believe that the procedure is legally objectionable. I have accordingly endorsed my approval as to form on the certificate; and you will note that the instrument also bears the approval of Leon C. Herrick as Director of Highways and Public Works.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3127.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN HARDIN, HAMILTON, MORGAN, COLUMBIANA AND BELMONT COUNTIES.

COLUMBUS, OHIO, May 23, 1922.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

3128.

BANKS AND BANKING—SHARES OF STOCK IN CORPORATION ORGANIZED FOR PURPOSES OF DEALING IN BONDS, STOCKS, ETC., WHERE CORPORATION IS ACTUALLY ENGAGED IN CONDUCT OF SUCH BUSINESS ARE SUBJECT TO TAXATION BY SAME METHOD AS APPLIED TO SHARES OF STATE AND NATIONAL BANKS—TILLOTSON AND WOLCOTT COMPANY.

The shares of stock in a corporation organized for the purpose of dealing in bonds, stocks and other evidences of indebtedness, and which is actually engaged in the conduct of such business, are subject to taxation by the same method as that applied to the shares of stock of state and national banks, namely, that provided for by section 5408 *et seq. of the General Code; and conversely, that the property of such companies (excepting the real estate) is not subject to taxation under the general property tax laws of the state.*

COLUMBUS, OHIO, May 23, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission recently submitted to this department a letter from Messrs. Tolles, Hogsett, Ginn & Morley, calling attention to the nature of the business done and authorized to be done by The Tillotson & Wolcott Company, a corporation, and asserting the claim that this company should by reason of the facts mentioned therein be considered a "bank", or "banker", within the meaning of section 5407 of the General Code. The commission requested the opinion of this department on the question thus raised.

Section 5407 of the General Code provides as follows:

"A company, association, or person, not incorporated under a law of this state or of the United States, for banking purposes, who keeps an

office or other place of business, and engages in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange notes, bonds, stocks, or other evidence of indebtedness, with a view to profit, is a bank, or banker, within the meaning of this chapter."

The facts shown by the letter, and otherwise, are as follows:

The articles of incorporation of the company declare that it is formed for the purpose of "the business of purchasing and selling bonds, mortgages and other securities". The letter (which has been subsequently supplemented by another letter submitting more detailed information) shows that the entire capital of this company is invested in the business described in the articles of incorporation. That is to say, the company invests its capital in the purchase of securities of the kinds mentioned, receiving the income therefrom during the period of its ownership, and disposing of them for profit. Such business is in a sense essentially mercantile, in that the element of buying and selling for profit is prominently present in it; but it is distinguishable from an ordinary mercantile business, in that the things sold are productive of income while held.

Unquestionably, the business described is one of the usual activities of a bank. It is one of the kinds of business expressly referred to in section 5407. It is conducted by the company in question as its sole and exclusive business pursuit, a statement which serves to distinguish the present case at once from the opinion of a former Attorney-General referred to in the correspondence, and found in the report of this department for the year 1911-12, Vol. I, page 662, for in that opinion the Attorney-General was dealing with the case of a department store which purely in an incidental way was wont to receive money on deposit for the accommodation of its customers and the extension of its general mercantile business. Regardless of the reasons assigned by the former Attorney-General for the conclusion reached by him, it is clear that the department store, or the individuals or corporation conducting it, could not be regarded as a bank within the meaning of section 5407, because the capital invested in the business generally was embarked upon a mercantile enterprise, to which the receipt of money on deposit was purely incidental. The capital invested in the enterprise of receiving money on deposit could not be separated from that invested in the general business, and for aught that appears, there was no investment of capital otherwise than in a stock in trade of merchandise, and the building and fixtures necessary to conduct the store. In the instant case, however, there is no such alien investment of capital, but the entire capital of the company is embarked in the enterprise of dealing with securities.

It is the opinion of this department, therefore, that the former opinion is not decisive of the present question, which accordingly may be very simply stated as a legal problem in the following terms:

Assuming that the company, association or person which invests its or his capital principally in an entirely unrelated business or enterprise, and as a mere incident thereto, buys and sells securities or receives money on deposit, is not a bank, is such a company, association or person which engages in the business of doing one or more of the things enumerated in section 5407, but not all of them, and invests all of its or his capital in such business, or makes a distinct separation of that investment and that business from any other investment and business conducted by it or him, a "bank", or "banker", within the meaning of said section.

