

Upon examination of these leases, I find that the same have been executed and acknowledged by the respective lessors in the manner provided by law. I also find upon examination of the provisions of these leases and of the conditions and restrictions therein contained, that the same are in conformity with statutory provisions relating to the execution of leases of this kind.

I am accordingly approving these leases as to legality and form, as is evidenced by my approval endorsed upon the several leases and upon the duplicate copies thereof, all of which are herewith returned.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

4396.

LIQUOR CONTROL ACT—CERTAIN SECTIONS OF LIQUOR CONTROL ACT,
 AS AMENDED BY 91ST GENERAL ASSEMBLY, SUBJECT TO REFER-
 ENDUM—OTHER SECTIONS EFFECTIVE IMMEDIATELY.

SYLLABUS:

Sections 154-3, 154-4, 6064-2, 6064-3, 6064-4, 6064-5, 6064-6, 6064-7, 6064-8, 6064-10, 6064-11, 6064-13, 6064-16, 6064-17, 6064-20, 6064-22, 6064-25, 6064-26, 6064-27, 6064-29, 6064-53, 6064-54, 6064-54a 6064-56, 6064-57, 6064-60, 6064-63, 6064-64, 6064-65, 6064-66 and 13393-1, as enacted in Amended Substitute Senate Bill No. 2 passed by the Ninety-first General Assembly, are statutes which do not contain any provision which provides for a tax levy and therefore are subject to referendum and do not go into effect as law until ninety days after the same has been approved by the Governor and filed with the Secretary of State.

Sections 6064-18, 6064-67, 6212-48a to 6212-48g, inclusive, and 6212-63, as contained in Amended Substitute Senate Bill No. 2, enacted by the Ninety-first General Assembly, are part of laws providing for tax levies as that clause is used in section 1d of article II of the Constitution and went into effect when approved by the Governor, and these statutes are not subject to referendum.

COLUMBUS, OHIO, July 6, 1935.

HON. J. W. MILLER, *Director, Department of Liquor Control, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads as follows:

“In your Opinion No. 4348 rendered under date of June 21st, 1935, to the Tax Commission of Ohio, you held that Sections 6064-1, 6064-15, 6064-41, 6064-41a and 6212-48, General Code, as contained in Amended Substitute Senate Bill No. 2, passed by the Ninety-first General Assembly, May 23d, 1935, and approved by the Governor June 5th, 1935, were laws providing for tax levies within the meaning of Section 1d, Article 2, of the Constitution of Ohio, and went into immediate effect on being approved by the Governor.

This Act contains many other sections which amend and supplement the present provisions of the Liquor Control Act as enacted into law by House

Bill No. 1 of the Second Special Session of the Ninetieth General Assembly. Numerous inquiries have been made of the Department with reference to the effective date of the other sections of Amended Substitute Senate Bill No. 2, and accordingly I request your formal opinion as to the effective date of the other provisions of this Act."

All acts, except those providing for tax levies, appropriations for current expenses of the state government and state institutions, and emergency laws, go into effect ninety days after the same have been signed by the Governor and filed with the Secretary of State. *State vs. Lathrop*, 93 O. S., 79. Laws providing for tax levies go into immediate effect when approved and signed by the Governor. *State vs. Lathrop*, supra; and *State, ex rel. Donahey, vs. Roose*, 90 O. S., 345.

The clause in the Ohio Constitution (section 1d of article II) excepting from referendum laws providing for tax levies, applies only to laws which in their terms provide for a self-executing tax levy, and as stated by Wanamaker, J., in the case of *State, ex rel. Keller, vs. Forney*, 108 O. S., 463, at page 469:

"The doctrine here is clearly that, though the law may 'relate' or 'pertain' or 'limit' tax levies, it must, to come within the constitutional exception, 'provide for a tax levy,' and therefore be self-executing. No one contends that this law is self-executing. It merely confers power for others to act. No levy is actually made and no contention is made to that effect."

