quiring of right of way for road purposes by a board of county commissioners, under the provisions of Section 1201, General Code.

Answering your question specifically, it is my opinion that it is the duty of a board of county commissioners to provide the requisite right of way when a road is being constructed or improved, under the provisions of Sections 1191, et seq., General Code, and a board of county commissioners may pay for such right of way out of the money received from taxes levied, under the provisions of Section 1222, General Code, or out of the proceeds of bonds issued, in anticipation of the collection of such taxes, as provided in Section 1223, General Code. However, no part of the fund raised by the issuance of bonds, in anticipation of the collection of special assessments against property abutting upon said improvement, may be used by the county commissioners to purchase right of way for road purposes.

Respectfully,
EDWARD C. TURNER,
Attorney General.

997.

MUNICIPALITIES—POWER TO IMPOSE OCCUPATIONAL TAX NOT EXTENDED TO FIELDS ALREADY OCCUPIED BY STATE—STATE LICENSE FEE AND MUNICIPAL OCCUPATIONAL TAX NOT UNCONSTITUTIONAL—STATE LICENSE AND MUNICIPAL LICENSE FEE NOT UNCONSTITUTIONAL.

SYLLABUS:

1. *The power granted to municipalities by Section 3 of Article XVIII of the constitution of Ohio, to impose an occupational tax in the exercise of its powers of local self government, does not extend to fields in such municipality which have already been occupied by the state.*

2. *The exaction of a license fee only by the state does not preclude the imposition by a municipality of an occupational tax in the exercise of the powers of local self government.*

3. *The imposition by the state of an excise or occupational tax does not preclude the exaction of a license fee by a municipality in the exercise of its local police powers, but such license fee must not be in excess of the cost of administering the police regulations.*

4. *The granting of a license for a particular privilege by the state does not prevent the exaction of a proper license fee by a municipality in the exercise of local police power.*

COLUMBUS, OHIO, September 14, 1927.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication requesting my opinion, as follows:

"On September 7th, 1922, the Attorney General by letter advised the Bureau that:

'Referring to your letters of recent date relative to the licensing and regulating of pawn brokers, beg to say that we are inclined to the opinion that municipal corporations are no longer warranted in exercising the power of regulating and licensing pawn brokers, but that power is now covered by the new act found in 109 Ohio Laws, pages 593, et seq., and designated therein as Sections 6337 to 6346 inclusive of the General Code.'

Sections 6302 et seq., G. C., provide for the registration of chauffeurs, for a badge and for the payment of a fee therefor.

Section 614-97, G. C., provides in part for the licensing of drivers for motor transportation companies and the payment of a registration fee, and further provides that no further fee shall be charged by any local political subdivision.

Section 3632, G. C., authorizes municipal corporations to regulate the use of the streets by vehicles, etc.

In the city of ---------- council adopted an ordinance requiring taxicab drivers to obtain a local license for which a fee is taxed. Said taxicab drivers are registered chauffeurs and have paid the required fee to the State of Ohio and contend that no further license fee may be exacted by the municipal corporation.

Your views in this connection would be appreciated."

Section 6302, General Code, provides as follows:

"A person operating a motor vehicle, as chauffeur, shall file, by mail or otherwise, with the Secretary of State, or his duly authorized agent, upon blanks prepared under the authority of the Secretary of State, an application for registration. The Secretary of State shall appoint examiners and cause examinations to be held at convenient points throughout the state, as often as may be necessary. Before any certificate of registration is granted, the applicant shall pass such examination as to his qualifications as the Secretary of State shall require. No chauffeur's certificate of registration shall be issued to any person under sixteen years of age. Every application for certificate of registration as chauffeur shall be sworn to before some officer authorized to administer oaths, and must contain the name and address of the applicant, together with a statement that he is of sound mind and memory and physically competent to operate a motor vehicle, together with a description of the vehicle, the trade name and kind or kinds of motor vehicles he is competent to operate, and whether or not such applicant has been convicted of violating a provision of this chapter or the penal statutes relating thereto, giving the date or place of such conviction, and the provisions of law so violated. Such said application for registration as chauffeur of a motor bicycle, motorcycle or motor tricycle shall be accompanied with a registration fee of one dollar, and such said application for registration as chauffeur, of any other motor vehicle shall be accompanied by a registration fee of three dollars."

Section 6296, General Code, reads as follows:

"Applications of chauffeurs shall be made at such times and for such periods as are provided in the next two preceding sections for applications of owners."

Section 6297, General Code, is as follows:

"Each certificate, number, placard or badge issued by the commission of motor vehicles to owners, manufacturers, or dealers, under this chapter, shall be for the period of one year beginning the first day of January."

Section 614-97, General Code, providing for the qualifications of a chauffeur or driver, is as follows:

"It shall be unlawful for any motor transportation company as defined in this chapter (G. C. Sections 487 to 614-102) to cause, allow or permit any motor propelled vehicle operated by it as a motor transportation company to be driven by any person under the age of twenty-one years; and such person shall be an American citizen and shall be skilled in the art of driving such public motor vehicle, and without physical disabilities or personal habits which would disqualify him or make him an unsuitable person to serve as driver of such public motor vehicle.

For the purpose of determining the qualifications of such chauffeur or driver, the Secretary of State shall be governed by Section 6302 of the General Code, in so far as the same may be applicable.

Upon the issuance of the certificate to drive, the applicant shall pay the registration fee, and no further fee shall be charged or examination required by the state or any local authorities in the state. The term 'local authorities' as used herein means all officers, boards and commissions of counties, cities, villages or townships. In case of sickness, accident or other emergency, any other licensed driver may be substituted."

In Opinions of the Attorney General for 1923, page 391, my predecessor rendered an opinion the syllabus of which is as follows:

"Before a person may act as chauffeur of a motor vehicle under House Bill 474, he shall be registered as provided under Section 6302 and such registration shall be annual as required by Section 6297 G. C."

It will be observed that Section 614-97, General Code, uses the following language:

"Upon issuance of such certificate to drive, the applicant shall pay the registration fee and no further fee shall be charged or examination required by the state or any local authorities in the state."

The only "certificate to drive" that is issued by the Secretary of State, is the "certificate of registration" which is authorized by Section 6302, General Code, and the only "fee" authorized to be charged is the fee of three dollars for registration of chauffeurs. Both the certificate and fee are annual requirements under Section 6297, General Code.

It is to be noted that while the act mentions a registration fee for chauffeurs, it does not say in terms what that fee shall be, whether a license or a tax. The power to license, which, strictly speaking, is simply a power to sell a privilege, may be maintained when a special benefit is conferred at the expense of the general public, or the business imposes a special burden on the public, or where the business is injurious or involves danger to the public. The power to license may be exercised for regulation or for revenue.

Questions germane to those brought into review here have been before the courts of this state in several cases for consideration. Some difficulty is experienced frequently in determining whether a particular enactment is based upon the police power

of the government or upon the taxing power. Licensing and regulating are an exercise of the police power, while the exaction of an excise tax is an exercise of the taxing power.

This distinction was clearly made by Judge Ranney in the case of *Mays* vs. *Cincinnati,* 1 Ohio St. 268. On page 273 he used the following language:

> "A license may include a tax, or it may not. If the exaction goes no further than to cover the necessary expenses of issuing it, it does not; but if it is made a means of supplying money for the public treasury, we agree with the court in *State* vs. *Roberts,* 11 Gill & Johns, 506, that it 'is a tax is too palpable for discussion'."

In *State ex rel. Zielonka* vs. *Carrel* (1919) 99 Ohio St. 220, 124 N. E. 134, it appeared that the city of Cincinnati imposed a license tax on the manufacturers of bottles and glassware in order to test the right of a municipality to impose occupation taxes generally. It was held that the state, through the agency of the legislature, could constitutionally impose such a tax, the court saying:

> "Reverting to the question of the power of Cincinnati to levy occupational taxes, it is our conclusion that an ordinance of that character is a valid exercise of its legislative power, *and unless and until the state itself invades the field,* or expressly interdicts the exercise of the power, the authority of the city of Cincinnati to utilize such subjects of taxation must be upheld."

Also on page 228, the court used this significant language:

> "It is possible, of course, that the interesting question whether both state and municipality may occupy the same field of taxation at the same time, may some day be presented to the courts for their determination."

Since the foregoing decision was rendered, our Supreme Court has been called upon to make a distinction in those cases where the state has entered the field of levying what amounts to an excise tax, holding that the state thereby pre-empts the field, to the exclusion of the municipality upon the same subject.

In the case of *City of Cincinnati et al.* vs. *American Telephone & Telegraph Co., City of Cincinnati et al.* vs. *Norfolk & Western Ry. Co., City of Cincinnati et al.* vs. *Western Union Telegraph Co.,* 112 Ohio St. 493, the syllabus is as follows:

> "1. Sections 5483, 5485 and 5486, respectively, lay an occupational tax upon telephone companies, telegraph companies, and railroad companies.
>
> 2. The power granted to the municipality by Section 3, Article XVIII, of the Constitution of the State of Ohio, to lay an occupational tax in the exercise of its powers of local self-government, does not extend to fields within such municipality which have already been occupied by the state."

On page 498 the court used the following language:

> "It is sufficient to say that the decision in the *Carrel case, supra,* declaring the right of the municipality to levy an excise tax at all, was arrived at by an interpretation of the constitution rather than by apt words therein found, and was then and since has been a subject of some doubt. That doubt having been resolved in favor of the power to the extent defined in that case, and that decision having been since approved and followed by this court in the case of

Globe Security & Loan Co. vs. *Carrel, Aud.*, 106 Ohio St., 43, 138 N. E., 364, and the cases of *Marion Foundry Co.* vs. *Landes* and *Clawson* vs. *Landes*, 112 Ohio St., 166, 147 N. E., 302, it should now be regarded as the settled law of the state. The majority of this court are neither disposed to unsettle the law by overruling that case, nor to extend the power of municipalities in that respect by a further interpretation removing the limitation therein expressed.

That the levying of a tax is an exercise of sovereign power, that the sovereignty of the state extends to each of its four corners, within the municipalities as well as without, is not a subject of debate; that such sovereignty would be impaired by construing the constitution so as to give a subdivision of the state equal sovereignty in so important a subject as that of taxation cannot be gainsaid.

To the end that the sovereignty of the state may be superior to that of any of its subdivisions in a matter so essential to that sovereignty as that of taxation, this court adheres to the interpretation of the power conferred by the constitution upon municipalities to levy an excise tax announced in *State ex rel Zielonka* vs. *Carrel*, supra with the limitation therein expressed."

In the case of *Firestone et al.* vs. *City of Cambridge, et al.*, 113 O. S. 57, the court had under consideration, among other things, whether the ordinance of the municipality provided for the payment of a license fee, or did it exact the payment of an excise tax. The syllabus in that case is as follows:

"1. The assessment of an annual fee by a municipal ordinance, upon owners of motor vehicles residing in the municipality, for the privilege of operating such motor vehicles upon the streets thereof, for the declared purpose of producing a fund to be used for the cleaning, maintenance, and repair of the streets of the municipality, to which use it is thereby appropriated, though denominated a license fee, is an 'excise tax.'

2. No municipality in this state has power to levy such excise tax in addition to that levied by the state for similar purposes."

It will be observed in the foregoing case that the basis of the decision was the declared purpose of the municipal ordinance to assess the fee to produce a fund to be used for the cleaning, maintenance and repair of the streets. This confessed purpose clearly, in the opinion of the Supreme Court, made the assessment an excise tax although denominated a license fee. Accordingly the court applied the rule laid down in the earlier cases that, where the state had preempted the field by itself imposing an excise tax, the municipality lacked authority to impose an additional tax.

With these principles in mind, it becomes necessary to consider the facts in the case you cite. Clearly a municipality may not impose an additional occupational tax where the field is already occupied by the state. You will observe, however, that whereas the state law provides for a chauffeur's license, no reference is found in the state law to taxicab drivers. I seriously question whether a chauffeur and a taxicab driver may be regarded as synonymous. No definition of the term "chauffeur" is found in the state law. Resort, therefore, must be had to the ordinary accepted definition of this term. Webster's New International Dictionary defines the word "chauffeur" as:

"One who manages the running of an automobile; esp. the paid operator of a motor vehicle."

It is quite obvious that the statute uses the term in the latter sense and does not make its terms applicable to all drivers. It is equally apparent that many chauffeurs in private employment are not in the same category as taxicab drivers. Likewise, it may be seriously questioned whether a taxicab driver who owns his own cab comes within the definition of a chauffeur, although he keeps his vehicle for hire. Of course, all taxicab drivers in the employ of other persons or corporations would necessarily be within the definition of the term "chauffeur."

While the matter is not free from doubt, I feel that the licensing of taxicab drivers is another and different thing from the licensing of chauffeurs and that, irrespective of whether the fee to be paid be denominated a license or tax, authority resides in a municipality to impose the fee upon taxicab drivers in spite of the provisions of Section 6302 of the General Code. Especially is this true in view of the provisions of Section 3632 of the General Code, which is as follows:

> "To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery stable purposes; to license and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon; to prevent and punish fast driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction and street railway cars within the corporation."

Obviously, Section 614-97 of the Code has no application, since its terms are limited to the drivers of vehicles operated by a motor transportation company, as defined in the Public Utilities Act.

It is to be noted that Section 3632 was under consideration in the case of *Firestone et al.* vs. *City of Cambridge, et al.*, supra, and the court concedes the right of a municipality to license persons who use vehicles for hire upon streets. That case, however, as before pointed out, hinges upon the fact that the license fee therein attempted to be imposed was in reality an excise or occupational tax.

Conceding that a court might hold the two classes, viz., taxicab drivers and chauffeurs, as being one and the same, a serious question arises as to whether, in the present instance, the ordinance may not be sustained. The rule announced heretofore, which is derived from prior decisions of the Supreme Court of Ohio, is to the effect that a municipality cannot impose an excise tax where the state has already occupied the field. Referring to the quotation from the case of *Mays* vs. *Cincinnati,* found in this opinion, you will observe that the test whether or not an exaction is a license or tax depends upon whether the exaction goes further than to cover the necessary expenses incident to the administration of the tax. If the license is made the means of supplying money for the public treasury, there can be no question as to the exaction being a tax. In the present instance, a chauffeur's registration is made upon payment of a fee of one dollar for a motor bicycle, motorcycle or motor tricycle and three dollars for other motor vehicles. There is no decision of the courts which I have been able to find indicating whether this exaction is in excess of the cost covering the issuance of the license and the administration of the law. I cannot say, as a matter of law, whether this is or is not a tax. That is dependent upon the facts and the facts are not before me. It is very questionable whether the proceeds from this license are sufficient to cover the cost of administration. You will observe that Section 6302 of the General Code provides that the Secretary of State shall appoint examiners and cause examinations to be held throughout the state. There is in addition the cost of the preparation of blanks and the issuance of licenses. All of this would entail,

undoubtedly, substantial expense and it is very questionable whether the revenue derived from the license fee would be so in excess of the cost of administration as to warrant a conclusion that a tax is being imposed.

If this be so, then the field of taxation has not been invaded by the legislature and it follows logically from the decisions of the Supreme Court that a municipality may validly impose an occupational tax in the exercise of the powers of local self government.

Furthermore, it is not clear that the $5.00 fee paid under the municipal ordinance in question must be treated as a tax. I have nothing before me as to what would be the cost of administering the details of the ordinance. It is very possible that the cost of administration incident to the licensing of taxicab drivers would equal or exceed the revenues derived from the license fee. In that event it could not, of course, be said that a tax is being imposed. This again is a question of fact upon which my present information does not permit me to pass.

From the foregoing it may be gathered that I am unable, from the information which I have, to determine the character of the exaction of either the state or the municipality in the present instance. Assuming, however, that the impositions by the municipality and the state are upon exactly the same privilege, certain general rules may be stated.

1. The power granted to municipalities by Section 3 of Article XVIII of the Constitution of Ohio, to impose an occupational tax in the exercise of its powers of local self government, does not extend to fields in such municipality which have already been occupied by the state.

2. The exaction of a license fee only by the state does not preclude the imposition by a municipality of an occupational tax in the exercise of the powers of local self government.

3. The imposition by the state of an excise or occupational tax does not preclude the exaction of a license fee by a municipality in the exercise of its local police powers, but such license fee must not be in excess of the cost of administering the police regulations.

4. The granting of a license for a particular privilege by the state does not prevent the exaction of a proper license fee by a municipality in the exercise of local police power.

As I have before stated, however, I am of the opinion that the driving of taxicabs upon the streets of a municipality is a special privilege for the exercise of which a municipality may impose either an occupational tax or a license fee, since the state has not occupied the field by the provisions of law relative to the registration of chauffeurs, whether the fee therein provided be denominated an occupational or excise tax or a license fee.

Respectfully,
EDWARD C. TURNER,
Attorney General.