Section 13727, provides as follows:

> "Upon the return of the writ against the convict, if an amount of money has not been sufficient for the payment of the costs of conviciton and no additional property is found whereon to levy the clerk shall so certify to the auditor of state, under his seal, with a statement of the total amount of costs, the amount made and the amount remaining unpaid. Such amount so unpaid as the auditor finds to be correct, shall be paid by the state, to the order of such clerk."

By the terms of Section 12375, supra, in all sentences in criminal cases the judge shall include therein and render a judgment against the defendant for the costs of prosecution. As provided in Section 13722, supra, upon sentence of a person for a felony, the clerk of courts shall make and certify a complete itemized bill of the costs made in *such* prosecution *including the sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor or on the request of the governor to the President of the United States.*

Answering your question specifically, it is my opinion that in so far as the costs of extradition are concerned it is immaterial upon which indictment you elect to proceed. If, upon either indictment, the defendant is sentenced for a felony, the clerk may properly include in the itemized bill of costs made in such prosecution, the sum paid as provided by Section 2491, supra, by the county commissioners for the arrest and return of the convict. If you elect to proceed upon the first indictment and the defendant is convicted and sentenced for a felony, the clerk should make and certify, under his hand and the seal of the court, a complete itemized bill of the costs made in such prosecution, viz., the costs incident to the preliminary hearing and being held to answer to the grand jury together with whatever costs accrued upon and after indictment and include therein the sum paid by the county commissioners, duly certified by the county auditor for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the President of the United States. If you elect to proceed upon the second indictment and the defendant is convicted and sentenced for a felony, the clerk should make and certify, under his hand and the seal of the court, a complete itemized bill of the costs made *in such prosecution*, viz., whatever costs accrued upon and after indictment and include therein the sum paid by the county commissioners, duly certified by the county auditor for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the President of the United States.

Respectfully,
EDWARD C. TURNER,
Attorney General.

787.

CANAL LANDS—HOUSE BILL No. 162, DISCUSSED WITH REFERENCE TO THE RIGHTS OF CERTAIN LESSEES UNDER A LEASE GIVEN TO D. Z. COOPER.

SYLLABUS:

Application of House Bill 162 *passed by the* 86*th General Assembly on March* 25, 1925, *entitled "An Act—To abandon for canal purposes that portion of the Miami and Erie canal between the Maumee river at Defiance, Defiance county, Ohio, and a point* 500

feet north of the Middletown dam near the north corporation line of the city of Middletown, Butler county, Ohio," 111 *O. L.* 208, *discussed with reference to the rights of certain lessees under a lease given to D. Z. Cooper by the State of Ohio on November* 1, 1835.

COLUMBUS, OHIO, July 27, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion as follows:

> "By the Act of the 86th General Assembly of Ohio, abandoning for canal purposes that portion of the Miami and Erie Canal, lying between the Maumee River at Defiance, and a point 500 feet north of the Middletown Dam, in Butler County, Ohio, it was provided that 'Any city, village or other political subdivision of the State desiring to lease any portion of said abandoned canal and feeder lands, basins, wide waters and state lots heretofore used in connection with canal property lying within or adjacent to the boundaries of such political subdivision, shall, within one year from the date at which the Act becomes effective, file an application for lease of the same with the Superintendent of Public Works.'
>
> The City of Dayton, desiring to avail itself of the provisions of this act, filed within the prescribed time limit, an application to lease all of the Miami and Erie Canal lands and other lands used in connection therewith within the corporate limits of said city, and in addition thereto, a short section of said canal immediately north of said city.
>
> Section seven of this Act provided for the appointment of a Board of Appraisers by the Governor, and such appraisal board, consisting of three members, has recently been appointed for the purpose of appraising the property applied for by the City of Dayton.
>
> In the making of such appraisements, it is necessary to appraise the existing leaseholds which are to be included in the lease to the city under the provisions of the act passed March 25, 1925. (See O. L. 111, pages 208–214.)
>
> One of the existing leases is a lease of water to D. Z. Cooper, and in connection with this water lease, there was also leased one and one-half (1½) acres of ground to be used in connection with the water power that was to be operated by the leases. This lease was to run for a term of ninety-nine (99) years, renewable forever.
>
> By a decision of the Supreme Court of Ohio and affirmed by the United States Supreme Court, in the case of Vought vs. The Columbus, Hocking Valley and Athens Railroad Company, it was held that 'Contracts made with the Board of Public Works or other agent of the State, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the state, and no action will lie against the state for damages resulting from such appraisement.'
>
> It so happened that no leases for a longer period than thirty years had been made for leases of water for power purposes, and all of the lessees gave up both their water power leases and likewise for the land used in connection therewith, so that the question as to the status of the lease, in so far as the same related to the lands leased in connection with the water power, was not raised.
>
> In regard to the abandonment of the canal lands in the City of Dayton, we find in existence the lease granted to D. Z. Cooper, as referred to above, for the use of water and lands in the City of Dayton, dated November 1, 1835. This water power and lands connected therewith, is now owned by Esther

