2503.

SAND OR GRAVEL — REMOVAL FROM LAKE ERIE — PERMIT — LEASE — LICENSE — TERM SPECIFIED — AGREED RATES.

SUPERINTENDENT OF PUBLIC WORKS, WITH CONSENT GOVERNOR AND ATTORNEY GENERAL, HAS AUTHORITY TO ISSUE SUCH GRANTS — SECURE PAYMENT OF RENTALS BY LIEN —— SECTION 412-28 G. C. — PROVISO, SUCH REMOVAL INCIDENTAL TO ARREST BEACH AND SHORE EROSION OR BENEFIT NAVIGATION.

NO POWER GRANTED SAID SUPERINTENDENT BY LEGISLATURE TO MAINTAIN ACTION AGAINST PERSON FOR WRONGFUL REMOVAL WITHOUT LICENSE — STATE EX REL. ATTORNEY GENERAL, MAY BRING ACTION FOR CONVERSION AND ENJOIN FURTHER THREATENED REMOVAL WHERE NO LICENSE ISSUED.

SYLLABUS:

1. *The Superintendent of Public Works of the State of Ohio, with the consent and approval of the Governor and the Attorney General, has the authority under Section* 412-28, *General Code, to grant permits for the removal of sand or gravel from Lake Erie for the term therein specified and*

at rates to be agreed upon, when such removal is incidental to arresting beach and shore erosion or to benefit navigation, and to secure the payment of the rentals reserved in such leases or licenses by a lien as provided in Section 412-28, *General Code.*

2. *The Superintendent of Public Works has not yet been granted by the legislature any power to maintain an action to recover the value of sand or gravel from Lake Erie against a person who has removed them without his license.*

3. *An action may be maintained by the State of Ohio on relation of the Attorney General against a person who has removed sand or gravel from Lake Erie without the license of the Superintendent of Public Works for the conversion thereof and to enjoin further threatened removal without such license having been issued.*

Columbus, Ohio, July 9, 1940.

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

Dear Sir:

I am in receipt of your request for my opinion which reads:

> "On May 1, 1935, the Ohio Legislature passed Substitute Senate Bill No. 236 known as the 'Erosion Bill' (Sec. 412-24 to 33, inclusive). Section 412-28, Sec. 5, provides that 'Subject to the limitations set forth in Sec. 6 of this act, authority is hereby granted to the superintendent of public works to issue permits, subject to the approval of the governor and attorney general, to parties making application therefor, for permission to take and remove sand, gravel, stone, minerals and other substances from the bottom of said lake, either upon a royalty basis or for a fixed annual rental as they may deem for the best interests of the state; said permits for sand, gravel, stone, minerals and other substances shall be issued for terms of not less than one nor more than ten years, to be taken within certain fixed boundaries that do not conflict with the rights of littoral owners. Upon request from the holders of such permit, the same shall be cancelled, but any equipment or buildings owned by the lessee shall be held as security by the superintendent of public works for payment of all rentals or royalties due the State of Ohio at the time of application for cancellation.'

To date as far as we know, there are four companies involved. One company has regularly applied for a permit, which has been granted, and have paid a royalty for sand, etc. Another company has applied and has been granted a permit but has never taken any material from the lake. Still another company was granted a permit, took material from the lake and for a time paid royalties, but recently has refused to comply with the law. The fourth company, the largest of the four, has consistently refused to apply for a permit, but at the same time has continued to take large quantities of materials from the lake. Recently, however, they have made some overtures as to the matter and which are now pending.

This department has never had, as far as we know, any opinion as to what the powers of the superintendent of public works are in this matter. We would therefore respectfully, request an opinion as to:—

(1) Can the superintendent of public works compel any person or company that takes materials from the lake to secure a permit to do so and charge them a royalty or rental?

(2) Is there any way to collect from persons or companies who have taken materials from the lake in the past to pay back royalties or back rental?

(3) If the superintendent of public works has the power to compel the securing of permits for removal of material from the lake and secure back payment, what steps should be taken to compel compliance with the above?"

Section 6 of such Act is now Section 412-29, General Code, and reads:

"All laws providing for the control and management of the public works of Ohio by the superintendent of public works are hereby made effective as to the provisions of this act in so far as the same are applicable. Provided however, that such laws shall have no application to littoral and/or submerged lands; (1) within or adjacent to municipal corporations to which the State of Ohio has delegated certain powers and duties by (a) Article 18, Section 7 of the Constitution or (b) the following acts: 107 Ohio Laws 587—(G. C. sections 3699a-3699-9 inclusive), 107 Ohio Laws 581, 111 Ohio Laws 417—(G. C. §3699-10), 113 Ohio Laws 505; and (2) in or adjacent to harbors or bays on Lake Erie in which the United States government has established harbor lines or between now existing breakwaters constructed by the United States government and a line, extended from such existing breakwaters two miles in each direction, parallel to the shore and the shore line, provided, however, that nothing in this section shall prohibit the superintendent of public works from co-

operating with a municipality, upon its request so to do, in preventing erosion or improving a harbor within the jurisdicton of such muncipality."

