As regards the State of Ohio, the question arises as to whether each of such structures requires an authorizing act of the State Legislature or whether there is some general provision of the state law under which the necessary underwater rights and authority to construct can be granted by some state official without the necessity for an authorizing act in each individual case.

It will be greatly appreciated if you can furnish this office with extracts from the law covering such cases."

There being no general provisions in the laws of Ohio covering the matter about which you inquire I have been holding your request until I was able to secure a copy of House Bill No. 71, passed March 10, 1927, and filed in the office of the Secretary of State, March 30, 1927, a copy of which is enclosed herewith. This act grants authority to the Sandusky Bridge Company to construct, maintain and operate a bridge across Sandusky Bay. The plans and specifications for said bridge and the means adopted for caring for navigation to be subject to the approval of the Director of Highways and Public Works of the State of Ohio and the construction of said bridge to be under his supervision.

In accordance with the provisions of Sections 342-1 and 2 of the General Code of Ohio this department has assigned to House Bill No. 71 sectional numbers 13996-2 to 13996-8, General Code, both inclusive. This act not being an emergency measure will become effective ninety days after the same was filed in the office of the Secretary of State, to wit, on June 28, 1927, unless a referendum petition shall have been filed requiring that the act be submitted to a vote of the people as provided in Sections 1 to 1-g, both inclusive, of Article II of the Ohio Constitution.

Respectfully,
EDWARD C. TURNER,
Attorney General.

379.

FRANCHISE FEE—QUALIFIED FOREIGN CORPORATION FOR PROFIT WHOSE REPORT SHOWS NO BUSINESS DONE AND NO PROPERTY OWNED IN STATE—PENALTY UPON FAILURE TO PAY MINIMUM FRANCHISE FEE.

SYLLABUS:

1. *Where a foreign corporation for profit has duly qualified under Section* 183 *of the General Code to do business in the state of Ohio and a subsequent report to the tax commission, under Section* 5495 *of the General Code, shows no business done and no property owned in Ohio, which report the tax commission finds to be correct, such fact should be certified by the commission to the auditor of state, who is authorized by virtue of Section* 5499 *of the General Code to charge such corporation the minimum franchise fee therein provided.*

2. *Where a foreign corporation for profit has qualified to do business in the state of Ohio and fails to pay the franchise fee provided in Section* 5499 *of the General Code, its certificate of authority to do business in this state may be canceled by the secretary of state by proper proceedings had under Section* 5509 *of the General Code.*

COLUMBUS, OHIO, April 25, 1927.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads as follows:

"The Commission is in receipt of your opinion No. 206 advising us that the state has no right to assess the minimum excise tax in case of a utility doing business in this state whose annual report shows no intrastate earnings.

This immediately suggests to us the further questions on which we desire to have your opinion, and which are:

1. In case of a foreign corporation admitted to do business and own property in this state but whose report shows no business and no property, has the state the right to require payment of the minimum franchise fee?

2. Can the state cancel the right of admission to do business for failure of a foreign corporation to make such payment?"

Section 5495 of the General Code requires a report in writing to the tax commission and provides as follows:

"Within thirty days after the taking effect of this act and annually, thereafter, during the month of April, except as otherwise provided by law, each corporation, incorporated under the laws of this state for profit, and each foreign corporation for profit, doing business in this state or owning or using a part or all of its capital or property in this state or having complied with the provisions of Section 183 of the General Code and having been authorized by the secretary of state to transact business in this state, shall make a report in writing to the tax commission in such form as the commission may prescribe, provided, however, that if any such corporation shall be adjudicated a bankrupt or a receiver shall be appointed therefor or a general assignment shall be made thereby for the benefit of creditors, such corporation shall file the report herein provided but it shall not be charged with any fee as hereinafter specified except for the portion of the then current year and of subsequent years during which such corporation *had the power to exercise its corporate franchise* unimpaired by such proceedings or act." (Italics the writer's.)

At the outset it should be borne in mind that the above quoted section requires the filing of an annual report by three classes of foreign corporations, namely, (1) all which are doing business in this state, (2) all owning or using a part or all of their capital or property in this state, and (3) all which have complied with the provisions of Section 183 of the General Code and have been authorized by the secretary of state to transact business in this state.

You mention the case of a foreign corporation which has been admitted to do business and own property in this state, but whose report shows no business done or property owned at the present time. Obviously such a corporation is not within the first two classes mentioned above, but very clearly it is within the third class. It has duly applied to the secretary of state for permission to do business and has, upon compliance with the requirements of Section 183 of the General Code, been granted that privilege. It is rather significant that, by the last sentence in Section 184 of the General Code, the secretary of state upon the payment of the franchise fee is required to issue a certificate to the foreign corporation stating "that it has complied with the laws of Ohio and is authorized to do business therein". Section 5495 specifically requires every corporation having that privilege to file the report therein provided for annually with the tax commission.

