was to permit the Board of Building Standards to test, investigate and take advantage of these new developments so that it could recommend to the legislature amendments to existing statutes and new legislation which would be in step with the advancement of science in the construction of buildings in respect to health, safety, life and welfare of the public using such buildings.

Your attention is invited to section 12600-295, General Code, which authorizes the Board of Building Standards, for the purposes of making investigations and tests, to utilize the services of the engineering experiment station at Ohio State University. You will note that the use of the facilities at Ohio State University by the Board is not mandatory. You will also note that section 12600-299, General Code, authorizes the Board of Building Standards to permit the use of any other system which is at variance with that prescribed by the building code or by the rules and regulations adopted by the Board.

Sections 12600-284 and 12600-299, inclusive, were enacted by the legislature after the decision of our Supreme Court in the case of *State ex rel.* v. *Industrial Commission of Ohio,* 105 O. S. 103, wherein it was held that a variance in the method of construction of a building could not be permitted by the authorities in violation of the specific requirements of the building code. In other words, the law previous to the enactment of sections 12600-284 to 12600-299 was that the Board of Building Standards had no authority to excuse compliance with the positive mandatory provisions of the building code or adopt rules and regulations which were in variance to specific requirements of the building code. Therefore, it will be presumed that the legislature, knowing of the interpretation made by the Supreme Court, has seen fit to make possible, under section 12600-299, that which the Supreme Court has said in the Myers case, supra, could not be done under the former statute.

It is therefore my opinion that:

1. The Ohio Board of Building Standards and the Director of Industrial Relations can not legally authorize a system of heating and ventilating which will not comply with the provisions of the building code of Ohio, under the guise of an experiment or test.

2. The Board of Building Standards and the Director of Industrial Relations may authorize an actual test in a public school building of a heating and ventilating system which does not conform to the requirements of the building code, providing such installation is for the purpose of a test only.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3097.

DOUBLE LIABILITY—STOCK OF NATIONAL BANK—WHEN SHAREHOLDERS OF FIXED INVESTMENT TRUST MAY BE SO HELD.

SYLLABUS:

The shareholders of a fixed investment trust may be held for the statutory double liability where the depositary holds stock of a national bank. States having similar enactments in reference to state banks, would be inclined to construe their statutes to obtain a similar conclusion.

COLUMBUS, OHIO, March 27, 1931.

HON. THEODORE H. TANGEMAN, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—Recently I received from your office the following inquiry:

"The Division of Securities, Department of Commerce, is requested

to accept for registration under form 6-5 of the Ohio Securities Act a so-called 'fixed investment trust,' the underlying securities of which are stocks of National and State banks. The stockholders of national bank stocks are subject to 'double liability' as are also the stockholders of stock of banks organized under various state laws.

In connection with this matter there arises in the Division of Securities a question as to whether the shareholders in the Trust are subject to any double liability. The question is pertinent by reason of the fact that if the *cestui que trustent* of a fixed investment trust, in which the securities held in the trust are bank stocks on which there is a stockholders' double liability, are liable to double liability, the Division of Securities might not consider the sale of such fixed investment trust shares in Ohio proper under the Ohio Securities Law.

Will you, therefore, please advise me whether there is any 'double liability' on the part of the shareholders of a fixed investment trust in which the securities held are bank stocks upon which there is a stockholders' double liability?"

Possibly the most singular advantage of the corporate method of transacting business is the immunity afforded to corporate shareholders from all liability for the debts of the corporation after full payment has been made to the corporation for the shares subscribed. Cook on "Stock and Stockholders and Corporation Law" (1894), Vol. I, sections 212-213, page 270. The double liability which attaches to the owners of national bank shares has its source in federal statutes (*Pauly* v. *State Loan and Trust Company,* 165 U. S. 606, 622; *Welles* v. *Larrabee,* 36 Fed. 866, 869; *Witters* v. *Sowles,* 32 Fed. 767, 768; *Page v. Jones,* 7 Fed. 2nd, 541, 544; 7 C. J. 769) independent of which it would be inexistent. *McClaine* v. *Rankin,* 197 U. S. 154, 162; *Williamson* v. *American Bank,* 115 Fed. 793, 795; *Fowler* v. *Gowing,* 152 Fed. 801, 812, affirmed 165 Fed. 891. Hence, the sole question is whether the shareholders of a fixed investment trust fall, bearing in mind the statutes' contemplation, within the category of persons upon whom this added onus is imposed. This necessarily depends upon the particular words of the enactments. Cook on "Stock and Stockholders and Corporation Law," Vol. I, section 215, page 271. I quote them for consideration. Section 62, U. S. C. A. (section 5210, Revised Statutes) provides:

"The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

Section 63, U. S. C. A. (section 5151 Revised Statutes) reads:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the

extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Section 64, U. S. C. A. (U. S. Compiled Statutes of 1916, section 9689) enacts:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock."

