

1414.

## APPROVAL, BONDS OF FRANKLIN COUNTY—\$108,110.00.

COLUMBUS, OHIO, January 14, 1930.

*Industrial Commission of Ohio, Columbus, Ohio.*

1415.

## ABANDONED CANAL LANDS—GRANTED ORIGINALLY TO A MUNICIPALITY WITH REVERTER PROVISION—HOW STATE MAY RE-GAIN TITLE.

## SYLLABUS:

*Where by an act of the Legislature, abandoned canal lands of the state, within the corporate limits of a municipality, are granted to such municipality on the condition that it occupy and use such lands for street, sewerage and water purposes, with a further provision that if such lands are not occupied and used by the municipality for said purposes within a period of ten years from the date of said grant such lands shall revert to the state, the state may repossess itself of said lands either by judicial proceedings or by legislative act declaring a forfeiture of the rights of the municipal corporation in such canal lands by reason of the breach of the condition upon which the conveyance to the municipality was made; or the state may assert its right and title to such lands by selling or leasing the same through the Superintendent of Public Works pursuant to the specific authority of an act of the Legislature enacted for the purpose.*

COLUMBUS, OHIO, January 15, 1930.

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

DEAR SIR:—This is to acknowledge receipt of your recent communication, which reads as follows:

“The eighty-third General Assembly of Ohio, in 1919, abandoned for canal purposes that portion of the Hocking Canal within the corporate limits of the city of Nelsonville, Ohio (O. L. 108, page 691, Sec. 1) (14152-10), Page’s Annotated General Code.

Section 2 (14152-11) granted to the said city of Nelsonville authority and permission to enter upon, improve and occupy forever, as a public highway and for sewerage and water purposes, that portion of the Hocking Canal situate within the corporate limits of said city.

Provided, however, said city shall have the right to dispose of the width of any portion of the canal in excess of sixty feet, the street to be defined by straight lines as nearly as possible, and that no portion of the canal property in the sixty feet reserved for street purposes herein described shall ever be used for any purpose or purposes other than for streets and avenues, parking purposes, sewerage and water purposes, and provided further that any portion of the said abandoned canal property that is not so occupied and used at the end of ten years from the date of the passage of this act, shall

immediately revert to the state of Ohio; and provided further that if at any time the state of Ohio shall have an opportunity to lease a right-of-way over the abandoned Hocking Canal property between Lancaster and Nelsonville, it may include a right-of-way over the canal property herein conveyed, even though the same is improved as a street or highway.

Section 3 (14152-12), That whatever title and interest remains to the state of Ohio in that part of the Hocking Canal vacated and abandoned by Section 1 of this act, G. C., Section 1 (14152-10), are hereby relinquished and transferred to said city of Nelsonville.

As a matter of fact, the city of Nelsonville never needed this canal strip for street purposes, for the reason that it is paralleled on its northerly side by Fayette and Chestnut streets, the latter being an extension of the former.

These streets, most of the distance, are from one hundred (100) to one hundred and twenty (120) feet distant from the canal property, while the south line of the canal is about an equal distance from Myers and Jackson streets, the latter being an extension of the former.

The entire distance between the streets on opposite sides of the canal is approximately two hundred and forty (240) feet, a distance too short to require the building of an expensive additional street between them.

It may be that the city of Nelsonville could use a right of way over a portion of the canal property for sewerage purposes, but it never intended building a paved highway or street over it.

The bill, as originally drafted, was intended as an outright grant to the city to do as it saw fit for the benefit of said city of Nelsonville; but the General Assembly amended the bill so that at the end of ten years any portion of the same not occupied by streets, avenues, etc., should immediately revert to the state of Ohio.

The question has been raised, as to whether or not Section 3 (14152-12) of the act did not convey the absolute title to the canal property described in said act.

We are having many inquiries from adjacent lot owners wanting to purchase or lease the canal lands abutting their property.

The canal property involved is worth between \$40,000.00 and \$50,000.00, but before taking any action on these applications, I would be glad to have you render an opinion as to whether or not the state of Ohio, by the expiration of the ten year limit, has again become vested with the title to this abandoned canal property."

