

4841.

APPROVAL, BONDS OF MIAMISBURG CITY SCHOOL DISTRICT,
MONTGOMERY COUNTY, OHIO—\$5,000.00.

COLUMBUS, OHIO, December 28, 1932.

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

4842.

CONSERVATION COUNCIL—MAY ACCEPT CONVEYANCE OF LAND
FOR PUBLIC PARK AND RESERVOIR PURPOSES SUBJECT TO AN
EASEMENT—SUCH LAND WOULD BE EXEMPT FROM TAXATION.

SYLLABUS:

The State of Ohio may accept a deed of conveyance from the Pymatuning Land Company for a tract of land in Williamsfield, Andover and Richmond Townships, Ashtabula County, Ohio, owned by said company, subject to the easement or right of the Commonwealth of Pennsylvania to submerge this tract of land or a part thereof in connection with the construction of the Pymatuning Dam across the Shenango River in Crawford County, Pennsylvania.

Subject to the approval of the Attorney General, the Conservation Council in the Division of Conservation is authorized to accept a conveyance of this tract of land on behalf of the State of Ohio for public park and reservoir purposes.

Such tract of land, when the same is conveyed to the State of Ohio for this purpose, will be exempt from state and local taxation.

COLUMBUS, OHIO, December 28, 1932.

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

DEAR SIR:—This is to acknowledge the receipt of your recent communication in which you request my opinion on a number of questions relating to the proposed acquisition by the State of Ohio of a certain tract of land containing about 5,018 acres in Williamsfield, Andover and Richmond Townships, Ashtabula County, Ohio, which land will be partly submerged by the construction of the Pymatuning Dam across the Shenango River in Crawford County, Pennsylvania.

The tract of land here in question, which is owned by the Pymatuning Land Company, was the subject of a communication which I directed to you under date of September 7, 1932. In this communication you were advised that as long as the Pymatuning Land Company held title to this land the State of Ohio would have no proprietary rights in and with respect to the reservoir which will be created by the submergence of these lands in and by the construction of the dam above referred to; and that in this situation neither the State nor the public could exercise any ordinary proprietary or public rights in the reservoir or in the other lands of the Pymatuning Land Company surrounding the same.

You were further advised, accordingly, that in this situation the reservoir on the Ohio side would not have the status of a public park and that neither the Division of Conservation nor any other department of the State government would have any authority to expend any part of the moneys appropriated to it, in improving this reservoir and surrounding land as a public park, or otherwise.

In my former communication to you, attention was called to the fact that these lands, though the same may be partly submerged, would as the property of the Pymatuning Land Company be subject to State and local taxation. And

by reason of this fact, it was suggested that the Pymatuning Land Company might be disposed to convey this property to the State of Ohio for reservoir and park purposes. Your recent communication contains a number of questions relating to the proposed conveyance of these lands to the State of Ohio for the purposes above indicated. Your first question is as follows:

“Could all Ohio lands (5018 acres) be deeded to the State of Ohio by the Pymatuning Land Company, subject to the ‘easement or right of flowage for reservoir purposes’ heretofore granted the Commonwealth of Pennsylvania October 9th, 1922?”

In and by Amended Senate Bill No. 265, enacted by the 88th General Assembly, under date of April 19, 1929, the Commonwealth of Pennsylvania was granted the right to flood and submerge these lands by the construction of the Pymatuning Dam, subject to certain conditions, provided for in the Act. In view of the provisions of this Act and of section 18, General Code, which provides, among other things, that the State may receive by way of gift lands and other properties and hold the same subject to the terms and the conditions of the gift and to any reasonable reservation therein contained, the State of Ohio may, without doubt, accept a deed for this property from the Pymatuning Land Company subject to the easement or right of flowage for reservoir purposes heretofore granted to the Commonwealth of Pennsylvania by the Pymatuning Land Company, the owner of these lands.

