I could not assume to pass judgment on that question without more facts before me than are recited in the ordinances. Assuming, however, that each of these claims does possess the elements of a moral obligation, I am satisfied that it rests within the province of the municipal authorities of the City of Columbus to recognize them as such and appropriate funds to pay them.

I have stated this conclusion without any reference to the charter of the City of Columbus and upon the theory that the legislative authorities of the City of Columbus are not limited by any provisions other than those contained in the constitution and the statutes of the state. It is, of course, possible that a municipality in Ohio might adopt such charter provisions as would prohibit its legislative authority from recognizing and paying moral obligations. Upon examination of the charter of the City of Columbus, I find no such limitation.

Until a showing is made to the contrary, it should be assumed that the facts, as set forth by the city council in the several ordinances authorizing the payment of these claims, are true and that these facts do in fact constitute these claims such that they may be recognized as moral obligations, and you are therefore advised that you are not authorized in making findings for recovery on account of the payment of these claims.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1702.

PUBLIC UTILITY—LEASED TO OPERATING COMPANY—EXEMPT FROM FRANCHISE TAX IF EXCISE TAX PAID UPON GROSS RECEIPTS OR EARNINGS.

SYLLABUS:

An incorporated company, whether foreign or domestic, owning a public utility in this state, which it has leased to an operating company that pays an excise tax upon its gross receipts or gross earnings as provided by law, is exempt from the payment of a franchise tax.

COLUMBUS, OHIO, February 13, 1928.

The Tax Commission of Ohio, Wyandotte Building, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your communication, which reads:

> "The commission has directed me to ask you to advise it as to whether or not The Ohio River Edison Company and The Ohio River Transmission Company are subject to the franchise tax. A claim is being made that no such liability exists. This claim is advanced in a brief filed in this office by Mr. U. C. DeFord and which is herewith transmitted to you for your consideration.
>
> In supplement to the facts as stated by Mr. DeFord, it is our understanding that The Pennsylvania-Ohio Electric Company was in existence as an operating utility prior to the organization of both of the corporations mentioned above; that being desirous of erecting a power plant it caused The Ohio River Edison Company to be organized for the purpose of erecting

the same. Just as soon as the erection was completed the 999 year lease referred to by Mr. DeFord was executed. Similarly The Pennsylvania-Ohio Electric Company caused the organization of The Ohio River Transmission Company and after the construction by that corporation of the transmission lines the same were taken over under lease by the parent company.

Neither The Ohio River Edison Company or The Ohio River Transmission Company has been actually an operating company in the true sense of the term."

This letter was supplemented by the following:

"Under date of September 30th we submitted to you the question of the liability to franchise tax assessment of The Ohio River Edison Company and The Ohio River Transmission Company. At the same time we submitted our letter of transmission to the attorney for these corporations. He writes us calling our attention to two matters which may not be material but in justice to him we are passing the information on to you.

1. The operating company referred to in our communication is 'The Pennsylvania-Ohio Power and Light Company' and not 'The Pennsylvania-Ohio Electric Company.'

2. The charters of both the owning lessor corporations provide for acquiring the property and constructing a power house and transmission line and the operation of the same, but neither of said companies have ever actually operated the properties in question."

The facts as stated by Mr. U. C. DeFord referred to in the Commission's letter are substantially as follows: The Ohio River Edison Company is a Delaware corporation, organized in 192—, for the purpose of acquiring the necessary lands, constructing, erecting, operating, maintaining, repairing and renewing an electric power station for the production of electric energy, for light, heat and power purposes. The said company constructed such power station, and after the same was put in operation executed a lease to the Pennsylvania-Ohio Power & Light Company for a period of nine hundred ninety-nine years. The said The Pennsylvania-Ohio Power and Light Company after the construction of the power plant put the same in operation and has continued to operate the same under the lease. The Ohio River Edison Company does not own or use any other property or capital in Ohio.

