

service officer when necessary under the provisions of section 3004, General Code."

From an examination of the above sections of the General Code and the opinion's, it appears that the fund provided in 3004 may be used for secret service in instances where there has been no officer appointed under section 2915-1, and where there has been an appointment made under the above section, and the use of such fund is to provide a secret service officer in addition to one provided for in section 2915-1, when such use is in furtherance of justice.

It would naturally follow that if the fund provided by 3004 G. C. can be used to employ a secret service officer, in addition to the one provided by 2915-1, when such use is in furtherance of justice, the prosecuting attorney could employ him at an annual salary.

It is the opinion of this department that the prosecuting attorney may legally employ a secret service officer at an annual salary, payable out of his allowance under section 3004, General Code, his employment being continuous throughout the year.

Respectfully,

C. C. CRABBE,

Attorney General.

325.

DEPOSIT OF FOREIGN INSURANCE COMPANY—HOW RELEASED—SUPERINTENDENT OF INSURANCE MUST BE SATISFIED THAT ALL LIABILITIES AND OBLIGATIONS WHICH THE DEPOSIT WAS MADE TO SECURE HAVE BEEN PAID AND EXTINGUISHED—IF IN DOUBT HE IS AUTHORIZED TO ASK FOR FAVORABLE DECISION BY COURT OF COMPETENT JURISDICTION.

SYLLABUS:

1. *The deposit of securities with the Superintendent of Insurance of Ohio, made by a foreign insurance company as a prerequisite to the transaction of business in Ohio, can only be withdrawn when such Superintendent is satisfied that all liabilities and obligations which said deposit has been made to secure have been paid and extinguished.*

2. *An indemnifying bond, however desirable it may be, would not alone justify the release of such deposit, since there seems to be no statutory provision in Ohio for the acceptance of a bond in lieu of the deposit.*

3. *Upon the proofs offered of the extinguishment of all liabilities and obligations which the deposit was made to secure, if the Superintendent of Insurance of Ohio is still in doubt, he is justified in asking the protection of a favorable decision by a court of competent jurisdiction, authorizing the release of the securities so deposited.*

COLUMBUS, OHIO, May 9, 1923.

HON. HARRY L. CONN, *Superintendent of Insurance of Ohio, Columbus, Ohio.*

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

“The American Indemnity Company of Galveston, Texas, has \$50,000 securities, on deposit with this Department, which it desires to withdraw.

“The company advises that there are no policies in force in Ohio, and that it has not written a policy in this state during the last two years; that the only claim existing against the company in Ohio is one involving \$1,000.

“The company suggests that we should allow the withdrawal of the securities because the State of Texas would release a deposit of a foreign company, if such company would furnish the Insurance Commissioner with a bond of sufficient amount to guarantee protection to outstanding policy holders, referring us to section 253 of the 1920 Digest of Insurance Laws of the State of Texas.

“The company suggests that, under the Retaliatory Act, this procedure should obtain.

“Will you kindly advise me whether you think, under our law, this plan is permissible?”

Section 253 of the Digest of 1920, Insurance Laws of the State of Texas, is as follows:

“That any such company, domestic or foreign, may at any time surrender to the Commissioner of Insurance and Banking its said certificate of qualification, and shall thereupon cease to engage in said business of suretyship; and such company shall thereupon be entitled to the release and return of its said deposit as aforesaid, in manner following: Said company shall file with said Commissioner of Insurance and Banking a statement in writing, under oath, giving the date, name and amount of all its then existing obligations of suretyship in this state, briefly stating the facts of each case to said Commissioner of Insurance and Banking, who, after examination of the facts, shall require said company to file with the Treasurer of this state a bond, payable to the state, under its contracts, conditioned for the faithful performance and fulfillment of all its outstanding obligations, or it may, at its option, reinsure its risks in some surety company authorized to do business in this state, or cancel all bonds on which it is liable, and return a pro rata of the premium received thereon, whenever such cancellation and return can be done without impairing its obligations to third parties.”

Under the above section of the Texas laws, a very clear provision is made for a company desiring to cease operations in the State of Texas to withdraw its securities from deposit in that state.

An examination of our statutes fails to disclose any similar provision of a reciprocal nature in Ohio.

