392

GAS OR OIL—PERMITS TO DRILL WELLS INTO BED OF LAKE ERIE—PURPOSE—TO TAKE GAS OR OIL FROM UNDERLYING STRATA—SUPERINTENDENT OF PUBLIC WORKS WITHOUT AUTHORITY IN LAW TO ISSUE SUCH PERMITS.

SYLLABUS:

The Superintendent of Public Works is without authority in law to issue permits to drill wells into the bed of Lake Erie for the purpose of taking gas or oil from the underlying strata.

Columbus, Ohio, August 13, 1945

Hon. Frank L. Raschig, Director, Department of Public Works
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

> "We have an informal application presented to us for permission to drill for gas and/or oil from the shore line of Lake Erie near the mouth of Rocky River north on the 81° 50′ meridian of West Longitude for a distance of 2½ statute miles; thence parallel to the shore line to a point four statute miles east of the 81° 50′ meridian of West Longitude; thence south for a distance of 2½ statute miles to the shore line; thence westerly following the shore line to the 81° 50′ meridian of West Longitude, the point of origin.
>
> About 8 square miles of this area is within the corporate limits of the City of Lakewood and two miles extend in each

direction beyond the corporate limits of said city. About 2½ square miles of the proposed area to be drilled is outside the jurisdiction of said city and would be under the control of this department. (Sec. 412-29 of the General Code.)

The applicant proposes to drill for oil and/or gas under the provisions of Section 412-28 of the General Code.

Under the provisions of Sec. 412-28 authorizing this department to grant permits 'to take and remove sand, gravel, stone, minerals and other substances from the bottom of said lake, either upon a royalty basis or for a fixed annual rental', would a permit as requested by the applicant be authorized in that portion of Lake Erie under the jurisdiction of this department?"

While your specific question is directed to the terms of Section 412-28, General Code, and your inquiry is whether or not such section confers authority upon the Superintendent of Public Works to grant permission to drill for oil and gas in the bed of Lake Erie, the fundamental question which must first be resolved concerns the ownership of the subaqueous lands of said lake.

A leading case dealing with the ownership of tide waters and the lands under them is Shively v. Bowlby, 152 U. S. 1, wherein it was held:

"Upon the American Revolution, the title and the dominion of the tide waters and the lands under them vested in the several States of the Union within their respective borders, subject to the rights surrendered by the Constitution to the United States."

The rule as above stated, with respect to tide waters and the subaqueous lands thereof, has been extended to all navigable waters and to the Great Lakes.

In the case of Hardin v. Jordan, 140 U. S. 371, Mr. Justice Bradley, speaking for the majority of the court and referring to many cases already cited, said:

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a por-

> tion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. * * * This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each state to what waters and to what extent this prerogative of the State over the lands under water shall be exercised."

Similarly, in the case of Illinois Central Railroad v. Illinois, 146 U. S. 387, it was recognized as the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters or navigable lakes within the limits of the several states belonged to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce. See also Martin v. Waddell, 41 U. S. 366.

The Treaty of Peace between the United States of America and His Britannic Majesty George the Third, dated September 3, 1783, which ended the Revolutionary War and which, among other things, acknowledged the sovereignty and independence of the thirteen original states and established the boundaries of the United States, reads:

> "ARTICLE I
>
> His Britannic Majesty acknowledges the said United States, viz. New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, to be free, sovereign and independent States; that he treats with them as such; and for himself, his heirs and successors, relinquishes all claims to the government, propriety and territorial rights of the same, and every part thereof."

"ARTICLE II

> And that all disputes which might arise in future, on the subject of the boundaries of the said United States, may be prevented, it is hereby agreed and declared, that the following are, and shall be their boundaries, viz. * * * thence along the middle of said river into Lake Ontario, through the middle of said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie, through the middle of said lake until it arrives at the water-communication between that lake and Lake Huron." (See 8 U. S. Statutes at Large, page 81.)

It will be observed that in so far as Lake Erie is concerned, the above document established the international boundary between Canada and the thirteen states, as the middle of said lake. Therefore, at the end of the Revolutionary War, the waters and lands beneath them which lie south of the middle of Lake Erie on a line drawn from the east to the west, belonged to the thirteen original states. In Shively v. Bowlby, supra, it was held:

> "The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."

