behalf of the State of Ohio, wherein it is provided that the state shall indemnify the railroad company and save it harmless from all loss or damage to persons or property resulting from the construction or maintenance of such sidetracks on state property.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4202.

APPROVAL, NOTES OF YORK TOWNSHIP RURAL SCHOOL DISTRICT, ATHENS COUNTY, OHIO—$3,000.00.

COLUMBUS, OHIO, March 29, 1932.

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

4203.

OHIO RIVER—LOW WATER MARK ON NORTH SHORE OF RIVER IS SOUTHERN BOUNDARY OF OHIO—JURISDICTION TO ENFORCE FISH AND GAME LAWS ON OHIO RIVER.

SYLLABUS:

1. *The low water mark on the north shore of the Ohio River remains the southern boundary of the State of Ohio, though such low water mark may have varied from time to time through the gradual processes of accretion and reliction. Where, however, such low water mark has been caused to shift by artificial means, as by the construction of locks and dams, the southern boundary of the state would not change, but would remain where the low water mark was prior to such construction.*

2. *The officers of the states on both sides of the Ohio River, for the practical purposes of enforcing their fish and game laws, may fix an arbitrary line on the river and agree among themselves that they will not enforce the laws of their respective states in the territory on the opposite side of this line. Such agreement, however, would have no binding effect upon said states for the reason that the fixing of such a line would not change or fix the actual boundaries of such states or affect the concurrent jurisdiction which said states have over said river.*

COLUMBUS, OHIO, March 29, 1932.

HON. WILLIAM H. REINHART, *Conservation Commissioner, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your recent communication which reads as follows:

"Referring to your opinion 1394 of January 13, 1930, you state in part on Page 2:

'The territorial limits of Ohio extend only to the low water mark on the northern shore of the Ohio River, etc.'

Many times the question has arisen as to just where the low water mark is. Fishermen may stand on the Ohio shore and fish in the Ohio River, but if they cast their line beyond the low water mark they are subject to arrest. But the question of how far out that low water mark is again confronts all interested in the enforcement of the law.

Previous to the building of the locks and dams, the water got very low in the summer time and sand bars extended out into the river as much as 300 or 400 yards. That, of course, established a low water mark. Since the locks and dams have been built the water has been raised several feet, thereby giving more water for fishing in the Ohio jurisdiction.

I am inclined to believe that some wardens of states who have authority over the river to our low water mark have lost sight of the mark which prevailed before the locks and dams were built, but instead, they consider the mark which is low now and, as previously stated, this mark is many feet ashore from the old one. It is estimated that in places there are as much as 200 yards difference between the old mark and the new one.

With the thought in mind of establishing a low water mark for the protection of all concerned, will you advise, among other angles which may develop:

(1) Is the old water mark, established before the locks and dams were built, the legal mark?

(2) Would it be legal for an arbitrary line to be fixed by common consent with the officials of other states who have jurisdiction over the Ohio River up to our low water mark, said line mutually agreed to be, say 200 yards from the Ohio shore line in low water?"

The low water mark on the northern shore of the Ohio River being the southern boundary of the State of Ohio, the question as to where the low water mark is, is a question of fact. Low water mark in waters in which the tide does not ebb and flow is defined as the point to which the water recedes at its lowest ordinary state, and is to be determined from the height of the water at ordinary stages of low water. 5 O. J. 712, *Kentucky Lumber Company* vs. *King,* 23 Ky. L. 1122.

This low water mark remains the southern boundary though it may have varied from time to time through the gradual processes of accretion and reliction.

As was the case of *Commonwealth* vs. *Garner,* 3 Gratt. 655:

"It must then, it seems to me, follow, that Ohio enjoys the right of alluvion, and this right brings her territory down the banks, and extends it to the water, increasing her territory, or lessening its extent, as the river may insensibly recede from or advance upon the one or the other side."

However, where the channel is shifted by artificial changes, the boundary is unaffected and remains where it was before such changes were made. 9 C. J. 195.

