that the act in question is clearly one providing for a tax levy. I refer particularly to the case of *State ex rel vs. Forney*, 108 O. S. 463. In the discussion of the Taft act in that opinion, the court concludes that the act was not self executing but merely conferred power on others to act. It was stated that no levy was actually made, but that merely the authority to make a levy was conferred. The court, however, quotes with approval the following language from the per curiam opinion in the case of *State ex rel vs. Milroy*, 88 O. S. 301:

> "The general assembly did not, in this act, impose a tax, stating distinctly the object of the same, nor did it fix the amount or the percentage of value to be levied, *nor did it designate persons or property against whom a levy was to be made.*" (Italics the writer's.)

Tested by the language which was quoted with approval in the Forney case, the present act certainly designates persons not theretofore covered by the gasoline tax as now being subject to it. For this reason, I feel that House Bill No. 177 is a law providing for a tax levy.

There arises, however, the further question whether the various sections of the act are severable so that certain ones of them, notably the ones heretofore quoted, go into immediate effect because they do provide for a tax levy, and the remainder, since they are concerned merely with the administrative details, are subject to referendum. I think such a contention is without foundation. This is so because a part of the act provides for a tax levy and the remaining sections pertain solely to administrative details in connection with the collection of the tax. The levying portions and the administrative portions are so inseparably bound together that it would seem to be scarcely possible to separate them.

I am accordingly of the opinion that House Bill No. 177, by virtue of the provisions of Section 1d of Article II of the Constitution of Ohio, went into immediate effect.

Respectfully,
EDWARD C. TURNER,
Attorney General.

724.

CANAL LANDS—LEASE BY CITY OF DAYTON FOR ABANDONED MIAMI & ERIE CANAL—USE OF WATER SHOULD NOT BE INCLUDED IN APPRAISEMENT.

SYLLABUS:

1. *The portion of the Miami and Erie Canal abandoned by the Act of the General Assembly* (111 *O. L.* 208) *for which the City of Dayton has applied for a lease, is to be leased to the city subject only to leases made by the state for lands, and not subject to leases for the use of water.*

2. *Leases for the use of water should not be included in the appraisement upon which the rental to be paid by the city is based.*

3. *Leases made by the state for the use of water will be terminated upon the execution of the lease to the city, and the land to be leased should be appraised without regard*

to such leases, except in so far as the possibility of income from water leases may be an element in determining the present value of the property.

COLUMBUS, OHIO, July 11, 1927.

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

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

"Herewith I am transmitting copy of lease that was granted by the State of Ohio to The Dayton Power and Light Company of Dayton, Ohio, under date of March 26, 1924.

This lease merely authorizes the Power and Light Company to take water from the Miami and Erie Canal, which at the time of the granting of the lease, had not been abandoned for canal purposes. The canal, however, was abandoned for canal and hydraulic purposes by the Act of the General Assembly of Ohio, passed March 25, 1925, (See O. L. 111, pages 208-214), which also authorizes municipalities to acquire the canal lands within their corporate limits, by a lease running for the term of ninty-nine (99) years, renewable forever, subject, however, to reappraisement at the end of each fifteen (15) year period, the annual rental to be four (4%) per cent upon the appraised value of said property.

The act provided that the Governor should appoint a Board of Appraisers, consisting of either three (3) or five (5) members who were required within thirty (30) days after such appointment, to appraise the portions of said abandoned canal lands applied for by municipalities.

In accordance with the provisions of this act, the City of Dayton made application to lease all of the abandoned Miami and Erie Canal lands within its corporate limits, and certain lands extending both north and south of said city. Accordingly the Governor appointed a commission of three (3) members to make this appraisement, consisting of Lewis R. Smith of Cincinnati, Seymour B. Kelly of Dayton, and R. T. Wisda of Columbus, Ohio.

The commission, in making this appraisement, have encountered some difficulties in making appraisements of certain classes of leases. Among others is the lease for water to The Dayton Power and Light Company of Dayton, Ohio.

This company is authorized to take water from the canal through a twenty-four (24") inch pipe at an annual rental of Twenty-eight Hundred and Eighty ($2880.00) Dollars, which, capitalized at six (6%) per cent, has a value of Forty-eight Thousand ($48,000.00) Dollars.

