I am accordingly approving this lease as to legality and form, and I am returning the same, together with the duplicate and triplicate copies thereof, with my approval endorsed thereon.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4549

DISCUSSION OF AUTHORITY OF THE PUBLIC UTILITIES COMMISSION OF OHIO TO STAY THE RUNNING OF THE STATUTE OF LIMITATIONS.

COLUMBUS, OHIO, August 8, 1932.

MR. E. J. HOPPLE, *Chairman, Public Utilities Commission of Ohio, Wyandot Building, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request to furnish the Public Utilities Commission with an opinion with respect to the authority of that Commission to stay the running of the Statute of Limitations (Sec. 11221-1, General Code of Ohio) upon an informal application.

Your letter recites that on July 13, 1927, the American Rolling Mill Company shipped a carload of sheet steel over the Cleveland, Cincinnati, Chicago and St. Louis Railway from Middletown, Ohio, to Cleveland, Ohio, consigned to the Geometric Stamping Company; that this shipment arrived at Cleveland and was delivered to the consignee on or about July 15, 1927, and the freight charges were paid on July 19, 1927.

It further recites that on January 31, 1930, you received a letter from the Benfer Company, dated January 30, 1930, reading as follows:

"Cleveland, Ohio, January 30, 1930.
"Big Four No. 774563-42
"Geo. Stpg. No. 16
"Our No. 31689.

"The Public Utilities Commission of Ohio,
Columbus, Ohio.
"Gentlemen:

We are enclosing claim of the Geometric Stamping Company, their number and carrier's number as above and will request that you toll this as to the run of the time limit. We would also state that original papers have not been returned and are held by the carriers. Kindly acknowledge receipt obliging.

Yours very truly,
THE BENFER COMPANY
Bert L. Benfer,
Commerce Counselor."

You then state that the claim referred to in the letter quoted consisted of one sheet statement indicating that a claim was filed with the railroad on or

about September 16, 1927, by the Benfer Company for overcharges on said car of sheet steel in the sum of $22.95.

On February 5, 1930, you acknowledged receipt of that letter ,as follows:

"Columbus, Ohio, February 5, 1930,
"File RS 15736.

"The Benfer Company,
Engineers Building,
Cleveland, Ohio.
Gentlemen:

This will acknowledge receipt of your letter of the 30th ult. with which you enclosed copy of your claim No. 31689, Big Four Railway No. 774565-42, against the Big Four Railway Company and in favor of the Geometric Stamping Company, of Cleveland, Ohio, for alleged overcharges on N. Y. C. Car 161966, carload of so-called 'waster sheet seconds' shipped from Middletown, Ohio, to Cleveland, Ohio, on July 13, 1927..

Said claim has been registered under our file number as above for the purpose of tolling the statute of limitations.

Very truly yours,
THE PUBLIC UTILITIES COMMISSION OF OHIO
Ira E. Sprankle,
Superintendent of Investigation.

Copy to
E. P. Boisseau, Auditor of Freight Overcharge Claims Cleveland, Cincinnati, Chicago & St. Louis Railway, Cincinnati, Ohio."

A copy of the above letter was sent to the railroad but not acknowledged.

You then state that on March 22, 1932, you received a formal complaint, subscribed and sworn to before a Notary Public, accompanied by the paid freight bill covering the shipment, a claim statement similar to the one accompanying complainant's original letter, allegations showing why the shipment was overcharged, and a prayer that the defendant company be required to pay the alleged overcharge plus interest.

This complaint was brought under Section 579 of the General Code of Ohio, docketed by you under No. 7798.

You note in your letter that the shipment in question was delivered to the consignee on or about July 15, 1927, and formal complaint for recovery of overcharges filed March 22, 1932, a little over four years and eight months after delivery of shipment.

You also refer to the case of *Los Angeles and Salt Lake Railroad Company* vs. *Railroad Commission of California,* decided by the Supreme Court of California on April 26, 1929 (277 Pac. 324).

Your letter closes as follows:

"The question, therefore, presented for your opinion is whether our informal letter, dated February 5, 1930, has the lawful effect of staying the running of the Statute of Limitations; and if we find that the shipment was actually overcharged, can we now find in favor of the claimant and certify our findings to the clerk of Court of Common

Pleas of Cuyahoga County under the provisions of Section 579 G. C.?"

