funder, at the rate of three per cent per annum from the date of the payment thereof pursuant to the temporary order until the date on which the final assessment and determination is made, but in no case longer than one year after the happening of the contingency, or the termination of the condition, by reason of the existence of which the temporary order was made, to be charged equally against the state and the township or municipality sharing in the tax and to be paid as other refunders. Interest at the same rate shall also be allowed and paid on all excess amounts which may hereafter be found to have been paid in under temporary orders prior to the time at which this act takes effect but in such cases such interest shall begin to run from the taking effect of this act only."

It will be noted that this section has reference only to inheritance taxes paid under a temporary order under the provisions of Section 5343, General Code, which relates to the taxation of estates dependent upon contingencies, conditions, etc. There is therefore an express provision for the allowance of said interest. The Tax Commission is a part of the executive department of the state and its powers are limited by constitutional and statutory enactment. It therefore may not order or allow interest to be paid by the state unless expressly authorized to do so. With the exception of the provisions of Section 5343-1, General Code, there is no authority granted the state Tax Commission to order interest to be paid upon refunders.

It is therefore my opinion:

(1) That when the probate court determines the inheritance tax in an estate and an appeal is taken from the order of said court in sustaining or overruling exceptions filed to said order of determination the order and judgment of the common pleas court in said case should be certified to the probate court to be carried into execution.

(2) That when a refunding order is entered (other than a refunding order under Section 5343-1, General Code) the judgment against an estate for refunder should not bear interest.

Your questions as you state are asked for the future guidance of the Commission, and the answers herein are so intended. The judgment in the instant case is res adjudicata.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1367.

INSURANCE CORPORATION—REQUIRED TO COMPLY WITH INSURANCE LAWS OF OHIO—MUST BE DULY LICENSED IN OHIO TO TRANSACT BUSINESS.

SYLLABUS:

An Ohio corporation proposing to transact the business of insurance in Ohio is required to comply with the insurance laws of this state, and to be duly licensed by the insurance department of Ohio to transact its appropriate insurance business.

COLUMBUS, OHIO, December 14, 1927.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

"Under date of February 4th, 1911, certain interested parties executed articles of incorporation for the Green Township Mutual Aid Society. These articles, however, for some reason were never filed with the Secretary of State. Notwithstanding this fact, this society has been operating since 1911 under the belief that its articles had been properly filed.

In a recent correspondence, however, with a member of this society, this office informed those interested parties as above that articles had never been received for filing in this office.

We are now in receipt of the original articles under date of February 4, 1911, and also proposed articles properly executed for filing under the general corporation act.

Your opinion is requested as to whether or not the original articles can be admitted to filing at this time or whether, on the other hand, the recently executed articles should be admitted to filing.

Further, if in your opinion, the articles are such as will create a corporation falling in the classification of a mutual insurance company, also indicate your approval or disapproval in such connection.

In case in your opinion the original articles can be admitted to record at this time, also advise as to amount of fee to be required."

An examination of the original articles of incorporation, dated February 4, 1911, accompanying your letter, and from information quoted thereon, it appears that four of the proposed incorporators are not now members of the association and that one of the original proposed incorporators is deceased. This would leave only two of the original proposed incorporators members of the company at the present time, or on the date at which they were offered to be filed with the Secretary of State.

You inquire whether in my opinion the original articles of incorporation can be admitted to filing at this time. Under the circumstances detailed herein, it is my opinion that they are not entitled to be so admitted.

Accompanying your letter in connection with the original proposed articles of incorporation are articles of incorporation offered to be filed, duly executed in regular form under the provisions of Section 8623-98, General Code.

The purpose clause of the two proposed articles of incorporation, both in the original under date of February 4, 1911, and the later one under date of November 21, 1927, is the same, to-wit:

"to assist its members in case of sickness by paying to such sick members, five ($5.00) dollars per week for ten (10) weeks and three ($3.00) dollars per week for the succeeding ten (10) weeks, and in case of death of a member, each member in good standing is assessed the sum of one ($1.00) dollar, said money or amount thus collected to be paid to the family or legal heirs of the deceased member."

