

land lease in triplicate executed by the State of Ohio through you as Superintendent of Public Works and as director of said department to the Clintonian Fuel and Oil Company of Columbus, Ohio. By the lease here in question, which is one for a stated term of fifteen years and which provides for an annual rental of six dollars (\$6.00), there is leased and demised to said lessee the right to construct and maintain a four-inch gas main across and under the bed of the Buckeye Lake Wasteway Run at or near Station 22—00, of H. L. Conner's Survey of said channel made under the direction of the Director of Public Works in 1930.

I find that this lease has been properly executed by you and by the Clintonian Fuel and Oil Company, the lessee therein named, acting by the hand of its Vice President under the authority of a resolution adopted by the board of directors of said company under date of May 2, 1934.

This lease is one executed by you under authority of Section 13970, General Code, and I further find that the provisions of this lease and the conditions and restrictions therein contained are in conformity with said section and with other sections of the General Code relating to leases of this kind.

I am accordingly approving this lease as to legality and form as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2780.

FIDUCIARY—REQUIRED TO OBTAIN APPROVAL OF PROBATE COURT
WHEN INVESTING FUNDS OF ESTATES UNDER SECTION 10506-41,
GENERAL CODE.

SYLLABUS:

Section 10506-41, General Code, as amended (115 O. L. 396), requires all fiduciaries, including trust companies administering estates with funds to be invested, to obtain the approval of the probate court for investing in the classes of investments authorized by said section.

COLUMBUS, OHIO, June 4, 1934.

HON. GEORGE N. GRAHAM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads as follows:

“Section 10506-41, General Code, as amended September 29th, 1933, provides as follows:

‘Except as may be otherwise provided by law or by the instrument creating the trust, a fiduciary having funds belonging to the trust which are to be invested may invest them in the following: * * *’

(the certain description of bonds being enumerated.)

Going to the next to the last paragraph of the section, we find the following:

'Provided that no executor or administrator shall have authority to invest funds belonging to the estate except with the approval of the court or where the will or other instrument creating the trust permits.'

Certain trust companies in this county have numerous small estates with funds to be invested. This latter clause of the section seems to make it obligatory upon a fiduciary to obtain authority of the Probate Court to invest any funds; in fact we cannot see that it leaves of any other interpretation; however, these fiduciaries seeking to avoid the payment of the fees of the Probate Court which they would have to pay in obtaining leave of court to invest their funds, believe that the Legislature intended that the bonds which are specifically enumerated within the section, can be purchased by the fiduciary without approval of the court.

We would like to have your opinion, therefore, as to whether or not Section 10506-41 requires that the fiduciary obtain approval in the investment by the fiduciary in bonds, etc., enumerated within the immediate section."

At the outset, it may be stated that you have erroneously quoted in the first part of your communication the next to the last paragraph of Section 10506-41, General Code, as amended by House Bill No. 437 of the 90th General Assembly, regular session (115 Ohio Laws 396, 397), effective September 30, 1933.

Instead of the words "executor or administrator" appearing in the first portion of the next to the last paragraph of the section before amendment, the word "fiduciary" now appears in the amended section. Evidently the person who typed your communication copied the wording of the next to the last paragraph of Section 10506-41, General Code, from one of the General Code supplements quoting Section 10506-41, General Code, as it existed before amendment in 1933.

Previous to amendment in 1933 (115 O. L. 396), section 10506-41, General Code, read as follows:

"Except as may be otherwise provided by law or by the instrument creating the trust, a fiduciary having funds belonging to the trust which are to be invested may invest them in the following:

(a) Bonds or other obligations of the United States or of the State of Ohio.

(b) Bonds or other interest bearing obligations of any county, city, village, school district, or other legally constituted political taxing subdivision within the State of Ohio, provided such county, city, village, school district or other subdivision has never defaulted in the payment of the principal or interest on any of its bonds or other interest bearing obligations.

(c) Bonds or other interest bearing obligations of any other state which has never defaulted in the payment of principal or interest on any of its bonds or other interest bearing obligations.

(d) Any bonds issued by any bank, organized under the provisions of the Act of Congress, known as the Federal Farm Loan Act, approved July 17, 1916, and amendments thereto.

(c) Notes or bonds secured by first mortgage on real estate held in fee, of at least double the value of the total amount secured by such mortgage, provided such notes or bonds if they comprise a part only of the obligations secured by such mortgage belong to the highest and most preferred class of obligations secured by such mortgage, and have equal priority with all other obligations in the same class so secured. Such mortgage shall require that the buildings, if any, on the mortgaged property be well insured against loss by fire, and so kept, for the benefit of the mortgagee, until the debt is paid.

Provided that no executor or administrator shall have authority to invest funds belonging to the estate except with the approval of the court or where the will or other instrument creating the trust permits.

In addition to the above, a guardian may, with the approval of the probate court, invest funds belonging to the trust in productive real estate located within the State of Ohio, provided neither the guardian nor any member of his family has any interest in such real estate, or in the proceeds of the purchase price paid therefor. The title to any real estate so purchased must be taken in the name of the ward."

The foregoing section was enacted as part of the new probate code in 1931 (114 O. L. 320-481). A short resume of the history of the course of Amended Senate Bill No. 10 in the General Assembly will aid in arriving at the intent of the General Assembly relative to your question.

A reference to the journal of the 89th General Assembly, 1931, shows that at the time of the introduction of Amended Senate Bill No. 10 in the Senate on January 12, 1931, the first clause of section 10506-41, General Code, must have read:

"Except as may be otherwise provided by the instrument creating the trust, a fiduciary having funds belonging to the trust which are to be invested may invest them in the following: * * *"

In other words, the words "by law or" immediately following the words "Except as may be otherwise provided", appearing in the said section as quoted above in its entirety, did not appear in the section when it was first introduced in the General Assembly. The words "by law or" were afterwards inserted by amendment in the Senate on February 25, 1931. See Senate Journal, Vol. 114, 1931, page 219.

The effect of the amendment was to include as proper investments by trust companies, those investments set forth in sections 710-111, 710-112, 710-140, 710-164 and 710-166 of the banking act, as well as the investments set out in section 10506-41, General Code. Trust companies, though included in the term "fiduciary", a defined by section 10506-1, General Code, did not have to obtain the consent of the probate court to invest in such classes of investments set out in sections 710-111, 710-112, 710-140, 710-164, 710-166 and 10506-41, General Code, as the next to the last paragraph of section 10506-41, General Code, required only "an executor or administrator" to obtain the consent of the probate court to investment of the funds belonging to an estate in any of the investments set out in section 10506-41, General Code.

The amendment of section 10506-41, General Code, in 115 O. L. 396, added subdivision (f) to the section, as follows:

"Life, endowment or annuity contracts of legal reserve life insurance companies regulated by the provision of chapters 1 and 2 of subdivision I of division III of title IX of the General Code of Ohio and duly licensed by the superintendent of insurance of Ohio to transact business within the state. The purchase of contracts authorized by this subsection shall be limited to executors or the successors to their powers when specifically authorized by will, and to guardians and trustees. Such contracts may be issued on the life or lives of a ward or wards, a beneficiary or beneficiaries of a trust fund, or according to the terms of a will, or upon the life or lives of persons in whom such ward or beneficiary has an insurable interest. Such contracts shall be so drawn by the insuring company, that the proceeds or avails thereof shall be the sole property of the person or persons whose funds are invested therein."

and substituted for the words "executor or administrator" in the next to the last paragraph of the section, the word "fiduciary."

Thus the obvious effect of the amendment is to require that trust companies and all other persons, associations or corporations within the definition "fiduciary", set out in section 10506-1, General Code (114 O. L. 364) must obtain the consent of the probate court for the investment of funds in not only any investments authorized by the sections of the banking act, already noted, but in those investments listed in section 10506-41, General Code, as amended in 115 O. L. 396, 397.

The comment of the special Committee on Revision of the Ohio Probate Laws of the Ohio State Bar Association, which prepared the Senate Bill No. 10 of the 89th General Assembly for introduction therein, is helpful in establishing that the foregoing analysis was intended by the General Assembly. On page 43 of a pamphlet containing the Third and Final Report of the Special Committee, the following comment of such committee appears under section 41 of chapter VI (Fiduciaries), later section 10506-41, General Code:

"The matter of investments by fiduciaries has been discussed at great length in numerous meetings of the committee. This section (later G. C. 10506-41) replaces to a considerable extent paragraph 7 of G. C. 10933, and all of G. C. 11214. It also includes some of the provisions of G. C. 710-111 in the banking law. Among the things which the section will make effective are the following:

* * *

2. Instead of scattered provisions relating to investments by fiduciaries, a single section will be substituted enumerating the investments permitted to all fiduciaries *with certain exceptions relating to executors and administrators* as above set forth. * * *

A reference to section 41, as set forth on pages 42 and 43 of such pamphlet shows that the exception relating to "executors and administrators" was the clause "Provided that no executor or administrator shall have authority to invest funds belonging to the estate *except with the approval of the court* or where the will or other instrument creating the trust permits."

Such comment appears to me to definitely show that trust companies before amendment of section 10506-41, General Code (115 O. L. 396-397), were not required to obtain the approval of the probate court as to investing of funds of

estates, and that the legislature in substituting the word "fiduciary" for the words "executor or administrator" in the next to the last paragraph of section 10506-41, General Code, meant to require the trust companies and other fiduciaries to be subject to the exception theretofore relating only to executors and administrators, namely, that the approval of the probate court must be obtained for investments that section 10506-41, General Code, authorized.

The construction of section 10506-41, General Code, herein set forth, is harmonious with the article appearing in Vol. 5, Cincinnati Law Review, pages 429 to 441, entitled "Investments by fiduciaries under the new Ohio Probate Code."

In view of the foregoing and in specific answer to your question, I am of the opinion that section 10506-41, General Code, as amended (115 O. L. 396-397), requires all fiduciaries, including trust companies administering an estate, with funds to be invested, to obtain the approval of the probate court for investing in the classes of investments authorized by said section.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2781.

UNION CEMETERY—BOARD OF TRUSTEES NOT ENTITLED TO CUSTODY OF PROCEEDS OF TAXES LEVIED FOR CEMETERY PURPOSES BY COUNCIL OF VILLAGE AND TRUSTEES OF TOWNSHIP.

SYLLABUS:

Where a union cemetery is established and maintained by a village and township, the board of trustees of such cemetery, appointed by virtue of section 4193-1, General Code, has no right to the custody of the proceeds of taxes levied for cemetery purposes by the council of the village and trustees of the township.

COLUMBUS, OHIO, June 4, 1934.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"Sections 4183 et seq. refer to the establishment of a union cemetery and the method of procedure in keeping up the same. Section 4193-1 provides for the appointment of cemetery trustees.

QUESTION: In the establishment of a union cemetery by the joining of a village and a township for cemetery purposes, may the funds arising from taxes levied by the council of the municipality and the trustees of the township be turned over to the cemetery trustees, or are such funds to remain in the treasuries of the village and the township and be expended upon the order of the cemetery trustees?"

Section 4183 General Code, provides for the uniting by the councils of two or more municipal corporations or of one or more such corporations and the