

966.

DISCUSSION, ADDENDUM TO LEASE OF MIAMI AND ERIE CANAL
AT GRAND RAPIDS, FOR HYDRAULIC PURPOSES.

COLUMBUS, OHIO, June 17, 1933.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a communication from your department in which inquiry is made as to the maximum amount of water under certain conditions which the Maumee Valley Electric Company or its successor in interest is authorized to take from the Miami and Erie Canal at a point about a half mile north of the Grand Rapids Dam in the Maumee River, for hydraulic power purposes in connection with the operation of a mill at or near this point.

Inasmuch as you conceive that the answer to this question depends upon the validity of a certain addendum executed by John I. Miller, the then Superintendent of Public Works, under date of July 30, 1915, to a certain lease theretofore on September 10, 1912, executed by the then Board of Public Works to one A. Pilliod, your more specific inquiry is with respect to the validity of such addendum or supplemental agreement by which such maximum was increased from that provided for in the Pilliod lease.

The Pilliod lease, above referred to, relates back to two water leases theretofore executed by the old Board of Public Works to one Peter Minor. The first of these leases executed under date of September 1, 1842, was executed to Minor by the Board of Public Works in consideration of the assignment to the Board of the rights that Minor had in a certain backwater pool which had been created or formed by a dam which Minor had constructed across the Miami River near the point in question, which back-water pool was thereafter used by the Board of Public Works as a feeder for the Miami and Erie Canal at this point. By this lease, Minor was given the right in perpetuity to take from the canal at this point for hydraulic power purposes water measured as to amount by the requirements of a certain specified number of millstones in the mill or mills operated by Minor at or near this point which is now in the village of Providence, Lucas County, Ohio.

It appearing that the Board of Public Works could not furnish to Minor the amount of water called for in this lease and at the same time maintain in the canal the level of water required for navigation, this lease was, as you state, modified by a new lease which was executed by the Board of Public Works to Minor under date of February 1, 1846, and which was accepted by Minor in the place of the former lease in consideration of the payment to him of a certain stated sum of money by the Board of Public Works.

This second lease, like the first, was in perpetuity and granted to Minor the right to take water from the Miami and Erie Canal at this point for hydraulic power purposes, and, as under the first lease, the amount of water that he was authorized to take was measured by that required to operate a certain number of millstones. Thus measured, however, the amount of such water was considerably less than that provided for in the first lease.

Both of the leases above referred to were executed by the then Board of Public Works under the authority conferred upon such Board by section 20 of an act of the 38th General Assembly passed March 23, 1840. 38 O. L. 87,

92. This section of the act here referred to provided that, whenever, in the opinion of the Board of Public Works, there was surplus water in the canals, or in the feeders, or at the dam erected for the purpose of supplying either of said canals with water, over and above the quantity of water which was required for the purpose of navigation, such officers might order such surplus water, or such part thereof as they might deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they might consider necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rent, or otherwise, as they might deem most beneficial for the interest of the state. Inasmuch as this Board of Public Works possessed no powers with respect to the state canals or the waters therein other than such as was expressly conferred upon the Board by law, or such as was necessarily implied from express powers granted to it, there is some question in my mind as to the authority of the Board of Public Works to execute these leases to Minor in perpetuity in consideration of the release assignment or release by him of rights which he theretofore had in the backwater pool in the Maumee River, above referred to. Under the earlier act of February 4, 1825, 23 O. L. 50, the Board of Canal Commissioners or Board of Public Works, as the case might be, had authority to acquire Minor's rights in the backwater pool in the Maumee River by purchase or by appropriation, and consistent with the provisions of section 20 of the act of March 23, 1840, above noted, I do not find in these statutory provisions any authority upon the part of such Board to acquire Minor's rights in the waters of the Maumee River by bartering away in perpetuity the state's rights in the waters of the canal at this point. It appears, however, that after the execution of the second lease above mentioned, Minor, acting under the authority conferred upon him by this lease and with the consent and approval of the Department of Public Works, took surplus water from the canal at this point for many years until this lease and Minor's rights thereunder passed to Pilliod. In this situation, I do not feel called upon to express any opinion upon the validity of the Minor leases.

Some time after Pilliod succeeded to Minor's rights under the second lease above referred to, to wit, on September 10, 1912, a new lease was executed by the then Board of Public Works to Pilliod, fixing the amount of surplus water which Pilliod was thereafter permitted to take from the Miami and Erie Canal at this point for hydraulic power purposes. By the provisions of this lease, the maximum amount of water which Pilliod was permitted to take for this purpose was fifteen thousand cubic feet per minute as long as water was flowing over the crest of the dam in the Maumee River and until the water level of the river fell to six inches below the crest of the dam, when the maximum amount of water that he was permitted to take was fixed at five thousand cubic feet per minute. This lease, like the former leases, did not provide for the payment of any rental for the use of such water, nor, by the provisions of this lease, was any lease term expressly provided for. However, there was a provision in the lease that Pilliod should have all the rights theretofore granted to Minor by the State of Ohio, except as amended in the lease to Pilliod. And it was undoubtedly the intention of the Board of Public Works, by this lease and agreement, to grant to Pilliod a right in perpetuity to take from the surplus waters of the canal the above stated quantities of water without the payment of any annual rental or other compensation therefor, except that which was the consideration for the preceding lease to Minor. In

this situation, it is obvious that every objection upon legal grounds that could have been made to the Minor lease might likewise be made to the Pilliod lease.

