I further find, upon examination of the provisions of these leases and of the conditions and restrictions therein contained, that the same are in conformity with the provisions of Section 471 General Code and of other statutory enactments relating to leases of this kind. I am accordingly approving these leases as to legality and form, as evidenced by my approval endorsed upon the leases and upon the duplicate and triplicate copies thereof, all of which are herewith returned to you.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2567.

APPROVAL, NOTES OF WILLOUGHBY RURAL SCHOOL DISTRICT, LAKE COUNTY, OHIO—$7,500.00.

COLUMBUS, OHIO, April 25, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2568.

APPROVAL, NOTES OF TRURO TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY, OHIO—$3,529.00.

COLUMBUS, OHIO, April 25, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2569.

APPROVAL, BONDS OF VILLAGE OF DENNISON, TUSCARAWAS COUNTY, OHIO—$1,700.00.

COLUMBUS, OHIO, April 25, 1934.

Industrial Commission of Ohio, Columbus, Ohio.

2570.

VENDING MACHINE—STOCKED WITH CIGARETTES, OWNER REQUIRED TO POSSESS LICENSE WHEN—CIGARETTE STAMP TAX LAW.

SYLLABUS:

1. *Where a vending machine company installs and stocks with cigarettes two*

vending machines on the premises belonging to a retail merchant, and such premises consist of one room or two or more connecting rooms constituting one establishment under one management, such company is required to possess but one license to sell cigarettes at retail on such premises.

2. *Where two different vending machine companies install and stock with cigarettes a vending machine on the premises belonging to a retail merchant, such companies are each required to possess a license to sell cigarettes at retail on such premises.*

COLUMBUS, OHIO, April 25, 1934.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is hereby made of your request for my opinion, which reads as follows:

> "We request your formal opinion relative to the interpretation of the cigarette stamp tax law.
>
> Sections 5894-1, et seq. of the General Code require a license for each retail place of business. We find instances where a vending machine company, owning machines vending cigarettes, will install two machines upon the premises of a retail merchant. The questions then arise:
>
> (1) Must the vending machine company be possessed of one or two licenses?
>
> (2) Assuming that two licenses are required, would the answer be changed if the machines were permanently fastened together by some device?
>
> (3) What would be the effect of the installation of two machines in the same retail place of business by different vending machine companies?"

In the fourth paragraph of the syllabus of an opinion of this office addressed to the Auditor of State, which opinion is reported in Opinions of the Attorney General for 1931, volume II, page 1052, it was held:

> "Where a cigarette vending machine is placed in a place of business, and the owner of the vending machine furnishes the cigarettes for said machine, but gives the owner of the business a portion of the receipts from the sales, the retail license should be taken out by the vending machine owner."

The portion of the request for opinion to which the foregoing syllabus was responsive, reads as follows:

> "Also, where a cigarette vending machine is placed in a place of business, should the owner of such business, which may be other than the trafficking in cigarettes, take out the cigarette license or the owner of the vending machine when the owner of the machine furnishes the

cigarettes and gives the owner of the business a portion of the receipts from the sales?"

Relative to this question, the then Attorney General stated in the opinion at page 1058:

"With respect to your third question, I call your attention to the title of Amended Senate Bill No. 324, which is as follows:

'Providing for the levy of an excise tax on sales of cigarettes in the state of Ohio for and during the years 1931, 1932 and 1933, and in aid of such purpose, the substitution for the present tax on the business of trafficking in cigarettes, cigarette wrappers or substitutes therefor, *of a license tax on the business of dealing in cigarettes;* and enacting supplemental sections 2624-1 and 2685-2 of the General Code and repealing sections 5894, 5895, 5896, 5897, 5898, 5899, 5900, 5901, 5902 and 12680-1 of the General Code.' (Italics the writer's.)

You will note that the license tax is on the 'business of dealing in cigarettes.'

Furthermore, section 1 of the act defines the terms used in the act and provides in part as follows:

Section 1. 'As used in this act:

"Person" includes firms and corporations;

"Retail dealer" includes *every person* other than a wholesale dealer *engaged in the business of selling cigarettes in this state,* irrespective of quantity or amount or number of sales thereof;

"Sale" includes exchange, barter, gift, *offer for sale and distribution,* and excludes transactions in interstate or foreign commerce;

* * *' (Italics the writer's.)

Also section 5 of the act provides in part:

'No person shall engage in the wholesale or retail business of trafficking in cigarettes within this state without having a license therefor. * * *' (Italics the writer's.)

