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GAS COMPANY—FRANCHISE TO LAY MAINS—VILLAGE STREETS — ORDINANCE OF COUNCIL — TO LAY MAINS ACROSS ABANDONED LANDS OF MIAMI AND ERIE CANAL, MUST OBTAIN LEASE FROM STATE—SECTION 14178-45 G. C.

## SYLLABUS:

A gas company having a franchise to lay its mains in the streets of a village pursuant to an ordinance of the council of such village, may not lay such mains across the abandoned lands of the Miami and Erie Canal, without obtaining a lease from the state pursuant to the provisions of Section 14178-45 of the General Code.

Columbus, Ohio, December 17, 1946

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

Dear Sir:

I have before me your communication in which you request my opinion as to the authority of your department to require the Dayton Power & Light Company to obtain by lease the right to cross the abandoned Miami & Erie Canal in the villages of Minster, Fort Loramie and New Bremen. I note from the correspondence attached to your letter that the company was granted franchises by each of the said villages to lay and maintain in the streets of the respective villages pipes and mains for supplying natural or artificial gas to the villages and their inhabitants. I note also the claim of the company that by reason of said franchises they are not under any obligation to obtain a lease from the state for carrying their mains over the canal lines where said streets cross the canal.

The general assembly has by the provisions of Section 10129, General Code, authorized county commissioners as to county and state roads, township trustees as to township roads and councils of municipal corporations as to streets and alleys in their respective jurisdictions, to grant to public utility companies the right to lay gas pipes and mains therein. This, it appears from an examination of the several ordinances above mentioned, the villages in question have done. The controlling question however which it seems to me underlies your inquiry is whether the villages in question have such jurisdiction over the portions of the aban-

doned canal property where the highways cross the same as to entitle them to make such grant without the consent of the state. In other words, has the portion of the canal which appears to form a part of the streets in question actually been dedicated by the state as the owner thereof to public use for highway purposes or has it by any act of the general assembly or of any department of the state under authority of the general assembly been conveyed to the villages so that they may dedicate it to public use for street purposes with all the incidents pertaining thereto.

The utility company has cited the case of *Smith v. Central Power Company*, 103 O. S. 681, in support of the proposition that the use of streets for the facilities of public utilities is a proper street use and not in and of itself an additional burden or abuse inconsistent with the use of the land for street purposes. With that proposition I have no dispute and do not consider it necessary to go into the very illuminating opinions uttered by the judges who concurred in that decision.

By act of the general assembly passed March 25, 1925, (111 O. L. 208) the Miami and Erie Canal between the Maumee River at Defiance and a point 500 feet north of the Middletown Dam near the City of Middletown was abandoned for canal purposes. The act provided for an appraisal of such portions of the abandoned canal land as might be applied for by municipalities or other subdivisions of the state and that would not be required in the construction of any ship or barge canal under authority of legislation passed or to be passed by the Congress of the United States or by the State of Ohio. The act further provided that based upon such appraisal leases might be made to municipalities applying, upon rentals at the rate of four percent annually on the appraised value. Such leases were authorized to be made for a period of ninety-nine years, renewable forever, or for a shorter term.

Section 16 of this act provided:

“The county commissioners of any county, likewise the council of any municipality, through which said abandoned canals pass, shall have the right to remove all existing bridges crossing any portion of said abandoned canals over which public highways or the streets of any municipality pass, and to grade such highways and streets by filling and grading across the channel and banks thereof, but must provide for all necessary drainage underneath the same; there is, however, reserved to the state of Ohio, its lessees, grantees, and their assigns, an unobstructed right-of-

way, for any and all purposes, across the land occupied by the highways and streets extending across said abandoned canals but not applied for by any municipality or other legal subdivision of the state of Ohio as provided for above.”

