104 O. S. 550. It only remains for us to determine the construction and application of the above quoted provisions of Section 9887, General Code, to the question presented in your communication. Under said statutory provisions, where, as in the case here presented, the title to the fair grounds is in the county agricultural society, the county commissioners may erect or repair buildings, or otherwise improve such grounds, or they may "contribute to, or pay any other form of indebtedness of said society"; and the commissioners are authorized to appropriate from the general fund such amount as they deem necessary for any of said purposes. Under the facts stated in your communications, I am inclined to the view that the construction of the cinder track referred to therein is an improvement, having such relation to racing as an activity carried on in the conduct of the fair, as authorizes the county commissioners under the provisions of Section 9887, General Code, to construct such improvement or to contribute therefor out of the general fund of the county such sum of money as they may deem necessary and proper for the purpose, if they determine that such improvement is for the best interest of the county and of said county agricultural society. If the total amount appropriated to be expended in the purchase of real estate or in the erection of buildings or other improvements or payments of rent or other forms of indebtedness and the expenditure for the construction of said cinder track should in the aggregate exceed ten thousand dollars in any one year, such expenditure may not be made unless the question of a levy of a tax therefor is submitted to the qualified electors of the county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3046.

FOREIGN CORPORATION—TITLE GUARANTY COMPANY—NOT ADMITTED IN OHIO TO GUARANTEE REAL ESTATE TITLES.

SYLLABUS:

A foreign corporation cannot be admitted to this state for the purpose of engaging in the business of guaranteeing titles to real property.

COLUMBUS, OHIO, December 21, 1928.

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

DEAR SIR:—This will acknowledge receipt of your communication, requesting my opinion as follows:

> "We are submitting herewith a letter from the North American Title Guaranty Company, 8 W. 40th Street, New York.
>
> Will you kindly give your opinion as to whether the company should qualify under the corporation laws or the insurance laws of Ohio."

Accompanying your letter, and to which you refer, is one from the North American Title Guaranty Company of New York, as follows:

"The North American Title Guaranty Company desires to qualify to do business in the State of Ohio. This company is organized under the insurance laws of the State of New York under Section 170, which reads as follows:

'To examine titles to real property and chattels real, to procure and furnish information in relation thereto, make and guarantee the correctness of searches for all instruments, liens, or charges affecting the same, guarantee or insure the payment of bonds and mortgages, or notes of individuals or partnerships secured by mortgages upon real property situated in this or any other state, and bonds, notes, debentures and other evidences of indebtedness of solvent corporations secured by deed of trust or mortgage upon real property situated in this or any other state, invest in, purchase and sell, with such guarantee or with guarantee only against loss by reason of defective title or incumbrances, bonds and mortgages, and notes of individuals or partnerships secured by mortgages upon improved and unincumbered real property situated in this or any other state worth fifty per centum more than the amount loaned thereon, and bonds, notes, debentures and other evidences of indebtedness of solvent corporations, secured by deed of trust or mortgages upon improved and unincumbered real property situated in this state or outside of this state worth fifty per centum more than the amount loaned thereon, and guarantee and insure the owners of real property and chattels real and others interested therein against the loss by reason of defective titles thereto and other incumbrances thereon, which shall be known as a title guaranty corporation.'

This company has already qualified in the States of New Jersey, Pennsylvania, Delaware, Florida, Texas, Tennessee, Mississippi, Indiana, Georgia, and also in the Island of Porto Rico. Will you kindly advise me fully as to the requirements that this company would have to meet in order to qualify in your state? Will you also advise whether or not we would be qualified through your department?"

Section 9850, General Code, defines the powers of a title, guarantee and trust company under the laws of Ohio, as follows:

"A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it."

The remainder of the sections of the General Code dealing specifically with title guarantee and trust companies are Sections 9851 to 9855, inclusive, which are as follows:

Sec. 9851. "No such company shall do business until its capital stock amounts to at least one hundred thousand dollars fully paid up, and until it has deposited with the treasurer of state fifty thousand dollars in securities permitted by Sections ninety-five hundred and eighteen and ninety-five hundred and nineteen. Except such deposit, the capital shall be invested as the board of directors of such company prescribes."

Sec. 9852. "The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of all guarantees entered into and trusts accepted by such company, but so long as it continues solvent he shall permit it to collect the interest of, or dividends on, its securities so deposited, and to withdraw them or any part thereof, on depositing with him cash or other securities of the kind heretofore named so as to maintain the value of such deposit at fifty thousand dollars.

Sec. 9853. Any company so organized shall be limited in its operation to only one county in the state, which shall be designated in its application for a charter, except that if it desires to issue its policies of title insurance in more than one county it may issue them in such other county or counties upon depositing with the treasurer of state an additional sum of fifty thousand dollars in securities as above provided, for each additional county in which it proposes to operate."

Sec. 9854. "If such a company has made deposits with the treasurer of state as herein required, it may request such treasurer to return to it securities in excess of the amount so required, and he shall surrender such excess to the company, taking proper receipts therefor."

Sec. 9855. "All companies doing the business of guaranteeing titles to real property shall comply with and be governed by the foregoing provisions relating thereto. But such companies heretofore organized and doing business thereunder, may continue business without prejudice to any rights thereby acquired or obligations incurred."

It is to be observed that these sections fail to make clear whether they are applicable alone to domestic corporations or may also be held to apply to foreign corporations.

The language of Section 9853, supra, is somewhat indicative of the fact that it was intended only to be applied to domestic corporations, since it states the company's operations shall be limited to only one county, "which shall be designated in its application for a charter." Ordinarily a charter of a corporation constitutes its articles of incorporation and hence the language might well be regarded as applying only to domestic corporations. On the other hand, the word "charter" might be regarded as generic in character and accordingly inclusive of the right or license to do business in the State of Ohio, as well as the articles of incorporation. In view of the doubt with relation to the application of these sections to foreign corporations, it is necessary to go further in order to answer your inquiry.

Section 665 of the General Code is as follows:

"No company, corporation, or association, whether organized in this State or elsewhere, shall engage either directly or indirectly in this State in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this State, and the laws regulating it and applicable thereto, have been complied with."

Accordingly, if the company in question is doing an insurance business, then it must be expressly authorized by the laws of this state. Broadly, the term "insurance" is defined in Cooley on the Law of Insurance, 2nd Edition, p. 6, as follows:

"Insurance has been defined in general terms as a contract by which one party undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event."

The business proposed to be done by the corporation concerning which you inquire is that of guaranteeing titles to real estate, based upon examinations made by it. With respect to this general type of business, it is fairly well settled that it may be denominated insurance.

Paragraph 339 of Joyce on Insurance is as follows:

"A class of contracts generally designated as guarantee insurance has been before the courts in numerous cases for adjudication. This class comprises fidelity, title, credit, bond and contract guaranty generally, and after much discussion it seems to be well settled that these contracts are essentially those of insurance where the companies engage in the business for profit and where the terms of the contract itself closely resemble the essential elements of an insurance contract, so that the rights and liabilities of the parties are governed by the rules of construction applicable to insurance rather than by the rule strictissimi juris which determines the rights of ordinary guarantors or sureties without pecuniary consideration. The application of this rule will appear under the next following sections. But an insurance company is not a guaranty or security company within the ordinary meaning of that term within a statutory declaration of what is meant by guaranty or security company."

With reference to title guaranty contracts, Section 339g of that author's work states:

"A title guaranty contract constitutes insurance within the rule above stated. And a title insurance company is not a surety where it agrees to 'indemnify, keep harmless, and insure' a mortgagee 'from all loss or damage, not exceeding' the amount of the mortgage debt, which he or his assigns might sustain by reason of defects in the title to the mortgaged premises, or by reason of liens or encumbrances thereon existing at the date of the policy. So it is determined in Missouri that a guaranty of title is also an indemnity similar to that of insurance and is governed by the same rule. In Pennsylvania it is decided that a contract to indemnify and insure against all loss or damage from defects or unmarketableness of title, or against loss on a mortgage given as collateral security on a loan, coupled with a guarantee for the completion of certain buildings is one of indemnity alone and cannot be severed, and evidence is inadmissible as to the nonerection of the buildings in the absence of a showing that a loss on the mortgage had been sustained by reason thereof. Under a New York case a contract of title guaranty is one of insurance and it is also there declared that the contract insuring against loss or damage on account of defects of title, by reason of liens and encumbrances, etc., was a contract of insurance pure and simple and that such corporations were, under the statute, placed upon substantially the same footing and were subject to the same rules as applied to other insurance companies, except so far only as the character of the business transacted differed from that transacted by other insurance companies recognized and provided for in the same law, and that these contracts are subject to the same rules of construction as are applicable to other insurance contracts."

In view of these authorities, I conclude that the business of guaranteeing titles is in fact a branch of the insurance business. Any doubts with respect to this conclusion are set at rest upon examination of the history of Sections 9850 et seq., of the Code, quoted above. Before discussing this history, however, it is well to quote Section 9510 of the General Code relative to insurance companies generally. That section is as follows:

"A company may be organized or admitted under this chapter to—

1. Insure houses, buildings and all other kinds of property in and out of the state against loss or damage by fire, lightning and tornadoes, and make all kinds of insurance on goods, merchandise and other property in the course of transportation, on land, water, or on a vessel, boat or wherever it may be.

2. Make insurance on the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; make insurance against loss or damage resulting from accident to property, from cause other than fire or lightning; guarantee the fidelity of persons holding places of public or private trust, who are required to, or, in their trust capacity do receive, hold, control, disburse public or private moneys or property; guarantee the performance of contracts other than insurance policies and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or by law allowed; make insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations. But a company of another state, territory, district or country admitted to transact the business of indemnifying employers and others, in addition to any other deposit required by other laws of this state, shall deposit with the superintendent of insurance for the benefit and security of all its policy holders, fifty thousand dollars in bonds of the United States or of the state of Ohio, or of a county, township, city or other municipality in this state, which shall not be received by the superintendent at a rate above their par value. The securities so deposited may be exchanged from time to time for other securities. So long as such company continues solvent and complies with the laws of this state it shall be permitted by the superintendent to collect the interest on such deposits.

3. Make insurance on the lives of horses, cattle or other live stock, against loss by death caused by accident, disease, fire or lightning, and against loss by theft and damage by accident. But such companies shall have a capital of one hundred thousand dollars, with at least twenty-five per cent of the capital stock paid up.

4. Receive on deposit and insure the safekeeping of books, papers, moneys, stocks, bonds and all kinds of personal property; lend money on bottomry or respondentia, and cause itself to be insured against any loss or risk it has incurred in the course of its business, and upon the interest which it has in any property by means of any loan which it has made on mortgage, bottomry or respondentia, and generally to do all other things proper to promote these objects."

The section has existed in substantially the same form for many years. It was found in the Revised Statutes as Section 3641, and, so far as pertinent to the present discussion, read the same in 1896, at which time the Legislature enacted a supplementary section numbered Section 3641d, which was as follows:

> "Every company organized for the purpose of guaranteeing the titles to real property shall before commencing business in this state, deposit an amount equal to one-half of its capital stock, and in no event less than the sum of two hundred and fifty thousand dollars, with the superintendent of insurance, in the securities permitted by Sections 3637 and 3638 of the Revised Statutes, and the entire stock of such title guaranty and abstract company shall be paid up, and with the exception of the deposit aforesaid, shall be invested only as the board of directors of said company may prescribe."

This section is the predecessor of all the present existing special sections dealing with title guaranty and trust companies, which I have heretofore quoted. Being enacted as a supplementary section to Section 3641, Revised Statutes, supra, it is quite evident that companies guaranteeing titles to real property were regarded as insurance companies authorized to be organized or admitted to do business in this state under the regulation and supervision of the insurance officials. Apparently the Legislature regarded the provisions of Section 3641, Revised Statutes, authorizing a company to be admitted to do business in this state, to "guarantee the performance of contracts other than insurance policies", to be broad enough to include the guaranteeing of titles to real property and saw fit to make specific provisions with relation to a deposit by such a company.

It was not long, however, until the Legislature took action repealing Section 3641d of the Revised Statutes, supra. In 95 O. L., p. 222, that section was repealed and Section 3821ggg was enacted, which section need not be quoted here except the last sentence thereof, which was as follows:

> "Title guarantee and trust companies shall make such reports to the state auditor as are required of safe deposit and trust companies and shall be subject to the same examinations and penalties as such companies; and it is hereby expressly provided that all companies doing the business of guaranteeing titles to real property shall comply with and be governed by the provisions of this act, and Section 3641 of the Revised Statutes of Ohio shall not apply to such companies."

The obvious purpose of the Legislature was to take title guarantee and trust companies from under the supervision of the insurance department and make them subject to examination by and under authority of the state auditor, and it is to be particularly observed that provision was made specifically to the effect that Section 3641 of the Revised Statutes should not apply to such company. Of course this constituted a recognition that in the absence of such a provision Section 3641 of the Revised Statutes should apply; that is, a notice of the fact that a company of this character is engaged in the insurance business and would have been normally subject to the supervision of the insurance department were it not for this specific provision.

Section 3821ggg of the Revised Statutes was amended later in the year 1906, the amendment being found in 98 O. L. 153. Here again is found the same language, that Section 3641 of the Revised Statutes shall not apply to such companies. Apparently there was no further amendment of this section until the action

of the Codifying Commission, when the language denying the application of Section 3641, Revised Statutes, was omitted without any specific legislative action other than the general adoption of the Code. Such being the fact, it is my opinion that the Legislature has always treated the business of guaranteeing titles to real property as a branch of the insurance business, but has deemed it proper to segregate it and set it apart from other types of insurance business, placing the supervision and provisions of law with respect thereto elsewhere.

In view of the legislative history, the conclusion must be reached that, while the business of guaranteeing titles to real property is a branch of the insurance business and hence within the language of Section 9510, supra, all jurisdiction of the Superintendent of Insurance over this particular type of company has been withdrawn by legislative action. Accordingly, if there exists any right of a foreign corporation engaged in this type of business to qualify and do business in this state, it must be sought elsewhere than in the insurance law.

The general provisions relating to the admission of foreign corporations to do business in this state are those contained in Sections 178 to 191, inclusive, of the General Code. Section 178 of the Code is as follows:

> "Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking insurance, building and loan, or bond investment corporations."

The last sentence of this section clearly negatives any right of a foreign insurance company to qualify under general law. Since, as I have before pointed out, the business of guaranteeing titles of real property is generally recognized as a branch of the insurance business, the conclusion cannot be escaped that the company concerning which you inquire has no right to qualify to do business in this state under general law.

In so stating I am not unmindful of the fact that Section 178, supra, was enacted at a time when corporations of this character were under the supervision of the insurance officials and probably could qualify to do business upon securing a license from the insurance department. The section has not been amended since the time when the jurisdiction of the insurance department over title guarantee and trust companies was withdrawn. It may be claimed that it was the obvious purpose of the Legislature to make the general law inapplicable to insurance companies because they were fully covered by the special provisions relating thereto and that at the time of the withdrawal of this particular type of company from the supervision of the insurance department the amendment of Section 178 of the Code, supra, was overlooked, the legislative intention not being to deny foreign title guarantee and trust companies the right to do business in Ohio indirectly. However this may be, I do not feel warranted in so assuming. If the Legislature had desired to qualify the last sentence of Section 178 of the Code so as to make the section applicable to title guarantee and trust companies, it could very well have so done by changing the sentence so as to make the section not applicable to foreign in-

surance corporations under the supervision of the insurance department. As it stands, however, the section clearly does not apply to any foreign insurance corporation, whether under the supervision and authority of the superintendent of insurance, or otherwise.

In view of what has been said, I am of the opinion that a foreign corporation cannot be admitted to this state for the purpose of engaging in the business of guaranteeing titles to real property. Accordingly, the company concerning which you inquire, which is engaged in this class of business, cannot be qualified to do business in Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3047.

HEALTH COMMISSION—GENERAL HEALTH DISTRICT—LICENSED PHYSICIAN RESIDENT OF CITY OUTSIDE OF DISTRICT MAY BE EMPLOYED.

SYLLABUS:

A licensed physician living in a city, which is not a part of a general health district, may be appointed or employed as health commissioner of said general health district.

COLUMBUS, OHIO, December 21, 1928.

HON. JAMES COLLIER, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your recent communication, which reads as follows:

> "I have been asked the question whether a physician living in the city of Ironton, Lawrence County, Ohio, is qualified to serve as County Health Commission. The county health district does not include the City of Ironton. The physician lives within the city limits but practices his profession both in the city and in the county.
>
> For several reasons I have been unable to satisfy the interested parties and therefore ask your opinion in this matter."

The provisions of the Ohio statutes pertinent to your inquiry are Sections 1261-16 et seq., General Code.

Section 1261-16, General Code, provides:

> "For the purposes of local health administration the state shall be divided into health districts. Each city shall constitute a health district and for the purposes of this act (G. C., Sections 1261-16 et seq.) shall be known as and hereinafter referred to as a city health district. The townships and villages in each county shall be combined into a health district and for the purposes of this act shall be known as and hereinafter referred to as a general health district. As hereinafter provided for, there may be a union of two general health districts or a union of a general health district and a city health district located within such district."