

Section 41, Article II of the Constitution of Ohio, adopted September 3, 1912, provides:

"Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state; and no person in any such penal institution or reformatory while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away; and goods made by persons under sentence to any penal institution or reformatory without the State of Ohio, and such goods made within the State of Ohio, excepting those disposed of to the state or any political subdivision thereof or to any public institution owned, managed or controlled by the state or any political sub-division thereof, shall not be sold within this state unless the same are conspicuously marked 'prison made'. Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of to the state or any political sub-division thereof, or for or to any public institution owned or managed and controlled by the state or any political subdivision."

As stated in Vol. 36, Cyc. at page 1114:

"In the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary signification. It is a very well settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the court to give it force and effect."

In view of the foregoing and answering your questions specifically it is my opinion in the case you present that it is immaterial whether the consideration received be cash or produce. The Constitution of Ohio, and the section of the General Code above quoted expressly and specifically prohibit the making of any contract by which the labor or time of a prisoner in the reformatory, or the product or profit of his work, shall be let, farmed out, given or sold to any person whomsoever.

Respectfully,

EDWARD C. TURNER,
Attorney General.

827.

BANKS—AUTHORITY OF TRUST DEPARTMENT TO PURCHASE SECURITIES FROM BOND OR INVESTMENT DEPARTMENT OF SAME BANK—LIABILITY OF BANK WHEN SUCH PURCHASE HAS BEEN MADE—AUTHORITY OF SUPERINTENDENT OF BANKS TO EXAMINE BOOKS AND AFFAIRS OF TRUST COMPANY.

SYLLABUS:

1. *There is no authority for the purchase by the trust department of a bank from the bond or investment department of the same bank, of securities in the investment of trust funds of an estate in its hands as trustee, unless specific authority therefor is found in the trust agreement.*

2. *In the event of such an unauthorized investment, the trustee is liable to account to the trust estate for any profits made upon such sale and for any losses which may result from such unauthorized investment.*

3. *A trustee may not either sell to or purchase from the trust estate and this rule is applicable to a case where one individual or a group of individuals dominates the affairs of a trustee bank and the corporation whose securities are purchased by the bank as an investment of trust funds.*

4. *The Superintendent of Banks is authorized to examine the books and affairs of any trust company as to any and all matters relating to any trust and if, in the course of such examination, he discovers unauthorized investments of trust funds and the trustee bank refuses voluntarily to account for any unauthorized profits and to change the character of such investments, he may suggest to the court having jurisdiction over the trust in question the condition of the affairs of such trust and the necessity for action and such court is given jurisdiction by virtue of the provisions of Section 710-162 of the General Code. Like suggestion may also be made to the cestui que trust who, by Section 710-162 of the General Code, is authorized to apply to the court having jurisdiction of such trust for proper remedy.*

COLUMBUS, OHIO, August 4, 1927.

HON. E. H. BLAIR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent request as follows:

“Your opinion is respectfully requested on the following questions, to-wit:

1. May a trust department of a bank purchase from the bond department of said bank securities or other property for investment in a trust estate under the control of said bank as trustee?

2. May bonds of an issue wherein the trust department of a bank is trustee be sold by the bond department of said bank for investment in a trust estate under the control of said bank as trustee?

3. May bonds of an issue wherein the trust department of a bank is trustee be sold by the bond department of said bank for investment in a trust estate under the control of said bank as trustee, when one or more of the officers or directors of said bank are also officers or directors of the corporation issuing the bonds?

4. May bonds be purchased for investment in a trust estate under control of a bank as trustee from a party other than said bank, when one or more officers or directors of said bank are also officers or directors of the corporation issuing the bonds?

5. May trust funds under the control of a bank as trustee be loaned to a corporation in which one or more officers or directors of said bank are also officers or directors?

6. May securities or other property belonging to a trust estate under the control of a bank as trustee be sold to said bank?

In the event that one or more of the above transactions are illegal, has this department the authority to compel the offending bank to return to a trust estate any profits which may have been derived by reason of such transactions, and should such investments be ordered taken out of said trust estate?”

In answering your first question, it is only necessary to apply the universally recognized rule that a trustee is not permitted to derive a profit from the trust estate other than the compensation specifically authorized by law or the trust agreement itself. This view is set forth in 39 Cyc., page 296, and considerable discussion of the general subject is therein found.

Applying the rules specifically, it must be conceded that a bank which makes a sale to its own trust department is deriving a profit from the estate other than its regular compensation. I find that the specific question you ask has been propounded to Thomas B. Paton, General Counsel, American Bankers Association, by one of the members of the association, and the question and his opinion thereon are published in Paton's Digest for 1926, Vol. 2, at page 1179. Because of their peculiar applicability, I am quoting both the question and the answer of the General Counsel in full, as follows:

"Can a National Bank purchase bonds with trust funds from the Bond Department of the bank, taking a profit thereon in addition to the compensation received by the bank as trustee?"

