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ABTRACTER—FOR LAND ACQUIRED IN WIDENING ROADS—WHEN COUNTY COMMISSIONERS MAY LEGALLY PAY WITH COUNTY FUNDS SUCH ABTRACTER.

SYLLABUS:

When the county commissioners acquire land for widening or straightening of county roads, an abtracter may be paid from the county treasury for an abstract or search of the records in those instances wherein in the judgment of such county commissioners the same is necessary in order to properly determine who are the owners of the land to be so acquired.

COLUMBUS, OHIO, April 9, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—YOUR recent communication reads:

“We respectfully request your written opinion upon the following:

Question: When the county commissioners of a county acquire land for the widening or straightening of county roads, may they legally employ an abstract company to furnish a certificate of title to such land and pay such abstract company out of the county treasury for such certificate?”

It is a well recognized rule in this state that county commissioners have only such powers as are expressly granted to them by statute and such implied power as is necessary to carry into effect the powers expressly granted.

Section 6860, General Code, as amended by the 87th General Assembly, 112 O. L. 484, provides:

“The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except that as to roads on the state highway system the approval of the Director of Highways shall be had.”

Section 6862, which was amended in the same act, provides, among other things, that when the county commissioners are of the opinion that it will be for the public convenience to widen or change the direction of a public road they shall so declare by resolution, etc., and set forth the general route and termini of the road. Said section also provides when a petition signed by at least twelve freeholders of the county residing in the vicinity is presented to the board requesting it to locate, establish, widen, etc., a county road, the county commissioners shall view the location of the proposed improvement. Said section further requires that such a petition shall set forth the general route and termini of the road, etc.

Section 6863 relates to the fixing of the date by resolution to view the proposed improvement. The next section provides for the notice of view and hearing. Section 6865 requires the county surveyor to make an accurate survey if the commissioners after view consider such improvement of sufficient importance. Under said section the surveyor is required to furnish an accurate and detailed description of each tract of land which he believes it necessary to take in the event the improvement be made, together with the name of each owner.

Section 6868 provides for compensation and damages to be paid by land owners in

cases where it is determined that such an improvement is of sufficient benefit to them and not of sufficient importance to justify compensation and damages to be paid from the county treasury.

Section 6869 indicates the method of procedure when on final hearing the county commissioners decide in favor of an improvement. Said section, among other things, further provides:

“No road shall be opened up, or property taken, however, until all compensation and damages allowed are paid, or the amount thereof as allowed by the county commissioners is deposited with the Probate Court as hereinafter provided.”

Section 6906, of the General Code, which relates to the general powers of county commissioners relating to public roads, among other things, empowers said commissioners to improve a public road by widening. The following is quoted from said section:

“The county commissioners shall have power to alter, widen, straighten, vacate or change the direction of any part of such road in connection with the proceedings for such improvement. Provided, the provisions of this section shall have no application to roads or highways on the state highway system, except such portions of the state highway system which the board of county commissioners may construct under plans and specifications approved by the Director of Highways and under his supervision and inspection as provided by law.”

In the event the proceedings are initiated in pursuance of the provisions of Section 6906, General Code, above mentioned, and in the event the surveys show that lands will be required for said improvement, the county commissioners are required to cause notice to be served upon the owners of such land as specified in Section 6913, of the General Code. From the foregoing it is sufficiently clear that the county commissioners are fully empowered to acquire lands in connection with road construction projects which they are authorized to undertake. In such a procedure it becomes necessary to indicate by means of a survey the lands that are to be acquired, together with the owners thereof. While it would seem it is the duty in the first instance of the county surveyor to determine the names of the owners of such lands, it further is clear that it is the duty of the commissioners in such a proceeding to serve notice upon the owners. It further follows as a matter of law that in such a proceeding the rights of any land owner may not be divested unless and until all the requirements of the statutes have been complied with, unless such owner voluntarily waives his rights and conveys his lands to the county for the purpose of such improvement. From a practical standpoint, it necessarily follows in many instances that an abstract of title or an examination by an abstracter is essential in order to determine who owns such premises. The county officials in obtaining lands for such purposes are in no different position that a private individual would be when undertaking to acquire land insofar as knowing who the owners thereof are. The practice of obtaining a certificate of title from those who are familiar with real estate records is so well known and so generally endorsed as a proper business practice as to require no defense.

In an opinion of the Attorney General found in the reports of the Attorney General for the year 1922, page 543, the right of a county treasurer to obtain abstracts in connection with foreclosure proceedings instituted under the provisions of Section 5718, of the General Code, was considered. The following is quoted from the syllabus:

"The county treasurer is impliedly authorized to incur expenses necessary in bringing the action provided for by Section 5718 of the General Code; and if the preparation of an abstract of title for the purpose of ascertaining who are proper parties is in fact necessary, such expense is authorized and may be paid in the first instance out of the county treasury on the allowance of the county commissioners.