Under the facts disclosed by your communication, it is apparent that the owner of the vending machine is the person who should take out the license. It is he who is engaged in the business of offering for sale and distribution the cigarettes. The fact that the proceeds of the sales may be divided and a portion given to the owner of the building or business does not affect the question. Apparently the distribution of a part of the proceeds to the owner of the business is the consideration for allowing the vending machine to be placed on the premises of the owner of the building and business. Of course, if the person who is conducting the business in the building has a key to the vending machine and is permitted to stock the machine at times and collect the coins from the box, it is probable that he would be regarded as providing for the sale and distribution of cigarettes at that place and would be required to take out the license. From the facts as disclosed in your communication, however, it does not appear that the owner of the business has any control over the vending machine, but only receives from the machine owner a part of the proceeds.

Therefore, I am of the opinion that, under the facts disclosed by you, the owner of the cigarette vending machine should take out the cigarette license."

Inasmuch as your first question asks whether or not the vending machine company, which owns and has installed the two machines on the premises of a retail merchant, must be possessed of one or two licenses, I assume that the vending machine company is furnishing the cigarettes and giving the owner of the retail business a portion of the receipts in a similar manner to that pointed out in the 1931 opinion, and is therefore the proper party to take out the retail license for the retail sale of cigarettes.

Section 5894-5, General Code (section 5 of Amended Senate Bill No. 324 of the 89th General Assembly), provides in part:

> "* * *
>
> Each applicant for such license (for engaging in the wholesale or retail business of trafficking in cigarettes) shall, within thirty days after this act shall take affect, and, thereafter annually, on or before the fourth Monday of May, make out and deliver to the auditor of the county wherein he desires to engage in such business upon a blank to be furnished by such auditor for that purpose, a statement showing the name of the applicant, each *place* in the county where the applicant's business is to be conducted, the kind or nature of such business, and such other information as the commission may require in the form of statement prescribed by it. At the time of making such application each such person desiring to engage in the wholesale business of trafficking in cigarettes shall pay into the county treasury a license tax in the sum of one hundred dollars, or if desiring to engage in such retail business, such tax in the sum of twenty-five dollars, *for each place where he proposes to carry on such business.* Upon receipt of such application and exhibition of the county treasurer's receipt showing the payment of such tax, the county auditor shall issue to the applicant *a license for each place of business designated in the application* authorizing the applicant to engage in such business *at such place* for and during the year commencing on the fourth Monday of May. * * *" (Words in parenthesis and italics mine.

Section 12680, General Code, as amended in section 23 of Amended Senate Bill No. 324, 89th General Assembly (114 O. L. 813, 814), provides:

> "Whoever, being engaged in the business of trafficking in cigarettes, cigarette-wrappers or a substitute for either, fails to post and keep constantly displayed in a conspicuous *place in the building* where such business is carried on, a receipt signed by the county treasurer showing that the amount of the assessment required by law has been paid into the treasury of the county where such business is located, or sells or offers to sell cigarettes, cigarette-wrappers or a substitute for either without complying with the provisions of law relating to cigarettes, shall be fined not less than one hundred dollars nor more than three hundred dollars and for each subsequent offense shall be fined not less than three hundred dollars nor more than five hundred dollars." (Italics the writer's.)

From the language of section 5894-5, General Code, supra, it may be observed that the license tax of twenty-five dollars for a right to sell cigarettes at retail, authorizes the licensee to retail cigarettes at *a place of business.*

The question therefore arises as to what the legislature meant by the phrase "place of business".

In the case of *Hochstadler* vs. *State,* 73 Ala. Reps., 24, decided by the Supreme Court of Alabama at the December term, 1882, it was held, as disclosed by the syllabus:

> "1. Retailing liquors; where one license sufficient.—Only one license is required of a person engaged in retailing vinous, spirituous and malt liquors, who occupies, and carries on his business in two adjoining rooms connected with each other by an open entrance or archway cut in the partition wall, in each of which is a bar, one of the rooms being used for white persons and the other for negroes, and both rooms constituting but one establishment, and being under one and the same management."

Section 491 of the Alabama Code of 1876, provided, with reference to a license to sell liquors at retail:

> "Upon the payment of such amount to the probate judge, he shall issue the license, which shall set forth the name of the person, firm, company, or corporation, the business which it is proposed to carry on, and the *location* where it is to be established; or, if a peddler, whether he proposes to travel on foot, on horse, or in a wagon; and such license shall not be transferable, nor shall it entitle the holder thereof to carry on or exercise any other *business* or profession than the one therein named, *nor at any other location than the one therein specified;* and the probate judge shall be paid for making out such license a fee of not more than fifty cents by the person receiving the same." (Italics mine.)

