it appear that service was made upon either one of these individuals or that either one of them waived service, entered appearance and consented to the sale of said real estate.

Information may be available indicating that Mrs. George Crawford and Florence Sclnetzer are the same person and that Ott Smith and H. A. Smith are the same person. If this should prove to be true I should like some definite evidence of it. Probably this deficiency could best and most quickly be cured by having Mrs. George Crawford and Ott Smith execute quit claim deeds to the state of Ohio for this strip of land.

I am herewith returning to you in the interim all of the papers enumerated above as having been received.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3155.

APPROVAL, CONTRACT FOR ROAD IMPROVEMENTS IN JEFFERSON AND FRANKLIN COUNTIES.

COLUMBUS, OHIO, April 15, 1931.

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

3156.

APPROVAL, BONDS OF JACKSON CITY SCHOOL DISTRICT, JACKSON COUNTY, OHIO—$250,000.00

COLUMBUS, OHIO, April 15, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3157.

DISCUSSION OF TITLE OF F. D. SULLIVAN TO CERTAIN TRACTION LANDS FORMERLY OWNED BY THE DAYTON & NORTHERN TRACTION COMPANY AND THE INDIANA, COLUMBUS & EASTERN TRACTION COMPANY.

COLUMBUS, OHIO, April 16, 1931.

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

DEAR SIR:—Acknowledgment is hereby made of the following inquiry from you:

> "An opportunity has been placed before this Department to acquire from a private owner certain abandoned traction company rights-of-way formerly owned by the Dayton & Northern Traction Company, adjacent to and paralleling State Route 51, in Montgomery County, between Dayton and Salem, Ohio.
>
> Prior to a decision as to the desirability of purchasing this right-of-way, it is necessary for us to know whether the present owner has clear and legal title thereto.
>
> The right-of-way in question was originally purchased from individ-

ual abutting farm owners by the Dayton & Northern Traction Company and later conveyed to The Indiana, Columbus & Eastern Traction Company. A receiver duly appointed by the Court for the later company disposed of the assets of the company and the title to certain portions of the right-of-way passed into the hands of Mr. F. D. Sullivan, of Columbus, Ohio.

Transmitted, under separate cover, are certain papers furnished us by Mr. Sullivan tending to prove his ownership or right to sell the property. He informs us, however, that the deeds, conveying those portions to him which he wishes to dispose of to the State, have not been recorded. The papers are as follows:

Articles of incorporation of the Dayton & Northern Traction Company.

Articles of incorporation of the Indiana, Columbus & Eastern Traction Company.

Deed of the Dayton & Northern Traction Company, conveying their property to the Indiana, Columbus & Eastern Traction Company.

Copy of the franchise granted the Dayton & Ohio Traction Company by the Commissioners of Montgomery County.

Typical warranty deeds from property owners to the Dayton & Northern Traction Company, conveying the original right-of-way and the subsequent transfer of such title from the Indiana, Columbus & Eastern Traction Company to Mr. Sullivan.

Three rolled blue prints showing the entire right-of-way of the Traction Company, with specific designation to those parcels which are being offered to the State.

It is our understanding that some question may exist as to the legality of the sale of right-of-way upon the part of a public carrier, when the same is being no longer used for the purpose for which it was originally purchased. Accordingly, it is requested that an investigation be made of the above papers and the Director of Highways formally advised as to the validity of the title to this abandoned traction company right-of-way which he contemplates acquiring for highway purposes."

No abstracts of title are submitted to indicate whether those persons who purported to convey the property under consideration to the Dayton and Northern Traction Company, had title thereto, and I do not, therefore, attempt to pass upon that question. You wish to know, as I understand from further communication with your office, whether, assuming that said grantors had valid fee simple titles, the public carriers acquired such fee simple titles, and whether, upon abandonment of the traction line, Mr. Sullivan could acquire title in fee simple.

An examination of the photostatic copies of the deeds from the property owners to the Dayton and Northern Traction Company, discloses that, with one exception, all of the deeds are of the same general nature. The deed from Susannah Crook to the Dayton and Northern Traction Company (pertaining to parcel No. 1) is typical of these instruments. The document is a general warranty deed, in printed form, reciting that, in consideration of two hundred and fifty dollars, the grantor

"does hereby Grant, Bargain, Sell and Convey to the said The Day-

ton and Northern Traction Company, its successors and assigns forever the following described real estate, situate * * * and being a strip of ground fifteen (15) feet wide * * * and all the Estate, Title and Interest of the said Susannah Crook either in Law or in Equity, of, in and to the said premises; Together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof; To have and to hold the same to the only, proper use of the said The Dayton and Northern Traction Co., its successors and assigns forever. And the said Susannah Crook for herself and for her heirs, executors and administrators, does hereby Covenant with the said The Dayton and Northern Traction Company, its successors and assigns, that she is the true and lawful owner of the said premises, and has full power to convey the same; that the title, so conveyed, is Clear, Free and Unincumbered; and further, that she will Warrant and Defend the same against all claim, or claims, of all persons whomsoever."