Section 66, U. S. C. A. (section 5152 Revised Statutes), relating to "Personal liability of representatives of stockholders," provides:

> "Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

Again and again, under varied circumstances, it has been held or expressly declared by courts, both federal and state, that, under the above provisions, those persons may be held liable whom the courts describe as the "real owners," the "actual owners," the "substantial owners," the "true owners," the "equitable owners," the "beneficial owners," the "owners in fact," and "those to whom the shares really belong." These appellatives are sometimes used singly and sometimes in various combinations. *Pauly* v. *State Loan and Trust Company,* 165 U. S. 606, 619, 623; *Anderson* v. *Philadelphia Warehouse Company,* 111 U. S. 479, 483, 484, 485; *Ohio Valley National Bank* v. *Hulitt,* 204 U. S. 162, 166, 167, 168, 169, 170; *Davis* v. *Stevens,* 7 Fed. Cas. 177, 178; *Houghton* v. *Hubbell,* 91 Fed. 453, 455; *Lesassier* v. *Kennedy,* 36 La. Ann. 539, 542; *Williamson* v. *American Bank,* 185 Fed. 66, 68; *Collins* v. *Caldwell,* 29 Fed. 2nd, 329, 330; *Rankin* v. *Fidelity Insurance, Trust and Safe Deposit Company,* 189 U. S. 242, 246, 249, 252; *National Bank* v. *Case,* 99 U. S. 628, 632; *Pufahl* v. *Fidelity National Bank,* 40 Fed. 2nd, 25, 26; *Yardley* v. *Wilgus,* 56 Fed. 965, 966; *McCandless* v. *Haskins,* 20 Fed. 2nd, 688, 691; *National Park Bank* v. *Harmon,* 79. Fed. 891, 893, affirmed 172 U. S. 644; *Scott* v. *Latimer,* 80 Fed. 843, 853, affirmed 181 U. S. 202; *Maddison* v. *Bryan,* 247 Pac. (N. M.) 275, 278, 281. See also: *Chapman* v. *Pettus,* 269 S. W. (Tex. Civ. A.) 268, 270; *Dunn* v. *Howe,* 107 Fed. 849, 850; *Harris* v. *Taylor,* 148 Ga. 663, 670; *Geary, etc., Company* v. *Rolph,* 189 Calif. 59, 68. And regardless of whatever indication one might think section 62 U. S. C. A., supra (relating to keeping a list of the stockholders) gives to the contrary, an equal wealth of authority has held that the owners so denominated may be held liable although their names do not appear (*Pauly* v. *State Loan and Trust Company,* 165 U. S. 606, 623; *Pufahl* v. *Fidelity National Bank,* 40 Fed. 2nd, 25, 26; *Tourtelot* v. *Stolteben,* 101 Fed. 362, 364, 365. See also, *Brown* v. *Artman,* 166 Fed. 485, 486) or never have appeared upon the books of the bank as shareholders thereof. *Early* v. *Richardson,* 280 U. S. 496, 499; *Ohio Valley National Bank* v. *Hulitt,* 204 U. S. 162, 167, 168, 170; *Houghton* v. *Hubbell,* 91 Fed. 453, 454; *Lesassier* v. *Kennedy,* 36 La. Ann. 539, 542; *Case* v. *Small,* 10 Fed. 722; *Yardley* v. *Wilgus,* 56 Fed. 965, 966; *Davis* v. *Stevens,* 7 Fed. Cas. 177; *Collins* v. *Caldwell,* 29 Fed. 2nd, 329, 330; *Wright* v. *Keene,* 82 Mont. 603, 609, 610; and 7 Corpus Juris 769. See also *Laing* v. *Burley,* 101 Ill. 591, 595; *Austin* v. *Marsico,* 281 S. W. (Tex.

Civ. A.) 198, 200; *Fletcher's Cyclopedia of Corporations* (1919), Vol. 6, sections 4110, 4185 and 4191. *Richmond* v. *Irons,* 121 U. S. 27, 58 and *Robinson* v. *Southern National Bank,* 94 Fed. 964, are earlier cases to the contrary.

Assuming that the interest of one who owns shares of fixed investment trust is the same as that of an ordinary *cestui que trust,* I believe that such shareholder may be held liable for national bank shareholder's double liability in the situation presented. Bearing in mind the type of owners which the courts, as above stated, have said may be subjected to such liability, this conclusion would seem to follow in view of the statements by an abundance of authority that a *cestui que trust* is the "real, substantial and beneficial owner" of a trust estate. *Larkin* v. *Wikoff,* 75 N. J. Eq. 462, 474; *Merchants Loan and Trust Company* v. *Patterson,* 139 N. E. (Ill.) 912, 916; *Ex Parte Jonas,* 186 Ala. 567, 577; *Reid* v. *Gordon,* 35 Md. 174, 183-184; *Mayor* v. *Safe Deposit and Trust Company,* 97 Md. 659, 664; 1 *Perry on Trusts* (1929 ed.), p. 200; 1 *Burrill's Law Dictionary* (1859 ed.), p. 269; 39 Cyc. 19, note 21; 28 *American and English Enc.* (2nd ed.) 1100; 11 *Corpus Juris* 225, note 33(a); *Bouvier's Law Dictionary* (Baldwin's Century Edition, 1926), p. 159.

What decisions and dicta do exist upon the express question of the double liability of a *cestui que trust* point in the direction already indicated.

The case of *English* v. *Gamble,* 26 Fed. 2nd, 28, decided in 1928 by the United States Circuit Court of Appeals presented the following situation: In 1924, the First National Bank of Devol, Oklahoma, being in a depressed condition, a twenty-five thousand dollar assessment was made upon its stockholders. Some of the stockholders, upon whom a total of ninety-four hundred dollars was assessed, did not respond. The comptroller advised that if this deficit were not made up and placed in the bank, the bank would not be allowed to open its doors. Whereupon the defendants, who were certain stockholders and directors, raised the money among themselves and deposited it in the bank in escrow in order to satisfy the requirement of the national banking department. Later, the defauted shares were put up at public auction, were bid in by the cashier for the defendants and were reissued in the name of the cashier as trustee for defendants, the purchase price being charged against said escrow account which defendants had deposited. Still later, upon the bank's condition becoming worse, an attempt, resulting in the present suit, was made to collect from defendants, as stockholders, a further assessment. The court held defendants liable, saying: (p. 30)

> "Shorn of all technicalities, clearly this made the defendants the joint owners of this particular stock which was still held by them in the name of the trustee * * * . As such joint owners they became jointly and severally liable for the subsequent assessment. The transaction was one of purchase and sale, wherein the money of the defendants was paid for the stock, and they thereby became the owners."

In *McNair* v. *Darragh,* 31 Fed. 2nd, 906, decided in 1929, the United States Circuit Court of Appeals, after making a direct holding to the effect that the defendant, who was a trustee of certain national bank stock, was not liable for the statutory assessment, declared: (p. 908)

> " * * * the decisions construing section 64 make it clear that * * * the beneficial owner is the one intended by the statute."

Certiorari was denied in this case in 280 U. S. 563.

In *Williams* v. *Cobb,* 219 Fed. 663, an attempt was made to recover an assessment against the defendant individually upon the theory that, as trustee, he had made an unauthorized investment in national bank stock and that, therefore, the *cestui que trust* could disaffirm the transaction, leaving the trustee the owner thereof. The United States Circuit Court of Appeals held that the investment transaction was not void, but merely voidable, and that, since the *cestui que trust* had not advantaged herself of the right of repudiation, the defendant was not individually liable to assessment, saying: (pp. 668-669)

> "As the trustees for Catherine Monohan hold an improper investment in stocks for her, she had the right, when the nature of her investment was brought to her attention, to accept or reject it. If she accepted it, or had lost her right by laches or acquiesence to reject it, *she would no doubt be liable under the statutes of the United States as a stockholder.*"
>
> (Italics the writer's)

The case was affirmed in 242 U. S. 307.

In *Chapman* v. *Pettus,* 269 S. W. (Tex. Civ. A.) 268, the Texas state banking commissioner brought suit against a Mrs. T. W. Pettus and her husband to collect an assessment in the matter of an insolvent state bank, under a constitutional provision imposing double liability upon "each shareholder." The stock had stood for more than 10 years on the bank's books in the name of "Mrs. T. W. Pettus." Mrs. Pettus made the claim that her husband was the real owner of the stock which had been transferred to, and held by, her, only as trustee for him and solely for his convenience. The court said, at page 271:

> " * * * in cases where a person holds stock apparently as owner but in fact as trustee under a secret agreement with the real owner, as in this case, both the *cestui que trust* and the trustee are liable * * * ."

