

## OHIO CANAL.

	<i>Valuation.</i>
J. J. Altherr..... Land Lease.....	\$250 00
O. J. Buser..... Land Lease.....	433 34
Department of Agriculture..... Land Lease.....	200 00
L. N. Fleming..... Land Lease.....	350 00
Chas. Heiman..... Land Lease.....	300 00
Heintzelman & Bloomberg..... Land Lease.....	750 00
Frank Herwick..... Land Lease.....	700 00
Perry Stephenson..... Land Lease.....	5,000 00

## HOCKING CANAL.

John Love..... Land Lease.....	\$150 00
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## INDIAN LAKE.

Estella Bridge..... Landing and Walkway.....	\$100 00
Vic Donahey..... Cottage Site.....	833 34
Judson Harmon..... Cottage Site.....	1,000 00
Charles E. Hicks..... Landing and Walkway.....	150 00
J. Harry Israel..... Cottage Site.....	833 34

## PORTAGE LAKE.

F. M. Dickinson..... Dock Landing.....	\$100 00
Harold Graves..... Walkway and Boathouse.....	150 00
Osborn L. Haring..... Walkway and Lawn.....	250 00

I have examined said leases, and them correct as to form, and I am therefore returning the same with my approval endorsed thereon.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2755.

GASOLINE TAX—HOW IT MAY BE USED—DEPARTMENT OF HIGHWAYS—TRANSFERS.

**SYLLABUS:**

1. All funds collected pursuant to and under the provisions of Sections 5541 to 5541-10, General Code, as enacted in House Bill No. 206, 87th General Assembly (112 v. 508), from May 24, 1927, the effective date of said bill, to and including December 31, 1928, were duly appropriated by the 87th General Assembly (House Bill No. 502).

2. No part of said funds may be used to pay obligations incurred prior to July 1, 1927.

3. The Auditor of State, with the approval of the Emergency Board, may make temporary transfers in the manner provided in Section 249-1, General Code, as enacted by the 87th General Assembly (112 v. 428). There is no other authority for a transfer of said funds to any other fund either in the general statutes or the Appropriation Acts of the 87th General Assembly.

4. *The Department of Highways may legally obligate such moneys as will, prior to January 1, 1929, be placed in the highway construction fund, created by Section 5541-7 and related sections of the General Code, as well as moneys actually in the fund, all of which moneys were duly appropriated by the 87th General Assembly in the act making general appropriations for the fiscal period ending January 1, 1929 (House Bill No. 502, p. 49), by contract, for the specific purposes for which such fund was created, before the actual or physical receipt of the moneys in the state treasury; and the Director of Finance may issue his certificate under Section 2288-2 of the General Code before such moneys are actually received in the treasury. However, such obligations should be limited to amounts reasonably certain to be actually collected, for the reason that no appropriation was made of moneys exceeding the amount actually received in the treasury to the credit of said fund prior to January 1, 1929.*

COLUMBUS, OHIO, October 19, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your communication, which reads as follows:

“In order that I may be certain of conducting the fiscal affairs of the Department of Highways in full accordance with the general statutes and with the current Appropriation Bill, it is necessary that I have your official opinion, at an early date, upon certain questions arising upon the following set of facts:

The 87th General Assembly imposed a tax of one per cent per gallon on motor vehicle fuel, this tax being imposed by H. B. No. 206, found in 112 Ohio Laws, page 508. The proceeds of this tax are appropriated in H. B. No. 502, being an Act to make general appropriations, the language of the appropriation being as follows:—“There is hereby appropriated to the State Highway Improvement Fund the State’s portion of revenues derived under H. B. No. 206, 87th General Assembly of Ohio.”

If you will examine H. B. No. 206 and the related statutory provisions, you will observe that the one cent tax on motor vehicle fuel first accrues and is then computed and certified and is thereafter collected. The necessary result of the performance of these various functions in orderly fashion is that a substantial amount of time elapses between the date when the tax accrues and the date when it actually reaches the State Treasury. You will note that H. B. No. 206 took effect late in May of 1927. I am informed that the amount of tax which accrued under this Bill prior to July 1, 1927, was \$834,681.08. The amount of the tax which actually came into the State Treasury during said period, or, in other words, the actual receipts amounted to \$13,258.87. If I am correct in my interpretation of action heretofore taken by the Auditor of State, I am compelled to believe that he has transferred out of the one cent motor vehicle tax fund the sum of \$834,681.08, above described, and used the same for the purpose of paying obligations of the State of Ohio contracted for the construction of State Highways, which obligations were incurred prior to July 1, 1927. I furthermore understand that it is the opinion of the Auditor of State that he may lawfully treat this transfer as permanent. In view of the foregoing, I respectfully request your official opinion upon the following question:—

1. Does the above quoted appropriation of the proceeds of the tax imposed by H. B. No. 206 cover (a) The receipts for the 18 month period covered by the Appropriation Bill under consideration, plus the accrued balance of \$13,258.87 in the fund at the opening of business on July 1, 1927; or (b) Only

the actual receipts from such tax coming into the State Treasury during said 18 month period; or (c) The tax accruing from the effective date of H. B. No. 206 to and including December 31, 1928; or (d) The tax accruing under H. B. No. 206 during only the 18 month period covered by the current Appropriation Bill?

I, of course, am not an attorney and my opinion therefore is of little weight, but as a business proposition and in the light of my experience with Appropriation Bills it is my opinion that H. B. No. 502 appropriates (1) either the balance in the fund on June 30, 1927, or, in other words, the receipts up to and including that date, plus all of the actual receipts for the 18 month period; or (2) only the receipts for said 18 month period. We all know that not every tax which is imposed is collected and under no other rule or interpretation could the head of the Department of Highways know even in late December of 1928 the exact amount of money which it was his duty under the law of Ohio to expend or obligate for highway construction purposes.

I have made such examination of H. B. No. 502 and other statutory enactments as might be made by a layman. I have not been unmindful also of Senate Bill No. 289 found in 112 Ohio Laws, page 428, and authorizing the Auditor of State, to make temporary transfers. In view of this last mentioned Act, there would seem to be no question of the right of the Auditor of State, should the necessity arise, to make temporary transfers from the one cent motor vehicle fuel tax fund to any other fund, providing surplus moneys were found in the one cent motor vehicle fuel tax fund. It would be necessary, however, under these provisions to reimburse the one cent motor vehicle fuel tax fund from the first moneys accruing and available for such purposes. Highways construction obligations of the state incurred prior to July 1, 1927, were payable from the General Revenue Fund and I am informed that from time to time since the transfer hereinbefore described of the sum of \$834,681.08 was made there have been ample balances in the General Revenue Fund to permit of the reimbursement required to be made by Senate Bill No. 289, and that such condition now obtains with respect to the General Revenue Fund.

Unless I have authority to obligate prior to January 1, 1929, the actual receipts from the one cent motor vehicle fuel tax during the preceding 18 months, substantial inequality and injustice to some communities in Ohio will be unavoidable. I have made a sincere attempt to justly and equitably apportion this fund according to law among the 88 counties of Ohio and among the many projected road improvements presented to me for consideration. A large part of the money has been obligated and there remain some projects of unusual merit which should certainly have been provided for out of the revenues for this 18 month period. Had I not assumed, as did my predecessor, that the Department of Highways was not only empowered but also enjoined with the duty of expending or arranging for expenditure of the entire proceeds, or practically the entire proceeds, of this tax for the 18 month period, a readjustment of our apportionment would most certainly have been made in some cases. If I am now to be deprived of obligating some \$800,000.00 upon which this Department had depended, some very essential highway projects must be abandoned.

