1811.

CORPORATION—FOREIGN—CONSTRUCTION AND MAINTENANCE OF BRIDGE OVER OHIO RIVER—MUST FILE REPORT WITH TAX COMMISSION OF OHIO—FRANCHISE TAX—SECTION 5495, GENERAL CODE, DISCUSSED.

SYLLABUS:

A foreign corporation whose sole business is that of construction and maintenance of a bridge over the Ohio river between Ohio and West Virginia and whose total receipts come from tolls which are collected on the West Virginia side, but which company owns property on the Ohio side, is required by Section 5495-2 of the General Code to file a foreign corporation franchise tax report with the Tax Commission of Ohio and to pay the franchise fee in an amount subsequently determined by proper action of the Tax Commission.

COLUMBUS, OHIO, March 5, 1928.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your recent communication as follows:

"The commission has had correspondence before it for some time from the Huntington & Ohio Bridge Company, Huntington, W. Va.

The Huntington & Ohio Bridge Company is a foreign corporation, incorporated under the laws of W. Va. Over the signature of their attorney, who is the secretary of the company, the statement is made that the company qualified under Section 178 of the General Code. They claim in their correspondence to us that no franchise tax is assessable against the corporation under the laws of Ohio because it is engaged exclusively in interstate commerce, and, therefore, exempted from complying with Section 183 of the General Code by expressed provision of the statute. Their contention also is to the effect that the State of Ohio can not lawfully tax the Huntington & Ohio Bridge Company for the privilege of holding property in Ohio or transacting business therein when they aver that the sole business of their company is interstate and all of its property owned in Ohio is devoted to interstate commerce. They filed their franchise tax report in 1927 with this commission and stated in filing same it was in error in so far as their report stated that the company had qualified in Ohio under Section 183 of the General Code. Their claim is also to the effect that the above company is and was not obliged to qualify under Section 183 of the General Code because of the provisions of Section 188, providing that Sections 182 and 187 of the General Code should not apply to foreign corporations engaged in Ohio in interstate commerce.

Desiring, therefore, to clear the record, the commission is asking that you render an opinion as soon as may be possible on the following:

Whether or not a foreign corporation who qualify to do business in Ohio, whose business is that of a bridge company with the termini of their business in Ohio and W. Va., whose total receipts as a bridge company come from tolls, all of which tolls are collected on the W. Va. side, but which company owns property on the Ohio side, are required to render a foreign corporation franchise tax report in order that there may be assessed against them the proper fee which said report would indicate should be so assessed."

Section 5495 of the General Code constitutes a part of Amended Substitute Senate Bill No. 22, passed by the 87th General Assembly, and Section 1 of that bill was given this numbering. The section now reads as follows:

> "The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable."

Section 3 of the act, which has been codified as Section 5495-2 of the General Code, is as follows:

> "Within thirty days after the taking effect of this act and annually, thereafter, between the first day of January and the thirty-first day of March 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 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. It shall be the duty of the commission to furnish corporations, on request, copies of the forms prescribed by it for the purpose of making such report."

By the same act original Section 5495 was repealed, which 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 benefits 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."

This section is first found in 111 Ohio Laws, 471. An analogous section (5499, General Code) was passed in 1921 and is found in 109 Ohio Laws, 94. That section was as follows:

> "Annually during the month of July, each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital

or plant 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, in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe."

It is unnecessary for me to enlarge upon the reasons which compelled the change in the wording of these statutes which I have just quoted and related sections, the substance of which was changed as the result of the decision of the Supreme Court of the United States in the case of *Air-Way Electric Appliance Corporation* vs. *Day*, 266 U. S. 71, 69 Law. Ed. 169. The former method of taxing foreign corporations in Ohio was in that case held invalid for the reason that the tax was based upon the entire authorized stock of a foreign corporation represented by property owned and business transacted in this state. As stated in the syllabus:

"1. A state statute which imposes a tax upon the entire authorized stock of a foreign corporation located within the state and doing an interstate business, the issued stock of which is much less than that authorized, violates the commerce clause of the Federal Constitution, since the tax upon all the shares, except the portion of the issued stock representing the business in the state, is a burden upon interstate commerce.

2. A tax upon the privilege of a foreign corporation to do business in the state should bear some relation to the value of the privilege.

