872.

FRANCHISE FEE—CORPORATION IN THE HANDS OF A RECEIVER.

SYLLABUS:

Discussion of the assessment of the franchise fee provided by Amended Substitute Senate Bill No. 22 against a corporation in the hands of a receiver.

COLUMBUS, OHIO, August 16, 1927.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your recent letter in which you ask me to confirm your understanding of the correct procedure to be followed in the assessment of the franchise fee against a corporation in the hands of a receiver. Your outline is as follows:

> "1. That where a receiver was appointed prior to January 1, 1927, and the business has not been conducted during any part of 1927 no tax should be assessed for 1927.
>
> 2. But if the receiver has continued to operate the business after January 1, 1927, a fee should be paid proportionate to the part of the year it has so operated but in no case less than $25.00.
>
> 3. If the receiver was appointed after January 1, 1927, a fee should be assessed proportionate to the part of the year prior to appointment unless the receiver continues to operate the business. If operation continues the full fee should be paid and in no case should the fee be less than $25.00."

The Aigler Act (Amended Substitute Senate Bill No. 22) became effective May 12, 1927. The amendment of the corporation franchise tax provided therein does not change the rules applicable to the assessment of such a tax against a corporation in the hands of a receiver. Section 7 of that act provides in part as follows:

> "On or before June 15th the Auditor of State shall charge for collection from each such corporation a fee of one-eighth of one per cent for each of the years 1927 and 1928 and one-tenth of one per cent for each year thereafter upon such value so certified, and shall immediately certify the same to the Treasurer of State, provided, however, that no fee shall be charged from any corporation which shall have been adjudicated a bankrupt, or for which a receiver shall have been appointed or which shall have made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commission shall find such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. But in no case shall the fee be less than twenty-five dollars. * * * "

The analogous section of the Willis Act (old Section 5495 of the General Code), after its amendment in 1925 read as follows:

> "Within thirty days after the taking effect of this act and annually, thereafter, during the month of April, except as otherwise provided by

law, each corporation, incorporated under the laws of this state for profit, and each foreign corporation for profit, doing business in this state or owning or using a part or all of its capital or property in this state or having complied with the provisions of Section 183 of the General Code, and having been authorized by the Secretary of State to transact business in this state, shall make a report in writing to the tax commission in such form as the commission may prescribe, provided, however, that if any such corporation shall be adjudicated a bankrupt or a receiver shall be appointed therefor or a general assignment shall be made thereby for the benefit of creditors, such corporation shall file the report herein provided but it shall not be charged with any fee as hereinafter specified except for the portion of the then current year and of subsequent years during which such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act."

The amendment of 1925 added the priviso so as to clarify the situation as to the assessment against a corporation in the hands of a receiver. In so doing the legislative intent is clear that no tax is assessable when the corporate franchises are impaired by receivership proceedings. Certainly it is not conceivable that any receivership would not impair the exercise of the franchises of a corporation.

In the case of the *Guardian Savings and Trust Company vs. The Templar Motors Company,* decided by the Supreme Court of Ohio, on March 8, 1927, and reported in the Ohio Law Bulletin and Reporter, April 11, 1927, the effect of the appointment of a receiver upon liability for the franchise tax prior to the 1925 amendment was under consideration. The specific question in that case was whether or not the receiver was continuing the business so as to authorize the assessment of a fee. The second branch of the syllabus is as follows:

"2. Where the state seeks to collect such franchise tax for the period during which the property was in the custody and control of a receiver, the question for determination is one of mixed law and fact, and the inquiry of fact relates to the manner of control by the receiver and whether or not his operations amounted to a continuation of the business."

Reverting to the language of Section 7 of the Aigler Act it is very clear that the assessment of the tax is not contemplated during that portion of any year in which the corporation is in the hands of a receiver.

The first conclusion which you reach is premised upon a receiver being appointed prior to January 1, 1927, and no business being conducted during any part of that year by the receiver. Under the wording of Section 7, supra, there clearly would be no tax assessed for the year 1927. I have not overlooked the fact that the last sentence of Section 7 provides that the fee shall not be less than twenty-five dollars in any case. This is, I believe, a minimum where there is a tax otherwise assessable, but which, by the ordinary method of computation either by reason of the small amount of value determined or an apportionment of the value by reason of failure to operate during a part of the year, would not equal twenty-five dollars. I do not believe that an assessment is warranted by this last sentence where there would otherwise be no tax assessable at all.

Your second assumption is that the receiver has continued to operate the business after January 1, 1927. Since, as I have pointed out, the evident purpose of the 1925 amendment was to exempt from taxation any corporation in the hands of a receiver there would likewise be no liability in this instance.

In your third conclusion the receiver was appointed after January 1, 1927.

In this instance a proportionate fee is payable for only that portion of the year prior to the receiver's appointment and his continued operation of the business is not material. The minimum of twenty-five dollars is applicable.

I desire to point out that Section 7, supra, directs the Tax Commission to make a finding, in the case of the appointment of a receiver for a corporation, as to whether the corporation has had the power to exercise its corporate franchise unimpaired by such proceeding. As I construe this, however, the duty of your Commission is merely to ascertain the date when the receiver was appointed and qualified, and when, if at all, the receivership was lifted. The plain language of the statute is that no liability for tax exists during the course of the receivership.

Respectfully,
EDWARD C. TURNER.
Attorney General.

873.

APPROVAL, RESOLUTION FOR SALE OF ABANDONED CANAL LAND IN MERCER COUNTY.

COLUMBUS, OHIO, August 16, 1927.

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

DEAR SIR:—Receipt is acknowledged of your communication of August 16, 1927, enclosing for my approval, resolution, in duplicate, for the sale of the following abandoned canal land:

> "That portion of the southeast Quarter of Section 12, Town 6, South, Range 2 East, Mercer County, Ohio, that is bounded as follows:
>
> Commencing at a point in the east and west half section line of said section, that is 16.78 chains east of the center of said section, measured along said half section line; thence south, parallel to the north and south half section line of said section, 20 chains, more or less, to the northerly line of the county road; thence east along the north line of said road, ten (10) links; thence N. 8° 30′ east along the DAMAGE LINE of the Mercer County Reservoir, 20.22 chains, more or less, to a point in the east and west half section line, as run for the State of Ohio by Justin Hamilton in 1847; thence west along the east and west half section line 3.19 chains to the place of commencement, and containing 3.29 acres, more or less.

to Sophia Martens, of Celina, Ohio.

The land is being sold, at private sale, under the provisions of Section 13971 of the General Code, at its appraised value of one hundred ($100.00) dollars.

Finding that said sale is authorized under the provisions of Section 13971, supra, and that said resolution is in proper form and legal, I have entered my approval upon the resolution.

Respectfully,
EDWARD C. TURNER,
Attorney General.