and repair purposes, we are of opinion that the courts are not called upon to interfere."

In concluding, the court said:

"The answer of the city showing that the purchase of the sand dryer is necessary to the equipment of the asphalt repair plant, and showing further that such asphalt plant is used exclusively for maintenance and repair work, we are of opinion that the city may in its discretion use the funds for the purpose of equipping said asphalt plant, and that the court has no authority to interfere therewith in the absence of some showing that the plant is to be used for some other purpose than that stated."

The construction of a water line beneath the surface of the street cannot be classed as maintenance or repair of the street or highway. Section 6309-2 of the General Code, provides that:

" 'Maintenance and repair' as used in this section, includes all work done upon any public road, or highway, or upon any street, in which the existing foundations thereof is (are) used as a sub-surface of the improvement thereof in whole or in substantial part."

You are, therefore, advised that in the opinion of this department the funds in municipal treasuries from auto license tax and gasoline tax cannot be legally transferred, or used otherwise than for maintenance and repair of public roads, highways and streets.

Respectfully,
EDWARD C. TURNER,
Attorney General.

90.

DIRECTOR OF HIGHWAYS—NEED NOT HAVE FEE SIMPLE TITLE FOR ROADWAY RIGHT OF WAY—PERPETUAL EASEMENT SUFFICIENT —DEEDS MUST BE DESCRIPTIVE ENOUGH TO ENABLE COUNTY AUDITOR TO IDENTIFY BY COUNTY MAP—SECTION 12 OF APPROPRIATION ACT 1925-26 APPLIES ONLY TO MONIES APPROPRIATED FOR PURCHASE OF REAL ESTATE DESIGNATED THEREIN—ANY EVIDENCE OF TITLE ACQUIRED BY DEPARTMENT OF HIGHWAYS MUST BE DEPOSITED WITH AUDITOR OF STATE.

SYLLABUS:

1. *When the Department of Highways and Public Works purchases lands for the purpose of locating or relocating a highway, it is not necessary for the department to acquire a fee simple title thereto; a perpetual easement in the public for a right of way for road and highway purposes is sufficient.*

2. *When the Department of Highways and Public Works acquires the fee of any real estate for highway purposes, the deed should contain a description of sufficient definiteness to enable the county auditor to locate the same upon the county map.*

3. *Section 12 of the appropriation act for 1925-26, requiring the consent and approval of the controlling board to the expenditure of monies therein appropriated*

for the purchase of real estate, applies only to the moneys appropriated by said act for the specific purchases of real estate designated therein.

4. Section 276 of the General Code, requiring all evidence of title of land other than public lands acquired by the state to be deposited with the state auditor and kept in his office, applies to any evidence of title to lands acquired by the Department of Highways and Public Works for highway purposes.

COLUMBUS, OHIO, February 18, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of January 27, 1927, which reads as follows:

"Several questions have arisen relative to the purchase of highway right of way and the deeds incident thereto, as affecting intercounty highways and main market roads. Stated below are the questions upon which your advice and opinion is requested.

1. The Standard Deed form adopted by the Division of Highways for right of way is based upon the use of a center line of survey description and refers definitely to the plans of the road project on file in the office of the Director of Highways and Public Works. Both deed and plan refer to county, township, intercounty highway or main market road and the section number of same.

Those counties in the state wherein the land was surveyed on the United States system of public land surveying have raised the question as to how they can deduct, on the tax duplicate, highway right of way secured by the present form of deed when the description therein contains no reference as to range or section.

It is desired to know whether the center line of survey description is sufficiently definite to serve for tax duplicate purposes even though range and section designated are lacking. Fully one-third of the state was originally surveyed in such a manner as to make impossible the use of a description referring to range and section.

2. In view of the fact that deeds taken either by the county or state for highway right of way purposes are in effect easements, since any change in the line of the road involves a reversion of the right of way vacated, will it be possible to change the title of the Department's 'Highway Right of Way Deed' to 'Highway Right of Way Easement?'

