

ing situated at the southeast corner of Ontario Street and St. Clair Avenue, in said city.

This lease is one for a term of two years commencing on the first day of January, 1937, and ending on the last day of December, 1938, and provides for an annual rental of \$2250.00 payable in monthly installments of \$187.50 each.

This lease has been properly executed by said lessor by the hand of one Frank W. Chopp, an authorized agent. Upon examination of the terms and provisions of the lease, it is noted that the obligation with respect to the payment of the rentals provided for in the lease is subject to appropriation therefor made by the legislature and inasmuch as there is nothing in the provisions of this lease which contravenes the law in any respect, the lease is hereby approved as to execution and form.

With the lease instrument above referred to, you have submitted contract encumbrance records Nos. 18 and 30. Considering these contract encumbrance records together, I find that a sufficient amount of money in the appropriation account to the credit of the proper department has been encumbered to pay the monthly rental on the leased premises for the months of January and February, 1937. This, in my opinion, is a substantial compliance with the provisions of Section 2288-2, General Code, and the lease is accordingly hereby approved and the same is herewith returned to you.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

389.

APPROVAL—ABSTRACT OF TITLE, WARRANTY DEED, ETC.,
HANOVER TOWNSHIP, ASHLAND COUNTY, OHIO.

COLUMBUS, OHIO, April 6, 1937.

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

DEAR SIR: You have submitted for my examination and approval an abstract of title, warranty deed, contract encumbrance record No. 41 and other files relating to the purchase of a tract of 143.457 acres of land which is apparently owned of record by Walter Dete, John B. Dete, Marguerite Dete and Mary T. Smith in Hanover Township, Ashland

County, Ohio, which tract of land is more particularly described by metes and bounds as follows:

The same being part of the Northwest quarter and Northwest quarter of the Southwest quarter of Section 17, Hanover Township 19, Range 15, and for description beginning at a stone at the center of Section 17; thence North 0-37 West, a distance of nineteen hundred sixty-one and no one-hundredths feet (1961.00) along the half Section Line to a stake; thence North 88-42½ West, a distance of twenty-six hundred fifty-two and fourteen one-hundredths feet (2652.14) to a stake on the West line of said section; thence South 0-09½ East, a distance of two thousand sixty-five and forty-six one hundredths feet (2065.46) along the West line of said section to a stake in the Center-line of the old Hoghollow Road; thence South 26-46½ East a distance of five hundred eighty-two and twenty-two one-hundredths feet (582.22) along the Center-line of said road to a stake; thence South 38-07 East a distance of three hundred ninety-nine and forty one-hundredths feet (399.40) along the Center line of said road, to a stake; thence North 89-24 East a distance of eight hundred sixteen and sixty-eight one-hundredths feet (816.68) to a stake on the East line of the Northwest quarter of the Southwest quarter of said Section 17; thence due North, a distance of eight hundred ninety-four and ninety-nine one-hundredths feet (894.99) to a stake on the South line of the Northwest quarter of said section; thence South 88-56 East, a distance of thirteen hundred forty-one and eighty one-hundredths feet (1341.80) along said South line of said Northwest quarter, to the place of beginning, containing one hundred forty-three and four hundred fifty-seven one-thousandths acres (143.457) of land.

Upon examination of the abstract of title submitted to me, it appears that the above named persons, Walter F. Dete, John B. Dete, Marguerite Dete and Mary T. Smith, the apparent owners of record of the above described tract of land, obtained title to this property by descent from their father and mother, Joseph Dete and Martha J. Dete, deceased, who obtained their title to the property by and through the last will and testament of one John B. Dete, the father of Joseph Dete, who died in the year 1909.

John B. Dete obtained legal title to the property by and through a deed executed to him by the Sheriff of Ashland County, Ohio, under date of January 23, 1894, pursuant to an order of the Common Pleas

Court of that county in a case instituted by John B. Dete to foreclose certain mortgages which had theretofore been executed to him by one Lucy A. Ward, the then owner of this property. One of these mortgages was in and for the sum of \$1600.00 and was executed October 17, 1892, and filed for record October 19, 1892. The other mortgage, which was for the sum of \$200.00, was executed November 8, 1892, and was filed for record November 10, 1892. In this connection, it appears that under date of August 29, 1892, Lucy Ward and William H. Ward, her husband, executed a mortgage on this property to one William A. Fike in and for the sum of \$985.00. This mortgage, however, was not filed for record until October 25, 1892. In the mortgage foreclosure proceedings above referred to, John B. Dete in his petition filed in this case apparently attempted to make William A. Fike a party defendant as the owner and holder of the mortgage just referred to. However, the party named in said petition as a party defendant was Wesley A. Fike" instead of William A. Fike, as apparently intended. A summons was issued in this case directed to the Sheriff of Muskingum County for service on "Wesley A. Fike" and the return of the Sheriff in this case shows personal service of the summons on "Wesley A. Fike."

