1925 (Amended House Bill No. 517) page 42. See also General Appropriation Act of the 89th General Assembly (House Bill No. 624), pages 47, 73, 120, 124, 131, 133 and 182; and the Appropriation Act of the 90th General Assembly (House Bill 699), pages 57, 58, 65, 82, 126, 128, 130, 132, 136, 138, 140 and 176. In fact in practically every general appropriation act passed by the legislature in the past thirty years, and perhaps longer, appropriations were made wherein the purpose of the appropriation was made certain and the amount was not certain but was readily ascertainable.

I am therefore of the opinion that the language here under consideration, if incorporated in a general appropriation act passed by the General Assembly of Ohio, in the manner suggested, would constitute a valid appropriation of all revenues not otherwise appropriated coming into the state treasury during the period beginning January 1, 1935 and ending December 31, 1936, and which are dedicated under existing law to the maintenance and repair of highways (including highway patrol) and to highway construction purposes as defined by law for expenditure by the state highway department during said period for the uses and purposes mentioned.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4950.

INSPECTION—DUTIES OF DIRECTOR OF AGRICULTURE AS TO WEIGHTS AND MEASURES OF COAL AND COKE UNDER H. B. NO. 330.

SYLLABUS:

Discussion of various questions relative to House Bill No. 330. (116 *O. L.* 333).

COLUMBUS, OHIO, December 2, 1935.

HON. EARL H. HANEFELD, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion on a number of questions pertaining to House Bill No. 330, enacted at the recent session of the legislature (116 O. L. 333). The questions are as follows:

> "1. Who is the administrative agent authorized by law to enforce sections 6420 and 6420-1?

2. Can prosecutions be made, and by whom, when a driver refuses to show bills of weight?

3. In interstate shipments, can weight in another state be accepted in Ohio if the scales in the other state have been sealed by an Ohio sealer, or a sealer authorized in the state where the coal is mined and weighed?

4. Is it necessary for the weigher or driver of the truck to have a weight slip during the time the coal or coke is in transit?

5. In the event the buyer and seller make a contract by agreement for the sale and purchase of coal or coke by lot instead of by weight, is it necessary for the driver of the truck in the delivery of coal or coke to have the weight certificate in his possession while the coal or coke is in transit? Do the provisions of sections 6420 and 6420-1 prohibit the sale of coal or coke by agreement instead of by weight?

6. What are the duties of the state sealer of weights and measures, deputy state sealer of weights and measures, or county or city sealer of weights and measures in the enforcement and administration of the above mentioned sections?

7. Can the dealer of coal or coke issue his own certificate if he does not own a scale?

8. As to the Coal Law Amended New Section 6420-1 and 6420-2, must the Sealer be deputized as a sheriff or police officer to make arrests? If so, who is to pay the bond?

9. Is the coal producer allowed to sell coal by contract instead of weight?

10. We have large quantities of coal brought over from the state of West Virginia. Should the drivers have the weighing slip when they come across the bridge? Or should it be weighed after they get here in our state?

11. Are the small producers who have no scales at their mines allowed to go elsewhere to weigh said coal, or are they compelled to have scales of their own?

12. If a person is caught delivering coal under weight, or if said weight does not correspond with the delivery slip, is the driver to be arrested or the person who weighed the load?

13. If the delivery slips are written in lead pencil instead of the indelible, is it a violation, and subject to the same penalties?"

Because of the number and the variety of your questions, it might be profitable to quote the pertinent sections of the Code at the outset. Section 6420, General Code, prior to its amendment by House Bill No. 330, read as follows:

"Sales of coal shall be by weight; and two thousand pounds avoirdupois shall constitute a ton thereof; but where coal can not be weighed, it may be sold by measurement."