You have set out in your communication the provisions of the act of May 8, 1919 (108 O. L., Part I, p. 691), relating to the questions here presented, and the provisions of said act which have been carried into the appendix to the General Code as Sections 14152-10 to 14152-12, inclusive, will not be restated herein.

The property here in question was a part of the canal system of the state, and, as such, the same was owned and held by the state by fee simple title regardless of the manner in which said lands were acquired by the state for said purpose; and said fee simple title of the state to said lands was not affected by the abandonment of the same for canal purposes, but said lands remained the property of the state until the same were relinquished by or under authority of an act of the Legislature. *State of Ohio ex rel. vs. Railway Company*, 53 O. S. 189, 243; *State of Ohio vs. Snook et al.*, 53 O. S. 521; *Malone vs. City of Toledo*, 34 O. S. 541; *State ex rel. vs. Cincinnati Central Railway Company*, 37 O. S. 157.

This brings us to a consideration of the act of the Legislature referred to in your communication. This act by the first section thereof provides for the abandonment for canal purposes of that portion of the Hocking Canal situated within the

corporate limits of the city of Nelsonville, Athens County, Ohio. Section 3 of said act provides that whatever title and interest remains in the state of Ohio in that part of the Hocking Canal vacated and abandoned by Section 1 of said act are relinquished and transferred to said city of Nelsonville. The provisions of Section 2 of said act are quite inconsistent with those of Section 3 of the act, above noted, and provides that there is granted to the city of Nelsonville the authority and permission to enter upon, improve and to forever occupy as a public highway and for sewerage and water purposes that portion of the Hocking Canal situated within the corporate limits of said city, with the proviso that said city shall have the right to dispose of such part of the width of any portion of the canal within its limits in excess of sixty feet, and that no portion of the canal property in the sixty feet reserved for street purposes shall ever be used for any purpose or purposes other than for streets and avenues, parking purposes, sewerage and water purposes. This section contains the further condition, stated therein by way of proviso, that any portion of said abandoned canal property that is not occupied and used for the purposes mentioned in said section at the end of ten years from the date of the passage of said act, shall immediately revert to the state of Ohio.

The provisions of Section 3 of said act relinquishing and transferring to the city of Nelsonville the title and interest of the state in that part of the Hocking Canal situated within the corporate limits of said city and abandoned for canal purposes by Section 1 of said act, are somewhat unusual in that they purport to relinquish and transfer such title and interest of the state in and to said abandoned canal lands direct and not through the medium of a deed to be executed by the governor pursuant to the authority and direction of the act. See *State of Ohio vs. Railway Company and Hubbard vs. City of Toledo*, *supra*; *Cleveland Terminal & Valley Railroad Company vs. State ex rel.*, 85 O. S. 251. However, I know of no constitutional limitation upon the power of the Legislature to dispose of property of the state in this manner. Under Section 1 of Article II of the state constitution the legislative power of the state is vested in the General Assembly, subject to the power reserved to the people. Speaking of this constitutional provision, the Supreme Court of the state in the case of *Baker vs. City of Cincinnati*, 11 O. S. 534, 542, said :

“It will be observed, that the provision is not, that the legislative power, as conferred in the constitution, shall be vested in the General Assembly, but that the legislative power of this state shall be vested. That includes all legislative power which the object and purposes of the state government may require, and we must look to other provisions of the constitution to see how far, and to what extent, legislative discretion is qualified or restricted.”

In the case of *Williams vs. Scudder*, 102 O. S. 305, the court in its opinion said :

“The legislative power of the state, which is here called in question, is limited only by the constitution of the state and the constitution of the nation; and before any legislative power, as expressed in a statute, can be held invalid, it must appear that such power is clearly denied by some constitutional provision.”

With respect to the power of a state to acquire and dispose of property, the rule is stated in 36 Cyc., at page 869, as follows :

“A state has in general the same rights and powers in respect to property as an individual. It may acquire property, real or personal, by conveyance, will, or otherwise, and hold or dispose of the same or apply it to any purpose,

public or private, as it sees fit. The power of the state with respect to its property rights is vested in the legislature, and the legislature alone can exercise all power necessary to the enjoyment and protection of those rights by the enactment of statutes for that purpose."

