

6119.

EMINENT DOMAIN—PRESIDENT AND TRUSTEES OF OHIO UNIVERSITY DO NOT HAVE THIS POWER—DEPARTMENT OF PUBLIC WORKS IS VESTED WITH POWER TO CONDEMN LAND FOR STATE PURPOSES.

SYLLABUS:

(1) *The statutes of Ohio do not confer upon "The President and Trustees of the Ohio University" the power of eminent domain—Annual Report of the Attorney General, 1913, Volume II, page 1023, followed.*

(2) *Under and by virtue of the provisions of Section 154-40, clause 5, of the General Code of Ohio, the Department of Public Works of the State of Ohio is vested with the power to procure necessary lands by condemnation or otherwise, for the uses and purposes of institutions of the State of Ohio, including Ohio University.*

COLUMBUS, OHIO, September 26, 1936.

DR. HERMAN G. JAMES, *President, The Ohio University, Athens, Ohio.*

DEAR DR. JAMES: This is to acknowledge your communication, wherein you inquire as to when and under what circumstances Ohio University may exercise the right of eminent domain.

The power of eminent domain is the power of a sovereign state to take or to authorize the taking of private property for public use, without the owner's consent. It is an extraordinary power inherent in every government, and is in fact said to be an inseparable incident of sovereignty vital to the public welfare of every self-governing community. This power inherently possessed by both the federal and state governments within their respective spheres, may be delegated to subordinate agencies. Such delegation may be done only by statute, and in express terms or by necessary implication. See Ohio Jurisprudence, Volume 15, page 689, et seq. I have found no statute which in my opinion extends the power of eminent domain to "The Ohio University" or to "The President and Trustees of the Ohio University."

Ohio University was established by Act of the Legislature of Ohio in 1804 (2 O. L., 193). By the terms of Section 2 of the act there was created within the university an agency styled, "The President and Trustees of the Ohio University." This agency was by the terms of the act endowed with corporate existence and constituted a body politic and corporate. Mere corporate existence does not include the power of eminent domain. That power must be conferred, if conferred at all, on corporations both public and private, by express statutory enactment or by lan-

guage incorporated in the statute which by necessary implication confers the power. In Section 10 of the act establishing Ohio University and creating the corporate entity known as "The President and Trustees of the Ohio University," it is provided:

"Said corporation shall be capable of having, holding and taking, in fee simple, or any less estate, by gift, grant, devise or otherwise, any lands or other estate, real or personal."

It is well settled in this state, as elsewhere, that statutes conferring powers upon corporations are to be strictly construed, and especially those which are claimed to have conferred the extraordinary prerogative of taking private property for public use, without the owner's consent, known as the right of eminent domain. Many authorities might be cited in support of this doctrine. See Volume 15, Ohio Jurisprudence, pages 704 and 705; Corpus Juris, Volume 20, pages 533 and 534. In both these texts many cases are cited to the effect that the delegation of the power of eminent domain by statute should not be gathered from doubtful inference and that it should be unmistakably expressed. It being a power in derogation of common right the acts conferring it or pretending to confer it should be strictly construed, and all doubts resolved in favor of the land-owners whose lands are sought to be taken. As illustrative of this principle, reference may be made to an early case decided by the Supreme Court of Ohio, which case has been cited with approval in many later cases; *Currier v. Cincinnati R. R. Co.*, 11 Ohio State, 231. In this case the court said:

"That grants of corporate power, being in derogation of common right are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the state itself, and interfering most seriously and often vexatiously with the ordinary rights of property."

See also:

Miami Coal Company v. Wighton, 19 O. S., 560; *Railway Co. v. South, et al.*, 78 O. S., 12; *Rockport v. R. R. Co.*, 85 O. S., 86; *Cincinnati v. R. R. Co.*, 88 O. S., 296; *Cemetery Association v. Traction Co.*, 93 O. S., 164; *Pontiac Co. v. Commissioners*, 104 O. S., 454.

Upon consideration of the foregoing authorities, I am of the opinion that the power of eminent domain is not possessed by "The Ohio Univer-

sity" or by "The President and Trustees of the Ohio University." This conclusion is supported by an opinion of a former Attorney General in an opinion found in the Annual Report of the Attorney General for 1913, Volume II, page 1023, where it is held:

"The board of trustees of the Ohio University have no right under the statutes of Ohio to appropriate private property by condemnation proceedings for the needs of the university or of the state normal college."

In Section 154-40, General Code, it is provided:

"The department of public works shall have all powers and perform all duties vested by law in the superintendent of public works and the state building commission. Wherever powers are conferred or duties imposed upon any such department, offices or officers, such powers and duties shall, except as herein provided, be construed as vested in the department of public works.

In addition to the powers so transferred to it, the department of public works shall have the following powers:

* * * * *

(5) To purchase all real estate required by the state government, or any department, office or institution thereof: in the exercise of which power such department shall have authority to exercise the power of eminent domain, in the manner provided by law for the exercise of such power by the superintendent of public works in the appropriation of property for the public works of Ohio, as heretofore defined."

It will be observed from the foregoing statute that the Department of Public Works is empowered to purchase all real estate required by the state government, or any department, office or institution thereof, and that the said department may exercise the power of eminent domain for the procurement of any such real estate.

Looking to the history of Ohio University, and especially in view of its present status and the present existing laws relating thereto, I am of the opinion that it is an "institution" of the State of Ohio within the meaning of the term as used in the above statute. Under present laws it is governed by a board of trustees appointed by the Governor of Ohio, with the advice of the Senate, the Director of Education of the State of Ohio being ex officio a member of the said Board with the power to speak but not to vote. The University is financed and maintained in large part with funds provided and appropriated by the Legislature of

Ohio, and is subject, to a great extent, to laws enacted by the Legislature relative to institutions of learning.

In the event the University should require lands for its purpose and an amicable arrangement cannot be made with the owner for the purchase of said lands, the same may, in my opinion, be appropriated for the uses and purposes of the university by the Department of Public Works of the State of Ohio, in pursuance of the provisions of Section 154-40, Clause 5, of the General Code of Ohio, quoted above.

Very truly yours,

JOHN W. BRICKER,
Attorney General.

6120.

COUNTY AUDITOR—MANDATORY DUTY OF AUDITOR TO MARK "TRANSFERRED" ON DEED GIVEN BY ADMINISTRATOR DISCUSSED — IMMATERIAL WHETHER COUNTY SURVEYOR HAS CHECKED AND APPROVED DESCRIPTION.

SYLLABUS:

When a holder of a deed for real estate, which has been legally purchased from an administrator or executor of an estate, through the probate court under procedure set forth in Sections 10510-2 et seq., General Code, makes application to the county auditor of the county in which the real estate is situated, for transfer of such real estate by said deed properly describing such real estate, and presents therewith the deed and order of the probate court, for the execution of such deed, it is the mandatory duty of the said county auditor to endorse on such deed "transferred", pursuant to Sections 2573 and 2768, General Code, and the county auditor may not refuse to make such transfer for the reason that the county surveyor has not checked and approved the description of the property contained in such deed.

COLUMBUS, OHIO, September 26, 1936.

HON. J. S. HARE, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR: This acknowledges receipt of your communication which reads as follows:

"In the case of William Ely, deceased, pending in the Probate Court of this county, an order was secured to sell 93 acres of land to pay debts of the deceased. The description of the