As noted above, the Alabama legislature used the word "location" instead of the word "place", as used by the Ohio legislature in section 5894-5, supra. However, Webster's New International Dictionary defines the word "location" as "situation; *place;* locality." Hence, the reasoning of the foregoing case would seem to be applicable to the situation at hand.

The opinion of the court in the above case is fairly short and may be profitably quoted here in entirety, as follows:

> "We are of opinion that the defendant required but *one* license to authorize him to carry on the business of retailing, in which he is shown to have engaged. The two rooms used by him clearly constituted but one establishment. There was but *one business, under one management, and in one locality.* If this was true, we think it immaterial that drinking was carried on, or retailing permitted in two rooms or apartments, one for the use of the whites, and the other for the use of negroes. These apartments were connected with each other by an open entrance or archway, and were both under the immediate supervision and control of defendant. * * * The fact that a brick wall intervened instead of a *mere* screen being used as a partition, can scarcely be claimed to change the legal status of the business. We can see no difference between a case of this character, and the more common one of a restaurant keeper having two separate apartments, respectively for males and females,

which is clearly permissible under one business license, if there be *unity of management, ownership and locality.*

The charge of the circuit judge was erroneous, and the judgment is reversed and the cause remanded."

This case was distinguished but not overruled in the later Alabama Supreme Court case of *Jebeles, et al.,* vs. *State,* decided June 9, 1898, and reported in 117 Alabama Reports, 174, 23 Southern Reporter, 676, which case involved the sale of cigarettes. The first paragraph of the syllabus of this case reads:

"The holder of a license, issued by the auditor, authorizing him to transact business as a dealer in cigarettes at Anniston, and at no other place, issued under the Revenue Law of the State (acts of 1894-95, p. 1192, sect. 44), is not thereby authorized to engage in the selling of cigarettes at two separate and distinct places in the said city."

Section 44 of the Acts of Alabama for 1894-95, at page 1215, reads as follows:

"That every person, firm or corporation shall pay a license tax for selling cigarettes in *places* outside of incorporated towns and cities, five dollars, in incorporated towns and cities, of two thousand inhabitants or less, ten dollars; in cities and towns over two thousand and not over five thousand inhabitants, fifteen dollars; and in all cities having over five thousand inhabitants, twenty-five dollars per annum." (Italics the writer's.)

The facts of this case showed that the licensees attempted to sell cigarettes at two places of business in Anniston, Alabama, situated on two different streets, but in the same block and about 100 or 135 yards apart. The court stated at pages 175 and 176:

"It seems very clear that under this license, the appellants could not carry on the business authorized in more than one place in the city. If so, the purpose of the statute, which was to raise revenue,—and, in so far as it gives the better supervision over the dealers by police authorities,—might be largely defeated. If they might sell in two places as claimed, they might sell in an indefinite number of places. In analogous cases of dealers in intoxicating liquors, licensed to sell in a given town, it has been held, that they cannot carry on the business at more than one place.—*State* vs. *Walker,* 16 Me. 241; *State* vs. *Gerhardt,* 3 Jones (N. C.) 178; 11 Am. & Eng. Ency. Law, 644-5.

And in *Hochstadler* vs. *the State,* 73 Ala. 24, it was held, that only one license is required of a person engaged in retailing spirituous liquors, who occupies and carries on his business in two adjacent rooms connected with each other by an open entrance or archway cut in the partition wall, in each of which is a bar, one of the rooms being used for white persons and the other for negroes, and both rooms constituting but one establishment, and being under one and the same management.

If the two rooms had not been thus connected, but had been separated at a distance, as in the case before us, it is plainly inferable, it would not have been held that one license would cover and protect the two."

From the foregoing cases, it would appear that a "place of business" may include one or more rooms in a building where cigarettes are sold, according to whether or not the rooms are connected and under one management. It is a question of fact whether rooms in the retail merchant's place of business wherein vending machines are placed are so connected together as to constitute for the purposes of the cigarette law "one place of business."

The facts of your communication do not disclose information as to whether or not the "premises" of the retail merchant consist of one or more rooms, and if more than one room, whether or not the two vending machines are placed in different rooms on the premises of the retail merchant; or whether or not, if the machines are placed in different rooms, the rooms are connected and under one management so as to constitute, within the meaning of the foregoing court decisions, one place of business.

