The language of the foregoing act is clear and general in terms; it makes no distinction whatever as between children compelled to attend school, so far as the school that they may attend is concerned. The compulsory school laws, in terms, recognize that compliance with them may be had by attending a public, parochial or other private school, and the act quoted above embraces all such children and authorizes relief to all such children.

I am of the opinion, therefore, that the relief authorized by this act may be extended to all children, who, by the terms of the compulsory schools laws, are required to attend school, without consideration as to whether or not they are attending a public or private school.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4808.

FOREIGN CORPORATION ACT—PUBLIC UTILITY PRIMARILY ENGAGED IN INTER-STATE COMMERCE NEED NOT COMPLY WITH ACT—DISCUSSION OF FILING OF FIRST REPORT UNDER SUCH ACT.

SYLLABUS:

1. *The provision contained in Section* 8625-3, *General Code, exempts public utility corporations from the provisions of the Foreign Corporation Act when they are engaged in this state in interstate commerce as a principal business as distinguished from an incidental business.*

2. *Any foreign corporation which was licensed to tranact business in Ohio under the provisions of former Section* 178, *General Code, must be held to be licensed to transact business in Ohio, and to have represented in this state such number of shares as may be determined from its first report filed under the Foreign Corporation Act, even though such corporation was exempt from complying with the provisions of former Sections* 183 *to* 188, *General Code.*

3. *By reason of the provisions contained in Sections* 8625-10 *and* 8625-11, *General Code, it from the first report of a foreign corporation filed under the Foreign Corporation Act, it is determined that such corporation is entitled to have a lesser number of shares represented in this state than that upon which it had paid the fees under the former act, such corporation is neither entitled to a refunder nor a credit by reason thereof.*

COLUMBUS, OHIO, December 12, 1932.

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

DEAR SIR:—This acknowledges receipt of your request for opinion as follows:

"Directing your attention to Sections 8625-3, -7 and -10 of the General Code of Ohio, your opinion is respectfully requested as follows:

(1) Does the exemption set forth in section 8625-3 regarding public utility companies apply to all public utility companies which are engaged

in part in interstate commerce, or only to those which are engaged solely in interstate commerce in Ohio?

(2) In case your answer to the first question is to the effect that all public utility companies engaged to any extent in interstate commerce are exempt, then what companies are required to file the reports required by section 8625-7 with the annual excise tax report as mentioned in the first paragraph of section 8625-7?

(3) In case your answer to number 1 holds that public utility companies operating in Ohio to some extent in intrastate commerce are required to make the report provided by section 8625-7, will the provisions of section 8625-10 apply to the first report of such public utility companies in the same manner as it would to private corporations? In this connection you will note that this would be the first report of this nature ever to be required by certain public utility companies whereas other foreign corporations have heretofore been paying fees based on section 185, now repealed.

(4) In case the first report of a foreign corporation made as required by section 8625-7, shall disclose a lesser proportion of property and business in Ohio than that upon which it has previously paid a fee under section 185 now repealed, will the difference between such proportions be lost to the company as a credit in a computation of a fee on the second report required under this act in 1933?"

The so-called "Foreign Corporation Act" (sections 8625-1 et seq. General Code) provides that all foreign corporations doing business in Ohio, with the exception of certain types of corporations specifically set forth in section 8625-3, General Code, shall file certain reports, pay certain fees, and obtain a license to do business. Your inquiry arises by reason of the language contained in such section 8625-3, General Code, which, in so far as material, reads:

"This act shall not apply to corporations *engaged* in this state *solely in interstate commerce,* * * nor to public utility companies *engaged* in this state *in interstate commerce.*"

(Italicized the writer's.)

Section 8625-3, General Code, is the exception clause of the Act of which it is a part, since if it were not contained therein the corporations named in the section would be subject to the provisions of the Foreign Corporation Act. (Section 8625-4, General Code). An exception in a statute or act is a clause, paragraph or section which "excepts from the operation of the statute persons, things or cases which would otherwise have been included in it." Black on Interpretation of Laws, Section 108.

In the interpretation of such type of sections the courts have established a rule, as set forth in the case of *State ex rel Keller* vs. *Forney et al.,* 108 O. S. 463, syllabus 1:

"Exceptions to the operation of laws whether statutory or constitutional, should receive *strict,* but *reasonable,* construction."

