Upon examination of this lease I find that the same has been properly executed by you, as Superintendent of Public Works and as Director of this department, and by the Sears and Nichols Corporation, by the hand of its secretary, acting pursuant to the special authority conferred upon him for this purpose, by a resolution of the Board of Directors of said company, adopted under date of June 26, 1934.

Upon examination of the provisions of this lease and of the conditions and restrictions therein contained, I find the same to be in conformity with the above noted statutory enactments. I am accordingly approving this lease as to legality and form, as is evidenced by my approval endorsed thereon and upon the duplicate and triplicate copies of the lease, all of which are herewith enclosed.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2914.

FRANCHISE TAX—COMPUTATION THEREOF ON DOMESTIC BUS CORPORATIONS TRANSPORTING PASSENGERS TO AND FROM THE STATE.

SYLLABUS:

In the Case of domestic bus corporations:

1. *All the cost of transportation paid by the passenger from any station in Ohio to any station outside of Ohio in an adjoining state should be allocated to Ohio as "business done within the state" in computing the annual franchise tax levied by virtue of Section* 5495 *et seq., General Code*

2. *All the cost of transportation paid by a passenger from any station in Ohio to any station outside of Ohio even though the destination of such transportation is not in an adjoining state but through several states away from Ohio, should be allocated to Ohio as "business done within the state" in computing the annual franchise tax levied by virtue of Sections* 5495 *et seq., General Code.*

3. *All the cost of transportation paid by the passenger from any station in an adjoining state to any station in Ohio should be allocated to Ohio as "business done within the state" in computing the annual franchise tax levied by virtue of Sections* 5495 *et seq., General Code.*

4. *All the cost of transportation paid by the passenger from a station several states removed from Ohio to any station in Ohio should be allocated to Ohio as "business done within the state" in computing the annual franchise tax levied by virtue of Section* 5495 *et seq., General Code.*

5. *All the cost of transportation paid by the passenger that originates in another state and entirely traverses Ohio and which destination is in another state, should be allocated to Ohio as "business done within the state" in computing the annual franchise tax levied by virtue of Sections* 5495 *et seq., General Code.*

6. *Where transportation originates in another state and entirely traverses Ohio during which trip through Ohio the passengers are transferred from the busses of one company and picked up by the busses of another company and carried to a destination in another state, in such cases, assuming both companies are domestic corporations, all the portion of the cost of transportation paid by the*

passengers from outside of the state to the point within the state should be allocated to Ohio as "business done within the state" for the first bus company, and the cost of transportation from the point inside the state to the destination outside the state should be allocated to Ohio as "business done within the state" by the second company in question.

7. No portion of the cost of transportation paid by the passengers which transportation originates in New York or some point east and terminates in Pennsylvania, even though the bus continues its run to its destination in Ohio, should be allocated to Ohio as "business done within the state" in computing the annual franchise tax levied by virtue of Sections 5495 *et seq., General Code.*

8. In computing the annual franchise tax levied by virtue of the provisions of Sections 5495 *et seq., General Code, on foreign corporations, all the cost of transportation paid by passengers from a station in Ohio to a station outside of Ohio should be allocated to Ohio as "business done within the state."*

9. In computing the annual franchise tax levied by the provisions of Sections 5495 *et seq., General Code, on foreign corporations the cost of transportation paid to an agent in a foreign state from such station to a station in Ohio, or to a station without Ohio, even though the bus in completing such transportation, traverses Ohio, should not be considered as "business done within the state."*

COLUMBUS, OHIO, July 12, 1934.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication which reads as follows:

"On October 20, 1933, in the Attorney General's Opinion No. 1749, certain questions with respect to the taxation of interstate business done by interstate bus lines was given to the commission, but in our examination in the Franchise Tax Department we have come across certain other features of interstate bus business, and we are requesting your opinion on the following premises. In our original request under the 'second group' the question was asked with respect to buses operating in interstate transportation consisting of two routes—one from Cleveland to Buffalo and northeastern points, and the other from Cleveland to New York via Erie and Scranton, Pennsylvania. On that question we asked for your opinion as to what shall be included as business in Ohio, the company only reporting that business arising from operations wholly within the State of Ohio. In answer to that question the Attorney General held as follows:

'Likewise in computing such tax "business done within the state" includes the interstate business where a part of such journeys are within the State of Ohio.'

Due to the fact that there will be an ever increasing question as to the proper segregation of interstate business, the Tax Commission desires to propound to your office the following questions.

1. What portion of the cost of transportation between any station in Ohio to any station outside of Ohio in an adjoining state should be allocated to Ohio?

2. What portion of the cost of transportation between any station in Ohio to any station outside of Ohio where the destination of such

transportation is not in an adjoining state, but through several states as far away as New York City should be allocated to Ohio?

3. What portion of the cost of transportation between any station in an adjoining state to any station in Ohio should be allocated to Ohio?

4. What portion of the cost of transportation between a state several states removed from Ohio to any station in Ohio should be allocated to Ohio?

5. What portion of the cost of transportation that originates in another state, entirely traversing Ohio and which destination is in another state, shall be allocated to Ohio?

6. What portion of the cost of transportation that originates in another state, entirely traverses Ohio, during which trip through Ohio the passengers are transferred from the buses of one company, picked up by the buses of another company and carried to their destination in another state, shall be allocated to Ohio?

7. What portion of the cost of transportation that originates in New York or some point east and terminates in Pennsylvania although the bus itself continues its run to its destination in Ohio, shall be allocated to Ohio?

The above questions should be answered by your department, first as to a domestic corporation and second as to a foreign corporation inasmuch as in Ohio we have both types of corporations operating as bus lines.

We will thank you for an early opinion on these questions as there are cases before the Franchise Tax Department depending on the interpretation of the statutes with respect to these questions."

My opinion to which you refer in your inquiry is found in Opinions of the Attorney General for 1933, Vol. II, page 1596, which held as disclosed by the syllabus:

"1. In computing the franchise tax on a domestic bus corporation for the privilege of exercising its corporate franchise as a domestic corporation, the value of the busses of a domestic bus company used solely in interstate travel, where part of such interstate journeys are in the state of Ohio, should be included in the computation of its total assets located within the state of Ohio.

2. *Likewise in computing such tax 'business done within the state' includes the interstate business where a part of such journeys are within the state of Ohio.*" (Italics the writer's.)

With reference to the numerator of one of the fractions used in the computation of the annual franchise tax on *domestic* bus corporations, I interpreted the phrase found in paragraph 8 of Section 5497, General Code, "business done within this state by domestic corporations shall include all business except extra-state business" and I held as quoted in the second branch of the syllabus, supra.

You now ask me to make an application of this principle to the seven questions you propound, first, with respect to domestic corporations. Your first question is:

"What portion of the cost of transportation between any station in

Ohio to any station outside of Ohio in an adjoining state should be allocated to Ohio?"

It is my opinion that the total cost of transportation between any station in Ohio to any station outside of Ohio in an adjoining state should be allocated to Ohio inasmuch as such transportation would be "business done within this state" by domestic corporations as such term is defined in paragraph 8 of Section 5497, General Code, and "business done by the corporation in this state" as used in Section 5498, General Code, and would not be "extra-state" business within the meaning of these sections.

It is also my opinion that the same answer is dispositive of your second, third, fourth and fifth questions.

Your sixth inquiry is somewhat ambiguous. You ask:

"What portion of the cost of transportation that originates in another state, entirely tranverses Ohio, during which trip through Ohio the passengers are transferred from the buses of one company, picked up by the buses of another company and carried to their destination in another state, shall be allocated to Ohio?"

I assume that both bus companies in question are domestic corporations and that their respective businesses are entirely distinct from each other. In such case all the portion of the cost of transportation from outside of the state to inside the state would be "business done within the state" for the first bus company, and the cost of transportation from the point inside the state to the destination outside the state would be "business done within the state" for the second company in question.

Your seventh question is:

"What portion of the cost of transportation that originates in New York or some point east and terminates in Pennsylvania although the bus itself continues to run to its destination in Ohio, shall be allocated to Ohio?"

In such case no portion of the cost of transportation that originates in New York or some other point east outside the state and terminates in Pennsylvania should be allocated to Ohio as "business done within the state" even though the bus itself continues its run to its destination inside the state of Ohio, as such business would be "extra-state" in the sense such term is used in Sections 5497 and 5498, General Code.

In consideration of your inquiries as applicable to foreign corporations, Section 5498, General Code, sets forth the method of determination of the franchise tax on corporations. Such section may be summarized as follows: Assuming the annual report of the corporation to be correct, such section provides the following fraction for the determination of such tax: Take the total of the company's capital, surplus, undivided profits and reserves; subtract from such sum the reserves for depreciation, depletion, taxes due and payable during the current year, good will under certain circumstances and padded value of assets, if any. Divide such result into two equal parts, multiply one part by a fraction whose numerator is the fair value of all the corporation's property *owned or* used by it in Ohio and whose denominator is the fair value of its property wheresoever located; take the other part and multiply it by another fraction whose

numerator is the value of the business done in Ohio, and whose denominator is the business done everywhere. Add such results together and multiply by $.001. Thus:

$$\frac{\text{Value of capital stock}}{2} \times \frac{\text{Book value of property in Ohio}}{\text{Book value of corporation's property}} = \frac{\text{Value of capital stock}}{2} \times \frac{\text{Ohio business}}{\text{Total business}}$$

X $.001 = Franchise Tax of the Corporation.

Your inquiry concerns only the method of arriving at the numerator of the final fraction of such formula, that is, what constitutes "Ohio business." The language of the statute (§ 5498, G. C.) is that Ohio business is "the value of business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period." Were it not for the constitutional inhibition against a state levying a tax which lays an unreasonable burden on interstate commerce, little difficulty would be encountered with such fraction.

In an opinion to be found in Opinions of the Attorney General for 1932, Vol. 2, page 615, my immediate predecessor in office held as stated in the first paragraph of the syllabus of such opinion, that:

> "For the purpose of determining the franchise tax on foreign corporations doing business in Ohio, the term 'business done within this state' by a foreign corporation, should be construed as being such part of the business of such corporation as is transacted in Ohio, but excluding therefrom such business as is interstate commerce."

A so-called corporation franchise tax has more of the attributes of a property tax than of a license tax. As stated by Mr. Justice Field, in the case of *Horn Silver Mining Company* vs. *New York,* 143 U. S., 305, 312, 38 L. Ed., 164, 167:

> "A corporation being the mere creature of the Legislature, its rights, privileges and powers are dependent solely upon the terms of its charter. Its creation (except where the corporation is sole) is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members without dissolution, and with a limited individual liability. The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states this franchise or privilege of being a corporation is deemed personal property and is subject to separate taxation. The right of the states to thus tax it has been recognized by this court and the state courts in instances without number. It was said in Delaware Railroad Tax, 85 U. S. 18 Wall. 206, 231 (21: 888, 896), that 'the State may impose taxes upon the corporation as an entity existing

under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however, arbitrary or capricious, are mere matters of legislative discretion;' except, we may add, as that discretion is controlled by the Organic Law of the State. And, as we there said also, 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.'

The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the Legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the Legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant as well as, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the Legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence."

In the opinion of *Atlantic & Pacific Teleg. Co.* vs. *Philadelphia,* 190 U. S., 160, 163, Mr. Justice Brewer observes:

"The franchise of a corporation, although the franchise is the business of interstate commerce, is, as a part of its property, subject to taxation, providing at least, the franchise is not derived from the United States. Delaware Railroad Tax, 18 Wall., 206, 232; *Postal Teleg. Cable Co.* vs. *Adams,* 155 U. S., 688, 696; *N. Y. L. E. & W. R. Co.* vs. *Pennsylvania,* 158 U. S., 431, 437; *Central Pac. R. Co.* vs. *California,* 162 U. S., 91; *Western Union Tel. Co.* vs. *Taggart,* 163 U. S., 1, 18."

An individual or partnership engaging in interstate transportation business would not be subjected to the tax under the statute in question. The tax purports to be upon the right of a fictitious entity to engage in business as an entity, separate and apart from the members composing it, and for the privilege of enjoying certain immunities granted to corporations which are not granted to the members of a partnership performing similar acts, but as a partnership.

A corporation as such, desiring to engage in business elsewhere than in the state of its creation, has no legal right so to do. It must engage in business in such foreign state solely by reason of the comity of such foreign state. As stated by Mr. Justice Field, at page 315 of the opinion of the Horn Silver Mining case, above cited:

"Having the absolute power of excluding the foreign corporation the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient, and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital

stock. * * It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

In the case of *Anglo-Chilean Nitrate Corporation* vs. *Alabama,* 288 U. S., 237, the court had before it a question involving the right of the state of Alabama to levy and collect a corporate franchise tax from a foreign corporation measured by the amount of capital actually employed within that state. The company sought to avoid the tax on the theory that its business consisted in the importation of nitrate which it sold in original packages, in interstate commerce, the taxation of which business would be illegal, as in conflict with the commerce clause of the federal constitution, that the franchise tax would be illegal for like reasons. The court held that since the Supreme Court of Alabama had held the Alabama statute levied a tax on the privilege of engaging in business rather than of existing as a corporation, and since the business of the corporation consisted in interstate or foreign commerce, such law was void in so far as it attempted to tax the plaintiff corporation. Attached to such opinion is a well reasoned dissenting opinion concurred in by three of the justices which might indicate that a different conclusion might be reached were it not for the therein and often enunciated rule that such Supreme Court deems itself bound by the decisions of the highest court of a state in the interpretation of the state's own laws. My examination of the decisions of the Ohio Supreme Court in the interpretation of our statutes, does not reveal any such interpretation of the Ohio statute.

If the tax imposed by Sections 5495 to 5498-1, General Code, is a tax for the privilege of engaging in business, it is void in so far as it purports to levy a tax on a foreign corporation for the privilege of engaging solely in interstate or foreign commerce. It is fundamental and needs no extensive citation of authorities, that such tax would violate the commerce clause of the federal constitution A few of the cases enunciating such rule are:

Le Loup vs. *Port of Mobile,* 117 U. S., 640, 648;
Lyng vs. *Michigan,* 135 U. S., 161, 168;
Uzark Pipe Line vs. *Monier,* 266 U. S., 555, 562;
Adams Express Co. vs. *Ohio,* 166 U. S., 185, 218;
Helson & Randolph vs. *Kentucky,* 279 U. S., 245.

If such tax is one on the privilege of doing business in the corporate form, that is on the corporate franchise or privilege rather than the act of engaging in business, and the amount of property owned in the state and the business done in the state are but a meter by which the proportionate value of the franchise or right is measured a different question arises.

I am inclined to the view that the so called "franchise tax" in Ohio is a tax upon the privilege of *doing business in a corporate capacity* rather than the "doing business" as such.

A statute levying a tax is to be strictly construed and not extended to include or embrace subjects not strictly included within its terms.

Caldwell vs. *State,* 115 O. S., 458, 460;
Cassidy vs. *Ellerhorst,* 110 O. S., 535;
Gray vs. *Toledo,* 80 O. S., 445, 448;
Cincinnati vs. *Connor,* 55 O. S., 82.

From an examination of Section 5495, General Code, we find that the tax is levied for the following privileges:

1. Of doing business in this state, or
2. Of owning or using a part of its capital in this state, or
3. For holding a certificate of compliance with the laws of this state.

From an examination of the fraction formula contained in Section 5498, General Code, it is apparent that if a corporation owns no property in Ohio and does no business in Ohio, no tax would be due. For example, if we substitute zero for "book value of property in Ohio" and also for "Ohio business" in such formula, the result of the formula will be zero, and no tax would result. If, however, the corporation has either property in Ohio or does business in Ohio, such result will not be zero.

You do not inquire concerning the property fraction of such formula and it is not herein considered. Since such formula one specifically mentions "business done * * in this state" only, no other type of business may be included in such property fraction, by reason of the rule requiring a strict construction of statutes levying a tax. In 40 A. L. R., 1451, appears a note abstracting numerous cases as to what constitutes doing business within franchise tax statutes similar to that in question. From the cases therein cited there would appear to be no question but that the operation of a passenger bus line constitutes "doing business." However, is the transportation of passengers from another state to Ohio or across the state of Ohio, the doing of business in Ohio?

To be "doing business" within Ohio, the corporation must be performing, in the course of repeated transactions, some part of the business for which it was incorporated or formed.

Martin vs. *Bankers' Trust Company,* 18 Ariz., 55;

Penn Collieries vs. *McKeever,* 183 N. Y., 98;

National Mercantile Co. vs. *Watson,* 215 Fed., 929.

For the purposes of this opinion, I believe it fair to assume with reference to the cases referred to in your first, second and fourth questions that the corporations in question maintain offices or stations having agents who have authority to make contracts for the transportation of passengers and to receive payment therefor, that is, to sell and receive payment for tickets entitling the purchaser to embark from such station to a destination named in such ticket; that in the performance of such contracts such passengers are transported in the course of repeated transactions. Such being the business for which the corporations in question were formed, such business being performed in Ohio would be "Ohio business" of such foreign corporation. In the ordinary meaning of the term as used by the ordinary business practice, such would be considered as business done in Ohio and would ordinarily be so reflected on the accounting books of the companies so engaged. It is to be presumed that the legislature used the words of a statute in their usual and ordinary sense unless the context otherwise clearly requires.

Smith vs. *Buck,* 119 O. S., 101, 105;

2 Lewis' Sutherland Statutory Construction, Sec. 389.

I find nothing in the language of the statute which would indicate that a different meaning was intended. I am therefore of the opinion that such business arising in Ohio from contracts made in Ohio, is "Ohio business" within the purview of Section 5499, General Code, and that your first and second inquiries should be answered in the same manner with reference to foreign corporations as I have above answered with reference to domestic corporations.

Conversely, ordinary usage would require the answer to your third, fourth, fifth, sixth and seventh inquiries that no part of such business is "Ohio business" within the purview of Section 5499, General Code.

Respectfully,

JOHN W. BRICKER,

Attorney General.