Holding these views, in specific answer to your question, I am of the opinion that those portions of the two cent gasoline tax and the motor vehicle license tax, apportioned to the counties of the state, in accordance with the provisions of Sections 5537 and 6309-2, General Code, may be expended by the county commissioners in the maintenance and repair of bridges on public roads and highways in the county system of highways.

Respectfully,
EDWARD C. TURNER,
Attorney General.

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2144.

LEASE—STATE OF OHIO MAY CANCEL LEASE OF NIMISHILLING FEEDER —NO WAIVER BY ACCEPTANCE OF RENT AFTER BREACH EXCEPT WHERE LEASE PROVIDES OTHERWISE.

SYLLABUS:

Certain facts relating to a claimed violation by The Canal Fulton Lake and Improvement Company of the provisions of its lease of the Nimishilling Feeder executed to it by the State of Ohio through the Department of Public Works October 28, 1925, considered, and such violations held sufficient to justify the forfeiture and cancellation of such lease.

COLUMBUS, OHIO, May 21, 1928.

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

DEAR SIR:—This is to acknowledge receipt of your communication of recent date in which you request my opinion with respect to the right of your department to declare a forfeiture of a certain written lease executed by the State of Ohio, through the Department of Public Works, to The Canal Fulton Lake and Improvement Company, and to cancel the same. This lease, which was executed October 28, 1925, released and demised to The Canal Fulton Lake and Improvement Company that portion of the Ohio canal property known as Nimishilling Feeder to the Ohio Canal located in Lawrence Township, Stark County, and Franklin Township, Summit County, Ohio, for a period of fifteen years for a consideration of an annual rental of $100.00, to be paid by said lessee, in semi-annual installments of $50,00 each on the first days of May and November of each and every year of the term of said lease. The lease here in question was granted subject to certain conditions and restrictions therein stated and such of said conditions as are pertinent to the consideration of the questions presented in your communication, with respect to the forfeiture and cancellation of said lease, are as follows:

> "This lease is granted with the understanding that the grantee herein, its successors and assigns shall at all times, when required by the State of Ohio, maintain a free flow of water into the channel of the Ohio Canal at the present outlet of said feeder, and that all dams, flumes, wasteways, gates and other devices used in the maintenance and operation of the proposed lake, and the said Nimishilling Feeder shall be constructed under plans which shall be approved by the Superintendent of Public Works of Ohio, and that the State of Ohio may, through its properly authorized employes, have the right of control over all dams, flumes, wasteways, gates and other devices, should any be built by the grantee, its successors and assigns, across said

feeder, in order that the flow of water into the said canal channel may be properly controlled.

* * * * * * * *

This lease is granted with the further understanding that the grantee herein, its successors and assigns, shall at all times maintain in good and substantial condition all dams, flumes, wasteways, gates and other devices, should any be built by the grantee, its successors and assigns, across said feeder, and shall be responsible for any and all damages to state or private property caused by the construction and maintenance of said dams, flumes, wasteways, gates and other devices.

* * * * * * * *

It is further understood and agreed, that if any installment of rent agreed to be paid under this lease shall not be paid at the time the same shall fall due, or within ten (10) days thereafter, whether a demand therefor shall, or shall not be made, then this lease shall, at the option of the party of the first part hereto, become and be null and void as against the State of Ohio, and the lessee so in default, its successors, or assigns, or any party in possession of the premises leased, shall yield possession of the same to the said party of the first part or its authorized agent; and the said party of the first part or its authorized agent, in case of default of the payment of rent as aforesaid, may at any time, without any demand or notice whatever given the lessee, its successors or assigns, or the party in possession of the premises, enter upon and take possession of the premises herein leased on behalf of the state.

* * * * * * * *

If the party of the second part shall do, or permit to be done, any act or thing herein prohibited, or shall in any respect violate the terms of this agreement, then, and in either case, all the rights and privileges derivable to said second party from this agreement shall, at the option of the party of the first part, cease and determine, and said second party shall be liable for any and all damages consequent upon such violation of this agreement.