Clearly, this instrument purports to convey a fee simple title to a definite strip of land. There is not a word in it tending to limit the grant to a mere easement. Indeed, no more unequivocal terms could be employed to convey a fee simple. If the grantee were any other corporation than a public carrier no one would have the least doubt about it.

But although the original grantor intended to convey an estate in fee simple, further question arises as to whether the traction companies had power to acquire and transfer fee simple title to the premises in question. The articles of incorporation of the Dayton and Northern Traction Company provide:

"Said corporation is formed for the purpose of building, acquiring, owning, leasing, operating and maintaining a railroad or railroads to be operated by electricity or other motive power from one municipal corporation or point in this state; to and through other municipal corporations in this state * * * ."

The articles of incorporation of The Indiana, Columbus and Eastern Traction Company provide:

"Said corporation is formed for the purpose of (a) owning, operating, acquiring by lease, purchase or otherwise, building, constructing and maintaining street, street and interurban, interurban and electric railroads, and extensions and branches thereof * * * with power to own, acquire by lease, purchase or otherwise, operate, construct and maintain such other lines and branches and extensions thereof as may hereafter be determined; and all things incident thereto; * * * (c) acquiring all property, real and personal, incident to the conduct of its business."

The deed from the Dayton and Northern Traction Company to the Indiana, Columbus and Eastern Traction Company, executed June 19, 1906, recites that the grantor

"does hereby Grant, Bargain, Sell and Convey unto the said The Indiana, Columbus and Eastern Traction Company, its successors and assigns, the following described property, to wit:

The line of electric railway of said The Dayton & Northern Traction Company, extending from the city of Dayton, in Montgomery County, Ohio, to and into the city of Greenville, Darke County, Ohio, together

with its roadbed, tracks, branches * * *, and all other property of every kind and nature, real, personal and mixed, rights, privileges and franchises, wheresoever situate, and all rights, privileges, franchises and easements thereunto pertaining; and all the estate, right, title and interest of said company in and to the property aforesaid * * * .

To Have and To Hold the same to the only proper use of said The Indiana, Columbus and Eastern Traction Company, its successors and assigns forever."

The receiver's deed pertaining to the particular strip of land under discussion, provides:

"THAT, WHEREAS, on the Fifteenth day of October, 1924, in a certain action pending in the District Court of the United States for the Northern District of Ohio, Western Division, in which the Pennsylvania Company for Insurance on Lives and Granting Annuities, a corporation organized and existing under the laws of the State of Pennsylvania and a citizen of the State of Pennsylvania was plaintiff, and The Indiana, Columbus and Eastern Traction Company, et al., were defendants, being Case No. 269 in equity on the docket of said Court, upon application of J. Harvey McClure, Receiver, The Indiana, Columbus and Eastern Traction Company, for authority to discontinue service upon that portion of the interurban railway property of the defendant known as The Dayton-Union City Division, and to dismantle said property and sell same, including the real estate forming the right of way of said division, and, whereas, upon the Eighteenth day of October, 1924, the Judge of said Court did authorize, subject to the approval of the Public Utilities Commission of Ohio, the discontinuance of service upon said Division and the dismantling and sale of the property, including the right of way thereof, and did grant to the said Receiver the right and authority to sell all of said property, and, whereas, on the Second day of March, 1925, the Public Utilities Commission of the State of Ohio did authorize the discontinuance of service upon said Division and subsequent thereto said service was discontinued and the rails and other interurban railway equipment was removed therefrom.

NOW, THEREFORE, I, J. HARVEY McCLURE, RECEIVER, THE INDIANA, COLUMBUS AND EASTERN TRACTION COMPANY, appointed under order of Court aforesaid, and pursuant to the authority granted to him as above set forth, and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to him in hand paid, the receipt of which is hereby acknowledged, do HEREBY GRANT, REMISE, RELEASE AND FOREVER QUIT-CLAIM to F. Dell Sullivan, his heirs and assigns the following described real property.

