

719.

BONDS—CITY OF PORTSMOUTH, SCIOTO COUNTY,
\$12,000.00.

COLUMBUS, OHIO, June 7, 1939.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN :

RE: Bonds of the City of Portsmouth, Scioto County,
Ohio, \$12,000 (Limited).

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of street, alley and sewer improvement bonds in the aggregate amount of \$25,000, dated March 1, 1939, and bearing interest at the rate of 2¾% per annum.

From this examination, in the light of the law under authority of which the above bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said city.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

720.

INSURANCE — SUPERINTENDENT OF—TRANSFERS—MADE
THROUGH ERROR OR MISTAKE OUT OF STATE DEPOSITORY
TRUST FUND—INTO STATE TREASURY—TO
WITHDRAW—SPECIFIC APPROPRIATION BY LEGISLA-
TURE NECESSARY—INSURANCE AGENTS' LICENSE
FEES—STATUS WHERE FUNDS CHARGED TO ACCOUNT
INSURANCE COMPANY WHICH DOES NOT OWE SAME—
LIABILITY—GROSS NEGLIGENCE—QUESTION OF FACT.

SYLLABUS:

1. *Transfers made by the Superintendent of Insurance through error or mistake out of the State Depository Trust Fund into the state treasury can not be withdrawn therefrom in the absence of a specific appropriation therefor by the Legislature.*

2. *The amount of transfers made by the Superintendent of Insurance out of the Depository Trust Fund into the state treasury on account of insurance agents' license fees, which licenses are returned unused subse-*

quent to such payment, may not be deducted from later transfers made by the Superintendent of Insurance out of the State Depository Trust Fund into the state treasury.

3. Transfers out of the State Depository Trust Fund made by the Superintendent of Insurance into the state treasury, which are charged to the account of an insurance company which does not owe same, may not thereafter be credited to such company and charged to the proper company without further transfer into the state treasury out of the State Depository Trust Fund of the amount of such charge.

4. If the Superintendent of Insurance, through gross negligence, makes improper transfers out of the State Depository Trust Fund into the state treasury and charges such transfers to the account of an insurance company, he is liable to such insurance company for such gross negligence. What constitutes gross negligence is a question of fact.

COLUMBUS, OHIO, June 8, 1939.

HON. JOHN A. LLOYD, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: I have your letter of recent date in which you request my opinion as follows:

“Insurance companies doing business in this state are required by Section 657, General Code, and certain other sections, to pay to the Superintendent of Insurance various fees for services rendered by the Division of Insurance; such as, issuing company licenses, agents’ licenses and certificates of authority, for filing copies of charters and statements, and for certifying papers. Because certain of these services are required very frequently, practically all companies maintain a deposit with this Division in an amount sufficient for their requirements during the year. Individual accounts are set up on these deposits, and all such monies are deposited in the Depository Trust Fund under Section 24-4, General Code.

It has been the practice at the end of each month to transfer from the Depository Trust Fund to the General Revenue Fund the amount in each company account represented by fees charged during that month, retaining the balance in the Depository Trust Fund.

By reason of the large number of accounts handled, the similarity of names of companies and the difficulty of applying the laws of other states in various instances under our retaliatory law, Section 658, General Code, errors are sometimes made which are not discovered until some time after the fees charged have been transferred from the Depository Trust Fund to the General Revenue Fund.

Another situation also produces errors. The companies request licenses for their representatives well in advance of the expiration of the license year on June 30, due to the fact that considerable time is required by this Division for the issuing of approximately 125,000 licenses annually. As a matter of administrative practice, requisitions for licenses are required to be filed on or before March 1, in order to give time for the checking and issuance of the licenses on July 1. The companies have been given until June 15 to return the licenses of agents who have severed their connections or have died after the making of the requisition, and a credit has been given to the company for the fees on such returned licenses. Where the funds for such fees have been previously transferred to the General Revenue Fund, a deduction in that amount is made in the amount transferred from the Depository Trust Fund to the General Revenue Fund at the end of the month. It must be remembered that these adjustments are not made with money, all monies being deposited when received. The making of the adjustments merely involves a matter of accounting between the Depository Trust Fund and the General Revenue Fund.

While these errors do not involve large sums, past experience indicates that they might result in showing an overage in the General Revenue Fund and a corresponding shortage in the Depository Trust Fund of two or three hundred dollars in the period between examinations of this office by the State Auditor.