The Ohio River Transmission Company is a corporation organized under the laws of Ohio in 1923 for the purpose, among other things, of building, constructing, erecting, operating, maintaining, repairing and renewing a transmission line from the said power house of the Ohio River Edison Company. After the transmission line was erected in July, 1923, the Ohio River Transmission Company joined in the above described lease with the Ohio River Edison Company, leasing its transmission line for a period of nine hundred ninety-nine years, and the power house of the Ohio River Edison Company was connected with the transmission line of the Ohio River Transmission Company and put in operation by the lessee, the Pennsylvania-Ohio Power & Light Company, and operated by it for the purpose of furnishing light, heat and power.

In the lease with both of said companies, as additional rental, the Pennsylvania-Ohio Power & Light Company is obliged, for the term of said lease, to pay, satisfy and discharge all taxes as they accrue, imposts duty, charges, licenses and assess-

ments, general and special, of every nature and description, lawfully imposed or assessed by any taxing authorities previous to taking effect or during the continuance of such lease in any way upon power and/ or transmission of other property, or upon the rentals reserved therein, or the business income, or for the enjoyment or perpetuation of rights, powers, privileges or franchises therein demised, said payments to be made as the same become due to the officers or other persons entitled by law to receive the same.

It appears from the statement of facts, as submitted, that the Pennsylvania-Ohio Power and Light Company was an operating utility prior to the organization of The Ohio River Edison Company, and also prior to the organization of The Ohio River Transmission Company. The Ohio River Edison Company was organized for the purpose of erecting an electric power plant and upon completion of said power plant it immediately effected a lease for the same for the period of nine hundred ninety-nine years to The Pennsylvania-Ohio Power & Light Company. The Ohio River Transmission Company was organized for the purpose of constructing transmission lines extending from said power plant and upon completion of same a lease was executed for said transmission line for the period of nine hundred ninety-nine years to The Pennsylvania-Ohio Power & Light Company. Neither The Ohio River Edison Company nor The Ohio River Transmission Company is in operation at the present time.

The Tax Commission has requested said Ohio river companies to file reports, and the question is presented as to whether they should be subject to a franchise tax as owning the properties that are operated by The Pennsylvania-Ohio Power & Light Company, a public utility, on which The Pennsylvania-Ohio Power and Light Company pays an excise tax. The Pennsylvania-Ohio Power & Light Company pays out of its gross reecipts all taxes, and the contention is made that if the owning companies are required to pay a franchise tax the utility would really be paying both an excise and a franchise tax.

Section 5503, General Code, was amended by Am. Sub. Senate Bill No. 22. Section 1 of said act provides what fees shall be charged against domestic corporations and foreign corporations; Section 3 provides for the filing of an annual report in writing with the Tax Commission; Section 7 provides for the charging fee for collection, and that payment should be made to the treasurer, and the penalty for failure to pay the fee. Section 10, which has been designated as Section 5503, provides what companies are not subject to the provisions of the act.

Section 5503, General Code, provides 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."

This section formerly read:

> "An incorporated company, whether foreign or domestic, owning or operating a public utility in this state," etc.

Section 5503, General Code, exempts, by its terms, incorporated companies owning and operating public utilities when they are required, as public utilities, to

file reports and to pay an excise tax upon their gross earnings. It will be observed that this exemption extends to all those incorporated companies which are required, as public utilities, to so report and pay, and it becomes necessary therefore to examine the definition of the term "public utility." The definition makes it include and embrace each corporation and its lessees. Referring again to the exemption, Section 5503, General Code, it will be observed that it exempts each incorporated company owning and operating a public utility, when, *as such,* it is required to file reports and pay the excise tax. If Public Utility embraces both the owner and the lessee, as it does by force of the definition, then where either the owner or lessee is required to and does report and pay the excise tax, it seems clear that as a public utility it has reported and paid the excise tax.

