

of substantial buildings thereon, other than buildings erected for use of gasoline and oil filling stations, may file an application within one year from the date from which this act becomes effective with the Superintendent of Public Works for permission to surrender his present leasehold and take a new lease thereon under the terms of this act, but no renewals of leases of canal property which has not been improved, as hereinbefore stated, prior to January 1, 1925, shall be made."

The lease here in question does not contain any recital showing that the application therefor was made by the Miami Valley Railway Company within the period of one year from July 14, 1925, as provided for in the above quoted provisions of Section 9 of said act. However, in response to my inquiry upon this point, you advise me by communication of even date herewith that the application for this lease was filed by said named lessee on July 12, 1926, within the period of one year from the date when said act went into effect. It follows, therefore, that under the provisions of said act, said Railway Company is entitled to a lease for the term and under the conditions provided for in the act of the General Assembly above noted, and upon the approval of the same to surrender the existing lease under which it occupies the property above described.

A careful examination of said lease shows that the same is in conformity with the provisions of the act under the specific authority of which said lease is executed, and with other statutory provisions relating to leases of this kind.

Said lease is therefore approved by me as to legality and form as is evidenced by my approval endorsed upon said lease and upon the duplicate and triplicate copies thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1355.

FLOODED LANDS—CONTIGUOUS TO CHANNEL OF FEEDER TO OHIO
CANAL—TITLE HELD NOT TO BE VESTED IN STATE.

SYLLABUS:

Where, in the construction of a feeder to a canal as a part of the canal system of the state, no bank is thrown up or constructed on one side of the channel of such canal feeder for a distance of one-half mile or more with the result that thereafter a strip of comparatively low land contiguous to the channel of the canal feeder is flooded by water flowing from the canal channel, does not effect an appropriation of the lands flooded so as to vest the title to such lands in the state; nor is such appropriation effected by the fact that the water in the basin thus formed is occasionally used for the purpose of turning canal boats that are in service on said canal feeder and on the canal or canals with which such feeder connects.

COLUMBUS, OHIO, December 31, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of a communication from you which reads as follows:

"The State of Ohio, under the provisions of the act of February 4th, 1825, entitled 'An Act to provide for the internal improvement of the State of Ohio by navigable canals' (O. L. 23, pages 56 and 57), authorized the Canal Commissioners and their agents, to enter upon, take possession of and use, any lands, streams or materials necessary for the construction of the canals intended under this act.

The Ohio Canal Commissioners, by virtue of the authority conferred upon them by this act, constructed what was commonly known as the Columbus Feeder to the Ohio Canal. This canal commenced at a lock connecting the Scioto River above the dam therein constructed by said commissioners, and the Ohio Canal in the village of Lockbourne, being a distance of about eleven and one-fourth (11 $\frac{1}{4}$) miles.

In the construction of this feeder canal, the canal was constructed through lands that were subsequently acquired by Jonathan F. Linton. No damages were claimed by these original owners of the land. Consequently no record of the payment of damages appears upon the records of the Department of Public Works. Wm. Stewart, one of the heirs of John Stewart, deceased, owner of the land at the time the feeder was built, filed a claim for compensation, but was given an award of benefits. [This no doubt prevented the other heirs from filing claims under the act of 1825.

By the terms of the decisions of the Supreme Court in the case of Ohio ex rel. vs. The P. C. C. and St. L. Railway Company, it was held that the title of the State to its canal lands is one in fee simple, and that the only fact to be ascertained was whether or not the lands so appropriated were a portion of the canal system.

The question that has arisen as to the title of the lands owned by the heirs of Jonathan F. Linton, as to whether or not the basin that was usually referred to as the Linton Basin, was transferred to the abutting property owners by the joint resolution of the General Assembly of Ohio, passed April 11th, 1876 (73 O. L., page 338), authorizing the owners of the lands along the east side of the Feeder to build 'A berm bank along the canal on their own lands from Shoafs (Chooops) Creek, to what was known as the Starch factory, to confine the waters in the canal channel, is referred to you for an opinion.

It seems quite evident that the intention of the act was to permit the owners of the adjacent lands to the basin or wide waters, to reclaim a portion thereof for agricultural purposes and other purposes.

Jonathan Linton constructed a berm bank to the satisfaction of the State Board of Public Works, under the terms of this act, and the large basin or wide water, was used for agricultural purposes for many years.