Your second question is as to whether these lands will be exempt from taxation if they are conveyed to the State for park purposes, and whether in such case the exemption from taxation is “automatic.” As to this, it may be said that, even aside from constitutional or statutory provision to this end, property owned by the State is presumptively exempted from the operation of general tax laws, because it is reasonable to suppose that the taxation of property owned by the State was not within the intent of the legislature in adopting such laws. In this connection, however, it is noted that section 2 of article XII of the State Constitution provides, among other things, that general laws may be passed to exempt from taxation “public property used exclusively for any public purpose.”

Section 5351, General Code, reads as follows:

“Real or personal property belonging exclusively to the state or United States, and public property used for a public purpose shall be exempt from taxation.”

It follows therefore that the lands here in question will be exempt from taxation upon the conveyance of the same to the State for the purposes above indicated. By way of further answer to your question, it may be said that in such case the exemption of these lands from taxation will be automatic in the sense that as soon as the title to this property is conveyed to the State, the same, under the constitution and laws of this State, will be exempt from taxation. Touching this question, it is noted that under the provisions of section 5570-1, General Code, it is the duty of the county auditor to make a list of all the property, both real and personal, in his county which is exempt from taxation under section 5351, General Code, and under other sections of the General Code therein mentioned. This section further provides, however, that no additions shall be made to such exempt lists nor shall additional items of prop-

erty be exempted from the tax list and duplicate under any of the sections of the General Code therein enumerated without the consent of the Tax Commission of Ohio, which body is granted independent authority to exempt from the tax list and duplicate of any county property which under the constitution and laws of this state is entitled to exemption. As a matter of practical procedure, therefore, it may be said that upon conveyance of this property to the State of Ohio for the purpose above indicated, the same may be removed from the tax list and duplicate of taxable real property in Ashtabula County upon application to the Tax Commission of Ohio for this purpose. And in this connection, it may be said by way of answer to a further question stated in your communication, that although the Tax Commission of Ohio could not act officially in the matter until this property had actually been conveyed to the state, no reason is seen why in a case of this kind the Tax Commission could not now give any assurance that may be necessary with respect to what their action might be in case of the conveyance of the property to the state.

In this connection you further inquire as to whether any officials of these townships or of Ashtabula County could "legally prevent the removal of this land from taxation." From what is said above, it is clear that as soon as this property is conveyed to the state it will be exempt from taxation, and that no township or county official can prevent the exemption of the property on the tax list and duplicate of the county.

In your communication the further question is asked whether these lands would be exempt from taxation if the same were leased to the state for public park purposes by the Pymatuning Land Company. As above indicated, lands *owned* by the state are exempt from taxation in the absence of constitutional or statutory provision providing for the taxation of the same. Aside from this, however, no real property in this state is exempt from taxation unless such exemption is granted by the constitution itself or by statutory provision enacted pursuant to constitutional authority. As before noted, section 2 of Article XII authorizes the legislature to exempt by law "public property used exclusively for any public purpose." This exemption has been provided for in the provisions of section 5351, General Code, above quoted. Touching this question, the following is noted in Cooley on Taxation (4th Ed.) Vol. 2, section 625:

"While ownership by the public is not the sole test, it is generally held, yet in order that property be not taxable because public property it is always necessary that the property be actually owned by the public. Independent of any other consideration, property cannot escape taxation on the ground that it is public property unless it is in fact owned by the public as represented by the state or some local subdivision or representative thereof."

Inasmuch as in this view the term "public property" as used in the Constitution means property owned by the state, or by some political subdivision, it would not be competent for the legislature to grant an exemption from taxation to property leased to the state or to any of its political subdivisions. And by way of answer to your question, I am of the opinion that this property would not be exempt from taxation if the property were leased to the state for the purpose above indicated.