In the interpretation of statutes, we must construe an act in the light of the purpose sought to be accomplished. Cochrel v. Robinson, 113 O. S., 526; Cleveland Trust Company v. Hickox, 32 O. App., 69. It is never to be presumed that the legislature intended to exceed its power in the enactment of a statute. If a statute is susceptible of two possible constructions, one of which will render its enactment within the power of the legislature and the other of which will render the act void as being in excess of the power of the legislature, we must place that interpretation on the act which will render it effective rather than invalid. State, ex rel. Village of Cuyahoga Heights, v. Zangerle, 103 O. S., 566. Since it is fundamental that the State of Ohio may not sell property which it does not own, let us examine briefly the nature of the ownership of the subaqueous lands under Lake Erie.

As was stated in Shively v. Bowlby, 152 U. S., 1, "upon the American Revolution, the title to and dominion of the tide waters and of the lands under them vested in the several states of the Union within their respective borders, subject to the rights surrendered by the Constitution to the United States." The same rule as was applied to tide waters is, in the United States, applicable to waters which are navigable in fact and to the Great Lakes. See Hickox v. Hine, 23 O. S., 523; Sloan v. Biemiller, 34 O. S., 492; Gavit v. Chambers, 3 Ohio, 496; Lamb v. Ricketts, 11 Ohio, 311; Walker v. Board of Public Works, 16 Ohio, 544; Hardin v. Jordin, 140 U. S., 371. It would, therefore, appear that the waters of Lake Erie, which are now a part of the State of Ohio, and the lands thereunder, at the end of the American Revolution belonged to the "original states" subject to the constitutional rights of the Federal Government therein. On September 13, 1786, Connecticut, by deed, ceded to the United States all its claim to the territory and jurisdiction of lands west of a line drawn from a point in north latitude forty-one degrees and one hundred and twenty miles west of the west line of Pennsylvania, due north to the national boundary line in Lake Erie. This grant was accepted by Congress on the next following day.

In 1792, Connecticut granted to the people who had suffered loss by reason of the incursions of the British troops during the Revolutionary War,

five hundred thousand acres of land "bounded on the north by the shore of Lake Erie" and on the west by a line drawn from forty-one degrees north latitude running north to Lake Erie and on the south by forty-one degrees north latitude; the east line was not fixed by metes and bounds, but was to be located far enough east to include five hundred thousand acres in the parcel set off. Such parcel was known as "The Western Reserve." (See Hogg v. Beerman, 41 O. S., 81, 83.) The jurisdiction over these lands, as well as of the waters north thereof, was later ceded to the United States Government.

In 1803, the State of Ohio was created and the title to the navigable waters and subaqueous lands thereunder, within the geographical limits of that State, passed to the State of Ohio to the same extent as though it had been a state at the end of the Revolution. Shively v. Bowlby, 152 U. S., 1. Under the common law of England, the sovereign was the absolute owner of the fee to subaqueous lands under tidal waters. Such rule of common law was not adopted by many of the courts of the states, including Ohio. In Martin v. Waddell, 16 Peters (U. S.), 367, the court enunciated the theory that the title was held in trust for the benefit of the people, rather than in a proprietary capacity. Ohio has adopted this theory of trust ownership. State v. C. & P. Railroad Company, 94 O. S., 61. As is stated in 1 Farnham—Waters & Waterways, Section 60, "Where the trust doctrine prevails, no grants can be made except the right to construct wharves or other structures in the aid of navigation." As it is generally stated, the ownership by the state of the subaqueous lands under navigable waters is jus publicum rather than jus privatum. The Ohio courts have held that "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." (State v. Cleveland & Pittsburgh Railroad Co., 94 O. S., 61, Syl. 3.) The specific holding of the court in State v. C. & P. Railroad Company, supra, is that the title of the state to the subaqueous lands is *in trust for public* purposes. In the sixth syllabus of such opinion, the court stated that:

> "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."