If, therefore, the construction of the locks and dams to which you refer has shifted the low water mark, the southern boundary of the state would not change but would be where the low water mark was prior to such construction.

In answer to your second inquiry, it would be entirely legal for the officers of the states on both sides of the river, for the purposes of avoiding the difficulties that may arise in the enforcement of the fish and game laws of their respective states where the same territory is covered by the enforcement officials of the states on both sides of the river, to fix an arbitrary line and agree among themselves that they will not assume jurisdiction over the portion of the river on the opposite side of this line. This would, of necessity, be in the nature of a gentleman's agreement only and would have no binding effect for the reason that the fixing of such a line would not change or fix the actual boundaries of these states or change their jurisdiction, as that can only be done by agreement between the states themselves with the consent of Congress. The question therefore arises as to the right of these states to enforce their fish and game laws up to this arbitrary line where such line may be beyond their actual territorial limits. Your inquiry concerning the low water mark is evidently made because of the assumption that the states across the river have no jurisdiction of the river north of the low water mark on the north side and that Ohio has no jurisdiction over the river south of this low water mark. This assumption is doubtless prompted by the following statement in my opinion of January 13, 1930, to which you refer:

> "The territorial limits of Ohio extend only to the low water mark on the northern shore of the Ohio River, and, therefore, the State of Ohio does not have jurisdiction to regulate fishing in the Ohio River."

After careful reconsideration of the authorities, I am of the opinion that, to a certain extent, Ohio does have jurisdiction over the Ohio River south of the southern boundary of the state and that the states across the river have the same jurisdiction over the river north of our southern boundary. While it has been held that the southern boundary of the State of Ohio is the low water mark on the north side of the river *(Handly's Lessee* vs. *Anthony, et al.,* 5 Wheat. 374; 5 L. ed. 113), the act of the Legislature of Virginia, passed on the 18th day of December, 1789, known as the Virginia compact, under which Kentucky became a state, provided with respect to the Ohio River that "the respective jurisdictions of this commonwealth and the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river." Hening's Statutes at Large, Vol. 13, page 19.

This condition was assented to by Congress when it admitted Kentucky into the union. This compact, therefore, by the sanction of Congress, has become a law of the union which inured to the benefit of the subsequently formed states. *Pennsylvania* vs. *Wheeling & B. Bridge Company,* 13 How. 518, 14 L. ed. 249; *Wedding* vs. *Meyler,* 192 U. S. 573, 48 L. ed. 570, 66 L. R. A. 833.

As said in the case of *Wedding* vs. *Meyler, supra:*

> "Concurrent jurisdiction, properly so-called, on rivers, is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase."

The court also says in this case:

"What the Virginia compact most certainly conferred on the states north of the Ohio was the right to administer the law below low water mark on the river * * *."

In the case of *Arnold* vs. *Shields,* 5 Dana 18, 30 A. D. 669, the court says:

"Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial and executive—as that possessed by Kentucky over so much of the Ohio River as flows between them."

As to concurrent jurisdiction over boundary waters, it is said in 8 R. C. L. 102:

"Under such an agreement, each state has a right to determine for itself what shall constitute a crime within its jurisdiction, and if things which are denounced by its laws are done on the waters of the river, it may punish in its own courts, whether the other state has the same law or not. On the other hand, neither state can conduct a prosecution against any person for the doing of a thing on the waters of the river which constitutes a crime only under the laws of the other state. Each state must conduct its prosecutions for such crimes as are denounced by its own laws, and, in case the act is a crime in both states, then the state first acquiring jurisdiction shall conduct the prosecution to its final termination, and when the prosecution is so conducted it is a bar to any further proceedings in the courts of the other state, even though the punishment may be different in each state. But a grant by Congress of concurrent criminal jurisdiction over boundary waters to bordering states in the acts creating them does not, in the absence of agreement between the states, give authority to one state to punish an act malum prohibitum committed on boundary waters within the actual territorial limits of the other states, where such act is one that is authorized by the laws of the latter state. The contrary rule has, however, been approved."

and in 11 R. C. L. 102 it is said:

"As to a river forming the boundary between two states, both states are sometimes given concurrent jurisdiction over the entire width of the river though the territorial boundary is the center of the river. This concurrent jurisdiction should not, however, be construed as giving one state the authority to punish criminally an act committed beyond its side of the river if such act was duly authorized by the neighboring state. Thus, though there are contrary opinions, it is generally held that if one state authorizes one of its citizens to catch fish in a certain manner on its own side of the center of the boundary river, the other state cannot make such catching a wrongful act and punish him therefor."

