it should be made. If necessary, this may be done at a special meeting after taking the necessary steps to call a special meeting.

Answering your specific questions in the order asked, I am of the opinion in answer to the first:

The filing of the second petition, under the circumstances, had no effect other than to invest the county board of education with jurisdiction to make a transfer as requested by the petition and to charge it with the mandatory duty to do so in the event the mandatory duty with which the board was charged at that time by virtue of the filing of the first petition, should later be abrogated by the withdrawal of signatures therefrom before action was taken thereon, or the mandatory duty of the board with reference thereto rendered nugatory by compliance therewith and refusal on the part of the Fremont City School District to accept the transfer.

Second: A county board of education in no event is authorized to transfer school territory to a city, exempted village or other county school district, other than the exact territory described in the petition filed therefor.

Third: The first petition takes precedence, under the circumstances outlined in your inquiry, for the reason that it imposes a mandatory obligation on the county board of education to act in compliance with its terms.

Fourth: The county board of education, under the circumstances, has no discretion in the matter, and may not act in compliance with the second petition, unless the mandatory duty imposed by the first petition is abrogated or rendered nugatory, as hereinbefore stated.

Fifth: Neither attempted transfer made on August 18th is effective nor will the acceptance by the Fremont City School District or the Seneca County School District of the transfers as made, make them so.

Sixth: In view of the answers to the former questions, your sixth question need not be answered.

Seventh: No matter what action, if any, may be taken by Fremont City School District or Seneca County School District, with reference to the attempted transfers of August 18th, a mandatory duty still rests on the county board of education to transfer Ballville School District in its entirety, to Fremont City School District, as requested by the petition filed therefor.

Eighth: Both these resolutions were invalid and ineffective.

Ninth: The invalid resolutions for the transfer of territory adopted at the meeting of August 18th, cannot be validated by changing the wording of the resolutions under the guise of correcting the minutes of the meeting of August 18th at the meeting of September 15th and approving the minutes of the previous meeting as corrected.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2618.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF EDWARD CUNNINGHAM IN NILE TOWNSHIP, SCIOTO COUNTY, OHIO.

COLUMBUS, OHIO, September 24, 1928.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, reading as follows:

"Referring to your opinion 1743, covering examination of the abstract of title with respect to certain lands located in Nile Township, Scioto County, Ohio, which the Experiment Station desires to purchase from Edward Cunningham, you have called attention to a certain apparent defect in the deed executed by G. W. Singer and wife, of Grant County, Indiana.

I have been informed that at the time the deed was executed, Mr. Singer was a very aged man, and it is doubtful if he is still living or in condition to execute such a quit claim deed as has been suggested.

I am informed further that Mr. Cunningham's attorneys, including Judge B. of Portsmouth, are of the opinion that the deed in the form in which Mr. Singer executed it is sufficient to protect the State of Ohio.

It would seem that the occasions for any questions to be raised by any heirs of Mr. Singer are so remote that the State would be taking little chance in approving this title.

The location of this particular tract in the Scioto Forest is such that it would be of no advantage to any outsider to try to claim ownership."

Opinion No. 1743 of this department, referred to in your communication, was one with respect to an abstract of title of a certain tract of 123 acres of land in Nile Township, Scioto County, Ohio, standing in the name of Edward Cunningham, and which is more particularly described in the former opinion of this department above referred to. In said opinion I held that Edward Cunningham did not have a merchantable fee simple title to said lands and premises for reasons therein stated, as follows:

"It seems that a number of deeds appearing in the chain of title to these premises were not witnessed as required by the law of this state. Some of these deeds, however, were executed in the State of Kansas, and others in the State of Missouri. In neither of these states are witnesses required in the execution of deeds, and inasmuch as said deeds were otherwise in proper form and were in all respects good and sufficient deeds under the laws of the state where executed, said deeds under the provisions of Section 4111, Revised Statutes (now Section 8516, G. C.) were sufficient to convey title to the premises under the laws of this state. However, a more serious objection arises with respect to one of the later deeds in the chain of title of the lands here under investigation. On, and for some time prior to January 9, 1923, these lands were owned by one George W. Singer of Grant County, Indiana. On said date said George W. Singer and his wife executed a deed for said lands to Edward Cunningham, the present record owner of the same. This deed followed a form prescribed and used for the conveyance of lands in the State of Indiana. Apparently, said deed was one which in substance and form was sufficient to convey a fee simple title to lands in said State of Indiana. Said deed, however, did not contain any words of inheritance such as at that time were necessary under the laws of Ohio. Without such words of inheritance said deed above referred to was under the laws of Ohio effective only to convey a life estate in said lands to Edward Cunningham. In this connection it is not clear that Section 8516, General Code, above referred to, has reference to any matter in connection with deeds executed in other states on Ohio lands other than those pertaining to the formal execution of such deeds. In this view the defect in the deed from Singer to Cunningham above referred to is not cured by the provisions of Section 8516, General Code. It is not clear to me, therefore, that said Edward Cunningham has anything more than a life estate in the lands here under investigation which are described in the caption of said abstract."

The deed whereby said George W. Singer and wife conveyed said lands to Edward Cunningham was one in the form prescribed by Section 13387 of Burns Annotated Indiana Statutes, which provides that the operative words "conveys and warrants" shall be effective to convey a fee simple title to the grantee, his heirs and assigns. Obviously the provisions of the Indiana statute above mentioned can have no operation with respect to a deed conveying lands in the State of Ohio. The deed here in question was not effective to convey to said Edward Cunningham anything more than a life estate unless a different effect is required to be given to the provisions of said deed by Section 8516 of the General Code, above referred to, which reads as follows:

> "All deeds, mortgages, powers of attorney, and other instruments of writing for the conveyance or incumbrance of lands, tenements, or hereditaments situate within this state, executed and acknowledged, or proved, in any other state, territory or country, in conformity with the laws of such state, territory, or country, or in conformity with the laws of this state, shall be as valid as if executed within this state, in conformity with the foregoing provisions of this chapter."

This section of the General Code was before the Supreme Court of this state for consideration as Section 4111, Revised Statutes, in the case of *Brown* vs. *National Bank*, 44 O. S. 269, in which case the question before the court was whether a mortgage deed conveying certain lands in Ohio for the purpose of securing the payment of certain notes executed by the mortgagor was effective to convey to the mortgagee the whole fee simple interest of the mortgagor, or whether said mortgage deed was effective to convey only the mortgagor's interest in such lands during the life of the mortgagee. The mortgage deed in question in the above cited case was one which followed a form prescribed by a statute of the State of Indiana, where the mortgage was executed, and which, though effective under the Indiana statute to convey to the mortgagee the whole fee simple interest of the mortgagor in such lands, did not contain any words of inheritance or perpetuity such as was necessary to convey a fee simple title under the laws of the State of Ohio. Though, as before noted, the Supreme Court in said case had before it the provisions of Section 4111, Revised Statutes, now Section 8516, General Code, the court did not make any decision on the effect of the provisions of this section with respect to the question then before the court. In said case, as indicated by the syllabus in the report of the decision and opinion of the court therein, it was held:

> "1. By a well established general rule the use of the word 'heirs', or other appropriate words of perpetuity in a mortgage or other deed of conveyance of lands, is essential to pass a fee-simple estate; but this is not an inflexible rule admitting of no exception or qualification.
>
> Where the language employed in, and the recitals and conditions of, a mortgage plainly evidence an intention to pass the entire estate of the mortgagor as security for the mortgage debt, and the express provisions of the instrument can not otherwise be carried into effect, it will be construed to pass such estate, although the word 'heirs' or other formal word of perpetuity is not employed.
>
> A mortgage was executed in Indiana upon lands in Ohio. By the terms of the mortgage the mortgagor's 'mortgage and warrant' the lands to the mortgagee (without the usual words of succession or perpetuity) to secure the payment of negotiable notes, and provide that upon default of payment they are to be 'collected by foreclosure of the mortgage or otherwise.' By virtue of an Indiana statute, the words 'mortgage and warrant' are operative to pass a fee-simple estate in the lands mortgaged. HELD, the mortgage security

does not terminate with the death of the mortgagee; but upon a foreclosure proceeding, after the death of the latter, a sale of the mortgaged premises in fee-simple is authorized."