The test to determine whether a law provides for a tax levy is set forth in the case of *State, ex rel. Schreiber, vs. Milroy*, 88 O. S., 301, at page 304:

"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. It merely imposed certain limitations and created an agency. The act cannot be said to be one 'providing for tax levies,' within the meaning of those words as used in Section 1d of Article II of the Constitution."

A reading of sections 154-3, 154-6, 6064-2, 6064-3, 6064-4, 6064-5, 6064-6, 6064-7, 6064-8, 6064-10, 6064-11, 6064-13, 6064-14, 6064-16, 6064-17, 6064-20, 6064-22, 6064-25, 6064-26, 6064-27, 6064-29, 6064-54a, 6064-56, 6064-57, 6064-60, 6064-63, 6064-64 and 13393-1, General Code, discloses no provision in those statutes which provides for a tax levy or which in any wise pertains to the carrying out of any tax levy provided for in Amended Substitute Senate Bill No. 2, as enacted by the Ninety-first General Assembly. These statutes relate solely to the administration of the liquor laws of the State of Ohio and to the regulation of the liquor traffic by the Department of Liquor Control. These statutes were amended by the legislature so as to enable the Department of Liquor Control to better enforce and administer the laws of the State of Ohio pertaining to the manufacture, sale and distribution of beer and intoxicating liquor in Ohio. It follows from what has been said that these statutes are not exempted from the referendum reserved and provided for in sections 1 and 1c of article II of the Constitution.

A more difficult question is presented by the provisions of sections 6064-18, 6064-53, 6064-54, 6064-65, 6064-66, 6212-48a to 6212-48g, inclusive, and 6212-63, as contained in Amended Substitute Senate Bill No. 2.

Section 6064-18 reads in part:

"No permit other than a class C-1, class C-2, class D-1, and class F permit shall be issued unless and until the applicant therefor shall have furnished a bond to the state of Ohio, with surety to the satisfaction of the commission, conditioned on the faithful observance of the terms of the particular class of permit and compliance with all laws of the state of Ohio and rules, regulations, and orders of the department of liquor control and the tax commission of Ohio with respect thereto. The penal sums of such bonds for the classes of permits designated shall be fixed by the department of liquor control within the following limitations, to-wit:

* * *

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* * *

2. For all class D-2, class D-3, class D-3-A, class D-4, class D-5, class E, class G, class H, class I, class J, and class K, permits, one thousand dollars."

In section 6064-15, as amended in Amended Substitute Senate Bill No. 2, which this office held became effective on the day it was signed by the Governor in Opinion No. 4348, provision is contained for the issuance of various classes of permits including seven new types of permits which were not contained in the original Liquor Control Act. By virtue of section 6064-18, the Department of Liquor Control cannot issue any permit, except class C-1, class C-2, class D-1 and class F permits, without a surety bond being first furnished to the State of Ohio. One of the conditions of the bond is that the principal and the surety shall be liable for taxes that the principal is obligated to pay by virtue of the provisions of the various laws of the State of Ohio pertaining to the manufacture and sale of beer and intoxicating liquor in Ohio.

In many instances, the permit holder, by virtue of the provisions of the Liquor Control Act as originally enacted and as amended, is made liable for certain taxes imposed by the act. For example, manufacturers, wholesale distributors and retail dealers are liable for the payment of the various taxes imposed by the legislature on the manufacture and sale of beer and other malt products in Ohio either in bulk or in bottles. See sections 6212-48, 6212-49 and 6212-50, General Code. In view of that fact, the provisions of section 6064-18 must be considered as being a part of section 6064-15 and therefore a part of an act providing for a tax levy.

Section 6064-53 and 6064-54, as amended in Amended Substitute Senate Bill No. 2, read as follows:

Sec. 6064-53.

"In the interpretation of the provisions of the General Code of Ohio, other than this act, the word 'liquor' and the phrase 'intoxicating liquor' shall be construed to have the meaning assigned to the phrase 'intoxicating liquor' by section 6064-1 of the General Code.

As used in the succeeding sections of the liquor control act and in the interpretation of the provisions of the General Code of Ohio relating to intoxicating liquor, other than this act:

'Sale' and 'sell' include exchange, barter, gift, offer for sale, sale, distribution and delivery of any kind, and the transfer of title or possession of beer and intoxicating liquor either by constructive or actual delivery by any means or devices whatsoever.

