struct a transmission line thereon, authorizing the Ohio Board of Administration, the duties and powers of which are now exercised by the Director of Public Welfare, to convey such right or rights to said the Massillon Electric and Gas Company.

The proposed lease contains the following paragraph:

> "This agreement does not interfere in any way, nor abrogate, any agreement or agreements previously made under the provisions of H. B. 323, 83rd General Assembly (O. L. 108, Pt. I, p. 355) between the State and the Massillon Electric and Gas Company, its successors and assigns."

Upon investigation I find that there is already in existence an electrical transmission line across the Massillon State Hospital property constructed by the Massillon Electric and Gas Company pursuant to an agreement or lease between the State of Ohio, acting by and through the Ohio Board of Administration, and said the Massillon Electric and Gas Company under date of April 16, 1919.

I am also informed that upon the construction of the proposed new electrical transmission line part of the old line will be removed and supplanted by the new line, but that a large part of the old line will remain.

The act above referred to grants to the Massillon Electric and Gas Company, its successors and assigns, the right to enter upon the Massillon State Hospital property

> "and to construct, maintain and operate thereon an electrical transmission line consisting of towers, poles, wires, crossarms, insulators, and other proper material and equipment, that it be used for a transmission line only, and that the same be located as may be agreed upon by the Ohio Board of Administration, upon the payment to the state of such sums of money as may be agreed upon by said State Board of Administration and said the Massillon Electric and Gas Company."

The right to construct, maintain and operate "an electrical transmission line" would seem to be limited to the construction of one electrical transmission line and would preclude the construction of two or more lines. In other words, having exercised its rights as granted by the act above referred to by constructing one transmission line, it is my opinion that the Massillon Electric and Gas Company has exhausted its authority and that there now exists no further right to construct a second transmission line, nor is there any authority in the Department of Public Welfare to grant such right by the proposed lease.

I am accordingly disapproving said lease and am returning the same to you together with all papers submitted in this connection.

Respectfully,
EDWARD C. TURNER,
Attorney General.

805.

CORPORATIONS—CONCERNING REDUCTION OF CAPITAL STOCK—MANDATORY TO FILE CERTIFICATE OF SUCH REDUCTION WITH SECRETARY OF STATE.

SYLLABUS:

1. *Under the provisions of Section* 8669 *of the General Code, prior to its amendment, where a corporation had redeemed and cancelled outstanding preferred stock, such*

corporate action effected a reduction of the capital stock and it was the mandatory duty of the corporation to file a certificate of such reduction with the secretary of state.

2. *The failure to file such a certificate cannot be used as the basis of a claim that such cancelled stock should be treated as authorized stock in the computation of the amount due for the filing fee of an amendment of articles of incorporation providing for an increase of capital stock.*

COLUMBUS, OHIO, July 29, 1927.

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

DEAR SIR:—This will acknowledge receipt of your recent communication as follows:

> "We are enclosing herewith proposed Certificate of Amendment to Articles of Incorporation of The _____ Company, submitted together with a remittance in the sum of $125.00 by the company's attorneys.
>
> The records of this office show, at the present time, a total capital of $1,750,000 consisting of $1,000,000.00 common stock with share of par value of $100.00 each and $75,000.00 in preferred stock with shares of $100.00 par value each. In other words, the company at present has a total of 17,500 shares authorized. The amendment and certificate of increase providing for preferred stock called for redemption and cancellation of preferred shares. We understand, through telephone conversation with attorneys named, that, while all of the preferred stock was never issued, about 500,000 preferred stock was issued and was subsequently redeemed and cancelled in accordance with the Articles, so the proposed enclosed certificate does not read correctly.
>
> As the records of this department now stand, there is no record of the cancellation and redemption mentioned above. The department has advised that, under the last paragraph of Section 39 of the General Corporation Act, the certificate called for should be filed in connection with the stock so redeemed and cancelled. Further, we have advised that credit cannot be allowed in computing fees for stock so redeemed and cancelled. We have advised, however, that in computing fees credit can be given for the number of shares of the unissued stock.
>
> In view of our advice to the attorneys for the company they have requested that certificate be submitted to your department for an opinion as to computation of fees."

