

"The statute is definite in respect to what shall be proven by the lienor; indefinite in respect to an owner. This difference in statutory phraseology, and the greater accountability of an owner, indicates that the 'good cause' that must be proven by an owner is something other and more than the lack of notice at a particular time that must be proven by a lienor. An owner may assert that he is free from complicity in the illegal use, and had no notice such use was contemplated, and yet by reason of neglect, indifference, consent, or acquiescence manifested in advance, or condonation or ratification afterward, or other fault or inequitable conduct, he may fail to show good cause against forfeiture and sale."

In support of this statement Blakemore cites *U. S. vs. Kane*, 273 Fed. 275 and *Jackson vs. U. S.*, 295 Fed. 621.

It is apparent from a reading of the authorities that proof of ownership and lack of knowledge of the use of the car may not be sufficient to show good cause to relieve the owner of forfeiture of his vehicle. What is "good cause" cannot be definitely declared in advance. Each case must depend upon its own facts and circumstances. A determination of what is "good cause" is within the discretion of the court, to be arrived at from the circumstances, the owners conduct before, during and in respect to the case.

In specific answer to your inquiry, in view of the authorities cited herein, I am of the opinion that the owner of an automobile which has been seized by authority of Section 6212-43 of the General Code, is entitled to the return of such vehicle upon a showing of good cause before such vehicle is ordered sold in a forfeiture proceeding.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1834.

LEASE—GRANTING TO LESSEE RIGHT TO TAKE WATER FROM STATE CANAL AND USE CERTAIN LANDS IN CONNECTION THEREWITH FOR 25 YEARS—INVALID AS STATUTE THEN AUTHORIZED TERM OF 15 YEARS ONLY.

SYLLABUS:

Where a lease is executed by the Superintendent of Public Works, granting to a corporation the right to take a specified amount of water from one of the canals of the State at a certain point, for a term of twenty-five years, as authorized by Section 14009, General Code, provisions in said lease granting and demising to such company the right to use and occupy certain described canal lands at said point during the term of said water lease, are invalid where, under the statutory provision in effect at such time and applicable to such canal land lease, such canal lands can be leased for a term of fifteen years only.

COLUMBUS, OHIO, May 8, 1930.

HON. A. T. CONNAR, *Director of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, which reads as follows:

"Under date of December 3, 1926, a lease was made by George F. Schlesinger, Director of Highways and Public Works, to the Harding-Jones Paper

Company, of Exello, Ohio, providing for certain water privileges in connection with certain lands, a copy of said lease being enclosed herewith, which you will kindly return with your reply.

Under the terms of the act passed by the 87th General Assembly of Ohio, this canal property was turned over to the Highway Department for highway purposes. Section 4 of said act (See O. L. 112, page 388), provides that 'All leases granted to any person, firm or corporation for which the rental has not been paid, shall, by the Superintendent of Public Works, be declared null and void, and all other leases, either for the use of water or lands, or other purposes, shall be annulled as soon as the same can be done legally, provided that no such leases shall be annulled prior to January 1, 1929, except by agreement of all parties concerned.'

It seemed to be the understanding that the water was supposed to be cut off from this section of the canal, January 1, 1929. However, it was not cut off until November 1st, and since that time the Harding-Jones Company has been deprived of the water privileges, but is occupying the land and desires to continue to do so, as a portion of the land is improved with buildings and railway switch tracks.

You will note that the lease provides that the annual rental shall be \$300.00, up to May 1, 1926, and thereafter it shall be \$400.00, and in order to protect their rights to the use of this land, the Harding-Jones Company has forwarded, through this office, to the Treasurer of State, a check for \$200.00, under the heading 'Semi-annual water rent', and in conversation with Mr. T. E. Jones, Secretary of the Company, he stated that the object in sending this rental was to protect their rights to the use of the land, and we are wondering whether or not we should accept this six months' rental in the full amount, when they are deprived of the most valuable portion of the lease;

Also whether or not, in the absence of any statement in the lease as to the amount to be charged for water and the amount to be charged for land, this lease can be modified by mutual agreement, to cover the rental on the land only, and under the terms of the act above mentioned, whether this should be done by the Department of Public Works, the lease being under the control of the Public Works, or whether it should be done by the Highway Department.

This plant is a very valuable asset to the State and the owners are very anxious to retain the right to the land and are willing to pay whatever is right."

From an examination of the provisions of the lease referred to in your communication, which is one executed under date of December 3, 1926, by and between the State of Ohio by the then Director of Highways and Superintendent of Public Works, and the Harding-Jones Paper Company of Exello, Butler County, Ohio, under the authority of Section 14009, General Code, it appears that there was thereby granted to the Harding-Jones Paper Company the right to take from the level of the Miami and Erie Canal above lock No. 34, sufficient water to generate one hundred horse power of electrical energy for a term of twenty-five years from the first day of November, 1924.