In short, is it necessary that a company, association or person should engage in a business which comprehends the doing of all of the things mentioned in section 5407 of the General Code in order to qualify as a "bank", or "banker", within the meaning of that section?

The former Attorney-General intimated with some doubt an affirmative opinion on this question in disposing of the case above described. For reasons above suggested, this department does not feel bound by this expression of opinion, because it is possible to dispose of the former case on another ground. Accordingly, the question as stated will be considered without reference to the former opinion.

Before entering upon a consideration of section 5407, it may be proper to remark that for several reasons this section is to be construed without regard to other statutory definitions of the same term. We have, for example, a definition of a bank in section 710-2 of the General Code, which is as follows:

> "The term 'bank' shall include any person, firm, association, or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass-book, a note, a receipt, or other writing, and unless the context otherwise requires as used in this act includes commercial banks, savings banks, trust companies and unincorporated banks; provided that nothing herein shall apply to or include money left with an agent pending investment in real estate or securities for or on account of his principal; nor to building and loan associations or title guarantee and trust companies incorporated under the laws of this state. All banks, including the trust department of any bank, organized and existing under laws of the United States, shall be subject to inspection, examination and regulation as provided by law."

This definition, it will be observed, makes the receipt of money on deposit the sole test. It is followed by other sections which make it an offense to use the word "bank" as a part of the designation of a business name, unless the user is engaged in receiving money on deposit. This section would prevent a company of the kind inquired about from using the phrase "investment bankers" as a part of any descriptive title employed by them, although in the correspondence they are referred to by that term.

However, these sections just referred to are part of an act providing for the regulation and supervision of banks which as a whole exhibits a consistent purpose to protect the depositors of money. It is, therefore, a definition for a particular purpose, and is in no wise to be confounded with the definition under examination at the present time. Another definition of the term "bank" is found in section 8295 of the General Code as follows:

> "'Bank' includes any person or association of persons carrying on the business of banking whether incorporated or not."

This definition is incomplete, in that it does not describe "the business of banking". That is evidently left to the common law. There have been many common law definitions of the word "bank", and it must be admitted that the receipt of money payable on demand constitutes an important element in all of them.

Numerous definitions of the word "bank", or "banker" might be quoted, but

they would unnecessarily burden this opinion. Those available will be found to make the concession stated in 3 R. C. L., page 375, in the following terms:

> "Strictly speaking, the term 'bank' implies a place for the deposit of money as the most obvious purpose of such an institution."

It is stated, however, in the same context that statutes for one purpose or another frequently use the term in an enlarged or restricted sense, and there are *dicta* of great weight describing the issuance of notes for circulation as the essential characteristic of a banking business. See Augusta vs. Earl, 13 Peters, 564. This also is the sense in which the phrase "associations with banking powers" is used in section 7, article XIII of the Constitution of Ohio. Dearborn vs. Northwestern Savings Bank, 42 O. S. 617.

But it is believed that it would not be profitable to pursue further the question as to what the term "bank" or "banker" means in its natural unqualified sense, or in any other statute; for, as stated, we are dealing here with a legislative definition of the term, and in the very nature of the case that definition would not have been framed had the legislature intended to leave the subject to the common law, or to other statutory definitions.

The letter of counsel suggests that doubt as to the meaning of the section must be resolved by taking into consideration the most probable legislative intent underlying the whole act of which it is a part.

This intent, counsel say, must have been to conform the tax legislation of Ohio to the requirement of section 5219 of the Revised Statutes of the United States. This section which is a part of the national banking act extends to the states permission to tax the shares of stock of national banks. In granting such permission, however, congress has attached a condition to the effect that such state taxation "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such states."

