

above bonds purchased by you. These bonds comprise all of an issue of refunding bonds dated October 1, 1937, bearing interest at the rate of  $4\frac{1}{4}\%$  per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said school district.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

2109.

STATUS, CERTAIN DEEDS AND ARTICLES OF AGREEMENT, NUMBERS 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 39, 40, 41, 42, 43, 44, REVERTER CLAUSES, COVENANTS RUNNING WITH THE LAND, EASEMENTS, STIPULATIONS, ETC.—SPRINGFIELD AND XENIA TRACTION COMPANY, SUCCESSOR TO LITTLE MIAMI TRACTION COMPANY, COULD CONVEY GOOD FEE SIMPLE TITLE TO CERTAIN NUMBERED DEEDS—E. C. GWYN AND JOHN P. MARTIN—ANNA MARGARET GERHARDT—GRANTORS—STATE OF OHIO, THROUGH DIRECTOR OF HIGHWAYS, GRANTEE.

COLUMBUS, OHIO, March 16, 1938.

HON. JOHN J. JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your communication with which you enclose for my examination and opinion photostatic copies of the following deeds and articles of agreement:

- No. 9 Articles of agreement between E. C. Gwyn and John P. Martin—not recorded.
- No. 10 Elizabeth Irie to the Little Miami Traction Company—Deed Book No. 134—page 79.
- No. 11 Hugh Boyle and Mary J. Boyle to the Little Miami Traction Company—Deed Book No. 134, p. 38.
- No. 12 Richard H. Rodgers to the Little Miami Traction Company—Deed Book No. 134, p. 326.
- No. 14 John W. Davis and Priscilla Davis to the Little Miami Traction Company—Deed Book No. 133, p. 365.

- No. 15 Mary S. Harshman and Jonathan S. Harshman to the Springfield and Xenia Traction Company—Deed Book No. 135, p. 130.
- No. 16 Martha E. Mellinger and Jacob D. Mellinger to the Little Miami Traction Company—Deed Book No. 133, p. 355.
- No. 17 Elliott W. Wheeler and Amy A. Wheeler to the Little Miami Traction Company—Deed Book No. 133, p. 353.
- No. 18 Mary Ann Hiestand and Jacob Hiestand to the Little Miami Traction Company—Deed Book No. 133, p. 349.
- No. 19 Aaron M. Turner and Mary R. Turner to the Little Miami Traction Company—Deed Book No. 133, p. 350.
- No. 20 William H. H. Turner and Flora Turner to the Little Miami Traction Company—Deed Book No. 133, p. 569.
- No. 21 Hannah A. Flohre to the Little Miami Traction Company—Deed Book No. 133, p. 633.
- No. 22 Alonzo E. Sparrow and Mattie S. Sparrow to the Little Miami Traction Company—Deed Book No. 133, p. 631.
- No. 23 Milton Crabill and Elizabeth Crabill to the Little Miami Traction Company—Deed Book No. 173, p. 522.
- No. 24 George W. Young and Lizzie J. Young to the Little Miami Traction Company—Deed Book No. 133, p. 635.
- No. 25 Albert Wike and Mary E. Wike to the Little Miami Traction Company—Deed Book No. 133, p. 308.
- No. 26 Isaac Moser and Sarah Moser to the Little Miami Traction Company—Deed Book No. 133, p. 632.
- No. 27 Anna Margaret Gerhardt and Sebastian Gerhardt to the Little Miami Traction Company—Deed Book No. 133, p. 629.
- No. 28 S. S. Shaw and A. J. Shaw to the Little Miami Traction Company—Deed Book No. 92, p. 543.
- No. 29 Noah Sipe and Sarah Sipe to the Little Miami Traction Company—Mortgage Book No. 92, p. 465.
- No. 30 Ella M. Johnson and Charles S. Johnson to the Little Miami Traction Company—Deed Book No. 92, p. 466.
- No. 31 Frank W. Johnson and Catherine Johnson to the Little Miami Traction Company—Deed Book No. 93, p. 50.
- No. 32 Lewis Kendig and Cora Kendig to the Springfield and Xenia Traction Company—Deed Book No. 95, p. 250.
- No. 33 W. G. Confer and Mary J. Confer to the Little Miami Traction Company—Deed Book No. 92, p. 460.

- No. 34 Wm. P. Baker, Administrator, to the Springfield and Xenia Traction Company—Deed Book No. 93, p. 389.
- No. 39 Cassie M. Jacoby and Robert S. Jacoby to the Little Miami Traction Company—Deed Book No. 92, p. 526.
- No. 40 Anna C. Dickey and William A. Dickey to the Little Miami Traction Company—Deed Book No. 92, p. 470.
- No. 41 The Miami Powder Company to the Springfield and Xenia Traction Company—Deed Book No. 94, p. 343.
- No. 42 Charles F. Carter and Lucile H. Carter to the Springfield and Xenia Traction Company—Deed Book No. 93, p. 601.
- No. 43 George Charlton and L. A. Charlton to the Springfield and Xenia Traction Company—Deed Book No. 93, p. 451.
- No. 44 S. H. Ellis and Indiana Ellis to the Little Miami Traction Company—Deed Book No. 92, p. 462.

