burg, Ohio, the right to occupy and use for cottage site and docklanding purposes a parcel of state property including Lot No. 48 of the Revised Plat of Minnewauken Island in Indian Lake, the same being a part of Virginia Military Survey No. 12276 in Stokes Township, Logan County, Ohio.

Upon examination of this lease, which has been approved by the Governor under date of May 28, 1935, I find that the same has been properly executed by the state of Ohio by the hand of the Conservation Commissioner, as party of the first part, and by Earl Merritt, the lessee therein named, as party of the second part.

I further find, upon examination of the provisions of the lease and of the conditions and restrictions therein contained, that the same are in conformity with section 471, General Code, under the authority of which together with section 464, General Code, this lease is executed, and with other statutory enactments relating to leases of this kind.

The lease here in question is accordingly approved by me as to legality and form as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof all of which are herewith returned.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4317.

TITLE GUARANTEE AND TRUST COMPANIES MAY NOT DESIGNATE THEMSELVES AS TRUSTEES TO HOLD OWN SECURITIES WHEN—(O. A. G. 1928, VOL. III, P. 2072, O. A. G. 1933, VOL. II, P. 960, OVERRULED)—AUTHORITY OF ULMER VS. FULTON, 129 O. S. 323.

SYLLABUS:

Title guarantee and trust companies may not lawfully designate themselves as trustees for the purpose of holding securities theretofore belonging to them for the benefit of the holders of certificates of participation issued against such securities by such companies. Opinions of the Attorney General, 1928, *Vol.* 3, *p.* 2072, *and Opinions of the Attorney General,* 1933, *Vol.* 2, 960, *Syllabus* 3, *overruled, on authority of Ulmer* vs. *Fulton,* 129 *O. S.,* 323.

COLUMBUS, OHIO, June 4, 1935.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your request for my opinion as to the effect of the decision of the Supreme Court in the case of *Ulmer* vs. *Fulton,* 129 O. S., 323, rehearing denied May 22, 1935, upon the conclusion reached in an opinion of this office reported in Opinions of the Attorney General, 1928, Vol. 3, p. 2072. The syllabus of that opinion reads:

> "Title guarantee and trust companies may lawfully, by proper action, designate themselves as trustees for the purpose of holding securities theretofore belonging to them for the benefit of the holders of certificates of participation issued against such securities by such companies."

The powers of title guarantee and trust companies are defined by Section 9850, General Code, which reads:

> "A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it."

After referring to this section and to Section 710-170, General Code, which authorizes such corporations to secure all trust company powers by compliance with the applicable statutory provisions, the then Attorney General said at page 2073:

> "The communication of your examiner does not disclose whether the title and trust companies under consideration have accepted the benefits of this latter section. In my view of the matter, however, that fact is immaterial for the reason that in my opinion title guarantee and trust companies have, under the provisions of Section 9850 of the Code, supra, authority to act in the manner here under discussion.
>
> You will observe that the section authorizes such a company to make loans as trustee for others. In my opinion this is in substance what is being done by the companies in question. The section clearly authorizes such companies to act as trustee in the making of loans. It does not specify that such trusteeship must result from a designation by others; nor does it in fact attempt in any way to describe in what method the trust relationship shall be created. Such being the case, I take it that the relationship may be established in any one of the recognized methods, and this clearly includes the right of the person establishing the trust to make himself a trustee with relation to his own property."

After giving citations to sustain the proposition that the settlor of a trust may constitute himself trustee, the then Attorney General continued:

> "I assume that in the transactions referred to the companies are taking definite, formal action in setting aside certain designated mortgages in trust for the benefit of the holders of the certificates of participation issued against such mortgages and unequivocally stating that such securities are held in trust for such purposes. In my opinion there is no general rule prohibiting such course, nor do I find any statutory prohibition applicable. In this instance the companies are in reality acting as trustee in the loaning of the funds of the holders of the certificates of participation. While it is true that the funds are not first advanced and then invested, in my opinion this is of no significance. The company furnishes the funds for the investments in the first instance and then establishes a trust for the benefit of those who subsequently supply the capital for investment in the certificates of participation."

This opinion was approved in a subsequent opinion of this office, reported in Opin-

ions of the Attorney General, 1933, Vol. 2, p. 960. The third branch of the syllabus of that opinion reads:

> "3. Title guarantee and trust companies may legally act as their own trustee."

In the case of *Ulmer* vs. *Fulton,* supra, the Supreme Court had before it the question whether a trust company, deriving its powers from Sections 710-156, 710-159, 710-164 and 710-165, General Code, has authority to create mortgage participation trusts out of its own mortgages and sell mortgage participation certificates therein to the public.

The court held as disclosed by the syllabus:

> "1. Banks and trust companies have only such powers as are expressly conferred on them by their charters and by statute, or such as may fairly be implied from those expressly given.
>
> 2. The statutes of Ohio do not authorize a bank and trust company to act in the dual capacity of settlor and trustee by creating trusts out of its own securities and selling participation certificates therein to the public.
>
> 3. Such undertakings are opposed to sound public policy, and are invalid.
>
> 4. Upon the insolvency of a bank and trust company, which has attempted to create trusts out of its own securities and has sold participation certificates therein to the public, the holders of such participation certificates will be placed in the position of general creditors.
>
> 5. The legal title to all securities which may have been allocated to such ineffective trusts remain in the bank and trust company.
>
> 6. Where such securities consist in whole or in part of mortgage obligations and the mortgagors also have deposits of money in such bank and trust company at the time of its insolvency, the mortgagors have the right to set off their deposits against their indebtedness, whether such indebtedness is then due or not."