Situate in * * * and being a strip of ground fifteen (15) feet wide * * * .

And being the same premises conveyed by Susannah Crook to the Dayton and Northern Traction Company by deed dated July 21, 1900, and recorded in * * * .

And being a part of the same premises conveyed by the Dayton and Northern Traction Company to The Indiana, Columbus and Eastern Traction Company by deed dated June 19, 1906 and recorded in * * * .

TO HAVE AND TO HOLD unto the said F. DELL SULLIVAN his heirs and assigns forever."

It is not only apparent that the original property owner purported to convey said strip of land in fee simple to the Dayton and Northern Traction Company, but it is equally clear that the latter company purported to convey to The Indiana, Columbus and Eastern Traction Company all that it acquired, and that the last named company purported, through its receiver, to convey to Mr. Sullivan a fee simple title. *Walsh* v. *Barton,* 24 O. S. 28, throws light upon the question of whether these intentions became legal realities.

In that case, plaintiffs sought to compel specific performance of certain contracts by which defendant agreed to purchase certain real estate, the terms of the sale stipulating "Title perfect." Plaintiffs derived title to said real estate from the Marietta and Cincinnati Railroad Company. The railroad had purchased the land for right of way purposes, but as a matter of fact it was not used or necessary for the operation or maintenance of said road. The defendant claimed that plaintiffs' title was at least doubtful because the railroad had no power to acquire or transfer the title to the premises. The court said: (p. 42)

> "We agree * * * that a corporation has power to acquire real estate only when such power is granted to it by statute or by its charter. Power to acquire and convey real estate, however, was granted to this railroad company by * * * the act of February 11, 1848 * * * as follows, to wit:
>
> 'Such company may acquire, by purchase or gift, any land in the vicinity of said road, or through which the same may pass, so far as may be deemed convenient or necessary by said company to secure the right of way * * * ; and the same to hold or convey in such manner as the directors may prescribe.'
>
> The only testimony in this case tending to show the purpose for which the company acquired these lands, is to the effect that they were purchased to secure a right of way for its road through the same. If such purchase, in the exercise of good faith, was, by the company, deemed convenient or necessary to secure the right of way for the road, it is clear that the power granted by the statute was ample for the purpose. If, however, it were shown that the company abused its discretion and power in making the purchase—that, in fact, the purchase of the whole of these lands was not convenient or necessary to secure the right of way for its road—still, we think that the lands having been purchased by the company for a valuable consideration, and having afterward been conveyed to the plaintiffs, the title became indefeasible in them. In no event, under the laws of this state, would the property escheat; and the vendor of the company, and the company itself, having executed the conveyances and delivered possession, would be estopped from questioning the validity of the plaintiffs' title. Whatever consequences might result to the corporation, if the state were to inquire into the abuses of its charter, it is quite certain that the title to these premises in the possession of the plaintiffs below or their assigns, would not be affected by such inquiry."

In 37 A. L. R. 204, under an annotation entitled "Power of corporation to pass title to real property which it holds in excess of its powers," it is stated:

> "In the absence of statute, charter provision, or the commencement of escheat proceedings, if a corporation which has no legal right to hold real

> property, or is limited in the nature or amount which it may acquire and possess, holds real property in excess of its power, it may, nevertheless, convey it to another and pass good title."

Without attempting to decide whether the charters of the traction companies empowered them to acquire, for right of way purposes, a fee simple title to, or merely an easement in, land, I am of the opinion, in view of the above authorities and in view of the fact that the pertinent deeds purport to convey a fee simple title, that Mr. Sullivan acquired a fee simple title to the land once owned by Susannah Crook and conveyed by her to The Dayton and Northern Traction Company. The same conclusion would obtain as to other strips of land where the documents pertaining thereto are similar to those pertaining to the Crook land. But it is to be distinctly understood that I am not attempting to pass upon any lands which may have been acquired by The Dayton and Northern Traction Company by condemnation proceedings instead of by purchase.

I note that as to quite a few of the strips of land which were conveyed to The Dayton and Northern Traction Company, there are, among the papers you submit, no corresponding receiver's deeds, and therefore I do not attempt to say what Mr. Sullivan's rights are in respect to such lands.

