two hundred dollars or less the contract may be let without competitive bidding. Such contract shall be performed under the supervision of a member of the board of township trustees or the township highway superintendent. Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township. The township trustees shall provide suitable places for housing and storing machinery and tools owned by the township. They shall have the power to purchase such material and to employ such labor and teams as may be necessary for carrying into effect the provisions of this section, or they may authorize the purchase or employment of the same by one of their number or by the township highway superintendent at a price to be fixed by the township trustees. All payments on account of machinery, tools, material, labor and teams shall be made from the township road fund as provided by law. All purchases of materials, machinery, and tools, shall, where the amount involved exceeds five hundred dollars, be made from the lowest responsible bidder after advertisement made in the manner hereinbefore provided. All force account work shall be done under the direction of a member of the board of township trustees or of the township highway superintendent."

It will be observed that Section 3373, supra, is found in a chapter of the General Code entitled "Road Superintendent." This chapter is composed of Sections 3370 to 3376, both inclusive, of the General Code. All of these various sections under the chapter entitled "Road Superintendent" deal with some phase of the maintenance and repair of highways and nowhere in said chapter is any mention made of the construction or relocation of highways.

The statutes being entirely silent as to conferring authority upon township trustees to undertake "new construction" of roads by the method of force account, it is my opinion that where the improvement of a road is of such a nature that it constitutes new construction, it is unlawful for township trustees to follow the method of force account as provided in Section 3373, supra.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1359.

TAX AND TAXATION—FRANCHISE TAX ON CORPORATIONS—METHOD OF COMPUTING.

SYLLABUS:

1. *In the determination of the proportion of the capital stock of a foreign corporation, upon which the payment of the fee required by Section* 184 *of the General Code is based, the amount of business done is presumed to be in direct proportion to property owned in this state, and, therefore, in reaching the proportion consideration should be given solely to the property owned and used in Ohio and the total property owned and used.*

2. *Long continued administrative interpretation of legislation is entitled to great weight where such legislation is susceptible of more than one meaning.*

3. *In determining the proportion of the capital stock of a foreign corporation represented by property owned and used and business done in this state under Section*

185 *of the General Code, the Secretary of State may adopt as a reasonable basis for the determination of business done the amount thereof during the next preceding annual accounting period of the corporation.*

COLUMBUS, OHIO, December 14, 1927.

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

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

"Having reference to a qualification by a foreign corporation under Section 183, et seq., General Code, it has been the practice of this office during my administration and the administrations of my predecessors to take into consideration in the computation of fees due under the sections in question the property owned by the corporation in Ohio and the property owned by the corporation outside Ohio, no consideration being given the business in this state or outside of the state.

In your Opinion No. 921, dated August 26, 1927, and addressed to me, you use the following language:

'In the interest of clarity I shall repeat the formula to be used.

To determine the amount to be charged a corporation seeking qualification to do business under the provisions of Section 184 of the General Code, as amended in Senate Bill 295, you should divide the sum of the property owned and business done in this state by the total amount of property owned and business done. The resulting fraction should be multiplied by the total number of authorized shares of stock of the company. The result will be the proportion of the authorized capital stock represented by property owned and business done in this state and your fees should be assessed in accordance with the schedule prescribed in Section 184 as amended.'

The language used is clearly to the effect that consideration is to be given business transacted both in the state and beyond the borders of the state.

In connection with the language quoted your attention is directed to G. C. Section 184 in that while business in the state is mentioned, no mention is made of business outside the state.

Your attention is also directed to the fact that technically a foreign corporation should not have prior to qualification transacted any business in the state. If only those corporations who have transacted business prior to qualification are to enjoy the advantage of having their business done taken into consideration, it would seem that a premium would be placed upon failure to qualify.

Due perhaps to the change in fees which has been occasioned by S. B. 295, the department has recently received a number of requests for information as to the basis of computing fees under Section 183. The requests all indicate the belief on the part of the attorney or company submitting same that business is to be taken into consideration.

Your opinion is requested at the earliest possible date as to whether or not in computing fees under Section 183, et seq., business done in the state and business done outside the state, or in a case where a company has transacted no business in this state, business outside the state shall be taken into consideration in computing fees under the sections indicated.

If it is possible in your opinion, also indicate what is meant by 'business done.' Requests are frequently made for information as to whether business done means business done during the previous calendar year or for some other period.

For your information in connection with the above a copy of the form used for qualification under Section 183 is enclosed.

There is also enclosed a letter from the Corporation Trust Company under date of November 7th which is a sample of requests received recently in connection with the foregoing. It is requested that in rendering your opinion the letter mentioned be returned to our files."

Your inquiry invites attention to a paragraph in my previous opinion, Number 921, dated August 26, 1927, in which the formula to be used in determining the amount of fees due under Section 184 of the General Code was briefly discussed. The recent amendment of Sections 183, 184 and 185 of the General Code, as found in 112 O. L. p. 513, merely changed the amount to be paid and did not in any respect alter the method of determining the proportion of authorized capital stock.

You state that it has been the practice in your office for a considerable time to consider only the proportion of the property owned and used by the corporation in Ohio to the value of the total property owned and used by the corporation in determining the proportion of the capital stock. Authority for this practice is found in the Annual Reports of the Attorney General for 1907, at page 86, where my predecessor held that the factor of business done should, in effect, be disregarded. This conclusion was based upon the assumption that the volume of business transacted in Ohio would generally bear the same relation to the total volume of business as the property owned in Ohio bears to the total property owned. I quote the following from the opinion at page 88:

"But since the volume of business transacted in Ohio would generally bear the same relation to the total volume of business as the property owned in Ohio bears to the total property owned, the more practical rule would be to eliminate the question of business transacted, except insofar as the same may assist in determining the value of property owned, and impose the tax upon that portion of the total authorized capital which represents the proportion which the property in Ohio bears to the total property. The only apparent purpose in the statute of requiring a consideration of the amount of business done is to secure for Ohio, as a subject of taxation, its full share of the capital stock of foreign corporations, and to prevent such corporations reporting as such share only the value of their tangible property in this state, while their intangible property, such as good will, franchises, patents, copyrights and investments of stocks and bonds in other corporations (generally making up the bulk of their capital) are reported as being held in other states.

For the guidance of your department, therefore, I suggest that with respect to all foreign corporations subject to the Willis tax it be ascertained from the reports or otherwise: First, the value of the tangible property in Ohio; second, the value of all tangible property; third, the total authorized capital stock; and that the corporation be required to pay one-tenth of one per cent upon that portion of its total authorized capital stock which represents the proportion its tangible property in Ohio bears to its total tangible property. Thus, if a corporation has $5,000 of tangible property in Ohio, a total of $10,000 of tangible property, and a total authorized capital stock of $100,000, it would pay the tax on one-half of its total capital or one-tenth of one per cent upon $50,000. So, if it had all its tangible property in Ohio, and a total authorized capital of $100,000, it would pay such tax upon $100,000."

Section 183 of the General Code provides as follows:

"Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the Secretary of State, in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts:

1. The number of shares of authorized capital stock of the corporation and the par value, if any, of each share.

2. The name and location of the office or offices of the corporation in Ohio and the names and addresses of the officers or agents of the corporation in charge of its business in Ohio.

3. The value of the property owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.

4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio."

Section 184, in so far as pertinent, is as follows:

"From the facts thus reported and any other facts coming to his knowledge, 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, upon the proportion of its authorized capital stock represented by property owned and used and business transacted in this state, * * * ."

The language of the legislature in these sections is, to say the least, anomalous in that it makes it the duty of the foreign corporation to file the statement before doing business and at the same time requires that there be set forth in that statement the proportion of the capital stock of the corporation represented by both property owned and used and business transacted in Ohio. The contradiction is emphasized by the repetition of the phrase "business transacted in this state" in Section 184, supra. The anomaly has been preserved by the re-enactment of these sections in 112 Ohio Laws.

If your question were before me upon the interpretation of these sections as a matter of first instance, I might reach a conclusion other than that which I have been compelled to adopt. We have in this instance, however, an administrative interpretation of the language of these sections which has persisted for more than twenty years. Such a long continued practice must, in my opinion, have been known to the legislature and the conclusion seems warranted that, in the re-enactment of these sections in 112 Ohio Laws, in the same language, the legislature intended that the same course of administration should continue.

Under circumstances of this character, the courts have frequently recognized that administrative interpretation is of great weight in determining the meaning of statutory language. Particularly pertinent is the very recent case of *Heiner* vs. *Colonial Trust Company,* decided by the Supreme Court of the United States November 21, 1927, the last paragraph of the opinion being as follows:

"It is not without weight that the Treasury Department from the beginning has consistently collected income tax from lessees of Indian oil lands running into vast amounts. If this was contrary to the intention of congress it is reasonable to suppose that this practice of the department would have been specifically corrected in some of the revisions of the laws taxing income in

1917, 1919, 1921, 1924 or 1926. Compare *National Lead Co.* vs. *United States,* 252 U. S. 140, 145, 146."

Of like effect is the case of *Industrial Commission* vs. *Brown,* 92 O. S. 309, in which Chief Justice Nichols, on page 311, used the following language:

> "Administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do."

In view of the manifest contradiction in the terms of these sections, I feel that the administrative interpretation which has continued for so long is of decisive weight and that I would not be warranted at this time in changing the practice which has been so long in effect.

You point out, however, that in an earlier opinion of this office I used the language which you quote in your communication. It is true that reference is had to the proportion of property owned and business done in this state to the total of property owned and business done. In so advising you, however, it must be borne in mind there was no intention to depart from the prior administrative interpretation of the language and that business done, as a factor, is really negligible since it will be presumed to exist in direct proportion to the amount of property owned.

Theoretically, therefore, the factor of business done must be included, but the presumption referred to necessarily results in the determination of the proportion of the capital stock on the basis of property alone.

You also ask me to advise you what is meant by "business done." My previous discussion has rendered unnecessary the consideration of this factor in the determination of the fee under section 184 of the General Code. I believe that you must, however, give consideration to business done in the determination of the fee upon the increase of the proportion of property owned and business done as provided in Section 185, General Code. The statute nowhere defines this term. By analogy, however, I believe the same rule may be applied as is applicable in the case of the determination of the franchise tax. Section 5497 of the Code requires every corporation in its annual report to show the total amount of business done and the amount of business done within the state during the preceding annual accounting period of the corporation. In my opinion, in the determination of the amount of business done as a prerequisite to a determination of the proportion of the capital stock, under Section 185 of the General Code, it would be reasonable to apply the same rule and to use as the basis the amount of business done during the last preceding annual accounting period of the corporation in question.

You are therefore advised that in the determination of the proportion of the capital stock of a foreign corporation, upon which the payment of the fee required by Section 184 of the General Code is based, the amount of business done is presumed to be in direct proportion to property owned in this state, and, therefore, in reaching the proportion consideration should be given solely to the property owned and used in Ohio and the total property owned and used.

Respectfully,
EDWARD C. TURNER,
Attorney General.