Said lease further provided, among other things, as follows:

"In connection with the foregoing water power herein leased, there is hereby granted to the party of the second part hereto, its successors and assigns, the right to occupy and use for the purpose of operating its manufacturing plant, as heretofore used and occupied by the predecessors of said second party hereto, a certain State lot containing nine-tenths (9/10) of an acre in Section 31, Town 2, Range 4, Butler County, Ohio, between the Miami

Rivers, excepting therefrom so much of said lot as is occupied by The Cincinnati, Hamilton and Dayton Railway Company's railroad right-of-way, which tract is more particularly described as follows:

'Being in the County of Butler and State aforesaid (Ohio) on the east side of the Miami Canal just below Lock No. 3 (13) of said canal described and bounded as follows: Beginning at a stake in the south line of Section No. 32, Town 2, and Range 4, between the Miami Rivers which is also in the south line of the lot of ground purchased by the State of Ohio, of Michael P. Ryerson, said stake being 4 chains and 55 links west of the beginning corner of the said lot purchased of Ryerson; thence south $14\frac{3}{4}$ degrees east, 3 chains; thence north $89\frac{1}{2}$ degrees west 4 chains and 12 links to the Miami Canal; thence with the canal to the aforesaid south line of Section No. 32 and thence east with said section line to the place of beginning, containing nine-tenths of an acre more or less.'

Also the right to continue the maintenance and occupancy of the race-way on the easterly side of the canal from a point opposite the foot of Lock No. 34, as above mentioned, down to the plant of the second party hereto;

Also the right to occupy and use so much of the berme embankment of the Miami and Erie Canal opposite the 'Excello Mills' formerly known as 'The Harding Paper Company', as is now occupied by the buildings and other structures of said second party hereto, including the railway switch track located in the rear of the Excello Mill property."

The annual rental reserved in said lease for the rights and privileges therein granted to said lessee was the sum of \$300.00 up to May 1, 1926, and thereafter, the sum of \$400.00 payable in semi-annual installments of \$200.00 each, in advance, on the first day of May and November of each and every year, during the full term of said lease. There was no division or segregation of this annual rent with respect to the respective rights of using water from said canal and of occupying and using the canal lands above described, both of which rights were granted to said lessee by the terms of said lease; but said annual rental provided for in said lease covered the rights of said lessee both as to the use of water from the canal and the use and occupancy of said canal land.

Neither in the provisions of said lease is there provided any term for that part of the lease which grants to said lessee the right to use and occupy the canal lands above described other than that for and during which said lessee was granted the right to take water from the canal for its uses; and as to this, it is apparent that it was the intention of the parties that the lessee should have the right to use and occupy said canal land for and during the term of the water lease.

On April 21, 1927, an Act was passed by the 87th General Assembly, providing for the abandonment for canal and hydraulic purposes, of that portion of the Miami and Erie Canal lying between a point 500 feet north of the State Dam, near the corporation line of the City of Middletown, Butler County, Ohio, to St. Bernard, in the City of Cincinnati, Hamilton County, Ohio (112 O. L. 388). This Act was filed in the office of the Secretary of State, on the 12th day of May, 1927, and became effective as a law, on August 10th, 1927.

That part of the Miami and Erie Canal at Excello, in which the Harding-Jones Paper Company took its land and water rights under said lease, was in and on the section of said canal which was abandoned for canal and hydraulic purposes by said act of the General Assembly above referred to. It is not questioned but that the rights taken by the Harding-Jones Paper Company under said lease to take water from the canal at this point for its uses, terminated upon the abandonment of said canal for canal and hydraulic purposes. *Vought vs. Railroad Company*, 58 O. S. 123; *Kirk vs. Maumee Valley Electric Company*, 279 U. S. 797.

Further in this connection, and touching the question presented in your communication, it would seem to follow that inasmuch as the lease to the Harding-Jones Paper Company of the right to use and occupy the above described canal lands was a part of, and incident to, the lease to said company of the right to take water from said canal, the right of said company to use and occupy said canal land terminated with the loss of its water rights. See Opinions of the Attorney General for 1927, volume 2, page 1382.

Aside from the consideration above noted, affecting the present status of said lease with respect to the canal lands therein described, I am inclined to the view that said lease, insofar as the same granted to the Harding-Jones Paper Company the right to use and occupy said canal lands, is invalid for the reason that the same did not provide a term for the lease of said canal lands in accordance with the then existing statutory provisions relating to the canal land leases. As noted before, the only term of the lease of the canal lands here in question was that for the water rights taken by said company under this lease, to-wit, the term of twenty-five years from and after the first day of November, 1924.