It is a well known rule of statutory construction that effect shall be given, if possible, to each and every part of the act, and the Legislature must be supposed to have had some purpose in view in using the words "as such" in this exempting section. The term "public utility" embraces both the owner and lessee and it is immaterial to the state which reports and pays, so that the excise tax provided for is paid by the public utility. The words "as such" must be given some force and effect, and it appears clear that it was the legislative intention that, whenever the owner or operator of a public utility is required to report and pay the excise tax for the public utility, both are exempt from the requirement to report and pay the franchise tax.

It may be contended that because the said Ohio river companies are not engaged in the operation of a public utility that they are not public utilities. I am unable to agree with this statement. In my opinion the Legislature did not mean to make the operation a controlling feature of this definition. In defining each and every public utility named in Section 5416, General Code, the definition begins with the same language, to-wit: "when engaged in the business of" and this phrase in every case is followed by the words: "conveying to, transmitting to, operating, furnishing, supplying, transporting," etc. So that if the said non-operating companies are not public utilities, then in every case where a public utility has become insolvent and passed into the hands of a receiver and is being operated by the court, the state will be authorized to levy its franchise tax upon the insolvent corporation while solvent corporations are exempt. This construction would lead to an absurdity. It certainly was not the legislative intention to thus add to the burdens of corporations which are already insolvent and, indeed, without assets from which to make payment of such a tax. The manifest intention of Section 5416, General Code, which defines the several utilities named in Section 5415 is to make clear what is intended to be included within the general terms used in designating the public utility named in Section 5415.

As stated before, any other construction would lead to absurd results. I conclude, therefore, that a fair and reasonable construction of the language of Section 5503, taken in connection with Section 5415 of the General Code, leads to the conclusion that it was the legislative intent to exempt public utilities which have leased their plants and transmission lines to an operating company which is required to and does report and pay the excise tax provided by law. It would be manifestly unjust to impose this third tax upon public utilities which have already paid a property tax and an excise tax, and that this was recognized as an injustice by the legislature is apparent from the fact of the exemption itself.

It may be said, however, in reply to this, that unless this franchise tax is imposed upon the owning and non-operating corporations it will escape taxation altogether. This argument is unsound. The only source from which a public utility, such as an electric power and light company, can derive funds for the

payment of taxes is its earnings, and whether these earnings are divided between two companies or go entirely to one, the earnings are the only source from which the taxes can be paid, whether paid by one company or be divided between two companies and paid by the two. The burden falls upon the earnings of the public utility in both cases and when a lease of a public utility is made by an owning company the tax, in every case, will necessarily be taken into consideration in the making of the contract itself; so that it can not be said in any true sense that the owning company escapes taxation entirely, nor is there any apparent reason why the Legislature should make discrimination in taxation against those public utilities which are being operated by a lessee, since it is not the policy of this state, as evidenced by its legislation to discourage the leasing of public utilities.

In the case of State vs. Cleveland and Pittsburg Railway Company, 20 Circuit Court (N. S.) 61, it was decided that such owning railway companies were exempt from the franchise tax by the terms of the Willis Act. It is an established principle governing the construction of statutes that where they have undergone revision that the same construction will be given to the statute after revision as before, unless the language of the amended act plainly requires a different construction.

Under the provisions of the statutes of Ohio, beginning with the Willis Act passed in 1902, it clearly has been the legislative intent, as construed by the courts, that no domestic or foreign corporation should be required to pay both an excise tax and a franchise tax on the same fund or property.

In cases of doubt where the state imposes a tax burden, the rule of strict construction is applied, and when any ambiguity exists as to the legislative intention it should be resolved in the favor of the party upon whom such burden is imposed: *Caldwell* vs. *State,* 115 O. S. 458; *Cassidy* vs. *Ellerhorst,* 110 O. S. 539.