As pointed out in the Jebeles case, supra, the Supreme Court of Alabama holds that the cases wherein the sale of intoxicating liquors at retail at a place is involved are analogous and would apply by analogy to the sale of cigarettes at a place at retail. Therefore, it is well to briefly cite some additional pertinent cases in which the courts discussed the question of whether or not a licensee could sell liquor from two or more bars situated in one or more rooms in a building where said room or rooms were under one management.

In the case of *Sanders & Son* vs. *The Town Council of Elberton,* 50 Ga., 178, it was stated that whether or not two rooms in a particular house in which it is proposed to sell spirituous liquors are two distinct "places" and thus require two distinct licenses is a question of fact. In this case the facts showed that two rooms in a building opened on different streets, that there was no communication inside between them, and they were on different stories, The court held that the council of a town did not abuse its discretion in deciding that these two rooms constituted separate, distinct places of business, and holding two licenses were necessary. Obviously, the rooms in this case were *not connected,* so as to be said to constitute "one place of business, under one management."

In the case of *Thomas* vs. *Arie,* 122 Iowa, 438, 98 N. W. 380, a similar conclusion to the foregoing Georgia case was reached. In this case, the facts showed that a licensee sold liquor from two rooms in a building, separated by a solid partition and which rooms could be reached only by doors opening on to separate streets.

The court held that these rooms were separate and distinct places and required separate licenses.

In the case of *Malkan* vs. *City of Chicago,* 217 Ill. 471, 75 N. E. 548, 2 Lawyers' Reports Annotated (N. S.) 488, the court held that where two saloons were placed in the basement and first floor of a building, and said basement and first floor had no inside connection, and a separate door opening on the street, separate licenses must be possessed for each saloon.

Finally, in the case of *Com.* vs. *Estabrook,* 10 Pick., (Mass.) 293, the facts showed that a small building was located on the same lot with a dwelling house, at a distance of forty-five rods from it, and with a passage-way between. The court held that the small building was not an apartment or dependence of the dwelling house, though the same person occupies the whole lot, including the house and building, and thus a license to the occupant which authorizes him to sell spirituous liquors in his dwelling house does not authorize him to sell them in the small building.

On the other hand, in the case of *St. Louis* vs. *Gerardi,* 90 Mo., 640, 3 S. W.,

108, a proprietor of a hotel erected three separate bars in three separate rooms for the sale of liquor on the same floor of the hotel. These bars were screened off by partitions, but the bars were immediately connected by doorways, and were accessible to guests without going outside the hotel. The court held that only one license was necessary for all the bars, as the bars were under one management and connected by doorways.

The Gerardi case was followed by the Supreme Court of Michigan in the case of *Courtright* vs. *Newaygo,* 96 Mich., 290, 55 N. W., 808. In this case a hotel owner erected a bar on the ground floor and basement of the hotel. The basement and ground floor had independent entrances from the street, but both bars were accessible from the hotel office and could be reached by doorways inside the hotel. The court held that the whole was one place, as the rooms in which the bars were placed were controlled by one proprietor and connected by doorways, and therefore but one license was necessary.

In view of the lack of knowledge of definite facts as to the arrangement of the premises of the retail merchant involved in your communication, it is impossible to categorically answer your first question. However, I may say that if the two vending machines are located in the same room on the retail merchant's premises, or in different rooms or on different floors, which rooms and floors are connected together by doors and passageways, so as to constitute one place of business within the principles of the foregoing cases, but one license would be required of the vending machine company. Otherwise, two licenses should be required.

As for your second question, it is hardly controvertible, under the various court decisions cited, that a vending machine company fastening together two vending machines on a retail merchant's place of business, would not be required to possess more than one license for the two machines. Certainly these two machines fastened together would be placed in one room, and the space taken up by such machines would clearly be one "place of business" within the meaning of that term as used in the cigarette law.

As for your third question, it would appear, in view of the reasoning of the cases that the different vending machine companies would each be required to take out a separate license for the vending machine owned and installed by it. As pointed out heretofore, in order for only one license to be required, there must be unity of management, ownership and locality. If two separate vending machine companies owned and installed the two machines, there would not be present the element of unity of management and ownership, set forth as necessary in the Hochstadler case. Moreover, in such a case two separate "persons" would be engaging in the retail business of trafficking in cigarettes, at a place of business, without each "person" possessing a license as required by the clear provisions of section 5894-5, General Code.

In reaching these conclusions, I am cognizant of the two pertinent opinions of former attorneys general, which opinions are reported in Opinions of the Attorney General for 1924, Vol. I, page 281, and Opinions of the Attorney General for 1927, Vol. I, page 360. The first mentioned opinion held, as disclosed by the syllabus:

> "Under the provisions of section 5894, G. C., a company operating two news stands where cigarettes are sold, one within the union station and the other upon the platform without the union station, is operating

two places were such business is carried on, and is required to secure a license for each place."