Such holding of the court is supported by decisions of the courts of jurisdictions abutting on the Great Lakes. See Hilt v. Weber, 252 Mich., 198; Nedtweg v. Wallace, 237 Mich., 14; Doemel v. Jantz, 180 Wis., 225; Barney v. Keokuk, 94 U. S., 324; McCormick v. Chicago Yacht Club, 331 Ill., 514; State v. Korrer, 127 Minn., 60; State, ex rel. Jackson County, v. District Court, 146 Minn., 510.

If then, as held in the cases cited above, the state holds the title to the lake and the subaqueous lands thereunder in trust for all the people of the state, and not in a proprietary capacity, subject to the rights of the Federal Government with reference to interstate and foreign commerce and war, the question arises as to whether the state may dispose of lands thereunder or a portion for private use. This limitation of the state's title has been recognized by the legislature in Section 3699a, General Code, which reads:

> "It is hereby declared that the water of Lake Erie within the boundaries of the state together with the soil beneath and their contents do now and have always, since the organization of the state of Ohio, belonged to the state of Ohio as proprietor in trust for the people of the state of Ohio, subject to the powers of the United States government, the public rights of navigation and fishery and further subject only to the right 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 avulsion. Any artificial encroachments by public or private littoral owners, whether in the form of wharves, piers, fills or otherwise beyond the natural shore line of said waters not expressly within its powers, shall not be considered as having prejudiced the rights of the public in such domain. Nothing herein contained shall be held to limit the right of the state to control, improve or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby."

It is elemental that a trustee may neither sell property held by him nor convert it to uses other than that for which the trust was created.

As is pointed out in 1 Farnham, Waters and Water Courses, 520, the primary purpose for which the waterway is held is for navigation. See also United States v. Chandler-Dunbar W. P. Co., 229 U. S., 53. Similarly, in Sloan v. Biemiller, 34 O. S., 492, it is pointed out that another purpose is for fishing. See also Angell on Tide Waters, 21; State v. C. & P. Railroad Co., 94 O. S., 61. It would thus seem that the State of Ohio is the

owner of the subaqueous lands in trust for the benefit of the public for purposes of navigation and fishing. As stated by the court in State v. C. & P. Railroad Co., 94 O. S., 61, 80:

> "The state as trustee for the public cannot by acquiescence abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created."

The cases seem to be unanimous in their holdings to the effect that a state may not convey title to the lands under the Great Lakes, or any part thereof, to a private owner. See Illinois Central Railroad Company v. Illinois, 146 U. S., 387. However, when we come to the question as to whether the state may sell or otherwise permit a private person to remove sand or gravel which has been deposited on such subaqueous lands as though by alluvium, the decisions are by no means multitudinous. In 27 R. C. L., 1396, we find the following statement:

> "Where the title to the bed of a navigable stream is in the state, no person has the right as against it to take or appropriate sand, gravel, phosphates and the like therefrom without its consent or license."

Such would appear to be the rule by reason of the ordinary incidence of ownership. Likewise, if Ohio were the owner of the fee simple estate to such subaqueous lands in its proprietary capacity rather than in a trust capacity, there would be no reason to conclude that the state might not sell or otherwise dispose of such sand or gravel.

In the case of Wear v. State of Kansas, ex rel. Brewster, 245 U. S., 154, the question was considered as to whether the State of Kansas could permit the removal of sand by a private person and require the payment of ten per cent of the market value of sand so taken from navigable streams within such state. The court in such case sustained the Kansas court in its holding that the state could consent to the removal of such sand and make such charge. The court did not consider the question of the trust capacity under which the state held the title, nor is it clear whether the consent to the removal of such sand was not for the purpose of maintaining the river in a navigable condition. In fact, in the pleadings in such case it was alleged that the presence of the sand in the channel of the stream interfered with the navigability of the stream.

From the decisions, it clearly appears that not only the state but the

federal government may, consistent with the trust title of the state, remove silt, sand or other substances from the channel in order to render the waters more suitable for navigation.

In St. Louis Iron Mountain and Southern Railroad Company v. Ramsey, 53 Ark., 314, the question as to the ownership of a sand bar in a river over which ships could pass at ordinary water level stages but not when at low level, was presented. The court held that even though during low water level this bar extended above the surface, the title thereto was in the state, in trust for the public, but did not consider the question of its right to sell such sand.

In Florida v. Black River Phospate Company, 32 Fla., 82, the court held that a littoral owner had no right to remove phosphate from the subaqueous lands without the consent of the state, but declined, under the pleadings of that case, to express an opinion as to whether an act somewhat similar to that under consideration was within the powers of the state.

