the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2378.

APPROVAL, BONDS OF GUERNSEY COUNTY, OHIO—$79,928.69.

COLUMBUS, OHIO, September 26, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2379.

WORKMEN'S COMPENSATION—LAW APPLICABLE TO ALL EMPLOYERS AND EMPLOYES ENGAGED IN INTERSTATE COMMERCE IN OHIO—WHERE CONGRESS OF THE UNITED STATES HAS ENACTED LEGISLATION ESTABLISHING A RULE OF LIABILITY.

SYLLABUS:

1. *The Workmens Compensation Law of Ohio is applicable to employers and employes engaged in interstate commerce, unless the congress of the United States has enacted laws establishing a rule of liability or method of compensation applicable to the business in which said employer and employes are engaged.*

2. *All of the employes in the service of an employer subject to the provisions of the Workmen's Compensation Law of Ohio are entitled to the benefits of that act while so engaged in the employer's regular business in this state.*

COLUMBUS, OHIO, September 27, 1930.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your request for my opinion on the following facts:

"1. ———————— Company is a corporation under the laws of the State of Illinois. It manufactures and sells instruments,

(a) For measuring, indicating and recording the flow of fluids in pipes;

(b) For measuring, indicating, recording and controlling temperatures in industrial processes;

(c) For analyzing, indicating and recording the carbon dioxide (CO^2) content of flue gases and other products of combustion.

(d) For measuring, indicating and recording the height of liquids in

tanks and reservoirs, together with suitable means of operating high and low level alarm devices and means of starting or stopping pumps and other machinery;

(e) Other meters and instruments for similar purposes and for special purposes including the combination of some or all of the foregoing devices on centrally located panel boards in power plants.

2. As will be seen, the product is of a highly technical nature and each device must be built to order to suit the individual conditions under which it is to be installed. It cannot be sold by sales agents, factors or commissioned salesmen because factory training is necessary for the securing of preliminary specifications and for the supervision of the installation.

3. The products are sold, installation supervised and engineered by salaried employees hired by the company in Illinois, and who for the sake of convenience are located at strategic points throughout the United States. These men make quotations subject to the approval of the home office in Chicago and take orders subject to acceptance by the home office before becoming binding upon the company. All shipments are made direct to the user from the factory in Chicago and all invoicing and collecting is done from Chicago. No stock is carried in warehouses or shipped from any other point but Chicago.

* * * * * * * * *

4. All employees of the company are hired by it in Illinois, under Illinois contracts of employment and are insured wherever they may be, including Ohio, by insurance company policy, under the Workmen's Compensation Act of Illinois, which applies to Illinois employees. Depending upon the exigencies of business the company directs its men to stay in certain locations and in such numbers as may be considered necessary.

* * * * * * * * *

5. In the State of Ohio at the present time the company has three men stationed, whose duties are in part of Ohio, part of Indiana and part of Kentucky. It also maintains men in the State of Pennsylvania who operate in a part of Ohio and portions of Pennsylvania, West Virginia, Maryland and the District of Columbia. One or two of the men stationed in Pennsylvania have occasion from time to time to sell and supervise the company's products in Youngstown, Ohio, and the company's customer at that city is disturbed because the company's men are not covered under the Ohio Compensation Act.

* * * * * * * * *

It is the desire of the Commission that they have your opinion on the following questions:

First, whether or not the thre employes of the ———— Company, living in Ohio are engaged in interstate commerce?

Second, whether or not the employes who may be hired in Ohio or sent from Illinois to install the meters in the State of Ohio are engaged in interstate commerce?

Third, if the ———— Company is amenable to the Workmen's Compensation Act of Ohio, are both the employes living in Ohio and those sent

from Illinois to install or those hired in Ohio to install said meters subject to the provisions of the Workmen's Compensation Act of Ohio?"

