2524.

1. INSURANCE COMPANY—INCORPORATED OR ORGANIZED UNDER LAWS OF FOREIGN GOVERNMENT—DEPOSIT OF $100,000.00 IN SECURITIES MUST BE HELD BY SUPERINTENDENT OF INSURANCE FOR BENEFITS AND SECURITY OF POLICY HOLDERS — NOT FOR ANY OTHER CREDITORS.

2. WHERE LITIGATION INSTITUTED IN FOREIGN STATE AS TO INCREASE IN PREMIUM RATES AND POLICY HOLDERS DO NOT RECEIVE ENTIRE REFUND, POLICY HOLDERS MAY RESORT TO SAID DEPOSIT—AMOUNT OF DEPOSIT SUPERINTENDENT MAY RETAIN UNDER SECTION 656 G. C.

SYLLABUS:

1. *Where an insurance company incorporated or organized under the laws of a foreign government deposits with the Superintendent of Insurance* $100,000.00 *in securities as required by Section* 9565, *General Code, such deposit must be held by the Superintendent of Insurance for the benefit and security of the policy holders only and not for the benefit and security of any other creditors.*

2. *Where an action is instituted against the Superintendent of Insurance of another state to restrain and enjoin such superintendent from interfering with an increase in the premium rates charged by such company, and where the court orders such increase to be paid into court to be distributed*

according to its further order and if such further order provides that the court costs and cost of distribution be paid out of the funds so impounded and as a result thereof the policy holders do not receive the entire refund to which they would otherwise be entitled, the deposit made by such company pursuant to Section 9565, General Code, may be resorted to by the policy holders.

Columbus, Ohio, July 13, 1940.

Hon. John A. Lloyd, Superintendent of Insurance,
Columbus, Ohio.

Dear Sir:

Your recent request for my opinion reads as follows:

> "The Svea Fire & Life Insurance Company of Gothenburg, Sweden, which discontinued business in this state several years ago, has made an application pursuant to Section 656, General Code, to withdraw the $100,000 deposit made with this Division pursuant to Section 9565, General Code, for the benefit and security of its policyholders residing in the United States. In order to determine the existence of any liabilities against this depost, I caused an examination to be made of the company's United States Branch.
>
> The report of my examiner raises a question as to the existence of liability against this deposit by reason of certain litigation in the United States District Court for the Central Divison of the Western District of Missouri. This case concerns the refund of premiums to residents of Missouri in the so-called Missouri Rate Case. My examiner sought to determine from Mr. W. T. Kemper, Jr., the Custodian of the impounded funds, whether such funds were sufficient to cover all possible liabilities of this company. The information which we obtained can most readily be set forth by the exchange of correspondence, and I, therefore, enclose a copy of Mr. Kemper's letter of December 21, 1939, our letter of May 14, 1940, and Mr. Kemper's letter of May 24, 1940. To the best of my knowledge, the decision referred to in the last mentioned communication has not been rendered.
>
> As we construe the letter from the Custodian, the only liability that might be chargeable to the deposit would be the expense of distributing the impounded funds. The question arises as to whether such liability would come within the purpose for the deposit as stated in Section 9565, General Code, "for the benefit and security of its policyholders residing in the United States." Recognizing the possibility that such liability might be held within

the terms of the deposit, I would appreciate your advice as to whether I would incur any liability on my bond for releasing the deposit in view of the present status of the Missouri litigation."

Section 9565, General Code, reads as follows:

> "A company incorporated by or organized under the laws of a foreign government shall deposit with the superintendent of insurance, for the benefit and security of its policy holders residing in the United States, a sum not less than one hundred thousand dollars in stocks or bonds of the United States, the state of Ohio or a municipality or county thereof, which shall not be received by the superintendent at a rate above their par value. Stocks and securities so deposited may be exchanged from time to time for other like securities. So long as the company so depositing continues solvent and complies with the laws of this state, the superintendent shall permit it to collect the interest or dividends on such deposits."

It may be observed that this section requires a company, organized or incorporated under the laws of a foreign government, to deposit with the Superintendent of Insurance securities therein enumerated in the amount of not less than $100,000.00 "for the benefit and security of its policy holders residing in the United States."

