4692

EASEMENT—DEED OF—LAND FOR HIGHWAY PURPOSES—DIRECTOR OF HIGHWAYS AGREED WITH OWNER AS TO AMOUNT OF PURCHASE PRICE—LANDOWNER WAS TO HARVEST AND REMOVE CROPS GROWING ON LAND—DIRECTOR WITHOUT AUTHORITY TO PAY DAMAGES TO LANDOWNER FOR BREACH OF AGREEMENT TO ALLOW REMOVAL OF CROPS—AUDITOR OF STATE MAY PROPERLY REFUSE TO HONOR VOUCHER.

SYLLABUS:

When the Director of Highways, pursuant to the provisions of Section 5501.11, Revised Code, has taken a deed of easement over land for highway purposes, has agreed with the owner of said land as to the amount to be paid for the land so taken, and has also agreed to allow the landowner to harvest and remove crops then growing on said land, the Director is without authority to pay damages to the landowner for breach of his agreement to allow the removal of such crops; and the Auditor of State may properly refuse to honor a voucher presented for such purpose.

Columbus, Ohio, December 31, 1954

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which arises from the the following set of facts:

On August 31, 1953 the Department of Highways presented to you its voucher No. 4471 in the amount of $28,972.30 for payment to M. S., et al., landowners from whom the Department has obtained an easement for highway purposes. Attached to this voucher was an "Analysis of Right of Way Settlement" which showed that the amount of $28,972.30 was made up of the following items:

"21.6 acres of land	$10,823.50
Channel changes	100.00
Limitation of Access	800.00
15.8 acres of land landlocked	7,138.00
43.4 acres of land and buildings with utility lessened	10,109.80
Permission to enter	1.00
	$28,972.30"

Attached to the voucher was also a document dated May 22, 1953, captioned "Permission to Enter Upon Private Property and Waiver of Damages," signed by the said M. S., et al., and providing in pertinent part as follows:

"KNOW ALL MEN BY THESE PRESENTS:

"THAT M. S., et al., for and in consideration of the sum of One 00/100 Dollars and for other good and valuable consideration to be paid by the State of Ohio, the receipt whereof is hereby acknowledged, does hereby grant permission to the Director of Highways, State of Ohio, and/or his duly authorized agents and contractors to enter upon their land, for the purpose of performing the work as set forth by the plan entitled State of Ohio, Department of Highways,..... ..... dated ..... which work includes

The search for existing tile, the normal functioning of which will be interfered with by the project, and the adequate disposition of such farm drainage as is now performed by the said tile as called for by said plans, and for the consideration hereinbefore named, the said M.S., et al., acknowledges that the said sum is full payment for damages by reason of the improvement of SR-120 R. Wood aforesaid and further the said..... does hereby release and forever save harmless the State of Ohio, and/or its authorized agents and contractors, from any and all claims of damages of every kind and nature whatsoever to..... property, arising from or in any manner growing out of the improvement as shown by the above entitled plans. It is understood that the above waiver applies to the work performed on ..... property, and not to accidents or negligence on the part of the State of Ohio, its contractor, or agents."

Voucher No. 4471 was paid by Auditor of State's Warrant No. 53985 dated August 27, 1953, and this warrant was cashed by the landowners.

In connection with the above transaction the landowners executed a deed of easement to the State of Ohio. That deed was dated May 22, 1953 and provides in pertinent part as follows:

"KNOW ALL MEN BY THESE PRESENTS:

"That M.S., et al., the grantor for and in consideration of the sum of Twenty-eight Thousand Eight Hundred Seventy-one dollars and thirty cents ($28,871.30) and for other good and valuable considerations to ..... paid by the State of Ohio, the Grantee, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell, convey and re-

lease to the said Grantee, its successors and assigns forever, a perpetual easement and right of way for public highway and road purposes in, upon and over the lands hereinafter described, including loss of direct access as hereinafter provided, situated in Wood County, Ohio, Troy Township, Road Tracts 56-57, Town 6 N, Range 12 E. and bounded and described as follows:

