1768.

APPROVAL—BONDS CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, $25,000.00, PART OF ISSUE DATED NOVEMBER 1, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

COLUMBUS, OHIO, January 15, 1938.

GENTLEMEN:

RE: Bonds of City of Cleveland, Cuyahoga County, Ohio, $25,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dited November 1, 1934. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of January 27, 1937, being Opinion No. 49.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

1769.

UNEMPLOYMENT COMPENSATION ACT—STATUS EMPLOYES IN NATIONAL BANKS, STATE BANK, FEDERAL RESERVE SYSTEM, BUILDING AND LOAN ASSOCIATIONS, FEDERAL HOME LOAN BANK—DEMARCATION —"PURELY GOVERNMENTAL FUNCTIONS".

SYLLABUS:

1. *Service performed in the employ of national banks is not employment within the meaning of Section* 1345-1(c) (E) (4), *General Code.*

2. *State banks which are members of the Federal Reserve System and state building and loan associations which are members of the Federal Home Loan Bank are not instrumentalities of the federal government exercising "purely governmental functions," and, therefore,*

3. *Employment by such institutions is not exempt from the provisions of the Unemployment Compensation Act by reason of the provisions of Section* 1345-1(c) (E) (4), *General Code.*

4. *The state banks and building and loan associations, having no relation to the federal government, are clearly not governmental instrumentalities and employment by such institutions is employment within the meaning of the Unemployment Compensation Act.*

COLUMBUS, OHIO, January 17, 1938.

HON. CHARLES S. LEASURE, *Chairman, The Unemployment Compensation Commission of Ohio, Columbus, Ohio.*

DEAR SIR: I am in receipt of your request for my opinion which reads as follows:

> "Referring to our Section 1345-1(c) (E) (4), what is the status of employees of the following types of corporations under the section first above referred to:
>
> 1. National banks;
> 2. State banks;
> 3. State banks which are members of the Federal Reserve System;
> 4. Building and loan associations;
> 5. Building and loan associations which are members of the Federal Home Loan Bank."

The pertinent portion of Section 1345-1(c) (E) of the General Code, referred to in your communication, reads as follows:

> "The term employment shall not include:
> * * * * * * * * *
> (4) Service performed in the employ of any governmental unit, municipal or public corporation, political subdivision, or instrumentality of the United States or of one or more states or political subdivisions *in the exercise of purely governmental functions.*" (Italics the writer's.)

Your attention is particularly directed to the italic portion of the statute. It is particularly noteworthy because, to my knowledge, the Ohio Unemployment Compensation Act is the only one in which it appears. In order to decide the status of employes of the enumerated classes of financial institutions, it is necessary to determine whether this

phrase qualifies the "service" or the institution.

The purpose of all statutory construction is to ascertain the probable intent of the Legislature. (In view of the system by which legislation is enacted, no one can definitely determine the composite intention of the enactors.) The first step of this process is to consider the language of the statute and the meaning ordinarily attached to the words used. A pertinent rule of grammatical construction (and also, therefore, of statutory construction) is that words appearing at the end of a sentence generally qualify and refer to the whole (Lewis'Southerland Statutory Construction, 2nd Ed., Vol. 2, page 795). Another rule is that qualifying words or phrases generally refer to the matter directly preceding them. In the statute in question, the general words are "in the exercise of purely governmental functions," but the words preceding them describe entirely dissimilar things, namely, types of institutons and "service." Under such circumstances, it is not likely that it was intended that the phrase be applied to all the terms preceding it and it is, therefore, reasonable to infer that it was only intended to qualify that which immediately precedes it. Inasmuch as all matter following "in the employment of" is descriptive of things that may be generally catalogued in the same category, whereas the words appearing before "in the employment of" describe something entirely different, it is reasonable to infer that the phrase "in the exercise of purely governmental functions" was only meant to qualify the latter portion of the section, to wit: "any governmental unit, municipality or public corporation, political subdivision or instrumentality of the United States or of one or more states or political subdivisions." There are often other aids in interpreting ambiguous statutes. However, in this instance, I find that none of the other rules of statutory construction are applicable and I, therefore, must conclude that the grammatical or literal construction should be adopted.

This leaves for determination the question of what constitutes a governmental instrumentality. (It is quite clear that state banks, members of the Feneral Reserve System, and state building and loan associations, members of the Federal Home Loan Bank, are not public corporations.) Before considering this question specifically, it is necessary to determine whether the adoption of any of the possible constructions would render the statute unconstitutional, for, if there are alternatives, that construction must be adopted which saves the legislation. As stated in 37 O. Jur., 624:

> "A construction rendering a statute unconstitutional should be avoided, unless the plain language of the statute prohibits any other construction. Where an act is fairly susceptible of two constructions, one of which will uphold its validity while

the other will render it unconstitutional, the one which will sustain the constitutionality of the law should be adopted, even though such construction may not be the most obvious or natural one."

With this rule of construction in mind, I shall proceed to consider first, the constitutional phases of the problems herein involved.

Inasmuch as the statute under consideration is an integral part of the Unemployment Compensation Act, Sections 1345-1 to 1345-35, General Code, it is necessary that we understand the nature of the entire legislation. In the language of the act itself, we find that the word "tax" has been assiduously avoided. The payments commanded therein are more euphemistically referred to as "contributions" and, considering the general purpose of the act, it must be admitted that a good argument could be made that in carrying out the precepts of the legislation, the state is exercising its police power and not its taxing power.

I am not aware of any cases in this state involving the Unemployment Compensation Act but there have been decisions in regard to similar legislation in other jurisdictions. In *Carmichael* vs. *Southern Coal and Coke Company,* 57 Sup. Ct. Rep., 868, the Supreme Court of the United States upheld the validity of the Unemployment Compensation Act of Alabama. A reading of the decision reveals that the court considered the statute primarily as a tax measure. The following quotation from page 871 of the opinion is illustrative of the general nature of the discussion:

> "In *Beeland Wholesale Company* vs. *Kauffman,* supra, the Supreme Court of Alabama held that the contributions which the statute exact of employers are excise taxes laid in conformity to the constitution and laws of the state, while the particular name which the state, court or legislature may give to a money payment commanded by its statute is not controlling here when its constitutionality is in question. * * (Citation) * * *We see no reason to doubt that the present statute is an exertion of the taxing power of the state.*" "(Citations) * *." (Italics the writer's.)

The Unemployment Compensation Act of New York was considered by the Court of Appeals of that state in the case of *Chamberlin* vs. *Andrews,* 2 N.E. (2nd), 22. Here again the language used by the court indicates it was contemplating a taxation measure. Evidence thereof are the first and third branches of the headnote which read as follows:

"As respects constitutionality of Unemployment Insurance Law requiring compulsory contributions by employers to single fund for disbursement through state agency to pay benefits therein provided to unemployed employees of all employers contributing to fund, employers generally are not so unrelated to unemployment problem as to make a moderate tax upon their pay rolls unreasonable or arbitrary (Labor Law, Sec. 500 et seq., as added by laws 1935, c 468, Sec. 1; Const. N. Y. art. 1, Sec. 6; Const. U. S. Amend. 14, Sec. 1).

Unemployment Insurance Law *held* not unconstitutional as imposing taxation for benefit of special class, and thus having essentially private purpose where Legislature, after investigation, had found facts to be that those who were to receive benefits under law were the ones most likely to be out of employment in times of depression (Labor Law, Sec. 500 et seq., as added by Laws 1935, c. 468, Sec. 1; Const. N. Y. art. 1, Sec. 6; Const. U. S. Amend. 14, Sec. 1)."

The court in this case, however, did not decide the issue but avoided it as follows, page 26:

"* * * Whether we consider such legislation as we have here a tax measure or an exercise of the police power seems to me to be immaterial. Power in the state must exist to meet such situations, and it can only be met by raising funds to tide over the Unemployment period. Money must be obtained and it does not seem at all arbitrary to confine the tax (?) to a business and employment out of which the difficulty principally arises." (Parenthetical matter the writer's.)

In the case of *Gillum* vs. *Johnson,* 62 Pac. (2nd), 1037, the Supreme Court of California considered that state's Unemployment Compensation Act. In the opinion upholding the validity of the legislation, this court also indicated, by the language used, that it was considering a taxation measure.

The Supreme Judicial Court of Massachusetts in the case of *Howes Brothers* vs. *Massachusetts Unemployment Compensation Commission,* 5 N. E. (2nd), 720, upheld the validity of the Massachusetts Unemployment Compensation Law on the basis of the power of taxation and the police power.

The decision in the case of *Beeland Wholesale Company* vs. *Kauffman,* 174 Southern, 516 (Alabama) (referred to by the court in the Carmichael case, supra), which upheld the constitutionality of the Unem-

ployment Compensation Act of Alabama, for the most part, deals with the taxation phase of the problem although it does consider the police power aspects of the issue.

I believe it is safe to say that the Ninety-first General Assembly, in enacting the original Unemployment Compensation Act, which is known as House Bill 608, appearing in 116 O. L., Part 2, 286, did not view the measure as taxation for it appended thereto, as Section 36 thereof, an amergency clause. Had it been considered as a taxation measure, no emergency clause would have been appended for Section 1-d of Article II of the Constitution of Ohio provides in part that:

> "Laws providing for tax levies * * * shall go into immediate effect."

It is fundamental that the essence governs over the form and that what the Legislature terms a thing is not binding upon courts if, in fact, the thing is really something else. *Choctaw and Gulf Railway* vs. *Harrison,* 235 U. S., 292, 298; *Galveston N. & S. R. Railway* vs. *Texas,* 210 U.S., 217, 227. (Cooley's Constitutional Limitations, 8th Ed. Vol. 2, p. 1050.)

The word "taxes" has been variously defined but, perhaps, the most widely accepted definition (often referred to as "Cooley's definition"), which appears at page 61, Cooley on Taxation, 4th Ed., Vol. I, is as follows:

> "Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs."

Applying this definition to the problem herein considered and a review of the above authorities impels me to the conclusion that the Unemployment Compensation Act was enacted, in part at least, in the exercise of the power of taxation and that the "contributions" therein provided are taxes.

Since the case of *McCulloch* vs. *Maryland,* 4 Wheat., 316, it has been (perhaps too broadly) asserted that the states are without power to tax instrumentalities of the federal government. Most courts in following McCulloch vs. Maryland, supra, have founded their decisions on the reasoning contained in the famous words of Chief Justice Marshall which appear at page 431 as follows:

> "* * * To tax involves the power to destroy; * * the power to destroy may defeat and render useless the power to create."

That there are distinctions between governmental instrumentalities

was indicated in the following portion of the decision in *Metcalf* vs. *Mitchell,* 269 U. S., 514, at page 525:

> "While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such character or so intimately connected with the exercise of a power or the performance of a duty by the one government that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power."

Thus, the problem is not alone to determine whether the classes of financial institutions herein considered are governmental instrumentalities, but also to determine whether the institutions which fall into this category are agencies "of such character or so intimately connected with the exercise of a power or the performance of a duty by the one government that any taxation of it by the other would be such a direct interference with the functions of government itself, as to be plainly beyond the taxing power."

Before proceeding further, I want to eliminate from consideration state banks and state building and loan associations which have no relationship to the federal government. They perform no governmental functions and are not constituted by the state to act for it to carry out any of the sovereign powers or duties of government. Clearly, they are not governmental instrumentalities in the eyes of the law.

Coming now to a consideration of national banks, I find that since the decision in *M'Culloch* vs. *Maryland, supra,* no court has suggested that national banks were subject to taxation by the states. Of course, where Congress has waived the immunity, the rule does not apply. The types of state taxation to which a national bank may be subjected are set forth in U. S. C. A., Title 12, Section 548, and it is sufficient for the purposes of this inquiry to say that the permission granted therein has no bearing on this discussion. (The cases of *Davis* vs. *Elmira Savings Bank,* 161 U.S., 275; *First National Bank* vs. *California,* 262 U.S. 366, *First National Bank* vs. *Missouri,* 263 U. S. 640, are some of the more recent authorities relating to the status of national banks as governmental instrumentalities.)

The conclusion, therefore, is inescapable that any interpretation of the provisions of the Unemployment Compensation Act which would

render national banks subject to the contribution provisions would render that aspect of the statute unconstitutional.

The powers and duties conferred upon state banks, by reason of membership in the Federal Reserve System, are at considerable variance with the powers and duties of national banks. National banks are creatures of the federal government and derive no authority from the state. State banks, on the other hand, are created by the state and the state is, in the first instance, the source of their powers and duties. When a state bank becomes a member of the Federal Reserve System (Sections 320, et seq., Title 12, U.S.C.A.), it is required inter alia: (1) to purchase a certain amount of stock in the Federal Reserve bank of its district; (2) to sever its connection, either through stock ownership or otherwise, with branches established after February 25, 1927, beyond the limitation of the city or town in which it (the parent institution) is situated; (3) to conform to the same requirements as national banks as to lending or purchasing their own stock, withdrawal or impairment of capital stock, and payment of unearned dividends; (4) to make reports of conditions and dividends to the Federal Reserve Bank; (5) to conform to certain requirements as to the amount of paid in capital; (6) to serve when designated by the Secretary of Treasury as a depository of public money. Furthermore, Section 332 of such Title 12 provides that said member banks may be designated as financial agents of the government and

> "* * * shall perform all such reasonable duties, as depositories of public money and financial agent of the government, as may be required of them * * *."

Section 531 appearing in Chapter 4 of Title 12, U.S.C.A., which chapter relates to "TAXATION" under the general heading of "Federal Reserve Banks", provides as follows:

> "Federal Reserve Banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from federal, state and local taxation, except taxes upon real estate."

In this connection, it is interesting to note that there is no similar provision relating to member banks, which fact might be indicative of an attitude by Congress that member banks were not such instrumentalities of the government as to warrant exemption from state or local taxation.

The status of state building and loan associations, members of the Federal Home Loan Bank, is closely analogous to state banks, members

of the Federal Reserve System. By the provision of the Federal Home Loan Bank Act (July 12, 1932 c. 522 Sec. 1, 47 Stat. 725), Section 1421, et seq., Title 12. U.S.C.A., said institutions may also be designated as depositories of public money and as financial agents of the government (Section 1434). Interestingly, there is also a provision that the Federal Home Loan Bank shall be exempt from local or state taxation (Section 1433), but here again the absence of similar provisions as to member institutions is conspicuous.

The following reasoning appearing in an opinion of the Attorney General of North Carolina rendered December 11, 1937, in consideration of the amenability of an insurance company which was a member of the Federal Home Loan Bank is worthy of consideration:

> "In my mind, there is a substantial difference between a state created corporation engaged in a nongovernmental enterprise and in a nongovernmental business, of which the United States Government may avail itself in some small particular as a governmental agency, if it might be called so, and a corporation created under an Act of Congress and by the Federal Government to carry on activities which are essentially governmental in their character. And I cannot agree that the modicum of governmental function which this insurance company, under the Act of Congress, may be called upon to perform, but as to which it is now only a 'stand-by,' and it is to be observed, too, that the insurance company may by withdrawal of its stock avoid even this obligation and refuse to accept the designation, is of such a character as to make it an instrument of the Federal Government within the meaning of our Unemployment Compensation Law. To do so would, in my judgment, reduce the whole proceeding to the level of a tag process by which the Government, in consideration of the investment of a more or less substantial sum in the stock of the Home Loan Bank, attempts to reward the insurance company by conferring upon it something which under the circumstances it was not within its right or power to bestow; that is, immunity from the state tax."

In the case of Metcalf vs. Mitchell, supra, another test was provided to be applied in the determination whether a particular institution or operation comes within the scope of the teaching of McCulloch vs. Maryland, supra. At page 523 the following appears:

> "But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence

the limitations upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with a minimum of interference each with the other; and that limitation can not be so varied or extended as seriously to impair either the taxing power of the government imposing the tax, (*South Carolina* vs. *United States* 199 U.S. 437, 461, 30 L. Ed. 261, 269, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Flint* vs. *Stone Tracy Co.* 220 U. S., 172, 53 L. Ed. 421, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312) on appropriate exercise of the functions of the government affected by it (*Union Pac. R.* vs. *Peniston,* 18 Wall. 31, 21 L. Ed. 791)."

That this test is still a valid one is indicated by the fact that the above quotation is cited with approval in the recent case of *James* vs. *Drave,* decided December 6, 1937, and reported in Vol. 58, No. 4 Sup. Ct. Rep. (The case of *Federal Land Bank of New Orleans* vs. *Crossland,* 261 U.S., 374, is not here authorative because it involved the parent institution, a federal corporation, specifically designated by Congress as "an instrumentality of the government" (Federal Farm Loan Act, July 17, 1926. c 245, Sec. 26) as to the particular function which the state sought to tax.)

Consistent with this principle is the following statement by the Supreme Court in *Willouts* vs. *Bunn,* 282 U.S., 216, which appears at page 226 as follows:

"* * * No constitutional implications prohibit a nondiscriminatory tax upon the property of an agent of goverment merely because it is the property of such an agent and used in the conduct of the agent's operations and necessary for the agency. *M'Culloch* vs. *Maryland,* 4 Wheat. 316, 436, 4 L. Ed. 579, 608; *Union P. R. Co.* vs *Peniston,* 18 *Wall.* 5, 33, 21 L. Ed. 787, 792; *Central P. R. Co.* vs. *California,* 162 U. S. 91, 126, 40 L. Ed. 903, 915, 16 S. Ct. 766; *Baltimore Shipbuilding & Dry Dock Co.* vs. *Baltimore,* 195, U.S. 375, 382, 49 L. Ed. 242, 244, 25 S. Ct. 50; *Choctaw, O. & G. R. Co.* vs. *Mackey,* 256 U.S. 531, 537, 65 L. Ed. 1076, 1080, 41 S. Ct. 582. The Congress may tax state banks upon the average amount of their deposits, although deposits of state funds by state officers are included. *Manhattan Co.* vs. *Blake,* 148 U.S. 412, 37 L. Ed. 504, 13 S. Ct. 640. Both the Congress and the states have the power to tax transfers or successions in case of death, and this power extends to the taxation by a state of bequests to the

United States, and to the taxation by the Congress of bequests to states or their municipalities. *United States* vs. *Perkins,* 163 U.S. 625, 41 L. Ed. 287, 16 S. Ct. 1073; *Snyder* vs. *Bettman,* 190 U.S. 249, 253, 47 L. Ed. 1035, 1037, 1038, 23 S. Ct. 803."

Congress has the power to employ state corporations as instrumentalities of the federal government (*Westfall* vs. *United States,* 274 U.S., 256, 259) and in certain instances to give such institutions immunity from state and local taxation (*Smith* vs. *Kansas City Title Company,* 255 U.S., 180, 212). It seems clear, however, after a consideration of the authorities, that institutions such as state banks, members of the Federal Reserve System, and state building and loan associations, members of the Federal Home Loan Bank, are not immune from nondiscriminatory taxation unless such immunity has been specifically conferred by Congress. I have been unable to find any cases holding that such institutions are constitutionally exempt from state and local taxation.

In summary of the foregoing, it is my opinion that the State of Ohio is constitutionally prohibited from exacting contributions under the Unemployment Compensation Act from national banks, but that this inhibition does not include state banks, members of the Federal Reserve System, and state building and loan associations, members of the Federal Home Loan Bank.

It should be kept in mind that the section under consideration provides for an exemption from a tax measure and it is an accepted rule of statutory construction that exemptions from tax measures should be strictly construed. (Lewis' Sutherland Statutory Construction, 2nd Ed., Vol II, p. 1002.) As hereinbefore stated, there can be no doubt that national banks, in contemplation of law, are instrumentalities of the national government and that the courts have considered their functions so intimately related to the successful operation of the federal government that they may be said to exercise "purely governmental functions." The same, however, may not be said of state banks, members of the Federal Reserve System, and state building and loan associations, members of the Federal Home Loan Bank. A review of the authorities cited herein compels a conclusion that such institutions of the latterly mentioned classes are not governmental instrumentalities merely because they may be designated as public depositories or financial agents of the federal government. (If any was designated to act as financial agent of the government, and functioned as such, a strong argument could be made that such institution is protected by the constitutional immunity described in M'Culloch vs. Maryland, supra.) Furthermore, it certainly cannot be said that these institutions exercise "purely governmental functions."

In conclusion, therefore, it is my opinion that: (1) service per-

formed in the employ of national banks is not employment within the meaning of Section 1345-1(c) (E) (4), General Code; (2) state banks which are members of the Federal Reserve System and state building and loan associations which are members of the Federal Home Loan Bank are not instrumentalities of the federal government exercising "purely governmental functions;" and, therefore, (3) employment by such institutions is not exempt from the provisions of the Unemployment Compensation Act by reason of the provisions of Section 1345-1(c) (E) (4), General Code; and (4) the state banks and building and loan associations, having no relation to the federal government, are clearly not governmental instrumentalities and employment by such institutions is employment within the meating of the Unemployment Compensation Act.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

1770.

APPROVAL—BONDS CUYAHOGA COUNTY, OHIO, $10,000.00, PART OF ISSUE DATED JANUARY 1, 1938,

COLUMBUS, OHIO, January 17, 1938.

Retirement Board, State Public School Employes' Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of Cuyahoga County, Ohio, $10,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above county dated January 1, 1938. The transcript relative to this issue was approved by this office in an opinion rendered to the Teachers Retirement System under date of January 6, 1938, being Opinion No. 1719.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said county.

Respectfully,
HERBERT S. DUFFY,
Attorney General.