In the case of *Nielson* vs. *Oregon,* 212 U. S. 315, 53 L. ed. 528, the court holds that, for an act done on the Columbia River within the territorial limits of Washington which is expressly authorized by that state, one cannot be prosecuted and

punished by the State of Oregon by virtue of its concurrent jurisdiction over the river. However the court says:

> "Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel. Where an act is malum in se, prohibited and punishable by the laws of both states, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality on both states, so that one convicted or acquitted in the courts of the one state cannot be prosecuted for the same offense in the courts of the other. But, as appears from the quotation we have just made, it is not limited to this. It extends to civil as well as criminal matters, and is broadly a grant of jurisdiction to each of the states.
>
> "The present case is not one of the prosecution for an offense malum in se, but for one simply malum prohibitum. Doubtless the same rule would apply if the act were prohibited by each state separately; * * *."

There is a conflict in the authorities as to the right of one state to punish acts, which are mala prohibita, within the territorial limits of another state on a boundary river over which both states have concurrent jurisdiction which acts are authorized by the state in the territory of which the act was committed. Wisconsin, in the case of *Roberts* vs. *Fullerton,* 117 Wisc. 222, 93 N. W. 1111, follows the rule laid down in *Neilson* vs. *Oregon, supra.* On the other hand, Iowa is directly contrary as shown by the case *Iowa* vs. *Moyers,* 155 Ia. 678, 41 L. R. A. (N. S.) 366, 136 N. W. 896, which case follows the dissenting opinion contained in *Roberts* vs. *Fullerton, supra.* In this case the Iowa court holds that, by virtue of concurrent jurisdiction of the states bordering on the Mississippi River, Iowa may punish one for fishing with nets without its license on that portion of the river within the territorial jurisdiction of the neighboring state, although he has a license so to do from the latter state. It holds that the case of *Roberts* vs. *Fullerton, supra,* is against the substantial weight of authority and says:

> "So far as cognizance of crimes is concerned, it seems to be conceded on all hands that the officers of the state bounded by such river may make arrests for such criminal acts on any portion of the river so far as it constitutes the common boundary, that the courts into which such offenders are brought may try them for the offenses committed as though committed within the limits of the state, regardless of whether the place of commission was on one side or the other of the boundary line, and that they may be punished in accordance with the laws of the state in which they are thus put on trial. Several of the cases already cited illustrates this application of the concurrent jurisdiction which Congress has provided for in such cases. But we are unable to see any distinction which can be drawn between the power to provide a punishment for acts of an essentially criminal nature committed upon the waters of a boundary river, and the power to provide for and enforce a criminal punishment for acts not inherently or essentially criminal, but which are in violation of the police regulations of the state. In *Walsh* vs. *State,* 126 Ind. 71, 9 L. R. A. 664, 41 L. R. A. (N. S.) 25 N. E. 883, and *Har-*

relli vs. *Speed,* 113 Tenn. 224, 1 L. R. A. (N. S.) 639, 106 Am. St. Rep. 814, 81 S. W. 840, 3 Ann. Cas. 260, it was held that the liquor laws of one state might be enforced as to sales of liquors upon a boundary river over which it had jurisdiction, and in *Dugan* vs. *State,* 125 Ind. 130, 9 L. R. A. 321, 25 N. E. 171, the Sunday laws of the state were held applicable to persons pursuing a business on the river over which the state was given jurisdiction, although beyond its boundary line. In our own case of *State* vs. *Mullen,* 35 Iowa, 199, approved and followed in *State* vs. *Metcalf,* 65 Mo. App. 681, it was held that criminal nuisances committed anywhere upon the river over which the state has common jurisdiction may be punished in accordance with the laws of such state, regardless of the locality of the nuisance with reference to the boundary line. We see no distinction which can be drawn between statutes regulating the sale of intoxicating liquors and the maintenance of nuisances, and those relating to fishing."