OPINION: It is a well settled rule of the law relating to trusts that a trustee cannot purchase from himself or at his own sale. The law does not stop to inquire into the fairness of the sale or the adequacy of price, but stamps its disapproval upon a transaction which creates a conflict between the self-interest and integrity of the trustee. (In re Wheeler, 11 Del. Ch. 469, (1919) 101 Atl. 865; Clark v. Wilson, 77 Ind. 176; Clay v. Thomas, 178 Ky., 199, 198 S. W., 762, 1 A. L. R., 738 and note; Freeman v. Harwood, 49 Me. 195; Johnson v. R. R. Co. 281 Mo. 166 (1918) 219 S. W. 36; Trust Co. v. Nelson, 104 Nebr. 499, (1920) 177 N. W. 835; McFadden v. Jenkins, 40 N. D. 422, (1918) 169 N. W. 151; Swife v. Craighead, 75 N. J. Eq. 102; Rochevot v. Rochevot, 74 App. Div. 585, 77 N. Y. Supp. 788.) The same rule is applicable to analogous case of a sale by a trustee to his cestui que trust; and the rule is based upon the same reasoning, namely the antagonistic interests of the trustee and the cestui que trust, and the further fact that such a transaction creates a conflict between the self-interest and integrity of the trustee. It is a well established and inflexible rule that a trustee must not derive any personal benefit from his use of trust funds, or from his position as a trustee. His personal interests must not be permitted to conflict with his fiduciary obligations. (Docker v. Somes, 2 Myl. & K. 655; Campbell v. Campbell, 8 Fed. 460; Wickersham v. Crittenden, 93 Cal. 17; Sypper v. McHenry, 18 Iowa 232.) It has been held that whenever a trustee charged with the duty of investing money belonging to and for the benefit of another, invests it in such a manner as to make it possible for him to profit by the investment individually, he makes himself personally liable for any loss which may occur by reason of such investment. (Carr's Estate, 24 Pa. Super. Ct. 369. And see Strong v. Dutcher, 186 App. Div. 307, 174 N. Y. Supp. 352.) The interest of one who acts in a fiduciary capacity should not be in conflict with the interest of the person whom he represents. (Trust Co. v. Nelson, 104 Neb. 499, (1920) 177 N. W. 835.) In the question submitted I am of the opinion that the purchase with trust funds of bonds from the Bond Department of the bank would be illegal and that at all events, the profits accruing in such transaction would inure to the cestui que trust and not the bank."

This conclusion is amply sustained by the authorities which he cites, as well as many others to the same effect, and I am therefore of the opinion that there is no

authority for the trust department of a bank to purchase from the bond department of the same bank securities or other property or investments in a trust estate under the control of such bank as trustee. This statement must, however, be qualified to the extent that specific authority may be found in the trust agreement for such purchases, and in that event the ordinary profits derived from such sales would, I believe, be construed as a part of the compensation of the trustee.

The answer to your first question also answers your second, inasmuch as the bank here is also selling to the trust estate. A somewhat difficult question would be presented were you to ask whether these securities of the corporation, for which the bank acted merely as trustee, were purchased from outside sources for investment in a trust estate under the control of the same bank as trustee. Presupposing authority to invest in securities of the character in question, I doubt whether the mere fact that the bank was acting as trustee under the mortgage of the corporation would create such an adverse interest as to preclude the purchase of the securities which in other respects were qualified for the investment of the trust funds in question. The function of a bank as trustee for an issue of corporate securities is ordinarily merely that of seeing to the proper protection of the security holders. Its position in this respect would be in no way inconsistent or in conflict with its position as trustee of the trust estate, the funds of which are invested in the securities in question.

For the reasons given in the discussion of your first question, your third question must also be answered in the negative. In other words, the bank may not be in a position of both seller and purchaser of the security.

It is impossible for me to give a categorical answer to your fourth question. In my opinion each case must be decided upon its own peculiar facts. I can, however, lay down certain principles which may be helpful to you in the determination of the specific case. The cardinal rule which must be borne in mind is the one which is set forth in the discussion of the first question, viz., that it is improper for a trustee to enter into any transaction which creates a conflict between the self interest and the integrity of the trustee. Where an individual or a group of individuals is substantially interested in or has a substantial influence in the administration of the affairs of a trustee bank, including the investment of the trust funds deposited therewith and at the same time the same individual or group of individuals has a substantial financial interest in the corporation issuing the bonds in question, the rule heretofore stated is applicable and no authority to make such an investment exists. I can conceive, however, of instances in which there might possibly be common officers of the trustee bank and the corporation issuing the securities and yet the common interests would be so minor in character that there would be no apparent reason why a purchase of such bonds would be objectionable. Each case must be governed by its own facts, but the inter-relationship of itself is sufficient to put you upon inquiry in every case and the facts should be scrutinized and all doubts resolved against the validity of the transaction.

