2871.

APPROVAL—THE FORM OF A PRIVATE SIDE TRACK AGREEMENT BETWEEN THE NEW YORK CENTRAL RAILROAD COMPANY AND THE DEPARTMENT OF HIGHWAYS OF THE STATE OF OHIO.

COLUMBUS, OHIO, June 29, 1934.

HON. O. W. MERRELL, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval the form of a private side track agreement to be executed by and between The New York Central Railroad Company and the Department of Highways of the State of Ohio in connection with certain improved property in the City of Delaware, Ohio, which was formerly owned by The Rainbow Tire and Rubber Company and which was recently acquired by the State of Ohio for state highway garage and other related purposes.

This proposed side track agreement is, for the most part, in the standard form prescribed for use as between railroad companies and persons and corporations owning and carrying on industries served by railroads by means of switch tracks leading to such industrial plants and establishments. As might be expected in this situation there are some provisions in the standard form of this proposed agreement which can only with great difficulty be given any legal effect as against the State of Ohio or a governmental department of the state as one of the contracting parties. This observation is more particularly pertinent to the eighth paragraph of this agreement wherein it is provided that:

> "The INDUSTRY assumes all responsibility for and shall indemnify and hold harmless the RAILROAD from and against loss or damage to property of the INDUSTRY or to property upon the premises of the INDUSTRY or upon said track regardless of the RAILROAD'S negligence, arising from fire caused by locomotives operated by the RAILROAD for the purpose of serving said INDUSTRY, except to the premises of the RAILROAD and the rolling stock belonging to the RAILROAD or to third parties and to shipments then in the common carrier custody of the RAILROAD."

It is quite probable that this provision is one founded on sound business reasons as they appear in the operation of contracts of this kind as between railroads and private industries served by the railroads by means of side tracks of the kind here contemplated. However, the difficulty in the application of a provision of this kind in a contract where the state or one of its governmental departments is one of the contracting parties, arises from the obvious rule and principle that the authority of an officer of the state to bind the state by contract is limited, and is extended ordinarily only to those matters as to which express authority is given by the statute or to those matters as to which the authority is implied in order to carry out express powers granted to such officers. In this view, it may be stated that notwithstanding the general rule that the state in acting with respect to its proprietary affairs is bound by those rules of right and justice which bind one of its citizens in like situation, it may well be doubted whether you, as the Director of the Department

of Highways and as one of the contracting parties to this proposed agreement, can bind the state in the assumption of such liabilities with respect to the operation of the side track here in question, imposed by the provisions of paragraph 8 of this contract above referred to. However, I do not deem it necessary to discuss this question at length for the obvious reason that any limitations upon your authority with respect to the matters set out in paragraph 8 of this contract would not affect in any way the validity of the other and, perhaps, more pertinent provisions of the lease in their application to the maintenance and operation of this side track. It is to be assumed that the railroad company in submitting this paragraph, which is a part of the standard form of contracts of this kind, well knew and rightly appreciated the limitations imposed upon you as a state officer with respect to the assumption on behalf of the state of liabilities of this kind. However, as above indicated, the most that can be said of this provision in its relation to this particular contract with the state or one of its governmental departments as one of the contracting parties is, that it is ineffective for any purpose and does not in any wise affect the other provisions of the contract with respect to this side track.

Upon these considerations and finding that said agreement is otherwise in proper form, I am inclined to the view that no adequate reasons appear why this contract should not be approved by me as to the form thereof. I am accordingly approving this lease as to the form thereof; and I herewith return to you all of the files forwarded to me in this matter.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2872.

COUNTY — DEPOSITORY CONTRACT — COMMISSIONERS UNAUTHORIZED TO COMPROMISE OR RELEASE BANK FROM REPAYMENT OF COUNTY FUNDS—PLAN RESUMPTION OF BUSINESS BY COUNTY DEPOSITORY BANK.

SYLLABUS:

1. *When the deposits in a county depository bank, made by a county treasurer of funds in his possession, consist of undivided tax moneys, which upon proper settlement by the county treasurer would become due to the state, county and other taxing subdivisions, the county commissioners of the county are without authority to compromise or release, in whole or in part, the obligation of the bank and its bondsmen to repay, or account for, any portion of the said funds, except that portion which upon settlement of the county treasurer would be due to the county. Opinions of the Attorney General,* 1931, *Vol.* II, *p.* 1245, *approved and followed:*

2. *Where there is a plan for resumption of business by a county depository bank, whereby depositors are to receive 40% of their deposits upon resumption of business, and debenture notes issued by a mortgage loan company for the other*