

HAYNES *v.* JONES.  
MYERS *v.* JONES.

*Canals and reservoirs—Entry and occupation of land by state—*  
*Constitutes appropriation under act of February 4, 1825 (23*  
*O. L., 56), when—Rights of original owners—Fee simple title*  
*in state, when—No adverse possession against state—Effect of*  
*act of congress of May 24, 1828 (4 Stats. at Large, 306; 8*  
*U. S. Laws, 119)—Fee simple title of state in borrow-pits.*

1. 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 thereafter, 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.
2. 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.

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3. 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.
4. The fifth and sixth sections of the act of congress of May 24, 1828, granting lands to the state of Ohio for the purpose of aiding the state in the construction and maintenance of canals, operated as a present grant, requiring only the selection and identity of the lands to become a perfect estate in fee simple in the state of Ohio.
5. Where under authority of this act of congress the state of Ohio selected lands for canal purposes, entered thereon and exercised acts of ownership over the same, and evidenced the boundaries of the land selected by it, by open and obvious change of the surface levels incident to the digging and removing of earth and soil therefrom and constructing embankments thereon, the fee simple title of the state became vested and absolute in and to the land so selected as against its grantor, the United States, and all persons claiming thereunder.

(Nos. 14442 and 14443—Decided January 26, 1915.)

## ERROR TO COURT OF APPEALS OF LICKING COUNTY.

Isaac Jones filed his petition in the common pleas court of Licking county, Ohio, against James T. Haynes, averring that he is the owner of certain lands described in his petition, that the defendant Haynes claims the right to the use and occupancy of said real estate and is about to enter and erect buildings thereon under and by virtue of a lease of said premises made, executed and delivered to him by the state of Ohio, that the state of Ohio has no right, title or interest in said premises, and prays that an injunction may issue restraining defendant from taking possession thereof and erecting buildings thereon and for a decree quieting the title and possession of plaintiff in and to said real estate as

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against any claim of the defendant thereto. To this petition the defendant filed an answer and cross-petition, admitting that he claimed a leasehold estate in said premises under a lease from the state of Ohio, who then was and still is the owner in fee of said premises, and that he is in possession and entitled by authority of said lease to the use of said land for and during the term of said lease for the purposes therein mentioned, denies that said plaintiff is owner or in possession of said realty or any part thereof, and prays that his title be quieted thereto.

The land in question is the land occupied by the embankment and borrow-pits adjacent thereto on the north side of the Licking-Summit Reservoir, now known as Buckeye Lake, which reservoir was at the time the embankment was constructed a part of the canal system of the state.

The common pleas court found against the plaintiff and in favor of the defendant in error, and quieted his title to this land. Upon appeal the court of appeals found for the plaintiff, dismissed the cross-petition of the defendant and quieted the title of the plaintiff in and to all the lands described in his petition that defendant claimed to hold under a lease from the state, subject, however, to the easement of the state in that portion of the lands actually occupied by the embankment to maintain the same thereon.

This proceeding in error is prosecuted to reverse the judgment of the court of appeals.

## Opinion of the Court.

The case of WILLIAM P. MYERS *v.* ISAAC JONES is similar in all respects and presents the same questions.

*Messrs. Flory & Flory*, for plaintiffs in error.

*Mr. Timothy S. Hogan*, attorney general, and  
*Mr. N. J. Weisend*, for the state of Ohio.

*Messrs. Kibler & Kibler*, for defendant in error.

