

Upon examination of this lease, I find that the same has been properly executed by the conservation commissioner and by L. von Gerichten, the lessee therein named.

I also find, upon examination of the provisions of the lease and the conditions and restrictions therein contained, that the same are in conformity with section 471 and other sections of the General Code relating to leases of this kind.

I am accordingly approving this lease as to legality and form, as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2953.

DISCUSSION OF TITLE TO ABANDONED RIGHT OF WAY OF D. AND
T. ELECTRIC RAILWAY IN MONTGOMERY AND MIAMI COUN-
TIES.

COLUMBUS, OHIO, July 25, 1934.

HON. O. W. MERRELL, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval photostatic copies of certain deeds concerning the abandoned right of way of the Dayton & Troy Electric Railway right of way in Miami and Montgomery Counties, along S. H. (I. C. H.) No. 61 U. S. Route No. 25. Such deeds bear reference numbers 80, 96, to 101, both inclusive, 130 to 145, both inclusive, 151 to 157, both inclusive, 7 to 10, both inclusive, 12 to 18, both inclusive, 20 to 22, both inclusive, 24 to 39, both inclusive, 50 to 73, both inclusive, and 76 to 79, both inclusive. You also enclose petition for the appointment of a receiver, waiver of summons, answer of defendant, motion for the appointment of a receiver and entry appointing a receiver, in case No. 73,419 of the Common Pleas Court of Montgomery County, Ohio.

From an examination of the pleadings in such case, it would appear that the Dayton & Troy Electric Railway Company only claims to have a perpetual lease on that part of the railway which is between the cities of Troy and Piqua, but claims to be the owner of the line between the cities of Dayton and Troy. The journal entry appointing the receiver only purports to authorize the receiver to operate the plant pending further order of the court. It is my opinion that unless and until the powers of the receiver are broadened to authorize the sale of the property of the defendant he has no power to sell and dispose of such assets.

Inasmuch as you have not submitted to me the evidence concerning the title of the persons named as grantors in the enclosed deed, I am unable to, and herein express no opinion whatsoever, concerning the title of such grantors. My opinion, as herein set forth, must necessarily be and is, based upon the assumption that the title of such grantors was a good and indefeasible estate in fee simple and without encumbrances.

In deeds Nos. 116, 164, 134, 136, 137, 138, 139, 140, 141, 142, 143, 154, 14, 15, 16, 18, 20, 21, 25, 27, 51 and 52, is contained a covenant obligating the grantee in such deeds to maintain a drain or supply drainage along the property described in such deeds.

In deeds Nos. 97, 134, 138, 141, 22, 24, 25, 51 and 72, there is contained a covenant obligating the grantees in such deeds to forever maintain a fence along such premises so conveyed.

In deed No. 145 there is contained a covenant obligating the grantee and its successors to build and maintain a retaining wall along the premises therein described. It is my opinion that in each of such cases a covenant as to drainage, fence, or retaining wall runs with the land and would become an obligation of the person acquiring the title to such premises so conveyed.

In deeds Nos. 96, 97, 99, 101, 134, 145, 151, 152, 153, 155, 156 and 51, there is contained a reversionary clause which would cause the premises therein conveyed to revert to the husband of the grantor named in such deed in the event that such premises ceased to be used for the purpose of a right of way for an interurban electric railway.

Deed No. 7 contains an option on the part of the grantor therein named, to repurchase the property described in such deed, within ninety days after it ceases to be used for the purposes of a right of way for an electric railway upon payment to the grantee of the sum of \$500.00. It is my opinion that the railway company or its receiver, upon abandoning the use of such property as a right of way for an interurban electric railway, could convey no title whatsoever to the premises containing such reversionary clause and as to parcel No. 7, could only convey it subject to the right of the grantor therein or her heirs or successor in interest to exercise her option.

Deed No. 157 is a guardian's deed. I am unable to determine from such deed whether the wards were the owners of the entire estate or not. However, the petition and the journal entry in the case described in the deed would show whether or not all parties having an interest in such property were before the court, and whether such deed was a conveyance of a partial interest or of the entire interest.