It would seem from the authorities above cited that no private person or corporation may take sand, gravel or other similar substances from the lands under Lake Erie, within the State of Ohio, without the consent of this State. If it should have become necessary from time to time to remove sand, gravel and other like substances from the subaqueous lands under Lake Erie for the purpose of maintaining proper channels for purposes of navigation, I am unable to find any rule of law which would prevent the State from selling such sand, gravel or other similar substances, when removed by or sold to private individuals. If, by your request, you desire to know whether the Superintendent of Public Works may issue permits to persons to remove gravel and sand from Lake Erie without regard to whether such removal is in aid of navigation, we must refer to the purpose of the enactment and construe such statute in the light of such purpose. Section 412-24, General Code, is a part of an act enacted in 116 O. L., 244. The purpose of such act, as stated in its title, is:

> "To create within the department of public works of Ohio, a division to have charge of matters pertaining to beach and shore erosion projects, and to authorize the superintendent of public works of Ohio to assist in arresting beach and shore erosion and to make harbor improvements along the shores of Lake Erie within the state of Ohio, to provide funds therefor, and to declare an emergency."

The first section of such act has been given section number 412-24, General Code, which reads:

> "The superintendent of Public Works of Ohio is hereby authorized and directed to act as the erosion agency of the State of Ohio for the purpose of cooperating with the Beach Erosion Board of the United States War Department, as provided for under the provisions of section 2 of the 'River and Harbor act' adopted by the congress of the United States, and approved July 3, 1930 and known as House Resolution No. 11781, of the second session of the 71st Congress of the United States of America, and said superintendent and engineers under his direction, shall cooperate with said Beach Erosion Board of the United States War Department in carrying out investigations and studies of present conditions along the main shore lines of Lake Erie and of the bays and projections therefrom, and likewise of the islands therein, within the territorial waters of the state of Ohio with a view to devising and perfecting economical and effective methods and works for preventing and correcting such shore erosion and damages therefrom."

The federal act referred to in such section is that contained in 46 Statutes at Large (Vol. I, 1930), 945, which act, among other things, authorizes the War Department to expend moneys and perform acts with reference to the prevention of beach erosion and shore protection, in the Great Lakes, and to remove readily removable obstructions in navigable waters and their tributaries, but only in cooperation with the states. In view of such fact and the appropriateness of the provisions of the act found in 116 O. L., 244, to such purpose, as well as the reference in such act to the federal enactment, it would appear to have been the legislative purpose in the enactment of such act to enable the State of Ohio to cooperate with the federal government in the prevention of beach erosion and shore protection and the removal of obstructions of navigation. The language quoted in your request from Section 412-28, General Code, is preceded by the following language:

> "The superintendent of public works may expend upon erosion and harbor projects along the shores of Lake Erie, and its connecting bays, such funds as may be appropriated by the general assembly from time to time for such purposes, and in addition, a sum of money equal to the funds derived from the granting of permits hereinafter authorized."

Then follows the language quoted in your request. Such language would further indicate that such act was enacted for the purpose of enabling the

State of Ohio to cooperate with the federal government in the prevention of beach erosion and shore protection and in aid of navigation. In view of such fact and also that the sale of materials from the subaqueous lands for purposes other than in furtherance of the public trust for which the State holds the legal title thereto—navigation and fishing—it would appear that the sale of such materials and granting of permits, under the authority of Section 412-28, General Code, by the Superintendent of Public Works is limited to the sale and issuance of such licenses for removal of sand, gravel, etc., as in the aid of navigation, or incidental to beach and shore erosion prevention projects.

The answer to your second and third inquiries requires different considerations. Inasmuch as that portion of Section 412-28, General Code, quoted in your request specifically provides that "any equipment or buildings owned by the lessee shall be held as security by the superintendent of public works for the payment of rentals or royalties due the state of Ohio at the time of application for cancellation" of a permit to take and remove sand, gravel, etc., from the bottom of the lake, I shall assume that your inquiry is as to whether any other method exists than the enforcement of such lien.

Section 413, General Code, reads as follows:

> "The superintendent of public works of Ohio may maintain an action in the name of the state for violations of any law relating to the public works for an injury to property pertaining to the public works or for any other cause which may be necessary in the performance of his duties."

It should be remembered that Sections 412-24 to 412-32, both inclusive, General Code, became effective on May 21, 1935. Prior to that date, the Superintendent of Public Works had no powers or duties with reference to the management or control of Lake Erie property. It would thus seem that the Superintendent of Public Works could not be authorized by Section 413, General Code, to bring any action for injury to such property prior to 1935. Since you do not infer that any claim has been outstanding for a period of more than five years, I will assume for the purposes of this opinion that the claims to which you refer arose after the date of the enactment of such act.