Your questions relate to the application of our Workmen's Compensation Law to this company. As I understand the matter, this company contends that it is not amenable to the Workmen's Compensation Law of Ohio because its business should be classed as interstate commerce, and cites some authorities to sustain its contention that its business in this state is interstate commerce.

Our Workmen's Compensation Act defines employers who are subject to the provisions of the act in Section 1465-60, General Code, which section, in so far as it applies to this question, reads as follows:

> "The following shall constitute employers subject to the provisions of this act:
>
> 1. * * *
>
> 2. Every person, firm and private corporation, including any public service corporation, that has in service three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written."

If this were the only section involved, the question would present no difficulty, since that section includes all persons, firms or corporations employing three or more workmen, and would include those engaged in interstate commerce.

The Supreme Court of Ohio in the case of *State, ex rel. Yaple* vs. *Creamer,* 85 O. S. 349, held, as disclosed by the syllabus:

> "The act entitled 'An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes,' etc., 102 O. L. 524, is a valid exercise of legislative power not repugnant to the federal or state constitutions, or to any limitation contained in either."

In the opinion in that case, at page 400, we find this language:

> "We think that in a case as is presented here, in which the state itself has undertaken a great enterprise in the interest of the general good, *and in the exercise of its police power,* and presents to its citizens the option to join in the undertaking and receive its protection and benefit, * * it cannot be said that in such withdrawal there is a violation of the constitution in the respects claimed. * * * "

In the case of *Fassig* vs. *State, ex rel.,* 95 O. S. 232, the Supreme Court of Ohio held:

> "The provisions of Section 27 of the workmen's compensation act (103 O. L. 72, 82), constitute a valid exercise of the legislative power, not repugnant to the federal or state constitution, nor to any limitation contained in either."

In the opinion in that case, the court in several instances referred to the Workmen's Compensation Act as being an exercise of the police powers of the state.

It is a well established principle that the states may, in the absence of federal legislation in the same field, enact police regulations which will be valid although they affect interstate commerce.

In 12 C. J. 13, it is said:

"The states may, as long as they do no more than legitimately exercise their reserved police power, enact laws which will be valid although they may incidentally affect interstate commerce. Local laws of the character mentioned have their source in the powers which the states reserved and never surrendered to congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the constitution, and considered in their own nature regulations of interstate commerce."

In the case of *Hendrick* vs. *Maryland,* 235 U. S. 610, the Supreme Court of the United States in the opinion delivered by Mr. Justice McReynolds says:

"In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles,—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horsepower of the engines,—a practical measure of size, speed and difficulty of control. *This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety, and comfort of their citizens*; * * * . " (Italics the writer's.)

In *Austin* vs. *Tennessee,* 179 U. S. 343, at 349, the court said:

"We have had repeated occasion to hold, where state legislation has been attacked as violative * * * of the power of Congress over interstate commerce * * * that, if the action of the state legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

The same rule is laid down in the case of *Kelley* vs. *Great Northern Ry. Co.,* 152 Fed. 211, which held that laws affecting the liability of common carriers for injuries to employees are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce, and that a state may, as long as congress has not legislated on the particular subject, enact such laws in the exercise of its police power without invading the exclusive power of congress.

Many other cases might be cited to sustain this proposition but it is so well established that it seems unnecessary so to do.

This employer states that it is required to pay premiums upon its men in Ohio under the Illinois Workmen's Compensation Law. If such employes are engaged in interstate commerce, Ohio has as much authority to enact legislation relative thereto as has Illinois, because one state of the union may exercise any power that may lawfully be exercised by any other state in so far as our federal constitution is involved.

This leads us to the consideration of another section of our Workmen's Compensation Law, viz.: Section 1465-98, General Code, which reads as follows:

"The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established

by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of congress, voluntarily accepts the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which the premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid."

The answer to your question depends upon the construction of this section. In my opinion it is an exception to the general provisions of the act, especially the general provision found in Section 1465-60, supra, and since it is an exception, it must be strictly construed.

