INSURANCE, DEPARTMENT OF: Investments; whether 99 year lease with provision for renewal or for purchase of improvements constitutes acceptable investment under section 147, sub-section D of Indiana Insurance Law, permitting investment in "perpetual leases."

April 6, 1939.

Mr. Geo. H. Newbauer, Commissioner,
Department of Insurance,
State House,
Indianapolis, Indiana.

Dear Mr. Newbauer:

I have before me your letter which is as follows:

"Sub-section D of section 147, page 92 of the Indiana Insurance Law, approved March 8, 1935, provides that a life insurance company may invest in 'perpetual leases thereon in the United States and Dominion of Canada worth not less than one hundred per cent more than the amount loaned thereon.'

"Under this sub-section there has arisen a question as to what constitutes under this section a perpetual lease.

"It has already been construed that 99 year leases do not meet the obligation of this section. However, we would desire an opinion of whether or not in the case of a straight 99 year lease, with no provision for extension or renewal and, second whether or not in the case of a 99 year lease containing provisions for renewal at the end of the term, or a provision for the purchase of improvements placed upon the land by the lessee at their fair market value, would constitute an acceptable investment under this section."

The only case which I have been able to find bearing upon the question submitted by you is the case of Edwards v. Noel, 88 Missouri Appeal Reports, beginning at page 434. This case was a suit to recover in an action at law for deceit and fraudulent misrepresentation in the sale of certain bonds. In offering the bonds for sale it was stated by the broker that they were to be "secured upon the Lindell Hotel building in St. Louis, and a perpetual lease upon the ground at a rental of $27,500 per annum."
In commenting upon the meaning of the above quoted language, the court said on page 440:

“As has been seen, the representation in substance was that the bond was secured by a deed of trust conveying a perpetual lease upon the ground whereon the hotel was situated at an annual rental of $27,500. The actual fact was that there was only a deed of trust conveying a lease upon the ground for the same rental for a term of ninety-nine years. Unless, therefore, such a lease was a perpetual one as understood in the law, the representation of defendant to that effect was untrue.”

After discussing the definition of a lease generally, the court continued on page 440:

“The right of the lessee to enforce a covenant for perpetual renewals, is now an established doctrine in the English courts. 1 Platt on Leases, p. 708. In the application of these principles, the term ‘perpetual lease’ can only mean one for years wherein the lessee has the covenant of the lessor for perpetual renewals.”

Later, in the same opinion, on page 441, the court said:

“While the terms ‘perpetual lease’ used by the defendant would justly describe either a lease for years with a covenant for perpetual renewals as is upheld in English courts, or a fee farm rent as defined by our Supreme Court, yet the terms in question are wholly inapplicable to a mere lease for ninety-nine years for that does not satisfy their obvious import.”

The above reasoning clearly removes from the class of leases which may be termed “perpetual leases” the straight ninety-nine year lease where there is no provision for extension or renewal. It also removes from the class designated “perpetual leases” a ninety-nine year lease even though it had a provision for a renewal at the end of the term.

As I understand the term, it applies to cases where there is an unlimited right of renewal. I do not see that the provision for the purchase of improvements placed upon the land by the lessee at the fair market value would operate to make the lease a perpetual one. It follows, in my opinion, that bonds secured only by leases of the type described in your letter
would not be acceptable investments under section 147 (d) of the Indiana Insurance Law.

---

WELFARE, DEPARTMENT OF: Specific act controls general act where two conflict; Acts 1917, chapter 83, requiring purchase of prison-made goods by all governmental divisions controlling over Acts 1913, chapter 156.

April 6, 1939.

Mr. T. A. Gottschalk, Supervisor,
Division of Institutions,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Mr. Gottschalk:

I have your communication of recent date in which you request an official opinion in answer to the following questions:

"1. Is chapter 83 of the Acts of 1917 in full force and effect and binding upon boards of county commissioners, township trustees, superintendents of county poor asylums and county sheriffs?

2. What effect, if any, has chapter 156, Acts of 1933, page 817 (Sec. 26-536, Burns Ind. Stat. 1933) in regard to said Act of 1917?

3. Would a yearly contract let to other parties for county supplies, which could be furnished by the state penal institutions, in violation of said Act of 1917, be legal?

4. Is it necessary for the political subdivisions of the state to advertise and take bids on items manufactured by the penal institutions of the State of Indiana?

5. If the board of county commissioners advertised for bids on supplies some of which are manufactured in the state penal institutions, the advertisement being in connection with other general supplies not manufactured by the penal institutions, is it at all necessary that such institutions at the time fixed by the advertisement, make any bid for the purpose of competing with other persons in regard to the supplies which are manufactured in such penal institutions?"