The present system appears to have been very successful in solving the problem of collecting the numerous fees of various kinds provided by law and at the same time of expediting the rendition of services by this department. In order to determine whether a change would be required, I desire your opinion upon the following questions:

1. Would the Superintendent of Insurance be liable personally for a shortage in the Depository Trust Fund created as above described and offset by a corresponding overage in the General Revenue Fund?

2. Is the Superintendent of Insurance authorized to make adjustments in the manner outlined to correct errors after the fees erroneously charged have been transferred from the Depository Trust Fund to the General Revenue Fund, or has an insurance company which has been erroneously charged no recourse other than a sundry claim if such error is not discovered until after the item has been transferred from the Depository Trust Fund to the General Revenue Fund?"

Section 24-3, General Code, creates the State Depository Trust Fund to which you refer in your letter. Section 24-4, General Code, requires that every state officer receiving fees or advances of money deposit such advances or fees in the State Depository Trust Fund within forty-eight hours after their receipt in case the office is located in Columbus.

Section 24-5, General Code, reads as follows:

“The financial officer or chief of each state office, institution, department, board or commission receiving contingent money shall open a separate or individual account with the depository trust fund in the state treasury in the name of his division. Withdrawals of money from the state depository trust fund shall be made by requisition on the treasurer of state as custodian of the depository fund by the authorized official of the office or department wherein the receipt originated and such requisition shall show the purpose of the withdrawal and such other information as the treasurer of state may require; and the authorized official of the office or department wherein the receipt originated shall draw a requisition or revenue voucher on his balance in the state depository trust fund for the amount accruing to the state and pay it in to the state treasury through the auditor of state, in compliance with Section 248 of the General Code.

The state treasurer shall place at interest the depository trust funds as provided by Sections 321 to 330 of the General Code.”

By reason of this section, when fees become payable to the State you are required to draw a requisition or revenue voucher on the balance to your credit in the State Depository Trust Fund for the amount so accruing to the State and pay same into the state treasury through the Auditor of State as provided in Section 248, General Code. Section 24, General Code, provides that this payment shall be made on or before Monday of each week after such fees are received.

These sections evince a very definite and positive legislative intent that fees collected by you either by requisition on the State Depository Trust Fund or directly from insurance companies must be paid promptly into the state treasury.

In your letter you state that it has been the practice of the Division of Insurance to transfer at the end of each month from the Depository Trust Fund to the General Revenue Fund the amount of fees charged during the month. I assume that in so doing you follow the procedure required by Sections 24-5 and 248, General Code, and that these monies are properly credited in the state treasury.

Section 22 of Article II of the Constitution of this state provides in part as follows:

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

In Opinion No. 275 for the year 1927, found in Vol. I page 479 of the Opinions of the Attorney General for said year, the then Attorney General, made the following ruling as disclosed by the syllabus:

“Money paid into the State Treasury by mistake cannot be refunded to the person entitled thereto until the Legislature has made a specific appropriation therefor.”

A similar ruling was made by the same Attorney General in Opinion No. 963 for the year 1927 found in Vol. III, page 1682 of the Opinions of the Attorney General for said year, in which it was held in the syllabus:

“Refunds cannot be made of over-payments of state franchise taxes in the absence of a specific appropriation therefor.”

It therefore appears to be the rule in this state that mistake or error does not alleviate the strict rule laid down in the constitutional provision and that monies paid into the state treasury through error or mistake are subject to the inhibition of the provisions of the Constitution and can not be withdrawn except in pursuance of an appropriation specifically made by law.

I am, therefore, of the opinion that monies paid by you into the state treasury through error or mistake can not be withdrawn by you therefrom unless the Legislature makes specific appropriation therefor.

The next question to be determined is whether you may credit companies for returned licenses after having transferred the license fees out of the State Depository Trust Fund into the state treasury and deduct from the next transfer for the amount of such credit.

In the solution of this problem it will probably clarify the situation if we disregard the bookkeeping procedure involved and assume for the purposes of this discussion that actual cash represented by the accounts in the State Depository Trust Fund is used. In other words, let us assume that the insurance companies pay the Superintendent of Insurance actual cash for the issuance of agents' licenses, which cash you pay into the state treasury and that thereafter such licenses are returned to you unused.