Rappaport, subject to the sub-lease granted by Cooper to The Durst Milling Company and likewise to the sub-lease which is now owned by The Wise-Schieble Company of Dayton, Ohio.

The account has always been carried either in the name of D. Z. Cooper, or his assigns, the sub-lessees not being known to the State of Ohio, except by common report.

The question that we are asking you to decide is whether or not the termination of the water rights also terminated the lease for the land used in connection therewith.

In case Mrs. Rappaport, through her attorney, should decide to hold on to the existing lease, would she be entitled to a reduction in the rental for the loss of water?

We are enclosing herewith certified copies of both the deed by which the State of Ohio acquired the land in question from D. Z. Cooper and likewise a certified copy of the lease for both water and land as granted by the State of Ohio to Cooper in 1835.

This Department has not been advised as to the conditions and stipulations contained in the sub-leases as held by the Wise-Schieble Company and likewise by the Durst Milling Company and we are therefore unable to give you any details as to the same."

Sections 1, 3, 5, 7, 9 and 10 of House Bill No. 162 (111 O. L. 208) provide in part as follows:

"Section 1. That the portion of the Miami and Erie Canal, including all canal feeders, basins, wide waters and state lots heretofore used in connection with said canal property, lying between the Maumee River at Defiance, Defiance County, Ohio, and a point 500 feet north of the Middletown Dam near the north corporation line of the city of Middletown, Butler County, Ohio, be and the same is hereby abandoned for canal purposes, subject, however, to the rights hereinafter provided. * * *."

"Section 3. Within four months after the approval of this act by the governor, the superintendent of public works shall have completed a thorough inspection of the canals, thus abandoned for canal purposes, *with a view to determining what portions of the same may be operated profitably for hydraulic purposes, and within ten days thereafter, he shall file with the governor, a detailed report describing each section of such abandoned canal which he recommends setting aside for hydraulic purposes, giving his reasons therefor,* and giving each section a serial number for a convenient reference. Within thirty days after the receipt of the superintendent's report, the governor shall return such report to said superintendent, *after first noting thereon those sections which he approves for retention for hydraulic purposes,* and likewise those sections, if any, of which he disapproves the retention for such purpose, and said superintendent of public works shall cause an exact copy of such findings to be recorded in the minutes of the department of public works, and place the original in the proper files of his office for the use and convenience of all persons interested therein." (Italics the writer's.)

"Section 5. Any city, village or other political subdivision of the state desiring to lease any portion of said abandoned *canal and feeder lands, basins, wide waters and state lots* heretofore used in connection with canal property lying within or adjacent to the boundaries of such political subdivision, shall, within one year from the date at which this act becomes effective, file an application for a lease of the same with the superintendent of public works." (Italics the writer's.)

"Section 7. As soon as convenient after the filing of said application, the governor shall appoint a board of appraisers, consisting of either three or five members, as he may deem best, one of whom shall be either the superintendent or assistant superintendent of public works, and the board of appraisers thus appointed shall proceed, within thirty days after such appointment, to appraise the portions of said abandoned canal lands applied for by municipalities or other subdivisions of the state, that will not be required for the purposes of any proposed ship or barge canal, as provided in section one hereof, together with all feeders, basins, wide waters and state lots heretofore used in connection with said canal property within such municipalities, and likewise *all the existing leases upon said canal and feeder lands, basins, wide waters and state lots, within the limits of the applications* as applied for by municipalities or other legal subdivisions of the state, at their true value in money, and shall file in writing certified copies of such appraisement with the governor and superintendent of public works of Ohio, and likewise with the mayor or city manager of the municipality making such applications." (Italics the writer's.)

