

clear of the dower interest of Zelma Snedeker in and to this property with a covenant of warranty on the part of said grantor that the property is conveyed to the State of Ohio free and clear of all encumbrances whatsoever.

Contract encumbrance record No. 21, which has been submitted as a part of the files relating to the purchase of this property, is properly executed and the same shows a sufficient balance in the appropriation account to the credit of your department for the purchase of lands required for the Nimisila Creek Basin Reservoir Project, otherwise unencumbered, to pay the purchase price of this property, which purchase price is the sum of \$1325.00.

It likewise appears by way of recital in this contract encumbrance record, as well as from other information at hand, that the Controlling Board has approved the purchase of this property and has released from the appropriation account the money necessary to pay the purchase price of this and of other property acquired or to be acquired by your department in connection with said project.

Subject only to the exceptions above noted, I am approving the title of J. H. Snedeker in and to this property. I am likewise approving said warranty deed, contract encumbrance record No. 21 and other files relating to the purchase of this property, which, together with the certificate of title, are herewith enclosed for your further action in consummating the purchase of this property.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

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DISCUSSION OF THE STATUS OF TITLE OF CERTAIN
LANDS ABANDONED TRACTION RIGHT OF WAY LANDS
IN MADISON COUNTY, OHIO, AND DESCRIBED BY
TWELVE DEEDS SUBMITTED FOR THE PURPOSE OF
THIS DISCUSSION.

COLUMBUS, OHIO, March 30, 1937.

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

DEAR SIR: You have submitted to me twelve deeds with request for and examination of the title to the lands described in said deeds and an opinion as to its availability for highway purposes, the party or

parties now having the capacity to convey said lands and the form such conveyance should take, said lands being abandoned traction right of way lands.

This opinion then is written upon the information obtained from the twelve deeds, hereinabove referred to, together with the information by oral discussion with your department, subsequent to the receipt of said deeds and no other.

No search of the records at the courthouse in Madison County has been made by me, therefore nothing herein contained can be construed to refer to the title to the lands in question, prior to their transfer to the Columbus, London and Springfield Railway Company by the several grantors in deeds numbers 1 to 9 inclusive.

Deeds numbers 1 and 2 are for lands within the Village of London, Ohio. In considering the use of these lands for highway purposes, it must first be noted that although General Code Sections 1189 and 1189-2 provide in substance that state highways in and through municipal corporations are declared to be a part of the state highway system and that the director may, at his discretion, widen any section of a state highway within the limits of a municipal corporation and pay in full therefor, yet it is further provided that the director shall first obtain consent of counsel or other legislative authority of a municipal corporation so to do.

Referring again to deed No. 1, the following sentence is found therein, to-wit:

“The above described land being a strip twenty (20) feet in width, to be used for the purpose of widening Lafayette Street, which will give said street a width of seventy (70) feet.”

Thereby, by deed duly recorded, said Lafayette Street, in the Village of London, became a street seventy feet in width. There is nothing that would indicate a change in width of Lafayette Street from then until the present time. This statement is made without consulting the present records in the Village of London and based only on the information furnished by you.

It will be noted that the description of the lands as contained in deeds numbers 3 to 9, inclusive, describe a strip of land of varying width, varying from 62½ feet to approximately 76 feet and that said description is bounded on one side by the center line of the present highway. It is only reasonable to assume then that the easement for highway purposes already exists over a portion of this land and that a relatively considerable portion of this land is now occupied with the state highway, although nothing in the deeds nor in the information furnished by you so indicates. We will refer then, on this assumption, to the remainder of the lands in answering your inquiry.

Deeds numbers 3, 5, 6, 7 and 8 provide, in substance, that the grantee in said deeds shall build and maintain wagon road crossings, good crossings, gravel crossings, etc. and shall provide sufficient and proper drainage. In contemplation of the use of these lands for highway purposes, we need not be concerned with such provisions in said deeds. The necessity for said crossings being removed, entirely eliminates any liability whatsoever as to maintenance of same. These same deeds provide in substance that the grantee shall build and maintain fence along the line of its right of way adjoining lands of the grantor, said fence being described in said deed as picket fence, board fence, good right of way fence, etc. By a former opinion of this office, O. A. G. 1931, p. 286, it was determined that a provision in a deed requiring the maintenance of a fence along lands is a covenant running with the land requiring the grantee and his successors in title to maintain such fence. In that opinion to which reference is hereby made, many authorities for such holding is found. I agree with that opinion and the same is hereby followed and the application of the same to the deeds in question means that the present title owner of the real estate in question, towit, the Columbus and Lake Erie Railroad Company, must comply with the conditions of the covenant. It is then for you to determine what effect, if any, such provision for the fence maintenance will have upon your acquiring said lands for highway purposes.

Deed No. 10 is a receiver's deed, said receiver having been appointed by the same court under which the lands in question are now in receivership, to-wit, the Circuit Court of the United States, for the Eastern Division of the Southern District of Ohio. That deed indicates, upon observation of the:

WHEREAS, conditions and statements therein contained as to the nature of the conveyance of the present receiver and further the fact that a receiver being an officer of the court in sale or transfer of property would be made upon application of the receiver to the court, stating that such sale or transfer would be either advantageous or necessary. The manner and form of the proceedings would be governed entirely by the rules of court in the particular jurisdiction.

Receivers are at all times subject to the order and discretion of the court that created and made them receivers. It is a well settled general rule that a receiver acquires no greater rights in property put into his possession by the appointing court than the debtor has. He takes the property in the same plight and condition and subject to the same rights, equities and liens as it stood in the hands of the person or corporation. General Code Section 11897 provides that the receiver may do such acts respecting the property as the court authorizes. It is the duty of the court to do with the property, through its receiver, at all

times what in the course of sound discretion appears to be of greatest advantage to all persons having an interest in said property.

Deeds numbers 10, 11 and 12 transfer the title to the lands in question subject to certain liens for taxes and assessments, certain outstanding receiver certificates and judgments, if any, and certain mortgage liens for the security of authorized issue of bonds in the particular sum of \$1,500,000.00.

The present title owner of the real estate is the Columbus and Lake Erie Railroad Company, subject to such liens as are designated in deed No. 12. It is within the province of the court appointing the present receiver of the Columbus and Lake Erie Railroad Company to authorize a transfer of these lands free from any liens of any kind and nature whatsoever and remit said liens to the proceeds from said transfer in their proper priority, if in the court's sound discretion it considers the same to be the advantageous and proper method of handling said property and to the best interests of all persons having interest therein. How the same might be done or whether or not these lands might be transferred for highway purposes by easement or by deed, is within the sound discretion of the court who has this property in charge under receivership. The court's powers and authority are very wide in so long as there is no abuse of discretion. The form of the conveyance would likewise be somewhat discretionary with the court now having the property in charge.

In answer to the one other question contained in your inquiry, to-wit, as to whether or not the lease to the Ohio Electric Railway Company would now be an encumbrance upon the lands in question, it is my opinion that said lease became void and of no effect upon the appointment of the receiver and whatever value or liability may have been in effect surrounding this lease, has been fully disposed of and cancelled in said former receivership.

I am returning you herewith the 12 deeds under consideration.

Respectfully,

HERBERT S. DUFFY,

Attorney General.