tion in November, 1919, for members of the board of education for the said newly created school district was invalid, said on page 456:

> "Your third question is whether the members of the board of education, appointed by the county board, hold over until such time as a proper and valid election is held, selecting their successors on the basis that the November, 1919, election was not valid. The answer to this is in the affirmative, it being provided in the school laws that members of boards of education hold over until their successors are legally elected and qualified, which, in this instance, has not taken place up to this time. * * * "

The syllabus of the above opinion reads as follows:

> "1. Members of the board of education in a school district newly created by the county board of education shall be appointed by the county board of education and shall hold office until their successors are legally elected and qualified.
>
> 2. The successors to the appointed board of education in a newly created district shall be elected in the manner provided in Section 4736, G. C., that is, two members shall be elected for two years and three members shall be elected for four years, and thereafter in accordance with the provisions of Section 4712, G. C. Where the ballots used in a school election in a newly created district are not in conformity with the mandate contained in Section 4736, there is no valid election for members of the board of education."

I am in accord with the holding of the Attorney General in the above mentioned opinion of 1920, and you are therefore advised that the members of the local boards of education, appointed by the board of education of the Washington County School District for the several newly created districts, hold over until their successors are duly elected and qualified. You are further advised that the county commissioners are not authorized to appoint their successors.

Respectfully,
EDWARD C. TURNER,

Attorney General.

1412.

MOTOR VEHICLE—EXCLUSIVE USE BY U. S. POSTOFFICE DEPARTMENT—MUST BE REGISTERED—NOT SUBJECT TO LICENSE FEE—PROPER OFFICIAL MUST APPLY FOR REGISTRATION.

SYLLABUS:

1. *Where postoffice department has the exclusive right to the use of a motor vehicle for a period of greater than thirty consecutive days, the United States government may be considered the owner of such motor vehicle and entitled to the registration thereof without charge upon the application of any officer, department or agent of the federal government.*

2. *Contractor leasing motor vehicle to postoffice department must register said motor vehicle and pay the tax thereon unless application for registration of such motor vehicle be made by an officer, department or agent of the federal government.*

3. *Such motor vehicle may not lawfully be operated or driven upon the public roads or highways of this state until registered.*

COLUMBUS, OHIO, December 22, 1927.

HON. CHALMERS R. WILSON, *Commissioner of Motor Vehicles, Columbus, Ohio.*

DEAR SIR:—I have your letter reading as follows:

"We are today in receipt of the following letter:

'I have six motor trucks which are being used for carrying the U. S. mail, between the depot, postoffice, and substations. These trucks are privately owned, but are controlled by the postoffice, and can be used for no other purpose but carrying the U. S. mail. Under my contract, do I have to purchase license plates for these trucks or not?'

Will you kindly let us have your official opinion on the question raised in this letter."

Paragraph 12 of Section 6290 of the General Code provides as follows:

"12. 'Owner' includes any person, firm or corporation other than a manufacturer or dealer having title to a motor vehicle *or the exclusive right to the use thereof for a period of greater than thirty consecutive days.*"

The last two paragraphs of Section 6295 of the General Code provide:

"Publicly owned and operated motor vehicles used exclusively for public purposes shall be registered as provided in this chapter, without charge of any kind; but this provision shall not be construed as exempting the operation of such vehicles from any other provision of this chapter and the penal laws relating thereto.

The secretary of state shall accept any application to register a motor vehicle owned by the federal government which may be made by any officer, department or agent of such government."

I am therefore of the opinion that if any officer, department or agent of the federal government makes application to you to register a motor vehicle, of which it has the exclusive right to the use thereof for a period of greater than thirty consecutive days, it will be your duty to register said vehicle without charge of any kind pursuant to the provisions of Section 6295 of the General Code.

This, however, is not the question which your letter presents. The question presented by your letter is whether a contractor furnishing motor vehicles to the postoffice department is required to purchase license plates for such motor vehicles where the contractor is obligated to bear all expenses of operation and maintenance. While the contract is not entirely free from doubt on the point and the particular point may not have been in the minds of the contracting parties, I am inclined to the interpretation that the contractor is required to bear all expenses of "lawful" operation. That is to say, the contractor is required to furnish a vehicle not only capable of being run upon the roads and highways but properly authorized so to do.

As stated by Mr. Justice Stone in the case of *Metcalf and Eddy* vs. *Mitchell, Administratrix,* 269 U. S. 514, 522:

"Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. * * *

When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. * * *

As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. * * *"

A somewhat similar question was disposed of in the case of *State of Washington* vs. *Wiles,* 116 Wash. 387; 199 Pac. 749. In that case Wiles was charged with unlawfully operating a motor truck on the public highways without first obtaining a license therefor as required by the state of Washington. In the course of the court's opinion it was said:

"The terms of his (the appellant's) contract required him to provide vehicles for the carriage of the mail, and to keep them properly equipped and in repair, and he was required also to furnish all necessary oil, gasoline, tires, upkeep *and drivers.* The contract further provided that such trucks should be used only in the business of carrying United States mail. At the time of his arrest, the appellant was in the exercise of the duties imposed upon him under the contract. * * *

"Appellant's argument is that the United States government has the constitutional right to carry its mails in any manner it may see fit, and without let or hindrance from any person or state; that in the use of his trucks he was in the performance of a governmental duty; that he was an instrumentality selected by the United States government for the purpose of carrying out and putting into effect its constitutional duty of carrying, delivering, and caring for the mail; that such a tax or license fee could not be lawfully imposed on the government itself, if it had owned the trucks and operated them in the performance of the work which appellant was doing, and that, since he is doing for the government what it might do for itself, to impose a tax on him would be in fact to impose it on the government, because any private person carrying the mail must require the government to pay him an additional amount equal to any such taxation as he might be required to pay.

* * * *

On the other hand, the respondent contends that the license fee is a tax imposed on the right to operate a motor truck on the public highways of the state, and is not a tax imposed on the right to carry the United States mail; that the state has sole control of its roads and highways, and that the agents of the United States are amenable to the reasonable rules and regulations

governing the use of such highways; that the immunity of the federal government from state taxation is not negotiable to the extent that it can transfer that immunity to every person who contracts with it to do any act for the furtherance of governmental business; that the mail contract between an individual and the federal government does not render the former an essential governmental agent, and confer on him freedom from state control.

* * * *

* * * * in the epoch-making cases of *McCulloch* vs. *Maryland,* 4 Wheat. 316, 4 L. ed. 579, and *Osborn* vs. *Bank of United States,* supra, (9 Wheat. 738) that a state did not have power to directly tax the right of the United States Bank to do business in such states.

But the law of those cases is not applicable to the facts of this case. In those cases the bank was chartered by the United States, and controlled by congressional acts as to the manner of doing business. It was the direct issue and immediate instrumentality of the govenment. Its private property within the state might be taxed like any other property, but for the state to require it to pay a tax for the right to do business was equal to requiring the government itself to pay a tax for the privilege of performing, within the borders of the state, functions authorized or imposed on it by the federal constitution. But the case at bar cannot come within the scope of spirit of those decisions. Here there is no effort to tax the business of carrying the mail. The appellant is not a direct instrumentality of the government; he is a personal contractor, doing certain work for the government, at a fixed compensation. In no sense is he the representative or agent of the government, or an integral part of it. * * *

A person building a state road is nothing but a contractor; he is no part of the state or its agencies, and does not thereby inherit the various immunities of the state. There is nothing in appellant's contract which indicates that the government intended to pass its immunities on to him. Under these circumstances it should be presumed that it was the intention that he should be subject to the general laws of the state."

The case of *Johnson* vs. *Maryland,* 254 U. S. 51, was then referred to in the opinion and the facts in that case distinguished from the facts in the Wiles case in the following language:

"There is a wide and fundamental distinction between that case and the one at bar, in that, in that case, the government owned the truck, and the person required to pay the fee and obtain the license was its direct employee, engaged in the performance of his duties, while here the person required to pay the license fee was a simple contractor, a resident of the state, the owner and operator of the truck in question, and engaged in a work which was to be performed entirely within the state. There the tax was, in effect, directly against the government, while here it is directly on the individual, and affects the government only indirectly and incidentally.

* * * *

But appellant further contends that to impose the license tax upon him would, in effect, be to impose it upon the federal government in the transaction of its constitutional functions. This argument, however, proves entirely too much. The appellant admits, and under like circumstances all the courts have held, that the state has the right to levy a property tax on motor trucks owned by him and used in the transportation of the mail. In making

his contract with the government he doubtless took into consideration this tax, and it would be in effect passed on to the government in identically the same way that he contends the license tax must be passed on to the government. We have in this state a statute which requires every person driving or operating a motor vehicle to obtain a driver's license before he will be permitted to operate such vehicle. If the state cannot compel appellant to pay the motor license tax, for the same reason it cannot compel him to license his drivers or himself as a driver. We also have a law in this state imposing a small tax on each gallon of gasoline sold. This tax is by the gasoline companies charged to the consumer, including the appellant, and he doubtless will, if he should renew his contract with the government, pass that tax also on to the government; and, if he be exempt from the motor tax, he is for the same reason exempt from the gasoline tax. Other like illustrations might be given.

While it is true, generally speaking, that a state may not, by its laws, hamper and interfere with the free and orderly performance of governmental functions, by taxation or otherwise, yet that interference must be substantial and direct. Every indirect and immaterial interference with the conduct of governmental business is not violative of the principles upon which the federal government is founded and performs its duties. The rule of reason must control in all such questions; otherwise the states will be greatly hampered in the conduct of their affairs, without any corresponding benefit flowing to the national government.

We are confident that the appellant is not, because of the facts of this case, relieved from complying with the state statute imposing upon him the motor truck license fees."

The decision in the Wiles case was referred to with approval by Judge Neterer of the United States District Court in the case of *United States, et al.,* vs. *Clallam County, Wash.,* 283 Fed. 645, decided June 28, 1922. Judge Neterer said as follows:

"* * * In *Page* vs. *Pierce County,* 25 Wash. 6, 64 Pac. 801, the state supreme court held that the state may not tax land in which the United States retains the right of control, and this was not changed in *State* vs. *Wiles,* 116 Wash. 387, 199 Pac. 749, 18 A. L. R. 1163, where the defendant was rendering a service to the United States by carrying mail, for which service he used a truck, of which he was owner. This truck was clearly not within the exemption provision any more than would be all vessels or trains carrying United States mail. The defendant was under contract with the United States to carry mail. * * *"

The Wiles case was also approved and followed by the Court of Civil Appeals of Texas in the case of *Grayburg Oil Co.* vs. *State,* 286 S. W. 489, decided June 12, 1926. The second and third headnotes in the report of the case are as follows:

"For tax by state or federal government to invade province of the other, it must directly and immediately constitute burden on other's governmental functions.

Occupation tax of a cent a gallon on gasoline sold, imposed by Acts 38th Leg. (1923) 3d Called Sess. v. 5 (Vernon's Ann. Civ. St. 1925, art. 7065), on dealer in gasoline, is not, as to sales made to the federal government, a tax on it or any agency or instrumentality thereof."

In the opinion the court used this language when referring to the Wiles case, supra:

> "The particular question before us, we believe, however, is not of difficult solution in the light of adjudicated cases. The question was very ably discussed and the authorities reviewed by the supreme court of Washington in 1921, in the case of *State* vs. *Wiles,* 116 Wash. 387, 199 Pac. 749, 18 A. L. R. 1163, and by the Supreme Court of the United States in the very recent case of *Metcalf* vs. *Mitchell,* 46 S. Ct. 172, 70 L. Ed. 384. * * *
>
> It was held, in an opinion evidencing much learning and research, that Wiles was not an agency or instrumentality of the federal government, but merely an independent contractor; that he was amenable to the tax on the vehicle in question; and the conviction was sustained."

Before leaving the adjudicated cases I desire to quote certain pertinent remarks of Mr. Justice Stone, from the opinion in the case of *Metcalf and Eddy* vs. *Mitchell, Administratrix,* supra:

> "As was said by this court in *Baltimore Shipbuilding Co.* vs. *Baltimore,* supra, in holding that a state might tax the interest of a corporation in a dry dock which the United States had the right to use under a contract entered into with the corporation:
>
> 'It seems to us extravagant to say that an independent private corporation for gain created by a state, is exempt from state taxation either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time.' (p. 382) And as was said in *Fidelity & Deposit Co.* vs. *Pennsylvania,* supra, in holding valid a state tax on premiums collected by bonding insurance companies on surety bonds required of United States officials:
>
> 'But mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control.' (p. 323.)
>
> These statements we deem to be equally applicable to private citizens engaged in the general practice of a profession or the conduct of a business in the course of which they enter into contracts with government from which they derive a profit."

Believing that under the contract in question it is the duty of the contractor to comply with all laws necessary to permit the operation of the motor vehicles in question upon the roads and highways of the state of Ohio, the fact that said motor vehicles are used exclusively for the purpose of carrying the mail does not excuse said contractor from the payment of the tax required to be paid by an ordinary owner. Therefore, such contractor is not entitled to have such motor vehicles registered without charge. On the other hand, if application for the registration of said motor vehicles be made by any officer, department or agent of the United States government, it will be your duty to register same without charge of any kind.

Said motor vehicles should not be permitted to be operated or driven over the public roads or highways of this state without proper registration.

Opinion No. 962, to be found in the Opinions of the Attorney General for 1920, at page 121, has not been discussed herein because it arose under a different state of facts and did not involve the liability of a private contractor.

Respectfully,
EDWARD C. TURNER,
Attorney General.