In the case of State of Ohio vs. Little Miami Railway, 7 Ohio Appellate, 309-310, it was held that:

> "a railway company which has leased its line to an operating company is exempt from payment of the state franchise tax, where the operating company is required to and does report and pay the excise tax."

The provisions of Section 5503, General Code, were originally enacted in Section 2730-25, Bates Revised Statutes (95th Vol. Ohio Laws, page 127) Section 7 of the Act reads as follows:

> "Provided that electric light, gas, natural gas, water works, pipe line, street railroad, electric interurban railroad, steam railroad, messenger, union depot, express, freight line, sleeping car, telegraph, telephone and other corporations, required by law to file annual reports with the auditor of state, and insurance, fraternal beneficial, building and loan, bond investments, and other corporations required by law to file annual reports with the Superintendent of Insurance, shall not be subject to the provisions of the preceding sections of this act. * * * "

It will be noted that this section specifically names corporations excepted from the provisions of the act. Later, by amendment, it was carried into Section 5503, 102 Ohio Laws, Section 129, at page 254. Said Section 129 (Section 5518, General Code, now repealed) reads as follows:

> "An incorporated company, whether foreign or domestic, owning or operating a public utility in this state and as such required by law to

file reports with the Tax Commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, 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 Sections 106 to 115 inclusive of this act."

In this amended section the specific names of the utility companies were dropped. The law was further amended in 1925, 111 Ohio Laws, page 474, Section 10 (Section 5503, General Code) so as to read 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 as provided in this act, * * * shall not be subject to the provisions of sections one to five inclusive of this act."

It will be noted that this section was amended so that the word "or" between owning and operating was changed to "and." Section 5503, General Code, was again amended, 112 Ohio Laws, page 414, Section 10, so as to read:

"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 investments 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."

The section was amended so that the phrase *"as provided in this act"* was omitted after the words "gross earnings," and also the phrase *"section one to five inclusive of this act"* was amended to read *"of this act."* It appears that there is no material change in the substance of said section as found in 111 Ohio Laws, 474, and 112 Ohio Laws, 414. The question, therefore, to be determined is what has been the effect, if any, of the amendment of said section changing the phrase "owning or operating a public utility" to the phrase "owning and operating a public utility."

The section defining "public utilities," 5415, General Code, contains the phrase "and such term 'public utility' shall include any plant or property owned or operated or both by any such companies."

Section 5419, General Code, contains the phrase "owned or operated." Section 5420 carries the same phrase, "owning or operating."

The word "and" is defined in Webster's New International Dictionary as:

"1. A particle expressing the general relation of connection or addition, and used to conjoin word with word, clause with clause or sentence with sentence, sometimes with an implication of: (a) repetition; as, they rode two *and* two, hundreds *and* hundreds. (b) Variation or difference; as, "there are women *and* women," that is, women of different sorts. (c) The modification of one of the connected ideas by the other; as, "the tediousness *and* process of my travel," that is, "the tedious process," etc.; "thy fair *and* outward character," that is, "outwardly fair character." (d) A consequence or sequel; as, I said go, *and* he went. *And* is very fre-

quently used where accurate and proper expression requires the word *or;* but, in the legal construction of language, either word will be treated as if it were the other whenever this construction is plainly required to give effect to the intention of the person using it; thus, in a bequest to 'a person *and* her bodily issue,' *and* may he read as *or;* in a law providing that certain cities may tax property 'taxable for state *and* county purposes,' *and* may be construed as *or.*"

In Webster's New International Dictionary "or" is defined as:

"A coordinating particle that marks an alternative; as, you may read *or* may write,—that is, you may do one of the things at your pleasure but not both. It often connects a series of words or propositions, presenting a choice of either; as, he may study law *or* medicine *or* he may go into trade. * * * It may join as alternatives terms expressing unlike things or ideas, * * * or different terms expressing the same thing or idea; as, this is a sphere, *or* globe."

