963.

APPROVAL GAS AND OIL LEASE FROM STATE OF OHIO TO THE OHIO FUEL SUPPLY COMPANY, SECTION 16, TOWNSHIP 9, RANGE 18, VINTON COUNTY, OHIO.

COLUMBUS, OHIO, January 24, 1920.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter dated January 21, 1920, transmitting for approval the gas and oil lease from the state to The Ohio Fuel Supply Company for part of section 16, township 9, range 18, in Vinton county, Ohio.

The facts are noted that these lands have been heretofore conveyed by the state to the lessees originally holding under perpetual leases and that the lessees have made arrangements and are required to discharge any and all obligations and liabilities for damages which may accrue by reason of drilling and operation. It is further noted that the lease is executed under the authority of section 3209 G. C., as amended in 105 O. L., page 6.

Consideration of the facts stated, the character of the land leased and the terms of this section which vests authority and discretion in such matters in the state auditor to lease such lands "upon such terms and for such time as will be for the best interest of the beneficiaries thereof," subject to the approval of the governor and attorney-general, this department is aware of no objections to such lease and the same, being in conformity to said section and apparently for the best interests of the beneficiaries thereof, is therefore approved.

Respectfully,
JOHN G. PRICE,
Attorney-General.

964.

APPROVAL, BONDS OF WILLOUGHBY VILLAGE SCHOOL DISTRICT, IN AMOUNT OF $25,000.

COLUMBUS, OHIO, January 24, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

965.

BANKS AND BANKING—SUPERINTENDENT OF BANKS MAY REQUIRE DEPOSIT OF BANKING CORPORATION WHOSE ARTICLES OF INCORPORATION CONFER UPON IT TRUST POWERS.

Before the superintendent of banks issues to a banking corporation, whose articles of incorporation confer upon it trust powers, whether it uses the word "trust" in its corporate name, or not, the certificate mentioned in section 710-56 G. C., (108 O. L. 94), to the effect that it has complied with all the provisions required by law and is authorized to commence business, he may properly require that the deposit of one hundred thousand dol-

lars mentioned in section 710-150 *G. C.* (108 *O. L.* 118), *be made by it. (As to whether such requirement should be made of guaranty title and trust companies, not considered),*

COLUMBUS, OHIO, January 26, 1920.

HON. IRA R. PONTIUS, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of the following communication from you:

> "Will you please advise this department in connection with the two questions submitted herewith, arising under recently enacted section 710, General Code of Ohio?
>
> (1) May the superintendent of banks properly require that the deposit of $100,000 mentioned in 710-150 be made as an incident to his issuance of the certificate mentioned in 710-55 and 56, by a banking corporation chartered with trust powers and using the word "trust' in its corporate name?
>
> (2) May the superintendent of banks properly require that the deposit of $100,000 mentioned in 710-150 be made as an incident to his issuance of the certificate mentioned in 710-55 and 56, by a banking corporation chartered with trust powers but which does not use the word 'trust' in its corporate name?"

You have advised that you do not wish me to consider these inquiries as relating to guaranty title and trust companies and I am therefore expressing no opinion as to your powers or duties regarding the organization of such companies.

The discussion of the above questions properly begins with a consideration of article XIII, Sec. 3 of the constitution of Ohio, which provides:

> "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her; except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word 'bank,' 'banker' or 'banking,' or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state."

The legislature, in enacting the Graham banking act, went somewhat beyond the constitutional provisions by the enactment of section 710-3 G. C., in the following language: (108 O. L. 81.)

> "The use of the words 'bank,' 'banker' or 'banking,' or 'trust,' or words of similar meaning in any foreign language, as a designation or name, or part of a designation or name, under which business is or may be conducted in this state, is restricted to banks as defined in the preceding section. All other persons, firms or corporations are prohibited from soliciting, accepting or receiving deposits, as defined in section 2 of this act and from using the word 'bank,' 'banker,' 'banking,' or 'trust,' or words of similar meaning in any foreign language, as a designation or name, or part of a designation or

name, under which business may be conducted in this state. Any violation of this prohibition, after the day when this act becomes effective, shall subject the party chargeable therewith, to a penalty of $100.00 for each day during which it is committed or repeated. Such penalty shall be recovered by the superintendent of banks by an action instituted for that purpose, and in addition to said penalty, such violation may be enjoined and the injunction enforced as in other cases.

Provided, however, that any corporation now incorporated under a name which includes the word 'trust,' and which is qualified to transact a trust business, may continue the use of such word so long as it complies with the requirements of this act; provided, that every corporation incorporated under a name which includes the word 'trust' and is not qualified to transact a trust business is required to change its name so as to eliminate the word 'trust' therefrom within two years from the date when this act becomes effective during which period such company shall not be subject to the penalty of this section."

The steps to be taken in the organization of a bank or trust company are also prescribed in the same act. Section 710-41 G. C. relates to the number of incorporators, the name to be used, the place where business is to be transacted, the amount of capital and its division into shares, and requires the articles of incorporation to set out:

"the purpose for which it is formed, whether that of a commercial bank, savings bank, trust company, or a combination of two or more or all, of such classes of business, or a special plan bank, as provided in section 180 of this act."

Subsequent sections make it the duty of the secretary of state to transmit to the superintendent of banks a copy of such articles of incorporation and provide that the incorporators must cause notices of their intention to organize to be published. The language of section 710-44 G. C. is in part as follows; (108 O. L. 91.)

"Upon receipt of a copy of the articles of incorporation of such proposed bank, the superintendent of banks shall at once examine into all the facts connected with the formation of such proposed corporation including its location and proposed stockholders and if it appears that such corporation, if formed, will be lawfully entitled to commence the business of banking, the superintendent of banks shall so certify to the secretary of state, who shall thereupon record such articles of incorporation. * * *"

It should here be observed that by section 710-2 G. C. the term "bank" is to include trust companies unless the context otherwise requires. After the superintendent's certificate has been furnished and the articles of incorporation recorded as provided in section 710-42 G. C., the bank completes its organization and the general incorporation laws are made applicable by section 710-52 G. C. The next duty of the superintendent is prescribed by sections 710-55 and 710-56, containing the following language: (108 O. L. 93-94.)

"Sec. 710-55. When a certificate is transmitted to the superintendent of banks, signed by the president, secretary or treasurer of such corporation, notifying him that the entire capital stock of such corporation is subscribed, and paid in, and that such corporation has complied with all the provisions of law required to be done before it can be authorized to commence business,

the superintendent of banks shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each director, the amount of capital stock of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business.

Sec. 710-56. If upon such examination of the facts referred to in section 55, and of any other facts which may come to the knowledge of the superintendent of banks, he finds that such corporation is lawfully entitled to commence business, he shall give it a certificate under his hand and official seal that it has complied with all the provisions required by law and is authorized to commence business."

We are now brought to an examination of section 710-150 G. C. The following portion of it is material: (p. 118 of 108 O. L.)

"No trust company, or corporation, either foreign or domestic, doing a trust business shall accept trusts which may be vested in, transferred or committed to it by a person, firm, association, corporation, court or other authority, of property within this state, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash the sum of one hundred thousand dollars, except that the full amount of such deposit by such corporation may be in bonds of the United States, or of this state or any municipality or county therein, or of any other state or any municipality or county therein, or in the first mortgage bonds of any railroad corporation that for five years last past has earned at least five per cent net on its issued and outstanding capital stock, which securities and the sufficiency thereof shall be approved by the superintendent of banks. * * *"

In this connection we should also consider section 710-151 and a part of section 710-154 G. C., which respectively provide: (108 O. L. 118-119.)

"Sec. 710-151. Every foreign trust company shall, upon being admitted to do business within this state as otherwise provided by law, file a certified copy of its certificate of admission with the superintendent of banks, together with a certified copy of the last published statement made by it and filed with the proper department of the state in which it is organized and doing business, and upon approval thereof and of the funds and securities to be deposited as in the preceding section provided, he shall certify that fact to the treasurer of state, and upon deposit of such funds and securities with the treasurer of state the superintendent of banks shall thereupon, and upon the payment of a license fee of one hundred dollars therefor, license said trust company to transact business within this state for the period of one year thereafter."

