fact, however, does not minimize the further fact that the property owners' share was definitely fixed at twenty-five per cent of the cost and expense of the improvement. Subsequent to the time the bonds were issued, new estimates were made at lower figures than those on which the bond issue was based; and following the making of the new estimates, the two final resolutions of the county commissioners were adopted agreeing definitely to the state's share at $47,700 should Type A be used and at $95,367 should Type B be adopted.

Previous opinions of this department having incidental reference to your inquiries are:

Opinions, Attorney-General, 1917, Vol I, p. 492;
Opinions, Attorney-General, 1918, Vol. I, p. 167;
Opinions, Attorney-General, 1918, Vol. II, p. 1606.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2656.

CORPORATIONS—NO LIMITATION ON AMOUNT OF AUTHORIZED CAPITAL STOCK, EITHER COMMON OR PREFERRED IN ARTICLES OF INCORPORATION OR IN CERTIFICATES OF INCREASE OF CAPITAL STOCK—AMOUNT OF PREFERRED STOCK AT PAR VALUE THAT MAY BE ISSUED AND OUTSTANDING AFTER INCORPORATION IS LIMITED TO TWO-THIRDS OF COMPANY'S ACTUAL CAPITAL PAID IN IN CASH OR PROPERTY—SEE SECTIONS 8625 AND 8667 G. C.

1. *There is no limitation on the amount of nominal or authorized capital stock, either common or preferred, that may be stated in the articles of incorporation or in certificates of increases of capital stock of companies subject to the general corporation laws of Ohio; but the amount of preferred stock at par value that may be issued and outstanding after incorporation is limited to two-thirds of the company's actual capital paid in in cash or property. Sections* 8625 *and* 8667 *G. C. construed.*

COLUMBUS, OHIO, December 2, 1921.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date relative to the interpretation of that portion of section 8667 G. C. which provides that "at no time shall the amount of preferred stock at par value exceed two-thirds of the actual capital paid in in cash or property," was duly received.

1. In Opinion No. 1996, reported in 1916 Opinions of Attorney-General, Vol. II, page 1716, it was held, according to the syllabus that

> "The par value of the authorized preferred stock of a corporation can never exceed two-thirds of the par value of all its authorized capital stock."

In the opinion, at page 1716, it was said with respect to section 8667 G. C., that

"The effect of the language is, therefore, that a corporation can at no time have outstanding preferred stock with a par value in excess of two-thirds of the par value of all its fully paid in capital stock, or, in other words, that the par value of outstanding preferred stock must never exceed twice the par value of the paid in common stock."

In the same opinion, and near its close, page 1717, it was also said:

"I am of the opinion that the corporation cannot have an amount of authorized preferred stock in excess of two-thirds of the amount of the total paid in capital stock," etc.

The opinion of the former Attorney-General, considered in its entirety, appears inconsistent in some of its statements with respect to the *effect* of section 8667 G. C., viz.: (1) at one place it is said that a corporation cannot have outstanding preferred stock with a par value in excess of two-thirds of the par value of all its fully paid in capital stock, (2) at another place, that the par value of outstanding preferred stock can never exceed twice the par value of the paid in common stock; and (3) at another place, that a corporation cannot have authorized preferred stock in excess of two-thirds of the amount of the total paid in capital stock; and (4) in the syllabus the conclusion of the whole matter is that the authorized preferred stock at par can never exceed two-thirds of the par value of all the company's authorized capital stock. In other words, instead of taking the company's *"actual capital* paid in in cash or property" as the basic factor, the opinion referred to substitutes alternately *"par value* of all its fully paid in capital stock," *"par value* of the paid in *common stock,"* and *"par value* of all its *authorized* capital stock;" and not only that, but the concluding portion of the opinion quoted above speaks about *authorized* preferred stock, whereas the rest of the opinion discusses the question from the viewpoint of *outstanding* shares.

Upon inquiry and after investigation I find that prior to your administration, the practice in the department of state has not been uniform in this matter. That is to say, the records of the department disclose that the rule announced in Opinion No. 1996 has not always been followed. For example, in the matter of increase of capital stock of The Forest City Paint and Varnish Company and of The Eastern Kentucky Coal Company, certificates of increase providing for preferred stock in excess of two-thirds of the amount of the nominal or authorized capital stock were accepted and filed. Both certificates appear to have been filed after correspondence and consultation between the secretary of state and attorney-general then in office and the attorneys of the companies involved.

In my opinion, the provision of section 8667 G. C. above quoted imposes a limitation upon the company's power to issue preferred stock after incorporation, that the limitation imposed should not be applied or confined to the par value of the paid in stock, but should also include the actual paid in capital, whether more or less than par, and that the statute has nothing to do with the requirement of paragraph 4 of section 8625 G. C. that the incorporators shall set forth in the company's articles of incorporation the "amount of its capital stock, * * * and the number of shares into which it is divided." In other words, the purpose of section 8625 G. C., which has to do with the contents of articles of incorporation, is to require the incorporators to fix a maximum amount of nominal or authorized capital stock beyond which the company cannot lawfully issue shares without increasing the amount in the manner provided by law, with no obligation resting on the company to

issue the entire amount at any time; but that when it does come to the matter of issuing its nominal or authorized capital stock, it must not exceed the limitation prescribed by section 8667 G. C. Hence, the incorporators of the company may provide in the articles of incorporation for nominal or authorized capital stock in any amount, common or preferred, as distinguished from the amount of preferred stock the company may actually and lawfully issue after incorporation under section 8667 G. C.

An examination of section 8625 G. C. will disclose that it imposes no limitation whatever on the amount of the company's nominal or authorized preferred stock; and to hold, as was said in Opinion No. 1996 supra, that section 8667 G. C. imposes a limitation on the nominal or authorized preferred capital stock, in the sense that it can never exceed the par value of the paid in capital stock, or the par value of paid in common stock, etc., would be to prevent the incorporation of a company with any nominal or authorized preferred stock at all, for the simple reason that at the time of the filing of the articles of incorporation, the company, not then being in existence, would have no paid in capital to which the limitation could be applied. Such a result also would conflict with the statutory authority expressly conferred, that if the company be for profit it may have a capital stock "which may consist of common and preferred."

Nor will it do to say that section 8667 G. C. means that the amount of nominal or authorized preferred stock can never exceed two-thirds of the nominal or authorized capital stock, or twice the amount of the nominal or authorized common stock, for the very good reason that the legislature has imposed no such limitation—the language of the legislature being that the amount of preferred at par value shall not exceed two-thirds of the "actual capital paid in in cash or property."

It should not be overlooked that there is no statutory prohibition against a corporation selling its capital stock, either common or preferred, for more than par. Corporations may, and frequently do, receive subscriptions for and sell their shares at prices above par. The amount received above par is as much a part of the company's paid in capital as the amount representing par value. That the amount received above par is part of the company's capital, see Merchants & Insurers Reporting Co. vs. Yontz, 178 Pac. 541, where the court say: "We are satisfied that the entire proceeds of sales by a corporation of its own stock, *even when sold for more than par value,* are part of its original assets or capital stock, * * * The sole purpose of selling stock is to acquire assets with which to carry on business." The amount above par being part of the company's capital, it should be counted in computing the amount of the company's actual capital paid in under section 8667 G. C., and to say that at no time can the amount of preferred stock at par exceed two-thirds of the company's authorized capital stock at par, or twice the amount of its authorized common stock at par, or to substitute any other basis of calculation than "actual capital paid in in cash or property," would not only read into the statute something that is not there, but would strike therefrom the words "actual capital paid in in cash or property," or destroy their obvious meaning. It would be administrative or judicial legislation pure and simple.

The question under consideration was before the supreme court of Pennsylvania in Person & Riegel Co. vs. Lipps, 219 Pa. St. 99. The statute involved in that case provided in language substantially the same as that used in section 8667 G. C., that at no time should the amount of preferred stock exceed two-thirds of the "actual capital paid in cash or property." The court held, according to the syllabus, as follows:

"The provision in the New Jersey corporation act that 'at no time shall the total amount of preferred stock exceed two-thirds of the actual capital paid in cash or property,' is to be construed as meaning that the preferred stock shall not exceed two-thirds of the actual property of the company. The words 'actual capital' in the act do not mean capital stock.

There is a distinction between the capital of a corporation and its capital stock, though they are often used as interchangeable terms. The capital stock is clearly not the same as property possessed by the corporation; for the capital stock remains fixed although the actual property of the corporation varies in value, and is constantly increasing in amount. What the amount of the capital shall be is within the discretion of the managers, but the amount of the capital stock is limited and determined by the charter and the law governing it."

