

current jurisdiction exists in the Common Pleas Court, in which case the prosecution would be based upon an indictment returned by the grand jury.

By the terms of Section 13568, General Code, the court may, when necessary, call a special grand jury in case the regular grand jury has been discharged. Apparently, therefore, there is no assurance of prompt action or that a person held to the grand jury would be promptly tried, since the matter of an indictment would depend upon the grand jury, and if the regular grand jury had been discharged, the calling of a special grand jury would be dependent upon the discretion of the trial court.

No attempt has been made to review the jurisdiction in this class of cases conferred upon justice's courts, mayor's courts and municipal courts, where such exists. All of these courts have jurisdiction in some respect with regard to prosecutions of this character. A detailed consideration of this subject would, however, not be profitable. Neither have I given any consideration to the authority of a constable which, in criminal matters, is co-extensive with the county.

The foregoing constitutes a summary of the usual and ordinary means available to remedy a situation such as you describe.

Without attempting an exhaustive review of every means open to county law enforcement officers to stop gambling, sufficient has been set forth to show that under the statutes of Ohio these officers are fully armed with the means and the various courts are clothed with the jurisdiction to enforce effectually the laws of Ohio against gambling.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

445.

FLEMING ACT—SECTIONS 3699a TO 3699-9, GENERAL CODE—CONSTITUTIONAL—RIGHTS OF STATE, CITY OF CLEVELAND AND LITTORAL LANDOWNERS IN WATERS AND SUBMERGED LANDS OF LAKE ERIE, DISCUSSED.

SYLLABUS:

1. *The title to all lands lying under the waters of Lake Erie, or which originally lay under the waters of Lake Erie, rests in the State of Ohio in trust for the people for the purpose of navigation and water commerce. The trust under which such property is held is governmental and the state, as the trustee for all of its people in the use of such lands, cannot abandon or abdicate a trust property or permit a diversion to private use different from the object for which the trust was created.*

2. *The Fleming Act (Sections 3699a—3699-9, inclusive, of the General Code) is valid and constitutional and impairs no property rights of shore owners.*

3. *The State's title to lands now or formerly submerged cannot be effectively surrendered or alienated so as to preclude subsequent use by the state when necessary to carry out the continuing trust for the purpose of navigation and water commerce.*

4. *Rights of shore owners of access to navigable water and to wharf out are always subject to be defeated by the assertion of the paramount title of the state when necessary in furtherance of the trust.*

COLUMBUS, OHIO, May 27, 1929.

HON. F. W. THOMAS, *City Clerk, Cleveland, Ohio.*

DEAR SIR:—This is to acknowledge the receipt recently of a copy of a resolution

adopted by the council of the city of Cleveland under date of April 15, 1929, requesting my opinion on certain questions therein stated touching the respective rights of the state, the city of Cleveland, littoral land owners and other interests in the waters and lands submerged and otherwise in the Cleveland harbor of Lake Erie. The questions presented for my opinion by the resolution above referred to are as follows:

1. Is the Fleming Act, Sections 3699a to 3699-9, inclusive, valid legislation?
2. If the city of Cleveland has in any way bound itself to co-operate with the railroads in procuring the release of the public rights in any port of Cleveland's lake harbor, is the state in any way legally bound to ratify such acts of the city?"
3. Has the State of Ohio power, by legislation or otherwise, to surrender the public rights in any part of the harbor of Cleveland now used or in the future expected to be needed as wharf sites?
4. Has the State of Ohio power to authorize the building of wharves in the harbor of Cleveland as aids of navigation without compensating the owners of shore lands in front of which such wharves may be built because of cutting off access of shore owners to the waters?"

The questions here presented are so framed as not to invite or even to permit, perhaps, any extended discussion of the subjects to which said questions relate.

The first question above stated is with respect to the constitutionality of the Fleming Act so called, the provisions of which have been carried into the General Code as Sections 3699a to 3699-9, inclusive, of the General Code. This act is one passed by the Legislature under date of March 20, 1917, 107 O. L. 587, and is entitled an act "declaring the rights of the state in the waters of Lake Erie and the soil under such water and granting powers to municipal corporations to use, lease and control such territory within their corporate limits, and amending and supplementing Section 3699-1 of the General Code."

