

five (25) links west of the northeast corner of 8 acre Lot No. 1168, Section 23, Town. 3, of Range 14, in the Ohio Company's Purchase, thence south 35 degrees east, 6 chains and 56 links to the northwest side of Chestnut Avenue in Maple Shade; thence west with said line south 55 degrees west, 16 chains and 82 links to the east line of the Gallia County Fair Ground Company's land; thence with said line north 11 chains and 50 links; thence south 69 degrees east, one (1) chain and 90 links; thence north 36 degrees east, one (1) chain and 90 links; thence north 52 degrees east, one (1) chain and 90 links; thence north 39 degrees east, 2 chains and 37 links; thence east 4 chains and 47 links to the place of beginning, containing 11 and 39/100 acres, more or less, and being in eight acre lots Nos. 1160, 1168, 1169, 1177 and 1178, in said township and section, and being all of said lots owned by grantors lying north and west of said railway right-of-way."

An examination of the corrected abstract of title submitted shows that said Naaman R. Canaday, Jr., has a good merchantable fee simple title to the property here in question, free and clear of all encumbrances except as to such taxes as may be unpaid and a lien upon the larger tract of which the one acre here under investigation is a part. The abstract of title submitted does not indicate whether any of the taxes on this property are unpaid. This matter, of course, should be investigated before the transaction relating to the purchase of this property is closed; although as to this I am quite sure that you are fully protected by the warranty deed which has been tendered by said Naaman R. Canaday, Jr.

An examination of said warranty deed shows that the same has been signed and otherwise properly executed and acknowledged by said Naaman R. Canaday, Jr., and Anna Canaday, his wife, and said deed is in form sufficient to convey to the State of Ohio a fee simple title to the property here under investigation, free and clear of all encumbrances whatsoever.

Encumbrance estimate No. 5360, above referred to, has been properly executed and the same shows that there is a sufficient balance in the proper appropriation account to pay the purchase price of the property here in question. It is also noted that the money necessary to pay the purchase price of this property has been released for the purpose of the controlling board as appears by certificate under date of November 4, 1929.

Said abstract of title, warranty deed and other files above referred to, are accordingly approved and returned to you.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1511.

APPROVAL, LEASE TO OHIO CANAL LAND IN CUYAHOGA COUNTY
AND LEASE FOR RIGHT TO TAKE WATER FROM SAME CANAL—
AMERICAN STEEL & WIRE COMPANY.

COLUMBUS, OHIO, February 10, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—There has been submitted for my examination and approval a

certain lease in triplicate executed by Hon. R. T. Wisda, your predecessor in office, by which there is leased and demised to The American Steel & Wire Company, a portion of the north division of the Ohio Canal between Station 777 and Station 72+85.6 of G. F. Silliman's survey of the Ohio Canal south of the city of Cleveland, together with the right to take from the portion of the canal so leased, such amount of surplus water therein as may be needed by said company for power and other purposes in the operation of the mills and plant of said company which are located near said canal.

The lease of the canal lands between the above designated points is for a term of fifteen years from the first day of May, 1930, with an option to said company to renew said canal land lease for an additional period of ten years, or for such other period of time as may be permitted by law. The lease to said company of the right to take from said canal surplus water that may be needed by said company for power and other purposes in the operation of its mills, is for the stated term of twenty-five years from the first day of May, 1930.

The lease of both said canal lands and of the surplus water therein, is in consideration of an annual aggregate rental of ten thousand dollars, of which annual rental three thousand dollars thereof is for the canal land, being six per cent of the sum of fifty thousand dollars, which is the appraised value of said canal lands as found by the Superintendent of Public Works and stated in said lease, and the further contract and agreement which are made a part of said lease, that said company is to take the canal as it finds it, and devices connected therewith, and thereafter maintain the same in good condition for canal and hydraulic purposes during the life of said lease, during which time said company is required to maintain a sufficient head of water in the canal to meet its own requirements, as well as those of other lessees of the state under existing contract, and to continue such supply during the time of renewals of such other leases up to the date of the expiration of the lease here in question.

In addition to the stated annual rental and other considerations for said lease above stated, this lease provides that certain lands aggregating in amount approximately twenty-six acres which are necessary for the deposit of dredging of the canal and for the location of a future spillway, are to be conveyed by said company to the state.

There can be no doubt as to the authority of the Superintendent of Public Works to execute leases of this kind on behalf of the state, and I can see no fundamental objection to the action of the Superintendent of Public Works in including a lease of canal lands and a lease of surplus water therein in one and the same instrument, such as that here presented.

In considering the legal questions presented by the provisions of this lease, it may be noted that there is no legal authority for the provision in said lease which gives to The American Steel & Wire Company an option to renew the canal land lease for a period of ten years after the expiration of the fifteen year period therein provided for. As I view the question, this provision is simply inoperative and void for want of authority upon the part of the Superintendent of Public Works to grant such option and said provision does not in any wise affect the other provisions of the lease.