About the year 1885, Jonathan Linton constructed an amusement park upon his own lands and by permission of the Board of Public Works cut through the berm embankment he had constructed and permitted the basin to fill with water in which boats were moored when not in use. The wide water or basin was renamed Lake Park Basin.

A boat livery was operated upon this basin, the row boats and other boats passing out through the opening made in the berm embankment by Mr. Linton. Mr. Linton operated a number of passenger canal boats between the foot of Main Street in the city of Columbus and a point near the opening in the berm embankment, and paid the usual tolls for the operation of such boats upon the canal feeder. The canal boats did not pass into the basin, but unloaded their passengers upon the berm side of the canal.

In the original construction of the Columbus Feeder, only one bank was built wherever this would answer the purpose, namely, the towing path, and

the water was permitted to flow to the foot of the slope of the natural bank. These wide waters served a useful purpose by storing a surplus quantity of water for the lockage of boats through the two locks that were built on the south end of this canal, one at the so-called four-mile lock, and the other a short distance north of the village of Lockbourne.

Mr. Linton operated this pleasure boat line between the points mentioned, up to about the year 1896. Mr. Booton of this Department, who made the trip over one of these canal boats in 1894, distinctly recalls the conditions as they existed at that time.

Colonel Innis, who made a survey of the Columbus Feeder under the direction of the Ohio Canal Commission about the year 1889, assumed that this basin was a part of the State Canal land and carried his line around the outer margin of the same.

J. W. Jones, who made a survey of the Columbus Feeder, under the direction of the State Board of Public Works about the year 1909, following the outlines of the Innis survey, and included the basin as a part of the State Canal lands. Neither of these engineers probably knew anything of the joint resolution referred to above.

The Superintendent of Public Works leased the canal property included in the Columbus Feeder and its embankments, and likewise the basins and wide waters adjacent thereto, to The Columbus Railway Power and Light Company, on December 31st, 1895, but the representatives of the company were given to understand that the State would not guarantee the title to the lands included within the basin, but left it to the railway company to establish, if it could, the ownership of the property in question.

An effort is now being made to settle this controversy between the heirs of Jonathan Linton, the State of Ohio, and its lessee, The Columbus Railway, Power and Light Company.

However, before carrying out the proposed settlement, we would like to have your opinion as to whether or not the owners of the abutting lands who reclaimed the basin by the construction of an artificial berm embankment, became vested with the title to the land recovered by their own industry and expense.

Should you hold that the State has not been divested of its title, these negotiations will terminate. Otherwise, if you hold that the State is no longer interested in any portion of these lands other than the artificial berm embankment that separates the main channel of the canal from the so-called basin, we will endeavor to settle the dispute to the satisfaction of all parties concerned.

It will, of course, be necessary for the Columbus Railway, Power and Light Company to give its formal consent to the Superintendent of Public Works to determine the boundaries of the State Canal Property, under the provisions of Section 13964 of the General Code.

Herewith I am enclosing a blue print showing the location of the basin in question, and the lands of Jonathan Linton's heirs.

I await your opinion before formally entering upon these negotiations."

By your communication and the files therein referred to, there is submitted for my opinion the question whether the state has any title or interest in a certain parcel of land contiguous to the channel of the Columbus Feeder of the Ohio Canal in Marion Township, Franklin County, Ohio, and now owned of record by the heirs of one Jonathan F. Linton, deceased. It is not claimed that the state ever obtained any title to the property in question by conveyance from any person or persons in the

chain of title to said property; and the question whether the State ever obtained any title or interest in and to the parcel of land here in question depends entirely upon the question as to whether there was an effective appropriation of this property for canal purposes under the provisions of the act of February 4, 1825, 23 O. L. page 56.

From the facts stated in your communication and from a plat which you submitted as a part of the files relating to the question here presented, it appears that from Shoops Creek, immediately south of the parcel of land here in question and extending northward for a distance of approximately one-half mile along the east side of the channel of the Columbus Feeder of the Ohio Canal there was a stretch of comparatively low land which, as above indicated, included the parcel of land here in question. By reason of the fact that the State in the construction of said canal feeder did not throw up any embankment on the east side of the canal channel along the stretch of low land above referred to, the water of the canal overflowed said low land thereby creating a shallow basin of water between the canal channel and the foot of the bluff or high land which lies about two hundred fifty or three hundred feet east of the canal channel.

