3316.

APPROVAL, BONDS OF CUYAHOGA FALLS CITY SCHOOL DISTRICT, SUMMIT COUNTY, OHIO—$33,000.00.

COLUMBUS, OHIO, JUNE 11, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3317.

FRANCHISE TAX—DOMESTIC CORPORATION OWNING CHATTELS PERMANENTLY LOCATED OUTSIDE OHIO—UNPAID BALANCES UPON CONDITIONAL SALE CONTRACTS RESPECTING SUCH CHATTELS INCLUDABLE IN CALCULATING TAX UNDER SECTION 5498, G. C.—WHEN UNPAID BALANCES ON INSTALLMENT LEASE CONTRACT RESPECTING SUCH CHATTELS INCLUDABLE.

SYLLABUS:

1. *The unpaid balance, whether due or not, upon a conditional sale contract made outside of Ohio, by an Ohio corporation in respect to a chattel permanently located in another state, must be included, in calculating the corporation's franchise tax under section* 5498, *General Code, as property owned by such corporation in Ohio. These items are to be figured at their actual as distinguished from their nominal value. Whether they are collectible or not is a matter going to their value.*

2. *As to whether the unpaid balances upon an installment lease contract made outside of Ohio by an Ohio corporation in respect to a chattel permanently located in another state must likewise be included for franchise tax purposes as property owned or used in Ohio, it is properly concluded that (a) they must be included if they are due and payable, (b) they must be included, though not yet due and payable, if the installment lease is really a subterfuge for a conditional sale, and (c) they are not includable, if they are not due and payable, in case the contract is a bona fide installment lease.*

COLUMBUS, OHIO, JUNE 11, 1931.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This opinion results from your request for my ruling as to whether, in calcuating, under section 5498, General Code, the franchise tax of The X Company, of Y, Ohio, a domestic corporation, certain items hereinafter mentioned may properly be classified as the company's *"property owned or used by it in Ohio."*

The X Company, whose factory is at Y, Ohio, markets its products throughout the country. This is facilitated by division offices which it operates in nine states. Said division offices, which, in turn, operate branch stores within their respective territories, are each conducted as separate units, and, to them, The X Company ships its products from its factory at Y, Ohio.

Pending their sale to customers, the products so shipped are carried on the books of the divisions at invoice values in merchandise stock inventory. All sales

are made either (1) under conditional sale contracts in which title to the article is retained by The X Company until the full purchase price is paid; or (2) under installment lease contracts which contain an option in the lessee to purchase the article for an agreed price, with the privilege of applying thereon all of the installments which had been paid as rental. After sale, the articles are carried on the books of the divisions at invoice prices less the credits paid thereon.

All of the merchandise, shipped to other states from Y, Ohio, remains, as far as the company is concerned, under the control of said divisions, and its physical situs is definitely and permanently established in the foreign state. When lessees or conditional vendees do not continue their payments and repossession is had, it is taken by the division office from which the sale was made, and the articles are placed back in the merchandise stock of that office for resale to other purchasers under similar forms of contracts. They are never returned to Ohio. (It appears that, of the $4,150,879.12 represented by such contracts, which were shown to be in force by the company's balance sheet of January 1, 1930, contracts totaling $511,490.89 were canceled between January 1, and June 30, 1930, and the articles covered thereby repossessed.)

The precise question to be determined is whether, in calculating, under section 5498, General Code, the franchise tax of The X Company, those items may properly be included as *property owned or used by said company in Ohio,* which represent the unpaid balances on the conditional sale and installment lease contracts made, under the circumstances above delineated, outside of Ohio.

Section 5498, General Code, after stating what, for the purposes of the franchise tax, the value of the issued and outstanding shares of stock of a corporation shall be deemed to be, provides:

> "The commission shall then determine as follows the base upon which the fee provided for in section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the value of *all the corporation's property owned or used by it in Ohio* and whose denominator is the value of all its property wheresoever situated; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted."
>
> "On the first Monday in June the tax commission shall certify to the auditor of state the amount determined by it through adding the two figures thus obtained for each corporation * * * ."

At this point, it is deemed best to consider more in detail the provisions of the types of contract used by The X Company, the printed blank forms of which are here in my possession. Consideration will first be given to the conditional sale forms. Two of these have been submitted, one being in use in California and the other in Michigan, but inasmuch as they are practically alike, I shall relate the provisions of the former and point out any material variances of the latter therefrom. Said blank form of contract substantially provides that:

> The undersigned (i. e., the purchaser) has this day received from

The X Company, a corporation under the laws of the State of Ohio, subject to the following conditions:

Style ..... Piano, number ..... with ..... for which the undersigned agrees to pay the sum of ..... Dollars, $..... cash, the receipt of which is acknowledged; $..... is allowed on said purchase price for ..... taken in trade, leaving a balance of $....., remaining unpaid, which balance, with interest at the rate of 8% per annum from date, payable monthly, the undersigned agrees to pay without demand to The X Company, or its assigns, at its office in San Francisco, California (the Michigan contract provides for payment at the Indianapolis, Indiana, office), in installments of ..... on the ..... day of each and every month hereafter, with interest, until said unpaid balance of $....., with interest as aforesaid, shall have been paid in full.

Title to said property shall remain in The X Company and shall not pass to the undersigned until all amounts herein agreed to be paid, with interest, or any judgment for the same, or any note given therefor, has been paid in full, whereupon The X Company will execute a bill of sale to the undersigned.

The undersigned agrees to pay all the taxes which may be assessed upon said property or the sale thereof.

The undersigned agrees to insure and keep insured, during the life of this contract, the above described property against loss by fire, for not less than the balance now unpaid on this contract.

Damage to or destruction of said property by fire or otherwise shall, however, not relieve the undersigned from this contract or from the obligation to pay the amounts herein agreed to be paid, but notwithstanding such damage or destruction, the undersigned agrees to pay the same.

Return of said property by the undersigned shall not cancel this contract unless said property is expressly so accepted in writing by The X Company and if the undersigned returns said property without the written consent of The X Company it may store the same for the account of the undersigned, and this contract shall remain in force.

The undersigned further agrees that should there be any default in the payment of any installment of the purchase price, or any interest thereon, or of any other amount herein agreed to be paid, when due, or should said property be destroyed by fire or otherwise, or in case of any violation of any term of this contract, The X Company may, at its option, declare all the remaining installments, with interest, at once due and payable; and also, at its option, may enter upon the premises where said property may be and take possession of and remove the same without legal process, and in such case, all payments theretofore made by the undersigned shall be deemed and considered as having been paid for the use of said property during the time the same remained in the possession of the undersigned and as compensation for depreciation in its value, and shall be retained by The X Company as such payment.

The rights herein secured to The X Company may be assigned by it, and its assignee or assignees shall be entitled to exercise all of the options and privileges herein secured to The X Company.

In a brief submitted by The X Company, the inclusion of such conditional sale items as property owned or used in Ohio is attacked on the grounds that:

1. Such items represent the value to the company of chattel property physically located in foreign states at the time of assessment.

2. The State of Ohio has no jurisdiction to tax tangible chattel property physically located without the state.

It may be conceded that Ohio can not directly tax tangible property which is permanently located in another state, but that principle is entirely irrelevant and inapplicable here. No attempt is being made to include the pianos themselves in the category of property owned or used in Ohio. Only the unpaid balances on said contracts are under consideration of inclusion. Between the two, there is a vast difference. The contention of The X Company is based upon the patent fallacy that, when it enters a conditional sale contract with regard to a piano, it still has nothing more than just a piano. This is exploded by the mere incredibility that the company having pianos to begin with, would engage in conditional sales so extensively if it did not gain some further, substantial, profitable, property rights thereby.

The word "property" as used in tax statutes has been held to mean everything of value that a person owns that is or may be the subject of sale or exchange or that when offered for sale will bring some price. Cooley on Taxation (1924 ed.), vol. 2, section 552, page 1213. For further definitions of *"property,"* see: *Watson* v. *Boston*, 209 Mass. 18, 23; *Wood* v. *Security Mut. Life Ins. Co.,* 198 N. W. (Neb.) 573, 575; *Groenendyk* v. *Fowler,* 204, Ia. 598, 600; *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S. 438; *Wapsie P. & L. Co.* v. *Tipton,* 197 Ia. 996, 1000. Seeing no reason why this definition does not properly interpret the word "property" as used in section 5498, it is believed that an analysis of the above related contract reveals that that instrument does create in the selling company additional valuable rights termed "property." In the most express terms, the purchaser promises to pay a fixed sum of money at a definite time. Such a promise, supported by consideration the existence of which here is apparent, creates an obligation—a right undeniably valuable and, of itself, a proper subject of barter and sale. Obviously this right is intangible property.

It is insisted that no distinctive, additional property rights are created because, in the event of non-payment, the company may choose to exercise the right of repossessing the piano itself, thereby losing the right to the payment of money, and because, until full payment has been made, it is conjectural as to which course the company may ultimately pursue. This contention overlooks several vital features of the contract. The purchaser makes an absolute promise to pay. He becomes legally obligated to make payment, and has no right to return the piano and thereby relieve himself of liability. On the other hand, the seller has absolutely no option of retaking the piano unless the buyer defaults. Except in that event, the seller can do nothing but avail itself of the intangible right to the payment of money. Even after default the vendor can enforce payment. To these payments it is entitled even in the event of the destruction of the piano. It is difficult to understand by what juggling of reason it can be said that these intangible rights do not possess the qualities of property, namely, merchantability and value. Certainly if their deprivation were threatened by such an arbitrariness as smacked of a bold flouting of the due process clause, the conditional seller would be the first to demand their protection as property under the Fourteenth Amendment.

The truth of the matter is that, while the conditional seller has some rights in the piano itself, it also has other, intangible rights. The two are not inimical.

Their coexistence is no more anomalous in the case of a conditional sale than in the case of a mortgage. The express reservation by the company of the power to assign its rights under the contract would mean little—for there would be nothing attractive to assign—if it had no more than just a right in the piano which was destined to vanish when the buyer fully complied with his contract. As an actuality, these intangible properties do exist under the law. The X Company has merely confused their *existence* with their *value.* Whether they are practically, as distinguished from theoretically, enforcible, or whether business expediency may dictate their being given up and possession being retaken, is a matter which, like insolvency, *goes to the value of the right. Singer Sewing Machine Company* v. *Cooper,* 263 F. 994, 999. See also, *Bank* v. *Hine,* 3 O. S. 1, 25; *Cameron* v. *Cappeller,* 41 O. S. 533, 534-535; *Martin* v. *Wise,* 183 Ind. 530, 534. Notice that it is the *"value"* of the corporation's property which, under section 5498, is the thing to be determined. This, I believe means the actual, as distinguished from the nominal, value. Mere difficulty of determining actual worth is no excuse for permitting escape from taxation. *Pryor* v. *Marion County,* 140 Tenn. 399, 406.

That the intangible rights in question are not too uncertain and indefinite to constitute taxable property is substantiated by a wealth of analogy. Thus, as is stated by Cooley on Taxation, vol. 2, section 575, pages 1245-1247:

> "* * * a contract for the sale of land, or the sums owing on the contract, is taxable as the property of the vendor, although the land itself is also taxed, and *notwithstanding it gives him an option to terminate the contract upon default of the vendee* or that the amount due is not represented by a note or a purchase money mortgage. A contract to sell land, *even where the vendor retains the title until payment in full,* is taxable as a credit belonging to the vendor. * * *. Contract rights are taxable as property, provided they have value, although nothing is due thereon when taxed." (Italics the writer's.)

Griffin v. *Board,* 184 Ill. 275; *Williams* v. *Osage County,* 84 Kan. 508; *Rampton* v. *Dobson,* 156 Iowa 315; *Martin* v. *Wise,* 183 Ind. 530; *Clark* v. *Horn,* 122 Iowa 375; *Motzner* v. *Bogan,* 89 Kan. 496; *Harris* v. *County,* 89 Kan. 661; *Johnson* v. *Woodburn,* 113 Kan. 505. See also, *McGregor* v. *Ireland,* 86 Kan. 426; *Golden* v. *Munsinger,* 91 Kan. 820.

Again, it has been held that a certificate of purchase at a sheriff's sale, entitling the holder to the amount of his bid and interest if the premises should be redeemed within a specified time, or if not so redeemed, to a deed for such premises, is subject to taxation as property, in spite of the uncertainty as to whether the purchaser will ultimately receive a deed or the redemption money. *Wedgbury* v. *Cassel,* 164 Ill. 622; *Miller* v. *Vollmer,* 153 Ind. 26; Cooley on Taxation, vol. 2, section 573.

Moreover, it has been determined that a judgment is taxable even though it is involved in a proceeding in error, in which, due to novel and difficult questions of law being raised, its affirmance is uncertain, such uncertainty merely having a bearing upon the value of the judgment. *Cameron* v. *Cappeller,* 41 O. S. 533. For further analogy see *Home Fire Ins. Co.* v. *Lynch,* 19 Utah 189.

Not only do the unpaid balances on conditional sale contracts constitute property, as determined both by the definition of that term and by pertinent analogies, but the authorities which deal directly with the nature of these particular items clearly treat them as property. Prof. Williston classifies them, not

merely as property, but as that particular kind of property known as a "debt", saying:

> "In the case of a conditional sale * * * the seller would doubtless be universally allowed to recover the full price. The only justification for such a result can be that the essential incidents of property have already been transferred to the buyer, when possession was delivered to him with the right to use the goods as his own, so that there is an *absolute debt* from that time. Such a result identifies the transaction with a mortgage, the vital feature of which is the *existence of a debt* irrespective of the property held for security." Williston on Sales (1924 ed), vol. 1, section 333, pages 776-777. (Italics the writer's.)

That a debt is property in the hands of the creditor hardly needs citation of authority. *Kirtland* v. *Hotchkiss,* 100 U. S. 491, 498; State Tax on Foreign-Held Bonds, 15 Wall. 300, 320. It is equally indisputable that an obligation, in order to constitute a debt, need not be presently due.

The few recorded cases which touch upon the taxation of unpaid balances on conditional sale contracts support the proposition that they constitute such property as can be taxed. I have found no case denying this right. In *Stillman* v. *Lynch,* 56 Utah 540, the court said: (pages 549-550)

> "What are called conditional sale contracts may or may not be taxable. It depends wholly on the terms of the contract and whether the purchaser has promised to pay the purchase price."

Clearly, the contract of The X Company is taxable within the rule stated, the purchaser expressly promising to make payment. The Utah court, in implying that a conditional sale contract is not taxable if the purchaser does not promise to pay, evidently refers to a type of contract termed conditional in the broad, as distinguished from the technical, sense, according to which possession is delivered on a down payment and title is to pass if certain payments, which are not promised, are in fact made.

In *State* v. *White Furniture,* 90 So. (Ala. App.) 895, affirmed in Ex parte State, 206 Ala. 575, question was presented as to whether conditional sale contracts are subject to taxation as property. The court declared that such a transaction gives rise to the relation of debtor and creditor, creating a solvent credit in favor of the seller which would be subject to taxation were it not for a statute which expressly exempted all solvent credits from taxation. The Supreme Court said: (page 576)

> "* * * the vendor's taxable interest, if not exempted by law, is the money value of the purchase money debt, regarded as a solvent credit, while the vendee's taxable interest is the general property right.
>
> No doubt this was the actual mode of assessment, prior to the enactment of the present law * * * exempting such credits from taxation."

Singer Sewing Machine Company v. *Cooper,* 263 F. 994, a case decided by the United States District Court for the Southern District of Ohio, which involved the taxability under Ohio law of the unpaid balances upon conditional sale contracts and of the chattels conditionally sold, is squarely in point. In the opinion, rendered by Judge Peck, it was said at page 998:

"It must therefore be concluded, upon looking through these transactions to their real character, in the light of the evidence before the tax commission at the time of the assessment complained of, and before the court, that by sections 5369 to 5372, inclusive, General Code of Ohio, the sewing machines in question were required to be listed by the purchasers as the owners thereof, and that *the balances of the purchase price unpaid on tax listing day were assessable against the vendor.* Thus each was required to pay upon what he had; the vendee upon the machine in his possession and under his control and use, notwithstanding that his title might be defeated, and *the vendor upon the credit owned by it.*" (Italics the writer's.)

At this juncture it should be pointed out that the promise of payment in a conditional sale does not have to be embodied in a negotiable instrument in order to qualify as property. True, if it were embodied in such an instrument, it might, as a practical matter, be a more valuable right because of the power of negotiation to a holder in due course, thereby obviating certain defenses which might otherwise preclude collection, and because of the greater facility in reducing a negotiable claim to judgment. But to say that the absence of a negotiable instrument renders the seller's claim for payment utterly valueless and unsalable is simply to err. See *Griffin* v. *Board,* 184 Ill. 275, 278.

Concluding, then, that unpaid conditional sale items constitute intangible property which can be taxed, further questions arise as to whether such items, as the ones in question, which emanate from contracts made in other states, have a taxable situs in Ohio, and whether they are required to be included as property owned or used by said corporation in Ohio in calculating its franchise tax. Both of these questions I am disposed to answer in the affirmative on the basis of Opinion No. 2207 (and the authorities therein cited) rendered to you on August 5, 1930, wherein was reviewed fully the law in respect to the taxable situs of intangible property. It there appeared that an Ohio corporation transacted *all* of its business *outside* of Ohio, and that all of its physical property, including its factory and business office, was located *outside* of Ohio. It was held, however, that accounts, bills receivable and other credits owned by such corporation, which had accrued in other states, where they may have acquired a business situs subjecting them to taxation there, had, nevertheless, a taxable situs in Ohio and were required to be calculated as property owned by such corporation in this state in determining its franchise tax. To the authorities therein cited may be added *Connor* v. *Wilson,* 6 O. Dec. Repr. 944; Cooley on Taxation, vol. 2, section 467. Further, it may be pointed out that the taxable situs of an intangible right is not altered by the mere fact that it is embodied in a bond or note, or that it is secured by tangible property which is permanently located in another state. *Baldwin* v. *Missouri,* 281 U. S. 586; *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Lee* v. *Dawson,* 8 O. C. C. 365, 375; *Connor* v. *Wilson,* 6 O. D. Repr. 944.

Now I come to a consideration of the company's so-called installment lease contract. The blank form submitted provides substantially as follows:

This agreement, made this ———— day of ———— A. D. ————, between The X Co., of Y, Ohio, Lessor, and ———— of ————, Lessee, witnesseth that:

Lessor hereby leases to Lessee, one (Style) ———— Piano, No. ————, delivered into the possession of Lessee at the above address, (where the same is to remain during the term of this lease, unless the

consent of Lessor to its removal is first obtained) for the term of ———— months, and for the use of said instrument Lessee agrees to pay to the order of Lessor, at its office, ———— Street, Y, Ohio, or to its assigns, ———— Dollars on ———— 19, ——, and ———— Dollars on the ———— day of each month thereafter, until the expiration of said term.

Lessee agrees to pay to Lessor punctually the said rent and hire on the days and times above specified; to take good care of said property and to return the same at the expiration or sooner determination of this lease in as good condition as reasonable wear and use will permit.

In case default be made in any of the payments of rental above agreed upon, or in case of the breach of any of the covenants aforesaid, Lessee agrees forthwith to deliver said property to Lessor, and to permit Lessor or its agents to enter into or upon the premises where said property may be, and without hindrance to take away the same. It is further agreed that all money paid or payable on account of rents or otherwise to Lessor under the terms of this lease, shall be retained or recoverable by Lessor as rent and hire for the use of said property without abatement or reduction.

It is further agreed that if Lessor shall repossess said property hereby leased by any action at law or otherwise, then Lessor shall be entitled to collect all rentals due under this lease up to the date of such repossession for the use of said property while in the possession of Lessee.

In case default be made at any time in the payment of any installment of rent, then, at the option of Lessor, the entire balance of rent for the remainder of the term of this lease shall forthwith become due and payable.

It is further agreed that if at any time during the term of this lease, or at the end thereof, Lessee desires to purchase said property, Lessee shall have the option to do so, and may purchase the same for ———— Dollars. In the event Lessee shall exercise said option, and shall purchase said property prior to or immediately at the end of the term of this lease, Lessor will refund to Lessee all rentals theretofore paid under this lease, less a brokerage charge of ½% per month, such refunder to be applied by Lessor as a credit on said purchase price.

It is also expressly agreed that no title, legal or equitable, other than that of Lessee, shall vest in the Lessee during the existence of this lease.

One can not categorically make an answer as to whether the unpaid balances on installment lease contracts filled out over the above form are necessarily includable, in determining the franchise tax, as property owned or used in Ohio. That depends upon the circumstances.

First, it is clear that, with regard to such balances as are *already due and payable,* though actually unpaid, credits arise which, being intangible personalty having a situs at the company's domicile in Ohio, are embraced in the category, for franchise tax purposes, of property owned in Ohio.

There remains to be considered the manner in which unpaid balances, *not yet due,* are to be treated. This turns entirely upon the nature of the particular contract as it is moulded by the terms inserted in the blank spaces. It is a matter of

common knowledge that merchants frequently devise contracts in the cloak of installment leases in order to hide creatures which are palpably conditional sales. Concerning these, it is said in Williston on Sales, section 336:

> "The distinction between an ordinary lease and a conditional sale is obvious. A lease contemplates only the use of the property for a limited time, and the return of it to the lessor at the expiration of that time. A conditional sale contemplates the ultimate ownership of the propery by the buyer, together with the use of it in the meantime. Sometimes, however, leases contain options giving the lessee a right to buy the leased property, and again the amount of rent may be so fixed as to reimburse the lessor not only for the use of the property and its possible deterioration, but also in large part, or wholly, for the total value of the property.
>
> Sellers desirous of making conditional sales of their goods, but who do not wish openly to make a bargain in that form, for one reason or another, have frequently resorted to the device of making contracts in the form of leases either with options to the buyer to purchase for a small consideration at the end of the term, provided the so-called rent had been duly paid, or with stipulations that if the rent throughout the term is paid, title shall thereupon vest in the lessee. It is obvious that such transactions are leases only in name. The so-called rent must necessarily be regarded as payment of the price in instalments since the due payment of the agreed amount results, by the terms of the bargain, in the transfer of title to the lessee. This has been clearly recognized and many of the statutes relating to conditional sales in express terms include leases within their scope. Apart from statutes courts have disregarded the form of the transaction and have held that where payment of so-called rent nearly or quite pays the price of the goods the bargain is conditional sale and subject to the rules governing that kind of transaction."

Hence, if, in the filled-in contract, the amount for which the option of purchase may be exercised is the same as the total of the installments promised to be paid as rent, the transaction is clearly a conditional sale *(Singer Sewing Machine Company* v. *Cooper,* 263 F. 994), and the unpaid balances thereon, though not yet due, must, as determined above in considering conditional sales, be classified, for franchise tax purposes, as property owned in Ohio. Likewise, although the amount stipulated in the purchase option may actually exceed the sum of the installments promised as rent, still if it is apparent that the latter really reimburses the company, not only for use and deterioration, but also in a large part for the total value of the property, and that the difference between what is promised as installment rent and what is necessary to effect a purchase is small and incommensurate as far as the purchase price of such an article is concerned, then the contract is substantially a conditional sale, and the unpaid balances thereon, although not due, must be included under property owned in Ohio.

This leaves alone for consideration the unpaid rent balances, not due, upon *bona fide installment leases,* where the installments are not out of proportion to the value of the use of the leased article and where the additional sum to be paid in case of the lessee's advantaging himself of the purchase option is not wholly incommensurate to the value of the article itself. If one were to listen only to the dictate of logic, there is strong reason to say that the right to the promised rent, though not due, is an intangible claim for money, and that it is therefore attached to the Ohio domiciliary situs. However, as a practical matter, courts have

been disposed to hold, at least as to real estate, that claims for unaccrued rent are not such property as may be separately taxed, it being considered in the case of land that such claims are incorporeal hereditaments—a part of the land itself. *State* v. *Royal Mineral Association,* 132 Minn. 232. Cooley on Taxation, vol. II, section 575, page 1248. By the force of pointed analogy from which it does not seem best to deviate, it follows, therefore, that claims for unaccrued rent upon *bona fide* installment leases of tangible personalty permanently located in another state are identified with the leased property itself and do not constitute property owned or used in Ohio.

In view of the foregoing, I am of the opinion that:

1. The unpaid balance, whether due or not, upon a conditional sale contract made outside of Ohio by an Ohio corporation in respect to a chattel permanently located in another state, must be included, in calculating the corporation's franchise tax under section 5498, General Code, as property owned by such corporation in Ohio. These items are to be figured at their actual as distinguished from their nominal value. Whether they are collectible or not is a matter going to their value.

2. As to whether the unpaid balances upon an installment lease contract made outside of Ohio by an Ohio corporation in respect to a chattel permanently located in another state must likewise be included for franchise tax purposes as property owned or used in Ohio, it is properly concluded that (a) they must be included if they are due and payable, (b) they must be included, though not yet due and payable, if, as determined by the principles above discussed, the installment lease is really a subterfuge for a conditional sale, and (c) they are not includable, if they are not due and payable, in case the contract, as determined by the rules given above, is a bona fide installment lease.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3318.

WHETHER OR NOT BID SUBMITTED BY THE SKINNER ENGINE COMPANY OF ERIE, PENNSYLVANIA, FOR ENGINES WITH AUXILIARY VALVES FOR THE POWER HOUSE AT LONGVIEW STATE HOSPITAL, CINCINNATI, OHIO, MAY BE CONSIDERED.

COLUMBUS, OHIO, June 12, 1931.

HON. HOWARD L. BEVIS, *Director of Finance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication requesting advice as to whether a bid submitted by the Skinner Engine Company of Erie, Pennsylvania, for engines with auxiliary valves for the Power House at Longview State Hospital, Cincinnati, Ohio, can be considered by the State Architect and Engineer in awarding the contract for such equipment, in view of the fact that said bid was submitted on the substitution sheet of the form of proposal.

From an examination of the specifications for the engines and generators, it seems that bids were invited for the furnishing of two 200 K. W. and one 150 K. W. engine generator units, said engines to be either three single-cylinder horizontal or three multiple cylinder vertical unaflow engines. See page 11 of specifications. It further appears that auxiliary exhaust valves were called for on all engines. See section 14 (c), page 14 of the specifications.