Resident engineers and county surveyors complain that they are having great difficulty in getting property owners to sign deeds when right of way is needed. They further state that were the deeds actually called easements a large percentage of right of way could be secured for nothing and at the same time remove objections on the part of the owners to signing deeds.

3. It is requested that, as a part of this opinion, you confirm the interpretation of Section 12 of the last appropriation bill of the General Assembly as applied to right of way purchased under Section 1202 of the General Code and the Fisher Grade Separation Act, 110 O. L., as given in a letter to the Director of Highways by C. C. Crabbe, Attorney General, under date of October 26, 1926. Under this interpretation we are permitted to pay for right of way purchased by the state, through the State Highway Purchasing Department by requisition and order.

4. Section 267 of the General Code requires that deeds for real estate in the name of the State of Ohio be filed in the office of the Auditor of State.

In view of the interpretation referred to in paragraph 3 above, it is requested that the Division of Highways be authorized to keep in its files the deeds for highway right of way, and to file certified copies thereof with the Auditor of State if deemed necessary."

Your questions will be answered in the same order as contained in your letter.

(1) It is desired first to know whether "the center line of survey description is sufficiently definite to serve for tax duplicate purposes, even though range and section designated are lacking." According to information from your department supplementing the letter above set forth, an opinion on this question is desired because of complaint being made by certain county auditors that they cannot make deductions from the value of tracts of land valued for taxation purposes of the "amount of land * * * used as a public highway."

Section 5561, General Code, provides:

"The county auditor shall deduct from the value of such tracts of land, as provided in the next preceding section, lying outside of municipal corporations, the amount of land occupied and used by a canal or used as a public highway, at the time of such assessment."

The next preceding section (Section 5560) provides for the valuation for taxation purposes, of each separate portion of real property at its true value in money.

Whether or not the description contained in a deed is sufficiently definite to enable a county auditor to deduct from the tax value of any tract of land the amount of land used as a public highway, depends of course upon the description in each particular case. Generally speaking, however, the town, range and section numbers are an essential part of any description in all counties where the "United States System of Public Land Surveying" was employed. Therefore, while a description in each of the four forms of deeds used by the Highway Department is sufficiently definite to pass to the state title to the property described in such deeds, it is my opinion that the town, range and section numbers should be included as a part of the description so that the county auditors may have sufficient information to make deductions from the tax duplicate covering lands used as public highways, especially in those parts of the state where the "United States System of Public Land Surveying" was used.

(2) As to your second question, it is the opinion of this department that so long as the state continues to take title in fee simple for highway rights of way, an instrument conveying such title should either be designated "Highway Right of Way Deed," or by other words equally apt, which truly and correctly describe the nature of the conveyance being executed by the grantor.

An examination of each of the four forms of deeds (Forms Nos. 2, 3, 4 and 5) in use by your department discloses that each of such forms is in fact a deed of bargain and sale, which, when properly executed, conveys to the state a title to the land described therein absolutely and in fee simple. It would obviously be improper to call such a deed a "Highway Right of Way Easement" for the reason that such instrument not only is *not* an easement, but conveys more than an easement, viz., a fee simple title. To call any of the forms now in use an easement would be incorrect because it is not in fact an easement nor a deed therefor, and would be improper because the use of such a designation might serve to mislead the person granting the title.

It is suggested that much of the difficulty mentioned in your letter might be obviated if an estate less than the fee be purchased for road purposes. As you probably know, it has long been the theory of the courts of Ohio that in so far as all roads

and highways lying without municipal corporations are concerned, the fee to such highways "is in the abutting owner, and the public has only the right of improvement thereof and uninterrupted travel thereover." See The Ohio Bell Telephone Co. vs. The Watson Co., 112 O. S. 385, and cases cited therein.

I find no statute that requires your department to buy the fee when locating or relocating a highway. A right of way in perpetuity for road and highway purposes, spoken of as an easement in the public, might be purchased by your department leaving the fee in the person from whom the purchase is made, and if such an interest in the land only be taken, it would be entirely proper to designate the instrument conveying such interest as a "Transfer of Highway Right of Way" or "Conveyance of Easement for Road Purposes," or by some similar designation. It should be pointed out in this connection, however, that if such an interest be purchased, when the right of way is no longer used for road or highway purposes, it reverts to the owner of the fee.