Section 641, General Code, provides as follows:

> "If any company, corporation, or association required by law to make a deposit with the superintendent of insurance, or other state officer, *to secure the contracts of such company, corporation, or association, or for any other purpose, fails to pay any of its liabilities upon such contracts, or other obligations,* according to the terms thereof after the liability thereon has been determined, or if such company, corporation, or association, having ceased to do business within this state, leaves unpaid any such liability or has become insolvent, the attorney general of the state, on behalf of the superintendent of insurance, or such other officer, and upon the application of any person entitled to participate in such deposit, or the proceeds arising therefrom, shall commence a civil action in the court of common pleas of Franklin County, making the company, corporation, or association, a party defendant, to determine the rights of all parties claiming any interest in such deposit, to subject the deposit to the payment or satisfaction of all liabilities and to distribute such fund among the persons entitled thereto." (Emphasis mine)

This section, it will be noted, provides that where an insurance company, which has made a deposit with the Superintendent of Insurance or

other officer to secure the contracts of such company or for any other purpose, fails to pay its liabilities upon such contracts or its other obligations secured, an action may be commenced by the Attorney General on behalf of the Superintendent of Insurance or such other officer, upon the application of any person entitled to participate in the deposit, to subject same to the payment and satisfaction of such liabilties and to distribute the fund to the persons entitled thereto.

There does not appear to be any judicial construction of Section 9565, General Code, supra, which is of assistance in answering your question, but in Falkenbach v. Patterson, 43 O. S., 359, the Supreme Court held that a deposit made by a domestic life insurance company under a similar statute requiring such deposit, was to be held only as security for the policy holders and not for the security of general creditors of the company. This decision is sound and the principles declared therein, when applied to Section 9565, General Code, show that the securities in question were deposited only for the benefit and security of the *policy holders* of the company residing in the United States. If all possible liability of this company to its policy holders residing in the United States has been satisfied or amply provided for, the provisions of Section 641, General Code, supra, would not apply and these securities should be returned by you to the company pursuant to the provisions of Section 656, General Code, which provides as follows:

> "When any insurance company or corporation other than life, which has made a deposit with the superintendent of insurance, intends to discontinue its business in this state, the superintendent upon application of such company or corporation, shall give notice at its expense of such intention at least once a week for six weeks in three newspapers of general circulation in the state.
>
> After such publication, the superintendent shall deliver to such company or association its securities held by him, if he is satisfied by the affidavits of the principal officers of the company and on an examination made by him or by some competent, disinterested person or persons appointed by him, if he deems it necessary, that all liabilities and obligations which said deposit has been made to secure have been paid and extinguished; but the superintendent may, from time to time, deliver to such company or its assigns, under like condition, any portion of such securities on being satisfied that an equal proportion of said liabilities and obligations have been satisfied, if the amount of securities retained by him is not less than twice the amount of the remaining liabilities and obligations."

The correspondence between your division and W. T. Kemper, Jr.,

custodian, indicates that litigation had been instituted in the United States Court for the Western District of Missouri by various insurance companies doing business in the State of Missouri, to enjoin the Superintendent of Insurance of Missouri from interfering with such companies in putting into effect an increase in rates. Apparently, the court ordered that such increase should be paid into the registry of the court and retained by a custodian appointed by the court until termination of the litigation. During the pendency of the actions a settlement decree was entered, the terms of which provided that twenty per cent of the impounded funds should be distributed to the policy holders and the remainder thereof, except for a small portion retained to cover the expense of distribution, to be distributed to the insurance companies or trustees for the companies. The Svea Fire and Life Insurance Company was one of the insurance companies which instituted this litigation.

Thereafter it appears that the court set aside the settlement decree for the reason that same was procured by fraud and through alleged bribery of the then Superintendent of Insurance of Missouri, and the court further ordered the insurance companies to repay into court the money distributed to them and to show cause why such funds should not be distributed to the policy holders at the cost of the insurance companies. The matter has been heard by a master but as yet the court has apparently made no further order with respect thereto.

It therefore appears that the only possible further liability which The Svea Fire and Life Insurance Company may owe as a result of this litigation will be court costs, including the pro rata expenses of the custodian in distributing the funds to the policy holders if the court should decree that this should be done. Ordinarily, I would say that the payment of court costs adjudged against the insurance company could not be said to be for the benefit and security of the policy holders. Section 9565, General Code, supra, was enacted for the purpose of protecting the policy holders and securing to them the performance by the company of the contracts of insurance issued by it. However, the court may adjudge that the court costs, including the cost of distributing the funds, be paid out of the impounded funds and, if so, the policy holders would not receive the entire refund to which they are entitled. In such event, the policy holders would have a right to resort to the deposit made for their security and benefit.

Section 656, General Code, supra, permits you to deliver the securities deposited to the company if you retain a portion thereof in the amount not less than twice the amount of the remaining liability and obligation. You are accordingly advised to retain in your possession a portion of the deposit equal in amount to double the sum by which the impounded fund may be depleted by the payment of court costs and expense of distribution therefrom, if the court so orders.

Respectfully,

THOMAS J. HERBERT,
Attorney General.