3. The number of shares of stock of a foreign corporation which are authorized but not issued is not a reasonable measure of the fee which may be imposed upon it for the privilege of doing business in the state.

4. The mere number of authorized shares of nonpar-value stock is not a reasonable basis for classification of foreign corporations for the purpose of determining the amount of annual fees to be imposed upon them for the privilege of doing business in the state, and violates the equal protection clause of the Federal Constitution."

You will observe that Section 5499 of the Code as enacted in 1921 required the report of a foreign corporation only in the event that the corporation was doing business in this state and owned or used a part or all of its capital or plant in this state. In the change as disclosed in Section 5495 of the Code as enacted in 1925, the field was appreciably broadened by requiring the report and tax of all corporations doing business in this state *or* owning or using a part or all of its plant or capital in this state. The substitution of the word "or" for the word "and" must be given significance. And the apparent purpose of the Legislature was to require the report and the payment of a fee from every foreign corporation which owned or used a part or all of its capital or property in this state irrespective of whether a corporation should be regarded as doing business within this state. In other words, the mere ownership of property in Ohio subjects a foreign corporation to the payment of the franchise fee.

The same language is used in Section 5495 in its present form, and from a reading of that section and Section 5495-2, heretofore quoted, I can reach no conclusion other than that the Legislature intended foreign corporations owning property in Ohio to be subject to the franchise fee.

From the facts as you state them in your letter, it is quite clear that the bridge company does not do any local business in Ohio. Its sole business is to provide the means whereby commerce can be conducted between the states of Ohio and West

Virginia, consequently it appears reasonable to say that the company is clearly engaged in interstate commerce, although in so saying, I am not unmindful of the language of Chief Justice Fuller in the case of *Henderson Bridge Company* vs. *Commonwealth of Kentucky*, 166 U. S. 150, 41 Law. Ed. 953:

> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted."

You will note that this language apparently makes a distinction between the company which merely owns the bridge and the interstate commerce which goes thereover, but the decision was reached upon a five to four vote, and the dissenting opinion, in my judgment, is better considered on this point. The subsequent decisions of the Supreme Court leave no doubt in my mind but that a bridge company owning a bridge over a stream between two states is engaged in interstate commerce.

Your attention is further directed to the fact that the franchise fee is required of all foreign corporations doing business in Ohio or owning or using a part or all of its capital or property in this state, excepting only those corporations exempted by Section 5503 of the General Code, which is as follows:

> "An incorporated company, whether foreign or domestic, owning and operating a public utility in this state, and as such required by law to file reports to the tax commission and to pay an excise tax upon its gross receipts or gross earnings and insurance, fraternal, beneficial, building and loan, bond investment and other corporations, required by law to file annual reports with the Superintendent of Insurance, shall not be subject to the provisions of this act."

While, under the ordinary definition of the term "public utility" a bridge company would undoubtedly be so classified, yet, upon reference to the statutory definition of that term in Ohio, it is found that this kind of a company is not included.

Section 5415 of the General Code, is as follows:

> "The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, sleeping car company, freight line company, equipment company, electric light company, gas company, natural gas company, pipe line company, waterworks company, messenger company, signal company, messenger or signal company, union depot company, water transportation company, heating company, cooling company, street railroad company, railroad company, suburban railroad company, and interurban railroad company, and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations."

There is no other section applicable to bridge companies requiring them to pay an excise tax, and accordingly it is obvious that the company in question is not within the exception enumerated in Section 5503 of the Code. I have no difficulty, therefore,

in reaching the conclusion that the corporation in question is within the terms of Sections 5495 and 5495-2 of the Code, and therefore is required to make a report and pay the fee prescribed in accordance with the ensuing sections. Whether or not the application of the act to the corporation in question would be violative of certain provisions of the Constitution of the United States presents a serious and difficult question.

Premising this inquiry upon the fact that the bridge company is engaged exclusively in interstate commerce, the question resolves itself into a determination of whether the state may constitutionally impose a franchise tax upon a corporation solely engaged in interstate commerce merely because it owns and uses a part of its tangible property within the state boundary. It would be impossible for me within the confines of this opinion even to enumerate all of the cases which bear more or less directly upon the question presented. The Supreme Court of the United States alone has had presented to it questions in scores of cases which involve the power of a state in various ways to impose burdens on interstate commerce. Many of those cases involve public utilities which, although engaged in interstate commerce, also do local business within the state. Clearly, such corporations were doing business within the state and so subject to the imposition of reasonable and non-discriminatory taxation upon the franchise or privilege to do a local business. While having some bearing upon the question here presented these cases need not be discussed.