The act of the Legislature here referred to was enacted shortly after the decision of the Supreme Court of this state was handed down in the case of *The State of Ohio vs. The Cleveland & Pittsburgh Railroad Company*, 94 O. S. 61, and its enactment was perhaps, to some extent, actuated by the decision of the court in said case. No extended discussion of the provisions of said act is necessary. The first section thereof, which is now Section 3699a, General Code, is apparently declaratory of the common law rights of the state in the waters of Lake Erie and the submerged lands thereof within the borders of the state.

The second section of said act amends Section 3699-1, General Code, as enacted by the Legislature under date of May 10, 1910, 101 O. L. 236, and supplements said section as amended, by the enactment of Sections 3699-2 to 3699-9, General Code. Said Section 3699-1, General Code, as amended, grants to municipal corporations, within the corporate limits of which there is or may hereafter be included part of the shore of the waters of Lake Erie, power, "in aid of navigation and water commerce, to construct, maintain, use and operate, or lease the right to construct, maintain, use and operate, piers, docks, wharves and connecting ways, places, tracks and other water terminal improvements with buildings and appurtenances necessary or incidental to such use, on any land belonging to the corporation held under title permitting such use and also over and on any submerged or artificially filled land or lands made by accretion resulting from artificial encroachments, title to which is in the State of Ohio, within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land within the limits of said corporation whether said littoral land is privately owned or not."

I have heretofore stated that Section 3699a is, in substance, merely declaratory of the common law rights of the State of Ohio as a sovereignty in and to the waters of Lake Erie within the borders of the state and in and to the submerged and other lands therein. That a title of this general character exists in the State of Ohio and did exist theretofore was clearly recognized in the case of *State ex rel. vs. The C. & P. Railroad Company*, supra. As to this particular section of the act, therefore, the only constitutional question of difficulty exists by reason of whatever limitation of the rights of littoral owners is contained therein. As to this, the section, after asserting the public title, states that it is:

“further subject only to the rights of littoral owners while said waters remain in their natural state to make reasonable use of the waters in front of or flowing past their lands, and the rights and liabilities of littoral owners while said waters remain in their natural state of accretion, erosion and evulsion. Any artificial encroachment by public or private littoral owner, whether in the form of wharves, piers, fills or otherwise joining the natural shore line of said waters, not expressly authorized by the General Assembly, acting within its powers, shall not be considered as having prejudiced the rights of the public in such domain.”

Discussion of the possible effect of the language just quoted may be deferred until the language in the subsequent portions of the act, raising similar questions, is pointed out. Heretofore there have been quoted the pertinent portions of Section 3699-1 which purport to delegate to municipal corporations the power in aid of navigation and water commerce to utilize in various methods submerged lands within the corporate limits irrespective of the ownership of the littoral land adjacent thereto. This section and the succeeding sections which detail the procedure incident to the exercise of the power conferred, substantially constitute the municipal corporation an arm of the state for the development of the harbor property in furtherance of navigation and the right so to do is asserted without regard to any and whatever rights may exist in the owners of littoral lands inconsistent therewith.

I have no hesitancy in saying that the exercise of any sovereign power of the state may properly be delegated to one of the subdivisions thereof. The remaining question is, therefore, whether the assertion of the state's title and the delegation of powers to the municipality so conflict with and impair property rights of littoral owners as to render the act invalid.

As heretofore indicated, the passage of the act was doubtless actuated by the decision in the in the case of *State ex rel., vs. C. & P. Railroad Co.*, supra, and it is very probable that any doubts engendered as to the constitutionality of the act have their origin in the language of the court in that case. However, inviting an exhaustive consideration of the whole subject of the relative rights of the sovereign state and the shore owners with respect to the ownership and use of the subaqueous lands in navigable waters may be, it is not my purpose to indulge therein.