"Sec. 710-154. No such trust company, foreign or domestic, authorized to accept and execute trusts, either directly or indirectly through an officer, agent or employe thereof, shall certify to any bond, note or other obligation to evidence debt, secured by any trust deed or mortgage upon or accept any trust concerning property located wholly or in part in this state, without complying with the provisions of sections 150, 151 and 152 of this act. * * *"

The powers of trust companies appear in sections 710-156, et seq., G. C. By the former they

"may receive and hold moneys, or property in trust, or on deposit from execu-

tors, administrators, assignees, guardians, trustees, corporations or individuals upon such terms and conditions as may be agreed upon between the parties."

The subsequent sections recite what are strictly trust duties. Section 710-161 declares that: (p. 121 of 108 O. L.)

"The capital stock of such trust company, with the liabilities of the stockholders existing thereunder, and the fund deposited with the treasurer of state as provided by law shall be held as security for the faithful discharge of the duties undertaken by such trust company in respect to any trust, and no bond or other security, except as hereinafter provided, shall be required from any such trust company for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, assignee, or depositary; except that the court or officer making such appointment may, upon proper application, require any trust company which shall have been so appointed to give such security for the faithful performance of its duties as to the court or officer shall seem proper, and upon failure of such trust company to give security as required may remove such trust company and revoke such appointment."

The difficulty encountered is now apparent. Must the trust company make its deposit of $100,000 with the treasurer of state before it receives its final certificate, or may it incorporate with trust powers, but withhold its deposit until it actually accepts the trust or enters upon the discharge of trust duties? In other words, may we have an inactive trust company organized under the present act without such deposit being made?

A superficial consideration of sections 710-150 and 710-154 G. C. would seem to make the deposit a prerequisite only to the acceptance of trusts or the certification of bonds, notes or other obligations. This view is strengthened by the contemporaneous construction of certain old sections under which deposits were not required from inactive trust companies.

The provisions quoted from section 710-150, with some exceptions not material here, were found in section 9778 G. C.; those quoted from section 710-154, in section 9780. We have therefore to consider whether or not the same rule should be followed in applying the present act, or whether there is something in the latter which requires a deposit at the time of the organization of the company.

It has been noted above that the articles of incorporation must set out the purpose for which the company is formed; that the superintendent must determine whether the corporation "will be lawfully entitled to commence the business of banking" and later whether it "has complied with all the provisions of law required to be done before it can be authorized to commence business." Now, manifestly, a trust company is incorporated for the purpose of doing a trust business. When it commences that business it begins to administer trusts. The latter function it can not perform without having made its deposit. How, then, can the superintendent find that it has complied with all the provisions of law necessary to its commencing business, if the deposit is not made?

In section 710-56 G. C. the finding is declared to be "that such corporation is lawfully entitled to commence business." Certainly, a trust company is not lawfully entitled to commence a trust business unless it has made its deposit. It may be suggested that it may organize for a combination of two or more purposes and be qualified to engage in its other functions without making a deposit requisite to beginning the trust business. But in coming to his conclusion, the superintendent of banks has had before him the articles of incorporation which show that the company may do a trust business. The company insists upon a certificate authorizing it to do such business.

Is not the superintendent bound to assume that it will transact the business which it is authorized to do and must he certify that it is properly qualified when it is not?

The argument that the trust company can qualify later before it actually accepts trusts is not convincing to my mind. The qualification must be shown before the certificate is granted and the reason is obvious. The functions of trust companies under the present statute are wide. They may act without giving further security for the benefit of the *cestui que* trust. To license them to do a trust business and so proclaim to the world, might subject those who deal with them, in reliance upon their full compliance with the law, to imposition by companies of insufficient resources.

Then some light is thrown upon the question by the language of section 710-151 G. C., viz.:

> "Every foreign trust company shall, upon being admitted to do business within this state * * *, and upon approval * * * of the funds and securities to be deposited, be licensed by the superintendent of banks to transact business within the state for the period of one year."

It is a fair assumption that accepting trusts and doing business mean practically the same thing. A foreign trust company can not do any business in the state without making its deposit, except to lend money. It can not receive deposits. Sec. 710-40 G. C.