Another line of decisions involves the right of the state to tax the tangible property of the corporations located within this state. Where no discrimination existed and a reasonable method was adopted for the determination of the valuation of the property, these property taxes have been uniformly upheld. It is likewise unnecessary to go into a discussion of the decisions of this character.

In this instance, however, I assume that the tangible property of the bridge company located in Ohio is subject to taxation as other property, and our question is whether the State of Ohio has power to impose, in addition to the ordinary taxation, a further franchise tax in which the property located in Ohio is used as a factor in determining the percentage of the fair asset value of the stock of the corporation represented by property owned or used in this state. I need scarcely say that a corporation engaged solely in interstate commerce is not doing business within this state and taxable upon its business. The decisions of courts of last resorts are fairly unanimous that corporations of other states have the right under the Federal Constitution to conduct business of an interstate character without interference by local authority except such incidental regulations as may be necessary in the exercise of police power. Such interstate business cannot be taxed under the guise of regulation. Accordingly, the bridge company in this instance could not be made subject to the franchise fee on the theory that it is doing business in Ohio. Before the change in the language of the franchise tax law to which I have heretofore referred, it was comparatively easy to determine whether or not a given corporation was engaged in business in this state and accordingly subject to the franchise tax.

There are several opinions of this office which have passed upon various specific cases under the old law, but those opinions need not be cited because the change in the statute has rendered their reasoning inapplicable.

If, therefore, the tax in the present instance cannot be justified on the ground that the corporation is doing business within this state, is there sufficient justification in the fact that the company owns tangible property in this state? On this precise question I have been unable to discover any very definite precedent. A very similar question was, however, under consideration by the Supreme Court of the United States in the case of *Gloucester Ferry Company* vs. *Commonwealth of Pennsylvania*, 114 U. S. 196, 29 Law. Ed. 158. There the plaintiff in error was incorporated in New

Jersey to run a steamboat ferry between Gloucester and Philadelphia. It maintained ferry-boats and had a slip or dock at each terminal. The one in Philadelphia was leased and it owned no other property in that city. All of the other property was located in New Jersey and its boats were registered at the port of Camden. Its sole business was the transportation of passengers and freight across the river. You will observe, therefore, that the facts are very similar to those now before us.

The state of Pennsylvania had a tax, in the following language:

> " 'That every company or association whatever, now or hereafter incorporated by or under any law of this Commonwealth, or now or hereafter incorporated by any other state or territory of the United States or foreign government, and doing business in this Commonwealth or having capital employed in this Commonwealth in the name of any other company or corporation, association or associations, person or persons, or in any other manner, except foreign insurance companies, banks and savings institutions, shall be subject to and pay into the treasury of the Commonwealth annually a tax to be computed as follows, namely. If the dividend or dividends made or declared by such company or association as aforesaid, during any year ending with the first Monday of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-half mill upon the capital stock for each one per centum of dividend so made or declared; if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of three mills upon each dollar of a valuation of the said capital stock,' made in accordance with the provisions of another section of the act."

The question raised was as to the illegality of the levy in view of the fact that the sole business of the corporation was interstate. The Supreme Court sustained this contention, and the court on page 206 stated as follows:

> "As to the second reason given to the decision below—that the Company could not lease its wharf in Philadelphia except by the implied consent of the Legislature of the Commonwealth, and thus is dependent upon the Commonwealth to do its business, and therefore can be taxed there—it may be answered that no foreign or interstate commerce can be carried on with the citizens of a State without the use of a wharf or other place within its limits on which passengers and freight can be landed and received, and the existence of power in a State to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce for the use of such places would be inconsistent with and entirely subversive of the power vested in Congress over such commerce. Nearly all the lines of steamships and of sailing vessels between the United States and England, France, Germany and other countries of Europe, and between the United States and South America, are owned by corporations; and, if by reason of landing or receiving passengers and freight at wharves or other places in a State, they can be taxed by the State on their capital stock on the ground that they are thereby doing business within her limits the taxes which may be imposed may embarass, impede and even destroy such commerce with the citizens of the State. If such a tax can be levied at all its amount will rest in the discretion of the State. It is idle to say that the interests of the State would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its