Of course, in Ohio the rate of property taxation under the present constitution must needs be uniform (Article XII, Section 2), so that literally it would be impossible on state constitutional grounds for the Ohio legislature to tax national bank stock at a higher rate than other moneyed capital in the hands of individual citizens. But numerous decisions of the Supreme Court of the United States have made it clear that the scope of the condition embodied in section 5219 of the Revised Statutes of the United States is not limited to nominal discrimination in rate but goes to the extent of prohibiting actual discrimination through different methods of assessment the allowance of set-offs and the like. Thus in Evansville Bank vs. Britton, 105 U. S. 322, it was held that Indiana could not permit the individual taxpayer to deduct his bona fide debts from rights, credits, demands for money and interest generally, in whatever form, without permitting a like deduction to be made from the assessed values of shares of stock in a national bank; and in our own state the application of different standards of value to the assessment of national bank stock and to that of other moneyed capital has been held to be a discrimination forbidden by that section.

> Pelton vs. Bank, 101 U. S. 143;
> Cummings vs. Bank, 101 U. S. 153;

also the tax imposed upon the capital, etc., of state banks from the assessment of which the value of United States bonds was permitted to be deducted, was held to be an invidious discrimination by our supreme court in Frazer vs. Seibern, 16 O. S. 614.

It is therefore argued that the motive of the general assembly in framing the statutory definition under examination was to insure that the same method of assessment would be applied to all invested capital that might be within the scope of the comparison required to be made by section 5219 of the Revised Statutes of the United States, so that the Ohio tax on shares of stock of national banks could not be attacked as discriminatory under that section.

With this object in view it is further argued that the legislature framed this definition intending thereby to contemplate all business that might come into competion with any of the recognized branches of the business of a national bank. Hence, it is argued that the statute should be read distributively rather than cumulatively.

In the opinion of this department this argument is sound. To be sure, it emanates from a source from which no complaint under the federal statute could arise; for other moneyed capital is not entitled to any protection under section 5219 of the Revised Statutes of the United States, and cannot object to being taxed at a higher rate than shares of stock in a national bank. The protection accorded by that section is limited to the national bank stock. This point is, however, beside the mark, for if to avoid the possibility of discrimination *against* national bank shares the legislature has enacted a statute to the general effect that competing capital shall be taxed in the same way as national bank shares, then the owners of such competing capital are entitled to whatever benefit may accrue to them from that section. Academically, it would seem that the burdens of such taxation would be quite likely in a given case to outweigh any benefits; for to take the case in hand as an example, if the company in question should at a given time have a very large part of its capital invested in United States bonds, such investment would be exempt from taxation under the general property tax; but if the construction contended for is correct, the fact that the capital was invested in United States bonds would be immaterial, as the thing taxed would not be the bonds themselves, but the capital invested in them represented by shares or otherwise, as in the case of national banks themselves. For some practical reason that is not expressed, however, this particular company, through its counsel, seems to believe that it would be advantageous to it to have the method employed in taxing shares of stock of a national bank applied to the taxation of its shares, and the question thus raised cannot be avoided by pointing out that under a possible combination of circumstances the application of such a method in lieu of that which would otherwise be applied would for reasons stated, and others which have not been mentioned, be disadvantageous from its point of view. The correctness of the argument which has been considered seems to be suggested strongly by the recent decision of the Supreme Court of the United States in Merchants National Bank of Richmond vs. Richmond, 256 U. S. 635. In that case there was drawn in question the validity of certain Virginia statutes and ordinances of the city of Richmond which, taken together, authorized the imposition of taxes on bank stocks, state and national, at a total rate of one dollar and seventy-five cents on the hundred dollar valuation, while the aggregate rate on intangible personal property in general, including bonds, notes and other evidences of indebtedness, was ninety-five cents on each hundred dollars of valuation. Such a discrimination against the national banks was upheld by the state court on the ground that the purpose of section 5219 Revised Statutes was confined "to the prevention of discrimination * * * in favor of state banking associations against national banking associations, and that since none such is shown here there was no repugnance to the federal statutes". The supreme court, however, following the earlier decisions, some of which have been cited, held this to be too narrow a view of section 5219. The following is quoted from the opinion of the court by Mr. Justice Pitney at page 639:

"By repeated decisions of this court, * * * it has become established that though 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others *that enter into direct competition with those banks.* They include not only moneys invested in private banking, properly so-called, but investments of individuals in *securities that represent* money at interest and other evidences of indebtedness such as normally enter into the business of banking." (Italics ours).

