

feited, and *transmit a transcript of his proceedings in the case, together with the recognizance, to the clerk of the proper court.* Proceedings shall be had thereon by such court, as may be expedient, in a like manner as if the recognizance had been taken therein." (Italics, the writer's.)

I feel that the language and intention of the foregoing statute is perfectly clear and unambiguous and under the facts of the case you have submitted, it is the mandatory duty of the Justice of the Peace to transmit the forfeited cash bail, together with a transcript of his proceedings in the case, to the clerk of the proper court. Accordingly, he cannot render judgment for costs and make the proper deductions from the forfeited recognizance before transmission to the proper court but must include the cost bill in his court as part of the record of the proceedings which is transmitted to the proper court and look to the payment of these costs from the County Treasurer.

Inasmuch as it is my opinion that the Justice of the Peace cannot render any judgment under the facts of your submitted case, the only items appearing in the cost bill you have submitted that are proper charges in the Justice's court, are as follows:

Taking and certifying Affidavits, ea.	.80	.80
Indexing case		.20
Issuing warrant 1 person, each	.80	.80
Taking Bonds or recognizances, each	.80	.80
Granting Continuance, each	.50	.50
Warrant to arrest Defendants, each	1.00	1.00
Mileage, 1st mile 50c, additional mile	.15	.50

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1547.

OHIO AND ERIE CANAL LANDS ACQUIRE UNDER LEASE
BY THE AMERICAN STEEL AND WIRE COMPANY—FEE
SIMPLE TITLE, WHEN.

SYLLABUS:

Lands acquired by appropriation or otherwise in the construction of the section of the Ohio and Erie Canal now held under lease by The

American Steel and Wire Company and of other parts of this and other canals of the State, including those acquired for embankments and other necessary purposes in the construction, operation and maintenance of the canal, were so acquired by absolute and unconditional fee simple title. And, 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 as against the owners of contiguous lands and others, although the owners of such contiguous lands may own and hold their lands under deeds describing the same as extending to the center line of such canal property and they have paid taxes on the property so described, and although the owners of such contiguous lands may have occupied and used for their own purposes a part of such canal lands.

COLUMBUS, OHIO, November 27, 1937.

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

DEAR SIR: This is to acknowledge the receipt of your recent communication in which you request my opinion as to the present title of the State of Ohio to a section of the Ohio Canal in Cuyahoga County which is now held under lease by The American Steel and Wire Company, to the full width of the bed and banks thereof, from a point at Harvard Street in the City of Cleveland, Ohio, to a point about thirteen miles south of Harvard Street.

The question presented in your communication arises by reason of the fact that some of the owners of lands contiguous to this canal property who hold their lands under deeds describing their property as extending to the center line of the canal property, now claim that since this canal property is no longer used for canal purposes, they have title to this canal property to the center of the bed of the canal.

I am advised that The American Steel and Wire Company has taken and now holds a lease of the lands in this section of the Ohio Canal under the authority of Section 13965, General Code, as well as a lease of the waters in this canal for hydraulic or other purposes executed to it by the Superintendent of Public Works under the authority of Section 14009, General Code. It appears further in this connection that although this section of the Ohio Canal has not been formally abandoned for canal purposes by any act of the legislature of this State, this property is no longer used for canal purposes, although a part of the same is being used to furnish water to The American Steel and Wire Company under its lease for this purpose.

The claims made by the property owners above referred to are, I assume, predicated upon the contention that the only interest which the State acquired in this canal property was an easement for canal purposes only and that when the State ceased to use this property for canal purposes it reverted to the owners of contiguous lands holding title under deeds which described their property as extending to the center of the canal.

It would seem that this is a late day for these property owners or anybody else to make or seriously urge a contention of this kind. Long ago the courts of this State held that the interest of the State in lands acquired by it for canal purposes was not an easement but was a title in fee simple which the State did not lose when it ceased to use such canal property for canal purposes.