House Bill No. 330, in addition to amending Section 6420, General Code, enacted Sections 6420-1 and 6420-2. These three sections as they now exist read as follows:

Sec. 6420:

"Sales of coal or coke shall be by weight; and two thousand pounds avoirdupois shall constitute a ton thereof. All coal or coke sold or delivered within this state shall be weighed on a scale inspected and sealed by a sealer of weights and measures as provided by law. At the time of the weighing of such coal or coke, duplicate weight certificates, written in ink or indelible pencil, or partly printed and partly written with ink or indelible pencil, shall be delivered by the weigher to the person in charge of the wagon or vehicle delivering the same, which certificates shall show the name and address of the seller, the name and address of the consignee, the name and address of the person in charge of the wagon or vehicle, the gross weight of the load, the weight of the wagon or vehicle used in such delivery, the date of the weighing, and the weight of the coal or coke purported to be delivered. The weigher shall imprint on said duplicate certificates, across the figures showing the weights, a seal showing the name and place of the scale where weighed and the words "Inspected and sealed scale." One certificate shall be delivered by the person in charge of said wagon or vehicle to the purchaser of said coal or coke, or other person in charge of the premises where said coal or coke is to be delivered, prior to the unloading of the same, and the other certificate shall be carried by the person in charge of said wagon or vehicle to and from the place of delivery."

Sec. 6420-1:

"On demand made by an authorized police officer having jurisdiction in the political subdivision where coal or coke is to be delivered, the person in charge of a wagon or vehicle delivering coal or coke shall exhibit such certificate to such police officer for inspection. If such police officer, from an inspection of such certificate and the load of such vehicle, has reasonable cause to suspect that the weights shown on said certificates are incorrect, he may cause

said person in charge of said wagon or vehicle to drive to an inspected and sealed scale within a reasonable distance for the purpose of verifying the weights shown on said certificate. The cost of verifying such weights shall be paid by the political subdivision wherein such verification has been demanded. If such verification of weights shows a two per cent (2%) or more shortage in net weight, as shown by said certificates of weight, such fact shall be *prima facie* evidence of attempting to sell or deliver coal or coke by short weight."

Sec. 6420-2:

"Any person, firm or corporation who sells or attempts to sell or deliver coal or coke by short weight, or who issues a false weight certificate as herein prvided for, or who alters or attempts to alter a weight certificate after the same has been issued, or who violates any of the provisions of this act, shall be guilty of a misdemeanor and shall be fined not less than twenty-five ($25.00) dollars nor more than two hundred ($200.00) dollars."

In reference to your first question, I call your attention to Section 7965, General Code, which reads as follows:

"The secretary of agriculture shall be state sealer, and shall make, promulgate and enforce such rules and regulations as may be necessary to the prompt and effective enforcement of the weights and measures laws of this state. The standards of weights and measures adopted by this state shall be deposited in a suitable room at Columbus, and be kept in suitable cases, to be opened only for the purpose of comparing them with such standards and copies which by law are furnished for the use of the several counties or villages unless by joint resolution of the general assembly, or upon a call of either house for information, or by order of the governor for scientific purposes. The secretary of agriculture shall, upon the passage of this act, and once every three years thereafter, require each county auditor and city or village sealer, in this state, to present all standards of weights and measures in their possession to him for comparison with the standards adopted by the state, and he shall condemn and destroy all of such standards as do not conform with the standards adopted by the state. Each county auditor and each city and village sealer shall be required to procure copies of all the original standards adopted by the state named in section 7966 of the General Code, except such standards now in their possession as

the secretary of agriculture shall find to conform with the standards adopted by the state. It shall be the duty of the secretary of agriculture to advise and assist all county, city and village sealers, and generally be charged with the enforcement of all laws relating to weights and measures; and in the performance of such duties it may use the service of any person employed in his department. The secretary of agriculture or any person employed by him for that purpose, may try and prove any weights, measures, balance and any other weighing or measuring device, or request from any person, and when the same are found or made to conform to the state standards shall cause the same to be sealed and marked, as provided in section 2616 of the General Code."