"* * * It is understood that the strip of land above described contains 21.647 acres, more or less, exclusive of the present road which occupies 0.000 acres, more or less. * * *

"In consideration of the sum of Twenty-eight Thousand Eight Hundred Seventy-one Dollars and Thirty Cents ($28,871.30), hereinbefore mentioned, ... do ..... hereby specifically waive and release any and all right or rights of direct access, or claims thereof, to the present highway improvement to be constructed, or to the ultimate highway improvement to be constructed in the future, as called for by the plans herein referred to, and the execution of this conveyance shall act automatically as a waiver to the State of Ohio in the elimination of any direct access to said highway either for present or future construction."

On May 15, 1954 the Department of Highways presented to you its voucher No. 46231 in the amount of $3,347.71 for payment to M. S., et al., the same parties mentioned above. This voucher indicated on its face that it was "For damage due to loss of crops, as described in the articles of agreement, signed May 11, 1954." Attached to the voucher was a document captioned "Analysis of Right of Way Settlement" which showed that the amount of $3,347.71 was made up of the following items: (details of computation omitted)

"5.42	acres	alfalfa	$ 975.60
4.	"	tomatoes	1,127.20
2.4	"	oats	87.36
1.8	"	wheat	175.50
1.2	"	timothy	36.00
8.07	"	corn	928.05
.06	"	potatoes	18.00
22.95			$3,347.71"

Also attached to the voucher was a document captioned "Special Agreement and Waiver of Damages," signed by M. S., et al., and providing in pertinent part as follows:

"These articles of agreement entered into on this the 11th

day of May, Nineteen Hundred and Fifty-four by M.S., et al., and the Department of Highways, State of Ohio, Witnesseth:

"That M.S., et al., for and in consideration of the sum of Three Thousand Three Hundred Forty-seven and 71/100 Dollars ($3347.71) paid by the State of Ohio, do hereby agree that the sum of $3347.71 is full compensation for the destruction of crops made necessary by the improvement of S. R. 120 R, Section 0.00, Wood County, Ohio, on the right of way granted in the easement dated May 23, 1953, in Vol. 336, Page 147 of the Wood County Record of Deeds, and the said M.S., et al., do hereby further agree for the consideration of Three Thousand Three Hundred Forty-seven and 71/100 Dollars ($3347.71) hereinbefore mentioned to release the said State of Ohio from any and all claims of damages to property arising from or growing out of the said improvement of S. R. No. 120 R, Section 0.00, Wood County, Ohio."

You have refused to issue your warrant in payment of this second voucher and present the question: "Is this expenditure a legal obligation of the State of Ohio?"

Apparently you present this question in connection with the performance of your duties under the provisions of Section 115.35, Revised Code. That section provides in part as follows:

"The auditor of state shall examine each voucher presented to him * * * and if he finds it a valid claim against the state and legally due and that there is money in the state treasury appropriated to pay it, and that all requirements of law have been complied with, he shall issue a warrant on the treasurer of state for the amount found due * * *. He shall draw no warrant on the treasurer of state for any claim unless he finds it legal and that there is money in the treasury which has been appropriated to pay it."

As was pointed out in the cases of State, ex rel. Ross v. Donahey, 93 Ohio St., 414, and State, ex rel. Price v. Huwe, et al., 103 Ohio St., 546, mandamus is the proper remedy to compel the Auditor to issue a warrant if he refuses to do so under the provisions of this section. I presume that you are asking whether you could successfully resist such an action based on the facts set out above in which the Director concedes liability and presents his voucher to you for payment—and I will advise you accordingly.

One preliminary matter can be disposed of at the outset. Your letter to me apparently relates the Permit and Waiver of Damages attached

to voucher No. 4471 to the deed of easement over 21.6 acres of land which was also attached to said voucher; and you have asked whether that waiver of damages does not decide the question of subsequent crop loss. It seems clear from a reading of the permit document that it refers only to damages which might arise from the exploratory trench which was dug outside the 21.6 acre tract. So the question for decision remains the same.