Practically all of this section of the Ohio Canal, now held by The American Steel and Wire Company under lease, as other parts of this and the other canals of the State, was acquired by the State under Section 8 of the Act of February 4, 1825, 23 O. L., 50, 56, entitled "An act to provide for the internal improvement of the State of Ohio, for navigable canals." As noted by the Supreme Court of this State in the case of *Malone vs. Toledo*, 34 O. S., 541, 546, 547, this section of the act above referred to conferred the power upon the State, through its authorized agents, to "enter upon and use, all and singular, any lands, waters, streams, and materials necessary for the prosecution of the improvements intended by the act," and provided, "in case any lands, waters, streams, or materials taken and appropriated for the purposes aforesaid, shall not be given or granted to the State," that, on application, of the owner, a just and equitable estimate and appraisal of the loss or damage, if any, over and above the benefit and advantage accruing to the parties interested in the premises, should be made. It was further provided that the "canal commissioners shall pay the damages so to be assessed and appraised, and the 'fee simple' of the premises so appropriated shall be vested in the State: Provided, however, that all such applications to the board of canal commissioners for compensation for any lands * * * so appropriated shall be made within one year after such lands * * * shall have been taken possession of by said commissioners for the purposes aforesaid."

The Supreme Court in this case of *Malone vs. Toledo*, *supra*, speaking of these provisions of Section 8 of the Act of February 4, 1825, said:

"This section prescribes three modes of acquiring title—by gift, purchase, and by appropriation. It is very manifest, from the words of the act, that the estate acquired by appropriation was either an absolute fee in the property taken, or a fee on

condition that the land continue to be used and occupied for the use of the canal, or for purposes of a similar nature. A mere easement would not have been described as a fee simple. Hence, the land, on its abandonment for public uses, if a conditional fee was taken, would revert to the original owner, or to his grantee of the specific parcel, and not to the grantee of the adjoining lands. But, when the language of the statute is considered in connection with subsequent acts relating to the same subject matter, and with the nature and character of the work contemplated, and the meagre means of transit then existing, or which the future promised, it is very apparent that the improvement was expected and designed to be of permanent duration; and, consequently, that the term 'fee simple,' employed to define the estate to be acquired by appropriation, was used in its strict legal sense, importing an absolute estate of inheritance. That the same interest or estate was intended where the lands were taken under the statute as where the title was acquired by donation, or purchase, would seem to be perfectly obvious; and that the title acquired by grant from the owner embraced the fee divested of all conditions or limitations, is made very clear."

Touching this question, the Supreme Court of the State in the later case of *Ohio, ex rel., vs. Railway Company*, 53 O. S., 189, held:

"By force of the provision of Section 8 of the act to provide for 'the internal improvement of the State of Ohio by navigable canals,' 23 O. L., 57, whenever the state actually occupied a parcel of land for canal purposes, a fee-simple title thereto at once and by virtue, alone, of such occupancy, vested in the state."

The court in its opinion in this case, found at pages 243 and 244 of the report of the case, said:

"That the title of the state to its canal lands is one in fee simple is a question of law. The only fact to be ascertained is whether the lands were in fact a portion of the canal system. How the acquisition was made is not material. The mere seizure and appropriation of a parcel of land for canal purposes, by force, of the statute under which our canals were constructed, was alone sufficient to vest in the state a fee simple title to them. Nor could any other title than one in fee simple

be received by the state for lands to be devoted to a canal. A mere occupation of lands by the state for canal purposes, was a seizure and appropriation of it to that purpose, and to be devoted to that purpose was to give to the state a fee simple title thereto. No conveyance was necessary; the seizure and occupation transferred to the state the entire estate in the lands so seized and occupied, leaving to the former owner simply a claim for compensation. 23 O. L., 56 (Section 8) *Malone vs. Toledo*, 28 Ohio St., 643; *Malone vs. Toledo*, 34 Ohio St., 541."

Likewise, the Supreme Court in the case of *State of Ohio vs. Snook, et al.*, 53 O. S., 521, held:

"Lands of which the state in any manner acquired possession under the acts of February 4, 1825 (2 Chase, 1472), and February 7, 1826 (24 O. L., 58), and used in the construction of its canals, became the property of the state in fee."

The Supreme Court in its opinion in this case, speaking of the Act of February 4, 1825, above referred to, and of the Act of February 7, 1826 (24 O. L. 58), which authorized the canal commissioners to acquire lots contiguous to the canal for lease by the State in connection with the lease of surplus waters in the canal for hydraulic purposes, and for the sale of other lands donated to or otherwise acquired by the State for the use of its canal funds, said:

"These acts contemplated that 'lands, waters and streams' would be acquired by the state for the actual construction of its canals, including 'feeders, dikes, locks, dams and such other works and devices as they (the canal commissioners) may think proper for making said improvements,' and lots and lands not needed for the construction and operation of the canals, but acquired by donation or otherwise, to be sold or leased and the proceeds used in aid of such construction. The effect of the legislation looking to the establishment of the canal system of the state was that it acquired an unrestricted title in fee to all the lands of which it in any manner took possession for the purposes of such construction. *Malone vs. Toledo*, 34 Ohio St., 541; *Ohio ex rel. vs. The P., C., C. & St. L. Ry. Co.*, ante, 189."

