

After examination, it is my opinion that the same is in proper legal form and will constitute a binding agreement when the instrument is properly executed and accepted by the State in accordance with the terms thereof. Accordingly, I have endorsed my approval on said forms and return the same herewith.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

747.

AGREEMENT — STATE WITH BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, RELOCATION AND RECONSTRUCTION, SECTIONS 15, 16 AND 22, CANAAN TOWNSHIP, ATHENS COUNTY, STATE HIGHWAY NO. 156.

COLUMBUS, OHIO, June 12, 1939.

HON. ROBERT S. BEIGHTLER, *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted an agreement by and between yourself as Director of Highways and the Baltimore and Ohio Southwestern Railroad Company covering the contemplated relocation and reconstruction of a part of State Highway No. 156, along and adjacent to the premises of the company through Sections 15, 16 and 22 of Canaan Township, Athens County, Ohio.

After examination, it is my opinion that said agreement when properly executed by the Director of Highways will constitute a valid and binding contract. Said agreement and other data submitted is being returned herewith.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

748.

LEASE — OFFICE SPACE — DEPARTMENT LIQUOR CONTROL—LIABILITY WHERE TERM OF LEASE EXPIRED—STATUS, FINAL PERIOD OF TERM—IMPLIED POWER TO OCCUPY PREMISES—TENANCY—MONTH TO MONTH BASIS—SECTION 6064-8 G. C.

SYLLABUS:

1. *If the department of liquor control occupies space lawfully leased by it for the purpose of a liquor store, after the expiration of the term*

specified in the lease for such space it is liable for the rental therefor during the period of occupancy at the rate specified in the indenture of lease for the final period of the term.

2. The department of liquor control has implied power to occupy premises which it has previously leased for a term certain under authority of section 6064-8 of the General Code, after the expiration of such term on a month to month basis, pending the receipt of acceptable bids and the execution of a new indenture of lease pursuant to the authority of such section.

COLUMBUS, OHIO, June 12, 1939.

HON. JOSEPH T. FERGUSON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: I am in receipt of a request for an opinion from your office bearing the signature of A. I. Balmert, which reads as follows:

“An examination of the records and accounts of the Department of Liquor Control discloses that the Department has adopted the practice of extending beyond their expiration by mutual agreement, on a month to month basis, various contracts of lease for state liquor stores which were previously executed for definite terms in accordance with the provisions of Section 6064-8, General Code.

In view of the fact that these mutual agreements of extension constitute an alteration of the terms of such leases as originally advertised, we request your formal opinion on the following question:

(a) Does the Department of Liquor Control, State of Ohio, have authority through its Director and/or Board of Liquor Control, to extend, without advertisement, the term of contracts of lease for state liquor stores beyond the period specified in the original contract and published in the original synopsis?

(b) Should the Department of Liquor Control have such authority and extend on a month to month basis the terms of a contract of lease whose rate of payment differed for definite periods during its specified term, what rate would apply to payment on the month to month extension?

Due to the fact that the Department of Liquor Control is occupying many properties under the above described conditions, we would greatly appreciate your immediate reply.”

It is fundamental that a public official, department or board has such power and authority as has been granted to him or it by the statute which created such office and defines its duties. We must therefore examine the statutes with reference to the Department of Liquor Control in order

to determine the extent of its authority with reference to leases. These are contained in part in section 6064-8 of the General Code. Such section, in so far as seems material to your inquiry, reads as follows:

“The Department of Liquor Control shall have all the powers and duties vested in and imposed upon a department. In addition thereto, the department shall have and exercise the following powers:

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9. All other powers expressly or by necessary implication conferred upon the department by any provisions of the liquor control act; and all powers necessary and proper for the exercise or discharge of any power, duty or function expressly conferred or imposed upon the department by any provision of the liquor control act.

