Tax Commission of Ohio may approve an issue of bonds to refund the payment of bonds already accrued and is not precluded from said approval by the phrase in said section, "bonds which are about to mature."

Respectfully,
EDWARD C. TURNER,
Attorney General.

1677.

FEES—OPINION NO. 921 REGARDING COMPUTATION OF FEES OF FOREIGN CORPORATIONS DOING BUSINESS IN OHIO, REVIEWED AND AFFIRMED.

SYLLABUS:

Opinion No. 921, dated August 26, 1927, is reviewed and affirmed.

COLUMBUS, OHIO, February 4, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

> "Under date of December 8, 1927, there was submitted to the Secretary of State a filing by the United Engineering and Foundry Company, under Section 185 of the General Code.
>
> Immediately upon receipt of same the increase in proportion reflected by the company's filing was computed and under date of December 13th, the company's attorneys were advised that the filing fee called for on account of the increase in proportion would be $3,122.40.
>
> Under date of December 17th, attorneys for the Company asked for an explanation of the method of computing the fee, questioning the amount thereof. Thereafter, on December 20th, the attorneys for the company were advised that the basis of computing the filing fee was as follows:
>
> The value of property in Ohio was added to the business in Ohio and the sum of these two items was then added to the value of property out of Ohio and the value of business out of Ohio, giving a grand total of property and business. This total was then divided into the value of property and business in Ohio, giving the percentage of .18316.
>
> The total present authorized number of shares of the company, to-wit, 431,867, was then multiplied by this decimal 79,100.75 as the number of shares at present represented by property and business in Ohio. From this was deducted the previous proportion in shares as evidenced by former filings, 25,020.72, giving 54,080.03 as the increased proportion in shares. This method of computation, we believe, follows your recent opinion in such connection. And in applying the schedule of fees in S. B. 295, the fee is figured as being $3,122.40.
>
> Under date of December 27th, attorneys for the company acknowledged receipt of information just referred to and presented certain considerations in connection with computation of fees, the gist of which seems to be that

attorneys for the company are of the opinion that on a filing under Section 185 a company should be given credit for dollars and cents paid under previous filings rather than credit for a previous proportion in shares.

Since the first of this year, this matter has been discussed with Mr. Laylin of your office by one of the attorneys for the company and under date of January 13th this office has been asked to refer the entire matter to your office for further opinion.

Having regard to the considerations presented by the foregoing and in particular to those considerations set out in the letter of December 27th from the company's attorneys, which is appended hereto, your opinion is respectfully requested."

The letter of the attorneys raises the point which you suggest and in addition apparently questions whether, in the determination of the fee to be paid under Section 185 of the General Code, the basis of computation is ten cents per share for the first ten thousand shares upon the increase, or whether the number of shares upon which the corporation has already paid should be included so that the corporation will have the benefit of reaching the lower bracket of fees sooner. That is to say, if a corporation has already paid upon ten thousand shares and is now required to pay on an additional five thousand shares, should this be charged at the rate of ten cents per share or five cents per share? I have examined the method of computation set forth in your letter and believe it is in accord with the method heretofore outlined to you by this office in Opinion No. 921, rendered on August 26, 1927. This is in my opinion the correct method of computing the fee to be paid under Section 185 of the General Code.

As you state, one of the objections raised by the attorneys is that the company should be given credit for the amount of dollars and cents paid to the state under previous filings either under Sections 184 or 185 of the General Code. Their idea is that there should be a credit in dollars and cents rather than a credit of the number of shares for which payment was made.

If the Legislature had desired the credit to be in dollars and cents, it could readily have so stated. The language of Section 185 of the Code, as amended in 112 O. L., p. 514, is as follows:

"A corporation which has filed its statement and paid the fee prescribed by the preceding two sections and which thereafter shall increase the proportion of its capital stock, represented by property used and business done in this state, shall file within thirty days after such increase an additional statement with the Secretary of State, and pay upon the *increase* of its authorized capital stock represented by property owned and business transacted in this state, a fee equal to the sum of

(a) Ten cents for each share up to and including ten thousand shares;

(b) Five cents for each share in excess of ten thousand shares up to and including fifty thousand shares;

(c) Three cents for each share in excess of fifty thousand shares up to and including one hundred thousand shares;

(d) Two cents for each share in excess of one hundred thousand shares up to and including one hundred and fifty thousand shares;

(e) One cent for each share in excess of one hundred and fifty thousand shares." (Italics the writer's).

