CONSERVATION COMMISSION: Acquisition of land from Evans-Howard Sewer Pipe Company.

August 26, 1939

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10

Mr. I. T. Bode, Director
State Conservation Commission
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letters of recent date concerning the property to be acquired by the Conservation Commission from the Evans-Howard Sewer Pipe Company. The facts are as follows:

A. J. Freund proposes to purchase approximately 80 acres of land from the Sewer Pipe Company and give the same to the Commission. The conveyance is to be made direct from the Sewer Pipe Company to the Conservation Commission. There is an "escrow" agreement to be entered into between the Commission and Sewer Pipe Company, separate and apart from the deed, to the effect that the Sewer Pipe Company "reserves" the right to mine and remove all minerals from said land, without payment, for a period of fifteen (15) years, and the right to construct and maintain on said property all things necessary and incident to said mining operations including transportation facilities to a certain railroad line. The Sewer Pipe Company is to defend and hold "purchaser" (apparently meaning the Commission) exempt from all claims for damages arising out of said mining operations and agrees to pay all taxes that "may" be levied on mineral or surface rights or title in said land or reimburse the Commission if it pays the same. The Sewer Pipe Company is to get possession of all buildings on a portion of said land. There is to be no adjustments other than on taxes for the year 1939. These agreements are to be binding on the Sewer Pipe Company, its successors and assigns, without incorporating them in the deed of conveyance.

Upon this statement of fact you ask the following questions:

(1) What title does the Conservation Commission obtain?

(2) Does the fact these "reservations" are contained in the separate "escrow" agreement rather than in the deed make any change in the title obtained?

(3) Is the property subject to taxation after this conveyance is made?

(4) What is the status if, under these same conditions, the deed is delivered to a third party to hold in escrow until the expiration of the fifteen (15) year period?

(5) Is this an acceptable manner to handle such a transaction and will not subject the Conservation Commission to criticism?

(6) Will the Conservation Commission be liable for damages as a result of the mining operations carried on upon said property?

We shall treat question one, two and four together since the law on each point is somewhat inter-related. The manner of conveyance to be used in the instant case is proper and lawful though somewhat unorthodox.

In Engelhardt v. Gravens 281 S. W. 715, 718 (Mo. Sup.) a grantor conveyed a portion of lands owned by him to two different parties in separate deeds. On the same date grantor and his grantees also executed a contract duly acknowledged creating an easement for a road right-of-way over a portion of said land for the use of all. Of this the court said:

> "The deeds made by Ulery to Walton and to Frederick Engelhardt, and the contract made by all three on the same day, and affecting the same subject, are to be read together. They related to the same subject; they were executed contemporaneously; they were executed upon a consid-

eration moving all the parties concerned, and the contract explained, and fully consummated the intention of the parties to the deeds, and made all parts of a complete expression. Cook v. Newby, 112 S. W. 272, 213 Mo. 471."

Other cases wherein this rule has been considered are Pursley v. Good 94 Mo. App. 382, 389; Cook v. Newly 213 Mo. 471, 490; Smith v. Smith 289 Mo. 405, 419. In the last cited case grantor conveyed certain lands to a son. Grantor and grantee then entered into a lease whereby grantor was to get a certain rental off the property for life, along with other stipulations of no concern here. The court said, "The deed and lease were executed contemporaneously, as one transaction, and should be read together. The deed was made subject to the lease."

Assuming (because we do not have the deed) that the grant from the Sewer Pipe Company to the Conservation Commission is to be by warranty deed with the usual covenants conveying a fee simple title we must consider what effect the terms of the "escrow" agreement have upon said title. This "escrow" agreement can be nothing more than a lease or a contract creating an easement. It is not a deed conveying back to the Sewer Pipe Company a certain portion of that which it granted to the Conservation Commission. We say this because there are no words of conveyance in said "escrow" agreement. It is essential for a deed to use "apt and proper words of conveyance necessary to show an intention to convey." Wimpey v. Ledford 177 S. W. 302, 303 (Mo. Sup.) Neither can it be said to be a contract creating an easement. "An easement can only be created by grant", (Kuhlman v. Stewart 282 Mo. 108, 115) and as said above there is no grant or words of conveyance in this "escrow" agreement. This process of elimination leaves only one reasonable conclusion to be reached and that is the "escrow" agreement is a lease of the property and rights set forth therein by the Conservation Commission to the Sewer Pipe Company for a fifteen (15) year period. Apparently the escrow agreement was intended to be a "defeasance." In 18 C.J. p. 153, Sec. 25, this is defined as "a collateral deed made at the same time with an original deed of conveyance, containing conditions which, when performed, will defeat the estate created by the original deed." It is to be noted a defeasance is a collateral deed. A deed must contain words of grant. This escrow agreement does

not contain any such words and therefore can not be a defeasance or collateral deed.

As we understand the situation this deed is to be made subject to the lease, (we think the deed should so recite so there will be no doubt of this fact. Tillman v. City of Carthage 247 S. W. 992 Mo. Sup.), and as such they must be construed together to ascertain what title the Commission will get. The Commission by warranty deed is to get immediately a fee simple title, subject to the terms of the lease (escrow agreement). This creates in the Conservation Commission a present, fixed right of future enjoyment subject for fifteen (15) years to the rights held by the Sewer Pipe Company under the lease, that is, the right to use the land and deplete a portion of the estate by removal of minerals without payment.