The only legal question of any consequence arising from the consideration of the provisions of this lease and the recitals therein contained, emerges from the fact that this lease of canal lands and surplus water therein is executed for the purpose of superseding an existing lease made and entered into by and between the State of Ohio and The American Steel & Wire Company, executed by the Director of Highways and Public Works under date of January 17, 1922, by which the canal lands here in question and the right to use surplus water therein, were

leased to said company; which lease as to the use of surplus water in said canal was for a period of nineteen years and six months from said date, and as to said canal lands was for a period of fifteen years from said date with an option in said company of the right to take an additional lease of said canal lands for a period of four years and six months. The aggregate annual rental provided for in said lease is fifteen thousand dollars of which three thousand dollars is for the canal lands covered by said lease, and twelve thousand dollars is for the right to take and use surplus water out of the canal.

Said existing lease, which as above noted, was executed on January 17, 1922, was executed for the purpose of superseding two then existing leases held by The American Steel & Wire Company, one being a canal land lease effective for a period of fifteen years from February 3, 1916, and the other being a lease of the right to take and use the surplus water in said canal for a period of twenty-five years from the first day of May, 1916. The existing combined land and water lease now held by the American Steel & Wire Company, above referred to, was approved by this office in an opinion directed to the Director of Highways and Public Works under date of January 21, 1922, Opinions of the Attorney General for 1922, Vol. I, page 29.

With respect to the power and authority of the Superintendent of Public Works to execute a canal land or surplus water lease which has the effect of superseding an existing canal land or surplus water lease by the lessee, it is quite clear that this question was presented to the then Attorney General when he was called upon to examine and approve the present existing canal land and surplus water lease now held by said company. There is nothing in the opinion of my predecessor above referred to, which is at all helpful in the consideration of the questions at hand other than the fact that it appears from said opinion that the sections of the General Code touching the authority of the Superintendent of Public Works, as director thereof, to execute leases of this kind were before him for consideration. In said opinion it is said:

"I have carefully examined the lease with special reference to Sections 431, 13965 and following and 14009 and following, of the General Code. I find said lease correct in form and legal and I am therefore returning it with my approval endorsed thereon."

I do not find any difficulty in approving the lease here in question so far as the same provides for the lease and demise of the canal lands therein described, notwithstanding the fact that said canal lands are covered by an existing lease held by The American Steel & Wire Company which has a number of years yet to run before its expiration. As to this, Section 13965, General Code, the provisions of which have been amended by the Legislature from time to time since the original enactment in 1888, provides that any owner of an existing lease for state canal lands may surrender the same to the state in order to have the land described therein included in a new lease which shall not be for a greater term than fifteen years, and the application therefor shall definitely set forth the reasons why an extension of the lease is desired, but that before granting a new lease for such state canal lands, the Superintendent of Public Works must be satisfied that the extension of the lease is for the purpose of making valuable improvements thereon, which the lessee could not otherwise afford to make for the remaining portion of the unexpired lease. This section further provides that when a new lease, which shall not be for a less rental than the original lease, has been granted and approved by the Governor and Attorney General, the Superintendent of Public Works shall cancel the original lease.

I do not have before me the application of The American Steel & Wire Company for the lease here in question, but I assume that it was in such form as is required by law. In said lease, however, there is a recital that The American Steel & Wire Company, the named lessee therein, "proposes to build a concrete spillway and to make other valuable improvements on the canal, which the Superintendent of Public Works is satisfied it cannot afford to make for the remaining portions of the aforesaid unexpired leases."

I am inclined to view that this finding of the Superintendent of Public Works is conclusive with respect to the application of the provisions of Section 13965 of the General Code, and that inasmuch as the new lease does not call for any decrease in the annual rental of the canal lands covered thereby, the lease here in question should be approved so far as the lease and demise of the above described canal lands are concerned.

The lease here in question presents a question somewhat more difficult in so far as it operates as a lease and grant to said company of the right to take and use surplus water from said canal, in view of the fact that the existing lease now held by said company gives to it this same right for a number of years yet to come.

The power and authority of the Superintendent of Public Works to lease surplus water in the canals of the state are conferred upon said officer by Sections 14009 and 431 of the General Code. Section 14009, General Code, provides that whenever, in the opinion of the Superintendent of Public Works there shall be any surplus water in any of the state canals, or in any of the feeders, or reservoirs, over and above the quantity of water which may be required for the purpose of navigation, said Superintendent of Public Works may sell or lease the right to use such surplus water for hydraulic or other purposes for any term not exceeding twenty-five years for a certain annual rental, or otherwise as he may deem most beneficial for the interests of the state, subject to such conditions, reservations and restrictions as he may deem necessary and proper. There is nothing in the provisions of this section which in terms authorizes the Superintendent of Public Works to change or modify an existing surplus water lease executed by him, or to execute a new lease for the purpose of superseding and cancelling an existing lease of the kind which by its terms will be in operation during a part of the time covered by the new lease.