"Section 9. As soon as the appraisement of the canal lands applied for by municipalities or other legal subdivisions of the state has been completed, the superintendent of public works, subject to the approval of the governor and attorney general, shall proceed, subject to all rights under existing leases, other than as hereinafter specified, to lease the canal *land* herein abandoned for canal purposes, in strict conformity with the provisions of this act, but the owner of an existing leasehold for canal *lands*, which prior to January 1, 1925, has been improved by the construction of railway tracks thereon, or by the erection 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 annual rentals for such new leases shall be at the rate of six per cent annually, and when such leasehold has been renewed, it may be assigned by said superintendent of public works to the municipality making the application to lease the canal lands within its corporate limits." (Italics the writer's.)

"Section 10. If any portion of the said abandoned canal property covered by such application has already been leased by the superintendent of public works, or his predecessors in office, under the provisions of statutes heretofore enacted, the superintendent of public works may, subject to the approval of the governor and attorney general, transfer and assign such lease or leases to the city, village, or other political subdivision making such application, *subject, however, to all the rights of existing lessees of the state of Ohio for lands only.* Such existing lease or leases shall be appraised at their true value in money for any purpose for which the land (t) herein described can be used, in the same manner as prescribed in section seven hereof. After such existing lease or leases have been transferred and assigned to said applicant, the city, village or other political subdivision to which such transfer and assignment has been made, shall thereafter be entitled to all the revenues accruing from the same, and from the renewals thereof, and shall pay to the state of Ohio rentals at the rate of 4% as hereinafter provided in section eleven. * * *" (Italics the writer's.)

In Opinion 724 rendered to your department under date of July 11, 1927, it was held that upon the execution of the lease to the city of Dayton all the leases of water rights terminated. The rule there expressed will clearly apply to the lease of D. Z. Cooper described in your letter so far as that lease applies to water rights.

As pointed out in that opinion, there is apparent in the act in question an intention to preserve the rights of lessees of canal *lands* only, as distinguished from water rights. In this connection it is interesting to contrast the language of the act under consideration with that of the act authorizing the abandonment of the Miami and Erie Canal in Lucas county (111 O. L. 367). In Section 5 of that act authorizing the governor to execute a deed for the property therein authorized to be sold to the board of county commissioners of Lucas county, this language is used:

> "But excepting therefrom and subject to the rights of owners of existing leases of said lands or water or both."

Similar language is elsewhere used in the act authorizing the abandonment of that portion of the Miami and Erie Canal in Lucas county, clearly indicating a legislative intent to except from the same and to preserve the rights of owners of existing leases of water rights as well as lands.

In order to answer your question as to the method of appraising the one and a half acres of ground covered by the Cooper lease it is first necessary to determine whether or not the rights of the lessees or assignees thereunder are preserved by the act of March 25, 1925 (111 O. L. 208).

The lease to D. Z. Cooper was made November 1, 1835. The granting clause of the lease is as follows:

> "That said party of the first part (the State of Ohio) agrees to lease to said party of the second part for the term of ninety-nine years from and after the first day of November aforesaid, renewable forever, subject to the restrictions, limitations and conditions herein contained, the use and occupation of two thousand cubic feet of water flowing in each minute by the lock on the Miami Canal within the town of Dayton.
>
> * * * * * * *
>
> And the said party of the first part in consideration of the rents and agreements herein specified, further agrees to lease to said party of the second part, upon the same conditions and subject to the same limitations herein contained, all that certain piece or parcel of land lying within the corporation of the town of Dayton * * * containing one and a half acre."

The consideration recited in the lease is as follows:

> "And that said party of the second part for and in consideration of the right to the use and occupation of said water, agrees to pay to the said state the yearly rent of one thousand dollars for the use of the whole of the aforesaid quantity of water, together with a lot of ground hereinafter described."

The authority to make this lease is found in the act passed February 18,1830. Chase's Statutes, Vol. 3, p. 1659.

Section 3 of that act provided as follows:

"That whenever, in the opinion of the board of canal commissioners, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purposes of navigation, the said commissioners may order such surplus water, and any lands granted to, or purchased by the state, for the purpose of using the same, or such part thereof, as they may deem expedient, to be sold for *hydraulic purposes;* subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rent or otherwise, as they may deem most beneficial for the interests of the state." (Italics the writer's).

Particular attention is called to the language of Section 3, supra, wherein the power of the board of canal commissioners to lease the land in question was granted only "for hydraulic purposes," or "for the purpose of using" the surplus water.

That there was no intention on the part of the legislature in the act of 1830 to permit the leasing of canal property for general purposes is evidenced by the fact that the power to lease canal lands for general purposes was not granted by the legislature until 1888, when the act found in 85 O. L. 127 was passed.