* * * * * * * *

It is also further agreed and understood that if said second party fails to comply with any of the conditions of this lease, as herein set forth, then this lease shall, at option of the said party of the first part hereto, become null and void, as to the party of the second part, and it is expressly agreed and understood that the receipt of rental after any act of forfeiture hereof by the party of the second part hereto, shall not be held to be a waiver by the party of the first part of its right to declare such forfeiture and cancel this lease, after the rental so taken has been earned under the terms of this lease, and the party of the first part may enter upon and take possession without notice or other legal process."

In your communication to this department above referred to, you state that some time ago it was ascertained that the Canal Fulton Lake and Improvement Company was in arrears on rent for more than a year on this lease and that the secretary of your department was instructed to enter a cancellation of the lease for the nonpayment of said rental; that through some oversight this was not attended to promptly, although it was supposed to have been canceled at the time of the execution of another lease for said premises, or part of the same, to one C. H. Cameron for oil and gas purposes. You state further that when gas was discovered near the line of said feeder, The Canal Fulton Lake and Improvement Company decided to pay up the back rentals and that they forwarded a check to the Treasurer of State in response to a letter from the Attorney General, to whom the rental account had been certified for collection. It appears that this money was accepted and paid into the State Treasury.

You state that your department is anxious to terminate this lease for the reason, as stated in your communication, that the lessee is not using the premises in question for the purpose for which they were leased. After referring to the conditions in said written lease imposing upon the grantee the duty of constructing and maintaining in good condition dams, flumes, wasteways, gates and other devices to be used in the maintenance and operation of the proposed lake to be developed and improved by said lessee, you say:

> "The Company, for the purpose of obtaining water for flooding the lake which was to be formed upon the lands owned by The Canal Fulton Lake and Improvement Company, constructed a wasteway with wickets to control the flow of water from the feeder through the proposed lake. This structure is only a short distance northeast of the junction of the feeder with the Ohio Canal near Canal Fulton.
>
> This structure should be kept in good repair, since any breach through the embankment would flood a large area of private lands. We are creditably informed, however, that this waste weir is now in very bad condition and is liable to be washed out by high water almost any time, as the water is now washing under the bottom of the concrete structure, which means of course that it will eventually be washed out, leaving a large breach in the canal embankment."

As I understand the situation, The Canal Fulton Lake and Improvement Company, at or near the place where its proposed lake was to be constructed, developed and improved, constructed a concrete spillway from the canal feeder over which water was to flow in more or less limited quantities for the purpose of filling said proposed lake and keeping the same at the proper level. Your complaint, as I understand it, is that the structure of this spillway, or of substantial parts thereof, has become broken down with the result that water no longer flows from the feeder over the spillway in limited and regulated quantities, but that the water in said feeder now flows down under the spillway, the quantity of which water so escaping increases as the debris formed by the breaking down of the spillway structure is gradually washed away; and that unless something is done to remedy the situation, it is only a matter of time when such debris will be so washed away as to permit all of the water in said feeder to flow down and under said spillway and thus escape in and upon the lands of said The Canal Fulton Lake and Improvement Company. In this connection it further appears, as I understand the facts submitted, that The Canal Fulton Lake and Improvement Company have not for some time maintained any lake on their said premises for the use of which this water was to be maintained, but that the water of said Nimishilling feeder now flowing under said spillway in and upon said premises of the lessee, escapes therefrom into the Nimishilling Creek and is thereby lost for all purposes either of said The Canal Fulton Lake and Improvement Company or of the State of Ohio. In this connection, as showing the interest of the State of Ohio in the proper preservation of water in said Nimishilling feeder, I am advised that said feeder forms its connection with the Ohio Canal, a short distance from the point where said spillway was constructed, and about seven or eight miles from the city of Massillon, where large quantities of water are sold by the state from said Ohio Canal to private consumers. One of the points to your complaint, as I understand it, is that this defective condition in the structure of said spillway is causing a loss of water which would otherwise go into the canal for purposes of sale by the state.