It has long been the rule and policy of this department to refrain from the consideration of questions relating to the constitutionality of statutes enacted by the General Assembly of this state, save in exceptional cases where the constitutionality or unconstitutionality of the statute in question is plain. This policy has peculiar force in the present instance where the Legislature has asserted title to public property in trust for public purposes, which title, were a dispute to arise, would appropriately be defended by this office. In view of these considerations, I must conclude that the Fleming Act is valid and constitutional.

I may add, however, that there appears to be nothing in the decision of the court in the case of *State, ex rel., vs. C. & P. Railroad Company*, supra, which, in my

opinion, impels a contrary conclusion. A consideration of the law of that case as announced in the syllabus, and viewed in the light of the facts there under consideration, is persuasive of the fact that all lands within the state lying under the waters of Lake Erie are and always have been held in trust by the sovereign state and that that trust is continuing and inalienable. The syllabus of the case is as follows :

"1. Under the constitutional grant of authority to regulate interstate and foreign commerce, the United States government has paramount control of navigable waters and power to establish therein harbor lines and regulations.

2. The title and rights of littoral and riparian proprietors in the subaqueous soil of navigable waters, within the limits of a state, are governed by the laws of the state, subject to the superior authority of the federal government.

3. The title of the land under the waters of Lake Erie within the limits of the State of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted.

4. The state has control of a harbor within a harbor line and may enact legislation prescribing regulations in connection therewith and to secure the rights of the public, provided it does not conflict with the regulations of the federal government.

5. The littoral owner is entitled to access to navigable water on the front of which his land lies, and, subject to regulation and control by the federal and state governments, has, for purposes of navigation the right to wharf out to navigable water.

6. The ownership of the waters of Lake Erie and of the land under them within the state is a matter of public concern. The trust with which they are held is governmental, and the state, as trustee for the people, cannot by acquiescence or otherwise abandon the trust property or permit a diversion of it to private uses different from the object for which the trust was created. The littoral owner is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust estate."

It might be argued that the fifth branch of the syllabus is indicative of some right of the littoral owner which he may assert as against the title of the state. When this branch is read in connection with the other branches of the syllabus, it is clearly shown that such a contention is untenable. The sixth branch is clearly dispositive.

It may be added, also, that the facts of the case reveal the reason for the statement in the fifth branch of the syllabus. The decision of the court was rendered prior to the enactment of the Fleming Act and no attempt by the state or any properly delegated public authority had been made to utilize in furtherance of the public trust for navigable purposes the subaqueous land there in controversy. The sum and substance of the holding of the court was that, in the absence of the assertion by the state of the necessity of using the lands occupied by the wharves and filled land for purposes of navigation, the littoral owner had the right to utilize such land to wharf out to navigable water. That is to say, the right of the littoral owner existed only so long as his use thereof was not inconsistent with the use to which the state, as a trustee for the people, determined to put the subaqueous lands upon which the wharf was located. That the littoral owner's right is subject to be defeated by the paramount authority of the state in furtherance of navigation is made clear by the last sentence of the sixth branch of the syllabus.

It is difficult to understand the import of your second question, for its wording is such as obviously refers to an existing state of facts concerning which neither the

questions themselves, nor the resolution within which the questions are incorporated, are definite. At a risk of being in error, I assume that your question has particular reference to the steps taken pursuant to the authority contained in House Bill No. 382 of the 88th General Assembly, popularly known as the Jackson Bill. The act authorizes the Governor to convey by a quit claim deed to certain railroad companies and the city of Cleveland or their nominees, "all right, title and interest of the State of Ohio in such parts of the submerged and filled lands in the harbor of the city of Cleveland as are described" in Section 1 of the bill. The deed, by Section 2, is to be executed by the Governor upon the resolution of the council of the city of Cleveland requesting same, accompanied by a concurrence of the railroad companies. Section 3 declares that the conveyances are "for the protection, and in furtherance of the public interest, in aid of navigation and commerce, and constitute no impairment of the rights of the people of the State."

In the light of the provisions of this bill, you are inquiring, if the city has bound itself to co-operate with the railroads in securing the release of the public rights in any part of the Cleveland lake harbor, whether the state is in any way legally bound to ratify such acts of the city.