It will be observed that the section just quoted appears to recognize the existence of highways and streets across the canal and authorizes the removal of such bridges and the filling of the channel under certain conditions. I do not, however, consider that such reference to highways and streets amounts to a conveyance or dedication thereof or necessarily to a recognition that they had been either fully dedicated by the state as owner for street and highway purposes, or that they had been conveyed by the state to the municipalities or other public subdivisions so as to give them the right to so dedicate them. My opinion in this respect is strengthened by the reservation contained in the last sentence of the section whereby there is reserved to the state an unobstructed right of way for any and all purposes across the land occupied by the highways and streets extending across said abandoned canal “but not applied for by any municipality or other legal subdivision of the state of Ohio as provided for above.” In other words, it appears that the municipality might under the terms of this act apply for and obtain a right by way of leasehold over a portion of the canal bed to be used as a street, and that such right could be in perpetuity. Whether such a lease would give the municipality a sufficient title to enable it to dedicate such land for full and complete street purposes, I do not need to decide. But it appears to me that this section relative to the maintenance of the bridge and the right to make a fill in lieu thereof does no more than recognize a right in the municipality to carry traffic across the canal bed. It certainly does not give to the municipality that complete title which would enable it to grant to a public utility company the right to build and maintain its lines through the state’s property. There is, in other words, a distinct implication of a reservation to the state of the rights which pertain to ownership of the fee subject to certain rights for passage conceded to the public for the purpose of public travel.

By an act passed by the general assembly on the 9th day of April 1931 and effective on the 6th day of August 1931, (114 O. L. 546) the general assembly again provided for the abandonment of that portion of the Miami and Erie Canal extending from a point where said canal joins

with the Maumee River on the westerly side thereof in Lucas County, to a point five hundred feet north of the state dam near the corporation line of the city of Middletown. This act apparently includes all of the portion of the canal covered by the former act together with an additional portion to the north. No reference is made to the former act but it is provided that all acts and parts of acts in conflict are to be repealed.

In the new act it is provided in Section 2 that the state of Ohio reserves unto itself the right, title and interest in and to all lands and waters acquired under the various acts providing for the construction of said canal, and Section 3 of the act provides that all of said lands that are now owned by the state and used and occupied by the Miami and Erie Canal and all lands used in conjunction therewith shall be held by the state by title in fee simple. Section 15 of this act, which has been codified as Section 14178-41 of the General Code, reads as follows:

“The state highway department, the county commissioners of any county, likewise the council of any municipality or the trustees of any township through which said abandoned canal passes, shall have authority to maintain the existing bridges under their respective jurisdiction, crossing any portion of said abandoned canal, or may remove all such highway and street bridges crossing over said abandoned Miami and Erie canal, and may substitute fills therefor, but shall provide for all necessary drainage underneath the same by pipes or conduits of sufficient capacity to take care of the drainage flowing in said canal, but such parties shall first submit to the superintendent of public works plans for such proposed fills, showing the size of such pipes or conduits and the elevation of the same with respect to the bottom of the canal, and no work thereon shall be commenced until such plans have been approved by said superintendent.”

It will be noted that the language contained in Section 16 of the former act which refers to the streets and highways as passing over the canal has been somewhat modified and the reference is only to the existing bridges under the respective jurisdictions of the county, township or municipality. It will be noted further that there is omitted in this new section the reservation contained in the last sentence of Section 16 of the former act. In view, however, of the explicit language of Sections 2 and 3 to which I have referred, reserving to the state the title in fee simple of all the lands occupied by the canal, I do not consider the omission of this reservation in the new act as being of any significance. The new

act contains provisions similar to those contained in the former act to which I have referred authorizing leases to municipalities of such portions as they may desire.

I find in the annual volumes of the Ohio Laws a number of instances in which the general assembly has by express grant conveyed or authorized the conveyance to municipalities of particular portions of the abandoned canal beds in language which manifests an intention to grant a complete title, at least for street purposes. Typical of these acts is that found in 118 O. L., 153, whereby there was granted to the city of Lancaster the authority to "enter upon, improve and occupy forever for street sewerage, sewage disposal, drainage, public park or other municipal purposes" a portion of the Hocking Canal property. A grant of this character would doubtless be equivalent to a dedication by a private owner of lands such as is contemplated by Section 3585 of the General Code which provides that upon filing of a map or plat of a subdivision "the map or plat so recorded shall thereupon be a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleyways, commons or other public uses."