I do not deem it necessary to discuss at any considerable length the rules and principles of law applicable in the consideration of questions relating to the forfeiture or cancellation of leases arising out of claimed violations by the lessee of conditions in

the lease. The principle governing in such cases is quite succinctly stated in Volume 2, Tiffany on Landlord and Tenant, at page 1363, as follows:

> "It is not infrequently said that a proviso for re-entry, or, as it may as well be called, a condition subsequent, or a provision for forfeiture, will be construed strictly in favor of the tenant, thus applying the general rule that forfeitures are not favored by the courts. Such a rule is, however, to be applied only when there is some obscurity in the language used, and the construction must accord with the apparent intent of the parties, so far as this may appear. And its application must, it seems, be considerably restricted when the condition takes the form of a right of re-entry for breach of a covenant of the lease."

Of course, in all cases the provision relied upon by the lessor as his authority to forfeit the lease must be a condition in said lease rather than a mere covenant.

I note what you say in your communication with respect to the receipt and acceptance by the State of Ohio of certain rental for said leased premises after the same was in arrears for payment. The importance of this fact arises with respect to the question of whether the State of Ohio, in receiving and accepting said rent after it became due and payable, did not waive any right then had by the state to forfeit said lease by reason of prior violation of the conditions of said lease. With respect to this question, the following is said in Taylor on Landlord and Tenant, Volume 2, Section 497:

> "The waiver of a forfeiture most commonly occurs by an acceptance of rent which became due after a breach committed by the tenant; or by distraining therefor. The acceptance of rent affirms the tenancy only during that period in respect of which the rent was paid; and therefore the landlord may receive any rent which became due before the alleged forfeiture up to the day of such forfeiture, or may bring an action to recover it, without waiving his right to re-enter. It is only by receiving or demanding rent due since the forfeiture that such right is waived."

In 35 Corpus Juris, at p. 1080, it is said:

> "The acceptance by a landlord of rent which accrued after the breach of the condition contained in the lease is a waiver of the right to declare a forfeiture of the lease, and re-entry because of such breach, whatever may be the ground of forfeiture."

Under the provisions of this lease above quoted, the failure of The Canal Fulton Lake and Improvement Company to pay the rental which was afterwards collected by the Attorney General and paid into the State Treasury was in and of itself a ground of forfeiture and the payment by said lessee of said rental on the demand of the Attorney General, and its acceptance by the State of Ohio, did not constitute a waiver of the right of forfeiture which existed by reason of the failure of said lessee to pay said rent in the manner and in the time provided for by the lease. In order that the receipt of rent may operate as a waiver, the rent paid and accepted must be such as has accrued after the right of forfeiture arose. Taylor on Landlord and Tenant, Vol 2, Section 499; *Campbell* vs. *McElevey*, 2nd Disney 574, 579. You do not state in your communication whether or not The Canal Fulton Lake and Improvement Company has paid and the State of Ohio has accepted rent accruing since said right of forfeiture arose by reason of the failure of said lessee to pay at the time and in the manner provided by said lease, which was afterward collected by the Attorney General. The

payment and acceptance of any such rental subsequently accruing, in the absence of other pertinent provisions in the lease, would constitute a waiver of the right of forfeiture arising by reason of the failure of said lessee to pay the particular rental that was afterward collected by the Attorney General; and such payment and acceptance of subsequently accruing rental would likewise constitute a waiver of any other non-continuing breach of the conditions of such lease which might have given the state the right to forfeit said lease, and of which the state through its officers and agents had knowledge. Pertinent to the consideration of this question and the application of certain of the provisions of this lease above quoted, it has been held that the rule that the lessor waives the right to declare a forfeiture for a breach of the conditions of the lease by accepting the payment of rent accruing subsequent to the breach of such conditions of the lease, with knowledge of the fact of such breach, is subject to an exception when the lease otherwise provides as to the effect of the payment and acceptance of such subsequent accruing rent. Tiffany on Landlord and Tenant, Vol. 2, p. 1388.