moderation in that respect; they require security. And they may rely on the power of Congress to prevent any interference by the state until the act of commerce—the transportation of passengers and freight—is completed. The only interference of the State with the landing and receiving of passengers and freight which is permissible is confined to such measures as will prevent confusion among the vessels, and collision between them, insure the safety and convenience, and facilitate the discharge or receipt of their passengers and freight, which fall under the general head of port regulations, of which we shall presently speak.

It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to state taxation, provided always it be within the jurisdiction of the State. As said by Chief Justice Marshall in *McCulloch* vs. *Maryland,* 4 Wheat., 429, 'All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may also be pronounced self-evident."

After reviewing quite exhaustively previous decisions of the Supreme Court, the following conclusion was reached:

"That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. How conflicting legislation of the two states on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware River. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferrykeepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in the present case is not complicated by any action of that state concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

Standing alone this case would apparently negative the right of the State of Ohio to require the payment of a franchise fee in the present instance. It is to be observed, however, that the tax therein provided was levied upon the entire capital stock of the corporation without any attempt whatsoever to limit the taxation to that portion of the capital stock fairly attributable to the Pennsylvania property. In this essential the facts are different and, I believe, distinguishable in principle. In fact, the late case of *Commonwealth* vs. *Clyde S. S. Co.,* 110 Atl. 532, decided by the Supreme Court of Pennsylvania cites the Gloucester Ferry Company case and distinguishes it. The defendant company in that instance was engaged exclusively in interstate commerce so far as the State of Pennsylvania was concerned; it had office furniture and equipment, appliances for unloading and loading passengers and freight and wharves in the city of Philadelphia. The tax in this instance was only levied upon that proportion of its capital stock represented by property permanently located in the State of Pennsylvania and employed in transacting its business therein. The contention was

made, as it was said in the Gloucester case, that the tax was unconstitutional and void because it constituted a burden on interstate commerce. The court points out that the tangible property of a foreign corporation located within the state may be taxed like other tangible property within its jurisdiction, although it may be employed in interstate or foreign commerce. On page 533 is found the following:

> "It is quite clear from these authorities that the defendant company's property is not exempt from taxation. The subject of the tax is the defendant's capital stock, that proportion of it represented by its property used in carrying on interstate commerce; nevertheless, as it is located permanently in this state and the property of other corporations is subject to a like tax, it also is taxable. According to the doctrine of the cases, such taxation cannot be regarded in conflict with the exclusive power of Congress to regulate interstate commerce."

It was pointed out in the course of the opinion that in the Gloucester case the tax was attempted to be laid upon the ferry-boats which did not have a taxable situs in Pennsylvania, and the court goes on to say that neither the capital stock nor property in the state in that instance was liable to taxation. In conclusion the court said:

> "Unlike the case of *Gloucester Ferry Co.* vs. *Pennsylvania*, there is now presented a case where the defendant company has property located permanently in this state, which it is using here, and whose situs for taxation is in this state. Its capital stock represented by such property therefore is here, and liable to taxation like the capital stock or property of other corporations.
>
> Wherefore, we conclude:
>
> 1. That the capital stock of the defendant company in this state, represented by its property permanently in this state, although used in carrying on interstate commerce, is nevertheless taxable in this state.
>
> 2. That the fact that the defendant company is carrying on interstate commerce and using, in connection with its business, the property subjected to the tax, does not exempt such property from the taxation imposed upon corporations doing business or employing property in this state."

You will observe that the tax was justified on the ground that property was located within the state and that only so much of the capital stock as was represented by property in Pennsylvania was taxable.

Applying the reasoning of this opinion to the case before us, it follows that the State of Ohio has authority to impose the tax in question. Without going into the details incident to the determination of the amount of the tax, with which you are perfectly familiar, it is sufficient to say that a conscientious effort has been made to apportion the fair value of the issued and outstanding stock of each corporation in the proportion which the sum of all the property owned or used in this state and business done in the state bears to the aggregate amount of property and business done. This is the method prescribed by Section 5498 of the General Code, as found in 112 Ohio Laws, page 412. I believe that the method of apportionment prescribed by this section fairly meets the objections raised by the Supreme Court in the Air-Way decision, supra. You will further observe that the factor of business done must in this instance be disregarded. That is to say, so far as a foreign corporation engaged exclusively in interstate commerce is concerned, it would be improper to take into consideration, and hence indirectly impose a tax upon interstate business.

The result of this would be that the corporation in question would only be taxable upon that proportion of the fair assessed value of its issued and outstanding shares of stock which would result from the application of the ratio obtained by dividing the property owned in Ohio by the sum of the total property owned and business done, such business done including, of course, interstate business. The net result of this method of determination would be to appreciably reduce the proportion of the assessed value of the capital stock upon which tax would be paid, since the factor of business done in Ohio is absent. Except for this departure from the ordinary rule, this method of determination is of uniform application to all corporations, domestic or otherwise. It cannot therefore be said that there has been any discrimination against corporations engaged in interstate commerce. In fact, the constitutional inhibition has resulted in a discrimination in favor of such corporation.

From what I have said I think it clear that if the Pennsylvania case may be regarded as a precedent, the imposition of the tax in the present instance is justified. There the sole business of the company was interstate, as it is here, and a tax upon the corporate stock represented by property owned or used in the state, was held valid. The franchise tax on Ohio corporations may properly be said to be measured by the Ohio proportion of the corporate stock, and as such, is governed by the same principles as are applicable to the Pennsylvania tax.

An interesting case, also commenting upon the Gloucester Ferry case is that of *Bosworth* vs. *Evansville & Bowling Green Packet Co.,* 199 S. W. 1059. In commenting upon the earlier case, the Court of Appeals of Kentucky said:

> "The Gloucester Ferry Company case did not deal with a franchise tax; it dealt solely with tangible property."

Reference was made to the earlier case of *B. & O. S. W. R. Co.* vs. *Commonwealth,* 177 Ky. 566, 198 S. W. 35. There the State sought to impose a franchise tax upon a foreign railroad company owning and operating a railroad in Indiana and Illinois, and operating as a part of its system only about three miles of road in Kentucky. It had, however, tangible property in Kentucky in the shape of depot buildings, office furniture and rolling stock, but its entire business in Kentucky was interstate. The imposition of a franchise tax was resisted on the ground that it would be a tax on interstate commerce. In this earlier case the court used language which is quoted in the Bosworth case, as follows:

> "Treating this tax, which for convenience we will call a franchise tax, as a tax on the intangible property of the corporation that has a situs in this state for taxation, we find no obstacle in the way of the State subjecting it to the same rate of taxation to which other property is subjected. The right of the State to subject this character of property to state taxation has been frequently and uniformly upheld by the Supreme Court of the United States. * * * Nor does the fact that this railroad company owns no main lines of track in this state relieve it from liability for this franchise tax. It comes into the state and into its depots situated herein, with its trains and engines over the tracks that it has leased from the Kentucky & Indiana Terminal Company, or that it uses under some traffic arrangement with this company. It does business in this state as an operating railroad company, carrying freight and passengers to and from its depots in this state, and owns tangible property located in this state, and by virtue of these facts it comes within the definition of the corporations subject to the tax described in Section 4077 of the Statutes, and is as much subject to a franchise tax as it would be if it owned the tracks upon which its trains run in this state. 177 Ky. 571, 198 S. W. 35."

The Bosworth case sustained the tax in question, and it is to be observed that this franchise tax of Kentucky provided an apportionment in the case of foreign corporations of interstate character. In effect, the tax in question was a tax upon the intangibles of the corporation which might be allocated to the tangible property located within the state. The court's conclusion is summarized on page 1063, as follows:

> "Under these authorities we conclude that the tax under consideration is not an unconstitutional burden upon interstate commerce. It is not imposed as a condition precedent to the doing of business; it is not a tax upon the gross receipts of the company, which are, on the contrary, merely used as a factor in measuring the value of the franchise; and all corporations both domestic and foreign are treated alike."

As stated in Cooley on Taxation, Section 384:

> "An annual franchise tax based on the proportion of outstanding capital stock represented by property in the state is valid, whether the corporation is a domestic or foreign one, notwithstanding the property is used in interstate or foreign commerce."