A domestic trust company is authorized by section 710-156 G. C. to receive deposits. An institution, soliciting, receiving or accepting money on deposit as a business is a bank. It would seem, therefore, by analogy, that the right of a domestic institution to exercise its banking functions when it also has trust powers, ought to be forbidden unless it has made the deposit required. Then we are to bear in mind that when sections 710-150 and 710-154 G. C. were enacted, there were trust companies already doing business in Ohio. Their organization was not effected under the statute, so naturally these provisions were so worded as to affect their functions, not their creation.

To have said that no trust company shall be incorporated without making the deposit, would have left out those companies already in existence, which in my opinion affords a reason for the somewhat unusual language used. Light is thrown on your questions by a consideration of section 710-3 G. C., already quoted. The provision is that any corporation incorporated at the time of the passage of the act under a name including the word "trust" and qualified to do a trust business, may continue so long as it complies with the requirements of the act; that if it is incorporated under such name and is not qualified to transact a trust business, it must change its name so as to eliminate the word "trust" therefrom within two years from the date when the act becomes effective.

Clearly it is the legislative intention ultimately to prevent the use of the word "trust" by companies not qualified to do a trust business and an institution is certainly not qualified to do a trust business—that is, to carry on and administer trusts, unless it has made the deposit required.

The legislative policy as to a corporation qualified to do a trust business but not using the word "trust" in its corporate name, is not quite so clear, but in my opinion it may be fairly deducible from the statutes quoted and examined.

I think therefore that both your questions should receive the same answer. Nor is it apparent how the conclusion here reached can work any particular hardship. If a corporation wishes to hold itself out as having trust powers, it should be willing to provide all the security which the public has the right to assume surrounds its transactions. The ordinary individual who deals with such company will not take the trouble to ascertain whether or not it has made its deposit, but relies upon its financial responsibility because of the requirements which the law makes of it. Nor should a company which is incorporated with trust powers, which it should not desire to use,

complain because it is required to secure the public against an unauthorized use of those powers. If it should not desire to meet the requirements imposed upon trust companies, it need not organize as such. It ought not to require the superintendent of banks to determine each time it exercises a trust function that it has a deposit up, or insist that whenever it completes the trust it may withdraw its deposit. Such course would require constant supervision which to my mind is a strong argument in favor of the conclusion which I have reached.

Respectfully,
JOHN G. PRICE,
Attorney-General.

966.

STATE DEPARTMENT OF HEALTH—HUGHES AND GRISWOLD ACTS CREATING CITY HEALTH DISTRICT BOARDS OF HEALTH ABOLISHED MUNICIPAL BOARDS OF HEALTH ESTABLISHED PRIOR TO PASSAGE OF SUCH ACTS.

The Hughes and Griswold acts (house bills 211 and 633), creating city health district boards of health, abolished municipal boards of health established prior to the passage of such acts under section 4404 G. C.

COLUMBUS, OHIO, January 28, 1920.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

> "We are enclosing you herewith copy of ordinance, which the council of the city of Newark contemplate passing, and are quoting from a letter from the clerk of council of Newark, as follows:
>
> 'I am enclosing an ordinance we wish to pass. Our solicitor says that under house bill 633 (Griswold act) all city boards of health cease to be unless re-appointed by the mayor. Is this a fact? * * * Can we under the new law appoint a new board and can we have all new appointments made, such as clerk, food inspector, sanitary officer, etc. Can I get the information by Thursday so the ordinance may be passed on the 19th. * * *'
>
> We have written the clerk of council that this is a deep question which will require a written opinion, and we respectfully ask a written opinion in answer to his questions."

The questions raised by your correspondent, involves the status of city boards of health and their employes, established under section 4404 G. C., prior to the passage of the Hughes and Griswold acts, so-called, by the present general assembly.

The former act is found in 108 O. L. (part 1), 236, being designated as sections 1261-16 et seq., 1245 et seq., and 4404 et seq. It was passed April 17, 1919, and became effective in part August 12, 1919, while section 29, the repealing section, became effective January 1, 1920.

The latter act (H. B. 633) was passed December 18, 1919, as an emergency measure and was filed in the office of the secretary of state January 2, 1920, at which time it went into effect.

Preliminary to a particular consideration of section 4404, and to obtain the proper