Clearly this money could not be obtained by you from the state treasury for return to the insurance companies nor would you be justified in withholding from your next payment due to the state treasury the amount represented by such returned licenses and paying same to the insurance companies entitled thereto. The statutes above referred to impose an absolute and positive duty on you to pay the fees collected by you promptly into the state treasury and overpayment by you at one time would not warrant a corresponding underpayment on a succeeding occasion.

I can see no reason why a different result should obtain where such payments into the state treasury are made by transfer out of the State Depository Trust Fund. In the one case actual cash is used and in the other requisitions or vouchers which represent actual cash.

What has been said with respect to agents' license fees is equally applicable to companies' licenses, certificates of authority, etc. If you cause a transfer to be made out of the State Depository Trust Fund and charge same to the wrong company or if you make an overcharge, the legal consequences thereof are not different than if you received actual cash.

For these reasons, I am of the opinion that you may not restore to the State Depository Trust Fund, by deducting from the amount to be transferred from such fund to the state treasury, the amount of overpayments theretofore made whether such overpayments are caused by the return of licenses after the transfer out of the State Depository Trust Fund into the state treasury or arise out of an overcharge made by you through error or mistake. I am also of the opinion that where the wrong company is charged and a transfer is made out of the State Depository Trust Fund into the state treasury, you may not thereafter credit such company in the State Depository Trust Fund and make a corresponding charge against the proper company and withhold such amount from your next transfer into the state treasury.

I come now to the question of your personal liability for shortages in the balances of the various insurance companies in the State Depository Trust Fund which come into existence for the reasons set out in your letter. By accepting these advances from insurance companies with the understanding that you will make proper payments therefrom in behalf of such companies, you thereby make and constitute yourself agent for the companies to perform such acts. It is well settled in Ohio that if an agent negligently performs his duties in behalf of his principal, he is liable for any loss which the principal may suffer by reason thereof. However, it must be kept in mind that you perform these services for the insurance companies gratuitously and the rule in Ohio is that an agent who serves without compensation is liable only for gross negligence. In *Grant vs. Ludlow's Admr.*, 8 O. S. 1, at page 10, it was said in the opinion of the court by Brinkerhoff, J.:

“Lawrence, being an agent acting without compensation, is liable only for *gross negligence*.”

and in the first paragraph of the syllabus of said case, the following rule was laid down:

“What constitutes such gross negligence in an agent acting without compensation, as will render him liable in damages to his principal, is a question of fact, to be determined by reference to

the subject-matter and objects of the agency, the known character, qualifications and relations of the parties, and all the circumstances of the case.”

In view of the law as laid down by the Supreme Court that the question of gross negligence is a question of fact, it is difficult for me to determine whether you would be guilty of negligence under the various sets of circumstances which you set forth. I incline to the view that it would be grossly negligent for you to charge the wrong company a license fee due to a confusion of names and that you would probably be liable therefor. However, this would be a question for the jury to determine. With respect to agents' license fees, I suggest that you should make no transfer on account thereof from the State Depository Trust Fund to the state treasury until July 1. If this practice were followed, no difficulty concerning the refund of such fees could arise.

In view of the foregoing, I am of the opinion that:

1. Transfers made by the Superintendent of Insurance through error or mistake out of the State Depository Trust Fund into the state treasury can not be withdrawn therefrom in the absence of a specific appropriation therefor by the Legislature.

2. The amount of transfers made by the Superintendent of Insurance out of the Depository Trust Fund into the state treasury on account of insurance agents' license fees, which licenses are returned unused subsequent to such payment, may not be deducted from later transfers made by the Superintendent of Insurance out of the State Depository Trust Fund into the state treasury.

3. Transfers out of the State Depository Trust Fund made by the Superintendent of Insurance into the state treasury, which are charged to the account of an insurance company which does not owe same, may not thereafter be credited to such company and charged to the proper company without further transfer into the state treasury out of the State Depository Trust Fund of the amount of such charges.

4. If the Superintendent of Insurance, through gross negligence, makes improper transfers out of the State Depository Trust Fund into the state treasury and charges such transfers to the account of an insurance company, he is liable to such insurance company for such gross negligence. What constitutes gross negligence is a question of fact.

Respectfully,

THOMAS J. HERBERT,
Attorney General.