This citation would apparently justify the imposition of the tax in the present case. There are numerous cases referred to by the author in the notes to this statement which need not be discussed. I might point out, however, that in practically all of them the corporation in question was doing some local business in addition to the interstate business. Cooley further points out that a tax as a condition to doing interstate business is never permissible. In the present instance the tax is not made a condition precedent, and therefore from this standpoint it is not objectionable. I observe from your letter that the company has not qualified under Section 183 of the Code. In accordance with the statement of Cooley, to which I have just referred, the State of Ohio could not constitutionally make the payment of a fee a prerequisite to the engaging in business of a purely interstate character. Section 183 of the Code makes the payment of the fee therein a condition to doing business in this state, and as I have heretofore stated, the corporation in question cannot be said to be engaged in business in this state since its business is purely interstate.

On the other hand, the company has, as I understand it, qualified under Section 178 of the Code. In the case of *Chesapeake & Ohio R. R. Co.* vs. *Newman,* 16 Ohio App. 156, the court held that a railroad corporation which merely operated a ferry from Kentucky to Ironton, Ohio, was engaged in business in this state for the purpose of service of summons upon the railroad. Service in that instance was made upon the superintendent of the ferry.

Apparently, therefore, for certain purposes the corporation would be doing business in this state, and compliance with Section 178 of the Code would therefore prevent the attachment of the property of the corporation. It is also authority for corporations to institute actions in this state.

I am not unmindful of many decisions of the Supreme Court which may be cited as preventing the imposition of the tax in question. Typical of these is the Gloucester Ferry case, supra, from which an inference may be drawn that the only tax which may be imposed upon a foreign corporation engaged exclusively in interstate commerce is the ordinary property tax upon the property which has a situs within the state. If this inference is the law, then this tax is not justified. On the other hand, I believe that the distinction pointed out in the later Pennsylvania case, from which I have quoted, is sound. The Ohio tax cannot be said to be oppressive

nor is there any discrimination between domestic and foreign corporations. It is not burdensome against a corporation engaged in interstate commerce as compared with other corporations. In fact, the burden is less on one engaged in interstate commerce than upon others. It does not attempt to reach property outside of the State of Ohio, and is not imposed as a condition precedent to doing business in this state. Its application to the corporation in question is, as I have pointed out, questionable under the authorities. While the question is one of grave doubt and uncertainty, I believe it to be my duty to resolve the doubt in favor of the applicability of the tax.

You are accordingly advised that the bridge company in question is required to file a foreign corporation franchise tax report and to pay such tax upon the determination thereof in accordance with law.

In this connection it is proper for me to point out that in the case of *Henderson Bridge Co.* vs. *City of Henderson,* 173 U. S. 592, 43 Law Ed. 823, the Supreme Court of the United States held that the boundary of Kentucky extends to low water mark on the Indiana shore of the Ohio River, and accordingly the city of Henderson was authorized to tax the bridge in question to the low water mark on the Indiana side. This principle would apply in the present instance and the only property which the State of Ohio would be justified in taking into consideration would be that tangible property of the bridge company, i. e., the portion of the bridge and the abutments thereof, as would extend to the low water mark on the Ohio side. The remainder would be taxable in the state of West Virginia.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1812.

DISAPPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE WEGE MARBLE & TILE COMPANY, COLUMBUS, OHIO, FOR WORK AT OHIO STATE UNIVERSITY.

COLUMBUS, OHIO, March 5, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for and on behalf of the Board of Trustees of the Ohio State University, and The Wege Marble & Tile Company, of Columbus, Ohio.

The consideration named in the contract is the sum of nine thousand six hundred and three dollars ($9,603.00). An examination of the estimate of cost reveals that the estimated cost of the marble, tile and terrazzo is the sum of six thousand eight hundred and fifty-six dollars ($6,856.00). It is apparent, therefore, that the amount of the contract award is in excess of the estimated cost. Your attention is directed to Section 2323, General Code, which provides as follows:

> "No contract shall be entered into pursuant to Section 2317 at a price in excess of the entire estimate thereof. Nor shall the entire cost of the construction, improvement, alteration, addition or installation including changes or estimates or expense for architects or engineers exceed in the aggregate the amount authorized by law for the same."