Another instance is an act found in 69 O. L., 182, whereby the general assembly authorized the city of Cleveland to occupy a part of the Ohio Canal. In that act the city was expressly authorized "to take, enter upon, improve and occupy as a public highway or for other purposes, and for laying therein gas and water pipes, and for sewerage purposes, as the city council of said city may determine."

Pursuant to this act the city having received a conveyance of said land, leased a portion thereof to a railway company for its tracks. In an action in quo warranto the court, in *Railroad Company v. State*, 85 O. S. 251, held as shown by the third branch of the syllabus:

"When the governor, in the exercise of authority expressly conferred upon him by statute, grants to a municipality 'all the interest of the state' in lands which it owns in fee to be used for streets and other purposes, the municipality, reserving the right to use the same for street purposes without compensation, may execute a valid lease of such lands to a railroad company for its general purposes."

Upon an examination of the general statutes and of the acts passed from time to time relating to canal properties, I am unable to find any

act whereby the state has undertaken to convey to municipalities in general terms, or to the villages mentioned in your letter by special provisions, the title to the portions of the canal property over which the highways in question pass. Furthermore, I am informed by your office that you find in the records of your department no evidence of any such grants having been made.

I note the provisions of Section 14004, General Code, relative to the construction of bridges over canals. This section provides in part as follows:

“In all cases where a new road or public highway is laid out by legal authority, in such direction as to cross the line of any canal or navigable feeder, authorized by the laws of this state, after the line of such canal or navigable feeder is permanently located and established, and in such manner as to require the erection of a new bridge over such canal or feeder, for the accommodation of said road, such bridge shall be constructed and forever maintained at the expense of the county in which such bridge is situated; provided, however, that no bridge shall be constructed across either of said canals or navigable feeders, without first obtaining for the model and location thereof, the consent, in writing, of one of the acting commissioners, or the principal engineer of the canal to be intersected by said road;  
\* \* \*”

This section is a part of an act passed by the general assembly March 23, 1840, providing for the protection of the canals of the state, the regulation of navigation thereof and collection of tolls. Section 14004, General Code, has been in effect in its present terms since the passage of that act. While it appears to assume that public highways may be laid out across the line of the canal it does not in terms or by necessary implication grant any outright title to the counties in the portion of the canal crossed, but merely authorizes the erection of bridges after first obtaining the consent of the canal authorities.

My immediate predecessor had before him a situation somewhat similar to that which you present, relative to the right of a telephone company to take its lines over a bridge crossing the Erie Canal. He held:

“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."

In the course of the opinion it was said:

"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. \* \* \*

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. \* \* \*

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."

In the light of the foregoing I am unable to find that either of the villages mentioned in your letter had such complete title or right to that portion of the land occupied by the canal bed which is crossed by the village streets as would entitle the villages to give to a public utility the right to cross the canal property without first obtaining the permission of the state. Furthermore, I am informed by your department that it has long been the practice for public utility companies desiring to extend their lines over or under these canal beds to obtain from your department leases granting the right to do so. Section 14178-45, General Code, being a part of the act of April 9, 1931 above referred to, authorizes the leasing of such portions of the abandoned canal as may not have been granted for highway purposes or leased for public parks or recreation purposes, and that section appears to be your authority to make leases based on an annual rental of six per cent of the appraised value of the tract leased. The section in question reads as follows:

"At the end of two years from the date at which this act becomes effective, any portion of said abandoned Miami and Erie canal that has not been designated by the director of high-

ways as necessary for state highway improvements under the terms of this act, or has not been leased for public park purposes, to any of the parties herein authorized to make application to lease portions of said abandoned canal for public park purposes, may be appraised by the superintendent of public works at its true value in money, and leased to responsible parties for a term of fifteen years and multiples thereof up to ninety years, or for a term of ninety-nine years renewable forever, subject to the approval of the governor and attorney general, and the annual rental therefor shall be six per cent of the appraised value thereof, as determined by said superintendent of public works.”

Respectfully,

HUGH S. JENKINS  
Attorney General