Similarly, in Knight v. U. S. Land Ass'n, 142 U. S. 161, 183, it is stated:

> "It is the settled rule of law * * * that absolute property in, and dominion and sovereignty over the soils under the tide-waters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty and jurisdiction * * *."

On April 30, 1802, the Congress of the United States passed an act which created the state of Ohio, defined its boundaries and provided that said state shall be admitted into the Union on equal footing with the original states. (2 U. S. Statutes at Large, page 173.) Said act reads in part:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the inhabitants of the eastern division of the territory northwest of the river Ohio, be, and they are hereby authorized to form for themselves a constitution and state government, and to

> assume such name as they shall deem proper, and the said state, when formed, shall be admitted into the Union, upon the same footing with the original states, in all respects whatever."

Following this, by an act of June 15, 1836 (5 U. S. Statutes at Large, page 49), the Congress of the United States established the northern boundary line of the state of Ohio, as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the northern boundary line of the State of Ohio shall be established at, and shall be a direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie; and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania."

Since the boundary line between the United States and the Province of Upper Canada was by the Treaty of Peace of 1783 fixed as the middle of Lake Erie, it would appear that it is now definitely established that the subaqueous lands of that portion of Lake Erie lying to the south of said line are a part of and belong to the state of Ohio.

Under the common law of England, the title to soil under the tide water of the sea and under the waters of navigable streams was in the King, who was the absolute owner thereof.

A leading case in the United States Supreme Court, dealing with the title to and the dominion of tide waters and the lands under them, is Martin v. Waddell, supra. Said case arose in New Jersey and presented a question concerning the title to lands included in charters granted by Charles II in 1664 and 1674 to his brother the Duke of York as Governor of the province embracing the lands which now comprise the states of New York and New Jersey. In the opinion of the court delivered by Chief Justice Taney, it was declared that under such grant "the dominion and propriety in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the Duke", and "in his hands they were intended to be a trust for the common use of the new community about to be established"—"a

public trust for the benefit of the whole community, to be freely used by all for navigation and fishery" and not as "private property to be parceled out and sold by the Duke for his own individual emolument". "When the revolution took place, the people of each state became themselves sovereign; and in that character held the absolute right to all other navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government".

Here the Supreme Court of the United States enunciated the principle that lands under the tide waters and navigable streams are held, not in absolute proprietorship of the soil, but in trust for the benefit of all of the people in the community. This doctrine of trust ownership was adopted and the rule of the common law of England rejected by the state of Ohio.

A leading case in this state on the subject is State v. The Cleveland and Pittsburgh Railroad Company, et al., 94 O. S., 61, wherein it was held:

> "3. The title of the land under the waters of Lake Erie within the limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adopted." * * *
>
> 6. The ownership of the waters of Lake Erie and of the land under them within the state is a matter of public concern. The trust with which they are held is governmental, and the state, as trustee for the people, cannot by acquiescence or otherwise abandon the trust property or permit a diversion of it to private uses different from the object for which the trust was created. The littoral owner is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust estate."

The above decision is in accord with the decisions of the courts of other states abutting on the Great Lakes. See Hilt v. Weber, 252 Mich. 198; Medtweg v. Wallace, 237 Mich. 14; Doemel v. Jantz, 180 Wis. 225; McCormick v. Chicago Yacht Club, 331 Ill. 514; State v. Korrer, 127 Minn. 60.

Therefore, since the state of Ohio holds title to that portion of Lake Erie and the subaqueous lands thereof which lie within its boundaries, the

next subject for consideration is the right of the state to grant any interest in such land to private owners. In determining such right, the character of the state's title must be kept in mind.

Obviously, since the title to the lands under Lake Erie is in the state, no person would have the right to take or remove gas or oil therefrom without its consent. Moreover, since the title to such lands is held in trust for all of the inhabitants of the state for the protection of the right of navigation, fishing or other public uses, it would follow that such consent or license, if given, cannot operate to divest such inhabitants of their common right. This trust doctrine, however, should not be held to extend beyond such public rights. In other words, if the waters of Lake Erie are kept open for passage and navigation and maintained for the community right of fishing and other public uses thereof, I see no reason why the state through its General Assembly cannot give its consent to the drilling for oil and gas in such lands. Certainly, the people of Ohio, holding in themselves the beneficial estate and the usufruct of such land, may, through their duly constituted representatives, grant the licenses in question and make such regulations concerning them as they see fit, so long as the navigation and other public uses of the waters are not destroyed, to the injury of the public.