By THE COURT. It is conceded by counsel for defendant in error that the state of Ohio did enter upon and appropriate for canal purposes that portion of the land described in plaintiff's petition that is actually occupied by the embankment on the north side of the Licking-Summit Reservoir, now known as Buckeye Lake. That being true, the fee simple title to the land so appropriated vested by force of the statute of February 4, 1825, in the state of Ohio, and the title of the state could not be divested by any adverse possession by adjoining proprietors. Therefore the finding and judgment of the court of appeals that the fee of this land occupied by the embankment is in the defendant in error, subject only to the easement of the state to maintain its embankment thereon and thereover, is erroneous, and to that extent must be reversed. It is now the claim of the defendant in error that no such selection, entry or appropriation was made of the land adjoining this embankment and included within the borrow-pit as would vest the title in the state. Upon this question there is no conflict of evidence. It is conceded that the state entered

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riation of the land itself adjacent to the improvement and for the purposes of the improvement. The entry of the state upon the land occupied by this borrow-pit was not of a temporary or uncertain character. Nor was it merely here and there at certain points. It was along the entire course of the embankment immediately adjacent to it and absolutely necessary not only for its construction but for its maintenance and equally necessary for drainage purposes at all times since the construction of this embankment.

There can be no doubt whatever that the entry, use, occupation and the destruction of this land for agricultural purposes by the state, was an appropriation of it within the meaning of the act of February 4, 1825 (23 O. L., 56). Nor can it be doubted that the original owner of this land was then and there entitled under the provisions of that act to full compensation therefor. Certainly the state could not have defended against a claim for compensation upon the theory that its acts, use and occupation of this land and the purposes to which it was put did not constitute an appropriation within the contemplation of the law authorizing it to appropriate land for canal purposes. That being true, the fee simple title, by the terms of the statute authorizing the appropriation, vested in the state of Ohio, and having so vested that title could not be divested by any adverse user by an adjoining proprietor. In this particular instance the land occupied by the embankment and borrow-pit belonged at the time of the appropriation to the United States. In 1828 the congress of the United States,

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for the purpose of encouraging the building of canals and reservoirs, gave, granted and ceded to the state of Ohio land belonging to the United States and situated within the state of Ohio that the state might select for canal and reservoir purposes (Sec. 5, 4 Stats. at Large, 306; 8 U. S. Laws, 119). The mere act of selecting and occupying this land by the state of Ohio by authority of the act of congress of 1828 vested the fee simple title to the land so appropriated and selected in the state of Ohio without payment of compensation or damages therefor. No private individual was then interested in any part or parcel of this land. It was solely a question between the state of Ohio and the United States. The fact that in 1842, many years after the state had selected and occupied this land for the purposes named in the act of congress in 1828, the United States government issued a patent deed to the predecessor in title of the defendant in error for the entire quarter section in which this land is situated, could not and does not affect the title of the state thereto. It was held in the case of *Strong v. Lehmer*, 10 Ohio St., 93, that the fifth and sixth sections of the act of congress granting lands to the state of Ohio for the construction of canals, operated as a present grant, requiring only the identity of the lands to be ascertained to become perfect. It was also held in that case that a purchaser who enters land and takes a patent deed, with full knowledge of a selection in fact, cannot in equity hold the land against a grantee of the state, notwithstanding the imperfect execution of the power to grant the land vested in the state by

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the act of congress. At the time this patent deed was issued to the predecessor in title of the defendant in error this excavation had been made and the embankment constructed. These were open and obvious acts evidencing that the state had made selection and had appropriated this land for canal purposes. The evidence of the selection was plain and unmistakable and the identity of the land selected beyond question. The patentee could not close his eyes to these conditions. Nor can he now be heard to say that he did not know that which was obvious to the most casual observer. He took under his patent deed from the United States government subject to the title of the state, whatever that title was, and it is apparent that that was a fee simple title of all that portion of the quarter section of land described in the patent that was covered by the waters of the lake and occupied by the embankment and borrow-pit. In other words, the patent deed conveyed to him no more land in that quarter section than the United States government then owned and had the right to convey, and he cannot now rely upon that patent deed to prove his title to land which the United States did not then own and which was then in the open, adverse and exclusive possession of the state of Ohio. The judgment of the court of appeals is reversed and judgment for plaintiff in error.

*Judgment reversed.*

NICHOLS, C. J., JOHNSON, WANAMAKER, NEWMAN, JONES and MATHIAS, JJ., concur.  
DONAHUE, J., not participating.