Sections 2615 and 4318, General Code, are also pertiment to your first question. These sections read as follows:

Sec. 2615:

"By virtue of his office, the county auditor shall be county sealer of weights and measures and shall be responsible for the preservation of the copies of the original standards delivered to his office. It shall be the duty of the county auditor to see that all state laws relating to weights and measures be strictly enforced throughout his county and to assist generally in the prosecution of all violations of such laws."

Sec. 4318:

"The mayor may appoint a sealer of weights and measures, who shall hold office co-extensive with the term of office of the mayor who made his appointment, and until his successor is appointed and qualified, unless otherwise removed from office."

While there is nothing in House Bill No. 330 relative to the duties of the Director of Agriculture in administering this new law, it is apparent that Sections 6420, 6420-1 and 6420-2, General Code, although passed later, are in *pari materia* with Section 7965, General Code, supra. It is specifically stated in Section 7965 that the Secretary of Agriculture (now Director of Agriculture) is charged with the duty of enforcing all the laws relating to weights and measures. It could not be seriously contended that Sections 6420, et seq., General Code, are not laws pertaining to weights.

In view of the above quoted sections, it would appear that the Director of Agriculture is generally charged with the enforcement of these new laws

relative to the sale of coal and coke. In other words, the Director of Agriculture is charged with the same duty of enforcing these laws, as he is charged with the enforcement of other laws relative to weights and measures.

In reference to your second question as to whether or not prosecutions should be made where the driver refuses to show his weight certificates, I call your attention to Section 6420-1, General Code. This section provides that on demand by "an authorized police officer having jurisdiction in the political sub-division where coal or coke is to be delivered", the driver of the vehicle shall produce and show the certificates to such police officer. Section 6420-2, General Code, after enumerating that certain acts shall constitute a misdemeanor, concludes with a catch-all provision that one who violates any of the provisions of this Act (House Bill No. 330) shall be guilty of a misdemeanor. Construing these two sections, it is apparent that one who fails to show weight Certificates to an authorized police officer, as defined in Section 6420-1, General Code, is guilty of a misdemeanor and may be prosecuted by such police officer in a court of competent jurisdiction.

While your question is general in character, it must be apparent that only the persons mentioned in Section 6420-1, General Code, may require the driver of a coal wagon or vehicle to exhibit their weight certificates. In other words, a private individual, no matter how interested he may be in seeing that this new law is enforced, may not require a driver to exhibit his weight certificates.

Your third and tenth questions pertain to the same subject matter and I shall consider them together. You state that there is a considerable quantity of coal which is brought over in trucks into Ohio from West Virginia. Such shipments are interstate commerce. In so far as any shipments constitute intra-state commerce, there is no doubt, under the decisions both in and out of this State, that Ohio may pass reasonable laws under the police power regulating the subject of weights.

Police power has been variously defined by innumerable courts and text-writers. It is defined in Cooley's Constitutional Limitations, 8th Edition, Vol 2, p. 1223, as follows:

> "The police power of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

This same author at page 1226 quotes the language of our Supreme Court in *Leonard* vs. *State,* 100 O. S. 456, as follows:

> "The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare. The measure of police power must square with the measure of public necessity. The public need is the polestar of the enactment, interpretation and application of the law."

The prime thought in such legislation as this is a protection to the general public from fraudulent weights. Legislation similar to this has been almost uniformly upheld in other states.

Where such shipments constitute interstate commerce, it is, of course, necessary to consider Article 1, Section 8 of the Federal Constitution. It is there provided that Congress shall have power to regulate commerce among the several states. The language of Section 6420, General Code, clearly indicates that it was intended to apply not only to coal sold and delivered within Ohio but also to coal that is shipped into Ohio regardless of where the sale was made. However, if it were determined that the legislature had no right to regulate the traffic of coal brought into Ohio from West Virginia, we would then be confronted with the question of giving to the statute a construction which would affect only intrastate transactions.

It has been often and variously expressd that a State may not pass laws which materially and directly burden interstate commerce. In the exercise of its police power, a state may, however, pass reasonable local regulations for the safety, comfort and convenience of its people, provided they do not burden interstate commerce in a substantial measure. See *Curton* vs. *State,* 136 Ga. 91, 94; *Gaines* vs. *Holmes,* 154 Ga. 344; *Louisville & Nashville Railroad Co.* vs. *Kentucky,* 183 U. S. 503; and *New York* vs. *Heslerberg,* 211 U. S. 31.

Thus, in the exercise of its police powers, a state may pass inspection laws upon articles which are the subjects of interstate commerce. Thus, a state law requiring all locomotive engineers to be examined and licensed, including those engaged in interstate commerce, was held valid in *Smith* vs. *Alabama,* 124 U. S. 465, on the ground that such a law did not impose any direct burden on interstate commerce. See also *Nashville Railroad* vs. *Alabama,* 128 U. S. 96.

In the case of *City of New York* vs. *Miln,* 11 Peters Report, 102, it was held that a law of the state of New York which required the master of every vessel arriving from a foreign port, to report to the mayor or recorder of the city of New York, the name, place of birth and other information concerning all of the passengers of the ship landed at New York was sustained

as constitutional on the ground that the same was not a burden on foreign commerce.

It also has been held that a state can regulate the use of its highways by operators of motor vehicles (buses and trucks), including those being used in interstate commerce, to the extent of requiring the users of such vehicles to secure a certificate of convenience and necessity from the State. See *Motor Transport and Truck Company* vs. *Public Utilities Commission,* 125 O. S. 374; *Bradley* vs. *Public Utilities Commission of Ohio,* 289 U. S. 92; and cases collated in 85 A. L. R. 1136. For other cases wherein interstate commerce has been affected by the state laws, which nevertheless have been sustained as constitutional, see *Richmond Company* vs. *Patterson Tobacco,* 169 U. S. 311 and *Missouri Co.* vs. *McCann and Smizer,* 174 U. S. 580.

A similiar question to this one was passed upon in the case of *State* vs. *Merchants Exchange,* 269 Mo. page 346. The 5th, 6th and 7th branches of the syllabus of that opinion read as follows:

> "5. The statute (Sec. 63, Laws 1913, p. 354) which makes it 'unlawful for any person, corporation or association other than a duly authorized and bonded State weigher to issue any weight certificate or to issue or sign any paper or ticket purporting to be the weight of any grain' received into or discharged from any public warehouse or elevator, and requiring expert grain inspectors to grade and weighmen to weigh such grain and to issue receipts or certificates certifying to both grade and weight, to be appointed by the State, was designed to provide a disinterested agency for the protection of farmers, warehousemen, millers and bankers, and to so hedge about the grading, weighing and selling of grain as to prevent all kinds of fraud, and tends to promote the public welfare, and is a valid and reasonable police regulation. (Distinguishing *State ex inf.* vs. *Goffee,* 192 Mo. 1. c. 679, 688, in which the statute there under review did not prohibit the giving of a weight certificate by persons other than State officials.)
>
> "6. The said statute cannot be so construed as to permit the weighing and certification of weights by both State weighmasters and the corporation constituting the grain exchange. The law does not prohibit the owner from weighing his grain before it is sent to or put in or after it is withdrawn from a public warehouse in order that he may have evidence to refute the *prima-facie* showing of the State's certificate of weight; but the statute excludes all other except State weighmasters from giving weight certificates, and it cannot be otherwise interpreted without thwarting its purpose.
>
> "7. The statute providing for the inspection and weighing of grain at public warehouses by State inspectors and weighmasters

> and forbidding all other persons and corporations to certify to the grade and weight of such grain, does not interfere in any material sense with interstate commerce. It does not purport to regulate interstate commerce, but is made applicable solely to citizens of and property in the State."

