

2. In determining what constitutes a muskrat farm or enclosure, the following facts, among others, should be considered: (1) whether or not the land, on which the 'farm' or enclosure is situated be owned or leased or otherwise under the control of the proprietor of such 'farm'; (2) whether or not a *bona fide* intent exists to utilize such land for the purpose of raising and propagating muskrats; (3) whether or not a suitable fence surrounds the farm, although a fence is not absolutely essential; (4) whether or not adequate provision, either natural or artificial, be made for feeding; (5) whether or not the land on which the farm is situated, either in its natural state or with such improvements as may be placed thereon by the owner of the farm, is adapted to use as a muskrat farm; (6) whether or not the owner thereof restocked his 'farm', if necessary, with new animals; (7) whether or not the owner thereof held himself out to the public as a breeder and raiser of muskrats, and (8) whether or not the owner thereof regularly marketed his product."

The above opinion, a copy of which I am herein enclosing, is determinative of the question which you present.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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2039.

BRIDGE—FOREIGN CORPORATION OPERATING SAME AND ENGAGED  
SOLELY IN INTERSTATE BUSINESS—TAX OBLIGATIONS.

SYLLABUS:

*A foreign corporation, engaged solely in interstate commerce in the operation of a bridge over the Ohio River, is not subject to, or required to comply with, the provisions of Sections 178 to 182, inclusive, or Sections 183 to 188, inclusive, of the General Code. Such a corporation is not, however, thereby relieved of the obligation to pay franchise taxes in accordance with law.*

COLUMBUS, OHIO, April 30, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent letter in which you ask my consideration of certain questions raised by a letter from attorneys representing two bridge companies which are both foreign corporations engaged in interstate commerce in the operation of bridges over the Ohio River. The letter you enclose is as follows:

"Our attention is called to Section 188 of the Ohio General Code, which exempts from the provisions of Sections 183 to 187, inclusive, foreign corporations engaged in interstate commerce. We have previously domesticated the two above named companies in Ohio, and paid license taxes and entrance fees thereon. Our first impression is that this was done needlessly and erroneously as both companies are engaged exclusively in interstate commerce.

We assume that the Attorney General of Ohio has made rulings upon this question and that you are familiar with same. We, therefore, request that you inform us of your attitude toward the future withdrawal of these corporations from Ohio.

Section 5495, providing for the annual license tax, does not make an exemption to foreign corporations engaged in interstate commerce correlative to that made by Section 188. Is it your opinion that if the original entrance fee was not required, subsequent yearly franchise taxes would yet have to be paid?

Our purpose in writing this letter is to be informed of the attitude of the Secretary of State and of the Attorney General in regard to this question."

I assume from the statement that the two companies were "domesticated" that the attorneys mean compliance was had with the provisions of Section 178, et seq., of the General Code and also with the provisions of Section 183, et seq., of the Code. The attorneys suggest that the qualification under these sections was unnecessary in view of the character of the business of the companies involved.

Section 178 of the Code is as follows:

"Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations."

The only specific exception to this section is contained in the last sentence of the section and this is obviously not applicable to a bridge company. It is to be observed, however, that the requirement of the certificate is made a condition precedent to any foreign corporation transacting business in this state. In other words, there must be business done in this state by a foreign corporation before the foreign corporation can become subject to the penalties prescribed for non-compliance. It has been uniformly held that this section has no application to a foreign corporation whose business is purely interstate. As said in the first headnote in the case of *McClarren vs. Longdin Co.*, 24 Ohio App. 316:

"Sections 178 and 179, General Code, have no application to a foreign corporation whose business within the state consists merely in selling through traveling agents and delivering goods manufactured outside of the state."

Apparently, therefore, no advantage would accrue to a foreign corporation engaged exclusively in interstate commerce in qualifying under Section 178 of the Code, as such corporations have the right to transact business in this state of an interstate character without complying with this section, and, as an incident to that business may bring actions in our courts.

Section 183 of the General Code is as follows:

"Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the Secretary of State, in such form as he may pre-

scribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts:

1. The number of shares of authorized capital stock of the corporation and the par value, if any, of each share.
2. The name and location of the office or offices of the corporation in Ohio and the names and addresses of the officers or agents of the corporation in charge of its business in Ohio.
3. The value of the property owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.
4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio."