Section 1 of said act provided for the appointment of a commission to survey and determine the boundaries of all lands theretofore appropriated for canal purposes and owned by the state; for the designation in that report of any part of said property that in their judgment was not necessary for canal purposes.

Section 3 provided that where such lands were not necessary in fact for public purposes and such necessity should be determined by the commission, the board of public works and chief engineer of the public works, then said commission should fix a fair value thereon according to the market value where such property was situated, and persons occupying such lands should be entitled to a lease of the same for a term *not to exceed fifteen years,* at an annual rental of six per cent of the valuation fixed thereon by the commission. The same section also provided that any of said lands not needed in fact for public purposes and upon which there was no occupant, might be leased by the board of public works upon the same terms and length of time and under the same rule for fixing the valuation. This act has been amended several times, and the pertinent provisions thereof now appear in the General Code as Section 13965.

By an amendment of said Section 13965 passed May 14, 1915 (106 O. L. 353) it was provided:

"Any owner of an existing lease for state canal lands may surrender the same to the state in order to have the land described therein included in a new lease, which shall not be for a greater term than fifteen years, * * *. When a new lease, which shall not be for a less rental than the original lease, has been granted and approved by the governor and attorney general, the superintendent of public works shall cancel the original lease."

This provision still appears in Section 13965, General Code.

Section 9 of the act of March 25, 1925 (111 O. L. 208) contains a somewhat similar provision by which the owner of an existing leasehold for canal lands which prior to January 1, 1925, had been improved by the erection of substantial buildings thereon, other than buildings erected for use of gas and oil filling stations, might file an application within one year from the effective date of the act for permission to surrender

his leasehold and take a new lease thereon under the terms of the 1925 act. None of the lessees under the Cooper lease have attempted to take advantage of these provisions.

While the Cooper lease on its face contained no reservation or restriction as to the use to be made of the one and a half acre tract, it is a well-established principle that the provisions of a statute authorizing or regulating the making of such leases must be read as a part of the contract whether specifically mentioned or described therein or not.

The lease, however, does within itself show conclusively that the leasing of the one and one-half acres was entirely incidental to the leasing of the surplus water.

Immediately following the paragraph fixing the consideration to be paid to the state, appears the following:

> "Provided the party of the second part shall not be deprived of the use thereof for more than one month in the aggregate in any one year.
>
> And for the purpose of repairing the canal, preventing breaches, removing bars or other obstruction, or making any improvements to the Canal, or the works connected therewith, or in consequence of breaches or the inadequacy of the supply of water, the party of the second part shall be either partially or wholly deprived of the use of any portion of the *water hereby leased*, so as to prevent the operation of any of the hydraulic works usually propelled by the water power hereby leased, such deduction shall be made from the rent accruing on such portion of the water power as the said party is so prevented from using as will bear the same proportion to the yearly rent thereof as the time during which the said party has been deprived of its use bears to eleven months."

It will be noted that in this provision no weight was given to the use of the land independent of the use of water.

The lease also contains the following provision:

> "And if it shall become necessary for the party of the first part to resume the use of so great a portion of the water hereby leased, or of the whole thereof, for so great a portion of the time as to defeat the object of this lease, by destroying the value of the privilege (which fact shall be determined by three judicious, disinterested freeholders, one to be chosen by the Acting Commissioner or other authorized agent of the State, one by the party of the second part, and the third by the two thus chosen). Then the party of the second part shall be from such time absolved from all further liabilities growing out of this agreement."

This provision likewise takes no account of the use of the land independent of the water.

The situation therefore is that the lessees under the Cooper lease, or their sublessees, desire to retain the lease and use the land therein described for purposes other than hydraulic purposes, notwithstanding the termination of the use of the water by the abandonment of the canal. This is necessarily the case because it has been officially determined under the provisions of the 1925 act that this particular section of canal property is not suitable and is not to be retained for hydraulic purposes.