(Italicizing ours.)

It should be noted that Section 8625-3, General Code, specifically provides that all "corporations engaged in this state solely in interstate commerce" are

exempt from the provisions of the act. Public utility corporations, whatever attributes they may possess, are, nevertheless, corporations. Being such, the first clause in the section would specifically exempt them from the provisions of the act, if the sole business done in Ohio is interstate commerce. It is the duty of the court, in the interpretation of statutes, to give effect to the intent of the legislature as expressed by the language used in the statute. It is never to be presumed that the legislature used unnecessary or redundant language. If it had been the intent of the legislature to exempt public utility corporations only when such corporations were engaging in this state solely in interstate commerce, the last clause would have been unnecessary. As stated by Marshall, C. J., in *Stanton* vs. *Realty Company,* 117 O. S., 345, 349:

> "It is a general rule of interpretation of statutes that the intention of the Legislature must be determined from the language employed, and, where the meaning is clear, the courts have no right to insert words not used, or to *omit words used,* in order to arrive at a supposed legislative intent, or where it is possible to carry the provisions of the statute into effect according to its letter."
>
> (Italicizing ours.)

Some meaning must necessarily be given to the language "engaged in this state in interstate commerce." As I have heretofore pointed out, if such language were held to mean engaged "solely" in this state in interstate commerce such ruling would be tantamount to holding such clause to be redundant.

What is the meaning of the phrase "engaged in interstate commerce," as applied to a corporation? In *Lewellyn* vs. *Pittsburg B. & L. E. R. Co.,* 222 Fed. 177, in the second paragraph of the headnotes the following description of "engaged in business" is set forth:

> "Within Act August 5, 1909, Section 38 the expressions 'engaged in business', 'carrying on business' or 'doing business' do not have different meanings, but separately or collectively convey the idea of progression, continuity, or sustained activity, and 'engaged in business' means occupied in business, 'carrying on business' does not mean the performance of a single disconnected business act, but means conducting, prosecuting, and continuing business by performing progressively all the acts normally incident thereto, while 'doing business' conveys the idea of business being done, not from time to time, but all the time."

Ladd, J., in *Brickler* vs. *Guenther,* 121 Ia. 419, 421, states:

> "But to 'engage in business' is uniformly construed as signifying to follow that employment or occupation which occupies the time, attention and labor for the purpose of a livelihood or profit."

Abel vs. *State,* 90 Ala. 631; *Shyrock* vs. *Latimer,* 57 Tex. 674; *Hickey* vs. *Thompson,* 52 Ark. 534.

Stevenson, V. C., in *Fleckenstein Bros. Co.* vs. *Fleckenstein,* 66 N. J. E. 9, 252, 256, says:

> "One cannot properly be said to be 'engaged' in a business unless there is, to some extent, a continuous occupation of his faculties and

powers directed toward the carrying on the business as an object or purpose. The extent of continuity implied when the word 'engaged' is employed depends upon the thing in which he 'engages'. A man may be engaged in prayer, although the engagement may occupy but a few minutes; a man may be engaged in building a house, which cannot occupy in the natural course of things more than a few months. A man also may be engaged in any occupation or pursuit for a limited time.

In addition to some substantial continuity in the conduct or occupation which constitutes engaging in business, I think, also, that such conduct must have for its *purpose* or *object* the carrying on of that business."

Connor, J., in *State* vs. *Roberson*, 136 N. C. 587, 588, confirms the rule that there must be a continuity of engagement in order to be engaged in business, as follows:

"To say that one is engaged in an occupation signifies much more than the doing of one act in the line of such occupation."

From the foregoing, it is evident that the legal meaning of the phrase "engaged in this state in interstate commerce" includes the following elements:

1. There must be some progression of the acts of interstate commerce in order to be engaged in such business.
2. There must be some continuity or sustained activity in interstate commerce in order to be engaged in such business.
3. Such interstate commerce business must occupy the time, attention and labor of the corporation for the purpose of accomplishing the principal purpose of the corporation, with a view to profit.
4. The corporation must be organized for the purpose of engaging in the public utility business.

In reply to your first inquiry it is my opinion that when a public utility corporation in the State of Ohio engages in interstate commerce as a chief or principal business, or one of its principal or chief businesses, as distinguished from an incidental business, such corporation is not required to comply with the Foreign Corporation Act even though it may engage in some intrastate business which is merely incidental to its main business.

In using the word "incidental," I use it with the meaning as given in Webster's New International Dictionary, as meaning "casual; not of prime concern; subordinate, collateral." If a public utility corporation doing an intrastate business incidentally engages in, or performs services of an interstate nature which are merely casual, which business comes to such corporation because it is convenient for the customer and is not striven for by such utility or is in other words, accidental business, the engagement in such business would not be sufficient to exempt such utility from the provisions of the Foreign Corporation Act.

In view of my opinion as to your first inquiry it becomes unnecessary to answer your second.

Your third inquiry is as to whether Section 8625-10, General Code, is applicable to public utility companies now required to file a report under Section 8625-7, of the Foreign Corporation Act. Such section reads:

> "A foreign corporation heretofore licensed and, at the time this act goes into effect, authorized to transact business in this state, shall be deemed to be licensed under this act and to have then represented in this state such number, but not more, of its issued shares as shall be determined, as provided in this act, from its first report filed under this act. Upon the filing of such first report the secretary of state shall issue to such corporation a supplemental license certificate setting forth the number of shares which the corporation is then authorized to have represented in this state."

Your inquiry undoubtedly arises by reason of the difference in the provisions contained in the former Foreign Corporation Act (former sections 178 to 192, General Code) and those contained in the present act. Under the former act all foreign corporations except banking, insurance, building and loan, and bond investment companies were required to obtain a certificate or become licensed before transacting business within this state, and pay certain fees ranging from fifteen to fifty dollars, determined by the amount of the authorized capital stock of such foreign corporations. (See former sections 178 to 180, General Code). By virtue of the provisions of former section 188, General Code, such corporations were so excepted, as well as "express, telegraph, telephone, railroad, sleeping car and transportation corporations" were not required to file a report with the Secretary of State from which could be determined the amount of stock represented by Ohio business, and were not required to pay a franchise or excise tax on such stock or business so done. Bearing in mind that such section does not enumerate all the types of public utility corporations but omits some, such as electrical energy, gas and other companies, it is apparent that certain utility companies were required to pay the license fee and also the annual fee popularly known as the capital stock tax, franchise or excise tax.

It is thus evident that certain utility companies such as electrical energy, gas companies, etc., not only might have been foreign corporations licensed to do business within this state by virtue of Sections 178 to 182, General Code, but also had a license under the provisions of Sections 183-184, General Code, which latter license determined the number of shares authorized to be represented in Ohio.

Section 8625-10, General Code, after providing that "a foreign corporation heretofore licensed" shall be deemed to be licensed under the "foreign corporation act" contains the following language:

> "* * and to have *then represented in this state* such number but not more, of its issued shares *as shall be determined,* as provided in this act, from its *first* report *filed under this act.* Upon the filing of *such first report* the secretary of state shall issue to such corporation a supplemental license certificate setting forth the number of shares which the corporation is then authorized to have represented in this state."

Under the provisions of former sections 178 et seq., General Code, foreign express, telegraph, railroad, sleeping car and transportation companies were licensed to engage in business in this state without complying with the provisions of former Sections 183 et seq., General Code, or obtaining the certificate therein mentioned. Since such corporations which hold licenses issued under the provisions of former Section 178, General Code, were licensed to transact business

within this state at the time the Foreign Corporation Act became effective, it is my opinion that they must be held to be licensed under the new act and to have such number of shares authorized in Ohio as may be determined by a computation made in the manner provided in Section 8625-8, General Code, from the report filed in the manner and at the time specified in Section 8625-7, General Code.

The language of Sections 8625-7 and 8625-10, General Code, makes no distinction between the reports to be filed by a public utility corporation when subject to the provisions of the Foreign Corporation Act and that to be filed by any other corporation. I must therefore hold that any corporation subject to the provisions of such act, whether utility or commercial, must file its report as prescribed by Section 8625-7, General Code.

In reply to your fourth inquiry, as to whether a corporation which had complied with former Sections 183 to 187, General Code, and by virtue thereof, was entitled to have certain shares represented in this state, is entitled to a refunder or credit in the event that a computation under the present Foreign Corporation Act shows a lesser number of shares to be represented in this state, an examination of the former Foreign Corporation Act does not disclose any legislative provision which authorizes a refunder of fees in the event that the company reduced its business or property in Ohio and thus reduced the fraction upon which the "shares represented in this state" was based. Likewise, an examination of the present act discloses no statutory provision authorizing such refunder.

The rule is well established, that when a taxpayer has paid a tax voluntarily, he cannot recover the payment. *Whitbeck, Treasurer,* vs. *Minch,* 48 O. S. 210; *State ex rel. Pulskamp* vs. *County Commissioners,* 119 O. S. 504. The recitals contained in your inquiry assume that the payment under the former law was voluntary. I therefore make a like assumption, and am of the opinion that the foreign corporation is not entitled to a refunder or a credit, even though the first report filed under the present "foreign corporation act" may show that such corporation has a lesser number of shares represented in this state than the amount on which it has paid the excise, franchise or license tax under the former law.

It may be that you have in mind a case where a foreign corporation has paid such fee on a number of shares under the former law and upon the filing of its first report under the present act it is determined that it has a lesser number of shares represented in this state than that upon which it has paid the fee under the former act, and shall subsequently desire to qualify a greater number of shares in this state. What fee should be charged? Is such corporation then entitled to a credit for the amount of tax heretofore paid?

Section 8625-10, General Code, specifically states that a corporation licensed under the former act should, under the new act, be entitled to have such number of shares represented in this state as shall be determined from its first report under the present Foreign Corporation Act "but not more." Such section definitely fixes the number of shares of a foreign corporation authorized to be represented in this state. The next succeeding section (8625-11, General Code) contains the following language:

> "In the event that any report filed under this act subsequent to the first report shall disclose that any foreign corporation heretofore or hereafter licensed to transact business in this state has represented in this state a number of shares in excess of the number theretofore determined to be represented, the corporation shall pay an additional installment of the license fee based upon such number of additional shares and such

fee shall be the same as the fee which a domestic corporation, having an authorized number of shares equal to the number which such foreign corporation has theretofore been authorized to have represented in this state, is required to pay upon increasing its authorized number of shares by the number of such additional shares of such foreign corporation represented in this state. * *"

The only conclusion that I can deduce from these two sections is that Section 8625-10, General Code, definitely determines the number of shares of a foreign corporation authorized to be represented in this state, whether such shares so determined be in excess of, or less than that authorized by the payment of the fee under the former act, without the payment of an additional fee. In other words, from the language of the "Foreign Corporation Act" the evident intent of the legislature was to permit each licensed foreign corporation to start with a clean slate as determined from its first report, even though such corporation may have been doing a business in excess of that for which it had paid its tax, or less than that amount of business upon which it had so paid.

Specifically answering your inquiries it is my opinion that:

1. The provision contained in Section 8625-3, General Code, exempts public utility corporations from the provisions of the Foreign Corporation Act when they are engaged in this state in interstate commerce as a principal business as distinguished from an incidental business.

2. Any foreign corporation which was licensed to transact business in Ohio under the provisions of former Section 178, General Code, must be held to be licensed to transact business in Ohio, and to have represented in this state such number of shares as may be determined from its first report filed under the Foreign Corporation Act even though such corporation was exempt from complying with the provisions of former Sections 183 to 188, General Code.

3. By reason of the provisions contained in Sections 8625-10 and 8625-11, General Code, if from the first report of a foreign corporation filed under the "foreign corporation act", it is determined that such corporation is entitled to have a lesser number of shares represented in this state than that upon which it had paid the fees under the former act, such corporation is neither entitled to a refunder nor a credit by reason thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4809.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS RESIDENT ENGINEER OF LAWRENCE COUNTY, OHIO—B. E. McCOWN.

COLUMBUS, OHIO, December 12, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a bond upon which the name of B. E. McCown appears as principal and the Hartford Accident and Indemnity Company appears as surety, in the penal sum of $5,000.00, condi-