A further question in your communication to me is "what departments of state could receive such lands?" In the consideration of this question, it is noted that by section 469, General Code, certain reservoirs therein named and lands

adjacent thereto owned by the state are dedicated as public parks or pleasure resorts, and that by section 470, General Code, it is provided that the resorts or lakes named in section 469 of the General Code shall at all times be open to the public as resorts for recreation and pleasure, including hunting, fishing and boating, subject to the fish and game laws of the state, and subject to such rules and regulations as may be prescribed by law and the conservation council with respect to the use of boats. More immediately pertinent to the question at hand, section 472, General Code, provides that "all lands and waters now or hereafter dedicated and set apart for public park or pleasure resort purposes, or which may hereafter be acquired for such purposes, shall be under the control and management of the conservation council, who shall protect, maintain, and keep them in repair." This section further provides as follows:

"Said conservation council may, subject to the approval of the attorney general, acquire by gift, purchase or by appropriation proceedings, on behalf of the state, such real and personal property, rights and privileges as may be necessary in its judgment for the use, extension, enlargement and maintenance of such public parks and resorts, and for new public parks, resorts, reservoirs, channels, drives, roadways, docks, dams, landings, wharves and other improvements."

It would seem from the provisions of this section, read in connection with those of section 18, General Code, above referred to, that the conservation council would be authorized to accept these lands for public park purposes, subject to the right which the Commonwealth of Pennsylvania has to submerge these lands, or a part of the same, heretofore granted to it by the Pymatuning Land Company and by the legislature of Ohio in the enactment of Amended Senate Bill No. 265, above referred to. See *State, ex rel., vs. Turney, Attorney General*, 93 O. S. 379. In the consideration of this question, I am not unmindful of the provisions of section 154-40, General Code, which imposes upon the Superintendent of Public Works, as Director of said department, the duty of exercising general custodial care of all real property of the state, and which more specifically provides that this department as administered by the Superintendent of Public Works, as Director of the department, shall have power,

"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."

Inasmuch as it is an established rule of statutory construction that a special statute covering a particular subject matter must be read as an exception to a statute covering the same and other subjects in general terms, it would seem that aside from the fact that it is not contemplated that the lands here in question are to be either purchased or appropriated, the power to accept these lands for public park purposes is in the conservation council rather than in the superintendent of Public Works, as Director of this department. In this connection, my attention has been called to section 412-1, General Code, which authorizes the Superintendent of Public Works to conserve and impound surplus and flood waters of any of the water sheds, rivers, streams, water courses or public waters in order to insure

and promote the public health, welfare and safety, and to encourage and promote agriculture, commerce, manufacturing and other public purposes. To this end the Superintendent of Public Works by the further provisions of this section, is authorized to construct such reservoirs, dams, storage basins, dikes, canals, raceways, and other improvements as may be necessary. And, subject to the written approval of the Governor of the State, he is authorized to acquire by gift, purchase or by appropriation proceedings, in the name and on behalf of the State of Ohio, such real and personal property, rights, privileges and appurtenances as may be necessary in his judgment for the construction of such reservoirs, dams, storage basins, dikes, canals, raceways, and other improvements, or for the alteration, enlargement or maintenance of existing reservoirs, dams and other improvements. Section 412-1, General Code, is a part of a comprehensive act enacted by the 83d General Assembly, under date of April 10, 1919, for the prevention of destructive floods and the conservation and prevention of waste of the waters of the streams, lakes and public waters of the State of Ohio, and to provide for the sale or lease to the public of such waters for agriculture, commercial, manufacturing and other public purposes. I am quite clearly of the view that the provisions of section 412-1, General Code, and the authority therein conferred upon the Superintendent of Public Works to acquire property for the purpose, among other things, of constructing reservoirs and storage basins, are to be limited to matters within the declared purpose of the act, and that they have no application to the matter at hand. I am therefore of the opinion in answer to this question that the Division of Conservation, acting through the conservation council, is the only department of state government which has authority to accept this land for the purpose above indicated. In this connection you further ask as to what officials will execute the deed for the State of Ohio. Obviously, no official of this state would have anything to do with the execution of the deed. The deed would regularly be executed by the Pymatuning Land Company, by the hands of its president and secretary, acting pursuant to the authority of a resolution adopted by the directors of said company. Upon examination and delivery of such deed, the same, if satisfactory to the conservation council, should after approval by this office be formally accepted on behalf of the state for public reservoir and park purposes by a resolution to be adopted by the conservation council at a regular or other legal meeting of said body.

