

from a recital contained in this contract encumbrance record, as well as from a copy of the certificate of the Controlling Board, that the purchase of this property has been approved by the Controlling Board and that the money necessary to pay the purchase price of this and other properties to be acquired in connection with the Kiser Lake Project has been released for this purpose.

In conclusion, it is noted that the Conservation Council, acting by resolution under the authority conferred upon it by the provisions of Section 472, General Code, has authorized and provided for the purchase of this property. Inasmuch as under the provisions of this section of the General Code land so purchased by the Conservation Council for purposes of the kind here in question are subject to the approval of the Attorney General, such approval is hereby given, as is evidenced by my approval endorsed upon the deed in and by which this property is to be conveyed to the State of Ohio.

I am herewith returning to you for your further action in the premises, said abstract of title, warranty deed, contract encumbrance record No. 17 and the other files submitted to me for my examination in connection with the purchase of this property.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

167.

CONTRACT BETWEEN BOARD OF PUBLIC WORKS AND OHIO POSTAL TELEGRAPH-CABLE COMPANY SUCCESSOR TO MERCHANTS TELEGRAPH CO. IS REVOCABLE LICENSE, WHEN—SUCCESSOR, NO LEGAL RIGHT TO MAINTAIN LINES ON OHIO CANAL LANDS—OUSTED HOW—LEASE.

*SYLLABUS:*

*The agreement made and entered into by and between the Board of Public Works and The Merchants Telegraph Company under date of May 19, 1887, by which said company was permitted to erect and maintain a telegraph line, including poles and other fixtures, along and adjacent to the towing path of the Ohio Canal between the cities of*

*Akron and Coshocton in consideration of the agreement of said company to transmit and deliver free of charge messages pertaining to the business of the Board of Public Works over its line or lines in Ohio presented to it by any member of the Board of Public Works or by the agents and employes of such Board, did not have the effect of granting to or conferring upon said company any permanent right or interest in said section of Ohio Canal lands for the purpose of this telegraph line; but this agreement, if any legal effect can be ascribed to it, was only a permit or license revocable by the Board of Public Works at its pleasure. The Ohio Postal Telegraph-Cable Company, as the successor in interest of The Merchants Telegraph Company, now has no legal right to maintain said telegraph line on this section of the Ohio Canal or any part of the same; and said company may be ousted from its occupancy of these canal lands by an action in quo warranto filed in the Supreme Court or in any other court of competent jurisdiction.*

COLUMBUS, OHIO, February 25, 1937.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: This is to acknowledge the receipt of your recent communication in which you advise me that The Ohio Postal Telegraph-Cable Company is occupying without lease therefor a section of Ohio Canal lands between the cities of Akron and Massillon upon which there have been erected approximately 885 poles for the use of its telegraph lines. It appears from your communication and from certain files submitted therewith that The Ohio Postal Telegraph-Cable Company is occupying this section of the Ohio Canal for the purpose above stated as successor in interest of The Merchants Telegraph Company under a certain agreement made and entered into under date of May 19, 1887, by and between the Board of Public Works and The Merchants Telegraph Company. This agreement, which took the form of a resolution adopted by the Board of Public Works and which was accepted by The Merchants Telegraph Company, by its provisions granted to said company an application theretofore made by it for permission to erect and maintain a line of telegraph along and adjacent to the towing path of the Ohio Canal between the cities of Akron and Coshocton. This resolution as a consideration for the pretended rights thus granted to said company further provided that the company, its successors or assigns would transmit and deliver free of charge any message or messages pertaining to the business of the Board of Public Works over its line or lines in Ohio that might be presented

to it by any member of the Board of Public Works, engineer, secretary, superintendent, collector or other employe of the Board of Public Works. From a letter directed to you by The Postal Telegraph-Cable Company under date of July 25, 1936, a copy of which you have attached to your communication to me, it appears that the free telegraph service to the members of the Board of Public Works and to their agents and employes provided for in this contract was furnished by the Merchants Telegraph Company and its successor The Ohio Postal Telegraph-Cable Company until on or about November 1, 1910, at which time the President of the Board of Public Works returned the telegraph franks then in the hands of said Board to The Ohio Postal Telegraph-Cable Company with the statement that neither the Board nor its officers could use them for the reason, among others, that canal affairs were receiving a certain amount of publicity at that time. Upon the facts here presented you request my opinion as to the right of The Ohio Postal Telegraph-Cable Company to occupy this section of Ohio Canal lands free of charge by reason of the permit granted to its predecessor in interest, The Merchants Telegraph Company, with respect to the canal lands here in question.

