twenty years after the last due date of the principal sums respectively secured by said mortgages, the lien of the same has terminated, under the provisions of Section 8546-2, General Code, as enacted by an act of the General Assembly, passed March 27, 1925. Moreover, independent of the provisions of the section of the General Code just noted, the Statute of Limitations has long since run against the right of said mortgagees or their successors in interest to recover on said mortgages.

I am, therefore, of the opinion that the title of said John H. Vaden in and to the caption lands should be, and the same hereby is approved, subject only to the lien of any unpaid taxes on said lands levied for the year 1928. The abstract, which was certified under date of January 18, 1929, shows that on said date taxes on said lands in the sum of $18.75 were paid. Whether this payment covered the whole of the taxes on said lands for the year 1928 or only the taxes for the first half of the year 1928, does not appear. This is a matter which should be ascertained by you before the purchase of the caption lands is consummated.

An examination of Encumbrance Estimate No. 4774 shows that the same has been properly executed and that there are sufficient balances in the appropriate account to pay the purchase price of this land and the certificate of the Controlling Board over the signature of the Secretary shows that, on December 14, 1928, the purchase of the caption lands from the appropriate account was authorized by said board.

I am herewith returning to you said abstract of title, warranty deed, Encumbrance Estimate No. 4774, and Controlling Board certificate. When the corrected deed has been prepared and executed by said John H. Vaden, the same should be submitted to this department for approval.

Respectfully,
GILBERT BETTMAN,
Attorney General.

113.

BOARD OF CONTROL OF ARMORY—WHEN MEMBERS PERSONALL RESPONSIBLE—INFRINGEMENT OF MUSIC COPYRIGHT BY PHONOGRAPHIC REPRODUCTION.

SYLLABUS:

1. *Members of a board of control of an armory, who conduct, under their own management, entertainments in said armory building, are personally responsible to third persons on account of such entertainments.*

2. *A public performance for profit, where copyright music is reproduced by means of mechanical devices such as perforated music rolls, phonograph discs, records and the like, constitutes an infringement of said copyrights, unless permission is first procured for the reproduction of such music from the owner or owners of the copyrights or their assignee or assignees.*

COLUMBUS, OHIO, February 23, 1929.

HON. A. W. REYNOLDS, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your inquiry with reference to the alleged infringement of copyrights on musical compositions by the board of control of the armory at Marion, Ohio.

It appears that the board of control of the armory at Marion has in the past conducted a skating rink in the armory. The skating rink is open to the public and a small fee is charged for the privilege of skating. Music has been furnished for these occasions by the use of a phonograph, and it is claimed that phonograph records are used from which was reproduced copyrighted music, and that the permission of the owners of those copyrights, for the production of the said music, had not been obtained.

Your inquiry is whether or not it was necessary, under the circumstances, to secure the permission of the owners of the copyrighted music in order to make use of it in the manner above stated, and whether or not if permission was not secured before reproduction at a public skating rink such as was operated by the board of control of the Marion armory, any liability was incurred for having done so, and if so, upon whom does that liability rest.

The board of control of the Marion armory is composed of certain appointees of the State Armory Board. The appointments were made under, and the powers of the board are fixed by Section 5245, General Code, which reads as follows:

> "For each armory erected or provided he shall appoint a board of control, to consist of one or more officers of organizations quartered therein. Such board or officer in control may rent the armory for temporary purposes, subject to regulations to be prescribed by the adjutant general, and the money derived from such rental shall be paid into the treasury of the organization quartered therein."

It will be observed from the terms of the foregoing statute that the authority of the board of control with reference to the use of the armory for other than strictly military purposes extends only to renting the armory for temporary purposes, subject to regulations to be prescribed by the Adjutant General. It has been the custom, under regulations prescribed by the Adjutant General, to rent the several armories in the State for temporary purposes, such as dancing, skating and other uses. In some instances the board of control itself, instead of renting the armory to third persons, has conducted entertainments of various kinds in the armory under their own supervision, and if any profits accrued therefrom they were used by the board, under the supervision of the Adjutant General, for decorations and similar incidental uses in and about the armory. While there is no direct authority for such uses of the armory, it has long been the custom to permit the use of the armory as a sort of social center, and the custom has never been prohibited by the Adjutant General.

The board of control in conducting these entertainments acts on its own responsibility and not as agent of the State of Ohio, and would therefore be personally responsible for any liability that might grow out of such uses such as liability for the cost, over and above the proceeds arising therefrom, of any supplies or articles purchased or used in connection with conducting the enterprises.

