easement deed theretofore executed by Charles Cordes to the State of Ohio, is not a matter of any importance.

Upon examination of the deeds executed to the State of Ohio by the Conservator of The Commercial State Bank of Napoleon, Ohio and by the Superintendent of Banks, as liquidator of this bank, I find that said deeds have been executed and acknowledged in the manner required by law. Although, as above noted, there is some question in my mind as to the authority of the Conservator of The Commercial State Bank of Napoleon, Ohio to execute a deed for the property here in question, there is, of course, no question with respect to the authority of the Superintendent of Banks to execute a deed for this property and I am quite clearly of the opinion that the form of this deed is such that it is legally sufficient to convey this property to the State of Ohio by fee simple title. Such deed is accordingly hereby approved by me.

Upon examination of Contract Encumbrance Records Nos. 22 and 23, which have been submitted as a part of the files relating to the purchase of this property, I find that the same have been executed in the manner required by law and that there is shown thereby a sufficient unencumbered balance in the property appropriation account to pay the purchase price of the above described parcels of land which purchase prices are $200.80 and $95.70, respectively.

I further find from the files submitted to me in connection with the purchase of the property here in question, that this purchase has been approved by the Controlling Board and that the amounts of money necessary to pay the purchase prices of these respective parcels of land, above described, have been released by said Board from the appropriation account.

In the consideration of the abstract of title and other files relating to the purchase of the above described property, I assume that the Conservation Council, acting under the authority conferred upon it by Section 472 General Code, has authorized and provided for the purchase of this property by the adoption of a proper resolution for the purpose, which has been duly entered in the minutes of said body in your office. A copy of such minutes showing this resolution and the adoption thereof by proper vote of the council, should be made a part of the files when the same are submitted to the Auditor of State for warrant pursuant to the voucher covering the purchase price to be issued by you.

Subject to the possible exception above noted with respect to outstanding taxes and assessments, the title of the Superintendent of Banks of the above described property is hereby approved, and the corrected abstract of title, deeds, contract and encumbrance records and other files relating to the purchase of this property are herewith returned to you.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4137.

SALES TAX—WHAT CONSTITUTES SALE IN INTERSTATE COMMERCE.

SYLLABUS:

1. *A state cannot tax interstate commerce nor tax business or sales which constitute such commerce or the privilege of engaging in interstate commerce.*

2. *In determining what constitutes interstate commerce, regard must be had in*

each instance to the facts of the particular case and known established commercial methods.

3. *When sales of tangible personal property in this state are effected, the question of when title passes is one of fact. In determining the question, the controlling factor is the intention of the parties which should be ascertained by consideration of the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case, aided by certain recognized presumptions of law, and rules of law as contained in the so-called Uniform Sales Law as it is in force in this state.*

COLUMBUS, OHIO, APRIL 10, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "The Tax Commission desires your opinion concerning sub-number 8 of Section 2 of Amended House Bill No. 134, which, speaking of exemptions in the said bill, reads as follows:
>
> 'Sales which are not within the taxing power of this state under the constitution of the United States.
>
> Nothing in this act shall be so construed as to impose any tax on the transportation of persons or property.'
>
> A case is before this Commission as follows: 'A' enters the store of 'B' and asks to see, for example, a man's lounging robe. The merchant, who is 'B', shows him a lounging robe priced at $9.00, and 'A' being satisfied with the article, agrees to purchase the same an offers the cash for the sale. At the time the cash is offered and taken 'A' relates that he desires the robe packed and shipped by parcel post to 'C' in Huntington, W. Va., and questions the right of 'B' to charge him the sales tax on the transaction.
>
> There is some doubt in the minds of the several commissioners with respect to the non-taxability of this transaction, the commission being divided on the matter. When 'B' offers the robe and 'A' agrees to take it and offers the money across the counter it is the claim of some of the commissioners that that ends the transaction with respect to its application to the provisions of the Sales Tax Law, which provides in Section 1 that: 'Sale' and 'selling' include all transactions whereby title or possession, or both, of tangible personal property, is or is to be transferred * *'.
>
> The question the Commission desires to propound to the Attorney General's office is whether or not the transaction ends when 'A' offers the $9.00 and it is accepted by 'B', whereupon the vendee's sales tax receipts are presumed to be transferred across the counter, but because of the information then given by 'A' that he desires the garment transported into West Virginia, is it proper to allow the transportation of the article without collecting the 27¢ sales tax?"

Amended House Bill No. 134 (115 O. L. Pt. II, p. 306), commonly called the Retail Sales Tax Law, was enacted by the 90th General Assembly. Exclusive of certain items of appropriation contained in the act and portions of the act relating to the tax on beverages and the tax on cosmetics and toilet preparations, its provisions have been codified as Sections 5546-1 to 5546-23 of the General Code of Ohio.

The object of the act as expressed in its title, is as follows:

"An act providing for the levy and collection of a tax upon sales of tangible personal property at retail for the purposes etc."

Section 5546-2, General Code, which contains the tax levying provisions of the act and the exceptions thereto, provides:

"An excise tax is hereby levied on each retail sale in this state of tangible personal property occurring during the period beginning on the first day of January, 1935, and ending on the 31st day of December, 1935, with the exceptions hereinafter mentioned."

This section also provides for the rate of tax levied and to be collected, and enumerates ten classes of sales to which the tax levied by the act shall not apply. No. 8 of these exceptions reads as follows:

"Sales which are not within the taxing power of this state under the Constitution of the United States.

Nothing in this act shall be so construed as to impose a tax on the transportation of persons or property."

A "sale" and "selling" as the terms are used in the act are defined in Section 1 of the act (§5546-1, G. C.) as follows:

" 'Sale' and 'selling' include all transactions whereby title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is granted, for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange or barter, and by any means whatsoever."

Without attempting to determine the full import of the applicability of the exception which provides that the tax shall not apply to sales which are not within the taxing power of the state under the Constitution of the United States and without attempting to say what other sales might be included within this exception it is sufficient for our present purpose to note that sales in interstate commerce are within the exception. It is well settled by a long line of authorities beginning with the State Freight Tax case, 15 Wall., 232, 21 Law Ed., 146 and ending with the case of *Cooney* vs. *Mountain States Telephone and Telegraph Company* decided by the Supreme Court of the United States, March 4, 1935 (Law Ed. Advance Opinions, Vol. 79, pages 498-503) that the state cannot impose a tax which operates as a direct burden on interstate commerce. In the latter case it is said by Mr. Chief Justice Hughes, who delivered the opinion of the court:

"But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it."

See also, *Baldwin* vs. *Seelig,* Law Ed., Advance Opinions, 525, 528.

It will be observed that the tax imposed by the terms of the Retail Sales Tax Law is a tax on a "sale" as defined in the act and if such sale is a sale in interstate commerce a tax levied thereon would, to the extent of the tax, directly burden interstate commerce and would therefore be forbidden by the United States Constitution, which

expressly reserves the regulation of interstate commerce to Congress. Such sales clearly come within the exception noted.

Even if this exception were not contained in the act a tax on interstate commerce would be invalid.

Just when a sale constitutes interstate commerce is a question of considerable difficulty and has been the subject of much controversy. There are many decisions of the courts defining the words "commerce" and "interstate commerce" but it is generally conceded that no arbitrary rule can be laid down as to what is commerce or interstate commerce, but that each case as it arises, must be determined by its own facts. As was said in *Public Utilities Commission* vs. *London,* 249 U. S., 245, 63 Law Ed., 577:

> "Interstate commerce is a practical conception, and what falls within it must be determined upon considerations of established facts and known commercial methods. *Rearick* vs. *Pennsylvania,* 203 U. S., 307, 51 Law Ed., 295, 297; *Pipe Line Cases* (*U. S.* vs. *Ohio Oil Co.*, 234 U. S., 548, 560, 58 Law Ed. 1459, 1470."

It is impossible to lay down a general rule whereby it may be determined whether or not a particular sale constitutes interstate commerce in the sense that a state law imposing a tax or license on the transaction will constitute an unlawful burden on interstate commerce. The courts have been loath to formulate any such rule and in fact have not always been consistent in their decisions on the question. They have been consistent, however, in saying that the question in all cases depends upon the circumstances of the transaction, the intention of the parties and the usages of trade. It has never been held, so far as I have found, that when a sale is entirely consumated between two parties, the price paid and title passed to the purchaser within a state, the sale was one in interstate commerce even though the goods were to be shipped to some other state unless by the circumstances of the transaction or the usages of trade both seller and purchaser intended that the transaction was an interstate transaction such for instance as a sale on a grain or commodity exchange where practically all or at least a greater part of the sales were for resale and shipment from elevator or warehouse in one state to destinations in other states. *Farmers Grain Company* vs. *Langor,* 273 Fed., 635. Even in such cases it has been held by the Supreme Court of the United States in the case of *Moore* vs. *New York Cotton Exchange,* 270 U. S., 593, that:

> "The mere chance shipment from one state to another of cotton purchased and sold on an exchange in spot transactions does not convert the purely local agreements or the transactions to which they relate into subjects of interstate commerce."

With respect to your specific inquiry, as I view the particular transaction about which you inquire in the light of the circumstances as stated by you and without the benefit of any other facts that might be within the knowledge of the participants in the transaction I am of the opinion after examining the authorities with respect thereto, that the transaction was not interstate in character and that the sale in question was not a sale in interstate commerce which could not lawfully be regulated or burdened by state law. The sale appears to have been completed and the property the subject of the sale transferred to the purchaser in this state. The delivery to a third person in another state for whom the purchaser, so far as anything appears, was not acting as agent, was a mere incident to the sale and a separate and distinct act on the part of the seller, from the actual sale. If the delivery in another

state of the article purchased, was in fact a part of the transaction or a condition of the sale or a part consideration for the purchase price of the article sold, and such had been the intention of the parties the situation would probably be different but such does not appear to be the case from the facts presented. It appears that while actual delivery of the article which was the subject of the sale was probably not made to the purchaser in this state constructive delivery was effected and the shipment into another state was made at the instance of the purchaser and entirely independent of the sale itself.

It does not appear that "B", the seller, was anything more than an ordinary merchant selling goods over the counter and perhaps making local deliveries. It at least does not appear that he was conducting a business involving deliveries at distant points by parcel post. This was most likely known to the purchaser. After the deal was closed and as the purchaser was paying the purchase price he stated that "he desired the robe packed and shipped by parcel post to 'C' in Huntington, West Virginia." This language would indicate that he simply requested the merchant to pack and ship the article which was the subject of the sale, to Huntington, West Virginia for him. It does not appear that the sale would not have gone through if the merchant had refused the request of the purchaser to pack and ship the article. Apparently delivery of the article in another state to a third person was not a part of the sale or a condition of the sale, nor does it appear that "A" was acting as agent for "C" in the matter. Under the facts as stated, the shipment to "C" in West Virginia was not in the usual course of trade or by means of the merchant's regular system of delivery nor at the risk of the merchant "A" even though it was probably at his expense. It therefore follows if my conclusions as to the facts are correct, that the sale was not a sale in interstate commerce and was taxable under the Retail Sales Tax Law providing either title or possession or both, passed to the purchaser or consumer in this state.

Section 8398, General Code, and the pertinent part of Section 8399, General Code, the provisions of which are identical with corresponding provisions of the Uniform Sale Law in force in many states, read as follows:

> "Sec. 8398. 1. When there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> 2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case."
>
> "Sec. 8399. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> Rule 1. When there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed. * * "

In the case of *Olin Company* vs. *Lambach,* 35 Idaho, 767, 209 Pac., 277, it is said:

> "The rule adopted by the majority of modern authorities, and supported by reason is identical with that embodied in the Sales Act, viz., that the title to an article sold is presumed to pass when the contract is made, if the article is identified and nothing remained to be done other than the delivery of the goods and the payment of the price. *Bill* vs. *Fuller,* 146 Cal. 50, 79 Pac. 592; *Crug* vs. *Gorham,* 74 Conn. 541, 51 A. L. R., 519; *Warner* vs. *Warner,* 30 Ind.

App. 578, 66 N. E., 760; *Wing* vs. *Clark,* 24 Me., 366; *Parsons* vs. *Dickenson,* 11 Pick, 352; Williston on Sales, Sec. 264, p. 359."

In *Piano Co.* vs. *Piano Co.,* 85 O. S., 196, it is held:

"Between the parties to a sale of specific goods especially when the price has been paid, a presumption arises that the title has passed without a delivery of the goods."

In the instant case the price was paid and at least constructive delivery of tangible personal property, the subject of the sale, was effected to the purchaser "A" who was acting for himself and not as agent for another in this state and title passed to the purchaser in this state, at least nothing appears to indicate a contrary intention. The presumption of the passage of title therefore prevails. I am therefore of the opinion that the sale in question is taxable under the provisions of the Retail Sales Tax Law. It should be understood that no arbitrary rule can be laid down as to just what constitutes "interstate" commerce. Each case depends upon its own facts and must be determined upon a consideration of established facts and known commercial methods.

The same is true of the question of when title passes upon the sale of personal property, the controlling factor being the intention of the parties in ascertaining which regard must be had to the terms of the contract, conduct of the parties, usages of trade and the circumstances of the case aided by certain recognized presumptions of law and rules of law as contained in the so-called Uniform Sales Law as it is in force in this state.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4138.

COUNTY AGRICULTURAL SOCIETY—INDEBTEDNESS THEREOF MAY BE PAID BY COUNTY COMMISSIONERS WHEN—LEVY OF TAX AND ISSUE OF BONDS TO PAY INDEBTEDNESS—COUNTY COMMISSIONERS MAY PURCHASE FAIR GROUNDS FROM SOCIETY.

SYLLABUS:

1. *The indebtedness of a county agricultural society may be paid by the county commissioners by appropriating a sufficient amount therefor from the general fund, except that where such indebtedness exceeds* $10,000.00 *in any one year the question of levying a tax therefor must be submitted to a vote of the electors or if the indebtedness is* $15,000.00 *or more the question of issuing bonds to pay the same may be submitted to a vote of the electors upon the presentation of a petition therefor signed by not less than five hundred resident electors of the county.*

2. *The county commissioners have the authority to purchase the fair grounds from the county agricultural society, and such society has the authority to sell its fair grounds to the county, whereon to hold fairs under the management and control of the society, for the purpose of using the proceeds of said sale to pay the indebtedness of such society.*