erected, altered or repaired *under contract*. If I understand the import of your second question, it refers simply to the purchase of material by the highway commission which the commission uses in the repair and maintenance of highways and bridges. As an incident to the purchasing of the material, delivery is required at the point where the same is to be used. I do not think such an operation is within the statute and your second question is therefore answered in the negative.

Your third question is not entirely clear. If the contract for the purchase of the material, although requiring the delivery on the road, does not require its spreading in the form in which it is to be left on the road, but the same requires additional treatment or handling as a part of its use in either repair or construction, such contract would not be within the meaning of section 1 of chapter 258, *supra*, and, in that event, your third question is answered in the negative.

The answer to your fourth question is in the affirmative.

With reference to your fifth question, without entering upon an elaborate discussion of the rule, I think it is clear that the legislation of 1933 must be given a prospective interpretation so as not to impair the obligation of existing contracts. For that reason, I think your fifth question should be answered in the negative.

Your sixth question is double. The first part of it is answered in the negative. The last part of it is answered in the affirmative. Note the following language on page 1147 of the Acts of 1933:

"On state highway road and bridge contracts, the provisions of the state highway commission act with respect to the bond shall govern."

The answer to your seventh question is in the affirmative.

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**TREASURER OF STATE:** Applicability of Gross Income Tax law—companies subject thereto.

Hon. William Storen,
Treasurer of State,
Indianapolis, Indiana.

March 27, 1933.

Dear Sir:

I have before me your request for an official opinion relative to the application of chapter 50 of the Acts of the Gen-
eral Assembly of 1933, to certain transactions described by you and hereinafter set out.

Chapter 50, supra, is an act entitled "An act to provide for the raising of public revenues by imposing a tax upon the receipts of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this act, and declaring an emergency." The act is properly referred to as the "Gross Income Tax Act of 1933." It provides for the levy of a tax according to prescribed rates "upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state," and further, that it "shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities." Chapter 50, section 2, Acts of 1933, page 388. The tax applies to "all gross incomes received on or after the first day of May, 1933" with such exceptions and limitations as are otherwise provided in the act.


The term "gross income" is defined by section 1 of the act as follows:

"The term 'gross income,' except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, and without any deductions on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expenses whatsoever, and without any deductions on account of losses: Provided, however, That the term 'gross income' shall not include
cash discounts allowed and taken on sales nor freight prepaid by the taxpayer and repaid to him by the purchaser; goods, wares, or merchandise, or the value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor the sale price of any article accepted as part payment on any new article sold, if and when the full sale price of the new article is included in the 'gross income' subject to taxation under this act. Provided, further, That 'gross income' shall include the proceeds from the sale of any property handled on consignment by the taxpayer."


Section 6 (a) of said act provides as follows:

"There shall be excepted from the gross income taxable under this act:

"(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United States of America or any of its agencies, and interest or other earnings paid upon bonds or other securities issued by the United States of America or its agencies, to the extent that the State of Indiana is prohibited from imposing a tax upon such salaries, pensions, emoluments, interest and/or earnings, by the Constitution of the United States of America."


The specific questions submitted by you are:

"1. Do outside corporations, shipping goods into Indiana, become subject to a tax under this new law?

"2. Are companies operating in the state, who have offices in other states, subject to this tax? By this I mean that several companies who have their main factories here and keep their books in other states."

It is evident from the foregoing provisions of the act that while there is present the intent to tax all gross income de-
vided from sales of merchandise in the state, it is carefully and explicitly provided that income derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries "to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America," is excluded.

The language of section 6 (a), supra, it will be observed, is general. Such a provision has very definite advantages when the act is exposed to the constitutional test to determine whether it violates section 8 of Article 1 of the United States Constitution conferring upon congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" and "to lay and collect taxes, duties, imposts, and excises" and providing that "all duties, imposts and excises shall be uniform throughout the United States." Burns Annotated Indiana Statutes of 1926, section 8. But it has the disadvantage of placing upon the person charged with administering the act, the duty to determine as the cases arise, the exact boundary of the state's taxing authority as limited by the foregoing provisions of the Federal Constitution.

The answers to your questions, therefore, require more than a consideration of whether income derived from the transactions described by you constitutes "gross income" as that term is defined by section 1 of the act, supra. It requires more than a consideration of whether the language of section 2, supra, is broad enough to authorize the levy of the tax. It requires a consideration further of whether the imposition of a tax upon such income constitutes a violation of section 8 of Article 1 of the Federal Constitution.