You further ask my opinion as to what legislation, besides Amended Senate Bill No. 265, above referred to, is necessary to operate this land and reservoir as a state park jointly with the Commonwealth of Pennsylvania. This question does not admit of a categorical or comprehensive answer. Although I am inclined to the view that under the provisions of section 472, General Code, above noted, these lands when the same have been conveyed to the State of Ohio for public reservoir and park purposes, and such conveyance has been accepted by the conservation council on behalf of the State, will on the submergence of these lands, or a part thereof, have the status of a public park under the control and management of the conservation council without any additional legislation formally dedicating such reservoir and lands as a public park, I am quite clearly of the view that before such reservoir and lands can be controlled and managed jointly with the Commonwealth of Pennsylvania additional legislation will be necessary for this purpose. The State of Ohio and the Commonwealth of Pennsylvania by appropriate and concurrent legislation within the constitutional limitations of the respective states may make provision for the use by the public of the waters of the reservoir, part of which reservoir will be in the State of Ohio and part of which will be in the Commonwealth of Pennsylvania. Such legislation by

these respective states might properly embody an agreement giving to each of the states concurrent jurisdiction of the waters of the reservoir. Such an agreement or any other agreement between the states providing only for the use, control and maintenance of the reservoir would not, in my opinion, be a compact or agreement which would require the consent of Congress under the provision of section 10 of article I of the Federal Constitution that "no state shall, without the consent of Congress enter into an agreement or compact with another state or with a foreign power." As to this, it seems that the prohibition embodied in this constitutional provision is directed only to the formation of any compact or combination between states tending to increase the political powers of such states and thereby encroach upon or interfere with the supremacy of the United States. *State of Virginia vs. State of Tennessee*, 148 U. S. 503, 519. What form this legislation is to take depends of course upon what is agreed upon with respect to the matters to be governed by such legislation and the proposed provisions carrying the same into effect. In this connection it is suggested after the State of Ohio has acquired title to the lands here in question for the purposes before stated, and after your committee representing the State of Ohio and the like committee representing the Commonwealth of Pennsylvania have agreed upon the terms of the proposed legislation, that this matter be then brought to the attention of this office for such aid or assistance as you may desire with respect to the preparation of a bill to be enacted by the General Assembly.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4843.

CREATION OF NEW TOWNSHIP FROM PART OF OLD TOWNSHIP—
NEW TOWNSHIP ENTITLED TO PROPORTIONATE SHARE OF
MONEY IN THE TREASURY, DELINQUENT TAXES WHEN COL-
LECTED AND EMBEZZLED FUNDS LATER RECOVERED—DISTRIBU-
TION OF OTHER FUNDS DISCUSSED.

SYLLABUS:

1. *In case of the division of a township and the establishment of a new township from a portion of the territory of the original township, the new township, under Section, 3246, General Code, is entitled not only to its proper portion of the money in the treasury of the original township, at the time the new township is established, but also to its proper portion of money thereafter coming into the said treasury as a result of tax levies for said township made prior to the time, to the extent the same was collected from the territory established into the new township.*

2. *When such a division is made, and there exist taxes due said original township which are delinquent, the new township is entitled to its proportionate share of the proceeds of said delinquent taxes as they are collected.*

3. *Where it appears, upon the establishment of a new township from a portion of the territory of an existing township, by force of Section 3249, General Code, that previous to that time township funds had been embezzled and the same were recovered after the creation of the new township, the said new township is*