The protestant contends that such a construction penalizes Ohio industries, in that it does not permit them to compete with those who import such motor vehicle fuel into this state, because of the latter provisions of Section 5526, as follows:

> "Provided, however, that when any such person, firm, association, partnership or corporation so importing such motor vehicle fuel into this state, shall sell such motor vehicle fuel in tank car lots or in its original containers to any purchasers for use, distribution or sale and delivery in this state, then such purchasers and not the seller shall be deemed the dealer as to the motor vehicle fuels contained in such tank car lots or original containers."

This section does not permit the re-sale of imported motor vehicle fuel without the payment of the tax imposed. The section specifically provides that when the importer sells such fuel in tank car lots or in original packages for use and distribution in this state, in that event the purchaser and not the importer shall be deemed to be the "dealer," and if such purchaser sells such imported fuel in tank car lots or original containers, he is required to pay the excise tax.

The Tax Commission, however, must be satisfied that the person selling such imported motor vehicle fuel is the actual importer thereof before he may be permitted to sell the same without paying the excise tax thereon.

While under the provisions of said act there may be discrimination in certain instances, such condition must be remedied by the legislature and not by the administrative officers. The law must be administered according to the provisions thereof.

Opinion No. 1016, rendered to you under date of September 19, 1927, contains matter somewhat in point on the question herein presented.

From what has been said, it is my opinion that when a refining company in Ohio sells motor vehicle fuel which it has refined, in tank car lots, to a purchaser who is a registered dealer, such purchaser is required to pay the excise tax on the amount of such motor vehicle fuel re-sold by him.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1272.

INSURANCE—BUILDING AND LOAN COMPANY MAY CARRY POLICY FOR OFFICER WHOSE DEATH WOULD BE A SUBSTANTIAL LOSS TO THE COMPANY—CONSENT OF STOCKHOLDERS UNNECESSARY—PROCEEDS OF SUCH POLICY DISCUSSED.

SYLLABUS:

1. *Where a building and loan company has a pecuniary interest in the life of one of its officers or where the success of the business is dependent upon the officer's continuance in life to such an extent that his death would cause a substantial loss to the company, the company has an insurable interest in the life of said officer and may protect itself from such loss by carrying a policy of insurance on the life of such officer.*

2. *Where the constitution of a building and loan company authorizes the directors to do all things necessary to enable the company to exercise the powers authorized by law, the board of directors may enter into such contract of insurance, without previous and specific authority having been obtained from the members or stockholders.*

3. *The disposition of the proceeds of such policy, upon death of the officer insured, depends upon the circumstances of each individual case and rests in the first instance in the sound discretion of the board of directors.*

COLUMBUS, OHIO, November 18, 1927.

HON. J. W. TANNEHILL, *Superintendent, Division of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your communication reading as follows:

"In an examination of the affairs of the H. Savings and Loan Company we find that the company paid a premium of $1,023.00 upon life insurance policy in the amount of $25,000 upon the life of the secretary.
Under this policy the schedule of premium is as follows:

LEDGER STATEMENT

Kind of Policy—Whole Life. Annual Premium—$1,023.00. Amount—$25,000. Age—47.

Year	Net Payment	Annual Increase in Inventory Value	Expense of Insurance for Year DR.	Expense of Insurance for Year CR.	Total Net Exp. of Insurance DR.	Total Net Exp. of Insurance CR.	Av. Net Annual Exp. of Insurance DR.	Av. Net Annual Exp. of Insurance CR.
1	$1,023 00	$219 00	$803 75	------	$803 75	------	$803 75	------
2	803 75	832 50	------	$28 75	775 00	------	387 50	------
3	797 00	685 50	112 50	------	887 50	------	296 00	------
4	790 00	693 00	97 00	------	984 50	------	246 25	------
5	782 75	577 50	205 25	------	1,189 75	------	238 00	------
6	774 00	584 75	189 25	------	1,379 00	------	230 00	------
7	765 00	591 00	174 00	------	1,553 00	------	222 00	------
8	756 00	596 25	159 75	------	1,712 75	------	214 25	------
9	747 00	600 50	146 50	------	1,859 25	------	206 75	------
10	738 25	608 75	129 50	------	1,988 75	------	199 00	------
11	724 75	611 75	113 00	------	2,101 75	------	191 25	------
12	711 00	618 25	97 75	------	2,199 50	------	183 50	------
13	697 25	613 75	83 50	------	2,283 00	------	175 75	------
14	683 50	613 50	70 00	------	2,353 00	------	168 25	------
15	669 50	611 50	58 00	------	2,411 00	------	160 75	------
16	656 00	608 50	47 50	------	2,458 50	------	153 75	------
17	642 50	604 75	37 75	------	2,496 25	------	147 00	------
18	629 00	597 75	29 25	------	2,525 50	------	140 50	------
19	615 50	590 00	25 50	------	2,551 00	------	134 50	------
20	605 25	588 25	17 00	------	2,588 00	------	128 50	------

Will you please advise:

(1) Whether or not the board of directors of this company are authorized under the building and loan laws to use the earnings of the company in the payment of this premium?

(2) If the board of directors do not possess such power could the expenditure on this account be made if authorized in advance by action of the stockholders of the company?

If it is found in either case that such expenditure was an authorized use of the earnings of the company will you please advise us also to what extent under the building and loan laws the proceeds of such insurance policy could be used by the company, i. e., whether or not such amount could be taken into the earnings and be used in the same manner as other earnings of the company may under the law be used, or would it be proper for the company to place the amount so received in its reserve fund to be available only for the purpose of taking care of any loss which might be sustained, it being understood in the latter event that the amount itself would be taken into the company's assets as cash received to be available for the purpose of taking care of withdrawals, the making of loans, and such other purpose as under the law may be proper?"

In considering your first and second questions I find nothing helpful or applicable in the statutes relating to building and loan associations. The answer thereto must, therefore, be ascertained from other sources.

The carrying of insurance by corporations generally on the lives of their officers is a comparatively new practice. In one of the earliest cases on the subject, *Victor* vs. *Louise Cotton Mills*, decided by the Supreme Court of North Carolina on May 29, 1908, and reported in 61 S. E., 648, 16 L. R. A. (N. S.) 1020, it was held, as stated in the second branch of the syllabus:

"A manufacturing company has no implied power to insure the life of its president and carry the policy after he has retired from office."

The Supreme Court of North Carolina in deciding the above case did not hold that the corporation had no insurable interest in the life of one of its officers, but its decision rests upon the ground that there is no implied power in a corporation to pay out or invest its assets in a contract of that character. On page 1025 the court says:

"The desire to eliminate the possibility of loss by the death of the president, during his term, is to be commended, but the necessity for paying out large sums after his life has ceased to have any possible relation to the welfare of the company, with all of the uncertainty attendant upon the cost and ultimate result, requires an investment out of all proportion to the purpose in view in making the original contract. Without passing upon the question of insurable interest, which is not very clearly involved as the matters now stand, we conclude that the complaint and answer do not disclose any power, either express or implied, enabling the cotton mills to enter into or continue to pay out the assets of the company upon the contract. It is not one of the incidental powers vesting in a manufacturing corporation."

The above case is annotated in 16 L. R. A. (N. S.), 1020, the following observation appearing in the annotations:

"There appears to be no other reported case involving the power of a corporation to pay with corporate funds the premiums on a life insurance policy carried on the life of one of its officers for the benefit of the corporation. In the foregoing case the relations between the officer whose life had been insured and the corporation had been severed, and although the court plainly implied that it did not believe that fact would make any differ-

ence, yet it is quite possible that such a distinction might be made were the case to come up in the other form in another court.

Nor does there appear to be any other reported case which directly passes upon the question whether a corporation has an insurable interest in the life of its president or any other of its officers."

In Fletcher on Corporations, Vol. 2, Section 836, page 1800, after discussing the North Carolina case above referred to, it is said:

"* * * While, perhaps, the rule laid down was correct as applicable to the particular facts, it is submitted that it is too broad for general application, and that the power to insure property is more or less analogous. For instance, is there any question as to the power of a corporation to take out accident insurance on a particularly valuable officer or employee? And if a corporation may take out accident insurance for a period covering the term of office or employment why may it not take out life insurance for such period? Whatever may be the rule as to insurance extending beyond the term of office or employment of the officer or employee, it would seem that the question as to the power to take out insurance limited in point of time should always depend on the circumstances of the particular case, taking into consideration the peculiar value of the services of the officer or employee, the amount of assets of the corporation, the amount of the insurance, and the period the insurance covers. And in Virginia, in a later case, it has been held that a corporation has power to insurance the life of its president who is also general manager, in order to protect itself from loss in case of his death."

