1047.

APPROVAL, BONDS OF UNION RURAL SCHOOL DISTRICT, CHAMPAIGN COUNTY, $7,963.88, TO FUND CERTAIN INDEBTEDNESS.

COLUMBUS, OHIO, December 28, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

1048.

APPROVAL, BONDS OF SALEM RURAL SCHOOL DISTRICT, CHAMPAIGN COUNTY, $16,076.08, TO FUND CERTAIN INDEBTEDNESS.

COLUMBUS, OHIO, December 28, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

1049.

TITLE GUARANTEE AND TRUST COMPANIES—WHEN FOREIGN COMPANY MAY INSURE TITLES IN OHIO—LIMITATIONS ON OHIO CORPORATIONS.

SYLLABUS:—

Under the authority as expressed in the case of Allgeyer v. Louisiana, 165 U. S., 578, a foreign corporation duly qualified in its own state, but not specifically admitted in Ohio, may insure titles to real estate located in Ohio, providing the contracts of such insurance are made and to be performed in the state of the domicile of such foreign corporation.

An Ohio corporation organized as a title, guaranty and trust company under the provisions or section 9850-9855, both inclusive, of the General Code, having deposited with the treasurer of state the $50,000 in securities required by section 9851 of the the General Code, and in all other respects qualified to operate in the county designated in its charter as that to which its operations will be confined, may insure titles to real estate situate in another than the designated county without making an additional deposit of securities for such other county, if such policies be issued in the designated county.

COLUMBUS, OHIO, December 28, 1923.

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

DEAR SIR:—This will acknowledge receipt of your letter of recent date requesting the opinion of this department as follows:

"We respectfully request your written opinion upon two questions affecting the authority of the Warren Guaranteed Mortgage Company of Warren, Trumbull County, Ohic, to do business in more than one county in the state under its deposit of $50,000.00.

I am submitting a letter from Mr. George T. Fillius, attorney for said company and would respectfully ask consideration at as early date as is convenient."

Accompanying your letter, and attached thereto is cne from The Warren Guaranteed Mortgage Company of Warren, Ohio, as follows:

"The undersigned, The Warren Guaranteed Mortgage Company, begs to submit to you the following questions relative first to the right of foreign title insurance companies to insure the title to lands located in Ohio, without qualifying to do business in Ohio, and second, relative to the right of title guaranteed and trust companies incorporated under the laws of Ohio to insure titles to land located in other than the county designated in their charter as that to which their operations will be confined. These questions stated categorically are as follows:

First: May a foreign corporation not qualified to carry on business in the State of Ohio, insure titles to real estate located in Ohio, provided the contracts of such insurance are made and to be performed in the state of the domicile of the foreign corporation—assuming of course that such contracts are otherwise within the powers of the insurer?

Second: May an Ohio corporation organized as a title guarantee and trust company under the provisions of sections 9850-9855 both inclusive of the General Code, having deposited with the treasurer of state the $50,000 in securities required by section 9851 of the Code and in all respects qualified to operate in the county designated in its charter as that to which its operations will be confined, insure titles to real estate situated in another than the designated county without making an additional deposit of securities for such other county?

We are aware that the Attorney-General has, upon one occasion partially answered the second of these questions, but in view of the fact that foreign title insurance companies are writing a great deal of title insurance in Ohio without qualifying, and thus encroaching upon the business of domestic corporations, and further in view of the very grave doubt which exists in the mind of many competent counsel as to the former opinion of the Attorney-General we earnestly request that you submit both questions for a further opinion of the Attorney-General."

Relative to the first question submitted, will say that the Supreme Court of the United States in the case of Allgeyer vs. Louisiana, reported in 165 U. S. Reports at page 578 in a very well considered opinion, which opinion has been recognized as the settled law of the United States since 1897, in the first paragraph of the syllabus uses the following language:

"The right of a citizen of a state to send a notification by mail to an insurance company in another state, which is not authorized to do business in the state where he resides, in order that insurance previously provided for by a valid contract made and to be performed outside the state might attach to the property specified in a shipment mentioned in the notice, although the property was then within the state, cannot be prohibited by a state statute,

since that right is included in the 'liberty' of the citizen which is protected against deprivation without due process of law."

Also in the third paragraph of the syllabus the following:

"The statute No. 66 of La. Laws 1894 is unconstitutional, when construed to prevent an owner of cotton in that state from sending to an insurance company of another state, not authorized to do business in Louisiana, an order by mail for insurance on the cotton to be shipped to a foreign port, in pursuance of a valid contract for such insurance previously made and to be performed in the other state."

In that case it will be remembered the state of Louisiana enacted a statute which undertook to forbid any person, firm or corporation, for himself or for another, from effecting insurance on property then in the state, in any marine insurance company which had not complied in all respects with the laws of that state, and for violation thereof be subjected to a fine, etc.