It is of course well settled that unless the mode of use of property leased be restricted by express agreement it may be put to such lawful use and employment as the lessee desires. Thompson on Real Property, in Section 1280, at page 377, states the rule as follows:

"A lessee has, by implication, the right to possess and enjoy the property during the term specified, and to put it to such use and employment as he pleases, not materially different from that in which it is usually employed, to which it is adapted, and for which it was constructed. But the mode of use may be restricted by express agreement, a lessee having no right to devote the premises to a use other than that stipulated in the lease without the consent of the owner. In the absence of express prohibition, offices rented for real estate business could be used by a constable without a breach of the covenant. A landlord may by contract lawfully restrict his tenant's use of the property, and, in case of such an agreement, if the latter use the demised premises for a purpose prohibited by the lease, it is a breach of the agreement for which the law affords relief. A covenant by a lessee not to carry on a particular business, or not to carry on any business except a business named, on leased premises, is binding and may be enforced. It has been uniformly held that a provision in a deed that no intoxicating liquors shall be manufactured or sold on the premises conveyed is valid, however much the same may affect the value of the property conveyed. 'It will not be doubted,' said Judge Cole, of the Wisconsin court, 'that the landlord having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be neither contrary to law nor the principle of reason or public policy.' A lessor may bind himself by a contemporaneous parol agreement, made in consideration of the execution of the lease, not to engage in a rival business in the same city; and in an action by the lessee for damages and for injunctive relief, parol evidence of the agreement is competent. And such a promise not to engage in a rival business is not void, because not in writing."

In the case under consideration it is obvious that it was not necessary to incorporate a clause in the lease that the premises in question should be used only for hydraulic purposes, for the reason that section 3 of the act under which this lease was entered into (Chase's Statutes, Vol. 3, p. 1659) only authorized the making of a lease by the proper state officers for the purpose of using surplus water, that is, "for hydraulic purposes." It would of course have been a vain thing to incorporate into the lease by express words a restriction when the statute authorizing the lease, which must be read in connection therewith, only authorized a lease for hydraulic purposes.

In view of the foregoing, the conclusion is inescapable that the lease in question was not intended to, could not and did not create any obligation on the part of the State, nor any right in the lessee, which will survive the abandonment of the canal, the determination not to reserve the portion of the canal in question for hydraulic purposes, and the lease of the abandoned canal property to the city of Dayton.

I am therefore of the opinion that the lease to D. Z. Cooper will terminate upon the lease or sale of the property to the city of Dayton, and that the appraisement now being made should be made without regard to the Cooper lease.

I have used the words "lease or sale" because of House Bill No. 173 passed by the last General Assembly, providing for the sale to the city of Dayton of certain of the lands included in the application for lease, and in which I am informed this one and one-half acre is situated.

I have also considered said House Bill No. 173 because of the following language contained therein:

"The lands sold pursuant to this act shall be sold subject to all existing leases or subleases for any portion thereof, with the right of renewals of the same direct from the state of Ohio, under the provisions of House Bill No. 162, as passed by the 86th General Assembly of Ohio, as heretofore referred to; also subject to the rights of the present owners of the lease for the one

and one-half (1½) acre lot or tract of land leased by the State of Ohio to D. Z. Cooper by lease dated November 1st, 1835, and of the owners of sub-leases for any portion thereof, with the right of renewal for the same under the provisions of House Bill No. 162 as hereinabove referred to."

This enactment does not assume to grant any additional rights, but seeks only to provide for the sale subject to the rights of the present owners of the Cooper lease, whatever those rights may be.

In view of the conclusion herein, it is unnecessary to discuss the question as to any adjustment of the rental under the Cooper lease upon the discontinuance of the water in the canal.

Respectfully,
EDWARD C. TURNER,
Attorney General.

788.

DEVISE TO STATE OF UNDIVIDED INTEREST IN LAND TO BE USED FOR BIRD SANCTUARY.

SYLLABUS:

Discussion relative to devising an undivided interest in land to the State for a bird sanctuary.

COLUMBUS, OHIO, July 27, 1927.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion as follows:

"I am enclosing herewith correspondence received this day from Director Williams of the Agricultural Experiment Station concerning a proposed gift to the State of an undivided interest, in a farm located in southern Ohio, for the purpose of establishing a bird sanctuary.

The question arises can such a gift be accepted and if so what should be the phrasing to be incorporated in the will?"

The proposed gift concerning which you inquire is described in one of the communications attached to your letter, which reads as follows:

"A lady owns an undivided interest (over 40%) in a farm of 180 acres in Southern Ohio, and is considering drawing up her will in such a way that this undivided interest be given to the State of Ohio to be used as a bird sanctuary. If this were done, what provision would be made by the state to see that the birds would be always protected? If the state would look favorably upon this plan, I would appreciate it very much if you would suggest the phrasing to be incorporated in the will."

You will note that the person who is contemplating making the gift is not the sole owner of the land but only owns an undivided interest therein.