

of the southeast quarter of Section 11, T. 5 N., R. 18 W., and 6.58 acres in the northwest quarter of the northeast quarter of Section 14, T. 5 N., R. 18 W., in Jefferson Township, Jackson County, Ohio, certificates of title concerning such properties; certified copy of resolution authorizing the purchase of such property; and copy of contract encumbrance record.

Upon examination of such documents, I am of the opinion that the condition of the title is such that upon delivery of the deed the State of Ohio will acquire good title to the premises described in the enclosed deed unincumbered, except for the lien of current taxes, and that the proper steps have been taken to authorize you to complete such purchase.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1265.

LESSEE—MAY REFUSE TO PERMIT SUBSEQUENT OR JUNIOR LESSEE TO ENTER DEMISED PREMISES—PURPOSE—ERECT POLE LINE—EXCEPTION, RESERVATION IN LEASE TO PERMIT SUCH RIGHT—CANAL LAND.

SYLLABUS:

A lessee may refuse to permit a subsequent or junior lessee to enter upon the demised premises for the purpose of erecting a pole line thereon, unless the lease to the senior lessee contains a reservation permitting the lessor to exercise such right.

COLUMBUS, OHIO, October 4, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication, which reads as follows:

“At the time our current land lease form was prepared, a paragraph was included which was intended to give the Department of Public Works the authority to grant pole line and pipe line leases on canal property already under lease for other purposes, providing the pole or pipe line lease would not be inconsistent with any provisions of the prior lease.

One of our lessees, who holds a fifteen year agricultural and residence lease on the Miami and Erie Canal is objecting to the department granting a pole line lease which will occupy ground on his leasehold. The lessee contends that since no provision was made in his lease which specifically stated that the

State reserved the right to grant a pole line on the ground that he has under lease, the department does not have the authority to grant a pole line lease which will include his leasehold. The paragraph mentioned above is as follows:

‘Said lands shall be so used and maintained at all times as not to interfere with the maintenance and navigation of any part of the adjacent canal system of the state, and party of the first part or its lessees may enter upon and use said lands for any purpose not inconsistent with the provisions of this lease, and for the purpose of making such changes and improvements as the Superintendent of Public Works as Director of Public Works or his authorized agent may deem necessary.’

This department holds that ‘its lessees’ in this paragraph would be the pole line company and inasmuch as the granting of a pole line lease will not be inconsistent with any provisions of this lessee’s land lease, the department is within its rights in entering into a lease with the pole line company for occupancy of canal property now under lease to this particular lessee.

Your opinion is therefore requested on the interpretation of ‘its lessees.’

For your convenience, a land lease form is enclosed.”

When the state determines that it has no immediate need for certain lands which it owns and thereupon leases such lands to private interests, the state is acting in a proprietary capacity as distinguished from the exercising of its sovereignty. The rights of sovereignty have been said to be confined to those rights which are deemed essential to the existence of government. Acting in its proprietary capacity, the state as a lessor has the same rights and is subject to the same rules of justice as in its sovereign power the state has prescribed for its citizens. *State v. Executor of Buttles*, 3 O. S., 309. In *Fid. & Cas. Co. v. Sav. Bk. Co.*, 119 O. S., 124, 131, Marshall, C. J., said in the opinion:

“That no sovereign prerogatives can be asserted where the government is acting in its proprietary capacity has been so often asserted by the courts of this state that it is not necessary to cite or discuss the authorities which support that proposition. It is only necessary to inquire whether or not in a given case the government is acting in the exercise of a governmental function.”

Authority for the leasing of canal lands is found in section 13965, General Code, if the making of such leases “would not injure or interfere with the maintenance and navigation of any of the canals of this state

* * * and if such lands shall not be under an existing lease.” It is further provided that such lands may be so leased for any purpose or purposes other than for steam operated railroads, railroads being especially limited in their use of such lands.

Regarding the use a tenant may make of leased premises, it is said in 24 O. Jur., 884, section 159, as follows:

“Where a lease is general in its provisions and terms, and expresses nothing as to the mode in which the lessee is to use or occupy the premises, he is clothed with full power and right to occupy and use the land demised for any lawful purpose not injurious to the reversion.”

Of course, a lessor has the right to incorporate restrictions and reservations in the lease, all of which would be binding on the lessee. In 36 C. J., 66, section 687, it is said:

“While the lease may reserve the right in the landlord to enter upon the premises, such right does not extend beyond the terms of the reservation.”

An examination of the lease form submitted with your inquiry discloses that the lessor did include certain restrictions and reservations, including the following:

“It is agreed that the party of the first part by its authorized agents, may, at any time when necessary, enter upon said lands for the purpose of making such changes and improvements as the Superintendent of Public Works as Director of Public Works may deem necessary.

* * *

Said lands shall be so used and maintained at all times as not to interfere with the maintenance and navigation of any part of the adjacent canal system of the state, and party of the first part or its lessees may enter upon and use said lands for any purpose not inconsistent with the provisions of this lease, and for the purpose of making such changes and improvements as the Superintendent of Public Works as Director of Public Works or his authorized agent may deem necessary.

This lease is hereby expressly made subject to all prior leases and grants heretofore made for any portion of the lands, rights or privileges embraced in this lease, and subject to the renewal of such leases and grants during the entire term of this lease.

The party of the second part for..... heirs, executors, administrators, successors and assigns agrees

not to plow down the canal embankments herein leased, nor fill up any drains or ditches in the bed of the canal, or in any manner obstruct the flow of water through the same.

The party of the first part hereby reserves all oil, gas, coal or other minerals on or under the lands herein leased, (excepting lands located within the corporate limits of municipalities) with the right of entry in and upon said premises for the purpose of selling or leasing the same, or prosecuting, developing, or operating the same."

It will be noted, however, that other than the above quoted portions of the lease, no attempt has been made by the lessor to reserve the privilege of granting any other or further rights in the demised premises, even though such grant or grants may not be inconsistent with the uses made of such lands by the lessee.

In response to your request for an interpretation of the phrase, "its lessees", I assume from your inquiry that in the case under consideration there were no rights in the demised premises granted by the state prior to the lease given to the objecting lessee. Hence, in the instant case, if "its lessees" is to have any meaning, it must refer to junior lessees. Certainly the rights obtained by a junior lessee could be no greater than the rights the state retained in the prior lease. "Its lessees", therefore, must mean persons whose rights can rise no higher than the rights of the state. Since the state has failed to reserve the right to erect or permit the erection of a pole line on the demised premises, "its lessees" are also precluded. The original lessee is entitled to the full and complete use of the demised premises except as restricted by the terms of the lease itself.

In answer, therefore, to your inquiry, it is my opinion that a lessee may refuse to permit a subsequent or junior lessee to enter upon the demised premises for the purpose of erecting a pole line thereon, unless the lease to the senior lessee contains a reservation permitting the lessor to exercise such right.

Respectfully,

THOMAS J. HERBERT,
Attorney General.