If your department decides to purchase for highway purposes an estate less than the fee, this department will be glad to co-operate in the preparation of proper forms.

(3) You request that I confirm "the interpretation of Section 12 of the last appropriation bill of the General Assembly, as applied to right of way purchased under Section 1202 of the General Code and the Fisher Grade Separation Act, 111 O. L." (Section 6956-22, et seq., General Code) as given in a letter to the Director of Highways by my predecessor on October 26, 1926. It was said in the letter:

> "Inasmuch as the purchases to which you refer are to be paid out of the maintenance and repair funds it would seem that the provision above referred to would not apply. In other words, Section 12 has reference to expenditures from funds specifically appropriated to purchase real estate and would not seem to cover purchases for highway purposes which are incident to the major project of constructing, reconstructing, maintaining and repairing highways and not paid from a fund specifically appropriated to purchase real estate."

Section 12 of the appropriation act of March 27, 1925, provides:

> "No moneys herein appropriated for the purchase of real estate shall be expended without the consent and approval of the controlling board herein provided for; such approval to be evidenced by a majority vote of the board entered on the minutes."

An examination of the appropriations made in this act for the Department of Highways and Public Works for all purposes shows that no funds were appropriated for the purchase of real estate for rights of way. The act does provide for the appropriation of money to be used for the purchase of real estate for certain specifically designated purposes therein provided. It is my opinion that Section 12 does not apply to the purchase by the Highway Department of real estate for right of way purposes, and I agree with the interpretation of my predecessor set forth in the letter above quoted.

(4) You inquire whether or not under Section 267 of the General Code you may keep in the files of your department the deeds for highway rights of way and file certified copies thereof in the office of the Auditor of State.

Section 267, General Code, provides:

> "The evidence of title of lands other than public lands, belonging to or hereafter acquired by the state, shall be recorded in the office of the recorder

of the counties in which they are situated, and when so recorded such evidence of title shall be deposited with the Auditor of State and kept in his office. He shall make an abstract of the title of all lands acquired by the state in a book prepared for that purpose and open for inspection by all persons interested."

The purpose of requiring evidence of title of lands other than public lands acquired by the state to be deposited with the Auditor of State, who is required to keep a record thereof, is to provide a central place where all such evidence of title shall be kept and a place where all persons interested may inspect the abstracts of the title of all such lands required to be kept by the auditor.

This department has heretofore construed the phrase "lands other than public lands" to mean lands other than those ceded to the state by the United States government for school purposes, canal lands and the like.

In an opinion dated October 18, 1913, (Reports, Attorney General, 1913, Volume I, page 161), this department said as follows:

"It will be observed that under Section 267, the evidence of title of lands belonging to the state or hereafter acquired by it, except public lands, shall be recorded in the office of the county recorder of the counties in which they are situated, and when recorded, deposited and kept in the office of the Auditor of State. While land acquired by the state for armory sites is in a sense public lands, it cannot be regarded as such public land, the evidence of title whereof would not have to be recorded and deposited in the office of the Auditor of State. The public lands coming within the exception, are lands ceded to the state by the United States government for school purposes, canal lands and the like."

In accordance with the holding in this opinion, lands deeded to the state for highway purposes would be "lands other than public lands."

The provisions of Section 267 are plain, and clearly require that the evidence of title of lands other than public lands belonging to or hereafter acquired by the state be deposited with the State Auditor and kept in his office. Since the lands to which you refer in your letter are lands other than public lands and since they are lands acquired by the state, it is my opinion that the provisions of Section 267, General Code, should be complied with by your department, and that all evidence of title of lands acquired by your department should be deposited with the Auditor of State and kept in his office.

It is suggested that for the purposes of your department, correct copies of all deeds and other evidence of title of land in which your department is interested, can be kept on file in the office of your department.

Respectfully,
EDWARD C. TURNER,
Attorney General.