You also inquire whether these articles are such as might fall within the classification of a mutual insurance company under the laws of Ohio. In reply will say, it is my opinion that said association would come under the mutual protective, or stipulated premium or assessment plan, health and accident association, as provided for in Section 9445, General Code. Said section provides:

"Companies consisting of five or more citizens of this state may be organized under this chapter and sections ninety-four hundred and forty-five to ninety-four hundred and fifty-one, both inclusive, for the special purpose of insuring against accidental personal injury and loss of life, sustained while

traveling by railroad, steamboat or other mode of conveyance, and against accidental loss of life and personal injury, sustained by accident of any description whatever, and against expenses and loss of time occasioned by injury or sickness, and on such terms and conditions, and for such periods of time, and confined to such countries and localities, and to such persons as may at any time be provided in the by-laws of the company."

It will be observed, however, that the number of incorporators required in that section is five. It is also apparent that this association has been operating for some years past under the mistaken belief that it was regularly incorporated. It is clear, however, that it has not been so incorporated, and neither has it been licensed by the insurance department of Ohio to transact its appropriate business under the above mentioned section.

The leading case involving the nature of these contracts is *Commonwealth* vs. *Wetherbee,* 105 Mass. 149. The contract involved was made by an organization known as the Connecticut Mutual Benefit Company. It provided that the member should pay a fixed sum at the inception of the contract, certain annual assessments, and a supplementary assessment on the death of any member of the division to which he belonged. On the death of a member by a peril insured against, the company promised to pay as many dollars as there were members in the class to which the deceased member belonged. After defining "life insurance," Justice Gray, who delivered the opinion, says:

"This is not the less a contract of insurance because the amount to be paid is not a gross sum, but a sum graduated by the number of members holding similar contracts, nor because a portion of the premium is paid at uncertain periods, nor because in case of nonpayment of an assessment the contract provides no means of enforcing payment, but merely declares the contract to be at an end. The contract is an insurance contract, though the object of the organization is benevolent, and not speculative."

Similar to this contract is the one considered in *State* vs. *Citizens' Ben. Ass'n.,* 6 Mo. App. 163. The agreement on the part of the association in this case was to pay to the beneficiary such an amount as might be collected by assessment on other members of the class to which the member belonged. Relying on the principles stated in the Wetherbee Case, the court regarded this contract as one of insurance.

The proposed articles of incorporation under date of November 21, 1927, are offered under the new general corporation laws of the state. It is my opinion that the business proposed to be transacted by this association, being an insurance business, would require it to comply with the insurance laws of this state.

Section 665, General Code, provides as follows:

"No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

In view of the foregoing, it is my opinion that for reasons heretofore given, neither of said articles of incorporation is entitled to be filed by the Secretary of State.

It is also my opinion that if said association proposes to transact its appropriate business, it should be incorporated under the provisions of Section 9445, General Code, supra, and receive a proper license from the insurance department for the transaction of its business.

Respectfully,
EDWARD C. TURNER,
Attorney General.

P. S.—I am returning to you herewith both proposed articles of incorporation for your files.

E. C. T.
Attorney General.

1368.

GARAGE—DIRECTOR OF HIGHWAYS AND PUBLIC WORKS IN ERECTING GARAGE, THE AGGREGATE COST OF WHICH EXCEEDS $3,000.00, MUST COMPLY WITH SECTIONS 2314 TO 2332, GENERAL CODE.

SYLLABUS:

The Director of Highways and Public Works must comply with Sections 2314 to 2332, both inclusive, of the General Code, when he wishes to build a garage for the use of the state, the aggregate cost of which exceeds three thousand dollars.

COLUMBUS, OHIO, December 14, 1927.

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

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion, as follows:

"This office is in receipt of Voucher No. 47350 from the Department of Highways and Public Works. By it authorization is given for the payment of $2,755.00 to ---------- for the erection of a highway garage at ----------, Ohio. This is estimate Number One on highway maintenance order number 8490, copy of which is hereto attached. I am advised that plans and specifications for the structure were prepared by the state architect and that bids were invited informally and that the bid of $42,720.00 by ---------- of ----------, Ohio, was the lowest of the bids submitted. Following the receipt of bids a maintenance order, number 8490, was issued for the construction of the building. The procedure outlined in Sections 2314 to 2332, G. C., relating to the filing of plans and advertising for bids, was not allowed.

The question at issue is whether it is necessary that these general sections be complied with in the construction of garages for use of the Division of Highways.

For your information I would advise that this question was submitted to your predecessor last year, and under date of October 8, 1926, he gave us a ruling in which he advised that it was unnecessary for the Highway Department to follow the procedure as set forth in the above mentioned statutes. In order that our auditing of expenditures may be in accord with your interpretation of the law, I herewith request that you review the ruling above mentioned and render your formal opinion relative to the question at issue."