In *Alexander* v. *Dover,* 95 S. E. (Ga. App.) 756, it appeared that the defendant received, under her husband's will, a life tenancy in the stock of a state bank, and that the executors delivered the stock to her under a deed or bill of sale; but it did not appear that any transfer had been made to her on the bank's books. The receiver, upon the bank's insolvency, sought to hold the defendant individually liable for an assessment equal to the face value of the stock. The court held her so liable, saying: (p. 756)

> "The language of the federal statute * * * fixing the liability of shareholders of every national banking association, is very similar to that in the Code of this state * * * . The Supreme Court of the United States has construed the federal statute, and the following decisions are in point in the instant case:
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> * * * * * * * * *
>
> " 'The beneficiaries of stock held in trust by a trustee are subject to the stockholder's liability.' *Smathers* v. *Western Carolina Bank,* 155 N. C. 283, * * * , *Witters* v. *Sowles et ux* (C. C.) 32 Fed. 767."

In *Smathers* v. *Western Carolina Bank,* 155 N. C. 283, the stock in a state bank stood in the name of "Lewis Maddux, trustee for Lauretta Maddux, his

wife." This case was reviewed later in *American Trust Company* v. *Jenkins,* 193 N. C. 761, the court declaring: (p. 764)

> "It was held that Lewis Maddux was not liable personally, but that his wife, Lauretta Maddux, was liable to the receiver."

In *Geary, etc., Company* v. *Rolph,* 189 Calif. 59, certain stock stood upon the books of an insolvent non-banking corporation in the name of "James Rolph, trustee." Rolph held the stock solely for the use of one Morrow and as Morrow's agent. The case decided that Morrow's estate was liable for unpaid stock subscriptions. See also, *Cole* v. *Satsop R. R. Company,* 9 Wash. 487.

In 7 Corpus Juris 504, it is stated:

> "A *cestui que trust* may be subject to the statutory liability on account of stock held by a trustee for his benefit."

A good discussion of this problem is to be found in *Maddison* v. *Bryan,* 247 Pac. 275, decided in 1926 by the Supreme Court of New Mexico. There, the receiver of the insolvent State Trust and Savings Bank at Albuquerque sought to recover, under a state statute imposing double liability upon "the stockholders of every banking corporation," an assessment against the defendants as alleged stockholders. It appeared that the stockholders of this state bank were also the stockholders of the National Bank of Albuquerque; that a trust agreement had been entered into pursuant to which the stockholders of said state bank transferred and delivered to five trustees all of its capital stock, to be held by said trustees in trust for the owners and holders of the shares of said national bank in proportion to their ownership of such stock; that said trust agreement was carried into effect by transferring the stock of the state bank to the trustees and by issuing to the stock holders of the state bank, the certificates of stock of the national bank bearing upon the reverse side an indorsement to the effect that the owner of the shares represented by such certificate was beneficially interested, by and under the trust agreement, in the capital stock of the state bank in proportion to his ownership of stock in the national bank, which beneficial interest, on the one hand, should not be sold or transferred otherwise than by the transfer of the stock in the national bank, but, on the other, should pass by such transfer. The court held that said beneficiaries were liable for the assessment, although it had been urgently contended that only the legal holders of the stock were liable. The court based its decision on the ground that the state statute was similar to, and was to be interpreted by, the federal national bank statute, and that under the latter, the defendants would be liable, saying: (pp. 278 and 281)

> "Under R. S. 5151, it is well established that the liability extended to the beneficial or equitable owners of the stock."

The argument that the failure of section 66, U. S. C. A., supra, to expressly provide for the liability of a *cestui que trust* is indicative of a legislative intent not to subject such persons to liability for assessment, is dispelled by the decisions just reviewed. *Maddison* v. *Bryan,* 247 Pac. (N. M.) 275, 281, 282, and *McNair* v. *Darragh,* 31 Fed. 2nd, (C. C. A.), 906, 907, 908, expressly discuss this angle.

In Opinion No. 1652, rendered by me under date of March 22, 1930, concerning the taxability of investment trust shares, I ventured the assertion that the holder of such shares had a legal right or interest. I am, nevertheless, of the

opinion that, though such be the case, a holder of such shares would still be a real and substantial owner, within the meaning of the federal statutes creating double liability, of any national bank stock held by the depositary and would be, therefore, subject to the extra liability therein created. Although the fixed investment trust is a thing so new in this country that there has not been sufficient time to have its status determined by the courts, and although the particular question which you ask concerning it is novel, I believe that the conclusion just announced is most in consonance with the whole philosophy and purpose of this added liability as I glean them from the decisions.