'Vehicle' includes all means of transportation by land, by water, or by air, and everything made use of in any way whatsoever for such transportation."

Sec. 6064-54.

"Whoever, not being the holder of a class A permit issued by the department of liquor control, in force at the time, and authorizing the manufacture thereof, or an agent or employee of the department of liquor control authorized by law and by said department to manufacture such beer or intoxicating liquor, either directly or indirectly, himself or by his clerk, agent, or employee, manufactures any beer or intoxicating liquor for sale, or manufactures spirituous liquor; or

Whoever, not being the holder of a class B, class C, class D, class E, class F, class G, class I or class J, class K permit issued by the department of liquor control, in force at the time, and authorizing the sale thereof, or an agent or employee of the department of liquor control or the tax commission of Ohio authorized by law and by said department or commission to sell such beer, intoxicating liquor, or alcohol, either directly or indirectly, himself or by his clerk, agent, or employee, sells, keeps or has in possession for sale to any persons other than those authorized by this act to purchase any beer or intoxicating liquor, or sells any alcohol at retail, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than thirty days nor more than six months, or both. Whoever, being the holder of a permit issued by the department of liquor control, either directly or indirectly, himself or by his clerk, agent or employee, sells, keeps or has in his possession for sale any intoxicating liquor not purchased from the department of liquor control or from the holder of a permit issued by the department of liquor control authorizing the sale of such intoxicating liquor unless the same has been purchased with the special consent of the department shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, and be imprisoned not less than thirty days nor more than six months. The department of liquor control shall revoke the permit of any person convicted of this offense."

Although these statutes relate to the provisions of section 6064-15, in that it makes it a penal offense for persons to manufacture or sell beer or intoxicating liquor in Ohio without being the holder of a proper permit as provided for in section 6064-15, nevertheless these sections cannot be considered as providing for a tax levy nor do these statutes in any wise enforce a law providing for a tax levy. Thus, sections 6064-53 and 6064-54 cannot be said to be laws providing for tax levies and therefore are subject to referendum.

Section 6064-65, General Code, reads as follows:

"Whoever violates any provisions of the liquor control act or the amendments thereto for which no criminal penalty is provided therein shall be deemed guilty of a misdemeanor, and upon conviction shall forfeit any permit granted to him or it by the department of liquor control, and shall be fined not less than twenty-five dollars nor more than fifty dollars."

This section is a general penal section and is not a part of any statute in Amended Substitute Senate Bill No. 2 which provides for a tax levy. The failure to pay the taxes imposed by the various provisions contained in Amended Substitute Senate Bill No. 2, as well as in the original beer and liquor control acts, is penalized by express provisions contained in those acts and, for that reason, the provisions of section 6064-65 are subject to referendum and therefore do not become effective until September 5, 1935.

Section 6064-66, General Code, provides:

"Holders of B-2 permits who surrender their permits for cancellation by the department in the event that the liquor control act is amended so as to allow holders of B-1 permits to sell ale, porter, stout and other malt liquors containing more than 3.2 per centum of alcohol by weight and not containing more than seven per centum of alcohol by weight, shall be refunded by the department of a proportionate amount representing the unexpired portion of their permit year, excepting that no refunder shall be made if the unexpired portion of the license year shall be less than thirty days; such refund shall be made from the moneys in the custody of the treasurer of state and subject to the order of the department and at the next distribution of permit fee revenues, the amount so refunded shall be withheld from the moneys, if any, due to the subdivision which received the original fee."

It is clear from a reading of the provisions of this section that the same provides for a refunder to certain permit holders of their unexpired permit fees and in no way provides for a tax levy. It therefore follows that this section does not go into effect until September 5, 1935.

