306.

COUNTY RECORDER—RECORDING OF CERTAIN INSTRUMENTS DISCUSSED—OPINION NO. 3001, DECEMBER 10, 1928, APPROVED.

SYLLABUS:

Duties of county recorder relative to recording certain instruments discussed. Opinion of the Attorney General No. 3001 for year 1928, approved and followed.

COLUMBUS, OHIO, April 15, 1929.

HON. JOHN G. WORLEY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication which reads:

"Our county recorder is in receipt of a copy of an opinion rendered by the Attorney General's office to Hon. George E. Schroth, Jr., of Seneca County, in regard to the proper place for the recording of certain kinds of easements.

The matter in which the opinion was rendered had to do specifically with the easement form used by the Ohio Power Company.

The directions for recording contained in this opinion have caused some uncertainties to arise in the mind of the county recorder and also the county auditor as to their duties in regard to instruments in the nature of easements or rights-of-way.

Our county recorder has heretofore recorded documents such as easements in 'Special Record' books. Ohio Power Company easements have been kept in these records. He has gathered from the opinion referred to that this is improper and understands from the opinion that he is required to keep but four sets of records. I understand, however, that the opinion covers only such instruments in which there was a transfer of such an interest in real estate as constituted a conveyance of lands and that, therefore, the opinion did not conflict with such a Section as 8538, G. C., or Section 8822, G. C.

The real difficulty arises, and it is in regard to this that I am asking some further elaboration, in that in this (Harrison) County, we have not an alphabetical system of reference to land transfers but transfers are found by reference to section, township, and range. No easements, including those of the Ohio Power Company, contain reference to these land subdivisions. The recorder therefore did not know in what books to index the easements, and they could not be found by one searching the title. As it is, our abstracters know that such instruments are to be found in the 'Special Record.' Unless the makers of the instruments designate township, range and section, it will be practically impossible in our county to follow the law as it is determined in the opinion above referred to.

For the benefit of the recorder, I am asking for some further directions in this matter.

A further uncertainty arises as to the duty of the county auditor, the county taxing authority, in the matter of the taxation of lands covered by easements. Under Sections 8820 and 8821, G. C., his duty appears clear, except, that in Section 8820, the words 'land leased for right-of-way' are used.

Under the opinion to which I have referred it would appear that such rights as gained by the Ohio Power Company easements would constitute even a more extensive transfer of the land and therefore an owner of the easement should pay the tax and not the transferor.

Our auditor tells me that in the past easements have not been separately taxed since it was considered that the fee remained in the giver of the easement.

Does not this opinion plainly render it his duty to tax the easement in the name of the holder thereof, and relieve the former owner of the land?"

The syllabus of the opinion of my predecessor, to which you refer, is as follows:

"An instrument of writing in which it is stated that the grantor grants, bargains, sells, conveys and warrants to the grantee, its successors and assigns forever, a right of way and easement with the right, privilege and authority to said grantee, its successors, assigns, lessees and tenants, to construct, erect, operate and maintain a line of poles and wires for the purpose of transmitting electric or other power, including telegraph or telephone wires in, on, along, over, through or across properly described lands for a consideration stated, and containing the statement that the grantee is to have and to hold an interest in said land unto said grantee, its successors and assigns, properly signed and acknowledged in the presence of witnesses, and duly acknowledged before an officer authorized in the premises, is an instrument of writing for the absolute and unconditional sale and conveyance of an interest in lands, tenements or hereditaments and should under the provisions of Section 2757, General Code, be recorded in the record of deeds."

The conclusion of said opinion was based upon the provisions of Section 2757 of the General Code, which, among other things, provides that the recorder shall record all deeds, powers of attorney and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments in the record of deeds.

As indicated by the syllabus above quoted, the then Attorney General held that the instrument under consideration in that opinion was an instrument of writing for the absolute and unconditional sale of lands, tenements and hereditaments as mentioned in said Section 2757, supra. After considering the reasoning of said opinion, together with the citation of authority therein mentioned, I am compelled to the same conclusion.

It is noted that the difficulty arising in your county grows out of the fact that your recorder does not keep an alphabetical system of reference to lands, but that a record is kept with reference to section, township and range. In connection with the problem presented, attention is directed to the provisions of Section 2764 of the General Code, which in unambiguous language, requires the county recorder to make and keep up a general alphabetical index, direct and reverse, of all the names of both parties to all instruments received for record by him. Without undertaking to quote the lengthy section, it may be stated that the provisions therein, relative to keeping the alphabetical indexes required, are mandatory. Section 2766 of the General Code authorizes the keeping of sectional indexes when in the opinion of the commissioners of any county such indexes are needed. However, said sectional indexes are to be "in addition to alphabetical indexes provided for in Section twenty-seven hundred and sixty-four."

No provision of law has come to my attention which would authorize a recorder to demand the description to be made with reference to section numbers. That is to say, a deed will not be declared void for uncertainty if it is possible to determine from the description, aided by extrinsic evidence, what property was intended to be conveyed. Thompson on Real Property, Sec. 3073. In other words, it would appear that the grantee of lands, which are not described with reference to sections, has a

right to have his instrument recorded, if it otherwise definitely describes the premises, notwithstanding such an instrument may work an inconvenience to the recorder in view of the system employed. As above indicated, if the recorder complies with the provisions of Section 2764, this condition will not arise in connection with the filing of the instruments about which you inquire, because the instruments may be found by examining the alphabetical list.

In considering your second inquiry with reference to the duty of the county auditor in regard to the taxation of such easements or rights of way as are under consideration, in view of the provisions of Sections 8820 and 8821 of the General Code, it should be noted that the sections to which you refer have no application to such an easement as is described in the instrument under consideration, for the reason that those sections relate to rights of way of railroad companies. Said sections are a part of Division II of Title IX of the General Code, and an examination of the related sections clearly indicates that said sections relate to railroad companies, and therefore have no application whatsoever to the interest conveyed in the instruments under consideration. In certain instances the Legislature has seen fit to provide for the taxing of leasehold estates in the name of the lessee, such as certain leases for a term of years, renewable forever (Sections 5329 and 5330, General Code), and rights to minerals in land (Section 5563, General Code). However, in the absence of specific authority, easements and lesser interests in land are not to be separately taxed.

Based upon the foregoing, it is my opinion that:

1. The conclusion of my predecessor to the effect that the instrument in said opinion considered should be recorded in the record of deeds, is correct.

2. The recorder of your county should keep an alphabetical index as required by Section 2764 of the General Code.

3. Sections 8820 and 8821 relate to railroad companies and have no application to the situation presented in your communication.

Respectfully,
GILBERT BETTMAN,
Attorney General.

307.

PETITION—FOR TRANSFER OF CONTIGUOUS TERRITORY TO CITY SCHOOL DISTRICT—SUCH TERRITORY MUST BE ADJACENT AT DATE OF FILING.

SYLLABUS:

1. *Only contiguous territory may be transferred to a city school district.*

2. *A petition filed with a county board of education requesting that territory, not contiguous to a city school district, be transferred to the said city school district, is a nullity, and will not be imbued with legality, simply by force of the fact that after it had been signed, the said territory had become contiguous to the city school district by reason of subsequent transfers of territory.*

COLUMBUS, OHIO, April 15, 1929.

HON. J. L. CLIFTON, *Director of Education, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your letter requesting my opinion, which reads as follows: