secure the funds deposited with them in the manner provided by said sections."

In this opinion the former opinion rendered in 1909 is referred to and followed and attention is called to an unreported case decided by the common pleas court of Franklin county, Ohio, in which the direct question was raised as to whether a title guarantee and trust company could be designated to act as a depositary for county funds under an act passed April 2, 1906, 98 O. L., 274. The common pleas court allowed a mandatory injunction to compel the county commissioners to recognize title guarantee and trust companies as eligible.

I am unable to find any other decision having direct bearing on the question at hand. The former opinions of this department are well reasoned and have, in my mind, reached the proper conclusion.

You are therefore advised that title guarantee and trust companies may properly be designated as depositaries of state funds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

206.

TAX COMMISSION OF OHIO—AUTHORIZED TO REQUIRE REPORTS ANNUALLY FROM ALL PUBLIC UTILITIES WHETHER BUSINESS BE INTRASTATE OR INTERSTATE—WHERE PUBLIC UTILITIES HAVE NO INTRASTATE EARNINGS IN OHIO—STATE NOT AUTHORIZED TO CHARGE MINIMUM EXCISE TAX.

SYLLABUS:

1. *The tax commission of Ohio is authorized to require reports annually from all public utilities doing business in this state, whether said business be intra or interstate.*

2. *Where a public utility has no intrastate earnings in Ohio the state is not authorized to charge the minimum excise tax.*

COLUMBUS, OHIO, March 19, 1927.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads as follows:

"The commission has directed me to acknowledge the receipt of yours of the 3rd instant to which you have attached a copy of a letter which you had received from Mr. S. regarding an excise tax charge assessed against the Louisville & Nashville Railroad Company.

This company you will note has made no excise tax report to this commission since 1916. There are several other utilities in the same situation and which have failed or refused to make any report or showing with regard to their business. It seemed to the commission that the mere fact that a utility, which operates in Ohio, had no intrastate earnings in 1916 does not necessarily impel the conclusion that it had no such earnings in 1926. Conditions change and the commission is of the opinion that each utility which so

operates in Ohio and claims exemption from excise tax should make an annual report which will justify our finding that such claim is justified. Otherwise the state would be put to expense by way of investigations to see that no utility escapes improperly. See also Sections 5470 et seq. which seem to require reports from all utilities regardless of the fact that they are engaged in interstate business only.

The question then arises if such report is proper and in order, is the state not entitled to charge the minimun fee of ten dollars in cases where the right of exemption is clear?

The commission respectfully submits that this point was not under consideration in the opinion rendered by yourself in 1916 to which Mr. S. called your attention.

Furthermore under Section 5503 of the General Code as it read prior to the amendment of 1925 you will note that the language 'which fee shall not be less than ten dollars in any case' is the same as that used in the closing lines of Sections 5483, 5485 and 5486. Under Section 5003 the commission has held for years that while the franchise tax report of a foreign corporation might show no taxes due yet there was a liability for the minimun fee of $10.00. Applying the same rule of construction to the sections governing excise tax the commission was of the opinion that while there might be no earnings subject to tax yet the minimum fee should be paid, that such a charge would not be derogatory of any of the constitutional rights of the reporting utility but was justifiable as a clerical charge or under the police powers of the state.

Since the questions have now arisen the commission has directed me to ask you formally

1. Has the commission the right to insist on reports annually from the class of utilities to which the railroad mentioned above, belongs?

2. Has the state the right to charge the minimum amount where the report shows no intrastate earnings?"

Section 5470, General Code, reads as follows:

"Each public utility except street, suburban and interurban railroad and railroad companies ,doing business in this state, shall, annually, on or before the first day of August, and each street, suburban and interurban railroad, and railroad company, shall, annually, on or before the first day of September, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe."

It seems evident from the provisions of this section that each public utility is required to make the report as provided in said section and in Section 5471, and that such railroad company shall in addition make the statement required in Section 5472, General Code, which reads:

"In the case of each railroad company, such statement shall also contain the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. Such statement shall also con-

tain the total gross earnings of such company for such period in this state from business done within this state."

You are therefore advised that in answer to your first question it is my opinion that the Louisville & Nashville Railroad Company and other utilities in the same class may be required by your commission to make and file a report with the commission in such form as the commission may prescribe.

You also inquire as to whether the state has the right to charge the minimun amount where the report shows no intrastate earnings.

Section 5477, General Code, provides as follows:

"On the first Monday of October, the commission shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this state, for the year ending on the 30th day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission shall be the gross earnings of such railroad company for such year."

This section when read in connection with Section 5486, shows that it was intended to base the excise tax solely upon the earnings in intrastate business. *Ohio Tax Cases,* 232 U. S., 576 (affirming Railway Co. v. Ditty, 203 Fed., 537).

Section 5486 reads as follows:

"In the month of November, the Auditor of State shall charge for collection, from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported to him by the commission, as the gross earnings of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking four per cent of all such gross earnings, which tax shall not be less than ten dollars in any case."

It is noted that this section authorizes the state to charge from each railroad company a sum in the nature of an excise tax for the privilege of carrying on its intrastate business; and that said tax is to be computed on the amount of said intrastate business so fixed and reported to the Auditor of State by the commission on the gross earnings of such company for its intrastate business. Said section also provides that said tax shall not be less than ten dollars in any case. This section evidently refers to any case in which there is intrastate business upon which to compute the tax, and if there is no intrastate business there can be no computation of the tax, and consequently no tax.

In *Ohio Tax Cases,* 232 U. S., 576, it is stated that:

"Section 5486, General Code, manifests an intent to take into consideration for the purpose of measuring the excise tax only the earnings upon the intrastate business."

The tax imposed by this section is an excise tax and does not interfere with the interstate commerce. If a report is required from a utility doing business in Ohio but having no intrastate earnings, and a tax is imposed, said tax is in reality imposed upon interstate business.

It therefore seems evident that as the tax must be computed upon the intrastate

business, and there is no intrastate business, no tax may be computed or required to be paid, and therefore the state has not the right to charge the minimum amount where the report shows no intrastate earnings.

Respectfully,
EDWARD C. TURNER,
Attorney General.

207.

SUPPLEMENTAL PETITIONS—WHEN HOUSE OF REPRESENTATIVES DEFEATS INITIATED BILL, IN ORDER TO HOLD A VALID ELECTION THEREON, SUPPLEMENTAL PETITIONS MUST BE FILED WITHIN 90 DAYS THEREAFTER.

SYLLABUS:

Under the provisions of Article II, Section 1b, of the Ohio Constitution, where an initiated bill is defeated in the House of Representatives on March 15th, in order to hold a valid election thereon, it is necessary that the supplemental petitions must be filed within ninety days thereafter.

COLUMBUS, OHIO, March 19, 1927.

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

DEAR SIR:—This will acknowledge receipt of your letter of the 16th instant requesting my opinion as follows:

> "Initiated House Bill No. 122, 'Chiropractic Bill' was defeated, as shown by the Journal of the House March the 15th. We are requested by the chiropractors of Ohio through Dr. C. E. Schilling, Secretary, to advise them of the date within which the supplemental petitions must be filed.
>
> We will very much appreciate an opinion from your department thereon."

The pertinent provisions of the Ohio Constitution involved in your inquiry are as follows:

> Article II, Sec. 1.
>
> "The legislative power of the state shall be vested in a general assembly * * * but the people reserve to themselves the power to propose to the general assembly laws * * * and to adopt or reject the same at the polls. * * * They also reserve the power to adopt or reject any law, * * * passed by the general assembly except * * *.
>
> Sec. 1a. The first aforestated power reserved by the people is designated the initiative, * * *.
>
> Sec. 1b. When at any time, not less than ten days prior to the commencement of any session of the general assembly, there shall have been filed with the secretary of state a petition signed by three per centum of the electors and verified as herein provided, proposing a law, the full text of which shall have been set forth in such petition, the secretary of state shall transmit the same to the general assembly as soon as it convenes. If said proposed law shall be passed by the general assembly, either as petitioned for or in an