The answer to your first question as stated and limited to its literal import presents no real difficulty. It is my understanding, however, that, in the consideration of said question, you desire that it be treated as representative of that class of cases where the manufacturer or merchant ships goods into the State of Indiana from another state and sells them in the State of Indiana in the original package. Thus amplified, it requires a consideration of the question as to where interstate commerce ends in such a case, for it is well settled that a state cannot lay a tax on interstate commerce.
As said by the court in the case of Kansas City, etc., Ry. Co. v. Botkin, etc., 240 U. S. 227, at page 231:

"It must be assumed, in accordance with repeated decisions, that the state cannot lay a tax on interstate commerce 'in any form,' by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it."

After citing numerous cases, the court continues as follows:

"And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized."


Similar expressions are found in numerous cases, so that the principle must be regarded as settled and, when applicable, it should be followed.

New Jersey Bell Telephone Co. v. State Board, etc., 280 U. S. 338, at p. 346;
Pullman Co. v. Richardson, 261 U. S. 330, at p. 338;
East Ohio Gas Co. v. Tax Comm., 283 U. S. 465, at p. 470;

It is doubtful, however, whether the above principle is fully applicable to the question presented by you. On the contrary, I think the case presented by you is governed by the decision in Sonneborn Brothers v. Cureton, etc., 262 U. S. 506. In stating the case, I can do no better than to quote from the decision. The court said on page 507:

"From an agreed statement of facts, the following appears:
"Sonneborn Brothers is a firm of non-resident merchants selling petroleum products, with its principal place of business in New York City. In January, 1910, it opened an office in Dallas, Texas, and since that time has maintained it and connecting warerooms and has rented space in a public warehouse at San Antonio, Texas. From January, 1910, until April 11, 1919, receipts from its total sales, made through orders received at the Dallas office, have amounted to $860,801.50. This sum included:

"(1) Those from the sale of oil which, when sold, was not in Texas.

"(2) Those from sales of oil to be delivered from Texas out of the state.

"(3) Those arising from the sale of oil shipped into Texas and afterwards sold from the storerooms in unbroken original packages.

"(4) Those from sales in Texas from broken packages.

"The receipts from the first two classes amounted to $643,622.40 and the state authorities made no effort to tax them. The receipts from (4) amounted in the period named to $16,549.84, and appellants do not deny their liability for the tax thereon. The sales made under (3) of unbroken packages, after their arrival in Texas, and after storage in the warerooms or warehouse of appellants, amounted to $217,179.10, and the tax on this amounting to $4,674.58 is the subject of the contest here."

The question before the court as stated in the opinion was:

"Whether oil transported by appellants from New York or elsewhere outside of Texas to their warerooms or warehouses in Texas, there held for sales 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."

Sonneborn Brothers v. Cureton, etc., supra, page 508.
The question was very fully considered in an opinion written by Chief Justice Taft and concurred in by the entire court. Inasmuch as the distinctions are so clearly made by the learned Chief Justice, I desire to quote quite liberally from his opinion. The court said, beginning on page 508:

"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 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 v. Houston, 114 U. S. 622; Coe v. Errol, 116 U. S. 517; Pittsburgh & Southern Coal Co. v. Bates, 156 U. S. 577; Diamond Match Co. v. Ontonagon, 188 U. S. 82; American Steel & Wire Co. v. Speed, 192 U. S. 500, 520; General Oil Co. v. Crain, 209 U. S. 211; Bacon v. 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 articles 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 v. Maryland, 12 Wheat. 419, 446, 447, and was declared in obedience to the prohibition of the Constitution contained in section 10, Article 1, par. 2, providing that:
"'No state shall, without the consent of the con-
gress, lay any imposts or duties on imports or exports,
extcept what may be absolutely necessary for execut-
ing its inspection laws.'

"The holding was that the sale was part of the im-
portation. 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. This immunity has been enforced
as against a license or occupation tax on the importer
in Brown v. Maryland, 12 Wheat. 419, as against a
personal property tax on a stock of wines of a wine
dealer to the extent to which the stock included im-
ported wines in the original packages, Low v. Austin,
13 Wall. 29, and as against an occupation tax on an
auctioneer measured by his commissions on the sales
of such imports, Cook v. Pennsylvania, 97 U. S. 566.
When, however, the article imported is sold or is taken
from the original packages and exposed for sale, the
immunity is gone. Waring v. The Mayor, 8 Wall. 110;

"Cases subsequent to Brown v. Maryland show that
the analogy between imports and articles in original
packages in interstate commerce in respect of immu-
nity 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 ques-
tion whether the tax challenged regulates or burdens
interstate commerce.

