the several findings and upon the duplicate and triplicate copies thereof, all of which, so approved, are herewith returned to you.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

509.

LEASES—EXCEPTIONS, IDENTITY—RIGHTS FAIL WHEN.

SYLLABUS:

1. *An exception in a lease must be properly identified to save any rights as to the exception for the lessor.*

2. *Where an exception in a lease is not properly identified said exception falls.*

COLUMBUS, OHIO, April 23, 1937.

HON. L. WOODDELL, *Commissioner, the Division of Conservation, Department of Agriculture, Columbus, Ohio.*

DEAR SIR: I have your letter of recent date as follows:

> "On November 29, 1932, a lease of lands in Defiance County, the title to which rests with the Department of Public Works, was made by the Department of Public Works to the Division of Conservation. In this lease a reservation which reads as follows was made:
>
> 'This lease being made under the terms of an Act passed by the 89th General Assembly, known as amended Senate Bill No. 69 (See O. L. 114, page 158) and with the understanding that the State reserves the right to grant a lease to the present owners of a cottage on the easterly side of said canal property near the Henry-Defiance County line.'
>
> The reason the above clause was inserted in the lease from the Department of Public Works to the Division of Conservation was because of the controversy that existed between Mr. F. S. and the Defiance County Park Board. The controversy existed even before the Defiance County Park Board had a lease from the Division of Conservation. Mr. T. S. Brindle, then the Director of Public Works, made an investigation as to who was entitled to the strip of land

in question. When the lease was being prepared by the Department of Public Works for the Division of Conservation, Mr. Brindle instructed the engineer to insert the above mentioned clause.

On January 28, 1937, the Department of Public Works by authority of this reservation in the aforementioned lease, made a lease to Mr. F. S. for a cottage site. The legality of this lease by the Department of Public Works to Mr. S. has been questioned. For your information, the Division of Conservation in turn leased this property which was acquired by lease from the Department of Public Works in connection with other lands, the title to which reposes with the Division of Conservation, to the Defiance County Park Board.

Please find enclosed copies of the aforementioned leases. We respectfully request an opinion from your office relative to the legality of the lease which has been granted to Mr. S.

We are also wondering whether it would be your recommendation that a new lease be drawn by the Department of Public Works to the Division of Conservation which would more specifically indicate the portion of land in question."

Because of the importance of this matter to the citizens of a large area of Ohio, I have had an investigation made of the factual situation which existed at the time of the making of the various leases so that I might be better able to advise you. Your particular question only relates to the last lease, but inasmuch as that lease depends on an exception contained in the lease to the Division of Conservation, I will first deal with this earlier lease.

The lease to the Division of Conservation executed on November 29, 1932, was not, in my opinion, made under the provisions of Amended Senate Bill No. 69, 114 O. L. 158, as recited in the lease, but rather under the terms of Substitute Senate Bill No. 194, 114 O. L. 546, now known as Sections 14178-27 and 14178-52, General Code, both inclusive. The particular sections which pertain to your question are Sections 14178-27, 14178-39 and 14178-40, and they read as follows:

Section 14178-27.

"That the portion of the Miami and Erie Canal lying between a point where said canal joins with the Maumee river, on the northerly side thereof, in Providence township, Lucas County, Ohio, being at or near station 1278 plus 61

of the Miami and Erie canal survey made by Alfred Albright under the direction of the state board of public work in 1912 and extending thence westerly, southwesterly and southerly over and along said Miami and Erie canal, including the full width of the bed and banks thereof, a distance of 175 miles, more or less, to a point five hundred feet north of the state dam near the north corporation line of the city of Middletown, Butler County, Ohio, being at or near station 10515 plus 00 of the state survey of said canal, be and the same is hereby abandoned for canal and hydraulic purposes; provided, however, nothing herein contained shall in any manner affect any state reservoirs heretofore set apart and dedicated as public parks and pleasure resorts, for the free use of the public."

Section 14178-39.

"If the division of conservation of the State of of Ohio, or any city, village or other municipal corporation, or any county, township, municipal park board, or other political subdivision or taxing district of the state, desires to lease any portion of said canal lands not required for highway purposes, such parties may make application, within two years from the date at which this act becomes effective, to the superintendent of public works of the State of Ohio for a lease thereof, stating the purpose for which such canal land, herein abandoned for canal and hydraulic purposes, is desired, such land or lands may be leased to such party or parties, by said superintendent of public works, for public park purposes only, for a period of fifteen years, or multiples thereof, up to ninety years, or for a term of ninety-nine years, renewable forever."

Section 14178-40.