Sections 579 and 580, General Code, are as follows:

Sec. 579. Damage claims; verification; burden of proof.—All claims, charges or demands against a railroad for loss of, or damage to property occurring while in the custody of such railroad and unreasonable delay in transportation and delivery, or for overcharges upon a shipment, or for any other service in violation of this chapter, if not paid within sixty days from the date of the filing thereof with such railroad, may be submitted to the commission by a formal complaint to be made upon blank forms which it is hereby made the duty of the commission to provide upon demand of the claimant. Such complaint shall be verified as petitions in civil actions and may be accompanied by the sworn statements of any witnesses who have knowledge of any fact material to the inquiry. Upon the filing of such complaint the commission shall forthwith cite the railroad to answer the complaint, and the citation shall be accompanied with a brief statement of the claim. The answer of the railroad shall be filed within three weeks from the service of the citation and shall be verified as answers in civil cases and may be accompanied with the affidavits of any witnesses having knowledge of facts material to the inquiry. The burden of proof shall be upon the railroad to show that loss or damage to property was not due to its negligence. The railroad to which property is delivered for shipment shall prima facie be liable for loss or damage occurring to such property in transit notwithstanding it may be delivered to other railroads before reaching its destination. The claim referred to in this section for loss of or damage to property may be made to any carrier over whose lines the lost or damaged property has been consigned, and such claimant may at his option join all such railroads as parties defendant in his complaint before said commission. The railroad shall furnish the claimant with a copy of its answer and affidavits, if any, and within two weeks from the filing of such answers the claimant may file his reply with affidavits in support thereof, verified as replies in civil cases. At the expiration of said period of two weeks the commission shall proceed summarily to examine the complaint, answer, the reply and affidavits and shall determine the existence and validity of the claim presented. If it find in favor of the claimant it shall certify its findings to the clerk of the court of common pleas of the county in which the claimant resides or where the railroad or any of its officers is maintained.

Sec. 580. Immediate trial; costs.—Within thirty days from the receipt of such findings by said clerk, the railroad may by motion cause the same to be docketed as a civil action in said court in which case the original pleadings shall be used and the case shall be advanced for immediate trial. If no such motion is filed the clerk shall enter up the finding of the commission as a judgment and the same shall be in all respects treated as a judgment at law with all the incidents thereof and upon which execution may issue as in other cases. If said matter is docketed for trial the action shall proceed as in other civil actions for damages except that upon trial thereof a copy of the findings and order of the commission, duly certified by the secretary thereof, shall be com-

petent testimony and shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for any costs unless they accrue upon his appeal."

Section 11221-1 is as follows:

Sec. 11221-1. "Limitation of actions for recovery of charges by and against carriers; defining term 'overcharge.'—All actions by carriers for recovery of their charges or any part thereof, arising out of the intrastate transportation of persons or property in Ohio, and all actions against carriers, upon recovery of overcharges, collected by such carriers, for the intrastate transportation of persons or property in Ohio, shall be begun within (3) years of the time the cause of action accrues and not thereafter.

The cause of action in respect to a shipment of property shall, for the purposes of this section, be deemed to accrue upon the delivery, or tender of delivery thereof, by the carrier and not thereafter.

The term 'overcharge' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the public utilities commission.

This section shall apply only to causes of action accruing after the effective date hereof."

This last section has been in effect only since July 15, 1925. Sections 579 and 580 have been in effect for many years, however, and have been construed as constitutional and cumulative remedies. These sections were considered in the case of the *Hocking Valley Railway Company* vs. *Cluster Coal Company*, 97 O. S. 140. In that case it was held that Section 580, authorizing the clerk of the court of common pleas to enter the findings of the commission as a judgment, did not confer judicial power upon that officer, that the act was ministerial, and not judicial. The opinion written by Jones, J., is also pertinent to the question raised by you. We quote from it as follows:

(p. 142) "Under the two statutes involved the legislature has committed to the public utilities commission the authority to ascertain the facts and enter its findings of the amount due as liquidated damages. In the instant case these findings were certified to the clerk of the court of common pleas, who is authorized, in the absence of a motion upon the part of the railway company, to docket the cause for trial and to enter up the findings of the commission as a judgment against the railway company. The railway company not having availed itself of its statutory right to docket the case for trial is in the position of a defendant who is in default for answer to a complaint in which an exact, stipulated amount is claimed against it by the plaintiff. The case is analogous to a default judgment, with the added advantage that here the plaintiff's claim has been liquidated by a public administrative body, exercising quasi-judicial functions."

(p. 144) "By the provisions of the section named the commission is required to cite the railway company to answer the complaint. Thereby the railway company was properly served and was subject to the future course of such proceedings, as the parties are in appealed cases, where

no further process is required. The character of the service and method of process is entirely within the legislative control, and cannot be disturbed by judicial action unless the legislative provision is clearly unreasonable.