William A. Fike did not by that name or by the name of "Wesley A. Fike" file any answer or other pleading in the foreclosure case filed by John B. Dete nor did he otherwise voluntarily appear in said action. And in this situation as to the foreclosure action of John B. Dete against William Ward and Lucy A. Ward, et al., the property here in question was sold on order of the court to John B. Dete, the plaintiff in that action; and, as we have seen, the property was conveyed to said John B. Dete by sheriff's deed under date of January 23, 1894.

Thereafter, after the lapse of more than eighteen years after John B. Dete obtained title to this property by the sheriff's deed above mentioned, William A. Fike filed an action in ejectment against Martha J. Dete, Walter Dete, Mary Dete (now Mary T. Smith), John B. Dete and Marguerite Dete, heirs at law and successors in title of John B. Dete as to the property here in question, to recover this property from said defendants. I assume that this action in ejectment was filed by William A. Fike on the theory that in legal contemplation he had not been made a party defendant in the foreclosure action of John B. Dete above referred to and that notwithstanding the fact that he was a junior encumbrancer with respect to the mortgage executed to John B. Dete upon which this property was sold to him in said foreclosure proceedings, he, Fike, was entitled to file and maintain such action in ejectment for the reason that as between him and Lucy A. Ward, the mortgagor, the legal title to the mortgaged premises vested in him as mortgagee after the condition of his mortgage was broken by the nonpayment thereof. See

Bradfield vs. Hale, 67 O. S., 316. As to this action, it may be observed that inasmuch as John B. Dete obtained title to this property by order of sale and sale in the foreclosure proceedings instituted by him, he stood as to an intervening lienholder, as a prior mortgagee holding the equity of redemption of the mortgagor, and as he as such purchaser was subrogated to all of the rights of the mortgagor and of himself as prior mortgagee, it would seem that the only relief that William A. Fike was entitled to obtain as a junior lienholder, even if it be assumed that in legal contemplation he was not a party to the foreclosure case, above referred to, would be a judgment and order of the court requiring a resale of the property, in which case he would be entitled to only that part of the proceeds of such resale as would be in excess of the amount of the prior mortgage. See *Stewart vs. Johnson*, 30 O. S., 24, 31.

Without further discussion of the theory of this case filed by William A. Fike or of the judgment the court might have properly entered in this case, it is to be noted that the last pleading filed in this case was a reply filed by Fike under date of April 23, 1917. Notwithstanding the fact that from that day to this, a period of nearly twenty years, nothing further was done by the plaintiff or by any of the other parties in the case to secure some disposition of the case, the case still stands on the docket of the Common Pleas Court of Ashland County. Why this case was not dismissed for want of prosecution many years ago is beyond our comprehension. The fact is, however, that the case has never been dismissed and as a pending action the same is a cloud upon the title of the present owners of record of this property however little merit this case may have. And inasmuch as I cannot advise the Board of Control of the Ohio Agricultural Experiment Station to purchase a lawsuit in acquiring lands on behalf and in the name of the State of Ohio, the only official advice that I can give you is to decline to purchase this property until the action above referred to is dismissed.

In this connection, it is to be noted that even if this action is dismissed by the court otherwise than by the voluntary action of the plaintiff, he, or if he be dead his representatives, might bring a new action within one year from the time of such dismissal. See Section 11233, General Code. It may be, however, that the situation with respect to said William A. Fike may be such that the probability of a new action after the dismissal of the present action may be very remote. In any event, I do not feel that you should proceed further with respect to the purchase of this property until the action above referred to is dismissed. After this is done, we may properly give consideration to the question as to whether or not the property may be safely purchased by your department.

The warranty deed and other files submitted to me seem to be in

proper form and I am retaining the same for the present. I am, however, returning to you the abstract of title so that there may be included therein any subsequent proceedings relating to the dismissal of the case above referred to or otherwise.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

390.

APPROVAL—LEASE OF CANAL LANDS TO EARL REID,
HARRISON AND WALNUT TOWNSHIPS, PICKAWAY
COUNTY, OHIO.

COLUMBUS, OHIO, April 6, 1937.

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

DEAR SIR: This is to acknowledge the receipt of your recent communication submitting for my examination and approval a canal land lease in triplicate executed by you as superintendent of Public Works and as Director of said department, acting for and in the name of the State of Ohio, as lessor, to one Earl Reid, as the lessee therein named.

By this lease, which is one for a term of fifteen years and which provides for an annual rental of \$21.00, payable in semiannual installments of \$10.50 each, there are leased and demised to the lessee above named certain tracts or parcels of Ohio Canal lands in Harrison and Walnut Townships in Pickaway County, Ohio, which are more particularly described in the lease instrument as follows:

First Tract: One and nine-tenths (1.9) acres at the angle between Walnut Creek and the Ohio Canal at Lock No. 31, of the Ohio Canal numbering south from the Licking Summit.

Second Tract: That portion of the state canal lot at said Lock No. 31, that lies in the angle formed by the been in Walnut Creek on the westerly side of the Ohio Canal and the towing-path of said canal extending from the head of the guard-lock to the northerly line of a tract of land owned by William Miller, and containing five and six-tenths (5.6) acres.