"If the said superintendent of public works determines after investigation, that it will be to the interest of the state and of the public in general to grant such lease, he may grant such party or parties a lease therefor, subject to the approval of the governor and attorney general; in determining the annual rental to be paid to the state for a lease of canal lands for such purpose, the said superintendent of public works shall take into consideration the public use that is to be made of such canal property by such party or parties, and fix the annual rental therefor at a nominal

sum, but such party or parties shall obligate themselves by the terms of such lease to make substantial improvements thereon so as to fit the same for public park and recreational purposes, and this shall be a necessary restriction in the granting of such leases, provided, however, that nothing contained in this act shall apply to canals herein abandoned for canal and hydraulic purposes, or to lands or bodies of water now used or hereafter to be used for power production, water supply and other industrial purposes, all of which shall be under the control and jurisdiction of the superintendent of public works for the purpose of maintaining and leasing the same."

Inasmuch as Amended Substitute Senate Bill No. 69 contains no authority for the Division of Conservation to lease abandoned canal lands and Amended Substitute Senate Bill No. 194 specifically authorizes the Division of Conservation so to do, it is clear that the lease was effected under this last mentioned enactment.

Section 14178-39, General Code, specifically authorizes the Division of Conservation to lease that part of the abandoned canal lands not needed for highway purposes, for public park purposes within two years from the effective date of the Act. (It will be noted that the lease to the Division of Conservation was given within this two year period.)

Section 14178-40, General Code, makes further provision that in leases made under the authority of the Act, the lessees must obligate "themselves by the terms of such lease to make substantial improvements thereon so as to fit the same for public park and recreational purposes, and this shall be a necessary restriction in the granting of such leases." In the particular lease we find that the purpose clause of the lease reads as follows:

"* * * propagation of fish, fishing grounds, park and recreation purposes."

This could not be considered as an undertaking to make substantial improvements, but it is further provided in the lease that the lessee (the Division of Conservation) undertakes to "keep the premises herein clean and sanitary, and free from weeds, vines and debris of all kinds * * *." It is my understanding that at the time this lease was executed, the leased lands were covered by a mass of undergrowth and weeds, and generally were not in a clean condition.

The usually accepted definition for an improvement is that given in Bouvier's Law Dictionary, Vol. 2, page 1517:

> "An amelioration in the condition of real or personal property affected by the expenditure of labor or money for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes. It includes repairs or additions to buildings, and the erection of fences, barns, etc."

(Cited with approval in *Jones* vs. *Harsha,* 226 Mich. 416.)

The courts of Ohio have never defined the word "improvement." There is a statutory definition to be found in the Uniform Bond Act (Section 2293-1e, General Code), which reads as follows:

> " 'Permanent improvement', or 'improvement' shall mean any property, asset or improvement with an estimated life or usefulness of five (5) years or more, including land and interests therein, and including reconstructions, enlargements and extensions thereof having an estimated life or usefulness of five years or more. Reconstruction for highway purposes shall be held to include the resurfacing but not the ordinary repair of highways."

Although it might be argued that the undertaking of the Division of Conservation in the lease may come within this definition, the five year provision notwithstanding, in my opinion, the said definition must be confined to the interpretation of the Bond Act and nowhere else.

The Occupying Claimant Law, Sections 11907, et seq., General Code, provides for the reimbursement of occupying claimants "for lasting improvements" and yet it has been held that the improvements need not be permanent in nature, *Gardner* vs. *Hoover,* 5 O. L. Abstr. 470. See also *Van Bibber* vs. *Williamson,* 37 Fed. 756 (Ohio) and 30, O. J. 482.

An improvement is not necessarily a building or structure. *Allen* vs. *McKay,* 120 Cal. 332, 335; *Van Bibber* vs. *Williamson,* supra. The Supreme Court of Minnesota in a recent case, *State* vs. *Babcock,* 242 N. W. 474, 476, said the word "improvement" denoted "some betterment such as cultivation, *clearing,* drainage, irrigation, erecting buildings or otherwise enhancing the value or usefulness of the lands."

The case of *Anderson* vs. *Sutton,* 301 Missouri, 50, involved the question of whether the clearing of land and the removal of brush for cultivation was an improvement for which compensation should be made to the one against whom a judgment or dispossession is given, and the court answered the question in the affirmative. This seems to me to be an analogous case, for the undertaking by the Division of Con-

servation was to keep the premises free of weeds, vines and debris, the performance of which would quite definitely render the leased lands more fit for public park and recreational purposes.

I have been reliably informed that thousands of dollars have been expended in doing the very work for which the Division of Conservation obligated itself, namely, the clearing of the land and the elimination of weeds, vines and debris. Certainly, therefore, the work to be done was substantial. In view of the generally accepted definitions of "improvements" and the foregoing authorities, I am of the opinion that the undertaking of the Division of Conservation satisfied the requirements of Section 14178-40, General Code.