In Deed No. 7, Rose A. Kearns is named as grantor. Her husband, if any, does not join in the conveyance or release dower yet in deed No. 8, Rose A. Kearns conveys another parcel, and her husband, Wm. M. Kearns, joins in the deed and release dower. You should require proper evidence, by affidavit or otherwise, which would show whether Rose A. Kearns was married or single at the time of the conveyance referred to herein as No. 7.

In deed No. 24, certain persons purport to convey as of the heirs of Henry Jeffrey. There is no evidence showing whether such persons are all of the heirs of Henry Jeffrey or not. There are certain deletions in the granting clause, as for instance, the name of "Georgiana Pearce", who, with her husband, is the grantor of the same premises in deed No. 25. You should require evidence as to whether or not such persons are all of the heirs of Henry Jeffrey.

In deed No. 36, the wife of John Y. Maxton, if any, fails to join. You should require evidence sufficient to satisfy you that no dower interest remains outstanding.

In deed No. 28, the conveyance is made subject to a certain turnpike easement therein referred to. You should require evidence to show whether such easement has terminated.

In deed No. 38 the conveyance is by the Butler Township School Board District No. 1, by its president and clerk. You submit no evidence as to the authority of such officers to make such conveyance. A sufficient portion of the board's

minutes should be submitted to show the authority of such officers to make the conveyance in question.

Deed No. 39 purports to be by the Trustees of Friends Church. No evidence is submitted showing the right of such trustees, if they are such trustees, to make such conveyance. You should require evidence showing whether or not such persons had any authority to make such conveyance.

Deed No. 55 is a quit claim deed of the Poplar Hills Cemetery Association. By reason of the fact that I have no evidence concerning the title of the grantor. I am unable to form any opinion as to whether this deed is of any value whatsoever.

In deeds Nos. 56 and 58, the husbands, if any, of Rebecca J. Baker and Anna R. Gilbert do not join. You should require proper evidence to satisfy yourself as to whether there is a dower interest yet outstanding.

In deed No. 64, Pearl Compton, Ada Compton and Harry Compton are named as grantors. However, this deed is signed only by Pearl Compton and Ada Compton. There is no evidence in this deed as to whether Pearl and Ada are husband and wife or whether they are both of the same sex. Nor is there any conveyance whatsoever of the interest of Harry Compton. If Harry Compton was a part owner of this parcel you should obtain a deed of his interest and satisfy yourself concerning the dower interest in these premises.

In deed No. 65, I am unable to determine whether John Fissell and Catherine Fissell are husband and wife. If they are not husband and wife, you should inquire concerning the dower interest in these premises.

In deed No. 67, there is no release of dower of the husband or wife of Marcella Zerick.

In deed No. 68, the grantee assumes some fence agreement referred to therein. You should ascertain the nature of this fence agreement and whether it would impose any obligation upon the subsequent grantee of this property.

Subject to the foregoing assumption and to the assumptions above made, it would appear that the receiver, when properly authorized, could convey title to that part of the premises described in such deed which lies between the city of Dayton and the city of Troy. By reason of the recital in the petition submitted you should inquire into the nature of the perpetual lease and determine whether there has not been a subsequent conveyance of that part of the line between the city of Troy and the city of Piqua with a lease back if such be the fact. Neither the receiver nor the railway company itself, could convey to you the title to such premises without having the lessor join in such conveyance.

In your letter you inquire concerning the right to compel the receiver to remove the poles from the property. Such matter can be adequately taken care of in the event you enter into an agreement of purchase which could well contain a covenant requiring the receiver to remove such poles, which could be embodied in the terms of the sale and could be ordered by the court at the time of the confirmation of the sale. If you will submit the deed to such property to this office, we will at that time determine if you are properly protected in such regard.

Respectfully,

JOHN W. BRICKER,

Attorney General.