In the case of *Keckley, et al., Executors,* vs. *The Coshocton Glass Company,* 86 *O. S.,* 213, the three principal stockholders of the corporation each took out a policy of life insurance on his own life for the benefit of The Coshocton Glass Company. One of these three, Thomas J. Gainor, was a man of extensive experience and schooled in the glass manufacturing and bottle blowing business and to whom especially all others interested in the company looked for its success. Gainor was largely responsible for the procuring of loans from banks and others, and it was to secure the company against loss or failure and to maintain its credit that he and his two associates took out the policies above referred to. In January, 1906, Gainor sold his stock and interest in the company but continued in its employ until September 1, 1906, when he resigned, and from that time had no connection whatever with the company. The insurance company refused to make payment of the proceeds of the policy because of the conflicting claims of Gainor's executors and the corporation. The proceeds were therefore paid into court, pursuant to the outcome of the case, and the insurance company was discharged. The Supreme Court held, as stated in the second branch of the syllabus:

"Where a person is the owner of a large portion of the stock of a corporation, and by reason of his skill and experience he is largely relied upon to make the business of the corporation a success, and when, in borrowing money of banks and in dealing with creditors, and in inducing other persons to buy stock in such corporation, he represents that he has insured his life for the benefit of the corporation and that the policies therefor are assets of the corporation, such facts disclose an insurable interest in the corporation; and such insured person and his legal representatives are estopped from

claiming that such policies are not based upon an insurable interest, or that the amounts due thereon do not belong to the corporation."

In the case of *Schott & Sons Company* vs. *Security Mutual Life Insurance Company, et al.*, 11 *O. C. C.* (*N. S.*) 401, the right of the corporation to take out policies of insurance on the lives of the directors and pay the premiums thereon was denied on the ground that a corporation has no insurable interest in the lives of members of its board of directors who are not indebted to it and in whose lives the company has no pecuniary interest. The decision in that case rests upon the additional ground that the use of the funds of the corporation for such purpose would be a mere speculation although the court recognizes that there might be cases where it would be possible for a corporation to procure and maintain insurance upon the life of one or more of its directors.

The syllabus in the case of *Mutual Life Insurance Company of New York* vs. *Board, Armstrong & Company*, 115 *Va.* 836, *L. R. A.* 1915 *F.* 979, reads:

> "1. Insurance by a corporation for its own benefit of the life of its president and general manager, to protect itself from loss in case of his death, is not ultra vires nor contrary to public policy.
>
> 2. A corporation has an insurable interest in the life of its president and general manager, whose death would result in a serious and substantial loss to its creditors and all others interested in its prosperity."

In the case of *United States, Appt.* vs. *Supplee-Biddle Hardware Company*, 265 *U. S.* 189, 68 *L. Ed.* 970, in holding that the proceeds of an insurance policy on the life of the president of the corporation are not to be included in the gross income of the corporation for income tax purposes, the Supreme Court of the United States held, as stated in the second branch of the headnotes:

> "Insurance taken by a corporation upon the life of its president is a valid, and not a wagering, contract."

The policy in question insured the life of Robert Biddle, who for twenty years had held various offices in the corporation, and it was shown that the returns from the company's business, under Biddle's management, had been greatly increased. In the course of the opinion Mr. Chief Justice Taft says:

> "Life insurance in such a case as the one before us is valid, and is not a wagering contract. There was certainly an insurable interest on the part of the company in the life of Biddle."

From a study of the foregoing cases I have no difficulty in reaching the conclusion that where a corporation has a pecuniary interest in the life of one of its officers, or where the success of the business is dependent upon the officer's continuance in life to such an extent that his death would cause a substantial loss to the corporation, the corporation has an insurable interest in the life of said officer and may protect itself from loss by carrying a policy of insurance on the life of such officer. In the case of a building and loan association, and especially in the case of the great many smaller associations in the smaller cities and villages of the state, the success of the association's operation often depends largely on the efforts and business ability of the secretary of the association. Where this appears to be the fact, I am of the opinion that the association has such an insurable interest in the

life of its secretary that it may protect itself against loss, occasioned through the death of such secretary, by carrying an insurance policy on his life. Whether or not there be such an insurable interest is, of course, to be determined upon the facts of each particular case.