Further, on this point the Supreme Court of this State in the case of *State of Ohio vs. Griftner*, 61 O. S., 201, held:

“The title acquired by the state to lands which it appropriated and used in the construction and operation of canals under the act of February 4, 1825, 23 O. L., 50, is a fee simple, and the former owners of such lands, by reason of such appropriation, parted with all their title and interest in such lands.

The fee simple title to such lands remains in the state after it ceases to use such lands for canal purposes, and the statute of limitations does not run against the state as to such lands.”

Obviously, the above rules apply to lands appropriated or otherwise acquired by the State for the purpose of constructing the banks of canals, reservoirs and other improvements constituting a part of the canal system of the State, as well as to lands acquired for the purpose of serving as the channel of the canal or as the bed of the reservoir, feeder or other improvement forming a part of the canal system.

Upon this point the Circuit Court of Licking County in the case of *The Columbus, Newark and Zanesville Electric Railway Company vs. Nelson, et al.*, 14 C. C. (N.S.), 129, held that “The banks of a canal, and of its feeders and reservoirs, constituted a necessary part of the canal, and in the absence of an agreement to the contrary formed a part of the original appropriation by the state.” The court in this case further held, as indicated in the headnote to the report of its decision, as follows:

“The appropriation of land for the banks of a canal reservoir included a space of a sufficient width to hold the waters up to the storage level and protect surrounding property and afford the agents of the state a right-of-way over and around the property for purposes of maintenance.”

In the case of *Haynes vs. Jones*, 91 O. S., 197, the question presented was the title of the State to certain lands occupied by the embankment and borrow-pits adjacent thereto on the north side of the Licking-Summit Reservoir, which reservoir at the time the embankment was constructed was a part of the Ohio and Erie Canal system of the State. As principles of law applicable to the appropriation by the State of lands for the purposes of such embankment and borrow-pit and to the State's title to land so acquired, the Supreme Court in this case held:

“The entry and occupation of land by the State of Ohio for canal purposes under authority of the act of February 4, 1825, and the exercise of open and notorious acts of ownership thereon and thereover, in and about the construction of the canal system of the state, was an appropriation of such

land for canal purposes within the meaning of that act, and entitled the original owner thereof to demand and obtain compensation therefor from the state.

Under the act of February 4, 1825, the fee simple title of all lands appropriated by the state for canal purposes vested in the State of Ohio.

No adverse occupation and user of land belonging to the State of Ohio, however long continued, can divest the title of the state in and to such lands."

As to the extent of the canal property now owned and held by the State with respect to the maximum width thereof at various points along the section of the Ohio and Erie Canal now held under lease by The American Steel and Wire Company, it may be observed that this question is to be determined by the evidence at hand as to amount and extent of land appropriated or otherwise acquired by the State under the authority of the Acts of February 4, 1825, and February 7, 1826, in connection with the construction of the Ohio and Erie Canal at this location; for it is certain that whatever lands the State thus acquired in connection with the construction, maintenance and operation of the canal were taken by fee simple title, and that the State still owns and holds a fee simple title in these lands notwithstanding the fact that it has long since ceased to use this property for canal purposes. And inasmuch as no possession or use of these lands or of any part thereof by the owners of contiguous lands can be adverse to the title of the State or create any right, title or interest in the owners of such contiguous lands with respect to canal lands occupied and used by them, and since obviously no estoppel can arise against the State by reason of any act of such property owners with respect to these canal lands, it is wholly immaterial to the question here presented with respect to the present title of the State to these canal lands, that some of the owners of these contiguous lands may hold such lands under deeds describing the same as extending to the center of the canal, that they may have paid taxes on their property as thus described or that they have occupied and used such canal land or any part of the same. In other words, it is quite clear that the State still retains an absolute fee simple title to all lands which it appropriated or otherwise acquired for canal purposes other than such of said lands as it may have since conveyed to others under the authority of statutory provisions providing therefor.

Very truly yours,
HERBERT S. DUFFY,
Attorney General.