present law is wrong in this respect, the remedy lies with the legislature. Suffice it to say that the legislature in Section 7246, supra, has spoken of each vehicle therein named as a single entity and has given no leeway to consider the same otherwise.

Answering your question specifically, it is my opinion that under the provisions of Section 7246, General Code, it is unlawful to operate a motor truck over the public streets of a municipality or the public highways of the state, the total gross weight of which, including truck and load, exceeds ten tons, unless said vehicle comes within one of the exceptions expressly provided in Sections 7246 or 7247, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1597.

TAX AND TAXATION—FLAXSEED—IMPORTED IN BULK—WHEN SUBJECT TO PROPERTY TAX OF OHIO.

SYLLABUS:

Flaxseed, or a like commodity, imported in bulk from a foreign country, for use by the importing company in the manufacture of finished products, which flaxseed is drawn from the hold of the ship in which it is imported by elevator and stored in large bins, from which the company takes sufficient flaxseed to supply its needs from time to time as production requires, has lost its distinctive character as an import and is property subject to taxation by the state of Ohio.

COLUMBUS, OHIO, January 18, 1928.

The Tax Commission of Ohio, Columbus, Ohio.

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

> "The Tax Commission of Ohio is desirous of having a formal opinion from your office relative to the following question:
>
> When does an import commodity into this state become merged or embodied into the commercial world, and thereby become subject to taxation?
>
> The question has been raised by the auditor of Cuyahoga County, Mr. Zangerle, and we feel it is a very pertinent question and heartily concur for an official opinion on this matter. We are submitting copies of his letter and material submitted from his office which will, perhaps, more clearly set forth the full scope of this subject."

The copy of the letter from the auditor of Cuyahoga County, referred to by you, reads as follows:

> "About a year ago one of the large paint manufacturers of this city purchased four shiploads of flaxseed from a Montreal vendor. The flaxseed was loaded at Montreal and shipped to the Cleveland manufacturer, unloaded at his dock on the Cuyahoga river and placed in a bin, or bins, within his warehouse. These shiploads of flaxseed are being used from time to

time as the necessities of their business require so that on the first day of January, 1927, it appears that the company still has a large quantity of this flaxseed on hand, valued, perhaps, at $700,000, the original importations being valued at about $1,200,000 and made about one year ago.

It is contended by the company that this property is exempt from taxation because of its import character, and that its taxation is forbidden by the Constitution of the United States which provides that no state shall, without consent of Congress, lay any duties on imports. We find many rulings on the question of the power of the state to levy taxes on imports while in their original package, also other cases indicating that when the goods are not in their original package and are mixed with other goods and property that they are taxable. All these cases, however, seem to be cases where the goods are in the hands of the importer and involve cases where the goods are again to be sold. In the case at hand, however, the goods are not to be sold but are to be used in the production of paints.

Along this line, there are thousands of cases of import where the importer does not sell the goods but consumes or uses the material. For example suppose I should purchase office desks for my office, or suppose a farmer should purchase a threshing machine, or suppose a manufacturer should import valuable machinery for his own use, perhaps an automobile, using it for years perhaps—in all these cases and during all these years the goods are in the hands of the original importer, yet they occupy and enjoy the same status as if purchased in this country. The question becomes very material and pertinent—when does the import become merged or embodied in the commercial world here and become taxable?

Since we have similar questions in the taxation of the goods of wholesale grocery houses, china and glassware merchants, etc., we think that we should have an opinion from the Attorney General as to the taxability of the property set forth. We enclose a copy of the authorities cited by the attorney for the taxpayer."

In a second letter from the County Auditor of Cuyahoga County, he says that:

"* * * The *flaxseed,* the material in question, was imported in bulk and constituted three different shiploads, received within a month or two with reference to each other.

This flaxseed was sucked up by elevator and stored in large bins, from which the company takes its needs from time to time as production requires."

Your question may be stated as follows:

When does property of the character here involved, imported from a foreign country, and the duties paid thereon, lose its character as an import so as to become subject to taxation by the state?

The Constitution of the United States, Section 8, Article I, provides that:

"The Congress shall have power to lay and collect taxes, duties, imports and excises, to pay the debts and provide for the common defense and general welfare of the United States; * * *"

Section 10, Clause 2 of Article I, provides:

"No state shall without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

In the case of *Brown, et al.*, vs. *The State of Maryland,* 12 Wheat. 419, 436; 6 Law Ed. 678, Chief Justice Marshall said:

"The first inquiry is into the extent of the prohibition upon states 'to lay any imposts or duties on imports or exports.' * * *

* * *

What, then, is the meaning of the words, 'imposts, or duties on imports or exports?'

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports?' The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the things imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. * * *

* * * *

The constitutional prohibition on the states to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. * * * It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

* * *

* * * All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. * * * So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution.

* * *

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?

This question was considered in the case of *Gibbons* vs. *Ogden* (9 Wheat. Rep. 1) in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. * * * If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

* * * Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation. * * * It has been contended, that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory.

We admit this power to be sacred, but can not admit that it may be used so as to obstruct the free course of a power given to Congress. We can not admit, that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the states may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the states must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of

justice in the courts of the union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. * * * the subject was taken up and considered with great attention in *McCulloch* vs. *The State of Maryland,* (4 Wheat. Rep. 316), the decision in which case is, we think, entirely applicable to this."

While the court in this case discusses both the clause of the constitution of the United States relating to imports and the commerce clause, it must be remembered that later cases have recognized a distinct difference between the two as relates to the power of the states to impose taxes. This distinction is clearly pointed out in the case of *Sonnenborn Bros.* vs. *Curcton,* 262 U. S. 506. The following from pages 508 et seq., of the opinion in that case will aid in avoiding confusion in this discussion:

"The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas, to their warerooms or warehouse in Texas, there held for sale in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas.

Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject.

This has been established so far as property taxes on the merchandise are concerned by a formidable line of authorities. *Brown* vs. *Houston,* 114 U. S. 622; *Coe* vs. *Errol,* 116 U. S. 517; *Pittsburgh & Southern Coal Co.* vs. *Bates,* 156 U. S. 577; *Diamond Match Co.* vs. *Ontonagon,* 188 U. S. 82; *American Steel & Wire Co.* vs. *Speed,* 192 U. S. 500, 520; *General Oil Co.* vs. *Crain,* 209 U. S. 211; *Bacon* vs. *Illinois,* 227 U. S. 504.

But the argument is that for articles in original packages, the sale is a final step in the interstate commerce, and that the owner may not be taxed upon such sale because this is a direct burden on that step. The reasoning is based on the supposed analogy of the immunity from state taxation of imports from foreign countries which lasts until the article imported has been sold, or has been taken from its original packages of importation and added to the mass of merchandise of the state. This immunity of imports was established by this court in *Brown* vs. *Maryland,* 12 Wheat. 419, 446, 447. * * *

The holding was that the sale was part of the importation. It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it. * * *

Cases subsequent to *Brown* vs. *Maryland* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article

because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce?"

The rule established in these cases has not been changed as to the power of the state to tax imports and each case must be decided upon the proper determination of when an import has been so acted upon by the importer "that it has become incorporated and mixed up with a mass of property within the country" and has "lost its distinctive character as an import."

It is settled that when the property imported has been sold (*Brown* vs. *Houston*, 114 U. S. 622), or when the original package of importation has been broken for the purposes of sale (*May* vs. *New Orleans*, 178 U. S. 496), the import character of the property is lost and it may be taxed by the state where it is located.

There is no original package to protect this flaxseed from taxation by the state, for if there ever was any original package it was the hold of the ship and it has been removed from that.

The flaxseed is not held for sale, but has come to rest in the state and is held for use as needed by the importer. Even conceding that while in the bins unused the flaxseed could have been said to be exempt from state taxation, on the theory that the importer still had the right to sell the total bulk of flaxseed, the reasoning of the court in *Brown* vs. *Maryland* and *May* vs. *New Orleans*, supra, would seem clearly to lead to the conclusion that when the importer commenced to use it the exemption was lost.

The following is from the opinion of the court in the case of *May* vs. *New Orleans*, supra, pages 501, et seq.

"If the goods of the plaintiffs were assessed for taxation before they had ceased to be imports, that is, while in the original packages and before they had, by the act of the importer, become incorporated into the mass of property of the state and were held for use or sale, then the assessment was void under the provisions of the constitution of the United States declaring that no state shall, without the consent of Congress, lay any imposts or duties on imports or exports except those absolutely necessary for executing its inspection laws, as well as under the provision giving Congress power to regulate commerce with foreign nations. * * *

* * *

Let us first inquire as to the consequences that may follow from the interpretation of the clause of the constitution relating to state taxation of imports, upon which the plaintiffs rest their case. In the view taken by them it would seem to be immaterial whether the separate parcels or packages brought from Europe were left in the shipping box, case or bale after it was opened, or were taken out and placed on the shelves or counters in the store of the importer for delivery or sale along with goods manufactured or made in this country. In other words, they argue that the importer may sell each separate package either from the box in which it was transported, after it is opened, or from the shelves or counters in his store, without being subjected to local taxation in respect to any package so brought into the country, provided such separate package be sold or offered for sale in the form in which it was when placed in the box, case, or bale by the European manufacturer or packer. * * * The necessary result of this position is that every merchant selling only goods of foreign manufacturer, in separate packages, although enjoying the protection of the local government acting under its police powers, may conduct his business, however large, without any liability whatever to state or local taxation in respect of such goods, provided he takes

care to have the articles imported separately wrapped and placed in that form in a box, case, or bale for transportation to and sale in this country. * * * Other illustrations arising out of the business of American merchants will readily occur to everyone. The result would be that there might be upon the shelves of a merchant in this country, ready to be used and openly exposed for sale, commodities or merchandise consisting of articles separately wrapped and of enormous value that could not be reached for local taxation until after he had sold them, no matter how long they had been kept by the importer before selling them. It cannot be overlooked that the interpretation of the constitution for which plaintiffs contend would encourage American merchants and traders seeking to avoid state and local taxation, to import from abroad all the merchandise and commodities which they would need in their business.

* * * Indeed, under plaintiffs' view, the constitution secures to the manufacturers of foreign goods imported into this country an immunity from taxation that is denied to manufacturers of domestic goods. An interpretation attended with such consequences ought not to be adopted if it can be avoided without doing violence to the words of the constitution. Undoubtedly the payment of duties imposed by the United States on imports gives the importer the right to bring his goods into this country for sale, but he does not, simply by paying the duties, escape taxation upon such goods as property after they have reached their destination for use or trade, and the box, case or bale containing them has been opened and the goods exposed to sale.

* * * We cannot impute to the framers of the constitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the plaintiffs. *When their goods had been so acted upon as to become a part of the general mass of property in the state the plaintiffs stood, with respect to liability to state taxation, upon the same basis of equality as the owners of like property, the product of this country;* the only difference being that the importers paid a duty to the United States for the privilege of importing their goods into this country, and of selling them in the original packages—a duty imposed for the purpose of raising money to carry on the operations of the government, and, in many instances, with the intent to protect the industries of this country against foreign competition. A different view is not justified by anything said in *Brown* vs. *Maryland.* It was there held that the importer by paying duties acquired the right to *sell* in the original packages the goods imported—the Maryland statute requiring a *license from the state* before any one could *sell* 'by wholesale, bale or package, hogshead, barrel, or tierce,' goods imported from other countries. But it was not held that the right to sell was attended with an immunity from all taxation upon the goods *as property,* after they had ceased to be imports and had become by the act of the importer a part of the general mass of property in the state. The contrary was adjudged.

Without further reference to authorities we state our conclusion to be that within the decision in *Brown* vs. *Maryland,* the boxes, cases or bales in which plaintiffs' goods were shipped were the original packages, and the goods imported by them lost their distinctive character as imports and became a part of the general mass of the property of Louisiana, and subject to local taxation as other property in that state, the moment the boxes, cases or bales in which they were shipped reached their destination for use or trade, and were opened and the separate packages therein exposed or offered for sale; conse-

quently, the assessment in question was not in violation of the constitution of the United States."

The flaxseed in question here is not held by the importer for sale. It must be conceded that even if it were for sale in order to be protected from state taxation it would have to be sold in the entire bulk and could not be sold piecemeal. This flaxseed was imported for use and it has reached its destination and is now being used.

Having no direct decision of a Supreme Court upon a situation involving property imported in bulk in this manner, we must necessarily depend upon analogies drawn from other decisions.

In view of these decisions, I am of the opinion that the flaxseed in question has lost its distinctive character as an import and is subject to taxation by the State of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1598.

NEWSPAPER—MEMBER OF VILLAGE COUNCIL OWNER OF ONLY ENGLISH NEWSPAPER IN VILLAGE—MAY BE PAID LEGAL RATE FOR PUBLICATION OF VILLAGE NOTICES, ETC.

SYLLABUS:

A member of a village council who owns the only English newspaper published and of general circulation in the village may legally be paid the legal rate for publication of the village ordinances, resolutions, statements, orders, proclamations, notices and reports which are required by law or ordinance to be published.

COLUMBUS, OHIO, January 18, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your communication, as follows:

"Sections 3808, 4218 and 12910, G. C., prohibit an officer of a municipal corporation from being interested in a contract with the corporation of which he is an officer.

QUESTION: May a village legally pay to a newspaper publisher who is also a member of council the rates fixed by statute for advertising ordinances, etc.? The newspaper owned by the member of council is the only one published in the municipality.

Opinion No. 1159 found at page 5 of the Opinions for 1916 may be pertinent."

Sections 3808, 4218 and 12910, General Code, referred to in your letter, read as follows:

Sec. 3808. "No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of