It must be clear from a consideration of the terms of the bill that considerations of policy forbid my expressing any opinion upon this question. The question concerns directly the duties of the executive head of the state government and it is asked, not by the Governor, but by a municipal council. By law the Attorney General is the legal adviser of all state officials and bound to represent them in any litigation growing out of their official duties. It is conceivable that an action might be brought to prevent the execution of the deed described in the bill, and, on the other hand, if the chief executive should refuse to execute the deed, action might be brought to compel him so to do, and in either event it would be the duty of this office to represent the Governor.

Quite obviously from the standpoint of policy, this office cannot render an opinion upon this question and it must remain unanswered unless and until advice upon this point is sought by the officer whose duties are directly concerned.

With respect to your third question, it is noted that in the case of *Appleby vs. New York*, 271 U. S. 364, it was held that the power of a state to part with property under navigable waters by a grant thereof to private parties free from subsequent regulatory control by the state of the water over the land, and the land itself, is governed by the law of the state as derived from statutes and decisions in force when such grant is made. And it was further held therein, that under the law of the State of New York applicable in the consideration of the question before the court in said case, the State of New York might authorize the conveyance by deed of a parcel of land of limited dimensions under tidal water with the right of the grantee to fill it, and thus part with its own power to regulate the navigation of water over the land which would interfere with its ownership and enjoyment by the grantee.

As the law of this state is reflected in the decision and opinion of the court in the case of *State vs. C. & P. Railroad Co.*, supra, I doubt very much whether the State of Ohio can authorize the conveyance of even a limited parcel of land to a private person or corporation, so as to preclude the state from its power to regulate navigation or other public needs with respect to the use of the parcel of land so granted.

I take it, however, that your question has application to a suggested general abdication and surrender of considerable areas of land and water of Cleveland harbor; and responsive to the question thus interpreted, I can have no hesitation in answering this question in the negative.

It was held by the Supreme Court of this state in the case of *State vs. C. & P. Railroad Co.*, supra, following the case of *Illinois Central Railroad Co. vs. People*,

146 U. S. 387, that the ownership of the waters of Lake Erie and all the land under them within the state, is a matter of public concern; that the trust under which such lands and waters are held is governmental, and that the state, as a trustee for all of its people in the use of such lands and waters, cannot abandon or abdicate the trust property or permit a diversion of it to private uses different from the object for which the trust was created. In this view your third question as above indicated should be answered in the negative.

Aside from the fact that your fourth question primarily concerns the rights of private persons as to which this department as a public office must be loath to advise, my consideration of this question is further embarrassed by the fact that conceivably the same may involve the question of the validity of Section 3699-1, General Code, as enacted by the Fleming Act, above referred to, a question which the rules and declared policy of this department preclude me from deciding.

In this connection, however, it is to be observed that in the case of *State vs. C. & P. Railroad Co.*, supra, it was held that the littoral owner along the shore line of the harbor is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust under and by which the state owns and holds the lands and waters of the harbor. And by the same token, it may be said that although the state may not arbitrarily destroy or impair the rights of such littoral owner by legislation which has no real or substantial relation to the uses of navigation, or appropriateness to that end (*United States vs. River Rouge Imp. Co.*, 269 U. S. 411), such littoral owner has no rights which can preclude the state from regulating the use of the harbor, lands and water fronting on the lands owned by such littoral owner by legislation having reasonable and appropriate relation to that end; and where such legislation provides for the construction of wharves in and upon the harbor waters, this may, in my opinion, be done without compensating the owner of the shore lines in front of which such wharves may be built, for damages sustained by such littoral owner by reason of his loss of access to such harbor, lands or waters.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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446.

APPROVAL, BONDS OF BOTKINS VILLAGE, SHELBY COUNTY, OHIO—  
\$3,000.00.

COLUMBUS, OHIO, May 27, 1929.

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

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447.

APPROVAL, BONDS OF LAKE TOWNSHIP RURAL SCHOOL DISTRICT,  
STARK COUNTY, OHIO—\$16,000.00.

COLUMBUS, OHIO, May 27, 1929.

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