The department of liquor control shall have power to sue; to be sued; only in connection with the execution of leases of real estate and such purchases and contracts necessary for the operation of the state liquor stores that are made under the provisions of this act; to make and enter into leases and contracts of all descriptions within the scope of its functions as defined in the liquor control act, and to acquire and transfer title to personal property. The department of liquor control may terminate at will any lease entered into pursuant to the liquor control act upon first giving ninety days' notice in writing to the lessor of its intention so to do.

All contracts of lease for a state liquor store entered into by the department shall be made in writing with the lowest and best bidder after an advertisement in a newspaper of general circulation in the community wherein it is proposed to establish such store. In determining which is the lowest and best bid the department shall have consideration for the length of lease, location, size, character, quality of construction and general fitness for use as such store of the premises for which a bid is submitted.

The board shall have the power to prescribe the form of bid and shall prescribe rules and regulations pertaining to the receiving of same and the advertisement thereof; provided, however, that before accepting a bid and before entering into any contract of lease of the premises for use as a state liquor store the department shall cause to be published in a newspaper of general circulation in the community wherein such premises are located a synopsis of the terms of such proposed lease including name of lessor, location of premises and yearly rental therefor.

The department may reject any or all bids. If it rejects all bids it shall then proceed to readvertise for bids for such leases and may continue to readvertise for such bids until a bid or bids are received made to the satisfaction of the department in conformity to the provisions of the liquor control act and the rules and regulations of the board pertaining thereto."

From your inquiry, we assume that the leases which have lapsed pursuant to their terms were entered into after advertisement and solicitation for bids in the manner and form specified in the then existing statutes, and that they were entered into in such manner to have been valid leases during the term specified in the indenture of lease. You are not specific as to the length of time during which the leases were extended, nor the reason for the extension thereof.

I am advised that the leases which are referred to in your inquiry were for a definite term of years, subject to the exception contained in the statute that "The department of liquor control may terminate at will any lease entered into pursuant to this act upon first giving ninety days' notice in writing to the lessor of its intention so to do." Your inquiry is whether such type of lease may be extended by agreement of the parties from month to month.

The leasehold estate referred to in the next preceding paragraph is what is called an estate for years, in so far as the interest of the lessee is concerned. It is the duty of the lessee under such a leasehold estate to deliver up possession of such premises on or before the time fixed in the leasehold indenture for the termination of such lease. If the lessee does not do so, the option is in the lessor either to treat the lessee from that date as a trespasser or as a tenant from year to year, if he remains in possession. *Gladwell v. Holcomb*, 60 O. S. 427; *Haggerty v. Maley*, 32 O. C. A. 505; *Palevsky v. Bentfield*, 46 O. App. 385; *Bumiller v. Walker*, 95 O. S. 344. If the landlord elects to treat the tenant as rightfully in possession after the expiration of the term of his lease, the question then arises as to whether the tenant is bound to pay rent for an additional year, or for another month merely. The courts appear to hold that if the rent reserved in the lease is reserved at an annual figure, whether or not payable in installments, the lessee becomes liable for an additional year's rental in the event he holds over after his term. *Moore v. Beasley*, 3 Oh. 294; *Lodge v. White*, 30 O. S. 569; *B. & O. etc. R. Co. v. West*, 57 O. S. 161; *Buschman v. Garfield Realty Co.*, 97 O. S. 54; *Strangward v. American Brass Bedstead Co.*, 82 O. S. 121; *Bumiller v. Walker*, 95 O. S. 344. If, however, the indenture of lease reserves rental on a monthly basis and the tenant holds over after the term specified in the lease, he becomes bound by the terms of the lease for an additional month only and thereafter may, with the consent of the lessor, hold over on a month to month basis. *Madison Building Ass'n v. Eckert*, 49 O. App.

210; *Hellebush v. Tischbein Apothecaries, Inc.*, 54 O. App. 162; *Rex Amusement Co. v. Nolan*, 11 O. App. 318; *Wineburgh v. Toledo Corp.*, 125 O. S. 219. In the syllabus of *Madison Building Association v. Eckert*, 49 O. App. 210, the court held:

“The continuance in possession of premises under an expired lease made for a term of years, but with provision for monthly rentals, creates a tenancy from month to month, and a reduction in rent made by agreement in any month limits the recovery of rent thereafter to the reduced rental agreed upon.”