The certificate of amendment which you enclose contains the following clause:

> "And, whereas, the company has retired its entire issue of outstanding preferred stock, and which by the terms thereof, and which by the terms of the Articles of Incorporation, cannot be reissued; * * *"

At my request you have also furnished a copy of the Certificate of Amendment to Articles of Incorporation, filed by this company in 1917. After providing for the issuance of 7,500 shares of preferred stock, this amendment further provides for the annual retirement of at least ten per cent of the preferred stock outstanding at a price not exceeding one hundred twelve per cent and accrued dividend. The act of retirement is described as follows: "shall be redeemed and cancelled." There is a further provision for the redemption at any dividend paying period of all or any part of this stock at the option of the company, this provision using the word "redeemed" but not making any reference to cancellation. Finally, the following sentence is found in this

amendment: "No preferred stock so redeemed or purchased under any of the provisions hereof shall be reissued, but the company shall have the right at its election to issue and sell, at not less than par, an equivalent amount in par value of common stock in addition to the common stock otherwise authorized." I am also advised, by the Attorneys representing the company that the total amount of outstanding preferred stock has actually been redeemed and cancelled. However, 2312 shares of the preferred stock were never issued and therefore were, of course, not redeemed. As practically all of the redemption of this stock was accomplished some time ago, the determination of the question you raise demands a consideration of Section 8669, General Code, as it existed prior to its repeal by the new general corporation act. That section was as follows:

> "A corporation issuing both common and preferred stock may create designations, preferences and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof.
>
> Preferred stock may also be redeemed in whole or in part by purchase thereof by the corporation or by exchanging the same for common stock, or be converted into common stock, upon such terms as from time to time may be proposed by the board of directors, and accepted by the holders thereof. Preferred stock redeemed may be cancelled by the board of directors, and if so cancelled shall not be reissued. A certificate of such cancellation shall be filed with the secretary of state, as a certificate of reduction. Thereupon the authorized capital stock of such corporation shall be reduced by the amount stated in said certificate."

You will observe that, while broad power is given in the matter of redemption of preferred stock, the statute specifically makes it optional with the corporation whether such redeemed stock shall be cancelled. If it is actually cancelled, however, the statute is very specific that it may not be reissued and imposes a mandatory duty upon the corporation to file a certificate of the cancellation with the secretary of state, such filing operating as a reduction of the authorized capital stock in the amount stated in the certificate. I find in the amendment to the articles of incorporation of this company in 1917 certain inconsistencies which are rather confusing. As to the annual retirement, the provision is specific that the stock so acquired shall be "redeemed and cancelled". As to that portion which is redeemed at a dividend paying period, no reference is made to any cancellation. But at all events, there is the unequivocal statement that any stock retired under the authority of the amendment shall not be reissued.

It may be suggested that the qualifying phrase which I have quoted and which purports to authorize the issuance of additional shares of common stock in lieu of the preferred stock redeemed and cancelled, is sufficient to preserve the authority and to prevent an automatic reduction of the capital stock. I have serious doubts as to the validity of the clause in question. While it is true that Section 8669, supra, authorizes the *conversion* of preferred stock into common, there is no authority for the redemption of stock and the subsequent issuance of common stock in an equal amount. This would be the equivalent of increasing the common capital stock up to the amount of the redeemed preferred stock, and I know of no authority for such a provision.