Under the provisions of Section 464, General Code, in force at the time of the execution of said lease, there was conferred upon the Superintendent of Public Works all of the powers and duties theretofore conferred by law upon the Ohio Canal Commission and the Board of Public Works with respect to the lease of canal and other State lands. The powers here referred to are those conferred upon the Canal Commission by statutory provisions later carried into the General Code as Sections 13965, et seq. These sections of the General Code, provide, among other things, that canal lands not necessary for the maintenance and navigation of canals, may be leased for a term of fifteen years, at an annual rental of six percent of the appraised valuation of the property leased. At the time of the execution of the lease here in question this statutory provision was the only provision fixing the term of this canal land lease. This statutory provision which is effective as a grant of authority to the Superintendent of Public Works to execute a lease for canal lands for a period of fifteen years carried in itself the conclusive implication that such officer is prohibited, so far as the operation of said statute is concerned, from granting a lease for a term greater than fifteen years. *City of Wellston vs. Morgan*, 59 O. S. 147.

It is a well settled proposition that the Superintendent of Public Works has only such power and authority with respect to the public works of the State as have been expressly conferred upon him by laws passed for this purpose. *State ex rel vs. Railway Company*, 37 O. S. 157, 174.

As before noted, the Director of Highways and Public Works, in his capacity as Superintendent of Public Works, provided in this lease, which was formally signed and accepted by the Harding-Jones Paper Company, for a lease and demise of said canal lands for a period of more than fifteen years, and inasmuch as neither this office nor the courts can by any decision rendered on this question, make a new contract for the parties, it follows that the lease here in question was and is void, so far as the lease of said canal lands is concerned. *City of Wellston vs. Morgan*, 59 O. S. 147, 157, and 158; *Spengler vs. Sonnenberg*, 88 O. S. 192, 203; *Gas Company vs. Ironton*, 107 O. S. 173, 181.

It follows from the considerations above noted, that the check for the sum of \$200.00, which has been forwarded to you by the Harding-Jones Paper Company, as advance payment for the semi-annual period beginning May 1, 1930, should not be accepted but that the same should be returned to said lessee.

With respect to the other question presented in your communication, it may be observed that the act of the General Assembly, providing for the abandonment of the Miami and Erie Canal above mentioned, provides that said canal lands so abandoned shall be forever held for the State of Ohio for the purpose of constructing upon said lands a highway to be erected, constructed and improved at such time or times

as the State of Ohio may hereafter by legislative enactment or otherwise, find proper and convenient. It is further provided in said act that all leases heretofore granted to any person, firm or corporation, shall be annulled as soon as the same can be done legally, but that no such lease shall be annulled prior to January 1, 1929. Carrying out the purpose and intent of said act, it is therein further provided that as soon as practicable, the Director of Highways shall cause surveys to be made of the canal property abandoned by said act, together with maps and plats of the same, and of all lands used in connection with that portion of the Miami and Erie Canal abandoned by the act, belonging to the State of Ohio. And the Director of Highways is further directed to make a plat or plan showing the highway, its length, grades and width of so much of the canal property as may be used for highway purposes, as well as of all other lands adjacent thereto that may be leased for other purposes. This act makes express provision for the lease of all lands shown on said plat, adjacent to said highway, that will not be used for highway purposes.

You do not state in your communication whether the canal lands therein referred to and above described, are included in the plat of the Director of Highways of the highway to be constructed in and over canal lands abandoned by said act. For want of information with respect to said tracts, I am unable to express any opinion with respect to the question submitted in your communication, as to whether a lease can now be granted to the Harding-Jones Paper Company, for the particular parcel of canal land here in question, and no opinion is expressed upon this point.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1835.

APPROVAL, ABSTRACT OF TITLE TO LAND OF H. C. FEYLER IN NILE
TOWNSHIP, SCIOTO COUNTY, OHIO.

COLUMBUS, OHIO, May 8, 1930.

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

DEAR SIR:—This is to acknowledge receipt of your communication submitting for my examination and approval an abstract of title, warranty deed, encumbrance estimate No. 124, controlling board certificate and other files relating to the proposed purchase of a certain tract of sixty-seven acres of land owned of record by one H. C. Feyler in Nile Township, Scioto County, Ohio, which tract of land is more specifically described as follows:

“Beginning at the southeast corner of said Lot No. 12 at a stone marked “E” and three hickories in the line of Surveys Nos. 15834 and 15878; thence with one line thereof N. 85 poles to a stake in the east line of said Lot No. 12; thence W. 310 poles to a stake in the west line of said Lot No. 12 and at the southwest corner of a one hundred and twenty acre tract sold to Nate Iddings; thence S. 85 poles to a stone marked “D” and a hickory corner to Lot No. 15; thence East with the south line of said Lot No. 12, 310 poles to the place of beginning. Containing one hundred and sixty-four acres of land, more or less.

The said east half containing eighty-two acres, more or less; but excepting therefrom the east fifteen acres thereof. The tract herein conveyed containing sixty-seven acres, more or less.