"This court is unable to say that this is an unreasonable provision, for it would appear that the railway company could ascertain, within the period named, the locus of the filing, either from the records of the public utilities commission, or from the court records in the counties named."

In the case of *The Taylor-Williams Coal Company* vs. *The Public Utilities Commission of Ohio,* 97 O. S. 224, these sections were again considered. At page 230 of that opinion it states—

"In this connection it must be noted that where a complaint is properly brought under that section for an overcharge, the finding of the commission in favor of the complainant is not a judgment, but merely provides the prima facie evidence in favor of the claim which the statute allows the railway company to contest in the court to which the finding is certified."

These two decisions were rendered in 1918.

The Supreme Court again had these sections under consideration in the case of The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. et al. vs. Mills Brothers, 101 O. S. 173. Paragraph 4 of the syllabus declares Section 579 to be constitutional and valid. Section 8989, which is also considered in that case, has since been repealed but it should be noted that in the opinion (p. 177) the court states:

"The remedy provided by Section 579, General Code, is a concurrent remedy, which a shipper is authorized to pursue."

Following that decision there is the case of *Wright et al* vs. *Erie Railway Company,* 14 Ohio App. 217, decided October 15, 1921. While no reference is made in that opinion to the Supreme Court decisions noted above, that court also held that the remedy provided by Sections 579 and 580, General Code, is not exclusive but cumulative. While in that case the shipper claimed damage for unreasonable delay in delivery rather than overcharge, the principle is the same.

The reasoning of the court there is set forth in its opinion, excerpts from which are quoted as follows:

(p. 221). "It will be noticed that Section 579 of the Code uses the words 'may be submitted to the commission,' but it is urged that 'may' should be construed 'must,' that a party having a claim for unreasonable delay in shipment must submit his claim to the commission, and that its action is exclusive so far as the shipper's rights are concerned.

"The ordinary meaning of the word 'may' is 'permission,' and it is not ordinarily considered as mandatory in character, but under certain conditions the word 'may' is construed 'must'. Presumably the words of a statute or act receive their ordinary interpretation unless such a construction would be repugnant to the intention of the legislature, as

appears from a construction of the entire statute. Medbury vs. Swan, 46 N. Y., 200, 202; Kemble vs. McPhaill, 128 Cal., 444; 5 words and Phrases, page 4420, and supplement of the same work, 336."

(p. 222). "The shipper is limited by the Code to the action of the commission, while the railroad company can require the action to be tried in the courts de novo, excepting that the finding of the commission shall be prima facie evidence of the facts therein stated; but the shipper has no such rights of appealing to the courts if he is dissatisfied with the action of the commission.

"If the construction of the word 'may' contended for by the railroad company is adopted, the shipper, in order to obtain relief, must apply to the commission, and its finding is final so far as the shipper is concerned. Under such a construction the shipper is limited to an application to the commission, and deprived of any right to appeal to the courts, yet the railroad company, after the finding of the commission, can either accept or cause the action to be tried in the court. Such a construction would give the railroad company undue advantage. The shipper would be compelled to appeal to the commission and be bound by its decision, while the railroad company could either accept the finding of the commission or appeal to the courts. On the other hand, if the ordinary and usual meaning of the word 'may' is given thereto, making the proceeding before the commission merely cumulative and not compulsory, it leaves the shipper the right to choose the forum in which his grievance shall be heard. If he chooses the commission, he is bound by his own intentional act, or if he does not wish to be bound by his own intentional act, or if he does not wish to be bound by the finding of the commission, he can bring his action in the ordinary way in the courts.

"We believe, from a reading of the two sections of the Code, that they manifest an intention on the part of the legislature to give the word 'may' its ordinary and usual meaning, and leave with the shipper the right to apply to the commission if he so desires, or to prosecute his common-law action in the courts."

It is apparent, therefore, from the foregoing decisions that Sections 579 and 580 give the shipper a concurrent or cumulative remedy in addition to his right to commence an action at law directly.

Turning again to Section 11221-1, it does not specifically refer to complaints filed with your Commission under Section 579. This distinguishes the present case from that of *Los Angeles and Salt Lake Railroad Company* vs. *Railroad Commission of California*, 277 Pac. 224, cited in your inquiry. In that case the shipper also endeavored to stay the tolling of the statute of limitations by filing a so-called informal complaint in the same manner as was attempted here, followed later by a duly verified complaint under the provisions of Section 60 of the California Public Utilities Act, but Section 71a of that same Act, fixing the time within which such a proceeding could be commenced, referred to and specifically included such proceedings brought before the Commission. The Ohio statute does not in express language refer to proceedings begun under Section 579 but does include "all actions." It is necessary, therefore, to determine when proceedings commenced under Section 579 become actions within the meaning of the statute as the remedy provided by that section is peculiar to that particular class of complaints. It is specifically provided that pleadings in such proceedings must be executed with the same formality as pleadings in civil actions but the section