Quite an exhaustive consideration of Section 8669 of the General Code is found in Opinions of the Attorney General for 1918, Vol. 1, at page 907. The specific question there involved was whether preferred stock which had been redeemed should be taken into consideration as "subscribed or issued and outstanding capital stock" in computing the basis of the franchise tax imposed by the Willis law. The conclusion of my

predecessor was that such preferred stock was extinguished by redemption, at least so far as the tax laws were concerned. I find the following language on page 911 ofthat opinion:

> "I conclude, however, that what is meant by 'cancellation' is the renunciation of the corporation's privilege of re-issuing the stock. It will be observed that the corporation apparently has the option whether to renounce this privilege or not, as the filing of a certificate of cancellation is not compulsory. It will be observed also that the effect of the filing of such a certificate is to reduce the authorized capital stock, i. e., deprive the corporation of the privilege of reissuing so much stock."

While this would seem to indicate that the filing of the certificate is an essential part of the act of the corporation in renouncing the privilege of reissuing the stock, I am of the opinion that such renunciation may be effectually accomplished by the corporation without the actual filing of the certificate. In fact the language of the statute would clearly indicate this possibility.

Section 8669, in my opinion, merely makes mandatory a filing of the certificate as evidence of the previous act of cancellation by the corporation. The language of the amendment of the articles in 1917, including the prohibition against reissuing, the clause which I have heretofore quoted from the present amendment restating the inability of the corporation to reissue this stock, together with the admission of those representing the corporation that this stock has actually been redeemed and cancelled, clearly demonstrate that all corporate authority with relation to this stock has ceased. The fact that the corporation has neglected to file evidence in the form of a certificate of cancellation with the secretary of state cannot have the effect of resuscitating the authority to reissue this stock which it could in the first instance have retained.

I am therefore of the opinion that your position is correct and that the corporation may not now claim that its authorized capital stock still remains at the 17,500 shares originally authorized by the amendment of 1917. By its own act of redemption and cancellation of the preferred stock in question, it has reduced the capital from 17,500 shares to 12,312 shares. This includes the 10,000 shares of common stock and the 2,312 shares of preferred stock which have never been issued.

As I have before stated, Section 8669 of the General Code makes it the mandatory duty of the corporation to file a certificate of cancellation with the secretary of state. This the corporation has failed to do. The new general corporation act, in Section 136, provides as follows:

> "This act shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this act had not been passed."

Clearly there existed a liability upon the part of the corporation to file the certificate prior to the effective date of this act. By the terms of this section, that liability has continued in effect and I am therefore of the opinion that the corporation in question must file its certificate showing the cancellation of the shares which have heretofore been redeemed and cancelled. To hold otherwise would permit the corporation to take advantage of its own wrong.

The present amendment of the articles of incorporation seeks to secure authority

for the issuance of 18,750 shares. Since its present authority is limited to 12,312 shares, there is an increase to the extent of 6438. On the basis of ten cents per share the fee chargeable by your office for the filing of the present amendment would be $643.80.

Respectfully,
EDWARD C. TURNER,
Attorney General.

806.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN CUYAHOGA, GALLIA AND WAYNE COUNTIES.

COLUMBUS, OHIO, July 29, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 29, 1927, submitting for my approval certified copies of nine final resolutions covering the following improvements:

Wooster-Massillon Road—I. C. H. No. 69, Section Dalton—Types B and C—Wayne county.

Cleveland-Elyria Road—I. C. H. No. 31, Section B—Types A, B and C —Cuyahoga county.

Cleveland-Elyria Road—I. C. H. No. 31, Section A—Types A, B and C —Cuyahoga county.

Ohio River Road—I. C. H. No. 7, Section FH—Bridge—Gallia county.

I have carefully examined said resolutions and find them correct in form and legal. I am therefore returning the same to you with my approval endorsed thereon in accordance with Section 1218, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

807.

APPROVAL, BOND FOR FAITHFUL PERFORMANCE OF DUTIES—FRED E. SWINEFORD.

COLUMBUS, OHIO, July 29, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my consideration an official bond of Fred E. Swineford, given in accordance with the requirements of Section 1182 of the General Code, for the faithful performance of his duties as Deputy Highway Commissioner in charge of the Bureau of Maintenance and Repair.