In the course of the opinion the court said at page 332:

> "It is a prevailing rule, in Ohio and elsewhere, that banks and trust companies, though organized primarily for private profit, are of a preeminently public nature and have only such powers as are expressly conferred on them by their charters and by statute, or such as may fairly be implied from those expressly given. 5 Ohio Jurisprudence, 363, Section 73; 3 Ruling Case Law, 419, Section 46; 7 Corpus Juris, 585, Section 213; 4 Michie on Banks and Banking 8, Section 5; 2 Morse on Banks and Banking (6 Ed.), 1557, Section 777; 1 Morse on Banks & Banking, 14, Section 6."

Reference was then made to the applicable statutes. Section 710-156, General Code, provides that a trust company may "receive and hold" property in trust. Section 710-164 refers to the management of property "held" as trustee. Section 710-165 refers to property "received or held" in trust.

Referring to these provisions, the court said at page 334:

> "Statutes relating to the same subject-matter must be read and construed

> together. A perusal of the Ohio Banking Act, particularly the part relating to trust companies, is unconvincing in support of the proposition that a bank with trust powers may create a trust out of its own securities and sell participating shares therein. Such procedure is foreign to the accepted notions of the proper business and functions of a trust company, viz., *the acceptance and execution of trusts at the instance of others,* and we are unwilling through conjectural and dubious construction to extend to banks exercising trust prerogatives such broad and far-reaching powers as the formation of trusts out of their own property would give them, when the General Assembly has not seen fit to do so through plain and unequivocal language."

Numerous authorities appear in the opinion to sustain the principle that a trustee cannot buy his own property for the purpose of the trust. This principle was used to sustain the conclusion that the so-called trust was against public policy.

The sections of the code above referred to with respect to trust companies generally are applicable to title guarantee and trust companies which have acquired trust company powers under Section 710-170, General Code. The *Ulmer* decision is thus direct authority for the proposition that such title guarantee and trust companies may not become trustees of their own securities for the benefit of purchasers of participation certificates therein.

Title guarantee and trust companies, as well as banks and trust companies with general trust powers, "are of a preeminently public nature." The type of regulation imposed upon them by the state is sufficient evidence of that fact. Sections 9850 to 9855, General Code; Section 710-171, General Code. It follows that under the *Ulmer* decision these companies "have only such powers as are expressly conferred upon them by their charters and by statute, or such as may fairly be implied from those expressly given."

There is no provision in Section 9850, General Code, or in any other section, expressly authorizing a title guarantee and trust company to create a participation trust out of its own securities. The reasoning of the 1928 opinion, supra, is that such authority can be implied from the power to make loans as trustees for others.

In the *Ulmer* case, the Supreme Court held that such authority could not be implied from the following language of Section 710-164, General Code:

> "In the management of money and property held by it as trustee, such trust company may invest such money and property in a general trust fund of the trust company. * *"

In my opinion the implication could be drawn more reasonably from this language than from the wording of Section 9850, *supra,* applicable to title guarantee and trust companies.

The reasoning of the 1928 opinion, supra, was based in part upon the principle that the settlor can become the trustee of his own property. In the *Ulmer* case the court refused to apply that principle to a quasi-public corporation in the absence of clear statutory authority. The supporting argument in the former opinion to the effect that there was no "statutory prohibition" must also be rejected in the light of the *Ulmer* decision.

Specifically answering your inquiry, it is my opinion that title guarantee and trust companies may not lawfully designate themselves as trustees for the purpose of holding securities theretofore belonging to them for the benefit of the holders of certificates of participation issued against such securities by such companies. Opinions of the Attor-

ney General, 1928, Vol. 3, p. 2072, and Opinions of the Attorney General, 1933, Vol. 2, p. 960, Syllabus 3, overruled.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4318.

APPROVAL, LEASES TO LAND IN GROTON TOWNSHIP, ERIE COUNTY, OHIO, FOR STATE GAME REFUGE—ROY C. DEYO, ERNEST F. DEYO, D. T. LIVENGOOD AND B. J. FORD.

COLUMBUS, OHIO, June 4, 1935.

HON. L. WOODDELL, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval certain leases executed to the state of Ohio by several property owners in Groton Township, Erie County, Ohio, leasing and demising to the state of Ohio for the purpose therein stated, tracts of land in said township and county.

The leases here in question, designated with respect to the number of the lease, the owner of the property, and the acreage of land covered by the respective leases, are as follows:

Number	Name	Acreage
2273	Roy C. DeYo	16.25
2274	Ernest F. DeYo	266.71
2275	D. T. Livengood	10.00
2276	B. J. Ford	200.54

Each and all of these leases are for a term of five years and in each instance the property described is leased to the state for the sole purpose of a state game refuge. And, in this connection, it is noted that as to each of these leases the Conservation Council, acting through you as Conservation Commissioner, has made an order setting aside the lands described in the lease for the purpose of a state game and bird refuge, as provided for in section 1435-1, General Code.

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.