In the opinion, at page 109, the court said:

"It is to be noted that this act does not provide that the total amount of the preferred stock shall not exceed two-thirds of the capital stock, but of the 'capital paid in cash or property.' * * * There is a well-understood distinction, universally recognized, between 'the capital or property' of incorporated companies and 'their capital stock.' The term 'capital' applied to corporations is often used interchangeably with 'capital stock,' and both are frequently used to express the same thing—the property and assets of the corporation—but this is improper. The capital stock of a corporation is the amount subscribed and paid in by the shareholders, or secured to be paid in, and upon which it is to conduct its operations; and the amount of the capital stock remains the same, notwithstanding the gains or losses of the corporation. The term 'capital,' however, properly means not the capital in this sense, but the actual property or estate of the corporation, whether in money or property. As was said in a New York case, 'It is the aggregate of the sums subscribed and paid in, or secured to be paid in by the shareholders, with the addition of all gains or profits realized in the use and investment of these sums, or if losses have been incurred, then it is the residue after deducting such losses.' It follows that a corporation's capital may be many times greater than its capital stock, and it is this which makes the shares of stock of a corporation worth more on the market than their par value."

The corporation involved in the foregoing case was engaged in the dry goods business, and the court, when it came to the matter of ascertaining the amount of the company's "actual capital paid in cash or property," to be used as a basis for determining the right of the company to issue $50,000 of preferred stock, included not only the common capital stock but also the inventory or appraised value of stock of goods on hand, less unpaid bills and other indebtedness. The aggregate amount of the items was $76,300, or $1,300 in excess of what was necessary in order to enable it to issue the $50,000 of preferred stock, under the court's decision.

In Conney Co. vs. Arlington Hotel Co., 101 Atl. 879, the Delaware statute involved provided that "at no time shall the total amount of the preferred stock exceed two-thirds of the actual capital paid in cash or property." In a suit by creditors, one of the preferred stockholders who had not paid for his shares contended that the company had no authority to issue the shares

to him, because they were in excess of the company's "actual capital paid in cash or property;" or, in other words, that the shares were an overissue, and hence illegal and void. The court held, among other things, that, as to creditors, the defense could not be sustained, because creditors were justified in acting on the assumption that the company's capital was at least equal to the amount of its issued common stock. The court did not hold that the amount of the company's "actual capital" was or should be limited to the amount of the company's issued and outstanding common stock, but rather that the amount of the common stock should be included in making the computation. That this is true is evidenced by the fact that the court distinguished between "capital" and "capital stock," by saying that "'capital' means property, and 'capital stock' means the aggregate of the interests of the stockholders in the property of the company after its debts are paid," and cited and commented upon Person & Riegel Co. vs. Lipps, 219 Pa. St. 99, supra, in support of its opinion. In the Person & Riegel Company case, it will be remembered, the court added the net invoice or appraised value of the company's property to its common stock, in order to ascertain the amount of the company's actual capital on which to compute the amount of preferred stock the company could lawfully issue.

In Foote vs. Greilick, 166 Mich., 637, the Michigan statute providing that preferred stock shall not exceed two-thirds of the paid in capital was involved. The court, at page 643, apparently makes a distinction between the amount of *authorized* preferred capital stock a company may provide for, and the amount that may be *issued*, and concludes with a statement to the effect that while the statute does not place a limitation on the former, it does prohibit the *issue* of preferred stock to an amount greater than two-thirds of the capital paid in.

In Heide vs. Securities Co., 76 So. 313, a statute was involved which provided that preferred stock "in no case exceeding two-thirds of the capital stock paid for in cash or property may be issued." In the opinion, at page 315, the court said that the legislative intent was that preferred stock should have some *"solid foundation* upon which to rest, * * * something more than simply the capital stock of the company, and in order to insure as nearly as may be this foundation for the issuance of preferred stock, the legislature has provided that the same shall not be issued in any sum exceeding two-thirds of the capital stock paid for in cash or property."