The court in its opinion in this case, among other things, said:

"It may be conceded that, as a general rule, the use of the word 'heirs' is essential to the conveyance of a fee-simple estate in lands. This, however, is not to be accepted as an iron rule, admitting of no exceptions or qualification. *Gould* vs. *Lamb*, 11 Met. 86.

'Every deed is to be construed as, if possible, to give effect to the intention of the parties. It is to be construed most strongly against the grantor. If the intention of the parties, apparent upon the face of the instrument, can not be carried into effect, this object should be attained as far as is possible.' *White* vs. *Sayre*, 2 Ohio, 113.

In *Bobo* vs. *Wolf*, 18 Ohio St. 465, Day, C. J., said that, in determining the true construction of a deed, 'we must seek for the real meaning intended to be expressed by the language used in the deed. For this purpose we may read it in the light of the circumstances that surrounded the parties at the time it was executed.'

Looking to the circumstances of the parties at the time of the execution of this mortgage we find them attempting to provide a security for the payment of several thousand dollars, evidenced by negotiable promissory notes.

This is sought to be done by pledging certain real estate by the use of a mortgage deed. We find the mortgagors in the state of Indiana. The form of the instrument used to express their intention is such as the law of that state expressly authorized and prescribed for the conveyance of lands in fee-simple as mortgage security for a debt. We are not unmindful of the principle that deeds intended to convey or incumber an interest in lands situated in one state, executed in another, must derive their vitality from the laws of the former.

It was to give effect to such instruments that it has long been provided in Ohio that; 'All deeds, mortgages, * * * for the conveyance or incumbrance of lands * * * situate within this state, executed and acknowledged, or proved in any other state, * * * in conformity with the laws of this state, * * * shall be as valid as if executed within this state.' (Section 4111, Revised Statutes.)

It is not our present purpose to construe this provision, or to say that it gives to the instrument before us the same effect it would have had as a mortgage of Indiana lands. We leave that question unconsidered. We are dealing with this feature of the case as one of the circumstances in the light of which the parties were dealing at the time of the execution of this instrument."

The court in this case, although it might have done so, did not construe the then provisions of Section 4111, Revised Statutes, or state its effect other than to say that the provisions of this section should be considered as one of the circumstances in the light of which parties were dealing at the time of the execution of the mortgage there in question; and the court proceeded to decide the case on the intention of the parties as disclosed by all of the language of the mortgage taken in connection with the situation of the parties at the time the instrument was executed. In this connection the court in its opinion further says:

> "While we may not be able to harmonize all the adjudications upon this question, the better doctrine seems to be that where the language employed in, and the recitals and conditions of, a mortgage plainly evidence an intention to pass the entire estate of the mortgagor as security for the mortgage debt, and the express provisions of the instrument can not otherwise be carried into effect, it will be construed to pass such estate, although the word 'heirs' or other formal word of perpetuity is not employed."

As a limitation on the application of the decision and opinion of the court in the case of *Brown* vs. *National Bank*, supra, to the question here presented, it is to be observed, although the principle was not there adverted to, that in order to mortgage land for the purpose of securing the payment of a debt, it is not necessary in all cases to transfer the legal title in the land to the creditor; but it is sufficient if the intent to pledge the land as a security for the payment of such indebtedness clearly appears from the instrument, and the same is duly executed and recorded as required by statute. *Bank* vs. *Johnson*, 47 O. S. 306.

I do not have before me the deed which George W. Singer and wife executed to Edward Cunningham. The abstract of said deed contained in the abstract of title submitted to me recites that said deed is made on an Indiana printed form and that the same was executed in Grant County, Indiana. The abstract shows that the operative words in the granting clause of said deed were "convey and warrant to Edward Cunningham." It is further recited in said abstract that there was no habendum clause in said deed. The deed appears to have been properly executed so far as signature, witnesses and the acknowledgment thereof are concerned, both under the Indiana law and the laws of Ohio.