The legislature of this state in Amended Substitute Senate Bill No. 2 enacted a retaliatory statute aimed at various states which discriminate against beer and intoxicating liquor manufactured and distributed by Ohio permit holders. The retaliation takes the form of additional taxes, fees and charges. Section 6064-67, General Code, reads:

"If the laws of another state, territory or nation, or the rules and regulations of an administrative body therein, provide for or authorize the levy and collection of taxes, fees and charges upon or against the products of Ohio manufacturers of wine or manufacturers or brewers of beer and other malt liquors when such products are sold in, delivered or shipped into such state, territory or nation, or any part thereof, in excess of the taxes, fees and charges levied and collected on the products of manufacturers or brewers of said states, whether such taxes, fees and charges are in the nature of an excise, sales or import tax, or by whatever name designated, the tax commission of Ohio is hereby authorized, and shall levy and collect additional taxes, fees and charges on the products of manufacturers of wine or manufacturers and brewers of beer and other malt liquor of said state, territory or nation when sold in, delivered or shipped into this state, as hereinafter provided.

The additional taxes, fees and charges herein authorized to be levied and collected shall be in addition to an in excess of those provided for in sections 6064-1 to 6064-64, both inclusive, and 6212-49 to 6212-64, both inclusive, or amendments thereto, of the General Code of Ohio, in the same proportion or in the same amount as taxes, fees and charges, levied and collected in said state upon or against the products of Ohio manufacturers of wine or manufacturers or brewers are in excess of those levied and collected on the products of manufacturers and brewers of said state.

If the laws of another state, territory or nation, or the rules and regulations of the administrative body therein, provide for or authorize the levy and collection of taxes, fees or charges against Ohio manufacturers of wine or manufacturers or brewers of beer and other malt liquor for the privilege of

doing business therein, like amounts shall be levied and collected on manufacturers or brewers of said state, territory or nation for the privilege of doing business in this state."

An examination of this section clearly discloses a law which provides for a tax levy. The objects and the persons to be taxed are clearly set forth in this section and from its terms it is self-executing. Because the terms of section 6064-67 provide for a tax levy, the same went into effect on the day Amended Substitute Senate Bill No. 2 was signed and approved by the Governor, and the provisions of this section are not subject to referendum.

Sections 6212-48a to 6212-48g, inclusive, General Code, provide:

Sec. 6212-48a.

"Whoever has in his possession a barrel or other container (excepting a sealed bottle) of beer, ale, porter, stout or other malt beverage containing more than 3.2 per centum but not more than 7 per centum of alcohol by weight, not bearing the stamps required to be affixed to each barrel or other container; or fails to produce, upon demand by the tax commission of Ohio, invoices of all such beverages purchased or received by him within two years prior to such demand, unless upon satisfactory proof it is shown that such non-production is due to providential or other causes beyond his control, shall be fined not less than twenty-five dollars nor more than one hundred dollars."

Sec. 6212-48b.

"Whoever makes any false entry upon an invoice, or container of beer, ale, porter, stout or other malt beverage required to be made under the provisions of section 6212-48 of the General Code, presents any such false entry for the inspection of the commission, shall be fined not less than twenty-five dollars nor more than one hundred dollars."

Sec. 6212-48c.

"Whoever prevents or hinders the commission from making a full inspection of any place where beer, ale, porter, stout or other malt beverages subject to the tax imposed by section 6212-48 of the General Code are sold or stored, or prevents or hinders the full inspection of invoices, books, records or papers required to be kept under the provisions of section 6212-48 of the General Code, shall be fined not less than twenty-five dollars nor more than one hundred dollars."

Sec. 6212-48d.

"Whoever sells beer, ale, porter, stout or other malt beverages in this state without there having been first affixed to each barrel or other container thereof the stamp or stamps required to be affixed thereto by section 6212-48 of the General Code, shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than ninety days, or both, in the discretion of the court.

Sec. 6212-48e.

Whoever falsely or fraudulently makes, forges, alters or counterfeits any

stamp prescribed by the commission under the provisions of section 6212-48 of the General Code, or causes or procures to be falsely or fraudulently made, forged, altered or counterfeited any such stamps, or knowingly and wilfully utters, publishes, passes or tenders as true, any such false altered, forged or counterfeited stamp, or uses more than once any stamp provided for and required by section 6212-48 of the General Code, for the purpose of evading the tax thereby imposed shall be imprisoned in the penitentiary for a term of not less than one year nor more than ten years."

