of the files relating to the purchase of the above described property, are properly executed and the same show sufficient unencumbered balances in the proper appropriation account to pay the respective purchase prices of the above described parcels of land, which purchase prices are $1,400.00 for the 79 acre tract and $100.00 for the 1 acre tract. It further appears that the purchase of this property has been approved by the Controlling Board, which board has released from the appropriation account the money necessary to pay the purchase price of these properties.

I am herewith returning to you, with my approval, said abstract of title, warranty deed, contract encumbrance records Nos. 12 and 20, Controlling Board's certificate, and other files submitted, relating to the purchase of the above described property.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4035.

LEASE—STATE OF OHIO ON PROPERTY AT 50 SOUTH THIRD ST., COLUMBUS, OHIO.

SYLLABUS:

Questions relating to lease of the State of Ohio on property located at 50 South Third Street, Columbus, Ohio, discussed.

COLUMBUS, OHIO, March 8, 1935.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion on several questions arising with reference to a lease of the State of Ohio entered into on the 13th day of March, 1928, for the use of the second and third floors of the Courley and Trautman Building at 50 South Third Street, Columbus, Ohio.

The following facts are necessary to a consideration of the questions presented:

It seems that on March 13, 1928, the then Superintendent of Public Works, Hon. R. T. Wisda, entered into such lease with the American Education Press, Inc., for the property mentioned, for a period of ten years, ending March 15, 1938, at a rental of $8,000 per year, for the use of the Bureau of Motor Vehicles of the State of Ohio.

Such property was used by the Bureau of Motor Vehicles until about the first of January, 1934, when it was vacated by such Bureau, due largely to additional space being necessary and the fact that the legislature had made no specific appropriation for the rental of such space during 1934 beyond the sum of $500. Soon after the vacation of the premises by the Bureau of Motor Vehicles, the Federal Public Works Administration took possession of such quarters, with the consent of both the lessor and lessee, and is now occupying such quarters.

It further appears that an appropriation had been made by the 90th General Assembly for the rental of these premises in the amount of $8,000 for the year 1933 and only $500 for 1934, as just pointed out above. See page 16 of House Bill 699 of the 90th General Assembly.

It appears that during 1934 the State Emergency Board had been releasing the stipulated monthly rental for the use of such premises by the Public Works Admin-

istration from the appropriation made to such emergency board by said House Bill 699. See page 178 of such bill.

By Amended Senate Bill No. 1, passed by the 91st General Assembly, it appears that an appropriation has been made in the amount of $4,000 for the premises at 50 South Third Street for the first six months of 1935. While the item H-6 appropriating to the Department of Public Works by such Amended Senate Bill 1 (see page 17 of said bill) reads: "Rent—50 S. Third Street, $9,400," I am informed by the Superintendent of the Budget that $5,400 of the $9,400 is for rental for the Pure Oil Building on North High Street for six months at $900 per month for quarters for the State Relief Commission, leaving $4,000 for the first six months of 1935 for 50 South Third Street.

Finally, it appears that the Public Works Administration may possibly move to the old Post Office Building when it has been repaired, and thus it is possible such premises may be vacated. However, I understand there is some possibility that another state department or board may use such space.

The questions that you present in connection with these facts may be set forth as follows:

1. Did the agreement made by the Superintendent of Public Works in 1928 constitute a valid lease?
2. May the State terminate the lease at any time upon payment of accrued rentals?
3. Would the State be liable to a suit for default in future payment of rentals and termination of the lease?
4. Was the lease operative without the specific appropriation by the legislature for the year 1934?
5. Should a new lease be made for the quarters at 50 South Third Street if same are needed for another state department or board, providing the Federal Public Works Administration vacates such premises?

With respect to your questions, you call my attention to sections 7 and 8 of the lease submitted. Such sections read as follows:

"7. That if DEFAULT be made in payment of said rent or any part thereof or in fulfillment of any of the covenants or agreements herein specified to be fulfilled by the LESSEE, or if any WASTE be committed or unnecessary damage done upon or to said premises, the LESSOR may, at LESSOR'S election at any time while such default continues or before the replacement or repair of such waste or damage, without notice declare the said term ended and enter into possession of said premises and sue for and recover all rents and damages accrued or accruing under this lease or arising out of any violation thereof; or LESSOR may sue and recover without declaring this lease void or entering into possession of said premises.

8. That every DEMAND for rent due wherever and whenever made shall have the same effect as if made at the time it falls due and at the place of payment or on the premises; and after the service of any notice or commencement of any suit, or final judgment therein, LESSOR may receive and collect any rent due, and such collection or receipt shall not operate as a waiver of nor affect such notice, suit or judgment. Any notice or summons to be served by or on behalf of LESSOR upon LESSEE under this lease or in connection with any proceeding or action growing out of this lease or the tenancy arising therefrom, may be sufficiently served by leaving such notice or summons addressed to LESSEE upon the said demised premises."