Looking to Section 8516, General Code, above quoted, it will be noted that the same provides that all deeds for the conveyance of lands, tenements or hereditaments situate within this state, executed and acknowledged or proved in any other state in conformity with the laws of such state, shall be as valid as if executed within this state "in conformity with the foregoing provisions of this chapter." The chapter of the General Code, of which said Section 8516 is a part, contains a number of sections of the General Code regulating the mode of signing, sealing, acknowledging and recording deeds and other instruments; and until the recent enactment of Section 8510-1, General Code, providing that the use of terms of inheritance are not necessary to create a fee simple estate, there was nothing in said chapter of the General Code making provision as to the operative terms or substance of deeds and other instruments of conveyance or encumbrance. Touching this point, it may be said following and applying the language of the court in the case of *Bank* vs. *Johnson*, supra, that the statutes of the state regulating the mode of signing, sealing, acknowledging and recording deeds and other instruments for the conveyance or encumbrance of property are limited in their application to the particulars therein provided for; that the legal or equitable effect of the instrument and its contents are unaffected by the statutes relating to the mode of signing, sealing and recording such instruments; and that otherwise the rights of the parties or of third persons subsequently dealing with the land are to be determined by the general rules of law and equity applicable to the instrument in question. It would seem, therefore, that Section 8516, General Code, expends its force in providing that a deed or other instrument for the conveyance or encumbrance of property in this state, executed with respect to the matters of signatures, witnesses and acknowledgments in another state according to the laws of such state, shall be as valid and effective as if such instrument were properly executed as to such matters in this state. I am not prepared to hold that the provisions of Section 8516, General Code, go any further than this; and, holding this view, I am not disposed to hold that as a matter of law Edward Cunningham obtained anything more than a life estate by the deed received by him from George W. Singer and wife.

It is altogether probable that said George W. Singer and his wife fully intended to convey to Edward Cunnigham all of their right, title and interest in said land, and it is likewise quite probable that you are entirely correct in your assumption that the possibility of any question with respect to the effect of this deed being raised by any of the heirs of George W. Singer is so remote that the state would be taking little chance in accepting and paying for the property here in question. However, I feel that this is a matter which your department should determine and that this department should not take upon itself any responsibility other than to advise you as to my opinion with respect to the legal question here presented.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2619.

CORPORATION—STOCK OF FOREIGN CORPORATION—NOT SUBJECT TO FRANCHISE TAX—TAXATION OF CORPORATION AS PERSONAL PROPERTY DISCUSSED.

SYLLABUS:

A foreign corporation, which is not subject to the franchise tax, cannot secure the exemption of its shares from taxation in Ohio as personal property in accordance with the provisions of Section 5499, *General Code.*

COLUMBUS, OHIO, September 24, 1928.

The Tax Commission of Ohio, Columbus, Ohio.

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

"Under date of March 29, 1928, the Commission received a report from The Indiana Refrigerating Company made upon the form provided for the annual report for the year 1928 of a foreign corporation. Similar reports were received from the East Chicago Dock Terminal Company and The North Pier Terminal Company. Each company in its report stated under item 19 thereof, that it elected as provided by law to exempt its shares of stock from taxation in Ohio as personal property. The statement was made upon each report that the entire capital stock of each company was owned by the Interstate Terminal Warehouses, Incorporated, an Ohio corporation of Cleveland, Ohio.

These companies have not complied with the provisions of Section 178 and 183 of the General Code. The reports which were filed by them in which the election was made to exempt the shares of stock from taxation as personal property indicate that all of the property is located outside the State of Ohio; that there was no business transacted in Ohio.

Kindly advise the Commission whether these companies can elect to exempt their shares of stock from taxation in Ohio as personal property by paying the franchise fee upon the entire value of their shares of issued and outstanding stock without apportionment when they have not filed certificates of compliance under the provisions of Sections 178 and 183 and when the reports submitted by them show no property owned in Ohio or no business transacted in Ohio. Under the provisions of Sections 5495, et seq., General Code, there would be no liability for franchise tax.