pared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
EDWARD C. TURNER.
Attorney General.

475.

CORPORATIONS—SUBSTITUTE SENATE BILL NO. 12, 87TH GENERAL ASSEMBLY DISCUSSED.

SYLLABUS:

1. *Under the provisions of Substitute Senate Bill No. 12 a foreign corporation would be admitted to do business in Ohio upon filing the application with the required information and paying the fee of fifty dollars, as provided in Sections 2 and 3 of the bill.*

2. *A state may not impose a tax upon the right of foreign corporations, which have been admitted to do business in the state, to exercise their corporate franchises therein, which discriminates among the foreign corporations themselves or as between foreign corporations and domestic corporations.*

3. *The fees or taxes authorized by Sections 5, 7 and 8 of Substitute Senate Bill No. 12 are imposed upon foreign corporations which have been admitted to do business in the state, and since in the imposition of such fees or taxes there might be a discrimination among such foreign corporations and between such foreign corporations and domestic corporations exercising the same privilege, said sections would be in a proper case subject to attack as being in violation of the equal protection clause of the Constitution of the United States.*

4. *Formal defects in Substitute Senate Bill No. 12 discussed.*

5. *In fixing a strictly "entrance fee" for foreign corporations, there is no objection to the method adopted in Section 5 of the bill, i. e., ten cents per share on the number of such corporations' shares of authorized capital stock employed in this state. The cases recently decided by the Supreme Court of Illinois under the caption of O'Gara Coal company vs. Emmerson are not apposite on this point.*

COLUMBUS, OHIO, May 10, 1927.

HON. ALLAN G. AIGLER, *Chairman Judiciary Committee, The Ohio Senate, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

> "Substitute Senate Bill No. 12 passed by the General Assembly last week provides that foreign corporations shall pay an initial qualifying fee based on the authorized shares. The bill as finally passed is in substantially the same form as original Senate Bill 12 introduced by me and drafted by the special corporation committee of the Ohio State Bar Association with the exception of the method as to calculating the fee to be charged.

I fully intended to talk with you regarding Substitute Senate Bill 12 before it was put on the calendar for final passage, and with the idea of getting your view as to the constitutionality of the method established in the Substitute Bill for calculating the initial fee to be paid by foreign corporations.

Mr. William V. Bennett of the Secretary of State's office drafted Substitute Senate Bill No. 12, and called my attention to a decision of the Supreme Court of the United States which seemed to make quite clear the right of the state to base the initial fee upon the authorized shares of a foreign corporation. I do not have in my office at Bellevue a reference to the Supreme Court case and so am writing Mr. Bennett this afternoon and asking him to submit to you any information that he may have in support of the constitutionality of the fee as fixed in Substitute Senate Bill No. 12.

I will be very grateful if you will be able to furnish us an opinion not later than next Monday when the General Assembly reconvenes after the recess regarding the constitutionality of the provision in Substitute Senate Bill No. 12 fixing the initial fee for foreign corporations. Mr. E. J. Marshall of Toledo has called my attention to the case of O'Gara Coal Company vs. Emmerson, decided April 20th, 1927, by the Supreme Court of Illinois, and wherein Mr. Marshall says the Illinois Supreme Court holds that the amount of capital stock which foreign corporations are authorized to issue by the states of their origin is not a reasonable basis for the purpose of determining the amount of the initial fee."

The title of Substitute Senate Bill No. 12 reads as follows:

"To prescribe the terms and conditions upon which foreign corporations may transact business in Ohio and to repeal Sections 178 to 191, both inclusive, ,and Section 5508 of the General Code."

Section 1 of the bill provides that:

"Before any foreign corporation for profit transacts business in this state it shall procure from the Secretary of State a certificate that it has complied with the requirements of law to authorize it to do business in this state. No such certificate shall be issued if it appears that the name of the corporation applying for admission is likely to mislead the public, or that the name is not such as to distinguish the corporation from any other corporation authorized to do business in this state, unless the written consent of such other corporation signed by its president or a vice-president is filed with the Secretary of State. Such certificate shall not be issued unless the business which such foreign corporation proposes to carry on within this state is such as might be carried on by a corporation organized under the laws of this state." (Italics the writer's.)

Section 2 provides that:

"Before issuing such *certificate* the Secretary of State shall require such foreign corporation to file in his office. * * * "

a copy of its charter with amendments and an application. As part of the application there is filed an appointment of a person upon whom process may be served.

Section 3 provides for a fee of fifty dollars ($50.00) for filing the above papers and *issuing the certificate.*

Upon compliance with these three sections the corporation is authorized to do business in the state, and is given a certificate to that effect by the Secretary of State.

Section 4 of the bill provides in part that:

"Within the seventh calendar month following the month within which such corporation *is admitted to do business in this state,* it shall present for filing in the office of the Secretary of State true copies of all amendments to its charter or articles not previously filed and an initial qualification statement under the oath of the president, vice-president, secretary or treasurer setting forth:

* * * * * * * *

5. The number of shares of authorized capital stock of the corporation and the par value, if any, of each share.

* * * * * * * *

10. The number of such corporation's share(s) of authorized capital stock employed in this state which number shall be deemed to be such proportion of the corporation's total number of shares of authorized capital stock as the sum of:

(a) The corporation's total amount of assets located or used in this state on the last day of the month preceding the month within which such statement is required to be filed; and

(b) The total amount of business done in this state by such corporation during the six months preceding the month within which such statement is required to be filed bears to the sum of:

(a) The total amount of assets of such corporation wherever situated on the last day of the month preceding the month within which such statement is required to be filed; and

(b) The total amount of business done by such corporation during the six months' period preceding the month within which such report is required to be filed."

Section 5 provides that:

"The Secretary of State shall charge and collect from such foreign corporation as an initial qualification fee, ten cents per share on the number of such corporation's shares of authorized capital stock employed in this state. The initial qualification fee so computed shall not be less than ten dollars in any case; and shall be certified by the Secretary of State to such corporation at its principal office in this state forthwith after the presentation for filing of such statement, and shall be paid to the Secretary of State within thirty days after the certification, whereupon such statement shall be filed."

Section 7 provides:

"The payment of such initial qualification fee shall entitle a foreign corporation *hereafter admitted to do business* in this state to employ in this state that number of its shares of unauthorized capital stock on which such fee was computed. If any annual franchise tax report of any such corporation to the Tax Commission shall show that it is employing in this state, a number of shares of its authorized capital stock in excess of the number on which it has theretofore paid qualification fees, the Tax Commission shall charge and collect in respect to such excess an additional qualification fee to be computed in the same manner as the initial qualification fee, except that there shall be no minimum additional qualification fee. Such additional qualifica-

tion fees shall be certified, brought to the notice of such corporation and paid to the treasurer of the state in the manner and at the times provided in respect to annual franchise taxes."

Section 8 makes the provisions of the bill apply to foreign corporations "heretofore admitted to do business in the state," that is, prior to the effective date of the bill if enacted.

Other provisions of the bill have a bearing upon the question, and will be discussed later.

Subject to the qualifications that a state may not (1) exclude from its limits a foreign corporation engaged solely in interstate or foreign commerce, (2) exclude a foreign corporation which is an agency or instrumentality in the employment of the Federal Government or (3) require as a condition of admission, that a foreign corporation surrender any rights secured to it by the Federal Constitution, the right of a foreign corporation to do business in this state is a matter of legislative discretion, and the state may impose such restrictions thereon as it may desire.

In *Ashley* vs. *Ryan,* 153 U. S. 436, it is said:

"The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that state's consent they could not have been procured."

In this case the court quotes and approves the following from the case of Paul v. Virginia, 8 Wall. 168:

"Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely. * * * "

In the recent case of *Hanover Fire Insurance Co.* vs. *Carr,* 77 Law ed. 224, the Supreme Court of the United States reaffirms this principle, and points out the third qualification above mentioned as follows:

"It was settled in the Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274, Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357, Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972, and Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup, Ct. Rep. 403, that foreign corporations cannot do business in a state except by the consent of the state; that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the state, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the constitution of the United States may be infringed."

The particular provision of the United States Constitution with which we are concerned here is that part of Section 1 of Article XIV, which provides that:

" * * * nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

This provision by its terms applies only to persons *within the jurisdiction of the state.* Since a foreign corporation seeking admission is not such a person, it is not protected by that provision, and cannot complain of conditions placed upon its admission into the state on the ground that such provisions discriminate between it and domestic corporations, or even between it and other foreign corporations.

In *Hanover Fire Insurance Co.* vs. *Carr,* supra, the court says:

> "With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; * * * "

However, the court says in the same paragraph:

> " * * * but after its admission the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."

The decision of your question, therefore, turns upon whether a corporation which has complied with Sections 1, 2 and 3 of the bill is a foreign corporation seeking admission, or is a corporation which has been admitted to do business, and which, therefore "stands equal and is to be classified with domestic corporations of the same kind."

We must recognize that the use of ten cents per share as the method of determining the amount of the fee does create discrimination. If it be a fee prescribed as a condition to the right to come into the state, such discrimination is permissible. If it be a tax upon the right to do business after admission, or a fee or tax upon the privilege of continuing to exercise its corporate franchise after being once admitted, such discrimination is illegal.

The attack upon this bill if it should become a law in its present form would undoubtedly be of the same nature as that in the case of *Hanover Fire Insurance Co.* vs. *Carr,* supra, viz., that the measure is not "a burden imposed by the state for the license or privilege to do business in the state" but is "a tax burden which, having secured the right to do business, the foreign corporation must share with all corporations and other taxpayers in the state." The bill must be examined to determine whether it will stand the test laid down in the Hanover case. In the opinion in that case Mr. Chief Justice Taft says:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state."

In the Hanover case the court quotes the following from the earlier case of *St. Louis Southwestern R. Co.* vs. *Arkansas,* 235 U. S. 350:

> "But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not depend-

ent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

An analysis of this bill reveals that it is particularly open to attack on the ground that the so-called fee is in fact a tax for revenue on corporations which have been admitted to do business in the state.

Upon compliance with the provisions of Sections 1, 2 and 3, a corporation:

(1) Is admitted to do business in the state.

This is not only apparent from the whole plan of the bill but from express provisions in the bill. For instance, in Section 4 is found the following language:

"Within the seventh calendar month following the month within which such corporation is *admitted to do business in this state.*"

Section 7 specifies what a foreign corporation which has been "admitted to do business in this state" after the passage of this act, may do upon the payment of the qualification fee.

(2) It receives a certificate of compliance.

By the express terms of Section 1 this is "a certificate that it has complied with the requirements of law to authorize it to do business in this state."

(3) It may solicit or transact business in the state free from the penal provisions of Section 13 of the bill.

(4) It may sue in the courts of the state upon its contracts.

(5) At least for six months its property is not subject to process of attachment on the ground that it is a foreign corporation.

Aside from the one provision of exemption from attachment contained in Section 9 of the bill none of the privileges which it secures by compliance with Sections 1, 2, and 3, are taken from it if it fails to comply with the provisions of Sections 4, 5 and 7, being the sections requiring the filing of the additional statement and the payment of the fees.

It still retains its certificate of qualification and there is no provision for the revocation of it. Even the provision originally contained in Section 178, General Code, for revocation of the certificate upon failure to appoint a resident agent for the purposes of service of process has been omitted from the present bill.

The only limitations upon its right to solicit or transact business are the penal provisions of Section 12. Being a penal section this must be strictly construed.

The first paragraph of this section reads as follows:

"Any foreign corporation, *required to comply with the laws of this state to authorize it to do business in this state,* which solicits or transacts business in this state without so complying, or after its certificate of authority has been revoked by the Secretary of State as provided by law, and any person who solicits or transacts business in this state on behalf of such foreign corporation, shall be fined not less than ten dollars nor more than one thousand dollars." (Italics the writer's.)

When a foreign corporation has filed its initial application and paid its fifty dollar fee it has complied with the laws of this state to authorize it to do business in this state. The provision of this section with reference to the revocation of its certificate of authority means nothing because there is no provision for the revocation of such certificate. Being in the bill, however, this language strengthens the proposition

that the penal provisions of Section 13 cannot be applied to a foreign corporation which has secured such a certificate, even though it has not complied with Sections 4, 5 and 7.

The second paragraph of Section 13 provides:

> "No foreign corporation *required to comply with the laws of this state to authorize it to do business in this state* shall bring an action in this state upon any cause of action arising in this state, or upon any contract made by it in this state, unless, prior to accrual of such cause of action or the execution of such contract, it has *procured the requisite certificate* from the Secretary of State and its authority to do business in this state has not been revoked." (Italics the writer's.)

This provision is made to rest squarely upon the possession of the certificate. There is no certificate provided for in the bill except that received by a foreign corporation upon its compliance with Sections 1, 2 and 3 of the bill and the only payment necessary therefore is fifty dollars.

Section 9 of the bill provides:

> "If a foreign corporation *complies with the provisions of the preceding sections* it shall not be subject to process of attachment under any law of this state upon the ground that it is a foreign corporation or non-resident of this state."

Since the protection afforded by this provision is made to depend upon compliance with "the provisions of the preceding sections" the corporation would lose this protection upon failure to file the additional report required by Section 4 and pay the tax required by Sections 5 and 7.

Considering the substance rather than the form of the bill in question, what would be its operation and effect and the express terms thereof, it is difficult to reach the conclusion that the fees are anything other than a tax upon the right of a foreign corporation already admitted to continue to exercise its corporate franchise. This being true, the discrimination which the bill would create both as among foreign corporations themselves and as between foreign corporations and domestic corporations would render the act unconstitutional as being in conflict with the provisions of Section 1 of Article XIV of the Constitution of the United States above set out.

The Supreme Court of Illinois in the consolidated cases of the *O'Gara Coal Co. et al.* vs. *Emmerson, Secretary of State,* decided April 20, 1927, has apparently taken the same view of a provision of the laws of Illinois similar to that contained in Section 7 of this bill.

With reference to the attempt to impose upon a foreign corporation already admitted to do business in Illinois a further fee for additional capital used in the state based upon the authorized capital stock of the corporation, the corresponding tax upon domestic corporations being based upon the capital stock issued and outstanding, the court said:

> "Sections 101 * * * as applied to the appellant in these five cases, was in violation of * * * the guarantee of the equal protection of the laws by the Fourteenth Amendment."

That this bill would create discrimination as between foreign corporations, becomes apparent from the following illustration: Suppose two foreign corporations have an equal amount of property and business in Ohio and an equal amount of

property and business everywhere. One has an authorized capital of 10,000 shares, the other of 20,000 shares. The privilege extended to one by the state is of the same value as that extended to the other, yet one pays twice as much fees or taxes as the other.

Illustrations might be multiplied to show much greater discrimination between corporations enjoying exactly the same privilege, but one will suffice.

In connection with Section 8 of the bill by which the terms of the bill are made applicable to foreign corporations heretofore admitted to do business in the state, your attention is directed to the following language of Mr. Chief Justice Taft in the case of *Hanover Fire Insurance Co.* vs *Carr,* supra:

> "In the present case there is no such permanent investment in the State of Illinois as there was in the Greene Case in Alabama, but the averments of the bill show that the complainant has from year to year secured renewal of its license in the state of Illinois, and has through many years past built up a large good will in the state of Illinois and has associated with it a large number of agents in the various counties of the state, whose connection with it has resulted in a large and profitable business to the complainant, and that it has large numbers of records containing information respecting its policy holders, the character and nature of its policies, and other records, the value of all of which would be destroyed if excluded from the state by a denial of the equal protection of the laws."

This case was quoted extensively and followed by the Supreme Court of Ohio in the cases of *State ex rel. Insurance Companies* vs. *Conn, Supt. of Insurance,* 116 O. S. 155; Vol. XXV, The Ohio Law Bulletin and Reporter, May 2, 1927, the second syllabus in which reads as follows:

> "Where an insurance company, not organized under the laws of this state, *has complied with the conditions precedent to the right to do business in the state, and, having been admitted, has built up an insurance business covering a period of years,* and is an applicant for a renewal of the certificate to so continue in business, a part of a statute requiring the refusal or revocation of such certificate unless the expense of management of such company is 30 per cent or less of its income from premiums, assessments, and membership fees, with which requirement it is unable to comply and continue business in this state, while domestic insurance companies doing precisely similar business are not limited in expense of management, such statute, as between such companies, one a citizen and the other a *quasi* citizen of the state, amounts to an unreasonable classification and is in contravention of the Fourteenth Amendment of the Federal Constitution. *Hanover Fire Ins. Co.* vs. *Carr, et al.,* 272 U. S. ————, 47 S. Ct., 179, 71 L. Ed., ————, decided November 23, 1926, followed." (Italics the writer's.)

The language used by the Supreme Court of the United States in the Hanover case and by the Supreme Court of Ohio in the insurance cases, supra, furnishes further illustration of the tendency of courts to get away from the early theory of the absolute rights of the states in dealing with foreign corporations and to consider measures of this character from the standpoint of fairness to the corporation.

From the foregoing discussion the following conclusions may be stated:

1. Subject to the qualifications that a state may not exclude from its limits a foreign corporation engaged solely in interstate or foreign commerce, or a foreign corporation which is an agency or instrumentality in the employment of the govern-

ment of the United States and may not require as a condition of admission to do business in the state that a foreign corporation surrender any rights secured to it by the Constitution of the United States, a state may impose such conditions as it may desire upon the admission of a foreign corporation to do business in the state, without regard as to whether or not discrimination is created as among the foreign corporations themselves or as between foreign corporations and domestic corporations. The equal protection clause of the Constitution of the United States being limited to persons *within the jurisdiction* of the state, does not apply to a foreign corporation which has not yet been admitted to do business in the state.

2. After a foreign corporation has been admitted to do business in the state, the equal protection clause of the Constitution of the United States may be invoked by such corporation, and in the imposition of taxes upon either the privilege of continuing to exercise the corporate franchise within the state or upon the right to do business in the state, a state cannot discriminate as among such foreign corporations or between such foreign corporations and domestic corporations.

3. Looking through the form to the substance, considering what will be the operation and effect of the bill if enacted into law, and in view of the express terms of the bill, a foreign corporation is admitted to do business in Ohio upon compliance with Sections 1, 2 and 3 of Substitute Senate Bill No. 12.

4. The provisions of Sections 4, 5, 7 and 8 of Substitute Senate Bill No. 12 therefore impose a tax upon foreign corporations already admitted. Since the basis of computing the tax might product discrimination as between foreign corporations enjoying the same privilege as well as between foreign corporations admitted to do business and domestic corporations, the bill, if enacted, would be subject to attack in a proper case under the equal protection clause of the Constitution of the United States.

5. In fixing a strictly "entrance fee" for foreign corporations, I see no objection to the method adopted in Section 5 of the bill, i. e., ten cents per share on the number of such corporation's shares of authorized capital stock employed in this state. The cases recently decided by the Supreme Court of Illinois under the caption of *O'Gara Coal Company* vs. *Emmerson* are not apposite on this point.

In view of the conclusions above set forth, it is deemed unnecessary further to comment on the formal defects of the bill indicated in this opinion, or to point out other defects of like nature existing in the bill as submitted.

Respectfully,
EDWARD C. TURNER,
Attorney General.

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APPROVAL, FINAL RESOLUTION ON ROAD IMPROVEMENT IN GUERNSEY COUNTY—I. C. H. NO. 349, CAMBRIDGE COSHOCTON ROAD.

COLUMBUS, OHIO, May 11, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works, Columbus, Ohio.*