Sec. 6212-48f.

"Whoever violates any of the provisions of section 6212-48 of the General Code, or any lawful rule or regulation promulgated by the commission under authority of section 6212-48 of the General Code, for the violation of which no penalty is provided by law, shall be fined not less than twenty-five dollars nor more than one hundred dollars."

Sec. 6212-48g.

"Whenever the commission or any of its deputies or employees authorized by it for such purpose shall discover any beer, ale, porter, stout or other malt beverage containing more than 3.2 percentum but not more than 7 percentum of alcohol by weight, subject to tax as provided by section 6212-48 of the General Code, and upon which the tax has not been paid as therein required, the commission, or such deputy or employee is hereby authorized and empowered forthwith to seize and take possession of such beer, ale, porter, stout or other malt beverage, which shall thereupon be deemed to be forfeited to the state and the commission may within a reasonable time thereafter by a notice posted upon the premises where such seizure is made, or by publication in some newspaper having circulation in the county wherein such seizure is made, at least five days before the day of sale, sell such forfeited beer, ale, porter, stout or other malt beverage, and from the proceeds of such sale shall collect the tax due thereon together with a penalty of fifty percentum thereof and the costs incurred in such proceedings and pay the balance, if any, to the person in whose possession such forfeited beer, ale, porter, stout or other malt beverage was found; provided, however, that such seizure and sale shall not be deemed to relieve any person from fine or imprisonment provided herein for violation of any provision of section 6212-48 of the General Code. Such sale shall be made in the county where most convenient and economical. All moneys collected under the provisions of this section shall be paid into the state treasury to the credit of the state emergency relief fund."

With respect to the provisions contained in section 6212-48a to 6212-48g, inclusive, there is some question as to whether the same can be considered as providing for a tax levy. However, the provisions contained in these sections tend to and do relate to the provisions contained in section 6212-48 which imposes a tax on the sale or distribution in Ohio of beer, ale and other malt liquors containing more than 3.2 per centum of alcohol by weight and not more than seven per centum of alcohol by weight. Sections 6212-48a to 6212-48g, inclusive, are for the purpose of carrying out the express provisions contained in section 6212-48 and must be deemed to be a part of and incidental to a statute which provides for a tax levy. It follows from what has been said that these sections are not subject to referendum and went into effect on the day that section 6212-48 went into effect.

Section 6212-63, General Code, defines the word "beer" as used in the various provisions of the General Code which impose a tax upon the manufacture and sale of beer. Section 6212-63 reads:

"For the purposes of section 6212-44 to 6212-49, both inclusive, of the General Code, sections 6212-49a to 6212-49t, both inclusive, of the General Code, sections 6212-50 to 6212-54, both inclusive, of the General Code, section 6212-54a of the General Code, sections 6212-55 to 6212-62, both inclusive, of the General Code and section 6212-64 of the General Code, the term 'beer' as used in any of said sections shall include beer, lager beer, ale, stout and porter, ale and other brewed or malt beverages containing one-half of one per centum or more of alcohol by weight but not more than 3.2 per centum of alcohol by weight."

Inasmuch as section 6212-63 redefines an object which is subject to a tax in Ohio, it follows that the same must be considered a part of a law which provides for a tax levy and becomes effective immediately and is not subject to referendum. See Opinion No. 4311 and Opinion No. 4348 of the Opinions of the Attorney General for 1935.

The next question raised by your letter is whether the statutes contained in Amended Substitute Senate Bill No. 2 which do not provide for tax levies go into effect immediately because other parts of the same act have gone into effect. This office has in the past held that part of an act which provided for a tax levy went into effect immediately while other parts of the same act did not become effective until ninety days after the act was approved by the Governor and filed with the Secretary of State. In the Opinions of the Attorney General for 1929, page 507, it was held in the syllabus that:

"None of the sections of the act of April 17, 1925, as amended in House Bill No. 17, passed by the 88th General Assembly, other than Section 9 therein, are exempted from the referendum reserved and provided for in Sections 1 and 1c of Article II of the constitution; and aside from Section 9, as amended in said act, which went into immediate effect on approval of the said act by the governor, the several sections of the act of April 17, 1925, as amended in said House Bill No. 17, do not go into effect until ninety days from the date said act was filed in the office of the Secretary of State."