Section 184 of the Code requires the payment of a fee based upon the proportion of the authorized capital stock represented by property owned and business transacted in this state.

The difference between Sections 178 and 183 lies in the fact that Section 183 becomes applicable only in the event that a corporation owns or uses a part or all of its capital or plant in this state. Section 178 of the Code is applicable to any foreign corporation transacting business irrespective of the employment of capital or plant in this state.

Since the provisions of Section 183 of the General Code are also only operative where a foreign corporation actually intends doing business in this state and that phrase, by judicial interpretation, does not include the transaction of purely interstate business, it is obvious that compliance with Section 183 et seq. of the Code would also be unnecessary as to the bridge companies in question. Even if this were not so, a corporation of this character would apparently be exempted from the terms of Section 183 by the provisions of Section 188 of the Code, which is as follows:

"The preceding five sections shall not apply to foreign insurance, banking, savings and loan, building and loan, or bond investment corporations, or to express, telegraph, telephone, railroad, sleeping car, transportation, or other corporations engaged in Ohio in interstate commerce; or to foreign corporations entirely non-resident soliciting business or making sales in this state by correspondence or by traveling salesmen."

Since the bridge companies in question are engaged in interstate commerce, these particular sections would not be applicable.

In these instances, however, the corporation has voluntarily qualified under both sections, as I understand it. This compliance has not, in my opinion, given them any right or privilege which they did not already have. Section 186 of the General Code provides that any corporation complying with Sections 183, 184, and 185, shall not be subject to process of attachment on the ground that it is a foreign corporation. With reference to this privilege, however, it is to be observed that the Supreme Court of Ohio has ruled that a voluntary compliance will not exempt a corporation which is not entitled to comply with the provisions of Sections 183, et seq.

In the case of *Bigalow Fruit Company vs. Armour Car Lines*, 74 O. S. 168, the court had under consideration the sections of the Revised Statutes which were carried into the General Code as Sections 183, et seq. The second branch of the syllabus in that case is as follows:

"Such corporation is not subject to the provisions of Section 148c, Revised Statutes, nor entitled to comply with its requirements; and a voluntary

compliance with that section by such corporation, will not bring the corporation within the proviso of Section 148d, Revised Statutes, so as to exempt it from process of attachment upon the ground that it is a foreign corporation or non-resident of this state."

I accordingly feel that these corporations would not in any way prejudice any of their rights and privileges by withdrawing their qualifications under the requirements of Sections 178 et seq., of the Code and Sections 183 et seq., of the Code, so long as their business remains and continues of a purely interstate character.

The attorneys also point out that Section 5495 of the General Code, providing for the annual license tax, makes no exemption to foreign corporations engaged in interstate commerce correlative to that made by Section 188 of the Code. They then inquire whether, if the original entrance fee was not required, subsequent yearly franchise taxes would yet have to be paid. The question here presented has already received consideration by me and my views thereon are expressed in Opinion No. 1811, dated March 5, 1928, the syllabus of which is as follows:

"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."

The conclusion therein reached would not be altered in any respect by reason of the fact that the corporation in question is not required to qualify in this state either under Sections 178 et seq., of the Code, or Sections 183, et seq., of the Code. The qualification or entrance fee is an entirely different matter from the tax laws.

I am, therefore, of the opinion that the fact that a bridge company engaged solely in interstate commerce is not required to qualify and pay fees under the provisions of Sections 178, et seq., and 183, et seq., of the General Code, does not exempt such corporations from the obligation to pay annual franchise fees in accordance with the provisions of Section 5495 of the General Code.

I am enclosing herewith a copy of Opinion No. 1811, heretofore referred to, for your consideration.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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2040.

APPROVAL, BONDS OF THE VILLAGE OF BROOKSIDE, BELMONT COUNTY,  
OHIO—\$7,005.10.

COLUMBUS, OHIO, April 30, 1928.

*Industrial Commission of Ohio, Columbus, Ohio.*