Section 656 of the General Code of Ohio provides for the discontinuance of insurance companies, other than life, and provides that the Superintendent of In-

insurance may deliver the securities deposited with him, to the companies so depositing, under certain conditions, as follows:

"When any insurance company or corporation other than life, which has made a deposit with the superintendent of insurance, intends to discontinue its business in this state, the superintendent upon application of such company or corporation, shall give notice at its expense of such intention at least once a week for six weeks in three newspapers of general circulation in the state. After such publication, the superintendent shall deliver to such company or association its securities held by him, if he is satisfied by the affidavits of the principal officers of the company and on an examination made by him or by some competent, disinterested person or persons appointed by him if he deems it necessary, that all liabilities and obligations which said deposit has been made to secure have been paid and extinguished; but the superintendent may, from time to time, deliver to such company or its assigns, under like condition, any portion of such securities on being satisfied that an equal proportion of said liabilities and obligations have been satisfied, if the amount of securities retained by him is not less than twice the amount of the remaining liabilities and obligations."

In a former opinion of this department, Vol 1, 1911-1912, at page 817, the syllabus reads as follows:

"Sections 9565 and 9373 of the General Code were not repealed by the amendment to section 656.

"The deposit with the superintendent of insurance in compliance with sections 9373 and 9565 of the General Code is a trust fund whose conditions and limitations were neither enlarged nor diminished by the amendment to section 656. Said deposit is absolutely 'For the benefit and security of policy holders residing in the United States and it cannot be withdrawn until all debts and liabilities which the deposit is made to secure * * * are paid and extinguished.'"

Quoting from the above opinion, it is stated:

"Under and by virtue of section 9373, in the case of life insurance companies, and of section 9565, in the case of companies other than life, the deposit with the superintendent of insurance is made and the trust imposed upon him, created. The conditions and limitations of that trust were neither enlarged nor diminished by the amendment of section 656."

Section 656 undertakes to establish the method in which such deposit may be withdrawn.

Again quoting from the language adopted in said opinion, as follows:

"Section 656 not only provides that before the superintendent shall permit a withdrawal of the securities, he shall be satisfied, by affidavits and examination, that all debts and liabilities due, or to become due, upon any contract or agreement made with any citizen or resident of the State of Ohio, are paid or extinguished, but in express terms it also provides

that before he permits such withdrawal, he must be satisfied 'that all debts and liabilities which the deposit was made to secure * * * are paid and extinguished.'

"Since our courts time and again have held that repeals by implication are not favored and since it is clear that the deposite made under sections 9373 and 9565 of the General Code are 'made to secure all debts and obligations due or to become due to policy holders residing in the United States,' as well as those resident of Ohio, section 656 must be considered as merely cumulative and as intending to provide that the superintendent of insurance shall not permit the deposit to be withdrawn until not only all obligations to policy holders residing in the United States (including those in Ohio) are extinguished—those being the 'debts and liabilities which the deposit was made to secure'—but until all other debts and liabilities upon 'any contract or agreement made with any citizen or resident of the State of Ohio are paid or extinguished.'

"Whether section 656 would be effectual thus to extend the condition of the trust deposit and to permit the superintendent of insurance to withhold the deposits until further obligations not strictly covered by the terms of the trust be extinguished, is, to say the least, an open question; although it might, and probably would, be contended that the deposit is to be regarded as made in view of all the statutes upon that subject."

It will be observed that the language used in section 656 is:

"If he (the superintendent of insurance) is satisfied by the affidavits of the principal officers of the company and on an examination made by him or by some competent, disinterested person or persons appointed by him, if he deems it necessary, that all liabilities and obligations which said deposit has been made to secure have been paid and extinguished."

It will be observed that the language under which this deposit is made and necessary to be construed in connection with this subject, being a part of section 9510 of the General Code, is as follows:

"But a company of another state, territory, district or country admitted to transact the business of indemnifying employers and others, in addition to any other deposit required by other laws of this state, shall deposit with the superintendent of insurance for the benefit and security of all its policy holders, fifty thousand dollars in bonds of the United States or of the State of Ohio, or of a county, township, city or other municipality in this state, which shall not be received by the superintendent at a rate above their par value. The securities so deposited may be exchanged from time to time for other securities. So long as such company continues solvent and complies with the laws of this state, it shall be permitted by the superintendent to collect the interest on such deposits."

In the case of Turner, Attorney General of Ohio, on behalf of Frank Taggart, Superintendent of Insurance of Ohio, v. Union Casualty Insurance Company of Philadelphia, decided November 30, 1917, reported in 28 O. C. A. at page 113, the first branch of the syllabus uses the following language:

"1. The deposit made by a foreign insurance company with the state superintendent of insurance as a prerequisite to doing business in Ohio should be administered, in the event of the insolvency of the insurance company, by said superintendent of insurance under the direction of the Ohio court to Ohio policy holders directly, instead of being turned over to the legal representatives of the insurance company in the state of its domicile."