With one exception, all of the deeds from the original property owners to The Dayton and Northern Traction Company are general warranty deeds in printed form and purport to convey an absolute title to said company. The exception referred to (the deed from Samuel L. Herr and Margaret M. Herr, pertaining to parcel No. 13) is not a deed in printed form, but is partly typewritten and partly written in longhand. It recites that the grantors, in consideration of one dollar, (no other consideration is mentioned)

> "grant, convey, assign, set over and demise unto said The Dayton and Northern Traction Company, its successors and assigns, for a right-of-way, a strip of ground fifteen feet wide and described as follows * * * together with the right and privilege to said Company, its successors and assigns, to build, maintain and operate its railroad upon and along said strip of ground and right-of-way forever, and to do all things that are necessary in that behalf; to have and to hold said strip of ground and right of way for the purposes aforesaid, to said Company, its successors and assigns forever. The grantors, for themselves and for their heirs, executors and administrators, do hereby covenant with the said grantee, its successors and assigns, that they are the true and lawful owners of said strip of ground, and have full power to convey the same, and that the title so conveyed is clear, free and unincumbered, and that they will warrant and defend the same against all claim or claims, of all persons whatsoever."

An examination of this deed convinces me, especially when it is considered that it is the only one of the deeds containing words limiting the uses for which the conveyance is made, while all the other deeds are outright grants without any limitations, that the grantors meant to convey, not a fee simple, but merely an easement for a right of way. See *Railway* v. *Wachter,* 70 O. S. 113; *B. & O. Rd. Co.* v. *Oak Hill,* 25 O. A. R. 301; 51 C. J. 540, footnote No. 90. An abandonment of the same for railway purposes, destroys the right therein. See *Railway Co.* v. *Ward,* 23 C. C. (N. S.) 465, 468. At least, there is such a reasonable doubt about the Herr deed conveying more than a mere easement that I am forced to conclude that Mr. Sullivan could not acquire a good and marketable fee simple title to this

particular strip of land. See Thompson on "Abstracts and Titles" (1930 ed.) sec. 96.

I call your attention to the fact that some of the deeds to Mr. Sullivan, of which the deed relating to parcel No. 9 is an example, state expressly that "This conveyance is made subject to pole line rights of The Dayton Power and Light Company over the above described premises."

In many of the deeds from the original grantors to the Dayton and Northern Traction Company, the grantors reserve the right to construct crossings over the land conveyed so as to give access to the grantors' land. The deed of Henry Y. Moyer, relating to parcel No. 9 is typical of these provisions. The deed of Katurah A. and Warren C. Lasure, relating to parcel No. 12, goes further and recites that "said grantee for itself, successors and assigns covenants and agrees with the grantors, their heirs and assigns to construct and maintain two crossings across said premises hereby conveyed and across its railroad, at such points as grantors may designate, to give access to said land of Katurah A. Lasure from said pike." Such provisions would be of no consequence if the state took this land over for highway purposes, and they may, therefore, be disregarded.

I also bring to your attention the fact that the deed from The Dayton and Northern Traction Company to The Indiana, Columbus and Eastern Traction Company contains the following provision:

> "The aforesaid conveyance is made subject to the lien of a certain mortgage given by said The Dayton and Northern Traction Company to the Central Trust Company, of New York, Trustee, dated March 1, 1901, securing an issue of bonds in the sum of Four hundred and fifty thousand dollars * * * ."

Most probably this mortgage has since been satisfied, at least as a result of the receivership proceedings of The Indiana, Columbus and Eastern Traction Company. However, you do not submit any papers which indicate that this probability is a certainty.

I wish to point out, also, certain defects in one of the deeds to The Dayton and Northern Traction Company relating to parcel No. 11. Here, those persons named in the premises of the deed (executed in 1900) as making the conveyance are four—Frederick Wolf, George Wolf, Elizabeth Wolf and Polly Wolf; but the deed is not signed either by Elizabeth Wolf or by Polly Wolf. Furthermore, the clause pertaining to the release of dower recites that Caroline Wolf is the wife of George Wolf; but Caroline Wolf's signature does not appear upon the instruments.

I must add that since no complete abstract of the record title has been furnished with reference to these lands, I am unable to say whether they are subject to any outstanding encumbrances, or whether Mr. Sullivan or any of his predecessors in title has ever conveyed any portions of them to anyone else. I take it, however, that your sole interest is in knowing whether—assuming that the grantors of The Dayton and Northern Traction Company had titles in fee simple and that the papers you submit are the only papers which pertain to the title to these lands in the interim—the traction companies could and did receive and transmit to Mr. Sullivan a fee simple in these lands which the traction companies used for right of way purposes, but which uses have been abandoned.

I am herewith returning to you all of the documents and papers which you have forwarded to me.

Respectfully,
GILBERT BETTMAN,
Attorney General.