In the particular case here under consideration I am informed that the board conducted a roller skating rink in the armory. No admission fee was charged, but a small fee was charged for the use of the skates and the privilege of the floor for skating. A phonograph was used to furnish music for the skaters and other persons who were there merely as onlookers. It is claimed that some, at least, of the musical compositions reproduced by the phonograph were copyrighted and that permission of the owners of the copyright was not obtained for the use of the phonograph records. A claim is now being made by the American Society of Composers, Authors and Publishers, who claim to be the assignee of these copyrights, for damages for the use of these phonograph records for public entertainments without permission of the owners or assignee of the copyrights.

Whether or not any of the musical compositions so reproduced were copyrighted and whether or not, if copyrighted, permission was not obtained for their use and the American Society of Composers, Authors and Publishers was the assignee of the copyrights are questions of fact. Assuming, for the purposes of this opinion, that the musical compositions reproduced by means of phonograph records at the skating rink were copyrighted, that permission for such use was not obtained, and that the American Society of Composers, Authors and Publishers is the assignee of these copyrights, it remains to determine just what liability attaches on account of said use.

The Federal Statutes, U. S. Code, Title 17, Sections 1 and 25 with reference to the subject of copyrights contains the following provisions:

> "Sec. 1. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (a) To print, reprint, publish, copy and vend the copyrighted work. * * *
>
> (e) To perform the copyrighted work *publicly for profit* if it be a *musical composition* and for the purpose of public performance for profit; and for the purpose set forth in subsection (a) hereof, to make any arrangement or setting of it or the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced. Provided, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to produce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of any foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, or law, to citizens of the United States similar rights. * * * (Italics the writer's.)
>
> Sec. 25. If any person shall infringe the copyright in any work protected under the copyright laws of the United States, such person shall be liable: (a) To an injunction restraining such infringement. (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement * * * or, in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts hereinafter as stated * * *. In the case of a dramatic or dramatico-musical or a *choral or orchestral composition* $100.00 for the first and $50.00 for every subsequent infringing performance; in case of other musical compositions $10.00 for every infringing performance." (Italics the writer's.)

Section 28 of the United States Code, Title 17, makes it a criminal offense punishable by fine or imprisonment for any person to wilfully and for profit infringe any copyright secured by the copyright act. An exception in said Section 28 makes its provisions inapplicable to the performing of religious or secular works such as oratorios, cantatas, masses or octavo choruses by public schools, church choirs or vocal societies provided the performance is given for charitable or educational purposes and not for profit.

Under former statutes which substantially gave protection only against the unauthorized multiplication and sale of copies, the manufacture or sale of perforated music rolls, phonograph discs, cylinders or other like devices serving to reproduce mechanically to the ear a musical work, was not an infringement of copyright in the musical work so reproduced, because not a "copy" of it within the meaning of the copyright statutes. Now however, as stated in 13 Corpus Juris, page 1149,

"A public performance for profit by means of mechanical devices such as perforated music rolls, phonograph discs, records, and the like, is an infringement, notwithstanding such mechanical means may not itself infringe the copyrighted music because not a copy of it, * * *"

In 13 Corpus Juris, page 1147, it is said:

"Ignorance of the copyright infringed is no defense."

It also seems that it makes no difference whether or not an admission fee is charged, if the performance is public and other considerations show it to be for profit. John Church Company vs. Hilliard Hotel Company, et al., 242 U. S. 591. In the above case it appears that the plaintiff owned the copyright of a lyric comedy in which was a march called "From Maine to Oregon." It took out a separate copyright for the march and published it separately. The defendant hotel company caused this march to be performed in the dining room of the Vanderbilt Hotel for the entertainment of its guests during meal time. It was contended by the hotel company that inasmuch as no charge was made for the music, and the patrons paid only for their meals, it was not a public performance for profit and did not amount to an infringement of plaintiff's copyright. The court held otherwise, however. In the course of the opinion, Justice Holmes said:

'If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendents could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendant's performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is, enough.'

I am of the opinion, with reference to the situation at the Marion Armory as outlined above, that if it be shown that copyrighted musical compositions have been reproduced by means of a phonograph, for the entertainment of the patrons of the skating rink, without permission of the owners of the copyright, there is a liability for damages on account of such use, in accordance with the laws relating to copyrights, and that liability under the circumstances rests on the individual members of the board of control of the armory.

I am informed that a proposition of settlement has been made. This is a private matter between the members of the board of control of the armory and the owners of the copyrights, or their assignee or assignees.

Respectfully,
GILBERT BETTMAN,
Attorney General.