeding in Probate Court for the sale of the lots here in question and of other lots and lands to pay the debts of the estate of C. Clifton McCue, was a *lis pendens* as to this judgment creditor and its judgment was subject to any proceedings or orders that might thereafter be taken by the court with respect to the sale of this property and to the acts of the executrix in carrying out the orders of the court so made. See *Stone vs. Equitable Mortgage Company*, 25 *Oh. App.*, 382; *Stewart, Administrator vs. Wheeling and Lake Erie Railway Company*, 53 *O. S.*, 151. On this view, I am of the opinion that Martin Istok took title to this property free and clear of the lien of the judgment and of the execution thereafter issued thereon and levied against these lots.

The same observations may be made with respect to a judgment obtained by The Brown-Graves Company against C. Clifton McCue and Augusta M. McCue, noted in the certificate of title. This judgment was one rendered by the Municipal Court of Cleveland, Ohio, against C. Clifton McCue and Augusta M. McCue for \$368.00, plus \$4.50 costs. The judgment was rendered some time prior to March 28, 1934, and on this day a writ of execution was received by the Sheriff of Summit County and levied upon the lots here in question and upon other lands, the legal title to which was then owned and held by Augusta M. McCue.

It appears from the certificate of title that no determination has been made by the Probate Court with respect to the inheritance taxes on the succession of Augusta M. McCue to the above described and other lands and property of C. Clifton McCue at the time of his death in 1928. I assume that the reason why no determination of this matter has been made is that the estate of C. Clifton McCue was so involved by reason of his indebtedness that the court has been unable to determine whether or not Augusta M. McCue took any taxable succession under the last will and testament of C. Clifton McCue. Aside from the fact that the debts of the estate of C. Clifton McCue were apparently such that no taxable succession accrued to Augusta M. McCue on his death, it may be said, giving effect to a late decision of the Court of Appeals of Franklin County, apparently approved by the Supreme Court on motion to certify, that Martin Istok took title to the lots here in question free and clear of any lien for inheritance taxes that might have accrued on this and other property of C. Clifton McCue at the time of his death. I am inclined to the view, therefore, that any exception that may be suggested with respect to inheritance taxes against the estate of C. Clifton McCue may be safely waived.

In this certificate of title the following statement is made with respect to the special assessments and taxes on this property which is self-explanatory:

"There are no Special Taxes charged against the premises above described on the Treasurer's 1935 General Tax Duplicate or shown on the County Auditor's 1935 Certified List of Special Assessments except an assessment for improvement of South Main Street Road which is payable in twenty semi-annual installments of \$31.00 each, beginning December 20, 1926.

The Status of said assessment is as follows:

Delinquent Assessments of former years and penalty, amounting to \$486.29, are a lien.

Assessments for the first half of 1935 amounting to \$31.00, are delinquent; penalty \$3.10.

Assessments for the last half of 1935 amounting to \$31.00, are delinquent; penalty \$3.10.

There is listed on the Treasurer's Tax Duplicate, Green Township, in the name of C. Clifton McCue:

McCue Little Farms Add. Lot 1 All.

Valuation: Lands \$140.00 Buildings \$—— Total \$140.00.

Taxes of former years amounting to \$14.42, 'Certified Delinquent' 1935 are a lien.

Penalties, cost of advertising and certification, and interest are to be added to the above taxes.

Taxes for the first half of 1935 amounting to \$1.17, are delinquent; penalty 12 cents.

Taxes for the last half of 1935 amounting to \$1.17, are delinquent; penalty 12 cents.

Taxes for 1936 are a lien.

McCue Little Farms Add. Lot 2 All.

Valuation: Lands \$140.00 Buildings \$—— Total \$140.00.

Taxes of former years amounting to \$14.46, 'Certified Delinquent' 1935 are a lien.

Penalties, cost of advertising and certification, and interest are to be added to the above taxes.