Further in the opinion, quoting from Mercantile Bank vs. New York, 121 U. S. 138, Mr. Justice Pitney gave approval to the following:

"The terms of the act of congress, therefore, include *shares of stock* or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested." (Page 640).

These principles serve very clearly to show that the money invested in the business of the Tillotson & Wolcott Company by way of contributions to its capital stock is "other moneyed capital in the hands of individual citizens" within the meaning of section 5219 of the Revised Statutes of the United States, for the capital so invested is on the facts stated, invested in securities with a view to the sale thereof and the reinvestment of the capital in other securities, thus being employed in precisely the manner described in the quotation from Mercantile Bank vs. New York, supra.

These things being true, it would follow that even if we had in Ohio no such statute as section 5407 of the General Code, an attempt by this state to tax an incorporated so-called "investment banker" under the general property tax law, allowing it an exemption in respect of United States bonds in which its capital might be invested, for example, and a deduction of its debts from its credits, could be successfully objected to by the national banks, unless the same privileges were accorded to them—and they are not so accorded; see sections 5408 and 5412, inclusive, General Code. These things being true, it is the opinion of this department that section 5407 is to be read in the light of the surrounding circumstances as an effort on the part of the legislature to avoid such a consequence. Being such an effort, it is to be construed consistently with that intent. Such a construction produces the result contended for by counsel, namely, that a company, association or person not incorporated under a law of this state or of the United States for banking purposes who does any one of the things enumerated in section 5407 as the principal object for which his or its capital is invested, is within the scope of the definition therein embodied. This statute so construed then becomes a law of this state the protection and benefits of which, if any, such a person or corporation is entitled to claim.

This deparment is aware of the fact that the above conclusion is in a sense revolutionary. Doubtless, the contrary interpretation of the section has the sanction of long usage. This, however, is easily explained, for as above pointed out, it may have been thought, and doubtless was thought on the part of "investment bankers" and others similarly situated that it was to their advantage to be taxed under the general property tax laws; whereas it was not until the recent decision in the

Richmond case, supra, that it became clear that national banks could object to a discrimination in favor of institutions other than state banks. While these speculations do not explain the inactivity of the taxing officials, they tend to account for the long acquiescence of others in what is now believed to be an erroneous interpretation of that section.

However that may be, it is the opinion of this department, for the reasons above stated, that the shares of stock in a corporation organized for the purpose of dealing in bonds, stocks and other evidences of indebtedness, and which is actually engaged in the conduct of such business, are subject to taxation by the same method as that applied to the shares of stock of state and national banks, namely, that provided for by section 5408 et seq. of the General Code; and conversely, that the property of such companies (excepting the real estate; see section 5409 G. C.) is not subject to taxation under the general property tax laws of the state.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3129.

MUNICIPAL COURTS OF CLEVELAND—WITNESS FEES COLLECTED BY CLERK OF SAID COURT PAYABLE INTO COUNTY TREASURY.

Witness fees when collected by the clerk of the municipal court of Cleveland, under the provisions of section 3014 *G. C., are properly payable into the county treasury.*

COLUMBUS, OHIO, May 23, 1922.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—In your recent communication you request my opinion on the following:

> "Section 1579-41 G. C. provides in part that the clerk of the municipal court of the city of Cleveland shall pay over to the proper parties all moneys received by him as clerk; he shall receive and collect all costs, fines and penalties and shall pay therefrom annually six hundred dollars in quarterly installments to the trustees of the law library association as provided for in division IV, chapter 1, of the General Code, and shall pay the balance thereof quarterly to the treasurer of the city of Cleveland.
>
> Under this provision witness fees are collected from defendants in state criminal cases and paid into the city treasury.
>
> Section 3014 G. C. provides in part that each witness attending before a justice of the peace, police judge or magistrate, or mayor under subpoena in criminal cases, shall be allowed the fee provided for witnesses in the court of common pleas, and in state cases said fees shall be paid out of the county treasury, and in ordinance cases out of the municipal treasury, upon the certificate of the judge or magistrate, and the same taxed in the bill of costs. When the fees herein enumerated have been collected from the judgment debtor, they shall be paid to the public treasury from which said fees were advanced.