

**Montana Trade Commission—License Fees, Disposition
Of—General Fund of State.**

Where fees have been collected by the Montana Trade Commission and paid into the general fund, though the law creating the commission is unconstitutional, they cannot be refunded without appropriation by the legislature.

Where fees remain in the hands of the commission, they should be returned to the persons paying the same, whether received before or after the law was declared unconstitutional.

February 3rd, 1920.

Board of Railroad Commissioners
of the State of Montana,
Building.
Gentlemen:

You have submitted to me, for opinion and direction, the following question:

“In view of the fact that the Montana Trade Commission Law has been declared unconstitutional (assuming the whole statute falls), what course should be followed with respect to receipts for license fees which (a) have been turned over by the commission to the State Treasurer and (b) which, since the date of the temporary restraining order have been held in the form in which received (checks, postal and express money orders and currency) and not turned over to the State Treasurer. Approximately fifty per cent of the license applications received since November 17, 1919, were intended for the year 1920, and some remittances cover both 1919 and 1920. Very few, if any, of the license fees were paid under protest.”
In reply you are advised:

(1) Inspection of Chapter 21, Laws Extra Session, 1919 (Montana Trade Commission Law), shows that the legislature made no provision whereby receipts from license fees should be credited to the specific appropriation of \$25,000.00 contained in the Act for its enforcement. Accordingly such receipts have been, properly, integrated in the general fund of the state. (Section 180, R. C. 1907.) It is not now a question of considering the circumstances under which the funds were received, or the equity of the claims that might be made for a return of same, but rather a matter of authority for making the disbursement necessary to return of the moneys. Such moneys having become a part of the general fund of the state, specific authority must be found for paying them out of that fund. Careful inspection of the statutes fails to disclose any authority in law for returning the license fees now massed in the general fund. (Sec. 170, R. C. subd. 17.) Relief may only be had by application to the legislature.

In this connection I have noted your statement that "very few, if any, of the license fees were paid under protest." I am not satisfied that payment under protest would be of any avail against the state. While it is intimated in *Cunningham vs. Northwestern Improvement Co.*, 44 Montana 180, that our statute (Sec. 2742, R. C. 1907, as amended by Laws 1909, p. 201) allowing actions against municipalities and counties to recover "taxes, licenses, or other demands for public revenue" when the same have been paid under protest, is applicable to unauthorized demands by a state officer, the intimation is unnecessary to the opinion, does not take account of the fact that licenses may be for purposes other than public revenue, and involves a forced construction of Section 2742. However, the question is not of great importance for, as you say, "very few, if any of the license fees were paid under protest" and the amounts involved are trifling. And, at any rate, you are concerned wholly with the question of voluntary return of the fees, not resistance to actions commenced for their recovery.

(2) Receipts like (b) above not having become a part of the state's funds, but only preserved as received during the force of the temporary restraining order (now made a permanent injunction) should be returned at once; and likewise with all fees received hereafter, for the reason that there is no authority for your receiving them or passing them on, to the general fund.

Respectfully,

S. C. FORD,

Attorney General.