

3001.

EASEMENT—PERPETUAL—INSTRUMENT OF WRITING FOR UN-  
CONDITIONAL SALE OF INTEREST IN LANDS—LISTING BY  
COUNTY RECORDERS IN DEED RECORDS.

*SYLLABUS:*

*An instrument of writing in which it is stated that the grantor grants, bargains, sells, conveys and warrants to the grantee, its successors and assigns forever, a right of way and easement with the right, privilege and authority to said grantee, its successors, assigns, lessees and tenants, to construct, erect, operate and maintain a line of poles and wires for the purpose of transmitting electric or other power, including telegraph or telephone wires in, on, along, over, through or across properly described lands for a consideration stated, and containing the statement that the grantee is to have and to hold an interest in said land unto said grantee, its successors and assigns, properly signed and acknowledged in the presence of witnesses, and duly acknowledged before an officer authorized in the premises, is an instrument of writing for the absolute and unconditional sale and conveyance of an interest in lands, tenements or hereditaments and should under the provisions of Section 2757, General Code, be recorded in the record of deeds.*

COLUMBUS, OHIO, December 10, 1928.

HON. GEORGE E. SCHROTH, JR., *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

"I am herewith inclosing request from the County Recorder of Seneca County requesting my opinion concerning recordation of Deeds of Easement of The Ohio Power Company. I am not just sure as to the record in which these Easements should be recorded, but I am of the opinion that under Section 2757, G. C., they should be recorded in the Deed Records. That Section provides:

'The Recorder shall keep four separate sets of records, viz.: A record of Deeds, in which shall be recorded all Deeds, Powers of Attorney and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments; second, a record of mortgages, etc.; third, a record of plats, etc.; fourth, a record of Leases in which shall be recorded all Leases and Powers of Attorney for the execution of Leases.

All instruments entitled to record shall be recorded in the *proper record* in the order in which they are presented for record.'

Section 2759 provides:

'The County Recorder shall record in the proper record in a fair and legible handwriting, etc., all Deeds, Mortgages, etc.'

In view of the fact that the recordation of instruments of this character is a State wide proposition and in view of the position taken by the Recorder of this County, I wish you would let me have your opinion on the subject."

A communication from the county recorder of Seneca County reads as follows:

"A difference of opinion has arisen between myself and The Ohio Power Company concerning the record in which its Deeds of Easements are recorded. I have been recording the same in the Lease record, but The Ohio Power Company contends that the same should be recorded in the Deed record.

I am attaching hereto a copy of one of The Ohio Power Company's Easements. You will note that it provides that the party of the first part hereby 'Grant, bargain, sell, convey and warrant to the party of the second part, its successors and assigns forever, a right of way and easement, etc.' The habendum clause in the Easement reads, 'To have and to Hold the same unto said party of the second part, its successors and assigns.'

Will you kindly advise me in what record these easements should be recorded? I refer you to Sections 2757 and 2759 of the General Code."

The copy of the indenture referred to by the county recorder is as follows:

"THIS INDENTURE, made this \_\_\_ day of \_\_\_\_\_ 192\_, by and between \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_his wife (or unmarried) of the County of \_\_\_\_\_  
in the State of \_\_\_\_\_, part \_\_\_\_\_ of the first part, and  
\_\_\_\_\_  
a corporation organized and existing under the laws of the State of \_\_\_\_\_,  
party of the second part.

WITNESSETH:

That for and in consideration of the sum of \_\_\_\_\_Dollars in hand paid to the part \_\_\_\_\_ of the first part by the party of the second part, the receipt of which is hereby acknowledged, said part\_\_\_\_\_ of the first part hereby grant, bargain, sell, convey, and warrant to the party of the second part, its successors and assigns forever, a right of way and easement with the right, privilege and authority to said party of the second part, its successors, assigns, lessees, and tenants to construct, erect, operate and maintain a line of poles and wires for the purpose of transmitting electric or other power, including telegraph or telephone wires in, on, along, over, through or across the following described lands situated in \_\_\_\_\_ township, in the County of \_\_\_\_\_, in the State of \_\_\_\_\_, and part of Section No. \_\_\_\_\_, Township No. \_\_\_\_\_, and Range No. \_\_\_\_\_ and bounded:

- On the North by the lands of \_\_\_\_\_
- On the East by the lands of \_\_\_\_\_
- On the South by the lands of \_\_\_\_\_
- On the West by the lands of \_\_\_\_\_

TOGETHER with the right to said party of the second part, its successors and assigns, to place, erect, maintain, inspect, add to the number of, and relocate at will, poles, cross-arms or fixtures and string wires and cables, adding thereto from time to time, across, through or over the above described premises, to cut and remove from said premises or the premises of the parties of the first part adjoining the same on either side, any trees, overhanging branches or other obstructions which may endanger the safety or interfere with the use of said poles or fixtures or wires attached thereto or any structure on said premises, and the right of ingress and egress to and over said above described premises, and any of the adjoining lands of the

parties of the first part, at any and all times, for the purpose of patrolling the line, of repairing, renewing or adding to the number of said poles, structures, fixtures and wires, and for doing anything necessary or useful or convenient for the enjoyment of the easement herein granted, also the privilege of removing at any time any or all of said improvements erected upon, over, or on said land, together with the rights, easements, privileges and appurtenances in or to said lands which may be required for the full enjoyment of the rights herein granted; provided however, the said

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 its successors or assigns, shall further pay to me/us or my/our heirs or assigns, the sum of \$----- for each pole erected along the public highway on said lands, hereinbefore described, from time to time, whenever and as soon as any poles are erected thereon. Grantee will immediately repair or replace all fences, gates, drains and ditches injured or destroyed by it on said premises or pay Grantor all damages done to the fences, drains, ditches, crops and stock on the premises herein described, caused by the construction, operation and maintenance of said lines. All claims for damages caused in the operation and maintenance of said lines, shall be made at or mailed to the office of the Grantee at One South Fourth Street, Columbus, Ohio, within thirty days after such damages accrue. If Grantor and Grantee cannot agree on the amount of damages, the same shall be arbitrated. Any trees cut will be paid for by Board Measure, using Scribner's Lumber Rules, at the market price in vicinity, and this indenture contains all agreements, expressed or implied, between the parties hereto.