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Where the preparation of an abstract is not necessary but some search of the records or other ascertainment of facts is necessary for the purpose of determining who are the proper parties, such services should be performed by deputies, or assistants employed by the county treasurer under the county officers' salary law."

In the body of the opinion above referred to, it is pointed out that the treasurer is required to institute actions against the necessary parties and that in order to prepare his cases it is necessary to have an abstract or a search of the records made. In my opinion, Number 144, issued under date of March 4, 1929, to Honorable Frank Pollock, Prosecuting Attorney, Painesville, Ohio, reference was made to an opinion of the Attorney General found in the Opinions of the Attorney General for the year 1923, page 598, wherein it was held in substance that the city solicitor is not obligated to prepare abstracts of title for a board of education. In the body of my said opinion, the following is stated:

"The opinion of the Attorney General for 1923 referred to above, with which I concur, is based on the fact that the preparation of an abstract of title to real estate is neither the giving of legal advice nor the conducting of a case in court. The preparation of abstracts of title is a business by itself, aside from strictly legal business. It furnishes the facts and the basis for the preparation of a legal opinion with reference to the title which it purports to abstract and contains the facts from which a legal opinion may be formulated, but does not in and of itself, consist of the doing of the things which Section 4761, General Code, requires prosecuting attorneys or city solicitors as public officials, to do. It is not, in my opinion in any way analogous to the conducting of a civil action brought by or against a board of education, which by the terms of Section 4761, a prosecuting attorney and a city solicitor are specifically enjoined to do."

It will appear that there is no obligation imposed upon the prosecuting attorney to prepare abstracts for lands such as you mention which are to be purchased or acquired by the county commissioners. Of course, in instances wherein the owner conveys his premises to the county without an appropriation proceeding for a given amount as fixed by the commissioners, undoubtedly in the purchase price said commissioners could take into consideration the cost of an abstract as a part of the purchase price to be paid. However, there may be instances wherein it will be found that the abstract obtained does not show sufficient title or shows the title to be in the name of one different from the party who is undertaking to negotiate for the sale of the land. In the latter case, of course it could not be included as part of the purchase price. However, in view of the foregoing, it will be seen that it is one of the duties of the county commissioners to obtain positive and definite information as to who are the owners of the land to be acquired. It is believed that in order to carry into effect the express powers relative to acquiring such lands and notifying the owners thereof, such commissioners have implied power to pay for an abstract or a search of the records in those instances wherein the same is required.

Based upon the foregoing and in specific answer to your inquiry, you are advised that when the county commissioners acquire land for widening or straightening of county roads, an abstractor may be paid from the county treasury for an abstract or search of the records in those instances wherein the judgment of such commissioners the same is necessary in order to properly determine who are the owners of the land to be so acquired.

Respectfully,
GILBERT BETTMAN,
Attorney General.

283.

APPROVAL, LEASE TO LAND OF THE HEATHER DOWNS REALTY
COMPANY IN LUCAS COUNTY FOR USE OF THE TOLEDO STATE
HOSPITAL.

COLUMBUS, OHIO, April 9, 1929.

HON. H. H. GRISWOLD, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date transmitting for my examination and approval a lease in triplicate, executed by the Heather Downs Realty Company and by which there is leased and devised to you as Director of the Department of Public Welfare, for the use of the Toledo State Hospital, four certain tracts of land in Lucas County, aggregating 281 acres of land.

An examination of said lease shows that the same has been corrected to meet the objections noted in my recent opinion to you relating to the same. The matter of taking this lease is within the authority conferred upon you by Section 1848, General Code, and inasmuch as said lease is properly executed and is otherwise in proper form, the same is herewith approved.

You will find my approval endorsed on said original lease and the duplicate and triplicate copies thereof, all of which are returned.

Respectfully,
GILBERT BETTMAN,
Attorney General.

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APPROVAL, ABSTRACT OF TITLE TO LAND OF ALVIN F. CYFERS, IN
NILE TOWNSHIP, SCIOTO COUNTY, OHIO.

COLUMBUS, OHIO, April 9, 1929.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of corrected abstract of title, warranty deed and encumbrance estimate relating to the proposed purchase of the tract of 35 acres of land in Nile Township, Scioto County, Ohio, now owned of record by one Alvin F. Cyfers, which property is more particularly described in Opinion No. 2032 of this department.