In the case of *Vintalora* vs. *Pappas*, 310 Ill. 115, it was held that:

> "The receipt by the lessor of rent accruing subsequent to a breach of the conditions of the lease, with knowledge of the fact, is a waiver of the right to declare a forfeiture for such breach, except where the rule is qualified by the language of the lease or the special circumstances of the case."

In the case of *Miller* vs. *Prescott*, 163 Mass. 12, it was held:

> "The acceptance, after the breach of a covenant in a lease of premises known to the lessor, of rent already accrued, accompanied by an express agreement that the breach is not thereby waived, does not affect the right of the lessor to enter for such breach."

In this connection it will be noted that the lease here in question specifically provides that the receipt of rental after any act of forfeiture by the lessee caused by failure to comply with any of the conditions of said lease, shall not be held to be a waiver by the party of the first part of its right to declare such forfeiture and cancel said lease, after the rental so taken has been earned under the terms of said lease, and that the lessor may enter upon and take possession of said premises without notice or other legal process. These provisions of said lease clearly have the effect of obviating any waiver of the state's right to forfeit this lease which might otherwise have arisen by reason of the acceptance by the state of rent accruing subsequent to breaches of the conditions of such lease giving the state the right to forfeit the same.

With respect to the violation of the provisions of said lease by The Canal Fulton Lake and Improvement Company occasioned by its failure to maintain the dam, wasteway, gates and other devices constructed by it for the purpose of obtaining a limited and regulated supply of water for the purposes of the lake which it proposed to construct, improve and maintain, it does not appear just when said lessee became in default. However, I do not consider this question to be material, for, independent of the provisions of said lease, to the effect that the receipt and acceptance of rent should not have the effect of waiving the state's right to forfeit the lease on account of prior breaches by the lessee of the conditions of said lease, the particular breach here under consideration is one of a continuing nature that the state, as the lessor, can take advantage of notwithstanding the fact, if it be so, that the state receive rental after said breach first occurred. See Taylor on Landlord and Tenant, Vol. 2, Section 500.

In the case of *Vintalora* vs. *Pappas*, supra, it was held:

"Where there is a continuing cause of forfeiture, the acceptance of rent after the breach incurring the forfeiture was originally committed does not preclude the lessor from insisting upon a forfeiture if the breach continues after acceptance of rent."

So in this case it does not make any difference when The Canal Fulton Lake and Improvement Company first allowed said wasteway or structures in connection therewith to become out of repair, resulting in the present broken down and dilapidated condition of said structures, and inasmuch as the violation of this condition of the lease is palpable, I am of the opinion that the State of Ohio, acting through your department, has the right to declare a forfeiture of this lease and to cancel the same by reason of the default of The Canal Fulton Lake and Improvement Company in this matter. It does not appear that your department has made any demand upon said lessee to perform its duties under the conditions of the lease here under consideration; but under the provisions of said lease and the law applicable thereto, I do not think any demand on your part was necessary. The matter of maintaining and keeping in a good and substantial condition said wasteway and other structures is under the terms of said lease a duty as to which said grantee has the sole responsibility, and it calls for no action upon the part of the department of public works.

I am likewise of the opinion that by reason of the express provisions of said lease, above referred to, the state, acting through your department, can forfeit said lease by reason of the failure of said lessee to pay at the time and in the manner provided by said lease the particular rental that was afterwards collected by the attorney general and paid into the state treasury.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2145.

APPROVAL, BONDS OF THE VILLAGE OF OAK HILL, JACKSON COUNTY, OHIO—$4,000.00.

COLUMBUS, OHIO, May 22, 1928.

Industrial Commission of Ohio, Columbus, Ohio.

2146.

APPROVAL, ASSIGNMENT OF LEASE BETWEEN THE DEPARTMENT OF PUBLIC WORKS AND THE TOLEDO AND CINCINNATI RAILROAD COMPANY.

COLUMBUS, OHIO, May 22, 1928.

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

DEAR SIR:—Receipt is acknowledged of your communication of recent date submitting for my approval assignment of lease heretofore entered into between the