One of the conditions in this lease is:

'It is further agreed and understood between the parties of the first and second parts hereto, that said first party shall not be required to supply the water herein leased, whenever the State is unable to supply the same economically.'

In appraising this lease, which is authorized by the terms of the act of abandonment, the appraisers have placed a tentative appraisement of Forty-eight Thousand ($48,000.00) Dollars upon this water lease.

By a decision rendered in the case of Vought et al v. The Columbus Hocking Valley and Athens Railroad Company, it was held by the decision of the Supreme Court of Ohio, and affirmed by the Supreme Court of the

United States, (176 U. S. pages 459-481) that 'Contracts made with the Board of Public Works or other agents of the State, for the use of 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 abandonment.'

It would appear from this that this water lease or contract, is terminated, or can be terminated at the option of the State at any time. The contract is a valuable one from the State's standpoint and the appraisers believe that the appraisement should be a part of the schedule of the property to be transferred to the City of Dayton, without regard to the use which the City of Dayton may make of it, even to the extent of depriving the lessee of the water. We respectfully request that you render an opinion covering this point at your earliest possible convenience.

To carry the contention of the City authorities to the extreme limit, we may suppose that all of the leases had been made for water. In that case, if these contracts were eliminated from the appraisement, the State would receive substantially nothing from leases that were producing a very considerable revenue to the State.

We will appreciate an opinion upon this point at your earliest convenience, for the reason that the appraisers are rapidly completing their task of appraising this abandoned canal property."

You also enclose copy of the lease referred to in your letter, which as stated therein was entered into on March 26, 1924, between the State through the Department of, Highways and Public Works and The Dayton Power and Light Company, of Dayton, Ohio.

This lease gives the lessee the right to take water from the Miami and Erie Canal in Dayton to be used for condensing purposes and prescribes the size of the pipes which may be used for that purpose. The lease also contains this provision:

"This lease is also granted with the further understanding that all water taken through said pipes shall be returned uncontaminated to the canal, and that upon six months' notice this lease may be terminated by either of the parties hereto."

The term of the lease is for five years, subject to the hereinabove quoted provision.

You state in your letter that the City of Dayton has made application to lease that portion of the Miami and Erie Canal within its corporate limits and certain lands extending both north and south of said city, and that this was done under the provisions of an act passed March 25, 1925, found in 111 Ohio Laws, p. 208.

The pertinent parts of said act are sections 1, 3, 5, 7, 9 and 10, hereinafter quoted.

Section 1 of said act provides 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, but 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.

Any portion of the said canal lands as described in Section 1 that may be required in the construction of any ship or barge canal under authority of legislation passed or to be passed by the congress of the United States or by the State of Ohio, or both is hereby reserved from the operation of this act and may be entered upon at any time by the United States or the State of Ohio, either or both, without judicial proceedings of any kind, and to that extent title to the property described in this bill is hereby reserved in the State of Ohio."

Section 3 reads:

"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 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 of said act reads:

"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."

Section 7 is quite important in a consideration of your question and reads as follows:

"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 of said act reads:

"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 of the act is also pertinent to your inquiry and, in so far as applicable thereto, reads as follows:

"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 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 6% as hereinafter provided in section eleven. * * *" (Italics the writer's.)

It is first necessary to determine the intention of the legislature with reference to so-called leases for water rights only. It is quite apparent from an examination of the entire act that the purpose was to select and set aside such portions of the abandoned canal as could be operated profitably for hydraulic purposes, and to dispose of all the remainder of the canal under leases to municipalities and individuals. It is clear from the act that the legislature intended to preserve the rights of all lessees of lands. This intention appears in the provisions of section 9, supra, in which it is provided that all owners of existing leaseholds for canal *lands* which prior to January 1, 1925, had

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, might secure a new lease for ninety-nine years, renewable forever, subject to appraisal at fifteen year periods. The intention to preserve the rights of lessees of lands further appears in the provisions of section 10, supra, by which it is provided that the assignment of leases therein provided for to a municipality shall be "subject however, to all the rights of existing lessees of the State of Ohio for *lands* only."