In the cases above mentioned the courts apparently did not consider the effect of the words "paid in," used in connection with the words "capital," "actual capital" and "capital stock." In my opinion these words should not be disregarded when attempting to ascertain the meaning of the phrase "actual capital paid in in cash or property," as used in section 8667 G. C., for it appears clear that in some instances "actual capital *paid in*" may mean something materially different from "actual capital." That is to say, and by way of illustration, while a company's actual capital may embrace all its capital assets from whatever source derived, its actual capital "paid in" may not be so far reaching, but be confined to what was paid in by the stockholders at the outset or added by them thereafter, including also any surplus profits arising from its business transferred to capital account in connection with the declaration and distribution of a stock dividend—assuming, as indicated in some cases, that the transfer and credit to capital account is equivalent to paying in, and, with special reference to section 8667 G. C., the definition, by reason of the use of the words "actual capital," should be further limited to the paid in capital actually existing or represented at the time preferred shares are issued.

It is believed that the views just expressed are clearly warranted by the

language of section 8667 G. C. See also Eisner vs. Macomber, 252 U. S. 189; Railway Co. vs. Furnace Co., 49 O. S., 102, 111, 112; recent opinion of U. S. supreme court, LaBelle Iron Works vs. U. S. reported in U. S. Advance Sheets (L. R. A.) of June 15, 1921.

But, as I view it, it is not indispensable that the exact line of demarcation between "actual capital paid in," on the one hand, and "capital" or "capital stock," on the other hand, be drawn in this opinion in order to dispose of the question confronting your department with respect to the amount of nominal or authorized capital stock that may be provided for in articles of incorporation or in certificates of increase of capital stock, as distinguished from the amount of preferred shares a company may issue and have outstanding. The cases heretofore cited, and comments made, have not been employed for such specific purpose, but in an endeavor to show that there is a distinction between the *nominal* or *authorized* capital stock of a corporation, which is *not* the basic factor under section 8667 G. C., and its *actual capital paid in,* which *is* the basic factor.

Before closing this part of the opinion another statement in Opinion No. 1996, supra, made in answer to the contention that actual capital paid in included assets, may be noticed, viz.:

> "This suggested interpretation would also result in uncertainty and confusion. For example: If a corporation having an authorized capital stock of $300,000 divided into $200,000 preferred and $100,000 common and having no surplus should suffer a loss of $50,000, it would be under the necessity of reducing the amount of its preferred stock in order to comply with the statute quoted."

Proper answers to the statement quoted would seem to be (1) that the statute makes no requirement that a company shall formally reduce its capital stock when it suffers a loss of actual capital, (2) that the only statutory authority and method of reducing capital stock (other than through redemption under section 8669 G. C.) is that granted and prescribed by section 8700 G. C., which provides therefor after the "written consent" of certain stockholders has been obtained, and (3) that the legality of any particular issue of preferred stock is to be determined at the time of the issue, and is not dependent or conditioned on subsequent events.

Followed to its logical conclusion, the statement quoted above would present the anomalous condition of a preferred stock issue being legal one day and illegal the next, and would necessitate a formal reduction in capital stock, notwithstanding the company might the very next day after the reduction recover the loss of the day before. Such a system of capitalization would be the one to result in "uncertainty and confusion," rather than one which recognized the rule that the validity of a particular stock issue should be determined as of the time it is made. But however this may be, the question as to what action a company should take when a loss of actual capital takes place after a lawful issue of preferred stock has been made, would appear to be one concerning which the secretary of state has not been charged with any responsibility, and also one concerning which you have made no inquiry. It is, however, respectfully suggested that when your department comes to the matter of getting out a new supply of printed forms of articles of incorporation, to be used by companies desiring to incorporate with an authorized capital stock consisting of both common and preferred shares, you may deem it advisable to insert at an appropriate place the language of section 8667 G. C., that "at no time shall the amount of preferred stock at par value exceed two-

thirds of the actual capital paid in in cash or property." Such a provision, while not required, would serve to direct the attention of the incorporators, stockholders and officers of the company to the fact that while the articles of incorporation may provide for a certain amount of nominal or authorized preferred capital stock, there is a limitation on the amount thereof that may lawfully be issued.

For the reasons above set forth, the conclusion is reached that section 8667 G. C. imposes a limitation only on the amount of preferred stock that may be issued and the basic factor in determining the amount is "actual capital paid in in cash or property," and nothing else. That being true, we are also confirmed in the view heretofore expressed herein that the limitation contained in section 8667 G. C. has no application to the nominal or authorized amount of capital stock required to be stated in the articles of incorporation under paragraph 4 of section 8625 G. C., for were it otherwise (to again use similar language employed in the former portion of this opinion), it would be impossible to incorporate a company with any nominal or authorized preferred stock at all, since, at the time of incorporation, the company would have no actual capital paid in on which to compute or base the amount of its nominal or authorized preferred shares.