In this connection, it is noted that the resolution of the Board of Public Works which by its acceptance constituted the agreement between said Board and The Merchants Telegraph Company provided that "any transfer of any of the rights herein obtained shall be subject to the approval of the Board of Public Works, and no other company shall be allowed by said telegraph company to use said poles for the purpose of a telegraph or telephone line without first having received the approval of the Board of Public Works." It does not appear from your communication or from any of the files submitted therewith when and in what manner The Ohio Postal Telegraph-Cable Company succeeded to the interests of The Merchants Telegraph Company under this agreement or whether the transfer or succession of this interest from The Merchants Telegraph Company to The Ohio Postal Telegraph-Cable Company was at any time approved by the Board of Public Works as provided for in the agreement. However, aside from this inquiry and the effect of the fact that this transfer or succession of interest under the contract was or was not approved by the Board of Public Works, I am inclined to the view that the question presented in your communication with respect to the right of The Ohio Postal Telegraph-Cable Company to occupy this section of the Ohio Canal for the purpose above noted may be determined upon a consideration of the power and authority which the Board of Public Works had with respect to the canals of this state at the time this contract was made and entered into by and between said Board and The Merchants Telegraph

Company. The canals of this state since the time of their construction, something more than a hundred years ago, have been successively under the authority and control of the State Canal Commission and the Board of Public Works until the authority and control of such canals as a part of the public works of the state passed to the Superintendent of Public Works on the creation of that office by the amendment of Section 12 of Article VIII of the State Constitution by vote of the electors under date of September 3, 1912, by the Act of March 19, 1913, 103 O. L., 119, providing for the appointment of the Superintendent of Public Works and prescribing his duties relating to the canals and public works of the state.

At the time the contract and agreement here in question was made the canals of this state were under the authority and control of the Board of Public Works. At this time Section 7691, Revised Statutes, relating to the powers and duties of the Board of Public Works, provided that "the Board of Public Works shall have charge of the public works of the state, and shall have power to perfect, render useful, maintain, keep in repair and protect the same, and to that end shall have power to remove obstructions therein or thereto, and to make such alterations or amendments thereof (whether now or hereafter constructed), to make such feeders, dikes, reservoirs, locks, dams, and other works, devices, and improvements, as they may think proper for the respective purposes aforesaid." Further than this, the Board was authorized to purchase or appropriate all such real and personal property as it might deem necessary for such purposes. By other related statutory provisions the Board of Public Works was authorized to collect tolls and other revenues accruing to the state from the use of its canals and other public works through designated agents and employes of the Board at various points throughout the state. Touching the question here presented it is noted, however, that at this time no provision of law was made authorizing the Board of Public Works to lease or to otherwise convey or transfer any interest in the canal lands of the state to third persons for any purpose whatsoever. In this connection, it may be observed that although from an early date in the history of the canals of this state, the State Canal Commission and, later, the Board of Public Works were authorized under certain conditions to lease the use of the surplus waters of the canals for hydraulic and other purposes and as an incident to this power to include in the lease lots or parcels of land contiguous to the canals at various points which the state had acquired for this purpose, no general authority was given to either of said bodies with respect to the lease of canal lands until the enactment of the Act of March 28, 1888, 85 O. L., 127, by which provision was made for the lease by the Board of Public Works of such

canal lands as were found to be not necessary for the public works of the state for terms not to exceed fifteen years. In other words, although by special acts of the legislature the State Canal Commission and later the Board of Public Works were authorized to lease particular parcels of the canal land of the state for designated purposes and in one instance back in the year 1861 a lease of all of the canal lands of this state for a term of ten years was authorized, there was not at this time any authority to lease any part of the section of the Ohio Canal here in question for the purpose of using the same for a telegraph line or for any other purpose.

In this connection, and as a matter of general law, it may be observed that aside from the right which one person may have to erect and maintain a telegraph line or other similar structure on the lands of another pursuant to a lawful lease executed by the owner of the lands for this purpose, the legal right of such person to erect and maintain structures of this kind on the lands of another is an easement which can be granted to him by the owner only by a deed executed by the owner in the manner provided by law. And without such deed a permit by the owner to another for the use of his lands for a purpose of this kind is but a license for the use of the lands which is revocable at the pleasure of the owner of the lands; and this is true whether the permit so given is in writing or by parol agreement. In the case of *Wilkins vs. Irvine*, 33 O. S., 138, it was held that:

“A written license, without seal and unacknowledged, to enter upon and imbed water pipes in the lands of another, with privilege to enter and repair them, creates no interest in, nor encumbrance upon the land such as will disable the owner from making a good and sufficient deed conveying a good title thereto.”

The court in its opinion in this case said:

“A license to do a particular thing, does not, in and degree, trench upon the policy of the statutes requiring that contracts respecting the title to land shall be by deed or other written instrument under seal. They amount to no more than an excuse for the act, which would otherwise be a trespass. A permanent right to enter upon and hold another's land, for a particular purpose, without his consent, is an important interest which should pass only in the mode and by the instrumentalities provided by law.”