It seems to me that the conclusion is inescapable that the Legislature has put the matter of fees strictly upon a share basis and it logically follows therefrom that any

increase in the number of shares representing the proportion of the capital stock of a foreign corporation represented by property used and business done in this state necessitates the payment of a fee upon such increased number of shares in the amounts prescribed in the section. The number of shares is the essential element under the section as amended and I therefore feel that you should, in each instance, determine the number of shares upon which the company has already paid and deduct this amount from the number of shares under the present existing status of the company. Payment should then be made upon the resultant sum in the amounts fixed in the section. This is in accord with the conclusions of the last paragraph of Opinion No. 921, heretofore referred to, and I am of the opinion that that paragraph correctly states the rule.

You will observe that Section 185 of the Code, supra, requires the per share payment upon the *increase*. I am unable to agree with the views of the attorneys as expressed in their letter, to the effect that the corporation is entitled to take into consideration the shares for which payments had theretofore been made. The language of the section plainly shows that the corporation shall pay ten cents for each share up to and including ten thousand shares and so on upon the *increase*. Hence it was plainly the intention of the Legislature to require payment at the rate of ten cents on the first ten thousand shares upon the increased number of shares, irrespective of the amount of shares for which payment had theretofore been made.

It may well be pointed out that the same Legislature which amended Section 185 of the Code also amended Section 176 of the Code with relation to the fees to be charged domestic corporations. This amendment is found in 112 O. L. 258, 259. Pertinent to the present consideration is the following portion of that section:

> "2. For filing and recording a certificate of amendment increasing the number of shares which a corporation shall be authorized to issue, a fee equal to the sum of
>
> (a) Ten cents for each share authorized up to and including ten thousand shares;
>
> (b) Five cents for each share authorized in excess of ten thousand shares up to and including fifty thousand shares;
>
> (c) Three cents for each share authorized in excess of fifty thousand shares up to and including one hundred thousand shares;
>
> (d) Two cents for each share authorized in excess of one hundred thousand shares up to and including one hundred and fifty thousand shares;
>
> (e) One cent for each share in excess of one hundred and fifty thousand shares.
>
> In no event, however, shall the fee be less than twenty-five dollars.
>
> * * * * * * * * * "

This section is likewise in my opinion only susceptible of one interpretation and that is, that the fee shall be payable at the rate of ten cents for each share up to and including ten thousand shares of the increase, irrespective of the existing capitalization of the company. It is reasonable to assume that the Legislature intended placing domestic and foreign corporations upon a parity and I am of the opinion that the two sections should be construed together in view of the similarity of their language.

The letter of the attorneys also raises certain questions concerning the constitutionality of Section 185 of the Code. I do not feel it within my authority to pass upon the questions suggested. The Legislature has enacted the section in its present form and, until the courts have construed it as being unconstitutional or inoperative, I conceive it to be my duty to consider it valid. It is a well known principle of law that legislative enactments are presumed to be valid until expressly held to the contrary.

The attorneys have also suggested a rather technical objection to the claim of the state in this instance. They say that, because Sections 183 and 184 of the Code were expressly repealed by the last Legislature and re-enacted in amended form, technically speaking the corporation has not "filed its statement and paid the fee prescribed by the preceding two sections" within the language of Section 185 as it appears in the new act. I do not feel that any court would have difficulty in construing this language to be applicable to payments under the sections as they existed prior to amendment by the last Legislature. The identity of the sections in question was not lost by reason of the fact that they were, pursuant to constitutional requirement, repealed and re-enacted in changed form in order to accomplish their amendment. In my opinion the application of Section 185 of the Code is not affected merely because the payments were made by the corporation in question under the provisions of Section 183 and 184, General Code, prior to their amendment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1678.

CERTIFICATE—FISCAL OFFICER—CONTRACT OR LEASE RUNNING BEYOND FISCAL YEAR—CITY COUNCIL—MAY NOT ISSUE BONDS IN INSTALLMENTS.

SYLLABUS:

1. *The provisions of Section* 5625-36, *General Code,* (112 O. L. 391, 408), *relative to certificates of fiscal officers in cases of contracts or leases running beyond the termination of the fiscal year in which they are made, have no application to contracts for the construction of improvements to be paid for out of bond issues.*

2. *A city council is not authorized under Section* 2293-26, *General Code, to issue bonds in installments as funds are needed to meet contractor's estimates as the same fall due.*

COLUMBUS, OHIO, February 6, 1928.

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

GENTLEMEN:—Acknowledgment is made of your recent communication requesting my opinion upon the following:

> "When bonds are authorized for the purpose of providing funds for the construction of a city building which will not be completed for several years, and council desires to issue such bonds in series as funds are needed to meet the contractor's estimates, may the fiscal officer, by virtue of the provisions of Section 5625-36 (112 O. L. 408), legally limit the amount of his certificates on such contracts to the amount that will be available and expended during the fiscal year in which the certificates are made?"

The portion of Section 5625-36, General Code, to which you refer in your communication, reads: