2971.

APPROVAL, BONDS OF CHATFIELD TOWNSHIP RURAL SCHOOL DISTRICT, $4,500.

COLUMBUS, OHIO, April 6, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2972.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENTS IN RICHLAND, DARKE, LOGAN, TRUMBULL AND FAIRFIELD COUNTIES.

COLUMBUS, OHIO, April 7, 1922.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

2973.

CORPORATIONS—SECTION 8667 G. C. DOES NOT APPLY TO NON-PAR STOCK ACT—PHRASE "AT NO TIME SHALL AMOUNT OF PREFERRED STOCK AT PAR VALUE EXCEED TWO-THIRDS OF THE ACTUAL CAPITAL PAID IN IN CASH OR PROPERTY" APPLIES ONLY TO GENERAL CORPORATIONS AND NOT TO NON-PAR COMPANIES.

Section 8667 of the General Code does not apply to corporations formed under the act commonly referred to as the non-par value stock act (sections 8728-1 et seq. G. C.)

COLUMBUS, OHIO, April 7, 1922.

HON. WILLIAM H. PHIPPS, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date inquiring whether or not section 8667 of the General Code applies to corporations formed under the act commonly referred to as the "non-par value stock act," was duly received.

The non-par value stock act was originally enacted by the legislature of this state in 1919, by an act entitled "An act to authorize the formation and reorganization of corporations with common stock without par value." It has been twice amended, and the act complete, and now in force, will be found in 108 O. L., pt. 1, p. 507; 108 O. L., pt. 2, p. 1287; and 109 O. L., p. 273; sections 8728-1 et seq., G. C.

The act makes provision for the formation of corporations for profit with a

peculiar class of stock which, prior to its enactment, had been unknown to or recognized by the statutory law of the state applicable to corporations for profit, to wit, common shares without par value. Up to that time, the legislature, in dealing with domestic corporations for profit, had only authorized or recognized par value shares, and every section of our statutory law, commonly referred to as the "general corporation law," applicable to such corporations, necessarily referred to those having a capital stock represented by par value shares.

The general corporation law, now designated as sections 8523 et seq. of the General Code, was enacted in code form several years prior to the enactment of the non-par value stock act, and its several sections have continued in force, either in original or amended form, up to the present time. Among its sections of long standing is section 8667, which imposes a limitation upon the amount of preferred stock that may be outstanding. The section reads as follows:

> "If a corporation be organized for profit, it must have a capital stock, which may consist of common and preferred, or common only; but 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."

In view of the history of the laws under consideration, briefly outlined above, the conclusion is irresistible that section 8667 was enacted with sole reference to corporations having par value shares, and that was its only possible application prior to the enactment of the non-par value stock act. While the non-par value act (either for the purpose of inclusion or exclusion, as will be disclosed later on), has made specific reference to certain sections of the general corporation law, no such reference has been made to section 8667, and the question now arises whether we are reasonably justified in incorporating that section into the non-par value stock act via the route of construction? In the consideration of this question the rule of reason should be applied, and unless necessarily required in order to give effect to the legislative intent as found in the non-par value act itself, an earlier and long existing provision of the general corporation law should not be employed, if the effect would be to nullify or seriously impair the express and unambiguous provisions of the act, or to create a situation out of harmony with the general and fundamental theory of the act.

After careful consideration the conclusion has been reached that section 8667 does not apply, and following the established practice of this department, we will now proceed to state the reasons for our conclusion.

On account of the length of the non-par value stock act it will not be quoted in this opinion, but a summary of the act sufficient to disclose its special character and the inapplicability of particular sections of the general corporation law, will be made. Other provisions of the act having more or less bearing on the question under consideration might be referred to, but they are of the same general character as those which are noted, and hence will not be specially referred to herein.

(1) *Section 1 of the act.* This section first deals with the articles of incorporation and authorized capital stock, and provides for the formation of a company with a capital stock consisting solely of non-par value common shares, or of both non-par value common shares and par value preferred shares. The par value of the preferred shares, if any, cannot exceed $100 each. No provision is made for a capital stock made up in whole or in part of par value common shares or non-par value preferred shares. In the respects just mentioned, there is a material departure from the general corporation law.

The section also requires that the amount of common capital with which the corporation will begin to carry on business, which shall not be less than $500, shall also be stated in the articles. This is a provision which is not found in the general

corporation law, but is special or peculiar to companies formed under the non-par value stock act.

After enumerating the different statements to be made in the articles, the section then expressly provides that such statements shall be in lieu of any statements required by law to be stated in the articles as to the amount of the capital stock, or as to the number of shares into which the same is to be divided, or as to the par value of such shares, thus expressly excluding the application of other laws to the subjects mentioned.

The section next deals with the subject of the filing fees to be paid to the secretary of state, and provides a rule or plan for computing the fees different from that applicable to companies formed under the general corporation law.

Next in the section occurs a provision placing a limitation on the number of outstanding shares. This provision is peculiar to companies formed under the act, and reads as follows:

> "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."

