State Highway—No. 436
Section—Shelby (Bridge)

Finding said contract correct as to form and legality, I have accordingly endorsed my approval thereon and return the same herewith.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3284.

AGRICULTURAL EXPERIMENT STATION—APPROVAL OF LEASE UPON GROSSJEAN PROPERTY TO OBTAIN WATER SUPPLY.

COLUMBUS, OHIO, October 6, 1934.

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

DEAR SIR:—Recently this office was advised of the intention of the Ohio Agricultural Experiment Station to take a lease upon a seventy-acre tract of land owned by one Grossjean, located a half mile or more from the institution grounds, for the purpose, among others, of obtaining therefrom a supply of water for the use of the institution and the lands now owned by it. As I am advised the institution expects to obtain this water to the amount of two hundred minute gallons by sinking a shaft or a well on the Grossjean lands thereby forming a spring or a pool from which the water will be pumped through a pipe to be laid in the Grossjean lands and in contiguous lands now held under lease by the institution, into one of the reservoirs now on the institution grounds.

With respect to this project, my views are requested as to whether, in obtaining this supply of water in the manner above indicated, the Ohio Agricultural Experiment Station, as such lessee, or Mr. Grossjean, the owner of the land, will incur any liability by reason of the fact that the taking of this water by the institution in the manner above indicated may deprive an adjoining property owner of the use of water which might otherwise find its way to his lands. The determination of this question, quite obviously, depends upon the facts as to the manner in which the subterranean water in the Grossjean lands flows and moves in and under such lands, and therefrom on and into the lands of such adjoining owner. From the facts disclosed, it appears that the Grossjean lands are separated from the lands of the adjoining property owner to the north by an unimproved public road running in an easterly and westerly direction along the north side of the Grossjean lands and along the south side of the lands of such adjoining owner. For a considerable distance the surface of this road is some four or five feet lower than the surface of adjoining Grossjean lands and is considerably above the elevation of that part of the lands of the adjoining owner which are contiguous to the roadway. At a number of points along this road and on the south side thereof small veins of water ooze through the banks of the Grossjean lands and accumulating flow as a small rivulet along the south side of the road. At other points along this stretch of road water from the Grossjean lands which has percolated through the ground under the road emerges in small veins and accumulating flows westerly as a small rivulet or water course along the side of the

road for a short distance and then on to the lands of such adjoining owner, continue to flow westerly on and through the lands of such adjoining owner.

From the facts above noted and from others with respect to the formation of the subsoil of the Grossjean tract of land, it appears that the water permeating this tract of land does not flow therefrom in defined channels, but moves by percolation and infiltration through earth, sand and gravel composing the subsoil of this tract of land and thus finds its way by emergence from the land upon the road right of way at the points above noted, and doubtless at other points along said roadway and elsewhere. In this situation, the question presented, broadly stated, is one with respect to the right of the owner of lands to take therefrom percolating waters, and the correlative rights, if any, of adjoining property owners in and upon whose lands such waters would naturally move or flow but for such taking. And inasmuch as the right and corresponding liability, if any, of a lessee taking percolating waters from lands covered by his lease are no greater than or different from that of the owner himself acting in like manner for the same purpose *(Logan Gas Company* vs. *Glasco,* 122 O. S. 126, 133). the question of the liability of the Ohio Agricultural Experiment Station in taking such waters from the Grossjean tract after it has leased the same, may be considered as if the state or said institution as a department thereof were the owner of this tract of land.

In the consideration of the question thus presented, it is to be noted that the courts of this state, following the earlier English rule, have held that percolating waters in a tract of land are appurtenant to and a part of the land itself and that the owner of the land has the right to take such waters therefrom for any use or purpose as he may see fit; and as between the owner of such land and the proprietors of adjoining lands, the law recognizes no correlative rights with respect to such waters. In the case of *Frazier* vs. *Brown,* 12 O. S. 294, 304, the court in its opinion says:

> "The question then is whether—in the absence of all rights derived either from contract or legislation—a land owner can have any legal claims in respect to subsurface waters which, without any distinct and definite channel, ooze, filter, and percolate from adjoining lands into his own, when such waters are diverted, retained, or abstracted by the owner of such adjoining lands in the use of his property, for any object of either taste or profit, even though the use may be accompanied by a malicious intent to injure his neighbor by means of such use?
>
> Whatever points of casuistry may arise out of this question, cognizable in the court of individual conscience, under the perfect law of Christian morals, we are of opinion that the law of the land can recognize no such claims; and that, subject only to the possible exception of a case of unmixed malice, the maxim, *'cujas est solum ejus est usque ad coelum et ad infernos,* applies to its full extent; and whatever damage may result from the exercise of this absolute right of property, to adjoining proprietors from the loss of such percolating subsurface waters, is *damnum absque injuria."*

The court in its opinion in this case, after reviewing earlier cases in other jurisdictions supporting this view of the law, speaking through Brinkerhoff, J., said:

> "From this running abstract of the cases bearing immediately upon the question before us, it will be seen, that though the question is one of no little novelty, niceness and difficulty, yet the current of decision is singularly

uniform and consistent. It is evident, that if the overwhelming current of authority is to be regarded, the judgment of the court of common pleas must be affirmed. But, as I have already said, the reasoning on which this course of decision proceeds, is, to our minds, as satisfactory as the cases themselves are uniform and consistent.