It appears from your communication that the city of Nelsonville has not availed itself of the provisions of said act for any of the purposes mentioned in Section 2 thereof, and the question here presented is whether by reason of this fact the state has again become vested with the title to the abandoned canal lands referred to in said act. The question stated in your communication calls for a consideration of the further question as to the nature of the title and interest in this property taken by the city of Nelsonville under the provisions of this act and the effect of the failure of the city of Nelsonville to occupy and use said lands for the purposes mentioned and provided for in said act. In the consideration of the question as to the nature of the title and interest taken by the city of Nelsonville, under the provisions of the act of the Legislature above noted, recognition must be given to the rule that grants made by the state are not to be extended by construction; and that where a statute operates as a grant of public property, or the relinquishment of a public interest, and there is any doubt as to the meaning of its terms or as to its general purpose and effect, that construction should be adopted which will support the interest of the state. *State of Ohio vs. Railway Company*, supra; *Slidell vs. Grandjean*, 111 U. S. 412, 437. In this view the act of the Legislature here in question should be read as a whole, and although under the provisions of Section 3 of said act the title and interest of the state in and to said abandoned canal lands passed to and became vested in the city of Nelsonville, such relinquishment and transfer of title to said city was subject to the condition that the city would occupy and use this property in the manner and for the purposes mentioned and provided for by Section 2 of said act, and upon its failure to do so the title to this property should revert to the state of Ohio. In other words, the effect of this act was to transfer this property to the city of Nelsonville, subject to the operation of a condition subsequent. With respect to the effect of the failure of the city of Nelsonville to comply with such condition subsequent, some concession must, perhaps, be made to the rule stated and applied in the case of *Cleveland Terminal & Valley Railway Company vs. State ex rel.*, supra, that in conducting transactions with respect to its lands the state acts in a proprietary and not in a sovereign capacity, and is amenable to all the rules of justice which it prescribes for the conduct of its citizens in like situation.

The general rule applicable with respect to the effect of the failure of a grantee to comply with a condition subsequent, including a reverter clause contained in a deed of conveyance to such grantee, is stated in Thompson on Real Property, Vol. 3, Section 2065, as follows:

"The title to land conveyed upon a condition subsequent vests in the grantee, and his failure to perform the condition does not divest the title. The title is divested only upon the entry of the grantor or his heirs for the condition broken, or by a suit for the recovery of possession, or other act equivalent to an entry. The possibility of reverter merely is not an estate in land, and until the contingency of the condition happens the whole title is in the grantee, and the grantor has nothing he can convey. Non-performance of the condition, or a breach of it, does not of itself determine the grantee's estate, though it is provided that upon breach the estate shall be void, or shall revert to the grantor."

Among the array of decided cases supporting the rule above quoted are those of *Field vs. Lake Shore & Michigan Southern Railway Company*, 3 N. P. (N. S.) 130,

62 O. S. 633; *Eciter vs. Pennsylvania Company*, 21 N. P. (N. S.) 58. The grant here in question, however, was one by the state of Ohio, and with respect to the effect of the breach by the city of Nelsonville of the condition subsequent contained in said grant above referred to, the following rule, as stated in the leading case of *Schulenberg vs. Harriman*, 21 Wall (U. S.) 44, is noted:

"If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office-found was necessary to determine the estate, but, as said by this court in a late case, the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings."

In the case of *Schlessinger vs. The Kansas City & Southern Railway Company*, 152 U. S. 444, 453, the court said:

"In the case of a public grant, the right of the government to repossess itself of the estate granted may be asserted through judicial proceedings, or by some legislative act showing an assertion of ownership on account of the breach of the condition upon which the original grant was made. But judicial proceedings to that end are not absolutely necessary, unless they are prescribed by the grant itself; for where land and franchises are held upon conditions to be subsequently performed, any public assertion by legislative act of the ownership of the estate after default of the grantee—such as an act resuming control of them and appropriating them to particular uses or granting them to others to carry out the original object—will be equally effectual and operative."

After quoting from the opinion of the court in the case of *Schulenberg vs. Harriman*, supra, and citing later decisions of the Supreme Court of the United States touching this question, the Supreme Court of the State of Massachusetts in the case of *Treasurer and Receiver General vs. Revere Sugar Refinery Company*, 247 Mass. 483, 490, in its opinion said: "Where the Commonwealth is the grantor, it can take advantage of a breach of a condition subsequent only by judicial proceedings or by legislative declaration of forfeiture."