It will be noticed that the proviso contained at the end of Section 14178-40, General Code, excepts from the application of the act, "canals herein abandoned for canal and hydraulic purposes." A reading of the Act in its entirety, Sections 14178-27 to 14178-52, inclusive, General Code, reveals that this language is contrary to the general intention of the Act inasmuch as by its terms the Act only applies to the canals therein abandoned for canal and hydraulic purposes, and is a local Act. Therefore, in construing Section 14178-40, General Code, the word "not" should be inserted between the words "canals" and "herein," so that the exception reads:

> "* * * provided that nothing contained in this act shall apply to canals not herein abandoned for canal and hydraulic purposes."

As the Supreme Court said in *Stanton* vs. *Realty Company*, 117 O. S. 345, 350:

> "It is a well settled rule that a court will not permit a statute to be defeated on account of a mistake or error where the intention of the legislature can be collected from the whole statute. * * *"

Also see Sutherland Statutory Construction, Vol. 2, page 796, and cases cited in footnote 72. It is obvious that to construe the above proviso strictly as it is written would destroy the entire meaning of the enactment, and it is therefore equally obvious that the word "not" was omitted by mistake and should therefore, be inserted in construing the section in order to carry out the general intention and purposes of the legislature.

The next point for consideration is the exception which you quote in your letter as follows:

"With the understanding that the state reserves the right to grant a lease to the proper owners of a cottage on the easterly side of said canal property near the Henry-Defiance County line."

My investigation has revealed that at the time of said lease there were four cottages on the easterly side of said canal property within a mile of the Henry-Defiance County line in the County of Defiance, cottage No. 1 being located 204 feet from the said county line, cottage No. 2, 290 feet, cottage No. 3, 3214 feet and cottage No. 4, 4478 feet. Which cottage was referred to in the above exception is certainly not clear. I see no way to determine from the lease which property was excepted. Perhaps the best claim would be for the exception of cottage No. 1 inasmuch as it was the closest to the Defiance-Henry County line, but even this is doubtful. This being the case, the exception must fall. In regard to a matter of this kind a lease is akin to a deed or any other instrument granting or conveying a right or interest in real property and the general rule is, as stated in Thompson on Real Property, vol. 4, page 380:

"When the terms used in excepting a parcel out of a grant are too vague and uncertain to enable such parcel to be located, the exception will be ineffectual to exclude any portion of the territory from the defined tract."

See also *Cook* vs. *Wesner,* 13 O. Dec. Rep. 531. Another reason why the exception must fall is that stated in 13 O. J. 947, as follows:

"And when words in a deed, clearly granting an estate without limitation, are followed by others excepting a part of the estate granted, the part intended to be excepted must be as clearly described as the property originally conveyed, to give any force to the exception or limitation."

There is a further rule that compels this conclusion, namely, that an instrument conveying an interest in realty must be construed most strictly against the grantor. The Supreme Court in *Pure Oil Co.* vs. *Kindall,* 116 O. S. 188, 203, quoted with approval the following passage from Tiffany on Real Property, Vol. 2 (2nd Ed.) Section 437:

"In case of doubt it is said the conveyance is to be construed most strongly against the grantor or in favor of the grantee on the theory it seems, that the words used are to be

regarded as the words of the grantor rather than of the grantee. Applying this rule an exception or reservation in a conveyance is construed in favor of the grantee rather than of the grantor."

The lease to the Division of Conservation includes all of the abandoned canal lands in Defiance County and does not expire until November 29, 1947. Therefore, I am compelled to the conclusion that any lease of property included within the general description contained in this lease made by the Superintendent of Public Works after November 29, 1932, was void and of no effect. Said Superintendent of Public Works had no right after November 29, 1932, to the possession of the abandoned canal lands in Defiance County. It is elementary that a lessor cannot give to a lessee greater right than he the lessor has. Therefore, I am of the opinion that the lease executed on January 28, 1937, by the Superintendent of Public Works to an individual whom, I believe, it is claimed was the owner of the cottage described above as cottage No. 3, was void and of no effect since, in my opinion, the Superintendent of Public Works had no right or claim to the possession of said property.

In view of the above, there is no reason or authority in my opinion for the execution of a new lease to the Division of Conservation. The lease executed November 29, 1932, as shown above is a valid lease and covers all the lands contained in the general grant.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

510.

APPROVAL—GRANTS OF EASEMENT EXECUTED TO THE STATE OF OHIO BY PROPERTY OWNERS IN TRUMBULL, CLARK AND ALLEN COUNTIES.

COLUMBUS, OHIO, April 23, 1937.

HON. L. WOODDELL, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval certain grants of easement executed to the State of Ohio by several property owners in Trumbull, Clark and Allen Counties, Ohio, conveying to the State of Ohio, for the purposes therein stated, certain tracts of land in said counties.