Allgeyer was a cotton exporter and had entered into an insurance contract for an open policy of marine insurance covering shipments of cotton from New Orleans with the Atlantic Mutual Insurance Company, a marine insurance company, incorporated under the laws of New York, but which company had at no time complied with the laws of the state of Louisiana applicable to the transaction of insurance in that state by a foreign corporation. The contract was a New York contract, valid there, the premium being paid there and the losses, if any, were to be adjusted and paid there. The property insured, however, was located in the state of Louisiana.

The facts brought the case squarely in conflict with the statute enacted by the state of Louisiana. The court on page 588 used the following language:

"We have then a contract which it is conceded is made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid and losses, if any, adjusted."

And, again, on the same page:

"It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State.

The Atlantic Mutual Insurance Company of New York has done no business of insurance within the State of Louisiana and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the State of Louisiana, and correlatively the citizens of Louisiana had the right without the State of entering into contract with an insurance company for the same purpose. Any act of the state legislature which should prevent the entering into such a contract, * * * is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State."

The principles announced in the Allgeyer case have been followed with approval in the following cases, among others:

New York Life Insurance Co. vs. Head, 234 U. S., 149;
Provident Savings Life Assurance Society, vs. Commonwealth of Kentucky, 239 U. S., 103;
New York Life Insurance Co vs. Dodge, 246 U. S., 357.

Coming to our own state, in the case of State vs. Amazon Insurance Company, the Franklin County Circuit Court in 1903, 1 O. C. C. (N. S.) 4, announced the law of Ohio in the following syllabus:

"A fire insurace company, organized under the laws of another state, that maintains an office in this state and there enters into contracts of insurance respecting property in other states, or transacts the business of insurance respecting property in other states, is engaged in this state in the transaction of the business of insurance, notwithstanding it does not enter into contracts of insurance with citizens of this state, nor insure property in the state."

On page 9 of the opinion the court uses the following language:

"In some states it is held that the issuing of a policy of insurance on property within the state is transacting business of insurance in the state where the property is irrespective of the place where the contract is made and the policy delivered. Swain v. Munson, 191 Pa. St., 582; Rose v. Kimberly & Clarke Co., 89 Wis., 545, but it may be doubted whether a state can make it unlawful merely to effect insurance on property in the state, contract being made with a foreign company and made and to be performed in another state. Allgeyer v. Louisiana, 165 U. S., 578. So that it is possible for the defendant company to insure property in a state without transacting the business of insurance there, and if the contention of its counsel is sound that such business transacted here is not insurance business, then it is transacting the business, but not at any place.

The business of insurance is, principally, contracting. Strictly speaking it is not insuring property. No precautions need be taken to secure or preserve the thing said to be insured.

The business is contracting with a party to indemnify him in case of loss of a particular thing; the contract is a personal contract of indemnity and is not incidental to or transferable with the thing insured. May on Insurance, Sec. 6; Carpenter v. Providence Washington Ins. Co., 16 Peters, 495; Clay Fire & Marine Co., v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346."

Upon a careful consideration and review of the authorities, we are clearly of the opinion that your first question should be answered in the affirmative.

This brings us to a consideration of the second question which you propound. The answer to this question is determined very largely upon the construction to be given to section 9853 G. C., and to the construction and interpretation of the words "operation" and "issue" as contained in said section. We fail to find where this section of the act has been construed by any of the courts of our state.

It may be of interest to note the statutory provisions governing the subject of title, guaranty and trust companies as contained in the General Code of Ohio, as follows:

Section 9850 defines the powers of such companies as follows:

"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, mortage, 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."

Section 9851 on the capital required, and providing for the deposit, is as follows:

"No such company shall do business until its capital stock amounts to at least one hundred thousand dollars fully paid up, and until it has deposited with the treasurer of state fifty thousand dollars in securities permitted by sections ninety-five hundred and eighteen and ninety-five hundred and nineteen. Except such deposit, the capital shall be invested as the board of directors of such company prescribes."

Section 9852, providing how deposits shall be held, is as follows:

"The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of all guarantees entered into and trusts accepted by such company, but so long as it continues solvent he shall permit it to collect the interest of, or dividends on, its securities so deposited, and to withdraw them or any part thereof, on depositing with him cash or other securities of the kind heretofore named so as to maintain the value of such deposit at fifty thousand dollars."

Section 9853 providing for the operation to be limited to one county, with the sole exception thereto, of title insurance and the construction and interpretation of which section is necessary for the purpose of this opinion, is as follows:

"Any company so organized shall be limited in its operation to only one county in this state, which shall be designated in its application for a charter, except, that if it desires to issue its policies of title insurance in more than one county it may issue them in such other county or counties upon depositing with the treasurer of state an additional sum of fifty thousand dollars in securities as above provided, for each additional county in which it proposes to operate."

Section 710-168 provides how a title, guaranty and trust company may acquire banking powers and conduct the business of a commercial or savings bank, but which also provides that the acquisition of banking powers under the act "shall not limit the powers now granted by law to title, guaranty and trust companies."

Section 710-169 provides that when the company acquires banking powers it is rendered subject to inspection by the Superintendent of Banks, but having acquired banking powers, it shall not be subject to the limitations prescribed by section 9853 of the General Code.