On page 117, the Court says:

"This Court formerly had before it, for consideration, in the case of Hogan, Attorney General, v. Empire State Surety Company, the question now presented. In that case this court stated:

'It is evident, however, that the deposit provided for in section 9510 was intended to be held for the benefit of the policy holders whose rights grow out of contracts made and business transacted in the State of Ohio.'

"We have carefully considered sections 9510, 641, 642, 643 and 656, General Code, as they existed at the time the rights of the Ohio claimants to this fund accrued, and have also examined other sections of the statutes in *pari materia* with the sections above quoted, and after such consideration, we cannot escape the conclusion that the said sections of our code, when read together, reflect an intention upon the part of the legislature to require said deposit to be held for the primary benefit of Ohio policy holders. Where the legislature provides for a deposit as a condition precedent to the right of a foreign corporation to do business within the state, we think the primary inference is that such deposit was required for the purpose of protecting the policy holders whose policies were issued within the state, and in order to extend the benefit of such deposit to the general policy holders of the company, we think the statute should clearly express such intention.

"It is urged that the amendment to section 9510, General Code, of date April 25, 1904, striking out the provisions as to the policy holders residing in this state and inserting the provision 'for the benefit of all its policy holders,' clearly shows an intention upon the part of the legislature to extend the protection of the deposit to all the policy holders of the company, irrespective of the state wherein such policies may have been issued.

"If section 9510, General Code, was the only section to be considered, then there would be much force in this contention, but when all the statutes relating to such deposit, and the distribution or discontinuance of business are considered, then we think it does not appear that the legislature intended to extend the benefit of such deposit to policy holders generally."

While our courts have held that the Ohio deposit, upon liquidation is primarily for the benefit of Ohio policy holders, yet there is an element of doubt as to just what liabilities and obligations are contemplated in section 656, and in view of the fact that sections 9373 and 9565 were not repealed upon the passage of section 656, and that the limiting words have been stricken out of section 9510, you are advised that, in our opinion, you would not be justified in releasing the deposit inquired about in your letter upon the execution of the undertaking or bond mentioned, however desirable that might be, since there seems to be no statutory pro-

vision in Ohio for your acceptance of a bond in lieu of the deposit. Under the circumstances, we are inclined to the opinion that you will be justified in asking such a showing under the statute as will satisfy you, as such Superintendent, that all liabilities and obligations which said deposit has been made to secure have been extinguished, and if still in doubt you will be justified in asking the further protection of a decision by a court of competent jurisdiction so finding and authorizing the release of the securities mentioned.

Respectfully,
C. C. CRABBE,
Attorney General.

326.

UNDER SECTION 6602-6 G. C. COUNTY COMMISSIONERS MAY CONTRACT FOR CONSTRUCTION OF SEWERAGE AND DISPOSAL PLANT WITHOUT ADVERTISING FOR SEALED PROPOSALS AS PROVIDED IN SECTION 6602-5 G. C.

SYLLABUS:

Under the provisions of section 6602-6 of the General Code, the county commissioners may enter into a contract for the construction of a sewerage and disposal plant without advertising for sealed proposals for the construction of such plant as provided for in section 6602-5 of the General Code.

COLUMBUS, OHIO, May 9, 1923.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your statement of facts and request for an opinion, as follows:

"In the course of our examination of the different sanitary sewer districts in the county of Montgomery, procedure has been called to our attention as follows:

"(a) Petition by the property owners for improvement in accordance with the provision of section 6602-6 G. C. Consent of the property owners that the lots and lands shall be assessed and they waive the publication of all resolutions and legal notices as provided under section 6602-6.

"(b) Property owners waive option to pay assessment in cash.

"(c) Resolution by County Commissioners establishing sewer system district in accordance with 6602-6 G. C., employing sanitary engineer and directing him to prepare plans, estimates of cost of construction, and an estimate of the assessment, the same to be submitted to the Board, subject to the inspection of the property owners.

"(d) Resolution by the County Commissioners stating that the petition was received from all the owners of the lots and lands in the district requesting installation of a sanitary sewer or water system. That the owners have examined the estimate of cost and assessments as made by the engineer and they have no objection thereto and that they waive