It will be observed that the limitation imposed goes to the *number* of shares of preferred stock outstanding, and not to their *amount at par value,* as does section 8667; and while its subject is outstanding preferred stock, it is, in the respect just mentioned, a departure from section 8667. In other words, it appears to be a special provision on the subject of outstanding preferred stock.

The section also authorizes the division of the non-par value common shares into classes, with such designations and voting powers, or restrictions or qualifications thereof, as may be stated in the article. In connection with this authorization is found another special provision respecting the certificates representing the non-par common stock. Both provisions are peculiar to companies formed under the non-par value stock act.

The section next deals with the issue and sale of the company's shares, and the consideration which the company may receive therefor. The provisions of the section on this subject read as follows:

> "Such corporation may receive subscriptions for, and issue and sell its preferred shares, as authorized by law. At the time of opening books of subscription to the capital stock, as required by law, subscriptions may be received for the common shares, without nominal or par value, for such consideration as may be decided upon by a majority of the incorporators at the time of ordering books to be opened for subscription; thereafter, subject to the provisions of section 8699, the corporation may issue and sell its said common shares, from time to time, for such consideration as shall be the fair value of such shares, as fixed by its board of directors, or for such consideration as shall be consented to in writing by the holders of all the outstanding shares of common stock, or for such consideration as shall be fixed by the vote of a majority in number of the outstanding common shares at a meeting called for that purpose in such manner as shall be prescribed by the code of regulations. Nothing herein shall prevent a corporation from paying dividends, subject to the limitations of this act, payable in common stock of the company at a price fixed by the board of directors instead of in cash or property. Any and all shares issued as permitted by this section shall be deemed fully paid and non-assessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereof."

Disregarding for the moment that part of the above quotation relating to the payment of dividends, the context indicates that the subject of the provision is the "consideration" to be received by the company when disposing of its shares. This appears, so far as the preferred shares are concerned, from the introductory part of the quotation which refers to subscriptions to its preferred shares, and the last sentence which provides that all shares issued shall be deemed fully paid and non-assessable, etc.; and, with respect to the non-par value common shares, it is made to appear from all of the provisions of the quotation, excluding only the first sentence and the one respecting the payment of dividends. No place in the quoted provision is there to be found any clear or express limitation on the amount of preferred stock that may be sold, or on the number of common shares that may be sold.

It will also be noticed that the quoted provision makes specific reference to section 8699. That section is one of the sections of the general corporation law. In the absence of such reference, the fair inference to be drawn would be that section 8699 G. C. did not apply, and we also feel warranted in saying that the fact that it is specifically referred to amounts to a legislative recognition that it would not have been applicable had it not been incorporated into the act by apt words of reference. We also believe it not illogical or unreasonable to state in this connection that if the legislature had intended section 8667 to apply to the issue and sale of the preferred shares, by non-par value stock companies, it would have specifically referred to such section, as it did in the respect just pointed out. In any event, considering the act as a whole, we do not feel justified in holding that the clause, "as authorized by law," which appears in the quotation, refers to section 8667, or to any other section of the general corporation law which would have the effect of placing a material restraint or limitation upon the exercise of the authority expressly conferred by the act to sell the common shares for such consideration as may be fixed by the incorporators, stockholders, or directors. If section 8667 is held to be applicable, by reason of that clause, then non-par value stock companies would be compelled to arrange their capital stock, and issue and sell it, to meet the requirements of the general corporation law, instead of the non-par value stock act under which they are incorporated and organized, and in many cases the company would be compelled to secure more than par for their preferred shares, or, in case par or less should be secured, $100 or more for their non-par common shares. For example, and by way of illustration: Suppose a non-par corporation with an authorized capital stock consisting of 1,000 of non-par common shares, and 2,000 shares of preferred of the par value of $100 each, and that the company has received subscriptions for all of the preferred shares at par, making a total of $200,000. If section 8667 applies, then the company before it can have $200,000 of preferred stock outstanding must have a paid in capital of $300,000, and in order to secure that amount it would be compelled to get not less than $100 per share for its common shares, notwithstanding the act expressly and in unambiguous terms authorizes the company to sell its common shares for such consideration as may be fixed by the incorporators, stockholders, or directors, as the case may be. That would also be requiring a minimum of $100,000 of common capital assets, whereas the act itself fixes the minimum at $500.

(2) *Section 2 of the act.* In this section the legislature recognizes the inapplicability of one of the sections of the general corporation law to the new class of corporations which it is dealing with, to wit, section 8633, and makes special provision in lieu thereof; and this is immediately followed by a provision suggestive of legislative recognition of the inapplicability of particular sections of the general corporaton law unless incorporated into the act by reference, viz.: the provision that as soon as the certificate of subscription and payment specially provided for has been filed with the Secretary of State, the stockholders shall then proceed "as provided in sections 8635 and 8636," both of which are sections of the general corporation law.

As already indicated, the first section of the non-par value stock act also provides that there shall be stated in the articles of incorporation the amount of common capital with which the corporation will begin to carry on business, which shall not be less than $500, and section 2 of the act, now under discussion, contains the provision that the corporation shall not begin to carry on business, or incur any debts, until the amount of common capital so stated shall have been fully paid to the corporation in money or in property taken at its actual value, etc.

Attention is now directed to another provision of section 2 of the act which is also suggestive of general legislative recognition of the inapplicability of particular sections of the general corporation law to non-par value stock companies, which is substantially a repetition of the language used in section 8624 of the general corporation law, to wit, the provision that "No such corporation shall declare or pay any dividend except from surplus profits arising from its business." The section also contains a further provision paralleling another section of the general corporation law, to wit, section 8728, imposing a liability upon directors for wrongfully paying dividends, etc.

(3) *Section 4 of the act.* Another provision of the act recognizing the general inapplicability of particular sections of the general corporation law, unless made so by the act itself, is the one authorizing non-par value stock companies to increase or reduce their capital stock, and to amend their articles of incorporation, in the manner provided for by sections 8698, 8699, 8719 to 8723, inclusive, of the general corporation law.

(4) *Section 5 of the act.* This section may be referred to as supporting the proposition that non-par value stock companies are not necessarily subject to all of the provisions of the general corporation law, since it expressly provides a plan whereby "any corporation for profit heretofore or hereafter organized under the general incorporation laws of this state" may be reorganized or converted into a non-par value stock company, whereupon, as further provided by the section, the reorganized company and its officers, directors and stockholders shall acquire and enjoy all of the rights, privileges, powers and exemptions, and become subject to all of the liabilities and obligations imposed by the new act. Companies desiring to take advantage of the act are required to file a certificate of reorganization with the Secretary of State, setting forth the history of the company and its proposed capital stock structure, and the section also expressly provides that the number of shares to be issued by the company may be either less than, or equal to, or in excess of the number into which its capital stock was previously divided, etc.

Generally speaking, the non-par value stock act appears to be complete in itself on the specific subjects to which it applies, and when the legislature enacts a special law, then to the extent that any particular subject is contained therein, the provisions of that law are deemed to be exclusive of general statutes, for the presumption is that a law on a specific subject is enacted for the purpose of making a change in the general law.

The conclusion at which we have arrived is not, as already indicated, in conflict with that provision of section 1 of the act which provides that non-par value stock companies may receive subscriptions for, and issue and sell their preferred shares "as authorized by law." In addition to the reasons already given in support of the conclusion, and as was said in Penrose vs. Ventnore, 80 N. J. L., p. 547, 549, "We think that the expression 'authorized by law' does not necessarily mean expressly authorized by statute." See also definitions of the word "law," in 2 Bouvier's Law Dictionary. The meaning of the clause, "authorized by law," in a particular instance, the same as any clause or word that is susceptible of two or more meanings, must be determined from the context; and the context, as already pointed out, excludes the application of any general clause in the act itself, or of any general statute, which would destroy or materially impair the power clearly and specifically

conferred upon non-par value stock companies to sell their common shares for such consideration as may be fixed by the incorporators, stockholders, or directors. Just what "law" is referred to does not clearly appear, but it does not necessarily exclude the so-called common law, nor does it necessarily include any particular statutory law, and surely it does not include any law, statutory or otherwise, that would conflict or be inconsistent with the clear and positive provisions of the act of which it forms a part. Perhaps the best general definition of the clause would be the one just indicated, viz., that it is a clause which refers to laws not in conflict with the other provisions of the act of which it is a part; which is but stating in different form the well known and universally accepted rule of statutory construction that the meaning of words or clauses which are susceptible of two or more meanings must be determined from the context, for, as is well stated in 1 Bouvier's Law Dictionary, p. 654, "It is a general principle of legal interpretation that a passage or phrase is not to be understood absolutely as if it stood by itself, but is to be read in the light of the context, i. e., in its connection with the general composition of the instrument."

For the reasons above stated, we feel confirmed in the view already expressed that section 8667 of the General Code does not apply to corporations formed under the non-par value stock act, and you are so advised.

In answer to your further question as to what rules or regulations your department may adopt in case section 8667 is held to be inapplicable, we can only say at this time that no rule or regulation in conflict with the provisions of the act should be adopted or enforced. If the act should prove to be detrimental to the public welfare, or if it should, in your opinion, be amended in order to place certain limitations or restraints upon the exercise of the powers or authority which it now confers, the matter can be called to the attention of the General Assembly, which is the only legally constituted body that can repeal or amend it. If you have any particular rule or regulation in mind, we will be pleased to confer with you concerning it.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2974.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS, GEAUGA AND TRUMBULL COUNTIES.

COLUMBUS, OHIO, April 8, 1922.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

2975.

APPROVAL, BONDS OF ALLEN COUNTY IN AMOUNT OF $62,900 FOR ROAD IMPROVEMENTS.

COLUMBUS, OHIO, April 10, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.