"The first of the cases making this distinction is
Woodruff v. Parham, 8 Wall. 123. In that case, Wood-
ruff, an auctioneer in Mobile, received, in the course
of his general business for himself and as consignee
and agent for others, merchandise from Alabama and
from other states and sold it in unbroken packages.
The city of Mobile, under its charter, levied a uniform
tax on real and personal property, on sales at auction,
on sales of merchandise, and on capital employed in
the business in the city. Woodruff objected to paying
any tax on the auction sales of merchandise from other
states in original packages. The question most considered by the court was whether merchandise exported from one state to another was an export which a state was forbidden to tax by Article 1, section 10, par. 2, of the Federal Constitution, above quoted. It was held that it was not, and that the words 'imports and exports' as there used referred to, and included only merchandise brought in from, or transported to, foreign countries. The court (p. 140) further held that such a tax which did not discriminate against the sales of goods from other states, but was imposed upon sales of all merchandise, whether its origin was in Alabama or in any other state, was not 'an attempt to fetter commerce among the states.' (Our italics.)

Note further the language of the court on page 514. The court said,

"Counsel for the appellants cite the case of Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290, as aiding their argument that a tax on a sale of merchandise in an original package brought from another state is a tax on interstate commerce and is different from an ad valorem property tax on the merchandise. But that case was not concerned with the power to tax, but rather with the power of a state to prevent an engagement in interstate commerce within her limits, except by her leave. The holding there was that a contract for the purchase of a crop of grain in Kentucky to be delivered at a railway station in Kentucky for shipment to Tennessee, conformably to a settled course of business, was an interstate contract which a corporation not authorized by Kentucky to do business in that state might nevertheless make and enforce without incurring the penalty of the state law. It was said in that case (p. 290) that,

"'Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of goods after they reach their destination and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446-447; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519. On the
same principle, where goods are purchased in one
state for transportation to another, the commerce in-
cludes the purchase quite as much as it does the
transportation. American Express Co. v. Iowa, 196
U. S. 133, 143.'

"But this language has no relevancy to show that a
tax without discrimination on goods after the trans-
portation ceases, is a burden on interstate commerce,
a proposition negated in the American Steel &
Wire Co. Case it cites, or that A DIFFERENT
RULE SHOULD APPLY TO AN AD VALOREM
PROPERTY TAX FROM THAT IN CASE OF A
TAX ON SALES." (Our italics and capitals.)

I desire also to call your attention, in this connection, to the
language of the court in Hart Refineries v. Harmon, etc., 278
U. S. 499, at p. 501, wherein the court made a very clear state-
ment of the holding in the Sonneborn Brothers Case, supra,
using the following language:

"In that case, this court, upon a full review of the
erlier cases, held that when a commodity shipped from
another state had come to rest as a part of the stock
in trade of the dealer, the interstate transportation
was at an end, and, whether in the original packages
or not, a state tax upon the commodity, either as
property or UPON ITS SALE IN THE STATE, if laid
on the commodity, generally without regard to its ori-
gin, would not constitute a burden upon or be a regu-
lation of interstate commerce of which the commodity
had been the subject. (Our italics and capitals.)

The court continued—

"But there is nothing in the opinion to suggest that
the taxing power of the state is limited to the two
kinds of taxes mentioned. Interstate transportation
having ended, the taxing power of the state in respect
of the commodity which was the subject of such trans-
portation, may, so far as the commerce clause of the
federal Constitution is concerned, be exerted in any
way which the state's Constitution and laws permit,
provided, of course, it does not discriminate against
the commodity because of its origin in another state."

See also: Doscher et al. v. Inery et al., 21 Fed.
(2nd) 521, at p. 524.
I think it must be clear, in answer to your first question, that the sale of merchandise shipped into the state for the purpose of sale in the State of Indiana, even though sold in the original package, is liable to the tax imposed by chapter 50, supra.

The previous discussion points very clearly to the answer to your second question. If the companies referred to are operating in Indiana and making sales in Indiana for delivery in Indiana, it makes no difference where they keep their books, they are liable to the tax. I call attention further to the fact that section 11 (a) of the act makes it the duty of every person subject to the tax "to keep and preserve suitable records of his gross income, and such other books or accounts as may be necessary to determine the amount of tax for which he is liable under the provisions of this act."


GOVERNOR: Appropriation—whether appropriation for structural outlay for interior remodeling of parts of state house is available to pay for services of architect for making plans and specifications.

March 28, 1933.

Hon. Wayne Coy,
Under Secretary to the Governor,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an opinion as to whether it is possible under certain provisions referred to by you in section 2 of the Biennial Appropriation Act of 1933, to place a man at work making plans and specifications for remodeling and decorating the present library quarters and for remodeling and redecorating certain rooms now occupied by court judges.

The language of the Appropriation Act referred to by you, is used in connection with the appropriation for the superintendent of buildings and property and is as follows:

"Structural outlay:
Structural improvement, available April 1, 1933, for the period ending September 30, 1934, for remodeling and decorating present library quarters and for re-