The sole question remaining, then, is whether the state has by legislative act, given such consent.

The Superintendent of Public Works, as all other public officials, has of course only such powers as are expressly delegated to him by statute and such as are necessarily implied from those so delegated.

The authority of the Superintendent of Public Works to issue permits for the removal of sand, gravel and other minerals, from the bottom of Lake Erie, is set out in Section 412-28, General Code, to which you refer in your letter. Said section reads:

> "The superintendent of public works may expend upon erosion and harbor projects along the shores of Lake Erie, and its connecting bays, such funds as may be appropriated by the general assembly from time to time for such purposes, and in addition a sum of money equal to the funds derived from the granting of permits hereinafter authorized. Subject to the limitations set forth in section 6 of this act, authority is hereby granted to the superintendent of public works to issue permits,

subject to the approval of the governor and attorney general, to parties making application therefor, for permission to take and remove sand, gravel, stone, minerals and other substances from the bottom of said lake, either upon a royalty basis or for a fixed annual rental as they may deem for the best interests of the state; said permits for sand, gravel, stone, minerals and other substances, shall be issued for terms of not less than one nor more than ten years, to be taken within certain fixed boundaries that do not conflict with the rights of littoral owners. Upon request from the holder of such permit, the same shall be cancelled, but any equipment or buildings owned by the lessee shall be held as security by the superintendent of public works for payment of all rentals or royalties due the state of Ohio at the time of application for cancellation."

There is no question that the term "mineral" when standing alone and not used in connection with restrictive words includes oil and gas. Poe v. Ulrey, 233 Ill. 56; Crain v. Pure Oil Co. 25 Fed. (2d) 824; Maynard v. McHenry, 271 Ky. 642; Amarillo Oil Co. v. McBride, 67 S. W. (2d) 1098; Wilson v. A. Cook Sons Co., 298 Pa. 85.

It will be noted that the above section authorizes the issuing of permits "to take and remove sand, gravel, stone, minerals and other substances" from the bottom of Lake Erie. Here we have in a statute the general term "minerals" preceded by specific words "sand", "gravel", and "stone". It is a familiar rule of statutory construction that in a case where general words follow specific words in an enumeration, the general words are construed to embrace only such things which are similar in nature to those enumerated in the specific words. Had the General Assembly intended to permit the taking and removal of all minerals from the bottom of Lake Erie, it might well have declared such intention by the use of the single word "minerals", which, of course, since they are all minerals, would include sand, gravel and stone. In other words, if the word "minerals", as the same appears in the statute, is given its full and natural meaning, that is, the meaning it would receive in the abstract, it would include sand, gravel and stone, thereby making the specific words in the statute superfluous. Since all words in a statute are to be given effect, it would follow that no part thereof should be considered superfluous and consequently disregarded. Relative thereto, it is stated in 37 O. Jur., pages 616 and 617:

"It is to be presumed that one paragraph of a statute is not a needless repetition of another, and courts should hesitate in

> ascribing careless and needless tautology to the lawmaking body. Therefore, in the construction of statutes, mere idle and useless repetitions of meaning are not to be supposed, if they can be fairly avoided. Hence a construction is not favored which would render a part of a statute superfluous, or a work of supererogation."

With respect to the application of the above principle (the doctrine of ejusden generis), it is stated in Sutherland on Statutory Construction, Vol. 2, page 400:

> "The doctrine applies when the following conditions exist: (1) the statute contains an enumeration by specific words; (2) the members of the enumeration constitute a class; (3) the class is not exhausted by the enumeration; (4) a general term follows the enumeration; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires."

In the instant case each of the above conditions is present, to-wit: (1) the statute in question contains an enumeration by the specific words "sand," "gravel," and "stone"; (2) sand, gravel and stone constitute a particular class of minerals; (3) the specific words enumerated in the statute do not embrace all the minerals of the class designated by the enumeration, minerals of the same class and of a similar nature being clay, shale, slate, etc.; (4) the general term follows the enumeration, and (5) there is nothing in the statute or elsewhere in the act of which the statute is a part, which clearly manifests an intent that the general term be given a broader meaning than the doctrine requires.