2. Section 8698 G. C., as amended in 107 O. L. pp. 414, et seq., was not overlooked in reaching the conclusion above expressed. That section is the one authorizing increases in authorized capital stock. In the first and fifth paragraphs provision is made for increasing the amount of authorized capital stock prior to and after organization, respectively, and it is provided, among other things, that the certificate to be filed with the secretary of state shall show "the proportion of common and preferred stock" when both classes are increased. These provisions, of course, add nothing to paragraph 4 of section 8625 G. C., for the statement in the articles made pursuant to paragraph 4 would per se suggest the proportion when both classes of stock are provided for; and, clearly, the provisions of section 8698 G. C. mentioned imposes no limitation on the amount of either common or preferred that may be authorized or issued, nor do they attempt to do so.

In the third paragraph of the statute authority is granted to increase the authorized capital stock after organization by "issuing" preferred stock "within the limits permitted by law." This provision, by the use of the word "issuing," gives support to the proposition heretofore advanced that there is a recognized distinction between (a) nominal or authorized capital stock and (b) actually issued capital stock. And with respect to the phrase, "within the limits permitted by law," it may be said that since the section contains no limitation as to amount, and the phrase itself is one of reference only, we necessarily must look elsewhere for the limitation referred to, if any exists. The search for the limitation, with respect to companies subject to the general corporation laws, only leads us back to the nominal or authorized amount of preferred stock fixed in either the articles of incorporation, or in certificates of increase, beyond which the company cannot in any event lawfully go in issuing shares, and to section 8667 G. C.—the latter section being the only one prescribing any limitation.

In the fourth paragraph of the section, another mode of increasing authorized preferred capital stock after organization is provided, and the provision is there made that "the total authorized preferred stock * * * after such increase shall not exceed the limits provided by law." But what are the "limits provided by law" that are referred to? We have just had occasion to discuss the phrase, "within the limits permitted by law," and what was

then said applies with equal force to the phrase now involved, viz.: that the only limit provided by law is the one found in section 8667 G. C.

What has been said also disposes of the provision found in section 8719 G. C., which section authorizes the amendment of articles of incorporation so as to change unissued common shares to preferred shares "within the limits permitted by law," and the argument or reasons will not be repeated here.

What is most obvious in connection with amended sections 8698 and 8719 G. C. is the inaccuracy of their language. It is quite possible that whoever drafted the sections did not have before him or clearly in mind the exact language of section 8667 G. C. and of paragraph 4 of section 8625 G. C., or if he did, that he did not appreciate or grasp its import. He may have thought that section 8667 G. C. had to do with *par* proportions, rather than *actual capital* proportions. But however it may have been, it is quite certain that the only limitation on the amount of preferred stock, so far as companies subject to the general corporation laws are concerned, is that found in section 8667 G. C., and since amended section 8698 or 8719 G. C. have not prescribed another or different basis for determining the amount, "actual capital paid in in cash or property" only can be used.

3. With respect to corporations having non-par value common stock, your attention is directed to section 8728-1 G. C., 108 O. L. Pt. 2, p. 1288, which provides that "At no time shall the number of shares of preferred stock outstanding be more than two-thirds of the total number of shares, common and preferred, outstanding."

You will observe that the limitation goes, not to the nominal or authorized capital stock, but to outstanding shares, thereby making it consistent with sections 8625 and 8667, G. C. which, as interpreted in this opinion, place no limitation upon the nominal or authorized amount of preferred stock, but only upon the amount of shares that may be issued.

You are therefore advised that there is no limitation on the amount of nominal or authorized capital stock, either common or preferred, that may be stated in the articles of incorporation or in certificates of increases of capital stock of companies subject to the general corporation laws of Ohio; but the amount of preferred stock at par value that may be issued and outstanding after incorporation is limited to two-thirds of the company's actual capital paid in in cash or property.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2657.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND GRANT-BOULTON COMPANY, COLUMBUS, OHIO, FOR CONSTRUCTION OF RAILROAD SIDING AT INSTITUTION FOR FEEBLE MINDED AT ORIENT, OHIO, AT A COST OF $19,270.40.

COLUMBUS, OHIO, December 2, 1921.

HON. LEON C. HERRICK, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for approval a contract (five copies) between the state of Ohio, acting by the department of highways and public works, and Grant-Boulton Company, a partnership composed of Earl C.