Taking up the first question presented, I may say that the agreement made by the Superintendent of Public Works in 1928 constituted a valid lease. Section 154-40, General Code, as it read in 1928 at the time of the making of the lease in question, and as it now reads, provides in part:

> "* * *
>
> In addition to the powers so transferred to it, the department of public works shall have the following powers:
>
> * * * * * *
>
> (10) To lease office space in buildings for the use of the state government, or any department, office or institution thereof.
>
> * * * * * *"

In the case of *State of Ohio* vs. *Medbery,* 7 O. S. 522, it was held that no officers of the state can enter into any contract whereby the General Assembly will, two years after, be bound to make appropriations either for a particular object or a fixed amount—the power and discretion, intact, to make appropriations in general devolving on each biennial general assembly, and for the period of two years.

When this case is read in connection with the case of *State ex rel. Ross* vs. *Donahey,* 93 O. S. 414, it conclusively appears that a valid lease may be made by a state officer for a period longer than two years, but that such lease is subject to the provision that the legislature will make appropriation for such term.

Article XII, Section 4, Ohio Constitution, states that the General Assembly shall provide for raising revenue sufficient to defray the expenses of the State for each year. Article II, Section 22 of the Ohio Constitution, provides that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law and that no appropriation shall be made for a longer period than two years. Because of these constitutional provisions, the lease in question must be construed as having included therein the provision that it will extend for ten years providing the legislature appropriates the money for the payment of the rentals. It is a general principle of law that pertinent provisions of the Constitution applicable to the subject matter of a lease or other instrument are to be read into such lease and the lease construed in accordance with such applicable provisions.

As for the second question presented, I may say that in my opinion No. 509, reported in Opinions of the Attorney General for 1933 at page 530 of volume I, a somewhat similar matter was discussed relative to a similar provision in the lease of the State of Ohio with the Market Exchange Bank for the Hartman-Ohio Building. It appears that Section 12 of such Market Exchange Bank lease read in substance that if the State of Ohio fails to make any payments under the terms of the lease, the lessor "at its option, may forfeit the lease and re-enter the premises." It appears that such provision is very similar to the provision contained in Section 7 of the lease under consideration, quoted supra. In the opinion above referred to it was stated at page 534 as follows:

> "By the terms of section 12 of the lease, the failure of the legislature to make the necessary appropriations *does not automatically terminate the lease.* Such failure gives the lessor the option to declare a forfeiture and re-enter. * * * If the lessor does not exercise its option to terminate the lease and the legislature makes a further appropriation, in my opinion, the lease will continue in operation."

Hence, it would appear, in answer to your second question, that the State may not terminate the lease at any time upon the payment of accrued rentals.

Concerning your third question, I may say that the State of Ohio would not be subject to a suit if it defaulted in future payment of rentals and attempted termination of the lease by virtue of sections 7 and 8 of the lease, as there is no provision in the statutes authorizing a suit of this nature. It is true that Article I, Section 16, Ohio Constitution provides that "suits may be brought against the state, in such courts and such manner as may be provided by law." However, in the case of *Raudabaugh* vs. *State of Ohio,* 96 O. S. 513, it was held in the syllabus:

> "1. A state is not subject to suit in its own courts without its express consent.
>
> 2. The provision of the Ohio Constitution, Article I, Section 16, as amended September 3, 1912, that 'suits may be brought against the state, in such courts, and in such manner, as may be provided by law,' is not self-executing; and statutory authority is required as a prerequisite to the bringing of suits against the state."

Thus the provision of section 7 and 8 of the lease in so far as they might provide for a suit against the State, are of no effect. Under the holding of the Supreme Court in the case of *State ex rel. Ross* vs. *Donahey,* 93 O. S. 414, a mandamus action might be instituted against an officer of the State if an appropriation exists, to collect rental found to be due. However, if there is no appropriation, such an action would not lie.

As for the fourth question presented, I may say that it has heretofore been shown that a lease of the type here in question is not automatically forfeited by failure of the State to appropriate money for a period of time during such lease, if the lessor does not exercise its option to forfeit the lease. Since the lessor did not forfeit the lease, it follows that the lease in question was still operative without a specific appropriation of the legislature during 1934.

Coming to your fifth and final question, I may say that it is to be noted that the original lease provided that the Department of Public Works, the lessee, shall use the premises for the Bureau of Motor Vehicles of the State of Ohio. However, it is pointed out in Donnelly on Public contracts, Section 164, that public bodies, from the fact that they possess the power to contract have also the power to modify or change contracts the same as natural persons, in the absence of statutory restriction. Hence, I see no reason why the lessee may not use the premises for another department, board or bureau, provided both the lessor and lessee agree to such use, thereby modifying the lease to such extent. If the State, through the Department of Public Works, desires the premises to be put to the use of another of its agencies and the lessor agrees thereto, I am unable to see any necessity for a new lease to be made.

From the fact that the legislature has appropriated moneys in Amended Senate Bill No. 1 for the first six months of 1935, it would seem that it has recognized that the lease still remains valid despite the fact that no specific appropriation was made for such quarters for practically the entire year of 1934, and further despite the fact that another department other than the Bureau of Motor Vehicles is using such quarters. Of course, it remains within the discretion of the General Assembly to appropriate moneys for the remainder of the present biennium by means of another special appropriation act or in the General Appropriation Bill.

Respectfully,
JOHN W. BRICKER,
Attorney General.