In the case of *U. S.* vs. *Dickson*, 10 Law Ed. 689, the Supreme Court of the United States, in an opinion delivered by Mr. Justice Story, said, at page 698:

> "We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

The Appellate Court of Illinois said, in the case of *Epps* vs. *Epps*, 17 Ill. App. 169:

> "The same policy which dictates a liberal construction of the statute in furtherance of its general beneficial purpose would necessitate a restricted construction of an exception by which its operation is limited and abridged."

With this rule in mind, we must construe the provisions of the last quoted section as applying only to employers who are engaged in both intrastate and interstate or foreign commerce. In the case before me, the employer contends that it is engaged in interstate commerce, and we may assume from the nature of its business that it also does business solely within the state of Illinois and is, therefore, engaged in intrastate commerce in Illinois; and if its contention is correct it is not engaged in intrastate business in Ohio.

Let us assume, however, that part of its business in Ohio may be intrastate business. In such case, it might even be engaged in both intrastate and interstate business in Ohio. But the section goes still further; it only applies to those who are so engaged when the interstate commerce in which the employer is engaged is subject to "a rule of liability or method of compensation (which) has been or may be established by the congress of the United States." The language of the statute is "has been or may be" established by the congress of the United States.

That this construction is correct is borne out by the fact that the phrase "for whom a rule of liability or method of compensation has been or may be established by the congress of the United States" modified "interstate and foreign commerce." It is my opinion that the legislature intended by this language to provide that in case an employer, as defined in Section 1465-60, supra, was engaged in interstate and foreign commerce and the congress of the United States, at the time of the passage

of the act, had provided for the liability or a method of compensation for injuries sustained in such employment or should in the future pass any such legislation, then our general act should apply to employes of such employers if such employes were engaged solely in intrastate work separate and distinct from the interstate and foreign commerce, if there was a written agreement to that effect as provided by said section. But if there was no such agreement, then the act would not apply to any of the employes of such employer. In other words, the general purpose of the Workmen's Compensation Law is to provide compensation for all employes in the State of Ohio, whether they are engaged in interstate commerce or not. The state had the power to legislate and provide for compensation for all employes, even though they are engaged in interstate commerce, providing that the congress of the United States had not provided for compensation for employes engaged in interstate business. The legislature knew, of course, that it could not make provision for compensation to employes engaged in interstate commerce if the congress of the United States had legislated upon that subject.

It is therefore my opinion that the Workmen's Compensation Law applies to all employers and employes in Ohio even though they may be engaged in interstate commerce, unless the congress of the United States has enacted legislation fixing a rule of liability or method of compensation for injuries to employes engaged in that particular line of interstate commerce.

This construction would afford relief to all employes in Ohio, either by virtue of state legislation or federal legislation; and I believe that such was the intention of the legislature.

There is no contention that the congress of the United States has fixed any rule of liability or method of compensation for the employes of employers engaged in the business of this employer.

According to the statement of the employer in this case, it has at this time in Ohio in connection with its business, three men; the personnel sometimes changes but this is not material. The provision of the section is that an employer is an employer within the meaning of the act if it has in its service three or more workmen or operatives regularly in the same business, etc. "Regularly" refers to the manner of employment and not duration of time.

In *State ex rel.* vs. *Derrer,* 23 O. N. P. (n. s.) 519, the Court of Common Pleas of Franklin County, in an opinion rendered by Judge Kinkead, said:

> "The character of the employment and work rather than the duration of the services constitutes the test of whether the employment is regular or casual."
>
> "There must be a uniform practice or rule to employ a man for the particular service as a universal essential practice in the conduct of the business, which regular and particular service is uniformly essential in the conduct of the business, and not merely occasional."

Therefore the fact that the employer changes the personnel of his employes in Ohio is not material to a consideration of this question.