Such case holds that if the tenant shall hold after his term he is a tenant from month to month at the same rental as during the last month of his term, unless the parties shall agree upon a different rental. In the case of *Hellebush et al. v. Tischbein Apothecaries Inc.*, 54 O. App. 162, 7 O. Ops., 33, the court held that the landlord may not impose a greater rental or change the terms of the lease with reference to the duties of the tenant thereunder, by reason of his holding over, without the consent of the tenant.

From an examination of the authorities it would appear to be the established law in Ohio that if a tenant holds over after his term, he is obligated to pay that rate of rental which he had been obligated to pay during the final period of his tenancy, in the absence of a specific agreement between the lessor and lessee fixing a different rate. (See cases above cited.)

I am not unmindful of that rule of law to the effect that the state may not be sued without its consent. However, in section 6064-8, General Code, as it now exists and as it existed before its amendment, the legislature has specifically given its consent for a suit to compel the execution or performance of leases for liquor stores by the department of liquor control. It therefore appears to me that if the department of liquor control uses and occupies premises which had been leased by it for the purpose of conducting liquor stores, it may be compelled to pay for such occupancy during the term for which it occupies the premises at the same rate of rental which had been reserved under the last period of the lease. It therefore appears to me that it is not the agreement of the landlord and the liquor board which creates the obligation of the liquor board to pay such rental, but is rather the holding over after the term, which as a matter of law creates a new tenancy from month to month or year to year, as the case may be.

In section 6064, General Code, the legislature has laid down certain rules to be followed by the department of liquor control in entering into new contracts of lease, including the solicitation of bids, the advertising of the term and conditions of the proposed indenture of lease. It provides that such board may reject any or all bids and continue to readvertise for

bids until an acceptable bid shall have been received. It would not appear to me that it was the intent of the legislature that the board should advertise for bids for new leases during the term of a running lease in order that it might be certain that it would be in a position to have a new lease executed prior to the expiration of the running lease. Such an interpretation would lead to an absurd result. If the board were to advertise for new bids for leases for stores in place of leases about to expire, and no acceptable bids were to be received prior to the expiration of the term of running leases, the equipment, fixtures and stock of trade would have to be removed from the leased premises prior to the expiration of the term.

In the interpretation of any contract it is always to be presumed that the law existing at the time it was entered into was a part of the contract. In the case of the indentures of lease for liquor stores, at the time they were entered into, it was the established law that if the lessee held over after his term he must pay for such hold over period at the rate specified in the indenture for the last period of the lease, such rule of law became a part of the lease then entered into, and was binding upon both parties in the absence of a new agreement as to rate prior to the expiration of such term of lease. Even if such were not the established rule of law the department of liquor control has not only the powers expressly conferred by the statutes but also such additional powers as are reasonably necessary to carry out its purpose of operating liquor stores—one of which would probably be the entering into a new lease for a temporary period until a new set of bids could be procured and accepted.

It is not the function of the Attorney General, and I express no opinion concerning the policy of continuing a month to month tenancy on liquor stores after the expiration of written leases, prior to entering into new leases.

In specific answer to your inquiries, it is my opinion that :

1. If the department of liquor control occupies space lawfully leased by it for the purpose of a liquor store, after the expiration of the term specified in the lease for such space, it is liable for the rental therefor during the period of occupancy at the rate specified in the indenture of lease for the final period of the term.

2. The department of liquor control has implied power to occupy premises which it had previously leased for a term certain under authority of section 6064-8 of the General Code, after the expiration of such term on a month to month basis, pending the receipt of acceptable bids and the execution of a new indenture of lease pursuant to the authority of such section.

Respectfully,

THOMAS J. HERBERT,
Attorney General.