While section 5894, General Code, mentioned in such opinion has since been repealed (section 24 of Amended Senate Bill No. 324, 114 Ohio Laws, 814), nevertheless, section 5894, General Code, provided for an assessment of fifty dollars for "each place" where the retail business of selling cigarettes was carried on, just as section 5894-5, General Code, now provides.

The latter of the two aforementioned opinions held, as disclosed by the second paragraph of the syllabus:

"Under the provisions of section 5894, General Code, a manufacturing company, operating stands where cigarettes are sold to employes in package and carton lots, must secure a retail cigarette license for each stand so operated."

These opinions did not cite any court decisions. The 1924 opinion turned on the fact that the stand on the platform was not in the "building" wherein the other stand was, and consequently the stands were different places of business. This opinion is in harmony with the law as announced by the cases mentioned heretofore. The 1927 opinion, however, is somewhat inconsistent with the conclusions of the Alabama cases. This opinion appears to hold that the word "place" as used in former section 5894, General Code (and now appearing in section 5894-5, General Code), means a "particular point or portion of space", and consequently that if two stands at which cigarettes were sold at retail were in the same room, such stands would be located at separate particular points of space, and require separate licenses. With this conclusion I am unable to agree, for such a holding is not in harmony with the cases heretofore cited.

Attention should now be directed to the fact that since receiving your communication you have forwarded me a copy of a regulation made by your commission on November 25, 1931. Without undertaking to quote this regulation at length, it may be stated that such regulation purports to require a separate license to be attached to each vending machine which retails cigarettes. I presume that this regulation was enacted by your commission pursuant to authority supposed to have been given your commission by the following language of section 5894-8, General Code:

"* * * *The commission shall have authority to promulgate such rules and regulations as it may deem necessary to carry out the provisions of this act* and may adopt different detailed regulations applicable to diverse methods and conditions of sale of cigarettes in this state, prescribing in each class of cases, upon whom, as between the wholesale dealer and the retail dealer, the primary duty of affixing stamps shall rest and the manner in which stamps shall be fixed. * * *" (Italics mine.)

In the case of *Davis* vs. *State ex rel. Kennedy,* 127 O. S. 261 (Ohio Bar, issue of December 25, 1933), decided by the Supreme Court of Ohio on November 15 1933, it was held in the first paragraph of the syllabus:

"Where a certain jurisdiction is duly conferred, duties assigned and powers granted to a board or commission, such board or commission cannot confer upon itself further jurisdiction or add to its powers by the adoption of rules under authority granted to adopt rules of procedure."

It appears to me that this principle is applicable here. The legislature has stated that a cigarette license must be obtained for each "place of business." The courts have construed this language. Any rule, modifying this construction, made by your commission would be clearly unwarranted under your power to make procedural rules. I therefore feel that such a regulation is invalid in so far as it conflicts with the right of a vending machine company to have two vending machines covered by one license, just as other persons who sell cigarettes at retail by means of stands, under the facts and circumstances set forth in the court decisions referred to herein.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2571.

FIXTURE—STEAM BOILER AND STATIONARY ENGINE INSTALLED IN POWER HOUSE AND FACTORY BUILDING FIXTURES WHEN—

SYLLABUS:

Steam boilers and a stationary engine installed in a power house and factory building, respectively, which have been annexed to the realty in such manner as to show the intention of the owner to make such boilers and engine a part of the realty in such way as to be adapted to the use and purpose of generating motive power for the operation of such machinery as might be installed in the factory building, are fixtures and, as such, pass to the grantee as a part of the realty upon a conveyance of the same by deed.

COLUMBUS, OHIO, April 25, 1934.

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

DEAR SIR:—This is to acknowledge the receipt of your communication of recent date, requesting my opinion as to the ownership of a battery of steam boilers and of a Corliss engine of the Simplex type now located in certain buildings on a ten-acre tract of land at or near the City of Delaware, Ohio, recently purchased by the state in certain foreclosure proceedings against the Rainbow Tire and Rubber Company in a case then pending against said company in the Common Pleas Court of Delaware County, Ohio. The deed of the Sheriff of Delaware County, Ohio, which conveyed this tract of land to the State of Ohio, described the same by metes and bounds, and conveyed to the state the property thus described "together with all privileges and appurtenances thereunto belonging." There is no express mention in the deed of the steam boilers or of the stationary engine above referred to either by way of inclusion or exclusion from the operation of the deed. In