We must bear in mind that the Superintendent of Public Works is a public officer and, as such, has such powers and such only as have been

granted him by the statutes creating such office and defining its duties. Peter v. Parkinson, 83 O. S., 36; State, ex rel. Bentley & Sons Company, v. Pierce, 96 O. S., 44; Frisbie Company v. East Cleveland, 98 O. S., 266. I do not find any grant of power in the statutes of Ohio granting to the Superintendent of Public Works any power to enforce payment for sand, gravel, etc., taken from the subaqueous lands under Lake Erie other than by enforcement of the lien, granted by Section 412-38, General Code, for the payment of royalties or rentals and the authority granted him by Section 413, General Code, to bring actions as may be necessary in the performance of his duties. It should be remembered, however, that Section 413, General Code, is not a part of the same act as that of which Section 412-28, General Code, is a part. Since Lake Erie is not a part of the public works of the State, except to the extent that it is made so by Sections 412-24 to 412-33, both inclusive, General Code, we cannot extend its terms by interpretation to authorize the Superintendent of Public Works to bring any action under its authority other than for interference with his performance of duty pertaining to his office. Since Section 412-24, General Code, merely grants to the Superintendent of Public Works a limited right to make certain leases or licenses and to charge a rental or license fee thereunder for the right of removal of sand, gravel, etc., I am of the opinion that the Superintendent of Public Works is not granted any authority to bring an action to recover compensation for the taking of such materials when not taken under authority of a license or rental agreement.

I do not think it could be claimed that the State of Ohio might not maintain any action concerning the trust of which it is the trustee, if under like circumstances a private trustee could maintain any action. It has been my attempt in the foregoing discussion to determine whether the Superintendent of Public Works could bring the action by reason of the conversion of the sand, gravel or other substance mentioned in your request. Since I have been unable to find any authority granted to such Superintendent to maintain such action, I must examine other provisions in order to determine whether any public official has been granted such authority. Section 345, General Code, reads as follows:

> "The attorney-general may prosecute an action, information, or other proceeding in behalf of the state, or in which the state is interested, except prosecutions by indictment, in the proper court of Franklin county, or of any other county in which the defend-

> ant or one or more of the defendants reside or may be found. No civil action, unless elsewhere specially provided, shall be commenced in Franklin county, if the defendant or one or more of the defendants do not reside or can not be found therein, unless the attorney-general shall certify on the writ that he believes the amount in controversy exceeds five hundred dollars."

This section has been construed as granting authority to the Attorney General to enjoin injury to a highway, State v. Railway Company, 36 O. S., 424, and to maintain ejectment and damages to state property. State v. Fenn, 10 O. N. P. (N. S.), 325. It would thus appear to me that an action might be prosecuted under this section by the State of Ohio on the relation of the Attorney General for the recovery of damages, as in trespass, by reason of the injury caused by the taking and conversion of the sand or gravel held in trust by the state. I have been unable to find any authority granted to any other official to maintain such action. It is highly probable that the courts would enjoin the taking of the gravel or sand unless and until a permit would be obtained under authority of Section 412-28, General Code, upon hearing of an action so brought.

Specifically answering your inquires, it is my opinion that:

1. The Superintendent of Public Works of the State of Ohio, with the consent and approval of the Governor and the Attorney General, has the authority under Section 412-28, General Code, to grant permits for the removal of sand or gravel from Lake Erie for the term therein specified and at rates to be agreed upon, when such removal is incidental to arresting beach and shore erosion or to benefit navigation, and to secure the payment of the rentals reserved in such leases or licenses by a lien as provided in Section 412-28, General Code.

2. The Superintendent of Public Works has not yet been granted by the legislature any power to maintain an action to recover the value of sand or gravel from Lake Erie against a person who has removed them without his license.

3. An action may be maintained by the State of Ohio on relation of the Attorney General against a person who has removed sand or gravel from Lake Erie without the license of the Superintendent of Public Works for the conversion thereof and to enjoin further threatened removal without such license having been issued.

Reference is made in your letter, without name, to two companies, each of which you state has for some time taken material from the lake without making payment therefor to the State, one under a permit issued to it and the other without a permit. Inasmuch as it is my opinion that recovery might be had against these companies for the value of the material taken, I suggest that you furnish me with the names of such companies, together with any other information which you have relative to their operations in Lake Erie, so that appropriate steps may be taken by me to effect the collection of moneys due the State.

Respectfully,

THOMAS J. HERBERT,
Attorney General.