However, no question is made in your communication with respect to the validity of either of these leases and, assuming the validity of the Pilliod lease as originally executed by the Board of Public Works under date of September 10, 1912, I address myself to the only question upon which my opinion is requested, to wit, that with respect to the validity of the addendum of the Pilliod lease executed by the Superintendent of Public Works under date of July 30, 1915. As above noted, the Pilliod lease, as originally executed, provided that the maximum amount of water which Pilliod was permitted to take from the canal at this point when the water in the river fell six inches below the crest of the dam was five thousand cubic feet per minute. By this addendum, Pilliod, in this situation with respect to the level of the water in the river, was permitted to take eleven thousand cubic feet per minute for hydraulic power purposes. It is obvious that this addendum effected a modification of the contract embodied in the original Pilliod lease, and gave to Pilliod substantial rights in addition to those therein provided for. I am unable to see in this transaction any consideration either of benefit to the state or of detriment to Pilliod supporting this addendum and the supplemental agreement therein made by the Superintendent of Public Works as to the amount of water Pilliod was allowed to take from the canal under the circumstances therein provided for. It is a well recognized principle of law that a new consideration is required to support a modification or an alteration of a previous contract. *Thurston vs. Ludwig*, 6 O. S. 1; *Marshall vs. Ames*, 11 O. C. C. 369. I am of the opinion therefore that, assuming the validity of the original Pilliod lease, the addendum or supplemental agreement made by the Superintendent of Public Works, above referred to, was and is invalid.

In addressing myself to the question above noted, which is the only one which your communication presents for my consideration, I cannot forbear to note that, in view of the enactment of the so-called Tom Act, 112 O. L. 360, the question presented in your communication and the above discussion responsive thereto are to some extent moot and beside the point, so far as the right of the Maumee Valley Electric Company, as the successor of Pilliod, to now take water from this canal is concerned. By the act of the 87th General Assembly above referred to, a section of the Miami and Erie Canal in Lucas County, including that at the point here in question, was abandoned for both canal and hydraulic purposes. Under the ruling made by the Supreme Court of the United States in the case of *Kirk vs. Maumee Valley Electric Company*, 279 U. S. 797, it seems clear that whatever rights Pilliod or his successor in interest, the Maumee Valley Electric Company, had under this lease to take surplus water in the canal for hydraulic power purposes, the same ceased upon the abandonment of the canal for canal and hydraulic purposes. In the case of *Kirk vs. Maumee Valley Electric Company*, where the court had under consideration the effect of the enactment of the Tom Act, above referred to, upon the rights of the Maumee Valley Electric Company to take water from this canal given to it under a lease executed to its predecessor in interest under the act of March 23, 1840, the court in its opinion said:

"The paramount object of the state in constructing the canal was to effect navigable communication between Lake Erie and the Ohio river. See *State ex rel. Atty. Gen. vs. Cincinnati C. R. Co.* 37 Ohio St.

157. The use of the water for hydraulic purposes was only incidental and subordinate to the declared purpose of the state to promote navigation and was expressly made so by the Leasing Act of 1840, which limited all leases to the use of surplus water not required for purposes of navigation and provided for their abrogation whenever the use of the water for hydraulic purposes interfered with navigation. Leases of surplus water, granted under the Act of 1840 and similar in terms to those involved in the present litigation, have been repeatedly construed by the highest court of the state of Ohio, which has uniformly held that they were only incidental to the use and maintenance of the canal for purposes of navigation; that they imposed no obligation on the state to maintain the canal either for navigation or other purposes and when abandoned by the state the right of lessees to surplus water ceased. *Hubbard vs. Toledo* (1871) 21 Ohio St. 379; *Little Miami Elevator Co. vs. Cincinnati* (1876) 30 Ohio St. 629; *Fox vs. Cincinnati* (1878) 33 Ohio St. 492; *Vought vs. Columbus, H. V. & A. R. Co.* (1898) 58 Ohio St. 123, 161, 50 N. E. 442."

I am of the opinion therefore that neither the Maumee Valley Electric Company, as the successor in interest under the Pilliod lease, nor any other corporation or person claiming through or under it has now any legal right to take water from the Miami and Erie Canal at this point for hydraulic power purposes. What the disposition of your department may be with respect to the continued use of water from the canal for hydraulic power purposes at this place is, of course, a matter for your determination.

Respectfully,

JOHN W. BRICKER,
Attorney General.

967.

APPROVAL, BONDS OF VILLAGE OF WILLOUGHBY, LAKE COUNTY,
OHIO—\$3,400.00.

COLUMBUS, OHIO, June 17, 1933.

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

968.

STOCKHOLDER—LIQUIDATION OF BUILDING AND LOAN ASSOCIATION—OWNER OF PAID-UP STOCK OF SUCH ASSOCIATION NOT A CREDITOR BUT STOCKHOLDER NOT REQUIRED TO PROVE CLAIM TO PRESERVE LEGAL RIGHTS AND ENTITLED TO SHARE IN PROCEEDS FROM SALE OF ASSETS IN LIQUIDATION—PAYMENT IN EXCESS OF SUBSCRIPTION ENTITLED TO REPAYMENT.

SYLLABUS:

1. *The claims which are required to be proven to the superintendent of build-*