The articles of agreement between E. C. Gwyn and John P. Martin constitute a contract to convey the land therein described, and I am informed that although there is no record of any deed executed pursuant to the agreement, the tract described in the contract was actually used by the traction company. What rights were thereby acquired is not for me to say, for, as the situation now stands, it is unable to convey a clear legal title.

By the terms of deeds numbered 14, 15, 16 and 41 a possibility of reverter was retained in the respective grantors, the grantee receiving only a conditional fee. Each of these deeds provides for a reverter upon cessation of the use of the premises for interurban railway purposes, and as that condition has now materialized, it is my opinion that the traction company would be unable to convey these tracts for highway purposes.

Deeds numbers 17, 21, 24, 26, 27, 29, 30, 31, 32, 39, 42 and 43 contain covenants obligating the grantee to construct and maintain fences paralleling the land granted. These covenants run with the land and pass as an incident to its ownership. 11 Ohio Jurisprudence 896. Of course, covenants relating to the maintenance of fences are not restrictive covenants enuring to the benefit of neighboring parcels of land, and therefore, there is nothing to prevent the owners of the land from releasing subsequent purchasers from their operation.

Deed number 21 requires the grantee to build a "picket fence with one drive-gate and one walking-gate in front of said grantor's property and forever maintain the same." In deed number 24 there is also a clause obligating the grantee to "take care of all storm water by placing tiling under right of way." By the terms of deed number 31 the grantee

agrees to take care of stock water and not to change the grade in front of the house. It is my opinion that the foregoing clauses relative to water and change of grade should be construed as real covenants, running with the land.

The signatures of deeds numbers 27, 33, and 42 do not correspond with the grantors' names as set forth in the body of the conveyances. Deed number 27 recites that Anna Margaret Gerhardt is one of the grantors, whereas it is signed "A. Margaret Gerhardt," and although the granting clause of deed number 42 describes Charles F. Carter as one of the grantors, the same is signed "C. F. Carter." The recitals in deed number 33 mention W. G. Confer as one of the grantors but it was signed "William G. Confer." Satisfactory evidence, identifying the signers as being one and the same persons mentioned as grantors, should be obtained before closing any transactions bearing upon the tracts described in these conveyances.

Deeds numbers 11, 12, 18, 19, 22, 25, 28, 33, 40, and 44 contain clauses relative to the construction of fences, but are silent as to the maintenance of the fences when once constructed and, in the absence of clauses casting the burden of maintenance upon the grantee, I am of the opinion that such clauses cannot be converted into real covenants by reading to the deeds that which the grantors failed to express.

One of the leading cases regarding covenants is *Masury vs. Southworth*, 9 O. S. 340. At page 352 the court said:

"We think the real question must be, the covenant being one which may be annexed to the estate and run with the land, whether such was the intention of the parties, *as expressed in the deed.*" (Italics, the writer's).

In the case of *Railway vs. Basworth*, 46 O. S. 81, the court had under consideration a deed wherein the grantee agreed "to build and sustain all fences on each side of said roadway." The court, commenting upon that clause, said:

"The addition of the agreement to *sustain*, to the agreement to *build* the fences, necessarily makes the obligation co-extensive with the duration of the grant, and compels the inference that the parties intended to treat it as attending the land of the grantor so long as the way granted should be used for the purpose of a railroad." (Emphasis the court's.)

The case of *Union Traction Company of Indiana vs. Thompson*, 61 Ind. App. 183, 111 N. E. 648 presents a situation where the parties, by

the very terms of their conveyance, recognized the distinction between construction and maintenance of a fence. The first syllabus is as follows:

“Where the owner of land sold a part thereof to defendant interurban company by deed with a covenant for fencing of the right of way by the company, but its maintenance by the grantor, such covenant was one running with the land, whereby the duty of maintenance passed to a subsequent purchaser from the grantor.”

Deeds bearing numbers 18 and 24 provide that the grantee is not to interfere with the passage of storm or other waters and is to furnish tile or pipe to care for such waters. Likewise, the articles of agreement which preceded the execution of deed number 28 provide that the traction company is not to interfere with the flow of stock or other waters. The agreements as to tiling are covenants running with the land, as also are those pertaining to the flow of water. These latter covenants are merely a recognition of the principle expressed 41 Ohio Jurisprudence 51.

“The rules of the civil law requiring the owner of the lower land to receive the surface water from the higher land and take care of it prevail in Ohio and such owner cannot obstruct or repel the flow of surface water.”

The land granted by deed number 19 is subject to an easement allowing the adjoining owner the privilege of running a water pipe across the premises granted.

Several of the deeds bear clauses requiring the traction company to plank the crossings over its right of way. As pointed out in my opinion to you under date of May 13, 1937, such provisions would have no effect if and when the lands are used for highway purposes.

Subject to the foregoing objections to deeds numbers 14, 15, 16, 27, 33, 41, and 42, and assuming that there is a clear chain of title prior to the time of the deeds in question, it is my opinion that the Springfield and Xenia Traction Company, successor to the Little Miami Traction Company, could convey a good fee simple title.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*