Thus, the United States Supreme Court has declared in no uncertain terms that the very design of the federal enactment is to protect the creditors of national banks and to give confidence to all dealings with such banks in respect to their contracts, debts and engagements. *Scott* v. *Deweese,* 181 U. S. 202, 213; *Lantry* v. *Wallace,* 97 Fed. (C. C. A.) 865, 868, affirmed in 182 U. S. 536, 548, 550-551; *Delano* v. *Butler,* 118 U. S. 634, 653-654; *Anderson* v. *Cronkleton,* 32 Fed. 2nd, (C. C. A.) 170, 171; *Frater* v. *Old National Bank,* 101 Fed. (C. C. A.) 391, at page 391; *Scott* v. *Latimer,* 80 Fed. (C. C. A.) 843, 853, affirmed 181 U. S. 202; *Page* v. *Jones,* 7 Fed. 2nd, (C. C. A.) 541, 544, certiorari denied 269 U. S. 587. The view announced tends to effectuate these purposes. This becomes increasingly important especially when there may be some question whether the depositary, being a mere nominal party, may be subjected personally to the extra liability. The remarks just made, taken together with another principle, announced in *McNair* v. *Darragh,* 31 Fed. 2nd, (C. C. A.) 906, seem to reenforce this conclusion. There it is stated: (p. 907)

> "Section 64, as construed in numerous cases before the Supreme Court and lesser federal courts, makes it very clear that that section, when read in conjunction with section 62 * * * *purposed to have every issued share in a national bank subject to assessment* and that such should be against the owner of such stock."
>
> (Italics the writer's)

A third principle which underlies the statutory liability now being considered—one which is mentioned frequently in the reasoning of the cases pertaining to it—likewise, I believe, warrants the decision made. This principle is aptly stated by the Circuit Court of Appeals in *Beal* v. *Essex Savings Bank,* 67 Fed. 816, thus: (p. 818)

> "It is a principle, recognized quite generally by the law and outside of it, that one who may profit by the gains of an enterprise should bear the losses, rather than that they should fall on strangers; and the statute imposing a liability on the shareholders of national banks undoubtedly rests on this."

Again, in *Lucas* v. *Coe,* 86 Fed. 972, 973, the court said:

> " * * * it is plain that he would be liable whose property paid for the stock and who was entitled to receive the dividends and proceeds in case the stock were sold."

For further statement of this same principle, consult *Welles* v. *Larrabee,* 36 Fed. 866, 868. You do not state the name or provisions of any particular investment trust. But considering that, generally, the shareholders of fixed

investment trust receive dividends derived from the stocks held by the depositary and are entitled, upon termination of the trust, to receive a proportionate share of the property held or proceeds from its sale, it would seem that the holders of the investment trust shares should be liable under the principle discussed. This liability is unaffected by the fact that some one else may vote the stock or receive the dividends in the first instance. *Davis* v. *Stevens,* 7 Fed. Cas. p. 177 at 178.

You have not indicated any particular state bank whose stock underlies the investment trust in question, and, of course, it is impossible here to take up and construe each state's particular enactment. However, as is disclosed by the cases discussed above, there is a tendency on the part of state courts, in construing their statutes, to follow the constructions which have been placed upon the federal statutes by the federal courts. Suffice it to say now, therefore, that, in any case where a state statute, in general terms, imposes such additional liability upon the stockholders of a state bank, the state courts, I believe, would be inclined to construe such statute in the manner in which the federal statutes have been construed.

In conclusion, may I quote from *Ohio Valley National Bank* v. *Hulitt,* 204 U. S. 162, 167, where the United States Supreme Court reiterated the following statement which it had made previously in *Pauly* v. *State Loan and Trust Company,* 165 U. S. 606:

> "The Courts will look at the relations of the parties as they actually are, or as, by reason of their conduct, they must be assumed to be, for the protection of creditors."

Answering your question specifically, I am of the opinion that the shareholders of a fixed investment trust may be held for the statutory double liability where the depositary holds stock of a national bank, and that states having similar enactments in reference to state banks, would be inclined to construe their statutes to obtain a similar conclusion. Of course, it is conceivable that some particular state statute might, in its terms, vary sufficiently from the federal statute as to warrant a different result.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3098.

BOARD OF OPTOMETRY—OFFICE—RECORDS OF BOARD REQUIRED TO BE IN COLUMBUS WHERE THEY SHALL BE OPEN TO PUBLIC INSPECTION.

SYLLABUS:

1. *The record of the proceedings of the State Board of Optometry, a register of persons registered as optometrists and a register of licenses revoked by such board, are required to be kept at the office of the board at Columbus where such records shall be open to public inspection.*

2. *In the event such records are so kept at the office of the Department*