

board of trustees and the trustees, who are required to give bond, are authorized to receipt therefor and to deposit said funds in a bank or trust company. I find no such authority with reference to the trustees of a union cemetery.

Consequently, I am of the opinion that where a union cemetery is established and maintained by a village and township, the board of trustees of such cemetery, appointed by virtue of section 4193-1, General Code, has no right to the custody of the proceeds of taxes levied for cemetery purposes by the council of the village and trustees of the township.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

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2782

DISAPPROVAL, ABSTRACT OF TITLE, WARRANTY DEED, CONTRACT ENCUMBRANCE RECORD AND CONTROLLING BOARD CERTIFICATE RELATING TO THE PROPOSED PURCHASE OF A PARCEL OF LAND IN STARK COUNTY BY THE STATE OF OHIO.

COLUMBUS, OHIO, June 6, 1934.

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

DEAR SIR:—You recently submitted for my examination and approval an abstract of title, warranty deed, contract encumbrance record No. 1433, and Controlling Board certificate relating to the proposed purchase by the State of Ohio for the use of your department of a parcel of land in Tuscarawas Township, Stark County, Ohio, which parcel of land is owned of record by one Mary Jarvis Rider and which is more particularly described as follows:

“Being a part of the S. E.  $\frac{1}{4}$  Section 10, Township 12, Range 10 Stark County, and bounded and described as follows: Beginning at the point where the west line of said Quarter Section intersects the center line of Massillon-Wooster Road, State Highway No. 69, also known as the Lincoln Highway, U. S. Route No. 30; thence along said Quarter Section line in a northerly direction, a distance of 789.60 feet to a point; thence in an easterly direction at right angles to aforesaid Quarter Section line, a distance of 576.22 feet to a point in the west line of Tudor Avenue, as recorded on the plot of Country Club Allotment; thence in a southerly direction along the west line of Tudor Avenue, a distance of 822.48 feet to a point in the center line of said Massillon-Wooster Road; thence in a westerly direction along said center line, a distance of 577.16 feet to the place of beginning and containing 10.66 acres of land, more or less.”

Upon examination of the abstract of title submitted which is certified by the abstracter under date of May 24, 1934, I find that I am unable to approve the title of Mary Jarvis Rider in and to the above described tract of land, or to

approve the purchase of the same by the state. The tract of land above described is a 10.66 acre parcel off of the south end of an 18 acre tract of land which was conveyed to Mary Jarvis Rider by Joseph B. Immler, Trustee, by warranty deed executed September 27, 1932, which 18 acre tract of land abuts upon and lies wholly to the north of the Massillon-Wooster Road. As above noted, said 18 acre tract of land, including the tract here under investigation, is located in the southeast quarter of Section 10, Township 12, Range 10, Stark County, Ohio; but no part of said tract of land lies to the south of the Massillon-Wooster Road, and the south line of said quarter section is a considerable distance south of this road. The 18 acre tract above referred to is properly described in the deed of Joseph B. Immler, Trustee, to Mary Jarvis Rider by metes and bounds as follows:

“Commencing at the intersection of the West line of the Southeast Quarter of said Section 10 and the center line of the Massillon-Wooster Road; thence North 7° 53' East on the West line of said Quarter to a point in the South line of Chippewa Avenue extended Westerly; thence Easterly along said extension of said South line of Chippewa Avenue to the intersection of said line with the West line of The C. W. Stuart Realty Company's Country Club Addition as recorded July 27, 1927, in Volume 19 at page 77 of the Plat Records in the office of the Recorder of Stark County, Ohio; thence Southerly along the West line of the aforesaid Addition to the center line of the Massillon-Wooster Road; thence Westerly along the center line of said road to the place of beginning.”