To Have and to Hold, the same unto said party of the second part, its successors and assigns.

In Witness Whereof, the part----- of the first part ha----- hereunto set ----- hand and seal the day and year first above written.

Signed and Acknowledged -----  
 in the presence of: -----  
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It is noted that the form of indenture submitted, assumes a consideration paid by the grantee and states it is a grant, bargain, sale and conveyance and warranty to the second party, its successors and assigns forever of certain real estate therein described. It also grants the right to place certain structures upon the land and to do anything necessary or useful or convenient for the enjoyment of the easement granted. The indenture also grants said described premises "to have and to hold the same unto said party of the second part, its successors and assigns." The form submitted also provides a place for the signature of the grantor and also a space for the signatures of witnesses. A form of acknowledgment is placed upon the indenture submitted. It is assumed that said indenture will be properly signed and witnessed and also that it will be acknowledged before the proper officer.

Section 2757, General Code, reads as follows:

"The recorder shall keep four separate sets of records, namely: First, a record of deeds, in which shall be recorded all deeds, powers of attorney, and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments; Second, a record of mortgages, in which shall be recorded all mortgages, powers of attorney,

or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or incumbered in law; Third, a record of plats, in which shall be recorded all plats and maps of town lots, and of the sub-divisions thereof, and of other divisions or surveys or lands; Fourth, a record of leases, in which shall be recorded all leases and powers of attorney for the execution of leases. All instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record."

It is noted that under the provisions of the foregoing section the county recorder is required to keep four sets of records and that the first record required is a record of deeds in which shall be recorded all deeds, powers of attorneys and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments. The question therefore arises as to whether or not the form of indenture submitted comes within said classification. That is, as to whether it is a deed or other instrument of writing and whether it makes an absolute and unconditional sale and whether it conveys lands, tenements or hereditaments.

Section 5322 of the General Code, provides as follows:

"The terms 'real property' and 'land' as so used, include not only land itself, whether laid out in town lots or otherwise, with all things contained therein but also, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or appertaining thereto."

Tiffany on Real Property, Vol. I, page 14, Section 5, reads as follows:

"Things of a real character were formerly referred to by the inclusive phrase 'lands, tenements and hereditaments,' which is still occasionally used. The meaning of these words, particularly the last two, calls for a brief consideration.

Land includes whatever is parcel of the terrestrial globe, or is permanently affixed to such parcel. This statement of the meaning of the term is sufficient for our present purpose, and the complex questions frequently arising as to whether specific things or classes of things are, under particular circumstances, owing to their connection with or annexation to the soil, to be regarded as a part of the land, are reserved for consideration in connection with a discussion of the rights incident to the ownership of land.

'Tenement' is defined as anything which may be the subject of common law tenure, or, as Blackstone says, it 'signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal, kind.' The word, the meaning of which will more clearly appear after a consideration of the system of feudal tenure, to which the next chapter is devoted, is of a more extensive signification than land, which it includes, in addition to most of what we have referred to as incorporeal things real. In fact, it appears at all times to have been regarded as a convenient term by which to designate these incorporeal things, provided they had what was regarded as a connection with the land, it being thus improperly applied to some things which were not in fact the subjects of common law tenure.

'Hereditament' includes whatever, upon the death of the owner, passes, in the absence of disposition by will, by the act of the law, to the heir, and not to the executor. The term is more extensive in its signification than the word 'tenement', which it generally, though not always, includes, and it may, in England at least, include things of a personal character."

It seems clear that the interest in the land herein conveyed comes within the terms of the statutes, namely, lands, tenements or hereditaments. It is also noted that the habendum clause reads as follows: "To Have and to Hold the same unto said party of the second part, its successors and assigns." It is a conclusive grant of a right in and to the land granted and said grant is perpetual. The conveyance, therefore, comes within the provisions of Section 2757, General Code, being a deed or instrument of writing for the absolute and unconditional sale or conveyance of an interest in lands, tenements and hereditaments.

It is therefore my opinion, specifically answering your question, that the conveyance of an easement to the Ohio Power Company, its successors and assigns, in accordance with the form and language therein submitted, is an instrument of writing for the absolute and unconditional sale and conveyance of an interest in lands, tenements and hereditaments, and should, therefore, under the provisions of Section 2757, General Code, be recorded in the record of deeds.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*

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3002.

REAL ESTATE BROKER—MAY ALSO BE LICENSED AS REAL ESTATE SALESMAN.

*SYLLABUS:*

*An individual may be licensed as a real estate broker and at the same time be also licensed as a real estate salesman employed by another licensed broker.*

COLUMBUS, OHIO, December 10, 1928.

HON. EARL D. BLOOM, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent communication, as follows:

"In several instances the State Board of Real Estate Examiners has licensed an individual both as a broker and as a salesman under another broker.

The question has been raised as to whether one individual can be licensed under the real estate license law, both as a broker and as a salesman.

Will you please give us your legal opinion as to whether an individual can be licensed at the same time as a real estate broker and as a real estate salesman under the real estate license law?"

There is little in the law governing the licensing of real estate brokers throwing light on the question you present. The answer is rather to be governed from the general theory of the law than from any specific provision thereof. The theory is that the agency which deals with the public in connection with a real estate transaction