Appropriations—State Auditor—State—Funds.

It is not necessary that an appropriation be made to justify the distribution of the moneys as provided in section 5127 R. C. M. 1921.

George P. Porter, Esq., February 16, 1926.
State Auditor,
Helena, Montana.

My dear Mr. Porter:

You have requested my opinion on the following question:

"Is it necessary that an appropriation be made for the payment of the firemen's disability fund as provided in section 5127 R. C. M. 1921?"

Section 6112 R. C. M. 1921, provides:

"All insurance corporations, associations and societies, as hereinbefore specified in the preceding section, before commencing to do business in the state of Montana, shall be required to secure a license, authorizing them to transact business of insurance corporations, associations, or societies, and shall pay to the state auditor, for such license, the following fees:

"For a license to collect in any one year premiums amounting to five thousand dollars or less, one hundred and twenty-five dollars.

"For a license to collect in any one year premiums over the sum of five thousand dollars, the sum of twenty dollars for each and every one thousand dollars to be so collected; provided that, where any insurance corporation, association, or society has fifty per cent. of its capital stock invested in Montana securities, such insurance corporation, association, or society shall be allowed to deduct whatever tax it may have already paid from the amount due for such license fee or tax, as herein provided."

Section 5127 provides:

"At the end of the fiscal year, the state auditor shall issue and deliver to the treasurer of every city his warrant for an amount equal to fifty per cent. of the licenses collected by the state auditor under section 6112 of these codes, in proportion to the premium so paid and collected by the said fire insurance company in such cities to the total premiums paid and collected by such fire insurance companies in the entire state."

Section 5128 provides:

"The state treasurer is hereby authorized and directed, upon the presentation to him of the said warrant of the state auditor, to pay to the treasurer of any such city, out of the general revenue fund of this state, the amount in such warrant specified, which amount shall be paid into the disability fund of the fire department."

Section 34 of article V of the constitution of Montana provides:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt."

Section 12 of article XII prohibits appropriations for a longer term than two years.

The question then is, is it necessary that an appropriation be made to justify the issuance of warrants under section 5127?

It is apparent from the sections of the statute above referred to that 50% of the license fees above referred to are collected for the use and

benefit of the cities of the state and that the title to the same never vests in the state and that it does not rightfully belong to the general revenue fund of the state.

It is precisely the same as the situation presented to the supreme court of Minnesota in the case of State ex rel. Nelson vs. Iverson, 145 N. W. 607. In that case the court had before it the statutes relating to the gross earning tax of railroads. The tax was required to be paid to the state treasurer and by him distributed to the municipalities and taxing districts through which the railroad extended. It was contended that there was no appropriation made so as to justify the auditor in issuing his warrant. The constitutional provision in question was substantially the same as our section 34, article V. The court held that the constitutional provision had no application to the facts of that case, saying:

> "But our conclusion in the matter, after due consideration, is that neither the constitution nor the statutes limiting his authority to issue warrants on the treasury, properly construed, have any application to the facts here presented. The statute imposing this tax and providing for its apportionment, construed in the light of the obvious intention of the legislature, does not vest in the state title to the money so raised, and it does not rightfully belong to the general revenue fund of the state. The intention of the legislature was to impose this tax for the joint benefit of the state and the municipal divisions through or into which the railroad extends. Each is thereby vested with an independent right to that part of the tax which shall be apportioned to it by the tax commission. No discretion in respect to apportionment is left to the commission; on the contrary the statute imposes that as a duty, and the members of the commission have no alternative but to make it in harmony with the spirit and purpose of the law. The fact that the state treasurer is made collector of the tax, and that the same is required to be paid to him, in no essential respect changes the situation or alters or modifies the rights of the municipal divisions entitled to a part of the fund. Until the division thereof is made the state treasurer holds the money as custodian, and for distribution as the statute requires. No specific appropriation of the money by legislative action is necessary to the performance of this act of distribution. The legislature by the statute imposing this tax expressly and in so many words requires that it be apportioned and distributed, and any further legislation upon the subject would amount to nothing more, as we view the subject, than a repetition of the purpose already declared. The situation would no doubt be different did the statute justify the conclusion that the tax upon payment becomes the property of the state, and a part of its general revenue fund. But this conclusion does not follow from the language or purpose of the statute, and the protection of the funds of the state does not require that it be so construed. The purpose of the constitution in prohibiting the

payment of money from the state treasury, except upon appropriation made by law, was intended to prevent the expenditure of the people's money without their consent first had and given. State ex rel. Eggers, 29 Nev. 469, 91 Pac. 819, 16 L. R. A. (N. S.) 631. The reason for the prohibition does not apply to this case, for here the portion of the taxes claimed belongs to the municipal divisions of Washington county, and not to the state. It is probable that the situation requires of the state officers separate accounts of funds received from this and other railroads subject to this form of taxation; but this is a mere matter of bookkeeping, not affecting the legal right conferred by the statute.

"Our conclusion, therefore, is that the constitutional provision referred to does not apply to the statute, and the judgment of the trial court is affirmed."

In Commonwealth vs. Powell, 249 Pa. 144, 94 Atl. 746, a writ of mandamus was sought to compel the auditor to draw his warrant on the state treasurer on a fund received from the registration of license fees for automobiles, which was appropriated by the terms of the act imposing the fees for the maintenance and repair of highways. The constitution was identical with our section 34, article V. The court, in referring to this constitutional provision, said:

"This provision of the constitution was only intended to apply to biennial appropriations made by the legislature out of the general revenues of the commonwealth. It has no application to a fund created for a special purpose and dedicated by the act under which such fund is to be created to a particular use. The appropriation of the fund so created continues as long as the act which dedicates it to a particular use remains in force."

In People ex rel. Einsfeld vs. Murray, 149 N. Y. 367, 44 N. E. 146, the court had before it a statute providing for the collection by the state of liquor licenses in the various municipalities and appropriating a certain proportion of the funds back to the municipalities. The court held that constitutional requirements relating to the method of appropriating money were not applicable, saying:

"The money levied and collected is not the money of the state. It is the money of the town, city, or village in which, under the exercise of corporate powers, it was levied and collected, and to it the state has no title."

The money representing 50% of the license fees provided for by section 6112 is trust moneys and must be used for the purpose for which they were raised and no biennial appropriation is necessary.

State ex rel. Ledwith vs. Brian (Neb.) 120 N. W. 916;
Sturtevant Co. vs. O'Brien (Wisc.) 202 N. W. 324.

It is not public money.

Tarrant County vs. Butler (Tex.) 80 S. W. 656;
Loe vs. State (Ohio) 91 N. E. 982.

It is my opinion, therefore, that the constitutional provisions relating to appropriations have no application to the license fees provided for by section 6112 R. C. M. 1921, and that they must be paid out as directed by section 5127 R. C. M. 1921, and that no further appropriation is necessary.

Very truly yours,
L. A. FOOT,
Attorney General.