In the courts of Ohio, where the question has arisen, no distinction has been made between acts which are mala in se and mala prohibita. In the case of *Dickow* vs. *Cincinnati,* 23 N. P. (N. S.) 1, it is held:

"A boat anchored in the Ohio river, opposite the Cincinnati shore, is within the municipal boundaries without regard to whether it is above or below low water mark; and such a boat is therefore within the legislative, executive and judicial jurisdiction of the city of Cincinnati subject to the paramount jurisdiction of the federal government over admiralty and interstate commerce subjects and the concurrent jurisdiction of Kentucky."

The case of *State* vs. *Savors,* 15 O. C. C. (N. S.) 65, holds:

"The state of Ohio has criminal jurisdiction of offenses committed beyond low water mark on the Ohio river, opposite the boundary of the state of Ohio.

"It is a violation of Section 4364-20b of the Revised Statutes of the state of Ohio to sell intoxicating liquors, as a beverage, on a boat anchored in the Ohio river opposite the shore of a municipality of this state, with a passageway for persons to and from the bank of said river in said municipality to said boat, after a majority of the voters of the municipality had voted to prohibit the sale of intoxicating liquors therein."

In opinions of the Attorney General for 1915, Vol. II, page 1009, the following is said:

"Thus it is clearly settled that the state of Ohio has both civil and criminal jurisdiction over the waters of the Ohio river beyond the territorial limits of the state of Ohio, technically speaking, to wit, the western or northwestern low water mark of said river. * * * It will be observed from the decision in the case of *Wedding* vs. *Meyler, supra,* that Ohio stands in the same light in respect to jurisdiction over the Ohio river as does Indiana, and that by virtue of the Virginia compact, Ohio has full jurisdiction and authority to administer its law below low water mark on the Ohio river."

and in reference to the right of this state to enforce its fish and game laws on the Ohio River, it is said in Opinions of the Attorney General for 1920, Vol. II, page 1055:

> "The waters of the Ohio river bordering the state of Ohio are within the jurisdiction of the state of Ohio, and persons may not, in view of the provisions of section 1431 G. C., hunt wild birds or wild animals on said river, without first having applied for and received a hunter's and trapper's license."

The court in the case of *State* vs. *Pyles,* 38 O. A. 380, by way of obiter dictum, made the observation that it has not been determined whether Ohio and the states across the Ohio River can legislate concerning fishing on its waters beyond the territorial limits of such states, and then said that the probable answer is in the negative, but this conclusion is not supported by the weight of authority and was not necessary to the decision of the questions involved in that case.

It seems clear, by the great weight of authority, that this state does have jurisdiction to enforce its fish and game laws on the Ohio River beyond the southern boundary of the state where the acts prohibited by this state are not permitted or authorized by the states across the river within whose territory it is committed; however, if the act is authorized or permitted by the state within whose territory it is committed, it would probably be held, in view of the holding of the United States Supreme Court in the case of *Nielson* vs. *Oregon, supra,* that this state would have no jurisdiction beyond its own territorial limits.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4204.

MUNICIPAL COURT—CLEVELAND—MAY REQUIRE SECURITY FOR COSTS IN FORCIBLE ENTRY AND DETAINER, COGNOVIT AND EJECTMENT ACTIONS.

SYLLABUS:

The Municipal Court of Cleveland has the power by rule of court, to require security for costs in forcible entry and detainer actions, actions on cognovit instruments, and ejectment actions.

COLUMBUS, OHIO, March 29, 1932.

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

GENTLEMEN:—I am in receipt of your recent letter in which you set forth the following inquiry:

> "Question: Has the Municipal Court of Cleveland power by rule of court, or otherwise, to require a deposit as security for costs in forcible entry and detainer actions, cognovit actions and ejectment actions?"