Therefore, in order to give effect to both the particular words and the general term "minerals," as the same are used in the statute, it would appear to be necessary to give to the latter term a meaning which is restricted to the minerals of the same class as, and similar in nature to, those specifically enumerated, i.e., sand, gravel and stone.

It will likewise be observed that the general term "minerals" is in turn followed by the words "other substances," which are also of a general nature. While these latter words are undoubtedly broad enough in meaning to include gas and oil, it can scarcely be contended that it was the intention of the General Assembly to include within the meaning thereof any substances which fall within the definition of the word "mineral,"

since such word likewise appears in the statute. Certainly, in view of this, it seems to me that it might well be assumed that by the use of the term "other substances," the General Assembly intended to permit in addition to the removal of minerals, substances other than minerals which, for instance, might lie on the bottom of Lake Erie and constitute a menace to navigation or operate in some manner to cause or contribute to beach and shore erosion. It is entirely conceivable that damaged wharves, piers or jetties or sunken ships lying on the bottom of the lake might, if salvaged, be of considerable value and at the same time the removal thereof might be necessary to serve the public interests of navigation and fishing and to prevent or arrest beach erosion, and consequently it might well be assumed that with this in mind, the General Assembly provided for the removal of such obstructions and in connection therewith created a source of revenue to the state.

It would therefore appear, and it is accordingly my opinion that the words "other substances" in the statute under consideration should not be construed to include gas and oil or other minerals.

In addition to the foregoing, there remains another reason which impels the conclusion that the word "minerals" should be restricted in its meaning in the manner heretofore set out. Certainly, if the General Assembly had intended to permit the removal of gas and oil from the lands underlying the lake, it might very easily have inserted the specific words in the statute. Reference to the General Code reveals three specific instances where authorization is given to state officials to execute leases for the removal of gas and oil, and in each case the statute granting such authority does so in specific terms.

Section 154-57a, General Code, provides:

> "The director of public welfare is hereby authorized and empowered to lease for oil and gas any real estate, or part or parts thereof owned by the state of Ohio and placed under the supervision of the department of public welfare, to any person, persons, partnership or corporation, upon such terms and for such number of years, not more than ten, as will be for the best interest of the state * * *."

Similarly, in section 3209-1, General Code, it is provided:

> "The auditor of state is hereby authorized to lease for oil, gas, coal, or other minerals, any unsold portions of section six-

> teen and section twenty-nine, or other lands granted in lieu thereof, of the original surveyed townships, for the support of schools and religion, to any person, persons, partnership or corporation, upon such terms and for such time as will be for the best interest of the beneficiaries thereof * * *."

Again, in section 13970, General Code, the following language is found:

> "* * * The said commission, the board of public works and the chief engineer of the public works may also lease to any person, natural or artificial, for the following purposes, any tract of land or part thereof, owned by this state, and the berm bank and outer slope of the towing path embankment along any of the canals, basins and reservoirs and the land within any of said basins and reservoirs owned by this state, for the purpose of drilling therein for oil, and gas to be conveyed or transported therefrom."

Here, in apt language and in express terms, the Genueral Assembly has authorized the drilling of wells for gas and oil. From this it certainly would seem logical to say that if that body had in the instant case intended to permit the removal of gas and oil, it would, as it did on three other occasions, clearly have said so.

While I am of the opinion that the conclusion reached by me is amply supported by what has heretofore been said and accordingly deem it unnecessary to give any further consideration to your question, attention might nevertheless be invited to the fact that the statute provides for the removal of sand, gravel, etc., from the *bottom* of Lake Erie.

The word "bottom," when used in connection with bodies of water, is defined in Webster's New International Dictionary, 2nd Edition, as "the bed of a body of water, as of a river, lake or sea." Said work defines the bed of a watercourse or a body of water, as the "surface serving as a base."

Therefore, since oil and gas, if present in the subaqueous lands of Lake Erie would be minerals underlying such surface, it seems to me that it might tenably be argued that the taking and removal thereof would not be from the "bottom" of the lake but from the underlying strata thereof.

In light of the above and without further prolonging this discussion, you are advised that in my opinion the Superintendent of Public Works is without authority in law to issue permits to drill wells into the bed of Lake Erie for the purpose of taking gas or oil from the underlying strata.

Respectfully,

HUGH S. JENKINS

Attorney General