The reasoning is briefly this: In the absence of express contract, and of positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing or filtrating through the earth; and this mainly from considerations of public policy. 1. Because the existence, origin, movement and course of such waters, and the causes which govern and direct their movements, are so secret, occult and concealed, that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be therefore, practically impossible. 2. Because any such recognition of correlative rights, would interfere, to the material detriment of the common wealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building and the general progress of improvement in works of embellishment and utility."

In the case of *Elster* vs. *Springfield,* 49 O. S. 82, 99, the court in its opinion said:

"The ownership of underground waters has been a prolific subject of discussion, and much difference of opinion has developed among text writers and judges. We are concerned only as to perco'ating waters. Upon this branch, the law, at least in Ohio, is settled to the effect that no right exists in the owner of one piece of land to receive percolation through the land of another, and that such a right cannot be acquired by prescription. The same rule must app'y to a spring supplied by percolating waters. That is, an owner of land cannot, in the absence of grant or contract, deny to his neighbor the right to use his own land for legitimate purposes, though the direct effect be to drain the former's spring, and it is not of consequence how long the spring has been enjoyed."

In the case of *Collieries Company* vs. *Cocke,* 107 O. S. 238, 258, it was said:

"As between adjacent owners, the rule of law seems to be that there is no right to recover for damages for loss of springs or wells fed by percolating water, and that, unless there is injury or damages to a subterranean stream or water in a known and fixed course and well defined channel, there can be no recovery."

In the case of the *Logan Gas Company* vs. *Glasco,* supra, it was held:

"Water percolating through the ground beneath the surface, either without a definite channel or in a course unknown and not readily ascertainable, is an appurtenant to the realty in which it is found."

This view of the law obviously leads to the conclusion that the Ohio Agricultural Experiment Station can take water from the Grossjean tract for its own

uses in the manner above indicated, without incurring any liability to the owner of the adjoining lands in and to which such waters might otherwise find their way.

In this connection, it may be observed by way of illustration of the rule above noted that if there were a spring or pool on the Grossjean lands formed by the accumulation of percolating waters and such waters flowed therefrom over Grossjean's lands through a well defined channel and thence by such channel in and upon the lands of the adjoining property owner, the owner of the spring or pool would be entitled to such portion only of the water therein as would be necessary for the reasonable use and purposes of the tract of land on which the spring was located. However, consistent with this rule, there would be nothing to prevent the owner of the land from sinking a shaft or well in some other part of such land and taking therefrom percolating waters which might find their way into such shaft or well, for any purpose for which the owner might desire to use the water. And in this same connection it has been held that the owner of land on which a new spring breaks out may make such use of the waters as he pleases, although the waters, if unmolested, would cause a stream to flow across another's land. *Mason* vs. *Yearwood,* 58 Wash. 276, 30 L.R.A. (N. S.) 1158.

In the consideration of this question it is but fair to note that in many of the later cases in other jurisdictions the courts have declined to follow the English rule above noted to which the courts of this state have subscribed, and have held that the right of a land owner to take percolating waters therefrom is limited by and conditioned upon the reasonable and proper use of such water upon the lands from which such water is taken. However, in many of the cases holding to this rule, it is frankly conceded that the rule in Ohio and other states is contra, and is in line with the original English rule on this question. In none of the cases considered by the Supreme Court of this state, above referred to, was there involved the specific question here presented as to the right of the owner of lands to take therefrom accumulated percolating water for the purpose of using such water on premises other than that from which the water is taken. However, in the consideration of this question it cannot be assumed that the Supreme Court of this state will depart from the broad rules laid down by it in the cases cited.

In closing, I venture the thought that it is extremely doubtful whether the taking by the Ohio Agricultural Experiment Station of water from the Grossjean tract of land in the amount and in the manner above indicated will seriously interfere with the total amount of water which now finds its way by percolation from the Grossjean tract to adjoining lands. However, aside from this observation, I am of the opinion, in answer to the question submitted, that the Ohio Agricultural Experiment Station may take from the Grossjean tract of land waters accumulated in a spring or well therein for use on said premises or on other premises owned and controlled by said institution, and that without liability to the owner or owners of adjoining land.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3285.

TOWNSHIP—MONEYS TRANSFERABLE FROM GENERAL FUND TO ROAD AND BRIDGE FUND WHEN.

SYLLABUS:

Moneys may not be transferred from the general fund of a township to the