does not provide for a hearing before the Commission nor are the findings given the status of a final order. If they were they would be subject to review by the Supreme Court under Section 544, et seq., as Article 4, Section 2 of the Constitution of Ohio provides that the Supreme Court shall be the only judicial body having jurisdiction to review the proceedings of the Commission. It would appear obvious, therefore, that the Legislature did not intend the findings in such proceedings to be considered as an order of the Commission. This again distinguishes the Ohio situation from that in California because there the Commission had the right not only to make a positive finding but also to order repayment to the shipper where it sustained his claim.

A finding of your Commission, in the event that it is against the railroad, automatically becomes a judgment thirty days after filing with the clerk of the court of common pleas unless the railroad by motion causes it to be docketed for trial.

Section 11237, General Code, is as follows:

> "An action is an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense."

Under Sections 11230 and 11231, General Code, an action is deemed to be commenced on the date of service of summons or when the complaining party diligently endeavors to procure service, if such attempt be followed by service within sixty days.

The Supreme Court of Ohio having already ruled that the service provided for by Section 579 is not an unreasonable provision by the Legislature, and inasmuch as the citation by the Commission constitutes the only service required on the railroad, there being no provision for service after filing in the common pleas court, it follows that if the citation is issued by the Commission within three years from the date of delivery of the shipment concerned the defense of Section 11221-1 would not be available to the railroad.

Sections 11230, 11231 and 11237, just referred to, are general in their nature and obviously not intended to cover a special process such as that provided by the Legislature in Sections 579 and 580.

In connection with Section 11221-1 there must also be considered Section 11218, which is as follows:

> "Lapse of time at bar. A civil action, unless a different limitation is prescribed by statute, can be commenced only within the period prescribed in this chapter. When interposed by proper plea by a party to an action mentioned in this chapter, lapse of time shall be a bar thereto as herein provided."

It is apparent, therefore, that the Statute of Limitations must be properly pleaded by the railroad before it is considered by your Commission in determining the validity of any complaints filed under Section 579. This requirement is a well settled rule in Ohio.

Syllabus 3 of *Sturges et al.* vs. *Marshall et al.* 80 O. S. 215, is as follows:

> "Where it appears, on the face of the petition, that the cause of action accrued at such a period, that, under the statute of limitations, no

action can be brought, the defendant may demur to the petition, on the ground that the petition does not state facts sufficient to constitute a cause of action. But if the objection does not appear on the face of the petition, and the answer does not set up the limitation, it must be deemed waived."

See also syllabus 3 of *Towsley* vs. *Moore,* 30 O. S. 184, as follows:

"In order to obtain the benefit of the statute of limitations, a defendant must insist on it as a bar in his answer. If instead of so doing he simply denies the allegations of the petition he can not, upon the trial, also insist upon the bar of the statute."

In conclusion, therefore, it is my opinion that when a complaint, duly verified, is filed with your Commission under the provisions of Section 579, a citation should issue forthwith directed to the railroad against which complaint is made and if the defense of Section 11221-1 is properly raised by the railroad in its answer and it appears from such pleadings and affidavits that such complaint was not filed within three years of the date of delivery of the shipment involved, then such claim should be found invalid, and in all other cases brought under Section 579 the Commission should make its findings and certify them accordingly without regard to the provisions of Section 11221-1.

Answering your specific question, the procedure outlined in your letter, whereby a so-called informal complaint is filed with you by a shipper for the purpose of staying the statute limitations, imposes no duty upon the commission to forthwith cite the respondent railroad and is therefore of no force and effect, as section 579, General Code, specifically requires that a complaint filed under the provisions of that section must be verified as a petition in a civil action. The specific complaint cited in your inquiry should therefore be found invalid if the answer of the railroad pleads the statute of limitations as a defense.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4550.

BUILDING AND LOAN—UNAUTHORIZED TO DISTRIBUTE EARNINGS TO UNDIVIDED PROFIT FUND WHEN DIVIDENDS HAVE BEEN OMITTED.

SYLLABUS:

Under Section 9673, General Code, a building and loan association has no authority to distribute a portion of its earnings to the undivided profit fund when dividends have been omitted.

COLUMBUS, OHIO, August 8, 1932.

HON. FRANK F. MCGUIRE, *Superintendent of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"I respectfully request your opinion as to the authority of a building association incorporated under the laws of Ohio and under