The successive steps after the filing of the report, as enumerated in the succeeding sections of the General Code, have an important bearing on the question at hand. Sections 5496 and 5497 deal with the contents of the report and the method of its execution. Section 5498 provides, in part, that the tax commission shall, on the first Monday in September, determine "the proportionate amount of the fair value on an

asset basis of the capital stock of *every foreign corporation, required to file a report under Section* 1 *of this act*, represented by the sum of all the property owned or used and business done by it, located or transacted within the state." Section 1 of this act refers to Section 5495 of the General Code. Since, as I have before indicated, this latter section requires a report from every foreign corporation which has qualified to do business in the state irrespective of whether it is actually doing business or not, it would appear to be the affirmative duty of the tax commission to find the value of each foreign corporation filing a report and to certify that valuation to the auditor of state. This would include not only those corporations as to which it finds a valuation, but also any corporation as to which it finds no valuation.

Section 5499 then provides, in part, that the auditor of state "shall charge for collection from *each such corporation* a fee of one-twelfth of one per cent upon such amount so certified, which fee shall not be less than fifteen dollars in any case and shall immediately certify the same to the treasurer of state."

The succeeding sentence of this section has considerable significance. It is in the following words:

> "Such fee shall be charged for the privilege of exercising its franchises and doing business within the state in the calendar year in which the tax is payable."

From the language of the sections quoted I believe it evident that the tax imposed is what is known as a franchise or privilege tax. While it is true that the measure of that tax is, for the most part, the volume of business done or the amount of property owned in this state, nevertheless the legislature has specifically stated that each foreign corporation filing a report shall pay at least a minimum of fifteen dollars. This minimum is charged for the privilege of doing business and is distinguished from the actual doing of the business.

It is to be noted that it is not mandatory upon every foreign corporation to qualify to do business in the state of Ohio. That is entirely optional with the corporation. If, however, the corporation sees fit to qualify, it is accorded by the state certain special privileges. By the terms of Section 186 of the General Code a foreign corporation which has qualified is not subject to process of attachment upon the ground that it is a foreign corporation. There are other incidental advantages to be gained by reason of this qualification which it is unnecessary to recite. These advantages are of tangible value to a corporation and it is the value of this privilege which the state is taxing.

It may be suggested, however, that, because the general measure of the tax is dependent upon the proportinate amount of the capital stock represented by business done or property owned in the state of Ohio, if no business is actually done or any property owned, then no tax can be levied. But to so hold would be to overlook entirely the minimum fee provision, which is as much a part of the tax provision as is the remainder thereof. In this connection attention is also called to the fact that under Section 183 of the General Code a statement is required before the qualification of a foreign corporation in much the same language as is the statement required by Section 5497. Further, section 184, which provides for the fee to be paid for qualification, states that the secretary of state "shall determine the proportion of the capital stock of the corporation represented by its property and business in this state, and shall charge and collect from such corporation for the privilege of exercising its franchise in this state, one-tenth of one per cent upon the proportion of its authorized capital stock represented by property owned and used and business transacted in this state, but not less than ten dollars in any case."

If a foreign corporation strictly complies with the law it is obvious that there can be no business done in this state prior to its qualification, and it is entirely con-

ceivable that a foreign corporation should wish to be qualified to do business in this state without owning any property therein. Under such circumstances, could it be contended that the secretary of state was not authorized to charge the minimum fee of ten dollars for qualifying such a corporation? The answer seems to be obvious. The minimum fee would be payable irrespective of any business transacted in this state, since its payment is a condition precedent to the right to do such business. Its payment confers the authority to do business.

By the same process of reasoning, the minimum annual fee is payable irrespective of whether any business is done or property owned. It constitutes an annual charge for the continuance of the privilege and is payable irrespective of whether that privilege is exercised or not. If the privilege be exercised, then the measure of the fee becomes the amount of business done or property owned, but I do not believe that this affects in any respect the right of the state to make a charge for the annual renewal of the privilege.

I deem the language of the latter part of Section 5495 of the General Code, above quoted, to be quite persuasive. You will note that this is a recent amendment which provides for the abatement of a proportional part of the fee otherwise required when, by reason of receivership, bankruptcy or assignment, all powers of the corporation are held in abeyance, but it specifically states that for the portion of the year "during which such corporation had the power to exercise its corporate franchise unimpaired" a fee may be required. I need scarcely point out that the corporation might have the power without exercising it and that the use of the above quoted phraseology clearly indicates the accrual of the tax where the power to exercise the franchise exists irrespective of its actual exercise.

For the reasons that I have set forth, I am of the opinion that the tax in question is in the nature of a franchise or privilege tax and that the annual renewal of the right to do business in Ohio requires the payment of the minimum fee provided by Section 5499 of the General Code.

You have called my attention, however, to my prior opinion No. 206 rendered on March 19, 1927, in which I reached the conclusion that the minimum charge provided by Section 5486 of the General Code could not be assessed against a railroad company whose report showed that it had done no intrastate business during the preceding fiscal year.

In my opinion, the two taxes are clearly distinguishable. As pointed out in my prior opinion, the tax upon public utilities, and railroads in particular, is a pure excise tax governed by entirely different principles from those applicable to franchise or privilege taxes. While the terms "excise" and "franchise" are often used indiscriminately and hence might possibly be regarded as synonymous, that there is a distinction is made evident by the use of both terms in the Constitution of Ohio. Section 10 of Article XII of the Constitution is as follows:

> "Laws may be passed providing for excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas and other minerals."

The distinction between the two lies in the fact that a franchise tax is a fee imposed upon the extension of a privilege to do some act or thing not otherwise authorized, while an excise tax is imposed upon the actual doing of the thing. As to the first tax it is only necessary that the privilege to do the thing be extended before the liability is incurred, but the excise tax further demands that the thing be actually done.

It is significant that the legislature has seen fit to define the one specifically as an excise tax, while the other is called a fee.

In my former opinion it was stated that the tax upon utilities is an excise tax and that therefore, being solely measured by the amount of intrastate business done, no basis of calculation exists where there is no such intrastate business.

Such a holding is entirely proper with relation to an excise tax, but it does not to me appear to follow necessarily that a franchise tax is governed by the same principles. Many instances might be cited of various franchise or privilege fees which are payable irrespective of the actual exercise of the privilege. The privilege itself is a valuable thing in exchange for which the state may properly require the payment of a reasonable fee. As was said in the case of State of Ohio vs. Harris, 229 Fed. 892, with reference to Section 5495, General Code:

> "The Ohio franchise tax must be laid with reference to the reasonable value of the privilege or franchise conferred, or its continued annual value thereafter."

Just what the value of the privilege to do business in the state of Ohio is, would, of course, vary with the particular corporation. That it is of some substantial value can scarcely be controverted, but any accurate measure of that value is manifestly impossible.

In Ohio Tax Cases, 232 U. S. 576, the Supreme Court of the United States, speaking through Mr. Justice Pitney, states on page 588 as follows:

> "The case referred to, *Southern Gum Co.* vs. *Laylin,* 66 Oh. St. 578, dealt with an Act of April 11, 1902, known as the Willis Law. The court held it to be an excise or franchise tax, not a property tax, and therefore not subject to the express limitations imposed by the state constitution upon taxes of the latter kind, but only to such limitations as were to be implied from certain other provisions of the constitution, respecting which the court said (p. 594): 'The constitution was established to "promote our common welfare." Preamble to the constitution. Government is instituted for the equal protection and benefit of the people. Section two of the bill of rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section nineteen of the bill of rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year.' *Ashley* vs. *Ryan,* 49 Ohio St. 504; *State ex rel.* vs. *Ferris,* 53 Ohio St. 314; and *Hagerty* vs. *State,* 55 Ohio St. 613, are examples of taxing the privilege or franchise conferred; while *Telegraph Company* vs. *Mayer,* 28 Ohio St. 521, and *Express Company* vs. *State,* 55 Ohio St. 69, are examples of taxing the continued value of the existing privilege or franchise from year to year. These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts."

I do not believe it can be urged that the imposition of a fifteen dollar minimum fee is in excess of the value of the privilege conferred upon any foreign corporation to do business in the state of Ohio irrespective of whether that corporation sees fit to exercise that privilege or not. The right is conferred and that right is valuable.

The foregoing discussion may be briefly summarized by stating my position to be that the franchise fee required by Sections 5495, et seq., of the General Code is a tax upon the privilege of exercising the corporate franchise in Ohio and that every foreign corporation which has qualified to do business in Ohio under Section 183 of the General Code must file annually a report with the tax commission and must pay annually for the privilege or rights to exercise its corporate franchise in Ohio at least the minimum

fee required by Section 5499 of the General Code. While the ordinary basis of the determination of the amount of the fee is the amount of business done or property owned within the state, yet the doing of business or the ownership of property is not an essential condition to the exaction of such fee. The minimum is payable in any event so long as the corporation chooses to retain the right to do business in this state. This conclusion is not inconsistent with the one reached in my prior opinion No. 206 rendered March 19, 1927, because of the essential difference in the nature of the taxes involved.

Answering your first question specifically, I am of the opinion that a foreign corporation admitted to do business and own property in this state, but whose report shows no business done or property owned, may be required to pay the minimum franchise fee provided by Section 5499 of the General Code.

Coming to the consideration of your second question, I refer you to the provisions of Section 5509 of the General Code, which are as follows:

> "If a corporation, wherever organized, required by the provisions of this act, to file any report or return or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this state, for profit or as a foreign corporation for profit doing business in this state and owning or using a part or all of its capital or plant in this state, or as a sleeping car, freight line or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the commission shall certify such fact to the secretary of state. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this state, by appropriate entry upon the margin of the record thereof, or cancel the certificate of authority of any such foreign corporation to do business in this state by proper entry. Thereupon all the powers, privileges and franchise conferred upon such corporations, by such articles of incorporation or by such certificate of authority, shall cease and determine. The secretary of state shall immediately notify such domestic or foreign corporation of the action taken by him."

While the language of this section is such as to raise some doubt as to its applicability to a foreign corporation which is transacting no business and owns no property in the state, yet it shows clearly the intention of the legislature to make this section all-comprehensive, and I therefore am of the opinion that the state can, upon failure of a foreign corporation to make the payment of the minimum fee, cancel the certificate of authority of such corporation to do business in this state.

Respectfully,

EDWARD C. TURNER,

Attorney-General.