In addition to the specific inquiry above propounded with respect to the funds legally appropriated for the use of the Department of Highways out of the proceeds of the one cent motor vehicle fuel tax by H. B. No. 502, I, therefore, desire to request your opinion upon the following:—

2. Is there any authority in the Auditor of State or the Emergency Board or other state official or officials to permanently transfer out of the actual receipts of the one cent gasoline tax fund for the current 18 months' period the sum of \$834,681.08 or any other sum, unless indeed it may be the above described sum of \$13,258.87?

3. May the actual receipts under the one cent gasoline tax law during the current 18 months' appropriation period be lawfully permanently transferred and placed in a fund and used for the payment of contract obligations of the Department of Highways incurred prior to July 1, 1927?

4. May the Auditor of State or Emergency Board or any other state official or officials apply one rule to the situation existing July 1, 1927, and another rule to the situation existing December 31, 1928? In other words, if you should hold that H. B. No. 502 appropriates accruals rather than receipts and that it does not appropriate accruals for the period prior to July 1, 1927, then I desire your opinion as to whether this rule must not also be applied to the closing months of the calendar year 1928. In other words, may the State Auditor or Emergency Board or other officials lawfully permanently transfer out of the receipts under the one cent gasoline tax law the entire amount of tax which accrued prior to July 1, 1927, amounting to \$834,681.08, and at the same time refuse to credit to the Department of Highways and refuse to regard as available for placing under obligation the accruals of tax under the one cent gasoline tax law during the closing months of 1928 and up to and including December 31, 1928? It is my own opinion that the same rule would have to be applied now that was applicable in July, 1927, whatever that rule may be determined to be.

You will note that under Section 1 of H. B. No. 502 appropriations made are available only to pay obligations actually incurred during the period covered by the Bill and cannot be used to pay liabilities or deficiencies existing prior to July 1, 1927. It would seem very clear that under these provisions whatever the proceeds of the one cent gasoline tax law is appropriated by H. B. No. 502 is available only to pay obligations incurred after July 1, 1927, and could not be used to pay obligations incurred prior to that date except as such funds might be temporarily transferred under Senate Bill No. 289. I would be pleased to have you advise me whether I am correct in this statement. If so, the answer to the first question propounded in this letter would largely answer my problem, if you would also advise me as to whether or not I have overlooked any statutory provision and as to whether or not the State Auditor may permanently transfer away from and take out of the appropriation of the one cent gasoline tax fund to the Department of Highways for the current appropriation period any sum of money and thereby deprive the Department of Highways of the right, power and authority to expend or obligate the same."

House Bill No. 206 to which you refer (112 v. 508), is entitled:

"An Act to impose an additional excise tax on the sale and use of motor vehicle fuel, and to provide revenue for supplying the state's share of the cost of constructing and reconstructing highways and abolishing railway grade crossings thereon."

This act was passed May 11, 1927, presented to the Governor on May 12, 1927, and was not signed or returned within ten days, and being a law to levy a tax would

go into immediate effect. Therefore, it became effective at midnight on May 24th, as pointed out in Opinion No. 526, dated May 24, 1927, reported in Opinions of the Attorney General for said year, Vol. I, p. 872.

In an opinion of this department rendered to the Auditor of State under date of September 29, 1927, and reported in Opinions, Attorney General, 1927, Vol. III, p. 1898, a lengthy discussion of the act under consideration was given, to which, for the purpose of brevity, reference is hereby made. The following is quoted from the syllabus of said opinion:

"1. The funds to be raised under House Bill No. 206, 87th General Assembly, during the fiscal period ending December 31, 1928, were legally appropriated to the Department of Highways and Public Works, Division of Highways, by House Bill No. 502, 87th General Assembly, and may be expended by that department in accordance with the provisions of and for the purposes specified in House Bill No. 206.