The primary purpose of the act being permanently to dispose of such parts of the abandoned canal as were not profitable for hydraulic purposes, by leasing the same to municipalities or individuals and to assign to the municipality all leases for canal *lands*, it is apparent that any effort to preserve water rights would be inconsistent with the general purpose of the act. In other words, the state could not expect to be able to abandon the canal and lease the canal lands and at the same time attempt to require the lessee to preserve existing water rights.

With this idea in mind it becomes clear that in section 7 of the act when the legislature used the language "appraise * * * 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," the word "lands" was used advisedly and was not intended to include mere water rights.

It is equally clear that in section 9 of the act the language "the superintendent of public works, * * * 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," refers only to leases for lands. This is emphasized by the fact that the further provision of section 9, providing for the renewal of certain existing leases, is clearly by its terms limited to leases for *lands* and does not include water rights.

The language of section 10 of the act is also consistent with this interpretation. The language of this section is that "Such existing lease or leases shall be appraised at their true value in money for any purpose for which the land herein (therein) described can be used, * * *"

Sections 7 and 10 contain the only authority to appraise leases, and in both the authority is limited to lands.

I am therefore unable to find in this act any authority to include in the appraisement water right leases.

That the state has the power to make a lease to the City of Dayton free from water right leases was settled in the case of *Vought vs. Railroad Company*, 58 O. S. 123, affirmed by the Supreme Court of the United States, 176 U. S. 481. The fourth branch of the syllabus of that case is as follows:

> "Contracts made with the board of public works or other agents 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 abandonment."

Specifically answering your question, it is my opinion that upon the execution of the lease from the State to the City of Dayton, the lease made by the State to the Dayton Power and Light Company under date of March 26, 1924, will be terminated so far as the State is concerned. The City of Dayton, having made application to lease the canal lands in question, is entitled to have the same leased to it free from all water rights, and there is no authority to include in the appraisement to be used as the basis for the rental under the lease to the City of Dayton the above lease to The Dayton Power and Light Company or any other water right lease which may be in existence within the limits of the property for which Dayton has applied.

While the land to be leased to the City is the thing to be appraised, the appraisers are at liberty to consider the probable uses of the land in determining the value thereof, and in so far as the possibility of continuing the lease in question or of making other hydraulic leases may affect that value, they may take them into consideration.

Respectfully,
EDWARD C. TURNER,
Attorney General.

725.

APPROPRIATION — ENCUMBRANCE CERTIFICATE — LAPSE OF AN APPROPRIATION—EFFECTIVE DATE OF REAPPROPRIATION.

SYLLABUS:

1. *It is not necessary in order to encumber an appropriation made by the General Assembly that an encumbrance certificate be filed in the office of the Auditor of State.*

2. *An appropriation made by the General Assembly or the unexpended balance of such an appropriation lapses at the end of two years from the date when such an appropriation became effective, whether or not such appropriation or balance of an appropriation has been duly encumbered according to law.*

3. *While the 87th General Assembly has reappropriated the unexpended balances of all appropriations and reappropriations made by the 86th General Assembly against which contingent liabilities have been lawfully incurred, such balances, in so far as appropriations for other than current expenses are concerned, so reappropriated will not become available until August 9, 1927, ninety days after the date of the filing of the appropriation act in the office of the Secretary of State, to wit, May* 11, 1927.

COLUMBUS, OHIO, July 11, 1927.

HON. HERBERT B. BRIGGS, *State Architect and Engineer, Columbus, Ohio.*

DEAR SIR:—In your letter dated June 24, 1927, transmitting for examination and approval several contracts in connection with the Agronomy Building for the Ohio Agricultural Experiment Station, Wooster, Ohio, you ask the following question:

> "As the appropriation for the Agronomy Building has not been reappropriated by the Legislature, we would like to know if it will be necessary that the encumbrance estimates and contracts be filed with the Auditor of State on or before June 30, 1927. The encumbrance estimates have been approved by the Director of Finance and are attached to above contracts."

Your attention is directed to Section 2288–2, General Code, which provides as follows:

> "It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the director of finance shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."