My immediate predecessor in that opinion at page 512, said:

"In the opinion of the court in this case (*State, ex rel. Donahey, vs. Roose*, 90 O. S., 345), as above noted, the view was distinctly expressed that where a section of an act provided for a tax levy such section would go into effect immediately, although other sections of the act not exempt from the referendum would not go into effect until after the lapse of the referendum period.

In view of the position taken by the Supreme Court in the case of *State ex rel. vs. Roose*, supra, and the rule that the provisions of Section 1d of Article II as exceptions to the general right of referendum to any law, section or appropriation item reserved and granted by the provisions of Sections 1 and 1c of Article II of the Constitution, are to be strictly construed, I do not believe that any conclusions can be safely reached with respect to the question presented in your communication other than those above stated, to-wit: that Section

9, as amended in House Bill No. 17, providing for a levy of taxes, went into immediate effect on approval of said act by the governor, and, that the other sections of the act of April 17, 1925, as amended in said House Bill No. 17, do not go into effect until ninety days from the time said act was filed in the office of the Secretary of State." (Insertion ours).

The contention that an act of the legislature should not become a law piecemeal or that legislation should not become law one section or provision at a time, finds no support in the Constitution or in reason. In the case of *State ex rel. Donahey, vs. Roose*, supra, it was recognized by the Supreme Court that part of an act could go into effect immediately while other parts of the same act would not go into effect until ninety days after the same was approved by the Governor and filed with the Secretary of State. Donahue, J., in the case at page 349, said:

"While perhaps some of the sections of this act may have been subject to the referendum provisions of Section 1c of Article II of the Constitution, yet Section 1d of Article II expressly exempts laws providing for tax levies from the operation of the preceding provision of the Constitution. Therefore section 1 of this act, providing for a tax levy of one-half of one mill on all taxable property within the state, went into immediate operation when approved and signed by the governor.

The contention of counsel that an act containing some sections subject to referendum will take effect only as a whole after the expiration of ninety days from the date it is filed in the office of the secretary of state, is not sustained by the provisions of Section 1c of Article II of the Constitution. That section of the constitution expressly authorizes a referendum upon any section of a law or any item of a law appropriating money. It follows that such sections of a law as are not subject to the referendum will go into immediate effect notwithstanding other sections or other items may be subject to the delay incident to a referendum or the right to petition therefor."

See also *State, ex rel. Davies Manufacturing Company, vs. Donahey*, 94 O. S., page 383.

Specifically answering your question, it is my opinion that sections 154-3, 154-4, 6064-2, 6064-3, 6064-4, 6064-5, 6064-6, 6064-7, 6064-8, 6064-10, 6064-11, 6064-13, 6064-16, 6064-17, 6064-20, 6064-22, 6064-25, 6064-26, 6064-27, 6064-29, 6064-53, 6064-54, 6064-54a, 6064-56, 6064-57, 6064-60, 6064-63, 6064-64, 6064-65, 6064-66 and 13393-1, as enacted in Amended Substitute Senate Bill No. 2 passed by the Ninety-first General Assembly, are statutes which do not contain any provision which provides for a tax levy and therefore are subject to referendum and do not go into effect as law until ninety days after the same has been approved by the Governor and filed with the Secretary of State.

Sections 6064-18, 6064-67, 6212-48a to 6212-48g, inclusive, and 6212-63, as contained in Amended Substitute Senate Bill No. 2, enacted by the Ninety-first General Assembly, are part of laws providing for tax levies as that clause is used in section 1d of article II of the Constitution and went into effect when approved by the Governor, and these statutes are not subject to referendum.

Respectfully,
JOHN W. BRICKER,
Attorney General.