You ask what change will be effected in this title if the deed from the Sewer Pipe Company is delivered to a third party to be held for fifteen (15) years while the Sewer Pipe Company carries on its mining operation. Ordinarily, a deed passes no title until said deed is delivered and accepted. Powell v. Banks 146 Mo. 620, 633. However, delivery may be made by placing the deed in escrow with a third party, but even then delivery is not complete unless the grantor in placing said deed in escrow releases all control over it, putting it beyond his power to recall. Peterman v. Crowley 226 S. W. 944, 946 (Mo. Sup.). If in placing the deed with a third party to hold in escrow for fifteen (15) years the Sewer Pipe Company releases all control over said deed, the title obtained by the Conservation Commission would be the same as above set out.

Your third question relates to the tax status of this property after the aforementioned instruments are entered into. In saying the "escrow" agreement was nothing more than a lease we were not unmindful of the rule that "a deed is to be construed as nearly as possible in harmony with the purpose of the grantor to be determined from the terms of the instrument." Elsea v. Smith, 273 Mo. 396, 412. Also in a deed, "its operation, as passing any particular right, is largely a matter of intention." Inlow v. Herren 267 S. W. 893, 895 (Mo. Sup.). Under these liberal rules of construction it may be that the courts would construe the escrow agreement as a

deed from the Commission to the Sewer Pipe Company even though there are no clear words of conveyance therein. At least this question is in the twilight zone with the authorities indicating it to be a lease. If it could be said that the terms of the escrow instrument merely reserve a portion of the title to the Sewer Pipe Company the law is well established that these mineral rights are taxable. Enclosed is an opinion of this department on that subject, rendered to Richard Chamier on April 28, 1937. However, if the escrow agreement is a mere fifteen (15) year lease there is some doubt as to whether this leasehold interest is taxable. This department in an opinion to Andrew J. Murphy on November 22, 1935, ruled that such an interest, if of any value, is taxable, but an examination of this opinion discloses that the point has not yet been definitely decided by our courts. We enclose a copy of t his opinion.

Your sixth question deals with the liability of the Commission in damages on a tort growing out of these mining operations that are to be carried on by the Sewer Pipe Company. By the lease the Sewer Pipe Company agrees to hold the Commission exempt from such claims, but aside from that the Conservation Commission would not be liable in any event. The Conservation Commission is comparable to the State Highway Commission in the powers held and authorized to be exercised. This body was created by the people through constitutional amendment (Laws 1937, p. 614) and as such there can be no doubt that it is an arm of the sovereign, and "a subordinate branch of the executive department." The State Highway Commission was held to be such and there is not a great deal of difference in the two bodies except the source from which they draw their authority. In the case so holding (Bush v. State Highway Commission 46 S. W. (2d) 855 (Mo. Sup.), it was definitely established that a subordinate branch of the executive department of the state could not be sued in tort. Thus, it is clear the Conservation Commission will not be liable in tort for damages arising out of the operation of the mine on this property.

Your fifth question asks if this manner of handling this transfer of the title is acceptable and will not subject the Commission to criticism. We have heretofore expressed the opinion that this mode of transfer was perhaps unorthodox but not invalid. The usual manner of handling such a transaction, if it is the parties intention to reserve a portion of the thing granted, is to do it in the instrument making the grant and not in a separate instrument. To say the least, the nature

of the possessary rights of the Sewer Pipe Company will be open to question, during this fifteen year period.

We assume, with reference to criticism, that you mean by way of public opinion. Public opinion is a fickle thing which no one can accurately predict and for that reason we can not advise you what may be in store from that source. However, we can point out what criticisms are possible. Considering the whole picture this situation could be called an attempt to withdraw land from the tax rolls and still permit private enterprise to get all the benefit of said land at the expense of the sovereign. In the minds of a great many persons the preservation and propagation of game for the delight of the huntsman is one of the luxuries the state fosters for its people. Especially is this so when you place this activity alongside of Education, Health and Public Safety. These absolute essentials are all supported by taxation. If the state is to embark on a policy that permits non-essential functions to deplete its source of revenue, then the necessities must suffer at the hands of a luxury. While not a probability it is not beyond the realm of possibility that the Conservation Commission might, by purchase or accepting gifts, withdraw all or the major portion of taxable land in a county from the tax rolls for a period of fifteen years and as a result that body would perish, along with the Education, Health and Safety it furnished its citizens. This indeed would be tremendous sacrifice for a luxury. The form of government enjoyed in this country is based, not on leaving things to improbability, but rather the elimination of even a possibility that, that which is harmful will occur. There can be no question that withdrawal of land from taxation for non-essential functions is harmful to the state as a whole. The better public policy would be for the branches of the sovereign which have authority to acquire land and hold it tax exempt not to permit private enterprise to enjoy its fruits without paying a just portion of the tax on said land. Any transaction which has that appearance should be studiously avoided, even if it necessitates refusal of the gift.

Respectfully submitted,

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APPROVED:

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