In your capacity as Superintendent of Public Works of the state, and as Director of said department of the state government, you have only such authority with respect to the canal lands and other property of the state as is given to you by statute. *State ex rel. vs. Cincinnati Central Railway Company*, 37 O. S. 157, 174.

There is no statutory provision which authorizes you or any other official of the state to enter in and upon the lands here in question and take possession of the same and thereby accomplish a reversion of the title to this property to the state of Ohio. However, under an act passed by the 88th General Assembly, April 5, 1929, and which went into effect on July 4, 1929, 113 O. L. 521, you as Superintendent of the Public Works of the state, and as director thereof, are authorized to lease and sell abandoned Hocking Canal lands in the counties of Fairfield, Hocking and Athens, subject to the approval of the Governor and the Attorney General.

Although the question is one inherently of some difficulty and is not free from

doubt, I am of the opinion that the sale or lease of the abandoned canal lands in the city of Nelsonville, here in question, under the authority of said act of the Legislature, would be an effective assertion of the rights of the state in and upon said lands for the purpose of again vesting title to the same in the state of Ohio.

And by way of answer to the question presented in your communication, I am of the opinion that the state may assert its rights under the condition subsequent by which this property was vested in the city of Nelsonville, and again invest itself with the title to the same by procuring in a court of competent jurisdiction a judgment or decree forfeiting the rights of the city of Nelsonville by reason of its violation of the provisions of said condition subsequent, by an act of the Legislature itself declaring such forfeiture, or by selling or leasing the property here in question under the authority of the act of the Legislature above referred to.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

1416.

APPROVAL, LEASE TO ABANDONED MIAMI AND ERIE CANAL LAND  
IN CONCORD TOWNSHIP, MIAMI COUNTY—TOLEDO AND CINCIN-  
NATI RAILROAD COMPANY.

COLUMBUS, OHIO, January 15, 1930.

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

DEAR SIR:—Some time ago your predecessor, Hon. R. T. Wisda, submitted for my examination and approval a certain lease in triplicate, executed by the State of Ohio, through the Superintendent of Public Works, by which there is leased and demised to The Toledo and Cincinnati Railroad Company for a term of ninety (90) years a certain parcel of abandoned Miami and Erie Canal land, located in Concord Township, Miami County, Ohio, which parcel is more particularly described as follows:

Beginning at a point in the westerly line of the lands of the Miami and Erie Canal, south 79 Deg. 34' west 77.0 feet from an iron pin at Station 8495+60.7 in the base line for said canal survey, and south 23 Deg. 29' east 89.5 feet from Station 3994+03.1 of The Toledo and Cincinnati Railroad; thence with said westerly line of said canal lands, the following thirteen courses:—North 3 Deg. 42' west 203.0 feet, North 0 Deg. 24' west 382.1 feet; North 8 Deg. 14' west 165.2 feet; North 11 Deg. 48' west 591.0 feet; North 12 Deg. 03' west 194.9 feet, North 17 Deg. 13' west, 393.5 feet, North 25 Deg. 28' west 310.6 feet, North 34 Deg. 05' west 269.6 feet, North 41 Deg. 49' west 340.2 feet; North 46 Deg. 47' west 820.4 feet, North 44 Deg. 24' west 373.1 feet, North 33 Deg. 47' west 264.4 feet, and North 27 Deg. 24' west 264.3 feet to a point which is North 81 Deg. 38' west, 75.9 feet from Station 4034+14.0 of said railroad and south 67 Deg. 52' west, 86.0 feet from an iron pin at Station 8449+67.4 in said base line; thence, intersecting said base line at Station 8451+64.8, south 47 Deg. 19' east 278.7 feet to the easterly line of said canal lands; thence with said easterly line of said canal lands, the following twelve courses:—South 33 Deg. 19' east, 247.4 feet, South 45 Deg. 15' east, 362.2 feet, south 47 Deg. 12' east 823.4 feet, South 40 Deg. 49' east, 351.2 feet, South 33 Deg. 28' east, 283.4 feet, South 25 Deg. 07' east, 323.3 feet, South 19 Deg. 33' east, 402.1 feet, South 13 Deg. 52' east, 201.4 feet, South 12