As heretofore stated, we find no decision of any court in our state upon this section, but we do find a former opinion of this department rendered on April 6,1918, Opinions of Attorney-General for 1918, volume 1, page 520, in which we find the following title and syllabus:

"TITLE GUARANTEE AND TRUST COMPANY, HOW OPERATIONS OF SAID COMPANY LIMITED.

Section 9853 G. C. limits the operation of a title guarantee and trust company to one county in the state, which must be designated in its application for a charter, but such companies may issue policies of title insurance on real estate located in other counties of the state, provided an additional deposit of $50,000 is made, as provided by law, for each additional county in which such company desires to issue policies of title insurance."

And again on page 521 of the opinion the following language is used:

"It seems to me that the language of this section requires no construction. Section 9850 quoted above, states the powers of these companies, that is what business they can transact, in short, the operations in which thay may engage, and section 9853 plainly states that such operation must be limited to only one county in the state, with one exception, namely, it may issue policies of title insurance in more than one county provided an additional deposit of $50,000 is made for each other county in which such policies may be issued. The residence of the policy holder has no bearing whatever upon this section; the only question is, in what county does it operate, and where is the real estate located, the title of which is guaranteed or insured. If the company has not deposited $50,000 for the county in which the real estate on which the company issues a policy of insurance, is located, it is without power to issue such policy."

Also the concluding paragraph of the opinion is as follows:

"Answering the question directly, my opinion is that section 9853 does not require an additional deposit for a county not designated in the application for a charter by a title guarantee and trust company, unless the company issues or desires to issue policies of title insurance upon real estate located in such other county; and when such policies are issued or are desired to be issued, then such additional deposit is mandatory."

It is with some reluctance that we express our inability to adhere to a former ruling of this department.

The caption of the section reads: "Operation limited to one county; exception." The language of the section provides that the "operation" of a title, guaranty and trust company is limited to one county with only one exception, to wit, the issuing of policies of title insurance. The language of the section in question "that if it desires to issue its policies of title insurance in more than one county it may *issue them* in such other county or counties upon depositing with the treasurer of state an additional sum of $50,000 in securities, as above provided, for each additional county in which it *proposes to operate*," seems to be perfectly clear in providing that the home office where the policies are issued is the situs of the operation.

In the case of Dargan v. Equitable Life Assurance Society, etc., reported in 51 S. E., 125, the court held that "issue" meant the act of preparing and signing the policy, but did not include delivery.

In Spencer v. Myers, 26 N. Y. Supp., 371, a policy of insurance was held to be "issued" in New York when it had been made and delivered in pursuance of New York laws and was effective and operative therein. The word "issue" has been defined as "to send out, to put in circulation."

It is apparent that the legislature intended to limit the operation of guaranty and trust companies to one county, and evidently that they should only carry on their business and exercise their powers in one county—with the single exception of the business of title insurance.

Does the insuring the title to lands located outside of the designated county constitute transacting business beyond its borders, providing the contract is made and is to be performed in the designated county of the home office? If the case of Allgeyer v. Louisiana, 165 U. S. and the case of the State v. Insurance Company, decided in 1 O. C. C. (N.S.) at page 4, is the law in Ohio, then manifestly it does not.

The opinion of this department heretofore rendered, referred to above, apparently attempted to interpret the phrase "issue in" as being equivalent to "issue upon lands located in." It seems to me that this is a strained construction, and in view of the law as laid down in the "Allgeyer" case and others, is without authority.

We can readily concede that if a company were located with its home office in a given county in which its policies were issued and business transacted and were to open a branch office in another county of the state and propose to issue policies therefrom, and likewise to transact its business from the branch office as well as the home office, it would be clearly subject to the provisions of the statute requiring the deposit of $50,000 with the state treasurer, and unless the deposit were so made it would be without authority to transact business and issue policies in the additional county. Manifestly, the original deposit gives the right to insure titles to land located in other counties of the state so long as the business is not conducted as herein defined in such other county or counties. It is believed that the limitation is not upon the right to deal with titles located beyond certain specific boundaries, but upon the right to carry on business as herein defined outside of certain territorial limits.

Section 9852 provides that the original deposit shall be held, not as security for the faithful performance of contracts of title insurance, but "as security for the faithful performance of all guarantees entered into and trusts accepted." We feel that the limitation on the operation has nothing whatever to do with the location or the situs of the property, or the title which it may insure, but does relate solely to the place where the business itself is carried on.

We feel that the making of the additional deposit gives the company the right to open its branch office, issue its policies and do all things necessary and incident to the business of title insurance in the additional county.

By reason of the premises, and the authority of the Allgeyer case and others, I find myself unable to adhere to the former ruling of this department above mentioned.

It is therefore my opinion that an Ohio title, guaranty and trust company entering into contracts of title insurance within its designated county, and which contracts are to be therein performed, may insure titles to real estate located elsewhere within this state upon making the original deposit of $50,000 with the state treasurer in securities, as designated.

Respectfully,
C. C. CRABBE,
Attorney-General.