Section 431, General Code, the provisions of which were first enacted in 1878 and which were enacted by way of amendment by an act of the Legislature passed in 1913, provides as follows:

"The Superintendent of Public Works may lease surplus water power on any of the public works, under such rules and regulations as may be prescribed by him. The superintendent of public works shall examine all leases from time to time and adjust and fix the amount of rent due and unpaid as may be deemed just, and cancel existing leases with the consent of the lessees, or when they have become forfeited. If rents are in arrears for thirty days or more, or if the lessee fails to put in gauges, weirs or other structures, as is required by the lease, the Superintendent of Public Works may shut off the water until such rent is paid, or gauges, weirs or other structures are established, or cancel the lease."

The provisions of Section 432, General Code, likewise have some application to the question at hand. This section provides as follows:

"Within thirty days from the making of a new lease of water power

or the renewal or modification of an old lease, the president of the board of public works shall furnish the Auditor of State an attested copy thereof. Within the time so prescribed such president shall also furnish an attested copy of such lease, renewal or modification to the collector of tolls required to collect rents therein provided for."

Assuming that the provisions of Section 431 and 432 of the General Code above quoted, have application to leases of the kind here in question, that is to leases of surplus water in the canal for power and other industrial uses, and giving to the provisions of these sections such construction as will make them practically effective and workable, it would seem that the provisions of these sections authorize the Superintendent of Public Works to cancel an existing surplus water lease of this kind by and with the consent of the lessee, or to modify the terms of such lease with the consent of such lessee.

If the Superintendent of Public Works has authority to cancel an existing lease of this kind, with the consent of the lessee, **he has, of course, authority** to enter into a new lease covering the subject matter upon such terms as may be agreed upon between him and such lessee not inconsistent with existing statutory provisions relating to leases of this kind.

Though not so expressed, my predecessor in approving the lease now held by The American Steel & Wire Company, must have held that the provisions of Sections 431 and 432, General Code, were applicable in the consideration of this feature of said lease, and that the same authorized the execution of said lease in so far as it pertains to the matter of surplus canal water, notwithstanding the fact that this was provided for by a then existing lease held by said company which had many years yet to run before its expiration.

Giving a practical construction of Sections 431 and 432, above quoted, and likewise giving effect to administrative interpretations of this office and of your department in their application to the question at hand, I am inclined to the view that they authorize the execution of the lease here in question in so far as the same pertains to the right of said lessee company to take and use surplus canal water for the term therein provided for, although such right is now accorded to it by an existing lease which it holds.

As above noted, the lease here in question calls for an aggregate annual rental of ten thousand dollars, of which the sum of three thousand dollars represents the rent to be paid for the canal land and seven thousand dollars represents the rental for the use of surplus water out of said canal. As likewise noted above, the annual rental reserved in this lease is net, inasmuch as by the terms of the lease the lessee company is required to maintain said canal and keep the same in repair for the purposes of the lease. In fixing the aggregate annual rental to be paid by the lessee company, the Superintendent of Public Works was bound by the provisions of the former lease so far as the rental of the canal lands was concerned and the question of the reasonableness of the rental fixed by him for the right of said lessee company to take and use surplus canal water, was doubtless a matter that depended upon a number of different factors and considerations which were in the mind of the Superintendent of Public Works at the time of the execution of this lease. As to this it is sufficient for me to say that I do not deem it to be any part of the functions of my office to determine the reasonableness or fairness of the annual rental reserved by the terms of this lease either as to said canal lands or as to the water to be taken therefrom, or to determine any other matter which relates to policy or advisability of executing the lease; and that the provisions of Sections 13965 and 14009, General Code, relating to the powers and duties of the Attorney General with respect to leases of this kind

should be construed as limiting the authority and power of the Attorney General to matters of law in the approval or disapproval of leases of this kind.

Said lease is herewith returned with my approval as to legality and form endorsed thereon and upon the duplicate and triplicate copies thereof.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1512.

APPROVAL, BONDS OF URBANA CITY SCHOOL DISTRICT, CHAMPAIGN COUNTY—\$75,000.00.

COLUMBUS, OHIO, February 10, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1513.

CORPORATION—LOANING MONEY UNDER SPECIFIC PLAN—HELD TO BE BUSINESS OF MAKING LOANS ON INDORSED NOTES AT INTEREST RATE EXCEEDING 8% PER ANNUM—LICENSE FOR EACH BRANCH OFFICE REQUIRED.

SYLLABUS:

When a corporation is engaged in the business of making loans under a plan whereby the borrower is made the payee of a \$100.00 note executed by two third parties which note is sold to such corporation for \$90.00 and is payable \$10.00 per month at the office of the corporation under agreement whereby there is a rebate of \$2.12 at the time of the last payment, such corporation is engaged in the business of making loans on indorsed notes at a charge or rate of interest in excess of eight per cent per annum as provided in Section 6346-1, General Code, and should be licensed as provided in Sections 6346-2 and 6346-3, General Code.

COLUMBUS, OHIO, February 10, 1930.

HON. ED. D. SCHORR, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“Your opinion in the following matter is respectfully requested:

XY, a corporation, has four offices, one of which is operating under the Chattel Loan Law and is licensed by the Division of Securities. All four offices make loans in the following manner:

A note is drawn to the order of John Doe, payable at the office of the XY Corporation in any amount agreed upon. The note is then signed