2. By the terms of Section 5541-8, General Code, all revenue derived under House Bill No. 206, 87th General Assembly, after the establishment and maintenance of the rotary fund of \$25,000.00 provided for in Section 5541-7, General Code, including the moneys, not exceeding one million dollars, determined by the State Highway Director to be used for the purpose of abolishing grade crossings, must be apportioned and used in the several counties of the state in accordance with the provisions of said Section 5541-8, supra, viz., forty per cent must be used in the various counties of the state in proportion to the number of motor vehicles registered in such counties, the remaining sixty per cent to be apportioned and used in the several counties of the state according to such equitable plan or method of apportionment as shall be from time to time adopted and prescribed by the Director of Highways and Public Works.

3. Section 22, Article II, of the Constitution of Ohio, applies to appropriations made by the General Assembly of funds derived under House Bill No. 206, passed by the 87th General Assembly."

In the opinion, after quoting the appropriation item referred to in your letter, which is set forth on page 49 of House Bill No. 502 and on page 72 of The Appropriation Acts of the 87th General Assembly of Ohio and reads as follows:

"G. Additions and Betterments—

There is hereby appropriated to the State Highway Improvement Fund the State's portion of revenues derived under H. B. No. 206, 87th General Assembly of Ohio."

as well as Sections 5541-1, 5541-7 and 5541-8 of the General Code, as enacted in House Bill No. 206, 87th General Assembly, it was said that "the appropriation was made to the Highway Division of the Department of Highways and Public Works, to be expended in accordance with the provisions of and for the purposes specified in Sections 5541-1, 5541-7 and 5541-8, supra," and that the words "state highway improvement fund" as used in the appropriation act are synonymous with and refer to the 'state highway construction fund' for which provision is made in Section 5541-8, supra." It was further pointed out in said opinion that such funds can be expended for no purpose other than to provide revenue for supplying the state's share of the cost of constructing and reconstructing highways and abolishing railway grade crossings. Thus we have the specific direction of the Legislature as to the use of said

fund, which direction is in harmony with Section 5 of Article XII of the Constitution of Ohio, which provides:

“No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied.”

From the above, it will be seen that the Legislature duly appropriated the funds “*derived*” under House Bill No. 203, supra, and the question here to be determined is when the funds are ‘*derived*’ within the meaning of the Appropriation Act.

Section 1 of the Appropriation Act provides in part:

“ \* \* \*. Appropriations for departments, commissions, bureaus, institutions and offices, for the uses and purposes of which, or of any activity or function thereof, specific funds in the state treasury are provided by law, are hereby made from such specific funds, insofar as such funds are subject by law to appropriation and expenditure for the purposes herein mentioned, and to the extent that the moneys to the credit of such specific funds on July 1, 1927, or which may be credited thereto prior to December 31, 1928, shall be sufficient to satisfy such appropriations. Any sums necessary to supply the balance of such appropriations are hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund, but no moneys shall be taken from the general revenue fund to support the activities of the fish and game division of the department of agriculture. The sums herein appropriated in the column designated ‘Six Months’, or in the column designated ‘Eighteen Months’ shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1927, or incurred subsequent to December 31, 1928; those appropriated in the column designated ‘Year’ shall not be expended prior to January 1, 1928, nor to pay liabilities incurred subsequent to December 31, 1928.”

The Attorney General in a lengthy opinion in 1921, which is found in the Opinions of the Attorney General for said year, Vol. I, p. 654, thoroughly discussed the question of when funds are to be regarded as appropriated by the Legislature. The question under consideration in that opinion arose by reason of the provisions of House Bill No. 325, passed in 1921, providing for a building fund for the Ohio State University and the universities supported by the state and for the several state institutions. For the purpose of providing the fund, the law levied a tax for the year 1921-1922 and for the year 1922-1923 on the grand list of taxable property of the state of .125 of one mill. The same act which levied the tax provided “there is hereby appropriated from the moneys raised or coming into the state treasury to the credit of the educational fund” certain sums. The question presented in that opinion was, when said funds were available in order to authorize the Director of Finance to make the certificate required under Section 2288-2, General Code. Said section is pertinent here in connection with this inquiry, for the reason that before any improvements can be made, for which the funds under consideration will be expended, such certificate is required to be obtained. Said section provides:

“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.”

The following is quoted from the syllabus of said opinion:

“ \* \* \*

2. Prior to the making by a state officer, board or commission of any contract involving the expenditure of money, the director of finance must, under the provisions of Section 2288-2, G. C. (109 O. L. 130), 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; but there is no requirement that he certify as to any balance in the fund in the state treasury upon which the appropriation is to operate. Said section merely requires that all contracts, agreements or obligations involving the expenditure of money, be brought within the amount set apart by the Legislature for a particular purpose, and such setting apart may antedate the appearance of funds in the state treasury.

3. By reason of Section 3 of H. B. 325 (109 O. L. 360) the appropriations of the proceeds of the educational building fund tax levy for the year 1921-1922 and for the year 1922-1923 take effect and are available on and after the first day of September, 1921, and for a period of two years thereafter. On said first day of September and during said period, contracts for the construction of necessary buildings at Ohio State University may be entered into, to an amount equivalent to that realizable from 72 per cent (the university's share) of said levy for both the year 1921-1922 and the year 1922-1923.”

The opinion was well considered and based on a number of other opinions involving similar laws and it is deemed unnecessary to quote extensively therefrom. Applying the reasoning and conclusions of the opinion in the instant case, however, it seems clear that it is unnecessary that the funds under consideration actually be within the state treasury before obligations may be incurred against them. The language in the Appropriation Act specifically appropriates “revenues derived” under the provisions of House Bill No. 206, *supra*. Section 1 of the Appropriation Act provides, in substance, among other things, that appropriations for specific purposes are made from specific funds, where there be specific funds provided by law for such purpose, to the extent that moneys were to the credit of such fund on July 1, 1927, or which may be credited thereto prior to December 31, 1928. In analyzing the provisions of the law and the Appropriation Act, it seems clear that it was the intent of the Legislature, from the language used, to appropriate such funds as found their way into the treasury to the credit of the highway construction fund from the effective date of House Bill No. 206 to December 31, 1928.

While, as above stated, undoubtedly obligations could be incurred against the probable amount that would come into the treasury during said period and contracts awarded prior to their actual receipt therein, in the final analysis it is believed that the appropriation is limited to the actual receipts during said period. It is further believed that, after the establishment and maintenance of the rotary fund prescribed by Section 5541-1, General Code, all of said receipts may be used by the highway department for the construction and reconstruction of highways and elimination of grade crossings.

It is further my opinion that no part of said funds may be legally used to pay obligations arising for such purposes prior to July 1, 1927. Section 1 of the Appropriation Act *expressly* so provides.

We now come to the question of whether or not a transfer may be made from the highway construction fund to other funds. Section 249-1, as enacted by the 87th General Assembly (112 v. 428), provides:

“Whenever a deficit exists in the general revenue fund or any other fund of the state, by reason of which the general operating expenses of the state can not be paid from appropriations made from such fund, an emergency shall be deemed to exist, and in such case the auditor of state may, with the approval of the emergency board, make temporary transfers to such fund of any surplus moneys in any other fund or funds available for state purposes. Any fund from which moneys are so transferred shall be reimbursed from the first moneys accruing and available for such purpose. The auditor of state is hereby authorized to make the necessary transfers to reimburse funds from which moneys have been transferred, and he shall certify such action to the treasurer of state.”

This section authorizes the Auditor of State, in cases of emergency, with the approval of the Emergency Board, to make temporary transfers to any fund, in which there is a deficit, from any surplus moneys in any other funds available for such purposes. Clearly, under the express provision of this section, with the proper approval, the Auditor of State is authorized to transfer from said highway construction fund. On the other hand, the section is equally explicit in providing:

“Any fund from which moneys are so transferred shall be reimbursed from the first moneys accruing and available for such purpose.”