The fact that Illinois requires the employer to pay premiums upon these men engaged in Ohio (if its law does require such to be done) is not in any way material to a consideration of this question because if this employer employs men in Ohio for whom compensation may be provided by Ohio legislation, the right so to do cannot be denied or hampered by the legislation of any other state. Nor is the inconvenience to the employer an element to be considered in this question because many employers, engaged in nation wide businesses, may be required to comply with the Workmen's Compensation Laws of every state of the Union.

As stated above, the employer contends that it is engaged in interstate commerce. The construction which I have placed upon the compensation act of Ohio obviates the necessity of an answer to your first and second questions because even though the employer's contention is correct, it is still amenable to the Workmen's Compensation Law of Ohio since no legislation has been enacted by the congress of the United States fixing a rule of liability or method of compensation for injuries received by employes engaged in the business of this employer.

In your third question you ask whether or not the compensation act of Ohio is applicable to employes living in Ohio as well as those sent from Illinois. The Workmen's Compensation Law of Ohio was passed for the benefit of "employes" as defined in Section 1465-61, General Code, which section reads in part as follows:

> "The terms 'employe', 'workman' and 'operative' as used in this act, shall be construed to mean:
>
> 1. * * *
>
> 2. Every person in the service of any person, firm or private corporation, including any public service corporation, employing three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.
>
> 3. * * * "

It will be noted that this section provides that every person in the service of an employer within the meaning of this act is entitled to the benefits of the Workmen's Compensation Law, except those persons whose employment is but casual and not in the usual course of trade, business, profession or occupation of the employer. Under the facts stated, these men who are sent from Illinois to Ohio are engaged in the usual course of the trade, business, profession or occupation of the employer, are in the service of said employer, and are, therefore, entitled to the benefits of the act even though they are only in the state casually.

That this conclusion is correct is emphasized by the fact that when said section was originally enacted, the latter part of the second paragraph of said section read:

> "but not including any person whose employment is but casual *or* not in the usual course of trade, etc."

This language, however, was amended so that it read as above quoted, the word "or" being changed to "and." As the section was originally enacted, it might have been said that an employe was not entitled to the benefits of the compensation act if his employment was casual even though he was engaged in the regular business of his employer; but by the amendment, the proviso is that the act does not cover an employe whose employment is casual *and* not in connection with the regular business of the employer. Accordingly, your third question must be answered in the affirmative.

It is, therefore, my opinion that:

1. The Workmen's Compensation Law of Ohio is applicable to employers and employes engaged in interstate commerce, unless the congress of the United States has enacted laws establishing a rule of liability or method of compensation applicable to the business in which said employer and employes are engaged; and

2. All of the employes in the service of an employer subject to the provisions

of the Workmen's Compensation Law of Ohio are entitled to the benefits of that act while so engaged in the employer's regular business in this state.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2380.

APPROVAL, BONDS OF MORROW COUNTY, OHIO—$34,407.03.

COLUMBUS, OHIO, September 27, 1930.

Industrial Commission of Ohio, Columbus, Ohio.

2381.

APPROVAL, BONDS OF WESTERVILLE VILLAGE SCHOOL DISTRICT, FRANKLIN COUNTY, OHIO—$125,000.00.

COLUMBUS, OHIO, September 27, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2382.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND E. ELFORD AND SON, COLUMBUS, OHIO, FOR GENERAL WORK ON BUILDING AT LONDON PRISON FARM, LONDON, OHIO, AT AN EXPENDITURE OF $330,000.00—SURETY BOND EXECUTED BY THE SOUTHERN SURETY COMPANY.

COLUMBUS, OHIO, September 27, 1930.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for the Department of Public Welfare, and E. Elford and Son, of Columbus, Ohio. This contract covers the construction and completion of contract for General Work for a building known as the New East and West Wing, London Prison Farm, London, Ohio, as set forth in Item No. 1 of the Form of Proposal dated August 12, 1930. Said contract calls for an expenditure of three hundred and thirty thousand dollars ($330,000.00).

You have submitted the certificate of the Director of Finance to the effect that