

the State of Ohio and by The Harding-Jones Paper Company, the lessee therein named, acting by the hand of its President, acting pursuant to the authority of a resolution duly adopted by the Board of Directors of said company.

It further appears on an examination of the provisions of this lease and of the conditions and restrictions therein contained that the same are in conformity with the statutory provisions above noted, under the authority of which this lease is executed, and with other statutory provisions relating to leases of this kind. I am accordingly approving this lease as to legality and form as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2776.

STATUS—STATE OF OHIO, THROUGH DIRECTOR, DEPARTMENT OF HIGHWAYS, CERTAIN TITLE OF TOLEDO EDISON COMPANY, LANDS IN LUCAS COUNTY, OHIO—SEE VOLUMES I AND II, OPINIONS OF ATTORNEY GENERAL, 1935, PAGES 641 AND 800.

COLUMBUS, OHIO, July 30, 1938.

HON. JOHN JASTER, JR., *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication wherein you request my supplemental opinion concerning the title of the Toledo Edison Company to certain lands situate in Lucas County, the status of which was discussed in Volumes I and II of the Opinions of the Attorney General for the year 1935, pages 641 and 800, respectively,

An examination of the abstracts and materials submitted disclosed the following:

1. The first of the above mentioned opinions directed attention to a \$15,000,000.00 bond issue secured by a mortgage and, also, to a reservation, in the deed of the Toledo Ottawa Beach and Northern Railway Company, of a perpetual easement for railway purposes. However, since

the date of that opinion, said mortgage has been cancelled of record, and the railway company has relinquished its easement by a reconveyance of same to the Toledo Edison Company.

2. In several instances, the deeds involved were improperly executed, but in each of such cases the deed concerned has been of record for more than twenty-one years and the defect is, therefore, cured by the provisions of Section 8516-1, General Code.

3. Nor is the title affected by the fact that four actions, in which a total of \$123,198.77 is sought to be recovered, are pending against the Toledo Edison Company. Apparently, each of these actions is one for money only and, consequently, the doctrine of *lis pendens* is inapplicable:

As stated in the first branch of the syllabus of the case of *Stone vs. Equitable Mortgage Co. et al*, 25 O. A. 382:

“An action for money only is not within the doctrine of *lis pendens*.”

Or, as expressed in 17 R. C. L. page 1019:

“If a purchaser of property is to be held to take his purchase subject to a pending suit, fairness would require that such property be directly involved in that litigation. Otherwise everyone buying from a party defending in an action would do so at the risk of having his purchase seized to pay the judgment. So it is generally held that the doctrine of *lis pendens* has no application to a proceeding in which the only object sought is the recovery of a money judgment. In such a case, the debtor's property is not in litigation, and his control over it is the same as before the commencement of the suit.”

4. Relative to the parcel of land described in abstract Number 160148, the deed from Joseph and Mary Shanteau to Samuel R. Dority contains a reservation of a right of way twenty four feet wide for the passage of teams and it would seem, from the provisions of an instrument dated July 15, 1921, that, out of the aforesaid twenty four foot reservation, Joseph Shanteau granted to Norman L. Mominee a right of way ten feet wide.

However, it is apparent from an examination of the maps contained in said abstract that said right of way was reserved in order to give the grantor access to 131st Street and, 131st Street having since been extended westerly so as to provide an outlet from the Shanteau and

Mominee premises, I am of the opinion that the easement terminated with the cessation of the purpose for which it was reserved.

5. Page 64 of abstract Number 160149 reveals a lease, dated August 3, 1897, from Nicholas Brown to George E. Lorenz as unreleased of record. However, on the same page there is a pencilled notation that said lease was to be "void in 9 months unless well drilled within that time. Terminated when the well ceased to be operated."

It is not indicated whether or not said notation was made by the abstractor, and I suggest that investigation be made with respect to the status of this lease.

6. Satisfactory evidence should be required that there has been a compliance with the condition appearing in the deed, dated September 27, 1905 (abstract Number 160149 instrument Number 42) from Nicholas Brown to Samuel R. Dority. Said condition recites that the grantor,

"reserves to himself, his heirs and assigns, the right to retain the possession and use of said land as against grantee and those claiming under him until grantee or his assigns shall have constructed a substantial wire fence on the east line and on the west line of the first strip of land hereby conveyed and on the east side of the second strip herein granted."

In the same deed there is contained a clause obligating the grantee, his heirs and assigns, to construct and maintain two crossings across the first strip described in said deed. This clause was obviously inserted because of the contemplated use of the land for railway purposes and, the operations of the railway having ceased, I am of the opinion that said clause was thereby rendered inoperative.

7. Under date of November 1, 1932, a mortgage was executed by The Toledo Edison Company to the Chase National Bank of New York City. This mortgage, which embraced each of the parcels described in each of the abstracts submitted, is unreleased of record.

In specific answer to your inquiry, it is therefore my opinion that The Toledo Edison Company will be unable to convey, free and clear, a warranty easement for highway purposes until there is a release of its mortgage to the Chase National Bank and a correction of the objections mentioned above. Also, the records should be checked as to any taxes against the property and as to any changes in the title which may have occurred subsequent to March 31, 1937, the date of each of the abstracts submitted; moreover, it should be determined whether or not any of the actions against the Toledo Edison Company have been reduced to judg-

ment and a certificate of lien filed under the provisions of Section 11656, General Code.

I am returning herewith the abstracts and instruments enclosed with your communication.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2777.

TAXES AND TAXATION — MUNICIPALITIES — OPERATING UNDER CHARTER OR GENERAL LAWS — MAY LEVY EXCISE TAX FOR POOR RELIEF IF STATE HAS NOT INVADED FIELD — CONSTITUTIONAL PROVISIONS — SURPLUS FUNDS OF MUNICIPALLY OWNED PUBLIC UTILITY MAY BE TRANSFERRED FOR POOR RELIEF — EXCEPTION — SURPLUS WATERWORKS FUNDS.

SYLLABUS:

1. *Municipalities, whether operating under charter or general laws, may levy excise taxes for poor relief purposes, providing the state has not invaded the field of such excise taxation.*

2. *The Constitution does not prohibit the General Assembly from authorizing municipalities to levy excise taxes or personal property taxes upon property not taxed by uniform rule according to value, when the state has invaded the field, but municipalities would be limited in the exercise of power so conferred in that such local taxes when added to any such state levies must have some reasonable relation to value of the right, privilege, franchise, or property so taxed.*

3. *Excepting surplus waterworks funds, which are required by Section 3959, General Code, to be used for waterworks purposes, surplus funds of a municipally owned public utility may be transferred for poor relief purposes under Sections 5625-13a, et seq., General Code. City of Niles vs. Ice Corp., 133 O. S. 169, Ohio Bar, January 24, 1938.*

COLUMBUS, OHIO, August 1, 1938.

HON. FRED ELSASS, *Clerk, House of Representatives, Columbus, Ohio.*

DEAR SIR: This is to acknowledge receipt of your recent communication certifying to this office a copy of resolution of the House of Representatives requesting my opinion upon the following two questions: