It is believed that the subject matter of this contract is incident to and necessary for carrying out the powers granted by the provisions of the new prison act enacted in 103 O. L., 249.

While this department is of course only concerned with the form and legality of the contract, it is deemed advisable to direct your attention to paragraph 12 of the proposed contract, pointing out that the term "or other causes beyond our control," relating to the delivery day of the stone, is very comprehensive. This, in connection with the fact that no liquidated damages for failure to deliver is fixed in section 14 of the agreement, seems to be of sufficient importance to especially call your attention to these features. It is realized, of course, that the policy of entering into such an agreement is entrusted to your board. The availability of the funds necessary for the discharge of the proposed agreement is evidenced by the certificate of the state auditor hereto attached.

After consideration of the agreement as a whole, it is, as to form, hereby approved.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1239.

APPROVAL, ARTICLES OF INCORPORATION, THE ANCHOR LIFE AND ACCIDENT INSURANCE COMPANY.

COLUMBUS, OHIO, May 14, 1920.

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

DEAR SIR:—The articles of incorporation of The Anchor Life and Accident Insurance Company, a company which it is proposed to incorporate and organize under authority of sections 9339 et seq., I herewith return to you with my certificate of approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1240.

HOTELS AND RESTAURANTS—CONSTRUCTION OF ACT PROVIDING FOR INSPECTION AND LICENSING OF SAME—"RESTAURANT" AS DEFINED BY ACT CONSTRUED—APPLICABLE TO MOVABLE LUNCH WAGONS ON WHEELS AND COUNTY FAIR LUNCH STANDS—NOT APPLICABLE TO MANUFACTURING COMPANY OPERATING EATING PLACE FOR EMPLOYES—WHEN COMBINATION LICENSE AUTHORIZED BY ACT—FAMILY HOTEL AS DEFINED BY ACT CONSTRUED.

1. *Covered movable lunch wagons on wheels, and county fair lunch stands fashioned and constructed somewhat after a shed, come within the meaning of the words "every building or other structure," as used in section 843-2 G. C.*

2. *Section 843-2 G. C. defining a restaurant, neither refers to nor makes the furnishing of chairs, stools or benches an element or part of the definition, whether the restaurant be commonly called a saloon, soft drink parlor, general store, or other name.*

3. *A manufacturing company operating an eating place commonly called a factory or employes' restaurant, in which meals or lunches are supplied and furnished solely to its employes, and which is never held out as a place where meals or lunches will be served to others, is not conducting a restaurant, as the word is defined in section* 843-2 *G. C. And the mere fact that occasionally, but not as a matter of practice, a traveling salesman or other person having business at the factory may, as a personal accommodation, be permitted to secure a meal or lunch in such factory or employes' restaurant, would not of itself constitute a holding out to the public, within the meaning of the statute.*

4. *The only combination license authorized by sections* 843 *et seq. G. C., providing for the inspection and licensing of hotels and restaurants, is for each "combined hotel and restaurant where both are conducted in the same building under the same management"; so that, by reason of section* 843-4 *G. C. which requires that a license be procured for restaurant, if there be two or more restaurants conducted in the same building, although under one general management and supplied from a common kitchen, a license must be procured for each.*

5. *A so-called family hotel in which five or more rooms have been set aside as sleeping quarters and are advertised or held out to the public for the use or accommodation of transient guests for pay, is a "hotel" within the meaning of section* 843-1 *G. C., and does not come within the provision of section* 843-3 *G. C. exempting family hotels from the act of which those sections are parts.*

COLUMBUS, OHIO, May 14, 1920.

HON. WILLIAM J. LEONARD, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date submitting certain concrete cases and inquiring whether or not they come within the recent act providing for the inspection and licensing of hotels and restaurants (108 O. L., Part I, 288; Part II, ——; Am. S. B. Nos. 14 and 237), was duly received.

1. Five of your cases depend upon whether or not they come within the definition of the term "restaurant," as that word is defined by the act.

Section 843-2 G. C., one of the sections of the act, defines a restaurant as follows:

> "Every building or other structure kept, used, maintained, advertised or held out to the public to be a place where meals or lunches are served for consideration, without sleeping accommodations, shall, for the purpose of this act, be defined to be a restaurant."

Your questions do not require the exact line of demarcation to be drawn between a "building" and "structure," as these words are used in the act, but they do involve a determination of whether or not covered movable lunch wagons and lunch stands commonly used and operated at county fairs are included in the phrase, "every building or other structure." Definitions of the words "building" and "structure" have been drawn upon and employed herein for the purpose of showing that the legislature, in using the phrase, "every building or structure," must have intended to reach and include buildings and structures of every kind and character kept, used, maintained, advertised, or held out to the public as a place where meals or lunches are served for a consideration, and that this must have been the legislative intent finds support in the fact that the words, "or other structure," are not associated with any particular objects or kinds or classes of buildings or structures, which could be referred to as calling for a limited or restricted meaning.

The terms "building" and "structure" are not defined in the act, and recourse

must necessarily be had to other sources to ascertain what is included within their meaning.

In State vs. Atlantic City, 59 L. R. A. 947, the court say:

> "What is a building, in the sense of the statute? According to Webster, a building is defined as 'that which is built; a fabric or edifice constructed, as a house, a church, etc.' * * * The word 'building,' in a statute, will almost always depend for its meaning, in some degree, upon the particular subject matter, and its connection with other words."

In Bailey vs. State, 7 C. C. (N. S.) 28, affirmed by the supreme court without report in 69 O. S. 551, the court had under consideration the meaning of the word "building," as used in section 6835 of the Revised Statutes, and it was held that the word, as therein used, meant

> "A building that had some permanency of structure. It may not be absolutely permanent, it may not be such a structure as that the removal of it, or in detaching it from the real estate it would damage the real estate at all, but it must have some permanency about it,"

and it was accordingly held in that case that the term did not include a movable chicken coop thirty-eight inches square.

In Truesdel vs. Grey, 13 Gray, (Mass.) 311, the court said:

> "The word 'building' can be held to include other species of erection on land, such as fences, gates or other like structures. Taken in its broader sense, it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacturing, armament or use constituting a fabric or edifice, such as a house, a store, a church, a shed."

In Lewis vs. State, 69 O. S., 473, 482, the court, having under consideration the meaning of the word "structure," as used in section 2753, R. S., said:

> "The Century Dictionary defines the word structure as follows: 'A fitting together, adjustment, building, erection, a building, edifice, structure. 1. The act of building or constructing; a building up. 2. That which is built or constructed; an edifice or building of any kind; in the widest sense, any production or piece of work artificially built up, or composed of parts joined in some definite manner; any construction.' The Standard Dictionary gives a similar definition."

In Cleveland vs. Painter, 6 N. P. (N. S.) 129, the meaning of the words "building or structure," as used in the restrictive covenant of a deed, was involved, and in the course of the opinion it was said:

> "What would be a structure under one state of facts might not be a structure under another * * *. We must construe the word with reference to the objects sought by the restriction, * * *."

In Montclair vs. Amand, 68 Atl. 1067, it appears that an ordinance prohibited the removal of any wooden building or structure from without to within the city fire limits. The defendant was found guilty of removing a covered "lunch wagon" from without to within the fire limits. In the opinion the court said:

"The fact that the subject of contention here was originally a lunch wagon movable from place to place, but now affixed to the defendant's lot and connected with gas, telephone and electric light mains of the town would include an intention upon the part of the owner to give to it a fixed resting place for business uses, and bring it within the meaning of the term 'building or structure' contained in the ordinance. * * * That the subject of controversy here is 'a building or structure' within the meaning of this ordinance is supported by the trend of authority in this and other states."

It would seem, therefore, that a covered movable lunch wagon on wheels, and county fair lunch stands fashioned and constructed somewhat after a shed, come within the meaning of the words "every building or other structure," as used in section 843-2 G. C., and, if kept, used, maintained, advertised or held out to the public to be a place where meals or lunches are served for a consideration, are restaurants within the meaning of that section.

2. You also inquire whether or not a building or other structure which otherwise comes within the definition of the term "restaurant," within the meaning of section 843-2, would be excluded from the definition by reason of the fact that chairs, stools or benches are not provided for the use of patrons or customers while eating their meals or lunches.

You are advised that, while under section 843-4 G. C., the amount of the license fee in each particular case is measured by the seating capacity of the restaurant, viz: $3.00 where the restaurant has a seating capacity of less than twenty-five persons, and $5.00 where it is twenty-five or more, the statutory definition of the word "restaurant" neither refers to nor makes the furnishing or use of chairs, stools or benches an element or part of the definition, and their presence or absence in any case is, therefore, of no vital importance, whether the restaurant be called a saloon, soft drink parlor, drug store, general store, etc.

3. You will also observe that it is a necessary and indispensable element of the definition of restaurant as used in section 843-2, that it be "held out to the public" as a place where meals or lunches are served for a consideration, etc.

What is meant by or included in the phrase, "held out to the public?"

(a) *Holding out*:

In U. S. vs. Snow, 4 Utah, 313, 325, it was held that "to lead the world to believe by language and conduct" that a certain relation or status exists, constitutes a holding out. See, also, 21 Cyc. 439. And in 30 Cyc. 392, where the subject of holding out as a partner is considered at some length, it is stated that "any conduct on the part of a person reasonably calculated to lead others to suppose" that the relation exists, amounts to a holding out.

(b) *"The public:"*

"The word public," said the supreme court of Vermont in Morgan vs. Cree, 46 Vt., 771, 786, "is used variously, depending for its meaning on the subjects to which it is applied." And in Austin vs. Soule, 36 Vt. 645, 648, the same court, speaking with reference to the term "public place," said that it must be defined "by reference to the circumstances and the subject matter of each particular case." By way of explanation the court went on to say that: "We call that 'public' which is open for general or common use or entertainment, as a public highway or road, a public house; and yet the term is more comprehensive than this definition," that some public places "may be more 'public' than others, and that the term is used in a relative sense."