Lewis' Sutherland Statutory Construction at Section 397, under the heading, "Use of the words 'or' and 'and'" states that:

"The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context."

In Black on Interpretation of Laws, it is stated at page 153 that:

"The word 'and,' in a statute, may be read 'or,' and vice versa, whenever the change is necessary to give the statute sense and effect, or to harmonize its different parts, or to carry out the evident intention of the Legislature."

This is followed by the statement that:

"This rule is based upon the assumption that the Legislature could not have intended to produce an absurd or unreasonable result, or to express itself in terms which would defeat the very objects of the enactment; and consequently, when such effects would follow a literal construction of the statute, the conjunctive particle may be read as disjunctive, or vice versa, on the theory that the word to be corrected was inserted by inadvertence or clerical error. For instance, where a statute defined the common law offense of burglary, and made it a felony to 'break or enter' a dwelling-house in the night-time, it was held that it should be read 'break and enter.' Where a statute provided that a person libelled, in certain cases, might proceed against the author of the libel by indictment 'or' bring an action at law for his damages, it was held that it could not possibly have been the intention of the Legislature to give the plaintiff merely his choice between these two remedies, and consequently the word 'or' must be read 'and.' So a statute providing that any person violating 'the first and second sections of this act' shall be liable to a

penalty, renders a person liable for a violation of either section. Even in a penal statute, and when it will operate against the accused, it has sometimes been held that conjunctions which connect different sentences describing different branches of the same offense will be construed as conjunctive or disjuntive, as the objects and sense of the law most distinctly require. Thus, where a statute imposed a punishment upon any person who should place obstructions in a water-course, whereby the flow of water should be lessened 'or' navigation should be impeded, it was held that the word 'or' should be read 'and.'"

Section 27, General Code, provides that:

"In the interpretation of parts first and second, unless the context shows that another sense was intended, the word * * * 'and' may be read 'or,' and 'or' read 'and,' if the sense requires it; * * *"

Section 5503, General Code, is found in Part 2, Title I of the General Code.

It evidently was the intention of the Legislature that "and" should be read "or" in Section 5503, General Code. The change is necessary in order to give the statute sense and effect, harmonize its different parts, and carry out the intention of the Legislature.

The evident purpose of Section 5503, General Code, was to exempt public utilities which paid the excise tax, from the payment of the franchise tax. In order to so exempt said public utilities as such, and to harmonize the provisions of Section 5503, General Code, with sections 5415, 5419 and 5420, and to give said Section 5503, General Code, sense and effect, it is necessary to read "and" as "or" in the phrase, "owning and operating a public utility." To interpret "and" in said phrase "owning and operating" as "or" is consistent with the payment of an excise tax by the operating company, and also is in accord with the decision in the case of *State of Ohio* vs. *Little Miami Railroad Company,* supra.

This office has heretofore contended in court that under the previous forms of Section 5503, General Code, the exemption from the franchise tax was only extended to a corporation which itself paid the excise tax. However, the courts in the cases herein cited have uniformly held that the prior wording of said section did not warrant the assessment of the franchise tax, where the property was under lease, and the excise tax was paid by the lessee. The changing of "or" to "and" again gives ground for testing the question, but I am of the opinion that under the former decisions the courts would hold that it evidently was the intention of the Legislature to exempt the lessor where the lessee paid the excise tax. If "and" should be read literally the lessee corporation would not be exempt from payment of the franchise tax. (Much of the foregoing language has been adopted from the opinion of Judge Bigger in the case of State vs. Little Miami Railway Co., Franklin County Court of Common Pleas.)

Specifically answering your question, it is my opinion that the owning companies, The Ohio River Edison Company and The Ohio River Transmission Company, are not subject to the payment of the franchise tax, but are exempt from said payments, as the excise taxes for said public utilities are paid by the operating company, "The Pennsylvania-Ohio Power and Light Company, lessee."

Respectfully,
EDWARD C. TURNER,
Attorney General.