Your fifth question may be answered in the language of my discussion of your fourth question. I see no essential difference as to whether bonds are purchased or loans made of trust funds. In either event the facts must be scrutinized to determine whether there exists the conflict of interest which renders a transaction of this character objectionable.

It is proper to say at this point that I am assuming in the discussion of your fourth and fifth questions that there otherwise exists authority to make investments of the character set forth. That is to say, that the investments in question are either

authorized by the trust agreement or, in the absence of any provision in respect thereto, by the section of the statute governing the investment of trust funds.

In your sixth question you ask whether securities or other property belonging to a trust estate under the control of a bank as trustee may be sold to the bank. Stating it baldly, you inquire whether the bank may sell to itself. I believe the discussion applicable to the first question clearly answers your last inquiry. Certainly, if the bank cannot sell to the trust estate, conversely it cannot purchase from it. The authority cited in the opinion of the General Counsel of the American Bankers' Association amply sustains this proposition and it is unnecessary to quote therefrom.

Finally, you ask whether you have the authority to compel the offending bank to return to the trust estate any profit which may have been derived by reason of such transactions and to order such investments taken out of the trust estate. Your authority for the examination of trust companies is found in Section 710-163 of the General Code, in the following language:

"The superintendent of banks shall have the right to examine, by any deputy, examiner or person especially appointed for that purpose, the books or affairs of any foreign trust company, or any corporation doing a trust business, as to any and all matters relating to any trust, estate or property within this state and concerning which such trust company is acting in a trust or representative capacity, the expense of which shall be charged to and paid by such trust company."

Just how far you may go in compelling observance of the law by summary proceedings is questionable. There is no specific statutory authority for you to make orders with respect to the administration of trust funds in the hands of trust companies nor is there any procedure provided in the event of failure to comply with any order. I call your attention, however, to the language of Section 710-162, General Code, as follows:

"Any judge of a court in which such trust company is acting in such trust capacity, if he deems it necessary, or upon the written application of any party interested in the estate which it holds in a trust capacity, at any time, may appoint a suitable person or persons, who shall investigate the affairs and management of such trust company concerning such trust and make sworn report to the court of such investigation. The expense thereof shall be taxed as costs against the party asking for such examination, or the trust fund of such trust company as the court decrees. Such court may at any time examine any officers of such trust company, under oath or affirmation, as to its trust matters in the court, or as to its affairs and management while considering its appointment in such capacity; and for any cause, applicable to natural persons in the same capacity, order that such trust company forthwith settle its trust."

This section gives the appointing court very broad authority to investigate the affairs of the trust company with respect to the administration of any trust, either on its own motion or on application of any party interested in the trust estate. I think it would be entirely proper for you to suggest informally to the court having jurisdiction over a trust in which unauthorized investments exist, the conditions which you find or you may take up with the cestui que trust the matter with a view to an application being made to the court.

In passing I may say that trustee banks themselves should recognize the danger of making investments of the character which you suggest. The rule is clear that

they are liable to the trust estate for any profits which may be made upon sale of property to the trust and it is equally clear that, should any loss be entailed by reason of such investments, the bank would be liable to the estate therefor. Under the circumstances, the demands of self interest should force banking officials to refrain from a practice which places their institutions in a position where there is nothing to gain and a possibility of a substantial loss.

Respectfully,
EDWARD C. TURNER,
Attorney General.

828.

APPROVAL, AGREEMENT BETWEEN THE STATE OF OHIO AND THE OHIO PUBLIC SERVICE COMPANY OF ELYRIA, OHIO, COVERING THE LOCATION AND MAINTENANCE OF AN ELECTRICAL TRANSMISSION LINE ACROSS MASSILLON STATE HOSPITAL PROPERTY.

COLUMBUS, OHIO, August 4, 1927.

HON. JOHN E. HARPER, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—Under date of July 28, 1927, I rendered to your department an opinion bearing number 804, disapproving a proposed agreement in the form of a lease between the State of Ohio, acting by and through the Director of Public Welfare, and The Ohio Public Service Company, of Elyria, (successor to the Massillon Electric and Gas Company) covering the location and maintenance of an electrical transmission line across the Massillon State Hospital property. The reasons for said disapproval are set forth in that opinion.

Further information has now been presented which indicates that the present transmission line will be entirely supplanted by the proposed new line, except that a portion of the present line will remain on the property as a service line to supply electricity to some of the buildings upon the State Hospital property. There will in fact be only one transmission line across the State Hospital property rather than two lines as my previous information had led me to believe.

For the above reasons I am now approving said agreement and return the same to you herewith, together with all other papers submitted in this connection.

Respectfully,
EDWARD C. TURNER,
Attorney General.

829.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND RONAN AND INGLESON, COLUMBUS, OHIO, FOR ARCHITECTURAL SERVICES FOR NEW TUNNEL AT KENT STATE NORMAL SCHOOL, KENT, OHIO, AT AN EXPENDITURE OF \$1,800.00.

COLUMBUS, OHIO, August 4, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State