In 32 Cyc. p. 748, decisions pro and con on the subject are cited, all of which have been examined and found to justify the conclusion that the word "public" is a

convertible term, depending for its meaning upon the subject to which it is applied. Thus, in some cases, it has been held to refer to the whole body politic, while in others it has been limited to a separate or distinct portion thereof, etc. See State vs. Hensley, 75 Ohio St. 255, 263.

In Cawker vs. Meyer, 147 Wis. 320, 325, the court after saying that "it is very difficult, if not impossible, to frame a definition for the word 'public' that is simpler or clearer than the word itself," proceeded to quote, with approval, one of the definitions found in Century Dictionary, viz.:

> "Not limited or restricted to any particular class of the community."

It was held in that case, applying the definition to the facts, that:

> "The tenants of a landlord are not the public, neither are a few of his neighbors or a few isolated individuals with whom he may choose to deal, though they are a part of the public. The word 'public' must be construed to mean more than a limited class defined by the relation of landlord and tenant, or by nearness of location, as neighbors, or more than a few who by reason of any particular relation to the owner of the plant can be served by him."

See, also, South Highland Land & Improvement Co. vs. Kansas City, 172 Mo. 523, 534; and Traction Co. vs. Warren Co., 100 Miss. 442.

Perhaps more closely in point is Tooks vs. State, 4 Ga. App. 495, in which the expression "public place" was under consideration. At page 505 the court say:

> "The expression 'public place' has been a matter of frequent judicial definition. There are two general lines in which these definitions run, dependent largely, in each case, upon the particular context of the subject-matter of the enactment in which the words appear. The one looks to the ownership of the place; and in this view, any building, premises, or lot owned by any branch of the government, or devoted to its uses, is a public place; and if this definition were adopted as to the law before us, a town calaboose or guard house would be a public place. The other definition looks to the congregating of a number of persons, by common right or usage, or by a general express or implied invitation, as furnishing the element of publicity."

The court then went on to say that the word, "public place," as used in the statute there involved, "excludes those places which, though publicly owned, are devoted to a private use and are not open to the access of the public; also those places privately owned and controlled and from which the indiscriminate public is generally excluded, notwithstanding that at at particular time in question a number of persons may have congregated there, if the congregation is the result of special invitation for that special occasion alone."

After considering the various definitions referred to in the foregoing authorities (and also others not specifically mentioned), in connection with the act now under consideration, I have reached the conclusion, and therefore advise you that a manufacturing company operating an eating place commonly referred to as a factory or employes' restaurant, in which meals or lunches are supplied and furnished solely to its employes, and which is never held out as a place where meals and lunches will be served to others, is not conducting a restaurant within the statutory definitions; and, also, that the mere fact that occasionally, but not as a matter

of practice, a traveling salesman or other person having business at the factory may, as a personal accommodation, be permitted to secure a meal or lunch in the employes' restaurant, would not of itself constitute a holding out to the public, within the meaning of the statute.

4. Section 843-3 G. C., which is the section of the act requiring every person, firm or corporation engaged in the business of conducting a hotel or restaurant to procure a license, expressly provides that a license shall be procured for

> "each hotel or restaurant so conducted or proposed to be conducted; provided, that one license shall be sufficient for each combined hotel and restaurant where both are conducted in the same building and under the same management."

This statute, it will be noted, requires that a license shall be procured for *each* restaurant, and no exception is made with respect to cases where two or more separate restaurants are conducted in the same building by the same keeper. The unit for the purpose of securing licenses, so far as restaurants as distinguished from a "combined hotel and restaurant" are concerned, appears to be a restaurant, or "each restaurant," so that if there be two or more restaurants conducted in the same building, although under one management, the law seems to require that a license be procured for each one.

The only combination license authorized by the section is the one authorized to be issued for each "combined hotel and restaurant where both are conducted in the same building and under the same management." No provision is made for a "combined restaurant" license, and the fact also, that the food may be prepared and furnished from a common kitchen would also appear to be immaterial in view of the statutory definition of the word "restaurant" and other provisions of the act.

5. With respect to a so-called family hotel, which, for example, has one hundred rooms, five of which have been set aside as sleeping quarters and are advertised or held out to the public for the use or accommodation of transient guests for pay, I beg to advise that the person, firm or corporation conducting such hotels, are conducting a "hotel" within the meaning of section 843-1 G. C., and subject to the provision of the act and must secure a license. Section 843-1 G. C., so far as pertinent, is as follows:

> "And every building or other structure kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are offered for pay to transient guests, in which five or more rooms are used for the accommodation of such guests, shall, for the purpose of this act, be deemed a hotel."

The provision in the last paragraph of section 843-3 G. C. that "nothing in this act shall be construed to apply to family hotels," etc., in my opinion has reference to that class of family hotels which are not held out to the public to be a place where sleeping accommodations are offered for pay to transient guests, and in which five or more rooms are used for the accommodation of such guests. In other words, the exemption just noted in favor of family hotels must be read in connection with section 843-1 G. C., which defines the word "hotel," which definition, among other things, includes "every building or structure kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are offered for pay to transient guests, in which five or more rooms are used for the accommodation of such guests," etc.

Respectfully,
JOHN G. PRICE,
Attorney-General.