In the case of *Yeager vs. Tuning*, 79 O. S., 121, it was held, as indicated by the syllabi in the report of the court's decision in this case, as follows:

"1. The right of an owner of an estate to erect and maintain, or to cause to be erected and maintained, a line of telephone poles over the estate of another for the benefit of the former is an easement.

2. An easement can be created only by deed or by prescription.

3. A parol agreement by several adjoining land owners to erect and maintain telephone poles on their respective lands, and to contribute equally to the expense of stringing wires thereon, and of operating a telephone line does not create an easement but is merely a parol license and is revocable by any one of such owners, although in reliance thereon the poles have been erected and the line constructed."

The court in its opinion in this case quoting with apparent approval from a note to the case of *Lawrence vs. Springer*, 31 Am. St. Rep., 702-715, said:

"At common law, a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. In many of the states this rule prevails, while in others the licensor is deemed to be equitably estopped from revoking the license, after allowing the licensee to perform acts thereunder, or to make expenditures in reliance thereon. These two lines of cases cannot be reconciled; for one of them holds that an interest in land cannot be created by force of a mere parol license, whether executed or not, while the other declares that where the licensee has gone to expense, relying upon the license, the licensor may be estopped from revoking it, and thus an easement may be created. The former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable, at the option of the licensor, and this, although the intention was to confer a continuing right, and money has been expended by the licensee upon the faith of the license. Such

license cannot be changed into an equitable right on the ground of equitable estoppel.”

It follows from the considerations above noted that aside from the fact that at the time here in question the Board of Public Works did not have any authority to lease or to otherwise grant or convey to The Merchants Telegraph Company any right in or with respect to these canal lands, the agreement by and between said Board and The Merchants Telegraph Company made in the manner above indicated was neither a lease or a deed but if any legal effect can be given to the same at all it was at best only a permit or license which was revocable by the Board of Public Works at pleasure; and said permit or license if now considered to be in effect for any purpose is revocable by the Superintendent of Public Works as successor to the powers and duties of the Board of Public Works with respect to the canals and public works of this state.

In the case of *State, ex rel., vs. The Cincinnati Central Railway Company*, 37 O. S., 157, wherein the court had under consideration a contract made and entered into January 4, 1881, by and between the Board of Public Works and the railway company above named whereby said company was permitted to build, maintain and operate its railroad on and along the berme bank of a section of the Miami and Erie Canal in Hamilton County, the court held as indicated by the syllabus in the report of the decision of the court in this case that:

“The Board of Public Works of the state is not authorized by law to grant to a railroad corporation the right to lay its track and to maintain and operate a railroad, on and along the berme bank of a navigable canal belonging to the state.”

The court in this case, upon consideration of the provisions of section 7691 and other related sections prescribing and defining the duties of the Board of Public Works with respect to the canals and public works of the state, said:

“The Board of Public Works possesses no powers except such as are expressly conferred by law, or as are necessarily implied, the purpose of which is, to perfect, render useful, maintain, keep in repair, and protect and make the canals useful as navigable highways. It may be conceded, that the state has power to sell, lease or abandon them. It may grant easements or rights for other public purposes. It may by neglect or by unfriendly legislation impair or destroy their use-

fulness. It may also be true that in these days of improved methods of commercial intercourse, canals are relatively of minor importance, but so long as the present policy of the state, as shown by its laws, stands, the courts must carry out that policy. It is for the legislature, not for the Board of Public Works, nor for the courts to change it."

Upon the considerations above noted, I am of the opinion, by way of answer to the question presented in your communication, that the Ohio Postal Telegraph-Cable Company does not at this time as successor in interest of The Merchants Telegraph Company under the contract and agreement here in question, or otherwise, have any right to maintain this telegraph line on this section of Ohio Canal lands and unless some arrangement is made for the lease of these canal lands for the purpose for which they are now held, said company may be ousted from its occupancy of the lands, and that this may be done by an action in quo warranto in the Supreme Court or in any other court of competent jurisdiction. *State of Ohio, ex rel., vs. Cincinnati Central Railway Company*, 53 O. S., 189; *State, ex rel., vs. The Miami Conservancy District*, 125 O. S., 201.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

168.

CONTRACTS—COMPANY FOR CONSIDERATION OF SUM OF MONEY AGREES TO REPAIR MOTOR VEHICLES DAMAGED BY AN ACCIDENT—SUBSTANTIALLY AMOUNTS TO INSURANCE—SECTION 665 G. C.

**SYLLABUS:**

*A company, which in the conduct of its business issues and sells a contract to owners of motor vehicles whereby in consideration of a certain sum of money it undertakes for a definite period of time to repair motor vehicles damaged as a result of an accident or agrees to furnish towing services to contract holders whose automobiles are disabled by*