It is well established that the title acquired by the State to lands which it appropriated in the construction of canals under said act of February 4, 1825, is a fee simple title and that such fee simple title remains in the State after it ceases to use such lands for canal purposes. *State of Ohio vs. Griffner*, 61 O. S. 201; *Ohio ex rel vs. Railway Company*, 53 O. S. 189; *State of Ohio vs. Snook*, 53 O. S. 521; *Malone vs. Toledo*, 34 O. S. 541.

In order to effect such appropriation, however, it is necessary that the occupancy by the state of the land in question should not only be exclusive but the taking and occupancy of such land must be so open and notorious as to put the owner on notice that the property has been taken by the state for its own with the purpose of incorporating it as a part of the canal system. *Smith vs. State*, 59 O. S. 278.

Touching this point the Supreme Court in the case of *Miller vs. Wisenberger*, 61 O. S. 561, after referring to the case of *Smith vs. State*, *supra*, and other cases in point, said:

"The above cases clearly point out the rule by which the state could acquire the fee to lands for canal purposes. If the entry, use and possession by the state were open and notorious so as to inform the land owner that his land had been taken by the state for canal purposes, a fee vested in the state. But if the entry, possession or use was merely incidental, constructive or indirect, and not of such character as to apprise the canal commissioners that they were making the state liable, nor the land owner that his lands were so appropriated as to give him a claim against the state for taking and using the same for canal purposes, no title of fee vested in the state.

To vest a fee in the state, the entry, possession or use must have been of such an open and notorious character as to make it fairly apparent to both the officers of the state and the owners that the lands were taken and used for canal purposes."

Consistent with the principles above noted, it was held in the case of *Smith vs. The State*, *supra*, that where a basin had been constructed by a private owner of lands adjoining a canal for purposes of his own, the state acquired no interest in said basin by reason of the fact that such basin was filled by water from the canal. And in the case of *Miller vs. Wisenberger*, *supra*, it was held that the incidental backing of water up a stream caused by the erection of a dam across a river into which such stream flowed, did not constitute such an appropriation and use of the bed of such stream and adjoining overflowed lands so as to vest in the state title to such property.

In the case of *State of Ohio vs. Fenn*, 18 C. C. (N. S.) 375, it was held that the state could not maintain its claim to the title of an island situated in a canal reservoir on the ground of constructive appropriation and possession of such island arising out of the fact that such island was surrounded and at times overflowed by water of the reservoir. The court in this case following the case of *Smith vs. State* and *Miller vs. Wisenberger*, *supra*, held that to accomplish an appropriation the taking and occupancy by the state must be actual, open, notorious and direct.

Applying the legal principle above noted to the case at hand, it follows that the state took no title to the lands included within the basin adjoining the Columbus Feeder of the Ohio Canal, by reason of the fact that such basin was incidentally formed by overflow of water from such canal feeder.

It is stated in your communication that the surplus water in the basin thus formed was used for lockage purposes at locations further down the canal. In view of the decision of the Supreme Court in the case of *Smith vs. State*, *supra*, and in other cases above cited, I do not believe that the incidental use of such impounded water in the operation of said canal was effective to give the state any right, title or interest to the lands in the basin from which the water was drawn for lockage purposes.

In this connection it is noted that in some of the files which accompanied your communication, the suggestion is made that some use of the water in this basin for the purpose of turning canal boats was made. The effect of such use of the water of a basin adjoining the channel of a canal was directly presented in the case of *Smith vs. State*, *supra*, and it was there held that such use by the state of the water of the basin was not in and of itself effective as an appropriation of such basin.

The basin of water caused by the overflow from the canal channel, though necessarily shallow, must have extended from Shoops Creek on the south to a point near where the starch factory is now located on the north, a distance of about one-half mile. To claim that the state obtained title to the whole of said basin by reason of the fact that at some place or places therein, canal boats were turned, is a proposition altogether unreasonable; yet on the whole aspect of the question here presented, there is just as much reason for the claim that the state took title to the whole of the basin created by the overflow of water from the canal as that the particular parcel here in question was so taken. Moreover as above noted, the authorities do not support the proposition that the use of the basin for turning boats indicates any intention on the part of the state to appropriate the basin for this purpose.

The joint resolution of the 62nd General Assembly, 73 O. L. 338, is significant in the consideration of the question here presented. This joint resolution which was adopted April 11, 1876, is as follows:

"Resolved, by the General Assembly of the State of Ohio, That the owners of the lands along the east side of the Columbus feeder to the Ohio canal, extending from Shoop's creek to the starch factory, be and they are hereby authorized to build, at their own expense, a berme bank along the canal on their own lands, to confine the waters of the canal within its channel, upon the opposite side of the canal from the tow-path; but no part of said work shall be done until after they have executed a bond, with good and sufficient sureties, to be approved by the Attorney General and filed with the Governor, securing the state against all claims for damages or claims on the part of the lessees of the public works caused by or in any manner growing out of said work."

Although this joint resolution was not a law and was not of itself effective to invest in the owners of land referred to in said resolution any title which the state might have theretofore had in the lands of the basin created by the overflow of water

from the canal, said resolution is significant as showing quite conclusively the knowledge of the state that the persons occupying the lands of said whole basin along the east side of the canal channel and along the berme bank thereafter constructed by them, supposed that they were the owners of this land, and that such ownership was thereby recognized by the state. See *Railroad Company vs. State*, 85 O. S. 251, 294.

In view of the fact that the owners of land referred to in said joint resolution, acting under the authority of the same, incurred expense in the construction of said berme bank under the belief then known to the state, that they were the owners of said land, there might be some warrant for the claim, on the authority of the opinion of the court in the case of *Railroad Company vs. State supra*, that the state is estopped to dispute the title of the persons referred to in said resolution in and to the land of the whole basin caused by the overflow from the canal channel. I do not deem it necessary to press this point or to express any opinion on the question thus suggested and this for the reason that I am clearly of the opinion on the facts here presented that the state never appropriated any part of said basin for canal purposes, and consequently never obtained title to the same.

In fact it clearly appears from the statements made in your communication, read in connection with the recognized law applicable to the matter of appropriating lands for canal purposes that no suggestion with respect to any possible rights of the state in the parcel of land here in question would have occurred to the minds of the responsible officers and agents of the Department of Public Works, had it not been for the fact that the surveys referred to in your communication inclosed the lands here in question as a part of the canal lands of the state. Aside from the fact that said surveys were and are wholly incompetent as evidence for the purpose of proving any claim, right, title and interest to these lands against Jonathan Linton, or those claiming under or through him (*State vs. Tin & Japan Co.*, 66 O. S. 182), it is entirely clear on the facts presented in your communication that the only reason why Colonel Innis in making his survey in the year 1889, included the lands here in question as a part of the canal lands of the state was that at that time these lands were covered with water, and that from this fact alone the surveyor concluded that they were a part of the canal system.

It appears, however, that the water then appearing on the lands of the basin then occupied by Jonathan Linton, was turned in and upon said lands not by any act of the state, but by the act of Jonathan Linton himself in cutting the berme bank of the canal and allowing the water of the canal to flow into the basin. This act of Jonathan Linton which was presumably taken with the knowledge and consent of the officials of the state then having charge of said canal, did not, of course, have the effect of creating in the state any right, title or interest in the lands thus flooded. That this is the proper explanation of the survey made by Colonel Innis, so far as concerns the inclusion therein of these lands as a part of the canal system of the state, is apparent from the fact that no other lands in the original basin caused by the overflow of water from the canal, and then owned of record by persons other than Jonathan Linton, were included in said survey as a part of the state canal system. It is entirely probable that the survey made by J. W. Jones in the year 1909, merely followed the lines of the Innis survey so far as these lands are concerned.

There is nothing in your statement of facts or in any of the files therewith submitted indicating that the lands here in question were ever set off as lands exempt from taxation as property of the state; on the contrary, it appears that Jonathan Linton during his occupancy of this land, paid taxes on the same as a part of the larger acreage owned by him, and since his death taxes on said lands have been paid by his heirs. The payment of taxes on this land by Jonathan Linton and those claiming under him, is not of course conclusive of the question here presented

Taken together, however, with all the other facts and circumstances touching, presented for my consideration in the determination of the question presented in your communication, I am clearly of the opinion that the state has no right, title or interest in this land which it can successfully assert against the present owners of record of said land.

Respectfully,
GILBERT BETTMAN,
Attorney General.