In your questions numbered one and two, respectively, you inquire further whether the board of directors is authorized under the building and loan laws to use the earnings of the company in the payment of the premium or whether such expenditure could be made, if authorized in advance by action of the stockholders.

Section 9667, General Code, empowers a building and loan association:

> "To provide by constitution adopted by its members and by-laws adopted by its board of directors, for the proper exercise of the powers herein granted, and the conduct and management of its affairs."

I have obtained from your department a verified copy of the constitution of the company involved in your inquiry and find the following provision therein in Section 6 of Article VI of said constitution:

> "The directors shall have the power to adopt, amend, repeal and enforce such by-laws, resolutions and orders as they may deem necessary to enable them to properly manage and control all the business, property, rights and affairs of this company. They shall provide for the issue and cancellation of stock; for the deposit with and the withdrawal of funds from depositaries, to be designated by them at the beginning of each fiscal year, and the carrying of funds in the office of the company for the most convenient transaction of business; for the making of loans, and no loan shall be made until it has been approved by the board of directors; and they are hereby authorized to do all and singular the things necessary to enable this company, through them, to exercise all the powers authorized by law that are not inconsistent with this constitution."

The directors of the company having been authorized by Section 6 of Article VI, supra, to do all and singular the things necessary to enable the company, through them, to exercise all the powers authorized by law that are not inconsistent with the constitution, I am of the opinion that the board of directors of the company may enter into the contract of insurance on the life of the secretary, as outlined in your letter, without previous and specific authority from the stockholders or members, subject, of course, to the limitation that the company must have a real insurable interest in the life of such secretary.

You inquire further as to the proper disposition of the proceeds of the policy in the event it be found that the company has authority to enter into the contract of insurance referred to. It seems to me that this must also depend, to a large extent, upon the circumstances of each individual case. The purpose of the policy is to protect the company from loss through death of the person upon whose ability and business acumen and upon whose continuance in life the success of the company depends to a large extent. When such person dies and the proceeds of the policy are paid to the company, it would seem to me that it depends upon the circumstances of each case, to be determined in the first instance by the board of directors, what disposition of such proceeds would best serve the purposes of the policy. In other words, whether the proceeds shall be placed in the reserve fund for the payment of contingent losses or in the undivided profits fund, subject to

the limitation contained in Section 9673, General Code, or shall be distributed as dividends, should rest in the first instance in the determination of the board of directors. Obviously, in some particular instances where the action of the board of directors as to the disposition of the proceeds of the policy would be an invasion of the rights of creditors, depositors or stockholders, such action would be reviewable by the courts.

Answering your questions specifically, it is my opinion:

1. Where a building and loan company has a pecuniary interest in the life of one of its officers or where the success of the business is dependent upon the officer's continuance in life to such an extent that his death would cause a substantial loss to the company, the company has an insurable interest in the life of said officer and may protect itself from such loss by carrying a policy of insurance on the life of such officer.

2. Where the constitution of a building and loan company authorizes the directors to do all things necessary to enable the company to exercise the powers authorized by law, the board of directors may enter into such contract of insurance, without previous and specific authority having been obtained from the members or stockholders.

3. The disposition of the proceeds of such policy, upon death of the officer insured, depends upon the circumstances of each individual case and rests in the first instance in the sound discretion of the board of directors.

I am returning herewith the copy of the constitution of the H. Savings and Loan Company and other papers obtained from your department.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1273.

FOREIGN CORPORATION—REVOCATION OF AUTHORITY TO DO BUSINESS IN THIS STATE, DISCUSSED.

SYLLABUS:

Revocation of authority of a foreign corporation to do business in this state for failure to designate a successor to its statutory agent discussed.

COLUMBUS, OHIO, November 18, 1927.

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

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

> "............ Company qualified June 15, 1925, under Sections 178 and 183 of the General Code of Ohio for the purpose of owning property and doing business in Ohio.
>
> At the time of qualification, one ...., Cleveland, was named as statutory agent upon whom service of process could be had. Our records show no further filings by the company in question.