As the courts have frequently stated, there is no necessity to construe a statute which is unambiguous. All this department can properly say is that the statute, being duly enacted, means what it says. It must therefore follow that any transfers made from the highway construction fund are to be regarded as of a temporary nature and must be reimbursed in the manner provided by said Section 249-1, supra, and such transfer would not prevent the Director of Highways from obligating the amount transferred.

Based upon the foregoing and in specific answer to your inquiries, it is my opinion that:

1. All funds collected pursuant to and under the provisions of Sections 5541 to 5541-10, General Code, as enacted in House Bill No. 206, 87th General Assembly (112 v. 508), from May 24, 1927, the effective date of said bill, to and including December 31, 1928, were duly appropriated by the 87th General Assembly (House Bill No. 502).

2. No part of said funds may be used to pay obligations incurred prior to July 1, 1927.

3. The Auditor of State, with the approval of the Emergency Board, may make temporary transfers in the manner provided in Section 249-1, General Code, as enacted by the 87th General Assembly (112 v. 428). There is no other authority for a transfer of said funds to any other fund either in the general statutes or the Appropriation Acts of the 87th General Assembly.

4. The Department of Highways may legally obligate such moneys as will, prior to January 1, 1929, be placed in the highway construction fund, created by Section 5541-7 and related sections of the General Code, as well as moneys actually in the fund, all of which moneys were duly appropriated by the 87th General Assembly in the act making general appropriations for the fiscal period ending January 1, 1929 (House Bill No. 502, p. 49), by contract, for the specific purposes for which said fund was created, before the actual or physical receipt of the moneys in the state treasury; and the Director of Finance may issue his certificate under Section 2288-2 of the General Code before such moneys are actually received in the treasury. However, such obligations should be limited to amounts reasonably certain to be actually col-



lected, for the reason that no appropriation was made of moneys exceeding the amount actually received in the treasury to the credit of said fund prior to January 1, 1929.

In view of the conclusions herein reached, it is deemed unnecessary specifically to answer the question asked in your letter in the paragraph numbered "4."

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2756.

ABSENT VOTER'S BALLOT—APPLICATION FOR—REQUIREMENTS OF  
—LATEST DATE FOR FILING.

SYLLABUS:

1. *The latest day a voter can make application for an absent voter's ballot is Saturday at midnight when the election is to be held on the following Tuesday.*
2. *An application for an absent voter's ballot must be made in writing and state that the applicant is a qualified elector in the precinct in the county in which he desired to vote and will be unavoidably absent from such precinct on election day and request that he receive the absent voter's ballot and bear the signature of said applicant.*
3. *In view of the provisions of Sections 5078-1 and 5078-8, General Code, construed together, an application cannot be made by telegraph for the reason that the law contemplates the application bearing the signature of the applicant.*
4. *There is no legal authority for an authorized agent or attorney to sign the elector's written application for an absent voter's ballot.*

COLUMBUS, OHIO, October 19, 1928.

HON. J. R. POLLOCK, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—In your recent communication you request my opinion as follows:

"The Deputy State Supervisors of Elections of Defiance County, Ohio, have heretofore made it a practice of permitting absent voters to cast their votes as late as Monday evening before the election on the following day.

QUESTION: What is the latest date a voter can make application for an Absent Voter's ballot?

The second question which said Board has raised is: What is the proper form of application for an Absent Voter's ballot?

QUESTION: Can an application be legally made by telegraph?

QUESTION: Can the duly authorized agent or attorney of a duly qualified elector sign said elector's written application for an Absent Voter's ballot?"

In considering your inquiry reference is made to Section 5078-1, General Code, which in part provides:

"It shall be lawful for any qualified elector who finds that he will be unavoidably absent from his home precinct on the day of any general, special or primary election to apply to the clerk of the board of deputy state supervisors of elections of his home county in writing or in person not earlier than thirty days and not later than three days prior to election day, stating the fact of his unavoidable absence from his precinct on election day and making application in writing for an absent voter's ballot. After such clerk shall have satisfied himself that the applicant is a duly qualified voter in such pre-