It would be appropriate here to consider the status of growing crops, and the right and duty of a public authority to make compensation for them under the law of eminent domain. I believe that this problem is one properly within that field, since all takings by the Director for highway purposes are accomplished either by the exercise of the right of eminent domain or with knowledge by both parties that the right can be exercised in case a negotiated settlement is not arrived at. The amount paid by the Director for a right-of-way easement can generally be said to be the amount which both the Director and the landowner believe would probably be fixed by a jury in an eminent domain proceeding; and the items for which settlement is negotiated are the same ones which would be considered by a jury in such a proceeding.

Crops, as such, are not separately valued or considered in eminent domain proceedings. The value to be arrived at is the fair market value of the land taken, and only evidence relevant to that value is admissible. It might be true, of course, that land on which unmatured crops are growing has a higher market value than the naked land, and that fact could be shown by proper evidence. It might also be true that the evidence used to establish this increased value would be the same evidence used to establish the value of the crops in an action for their loss or damage. But such evidence could be considered by a jury only as it is relevant to the value of the land.

If the landowner has a right to harvest and remove growing crops, no evidence as to their value is admissible, and the Director would not be justified in considering them in negotiating a settlement. In establishing that the landowner has a right to remove growing crops, it has been held by the Supreme Court of Ohio that parole evidence is admissible to prove such an agreement, even though the instrument of conveyance purports to dispose of all of the landowner's interest in the realty. Baker v. Jordan, 3 Ohio St., 438. I have no doubt that such evidence would

also be admissible in the case now before me, if the landowner were seeking to prevent the Director from interfering with his right to harvest the crops, before the Director had begun actual highway contsruction operations.

Finally, the rule of the Baker case, supra, also establishes that once the parole agreement to permit removal of crops is proven, damages for its breach can be awarded. Here the rule of law applied to the Director is different from that applied to private parties. Since the Director acts as a state officer in buying or condemning land, and since the state has not given its consent to be sued in such actions, damages for breach of an agreement to allow the removal of crops can be recovered only by the sundry claims procedure provided by Section 127.11, Revised Code. Since damages could not be recovered from the Director in an action at law, I know of no authority for him to agree to pay such damages voluntarily.

How do these principles apply to the case before me: The Director received a deed of easement over 21.6 acres of land. He and the landowner agreed to a price of $500 per acre for this land. By parole, both parties also agreed that the landowner should be allowed to remove his growing crops. The Director breached this agreement by beginning highway construction and destroying the crops before they were matured. Since the state has not provided that it can be sued, the Director cannot now pay damages for the breach of that agreement and the landowner must therefore apply to the Sundry Claims Board for relief.

In arriving at this conclusion I am aware that approximately the same amount of money properly could have been paid to the landowner if the transaction had taken a different form. The Director could have agreed to a valuation of the naked land and to an increased valuation of the land enhanced by a growing crop; and he could have agreed to pay the enhanced value in case it was necessary for him to destroy the crop. In such an event the measure of the enhanced value would have been about the same as the measure of damages involved here. But the Director did not make such an agreement, and instead now purports to pay damages for breach of the agreement which he did make. I believe that the nature of this case compels me to follow a strict rule based on the form actually used, and forbids my applying any other rule which might be based on the equities of the parties or the established practices of the Director.

In view of the above, it is therefore my opinion that when the Director of Highways, pursuant to the provisions of Section 5501.11, Revised Code, has taken a deed of easement over land for highway purposes, has agreed with the owner of said land as to the amount to be paid for the land so taken, and has also agreed to allow the landowner to harvest and remove crops then growing on said land, the Director is without authority to pay damages to the landowner for breach of his agreement to allow the removal of such crops; and the Auditor of State may properly refuse to honor a voucher presented for such purpose.

Very truly yours,
C. WILLIAM O'NEILL
Attorney General