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CANAL PROPERTY OWNED BY STATE — PARTIES DESIRING TO CROSS CANAL PROPERTY BY MEANS OF BRIDGES, STRUCTURES OR OTHER FACILITIES MUST HAVE LAWFUL AUTHORITY TO DO SO — BY SPECIAL ACT OF LEGISLATURE OR BY LEASE — SECTION 13965 G. C.

SYLLABUS:

Parties desiring to cross canal property which is owned by the state, by means of bridges, structures or other facilities, must have lawful authority to do so, either by special act of the Legislature or by obtaining a lease as provided in section 13965, General Code.

Columbus, Ohio, August 26, 1944

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

Dear Sir:

This will acknowledge receipt of your communication which reads as follows:

“Upon a survey made of the Ohio and Erie Canal lands at Akron, Ohio, we find that the Ohio Bell Telephone Company owns and controls conduits or cables which are located in the street right-of-way crossing the canal lands under the jurisdiction of this department. The conduits or cables are either in the bridge structure itself or by various methods in the bridge supports. We do not know the exact number of crossings the company had installed; however, we do know that there are cables located across our property at the Ash Street Bridge, (under control of Summit County authorities) and the Bowery Street Bridge (under control of the city of Akron, Ohio).

The county and city obtained the right to cross the canal lands by these bridges through license agreement between our department and the county or city as the case might be.

This section of the canal lands has never been abandoned by the Legislature for canal purposes. Leases describing any portion thereof are granted in accordance with the general provisions of Section 13965 of the General Code of Ohio. The Telephone Company installed these conduits or cables without any notice to or agreement with this department.

Our query is, do we have the right to require the telephone company to obtain a lease from this department to install conduits or cables upon canal lands wherein such installations are placed in a bridge which is not under the control or jurisdiction of this department * * *?”

Reference is also made to a communication addressed to your Department by your resident engineer located at Akron, Ohio, wherein it is stated:

“In regard to Ash St. bridge I called at the County Engineer’s office and talked to the office man and Van Bremer (county bridge engineer). They could not find any records that showed when the canal was bridged and the best they could remember they had evidence that there was a road or trail running through this district before the canal was built.

They have no contract or agreement with the State.

There is a map in the recorder’s office (transcribed from Portage Co.) which was ordered made by the court and recorded 10/27/35 that shows a mill at the canal, and Ash Street coming from the canal and to the east. It was called Mill St. This map does not show bridges at any street but evidently there was a bridge crossing as this was the center of operations at this time. Present Ash Street bridge was built in 1919.

Bowery St. bridge—city records show the first bridge that

they have any record of was built in 1887 and replaced in 1910 by present bridge.

The plat referred to in regard to Ash St. shows Bowery St. as a street. It seems that Bowery and Ash Streets were in when the canal was built. They couldn't find any permit from the state to build the bridge. Information was from the City Bridge Engineer, Mr. Schneider."

The first proposition for consideration is a determination of the legal status and the effect of the bridging of the canal by the county and the city. This has a distinct bearing on your inquiry for the reason that the question involved might lie solely between the political subdivisions and the telephone company.

Your communication states that the bridges are under control of the city of Akron and the Summit County authorities. This might be true only with respect to maintenance and repair. It must be determined whether or not the respective authorities were legally authorized to bridge the canal property, and if so, by what authority.

Your basic letter states that, "the county and city obtained the right to cross the canal lands by these bridges through license agreement between our department and the county or city as the case might be", however, the copy of the letter from the resident engineer of your department, which was transmitted to this office by inter-office communication, states that no contract, permit or agreement with the state could be found. As the copy of the letter was of a later date and the statement therein was not denied, it is assumed that that is the correct situation. In other words, the bridges were not installed over state property through any arrangement between the political subdivisions and the state. In view of this circumstance, it is necessary to consider whether or not a statutory provision will suffice.

Sections of the General Code, such as sections 2421, 2446 and 7556, provide for the erection of bridges over canal property but these sections do not give a general power to cross state property by means of bridges. The fact that a bridge is part of a public highway does not alter the question involved. No general or special statute has been found authorizing the erection of these bridges over state property.

There is nothing in your correspondence that suggests that the state

is making claims or objections on account of the bridges being located on or over state property. The sole purpose of treating this particular phase of the matter is to ascertain whether or not the city and the county have jurisdiction over the bridges, to the exclusion of the state.

From the available facts and an examination of the law, it appears that they have not. Therefore, the telephone company cannot avail itself of any right to the use of a bridge, as against the state, when none exists in the city or county.

It is a well established rule of law that lands acquired by appropriation or otherwise in the construction of the Ohio and Erie Canal, were so acquired in absolute and unconditional fee simple title. *Malone v. Toledo*, 34 O. S. 541; *Ohio, ex. rel. Railway Co.*, 53 O. S. 189; *State of Ohio v. Snook, et al.*, 53 O. S. 521; *State of Ohio v. Griftner*, 61 O. S. 201.

Notwithstanding the fact that the state has long since abandoned the use of such canal property for canal purposes, it still retains a fee simple title to such canal property. *Kirk v. Maumee Valley Electric Co.*, 279 U. S. 797.

As the state has an unqualified fee simple title to the canal property in question, it now becomes the duty to consider the legal requirements in connection with the obtaining of the right to cross said property, from the state, by those desiring to do so. The most common mode of authorizing the crossing or use of canal property is the leasing thereof as authorized by section 13965 of the General Code. In many instances such privilege has been granted by special acts of the Legislature.

It is apparent that lawful authority must be obtained by any party choosing to cross state property by means of bridges, structures or other facilities, either through legislative enactment or leasing, as provided in section 13965, General Code.

Respectfully,

THOMAS J. HERBERT

Attorney General