The defect in the record title of Mary Jarvis Rider in and to this tract of land arises out of a defective description of this 18 acre tract of land in a deed executed by one Sarah Jarvis Pumphrey and Claude E. Pumphrey, her husband, to Joseph B. Immler, Trustee, under date of June 9, 1931. Notwithstanding the fact, as before noted, that no part of this 18 acre tract of land extended south of the Massillon-Wooster Road and notwithstanding the fact that there is nothing in the abstract to show that Sarah Jarvis Pumphrey owned any land in the Southeast Quarter of Section 10 extending to the south line of this Quarter Section, the beginning point in the description of the 18 acre tract intended to be conveyed by Sarah Jarvis Pumphrey to Joseph B. Immler, Trustee, is the Southwest corner of said quarter section. Starting at this point, the calls in the description of the property set out in this deed are the same as those contained in the deed from Joseph B. Immler, Trustee, to Mary Jarvis Rider. Since, however, the last call in the description of this property set out in the deed is from the west line of the Country Club Addition, thence along the center line of the Massillon-Wooster Road “to the place of beginning”, the description by metes and bounds set out in the deed is an impossible description with respect to the property intended to be conveyed. This defect in the record title of Mary Jarvis Rider in and to the 18 acre tract of land, which includes the parcel here in question, can be and should be cured by a quit claim deed executed by Sarah Jarvis Pumphrey and husband to Mary Jarvis Rider, conveying this property to her by proper description and stating the reason therefor.

As a further exception to the record title to the property here under investigation, it is noted that on September 26, 1896, one James Bayliss who then owned and held the record title to the whole of the Southeast Quarter of Section 10, Township 12, Range 10, containing 160 acres of land, executed a coal lease

on this property to one John C. Albright by which Albright, and presumably his assigns, were given the right to mine and remove stone coal from said premises. It appears that thereafter Albright conveyed all of his right, title and interest under this lease to the Massillon Coal Mining Company, which company thereafter assigned its interest in the lease to Levers and Smith, a partnership. Thereafter, on dissolution of said partnership, all right, title and interest in this coal lease passed to C. F. Smith, one of the partners in said partnership. Some time after C. F. Smith executed a quit claim deed by which he released to Mary Jarvis Rider, Sarah Jarvis Pumphrey, Helen Jarvis Thomas and Floyd C. Snyder all the rights under this lease with respect to stone coal lying in and under the 18 acre tract of land, which includes the parcel here under investigation. It would seem from this that all of the rights which originally accrued to Albright under the coal land lease above referred to and which thereafter passed by mesne conveyance or assignment to other persons and corporations, have been surrendered. However, the abstract shows that under date of October 30, 1917, some time after the coal lease was executed to Albright, and after all rights under the same had passed to Levers and Smith, a partnership, an agreement was made by one Sylvester Johnson who then owned a 248 acre tract of land, including that here in question, by which he gave to Stephan H. Fox and Harry Howells, who apparently at the time claimed to hold the rights originally granted to Albright in and by this coal lease, the further right to take coal from a two acre tract of land upon which certain buildings on the farm were located, which two acre tract had apparently been excepted from said coal lease as the same was originally executed to Albright. There is nothing further shown in the abstract with respect to the interest of Fox and Howells in and to this lease. Likewise there is nothing in the lease to show the termination of any rights which Fox and Hunter may have secured to take coal from said property or any part thereof. In this connection, it may be further noted that there is nothing in the abstract to show whether the two acre tract of land above referred to is a part of the parcel of land here under investigation or not.

On December 31, 1912, Sylvester Johnson who has been the owner of a 240 acre tract of land situated in part in the Southeast Quarter of Section 10 and in the Northeast Quarter of said section and which included the land here under investigation, executed an oil and gas lease on said property to A. J. Webber for the period of one year and as long thereafter as oil and gas should be removed from said premises. There is nothing in the abstract of title to show the surrender or cancellation of this lease by said A. J. Webber or by any assignee of the lease. On the other hand, there is nothing to show that there was any development of oil and gas on this land under the lease or that said lease was not abandoned. Further investigation of this matter will probably show that as a matter of fact this lease has been abandoned and such investigation and report is hereby required.

The abstract is somewhat indefinite in its statements with respect to the taxes on this property. I gather, however, that all the taxes on this property prior to those which are due and payable in June, 1934, have been paid, but that the taxes for the last half of 1933 in the amount of \$60.05 which are due and payable in June, 1934, are unpaid and are a lien upon the property, and that the undetermined taxes for the year 1934 are likewise a lien upon this property.

On the considerations above noted and expressed, the title of Mary Jarvis Rider in and to the property above described is disapproved upon the abstract submitted.

The warranty deed and other files submitted to me with respect to the proposed

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.*

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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