

Section 6373-25, et seq., of the General Code to secure a license as a real estate broker, irrespective of the fact that such auctioneer is already licensed as an auctioneer under the provisions of law applicable thereto.

Respectfully,
EDWARD C. TURNER,
Attorney General.

961.

APPROVAL, ARTICLES OF INCORPORATION OF THE LAKE TOWNSHIP MUTUAL INSURANCE COMPANY.

COLUMBUS, OHIO, September 7, 1927.

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

DEAR SIR:—I am returning to you herewith the amendment to the articles of incorporation of the Lake Township Mutual Insurance Company, with my approval indorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

962.

APPROVAL, BONDS OF THE VILLAGE OF FAIRVIEW, CUYAHOGA COUNTY, OHIO—\$66,880.00.

COLUMBUS, OHIO, September 7, 1927.

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

963.

FRANCHISE TAX—REFUNDS OF OVER-PAYMENTS CANNOT BE MADE IN THE ABSENCE OF SPECIFIC APPROPRIATION THEREFOR.

SYLLABUS:

Refunds cannot be made of over-payments of state franchise taxes in the absence of specific appropriation therefor by the legislature.

COLUMBUS, OHIO, September 7, 1927.

HON. BERT B. BUCKLEY, *Treasurer of State, Columbus, Ohio.*

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

"The Treasurer of State is in receipt of a communication from a leading firm of accountants and auditors in Ohio, the first paragraph of which reads as follows:

'A number of our clients are of the opinion that refunds will be made for overpayment of state franchise taxes, without the formality of a special appropriation by the legislature. They insist that this has been done in previous years and will undoubtedly be done this year.'

Section 22 of Article II of the Constitution of Ohio reads as follows:

'No money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law; * * *'

Having in mind this provision of the Constitution, the present treasurer of state has the view that he is without authority to make any refund for overpayment of state franchise taxes from funds paid into the state treasury.

The opinion of the Attorney General is requested on the question as to whether the treasurer of state is authorized to make refunds for overpayment of state franchise taxes under existing law and the Constitution."

Upon examination of the statutes of Ohio relative to the imposition of the franchise tax, I find no provision authorizing the retention of any of the monies paid upon said tax by any official, and in the collection thereof it becomes mandatory, by virtue of Section 24 of the General Code of Ohio to pay proceeds of such taxes weekly into the state treasury. That section, so far as pertinent, is as follows:

"On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed verified statement of such receipts. * * *"

The plain wording of this section is emphasized by the succeeding two sections, which I also quote:

"Sec. 24a. All sections and parts of sections of the General Code which provide for the custody, management and control of moneys arising from the payment to any state officer, state institution, department, board, commission, college, normal school or university receiving state aid of any fees, taxes, assessments, licenses, premiums, penalties, fines, costs, sales, rentals or other charges or indebtedness and which are inconsistent with the provisions of Section 24 of the General Code, as herein amended, are, to the extent of such inconsistency, hereby repealed."

"Sec. 24b. Immediately upon the taking effect of this act (G. C. Secs. 24, 24a and 24b) all moneys, checks and drafts in the possession of any state officer, state institution, department, board, commission or institution received for the state or for any such state officer, department, board or commission from the sources mentioned in Section 24 of the General Code, as herein amended, shall be paid into the state treasury in the manner provided by said section."

From this emphatic statement of the intention of the legislature, it is plain that the proceeds of the franchise tax must be paid immediately into the state treasury

and such payment would of course include remittances which might ultimately prove to be over-payments. Having reached the treasury, these payments are as much subject to the restrictive provision of Section 22 of Article II of the Constitution from which you quote as any of the revenues of the state.

In view of the uniformity with which this restriction upon payment from the treasury has been applied, it is unnecessary for me to quote to you from the many opinions of this department in which it has been held that there is no authority to pay money from the treasury in the absence of specific appropriation, although there may be both a legal and moral obligation upon the state. The case that you present constitutes no exception to this rule and I am therefore of the opinion that refunds can not be made of over-payments of state franchise taxes in the absence of specific appropriation therefor by the legislature. My conclusion is strengthened by the various special provisions of the Code creating rotary funds for similar purposes. A particular instance is the rotary fund established by Section 5537 of the General Code for the purpose of paying refunds of the tax upon gasoline. There being no similar provision with relation to the franchise tax, you are unauthorized to make payment out of the state treasury of refunds in the absence of specific appropriation therefor.

In so holding I am not unmindful of the line of cases which apparently lay down the rule that a public officer may be sued for recovery of funds paid into the public treasury but not lawfully there by reason of a mistake of fact or unconstitutionality of the statute by which the exaction was originally made. These cases are exemplified by *Osborne vs. Bank of U. S.*, 9 Wheaton, 738, and *Poindexter vs. Greenhow*, 114 U. S., p. 270; 29 L. Ed., p. 185. The rule announced is that, the court's action having determined the illegality of the exaction, the act of the officer in retaining the money is not and cannot be the act of the state, so that the state is not in any sense a party. Theoretically, at least, the moneys were never in the state treasury. You will observe that these cases are premised upon a decision of a court of competent jurisdiction as to the illegality of the payment into the treasury. Until such a judicial determination has been made, any administrative officer is unauthorized to make payment from the public treasury of funds, howsoever they may have been received, except in pursuance of a specific appropriation made by law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

964.

APPROVAL, GAME REFUGE LEASE.

COLUMBUS, OHIO, September 7, 1927.

Department of Agriculture, Division of Fish and Game, Columbus, Ohio.

GENTLEMEN:—I have your letter of September 7, 1927, in which you enclose the following Game Refuge Lease, in duplicate, for my approval:

No. 1052, Elsie Winegardner, Thorn Twp., Perry County, 88 acres.

I have examined said lease, find it correct as to form, and I am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.