From the above authorities, it would appear that the State of Ohio has not exceeded its authority in requiring that coal or coke which is transported from West Virginia into Ohio shall be weighed upon scales which have been properly tested, as provided in Section 6420, General Code. Such requirement is not an unreasonable burden upon interstate commerce.

In your third question you ask whether or not weight in another State may be accepted in Ohio, where the scales in such other state have been sealed by an Ohio sealer. Our Ohio laws and particularly our police regulations, can have no extra territorial effect. See 8 *O. Jur.* 363. When an Ohio sealer inspects and seals scales in West Virginia, such Act so far as the Ohio laws are concerned is a nullity. Such sealer has no jurisdiction in West Virginia and has no authority to there perform an official act under the laws of Ohio. Without going into the practical difficulties in attempting to inspect scales in West Virginia, it is sufficient to say that such inspection, if made, is worthless. Consequently, in answer to your third question, it is not a compliance with House Bill No. 330, for a person bringing coal into Ohio to have it weighed on a West Virginia scale, even though such scale may have been sealed by an Ohio dealer.

The same is true if the coal were brought from another state, even though such coal were weighed on a scale sealed by a sealer of such other State. From the above, it would likewise follow, in answer to your 10th question, that coal brought from West Virginia should be weighed after it is brought into the State of Ohio.

In reference to your fourth question, I call your attention to the fact that Section 6420, General Code, provides that the weigher should deliver duplicate weight Certificates to the driver of the wagon or vehicle and that such driver should deliver one Certificate to the person in charge of the premises where the coal is delivered. In answer to your question as to whether or not such driver should have a weight slip during the time the coal or coke is in transit, I call your attention to the last part of Section 6420, General Code, which reads as follows: "the other certificate shall be carried by the person in charge of said wagon or vehicle to and from the place of delivery." In other words, the driver must have such certificate, not only while the coal or coke is in transit but even while he is returning from making such delivery.

In your 5th question you inquire whether or not Sections 6420 and 6420-1 prohibit the sale of coal or coke by agreement instead of by weight. Section 6420, General Code, prior to its recent amendment, provided that

sales of coal should be by weight. However, such section contained the following proviso, "but where coal cannot be sold by weight, it may be sold by measurement". Section 6420, General Code, as amended by House Bill No. 330, omits the above quoted language. It states that such sales of coal or coke shall be by weight. Some purpose in leaving out the language relative to the sale of coal by measurement must be attributed to the legislature. A reading of the entire statute, together with the fact that the legislature dropped the language permitting the sale of coal by measurement, compels the conclusion that coal and coke may now only be sold by weight.

Your 6th question is somewhat similar to your first question. You inquire about the duties of the various sealers, State, County and Municipal, with reference to the administration of House Bill No. 330. I concluded in my answer to your first question that the Director of Agriculture is generally charged with the enforcement of these new laws. The pertinent sections with reference to the duties of the various sealers have already been quoted in considering your first question and I will not again quote them. Your question as to the duties of these various sealers is so general that it would be impossible to enumerate in detail all the duties of these various officials. However, it can be stated that these officials are charged with the same duty of enforcing these new laws as they are charged with the enforcement of other laws relative to weights and measures.

Your 7th question pertains to whether or not a dealer of coal and coke may issue his own weight certificates if he does not own a scale. In other words, as I understand your question, you desire information as to whether or not a dealer is excused from the provisions of House Bill No. 330 in so far as it requires coal or coke to be weighed, merely because such dealer does not own a scale. The mere fact that a dealer issues his own weight certificate, is not a compliance with the law. If such dealer certifies that coal weighs so much, he is at best merely making a guess. Section 6420, General Code, specifically provides:

> "All coal or coke sold or delivered within this State shall be weighed on a scale, inspected and sealed by a sealer of weights and measures as provided by law."

The mere fact that a dealer does not own a scale does not excuse him from complying with the provisions of this new law. He must have the coal or coke weighed as required by Section 6420, et seq., General Code.

