purchase of this property are in all respects regular, but the same, together with the abstract of title submitted, are herewith returned to you for such further action as may be necessary in order to clear the title to this property with respect to the exceptions thereto above noted.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2783.

PARTITION FENCE—COST OF MAINTENANCE WHERE RIGHT OF WAY OR LANE USED AS OUTLET TO PUBLIC HIGHWAY.

SYLLABUS:

When a person or persons own in fee simple, a right-of-way or lane which runs along the former boundary line of two adjoining property owners, which he or they use as a farm outlet to a public highway, he or they are required by the provisions of Section 5908 *and* 5919, *General Code, to build and maintain one-half of the fence on each side of such right-of-way.*

COLUMBUS, OHIO, June 6, 1934.

HON. LESTER S. REID, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

> "A and B own adjoining farms which border along the highway. C and D own farms directly in the rear of the farms of A and B and C and D own a right-of-way or lane jointly, in fee simple, which passes between lands of A and B and which they merely use for ingress and egress to the highway. The question which I desire to have answered is whether or not C and D are required to construct one-half of the fence on each side of the private roadway as the line fence law requires, in other words, the sole question is whether a private roadway owned in fee simple, comes under the provisions of the law regarding line fences when such roadway separates the farms of A and B as above described. It is conceded that the construction of a line fence along each side of the roadway would not be beneficial to C and D.
>
> I have examined the case of *Zarbaugh* vs. *Eglinger,* 99 Ohio State, 133. This case is cited in Rockel's Ohio Township Officer's Guide which intimates that a different rule might apply where the owner owns the land in fee simple, and states that the question of beneficial use would probably be the determining factor.
>
> If gates were to be placed through this roadway, would this alter the situation in any way?"

Section 5908, General Code, reads as follows:

> "The owners of adjoining lands shall build, keep up and maintain in good repair in equal shares all partition fences between them, unless

otherwise agreed upon by them in writing and witnessed by two persons. This chapter shall not apply to the enclosure of lots into municipal corporations or of lands laid out into lots outside of municipal corporations, or affect any provision of law relating to fences required to be constructed by persons or corporations owning, controlling or managing a railroad."

From an examination of this and the succeeding sections in Chapter 8, Title 2, Part 2nd, of the General Code, it would appear that the legislature uses the phrase "partition fences" as designating a fence forming a dividing line between lands of individual owners of real estate outside of municipal corporations and excepting therefrom the dividing line between a railroad and another type of lands.

In the case of *Coal Company* vs. *Cozad,* 79 O. S. 348, the Supreme Court of Ohio had before it the question as to whether a similar predecessor statute had any application to facts similar to those presented in your inquiry, and in that case the Supreme Court held that such statute did not require the building of a partition fence where the fence was of no benefit to the owner of one of the parcels of real estate. However, subsequent to the rendition of such opinion, the legislature amended the statute and adopted the definition contained in Section 5919, General Code (98 O. L., 149), which defines "owner" for the purposes of such chapter of the General Code. Such Section 5919, General Code, reads as follows:

"In this chapter, the term 'owner' shall apply to the owner of such land in fee simple, of estates for life, or of rights of way while used by the owners thereof as farm outlets, but these proceedings shall not bind the owner unless notified as provided herein."

The question again came before the Supreme Court in the case of *Zarbaugh, Treas.,* vs. *Ellinger,* 99 O. S., 133, and such court held as stated in the first paragraph of the syllabus:

"Where the owner of a private right of way which passes through farm lands owned by others, uses it as a farm outlet to a public highway, he is required by the provisions of Sections 5908 and 5919, General Code, to build and keep up one-half of the fence on each side of his private right of way."

In the Zarbaugh case cited above, the court enters into a lengthy discussion as to the constitutionality of such section, and discusses in detail the case of *Coal Company* vs. *Cozad, Treasurer,* and thereupon holds such statute to be constitutional. I believe such holding of the court, since it has not been reversed, is dispositive of your inquiry.

It is therefore my opinion that when a person or persons own in fee simple, a right-of-way or lane which runs along the former boundary line of two adjoining property owners, which he or they use as a farm outlet to a public highway, he or they are required by the provisions of Sections 5908 and 5919, General Code, to build and maintain one half of the fence on each side of such right of way.

You also inquire as to whether or not the placing of gates through the right of way in question would alter the situation in any way. It is my opinion that

the matter of whether or not gates are placed at either end or at each end of this private road has no bearing upon the requirement as to the construction of partition fences. I base this view on the language of the court in the Zarbaugh case, supra, at page 140, wherein it is said:

> "The validity of such a requirement is to be determined wholly without reference to whether gates are fixed at the end of the right of way, making a complete enclosure. The making of the complete enclosure of the right of way is not the necessary thing."

See also *Smith* vs. *Pierce, Aud.*, 17 O. N. P., (N. S.) 264.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2784.

DEPOSITORY—UNDER SECTION 2729, GENERAL CODE, COUNTY DEPOSITORY BANK LIABLE FOR INTEREST BETWEEN EXPIRATION DATE OF CONTRACT UNTIL NEW DEPOSITORY CREATED.

SYLLABUS:

When the time covered by a depository agreement between a bank and the county commissioners for the deposit of county funds has lapsed, the depository bank by reason of the provisions of Section 2729, General Code, is liable for interest at the contract rate specified in such depository agreement until a new depository is created and its undertaking has been accepted by the county commissioners or until the money has been paid by such former depository into the county treasury.

COLUMBUS, OHIO, June 6, 1934.

HON. PAUL A. FLYNN, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

> "On March 31, 1934, the depository contracts of the Seneca County Commissioners with two of the banks in this city expired. At that time the banks were awaiting legislation which would allow them to pay a lesser rate of interest upon such public funds, and no bids were received until after the law was changed removing the minimum of 2%. The new contract of one bank was not executed and delivered, together with the bond securing the deposit, until about the 15th of April. The other bank which received the contract for one-half of the county funds has not yet submitted sufficient security to satisfy the Board of County Commissioners, but contemplates doing so within a short time.
>
> The banks maintain that on the 31st of March they told the commissioners that they would not pay any interest after that date, and that they could have the funds immediately that were then on deposit in the