Taxes for the first half of 1935 amounting to \$1.18, are delinquent; penalty 12 cents.

Taxes for the last half of 1935 amounting to \$1.18, are delinquent; penalty 12 cents.

Taxes for 1936 are a lien.

McCue Little Farms Add. Lot 3 All.

Valuation: Lands \$200.00 Buildings \$—— Total \$200.00.

Taxes of former years amounting to \$21.24, 'Certified Delinquent' 1935 are a lien.

Penalties, cost of advertising and certification, and interest are to be added to the above taxes.

Taxes for the first half of 1935 amounting to \$1.68, are delinquent; penalty 17 cents.

Taxes for the last half of 1935 amounting to \$1.68, are delinquent; penalty 17 cents.

Taxes for 1936 are a lien.

Penalties above described are subject to Additions of General Taxes or Assessments, if any, which may hereafter be made by legally constituted tax authorities."

In addition to this, it may be noted that the undetermined taxes on this property for the year 1937 are likewise a lien thereon.

Accompanying the certificate of title which has been submitted to me are two deeds. One of these deeds is that above referred to, executed by Augusta M. McCue, as executrix of the estate of C. Clifton McCue, conveying the above described lots to Martin Istok. In this deed there is excepted from the lots thereby conveyed the right of way of The Canton, Massillon and Akron Railroad Company, hereinbefore referred to, and the conveyance of the lots is made subject to all legal highways and subject to an easement for telephone right of way to one Charles E. Wise which has been likewise noted above. In addition to this, the conveyance is made subject to the easement of The Tide Water Pipe Company, Limited, above referred to, and to the oil and gas lease to The East Ohio Gas Company, which has been referred to as one of the exceptions to the tax. This deed has been properly executed and acknowledged and the form of the same is such that it is legally sufficient to convey the above described lots subject to the exceptions above noted, to said Martin Istok by fee simple title. The other deed herewith submitted is the deed tendered by Martin Istok conveying the above described lots to the State of Ohio. This deed has been properly executed and acknowledged by Martin Istok and by Mary Istok, his wife, and the form of the deed is such that the same is legally sufficient to convey this property to the State of Ohio by full fee simple title, subject to the exception with respect to the right of way of The Canton, Massillon and Akron Railroad Company, above referred to, free and clear of the dower interest of Mary Istok, as the wife of said Martin Istok, with a covenant

of warranty that the property conveyed is free and clear of all encumbrances whatsoever. Both of said deeds are accordingly hereby approved.

You have likewise submitted to me contract encumbrance record No. 27 in connection with the purchase of the above described property. This contract encumbrance record has been properly executed and the same shows a sufficient balance in the appropriation account to the credit of your department for the acquisition of lands in connection with the Nimisila Creek Basin Reservoir Improvement, to pay the purchase price of the above described lots, which purchase price is the sum of \$2,960.00. I am accordingly approving said contract encumbrance record.

Further, in this connection, it is noted from the recital contained in said contract encumbrance record, as well as from other information at hand, that the purchase of the above described lots and of other lands for use in connection with the Nimisila Creek Basin Reservoir Improvement has been approved by the Controlling Board in the manner required by law.

Subject to the exceptions above noted, the title of Martin Istok in and to the above described property is approved as are likewise the deeds above referred to and the encumbrance record, all of which files are herewith returned to you.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

571.

APPROVAL—WARRANTY DEED TENDERED BY EDWARD P. LINGO AND MABEL LINGO, RELATING TO THE PROPOSED PURCHASE OF CERTAIN LANDS IN GREEN TOWNSHIP, SUMMIT COUNTY, OHIO.

COLUMBUS, OHIO, May 8, 1937.

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

DEAR SIR: You have submitted for my examination and approval certificates of title No. 56856 executed by The Northern Ohio Guarantee Title Company under date of March 24, 1937, warranty deed executed by Edward P. Lingo and Mabel L. Lingo, and contract encumbrance record No. 25, relating to the proposed purchase