I come now to your 8th question relative to whether or not the various sealers may make arrests. An examination of Section 6420-1 General Code, indicates that only police officers who have jurisdiction may make such arrests. In other words, House Bill No. 330 does not confer the power of making arrests upon the various sealers. However, there is nothing by way of

example to prevent a deputy county sealer from being appointed a deputy sheriff. Wherever he is required by law to furnish a bond, the premium for the same may be paid by the sub-division with which he is connected. Section 9573-1, General Code, reads as follows:

> "The premium of any duly licensed surety company on the bond of any public officer, deputy or employe shall be allowed and paid by the state, county, township, municipality or other subdivision or board of education of which such person so giving such bond is such officer, deputy or employe."

Your 9th question has already been answered by my discussion relative to your 5th question.

In your 11th question you inquire whether or not small producers who have no scales at their mines, may go elsewhere to weigh their coal. An examination of House Bill No. 330 does not disclose that the legislature intended that one who produces coal must have the same weighed. However, when such producers sell and deliver coal, it must be by weight. Such weight must be recorded from a scale which has been properly tested in accordance with the provisions of Section 6420, General Code. The statute provides that all coal and coke that is sold or delivered in Ohio must be weighed on a proper scale. There is nothing in the statute which indicates where the coal must be weighed. Had the legislature intended that the coal or coke one mines should also be weighed by such person, it would have been an easy matter to have used language appropriate to such an intention. I am of the opinion that it is not necessary for a producer to weigh the coal on his own scales but may weigh it on any scale that has been properly tested and from which he receives the duplicate certificates.

Your 12th question is as follows: "If a person is caught delivering coal under-weight, or if said weight does not correspond with the delivery slip, is the driver to be arrested or the person who weighed the load?" A categorical answer to this question cannot be given in view of the fact that the answer in each particular instance will rest upon the facts of each case. A situation can exist where a driver might have a false weight certificate and anyone of three individuals might be arrested under Section 6420-2, General Code. In the first place, the driver might, on his own initiative, change the weight on the certificates. In the second place, the weigher might intentionally issue false weight certificates and the driver be ignorant of such fact. Again, the coal might be weighed by the owner of the business, who orders the issuance of the fraudulant certificate. The person who will be charged with violating Section 6420-2 might be different in all these cases. In conclusion, it would be impossible to render a categorical answer to your 12th question, in the absence of facts leading up to the alleged violation.

In your 13th question you inquire whether or not it is a violation of the provisions of this new law to have the weight certificates made out in lead pencil. Section 6420, General Code, specifically provides that duplicate weight Certificates shall be "written in ink or indelible pencil or partly printed and partly written with ink or indelible pencil". It is a well known principle of statutory construction that where the legislature expressly states the method of performing an act, it impliedly intends to exclude other methods of performance. *Expressio unius est exclusio alterius.* Here the legislature has stated such certificates must be made out in ink or by indelible pencil and it would logically follow that the legislature did not intend that such Certificates should be made out in lead pencil. An interesting case in this connection is that of *State, ex rel.* vs. *Lloyd,* 93 O. S. 20. It was there held that a provision in the charter of the city of Columbus to the effect that each signer of a nominating petition should sign his name in ink or indelible pencil, was mandatory. The Supreme Court held that a signature in lead pencil could not be counted in determining the sufficiency of a nominating petition.

No doubt the legislature, in inserting the provision that certificates be made out in ink or indelible pencil, realized that this would materially decrease the opportunities of fraudulently changing the weight certificates. Section 6420-2, General Code, provides that anyone who violates any of the provisions of this Act is guilty of a misdemeanor. Consequently, it would be a violation of House Bill No. 330 to have the weight certificates written in lead pencil.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4951.

APPROVAL, BONDS OF MORGAN TOWNSHIP, RURAL SCHOOL DISTRICT, SCIOTO COUNTY, OHIO, $11,000.00 (UNLIMITED).

COLUMBUS, OHIO, December 2, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.