

State Educational Bonds—Power of the Board of Examiners—Use of Interest and Income Fund for Construction Work.

Money from the Interest and Income Fund of the State School of Mines may not be applied by the State Board of Examiners to building purposes.

The State Board of Examiners has no authority to authorize the payment of claims on account of construction work on the Metallurgical Building from the Interest and Income Fund of the State School of Mines, the same to be reimbursed or replaced from the proceeds of the sale of the State Educational bonds authorized by Initiative Measure No. 19.

Edward C. Elliott, Esq.,
Chancellor of the University,
Helena, Montana.

My dear Chancellor Elliott:

You have requested my opinion upon the following question:

"Pending the sale of the State Educational Bonds, authorized by the people at the general election held in November, 1920, will it be legal for the State Board of Examiners to authorize the payment of claims on account of the further construction work on the Metallurgical Building of the State School of Mines in Butte from the balance remaining in the so-called Interest and Income Fund of the State School of Mines on March 1, 1921? The amount of any such claims paid from the Interest and Income Fund would be replaced in such fund from the proceeds of the sale of State Educational Bonds."

The fund in question consists of interest upon the investments of the School of Mines' permanent fund resulting from sales of lands of the School of Mines' land grant and of a small amount of income from leases of unsold land. This land was granted to the State by Congress by the Enabling Act.

A preliminary question is: What is the nature or effect of the action proposed? Is it a mere temporary borrowing from the fund in question, or is it an application of the fund to building purposes?

If regarded as a borrowing, it is clear that the action contemplated is not authorized, inasmuch as there is no constitutional or statutory authority given the Board of Examiners, either general or specific, to borrow from this or any special fund of the State. Furthermore, the fund is under specific limitations as a trust fund created by the Enabling Act and accepted by the provisions of the Constitution of Montana, which provisions placed restrictions upon it in addition to those contained in the Enabling Act.

Section 11 of the Enabling Act reads, in part, as follows:

"That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the *support* of said schools."

Section 7 of Ordinance 1 accepted the land grants made by Congress in the Enabling Act "upon the terms and conditions therein provided."

Section 12 of Article XI of the Constitution of Montana provides as follows:

"The funds of the state university and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties shall be devoted to the maintenance and perpetuation of these respective institutions."

That the foregoing constitute a permanent trust fund has been definitely decided by our Supreme Court in the case of *State ex rel. Koch v. Barrett*, 26 Mont. 62, in which Mr. Chief Justice Brantly, in referring to the foregoing provisions, used the following language:

"We think the manifest intention of congress was to create a permanent endowment, which was to be preserved inviolate; and to require that the revenues derived therefrom should be faithfully applied to the support of the institutions created, and not be diverted to other purposes."

To the same effect is the case of *State ex rel. Haire v. Rice*, State Treasurer, 33 Mont. 365, holding that the above constitutional provisions are not in conflict with the Enabling Act, and are supplementary thereto.

While the proposition includes the return of the amount from the proceeds of the sale of bonds of the \$5,000,000 authorized issue, and while it probably would be returned out of such funds, its return is contingent upon the sale of such bonds; and there is always a possibility, however remote, that they may never be sold. In the event of such happening the money could not be replaced from the proceeds of the bonds and a depletion of the trust fund would result from the action of the Board of Examiners in authorizing such use of the money. In this view of it, even statutory authority, if such existed, would be insufficient to warrant the Board in borrowing the money or using it for purposes other than those of the trust.

However, the use of the fund for the purpose of paying for construction work on the Metallurgical Building of the School of Mines is not, in my opinion, a borrowing of the money. If the proposed action were taken the money in the fund would, in fact, have been expended for building purposes. It is immaterial that an equal amount of money from other sources is intended to be used to replace the money taken from the fund. The original fund would be expended and gone.

Having decided that such use of the fund would constitute an application of the same to building purposes, it remains to be ascertained whether such fund could be applied by the Board of Examiners to such purpose without violating the terms of the trust established by the Enabling Act and constitutional provisions.

The Enabling Act contains also a grant of land for the purpose of establishing the State Normal College, which grant was under the same restrictions and limitations as the grant for the School of Mines. It was attempted by legislative act to provide that a bond issue should be made for the purpose of constructing buildings for the State Normal School, to the payment of which bonds the proceeds of sales of lands included in the grant and all rentals of such lands should be pledged.

In *State ex rel. Haire v. Rice*, 33 Mont. 365, which case was appealed to the Supreme Court of the United States, 204 U. S. 291, where the decision of the Supreme Court of Montana was affirmed, it was held that the lands in question and all proceeds therefrom, including interest and rentals, constitute a trust for the maintenance and perpetuation of the institution, and that none of the proceeds or interest might be used for any purpose other than its maintenance and perpetuation.

The question whether the word "support" in the Enabling Act includes construction of buildings has been passed upon by the Supreme Court of Idaho in *Roach v. Gooding*, 81 Pac. 642, where it was held that the "support" of the University excludes the building of buildings for the University; also that the phrase "University purposes" in the Enabling Act does not include the erection of buildings. To the same effect are *Mitchell v. Colgan* (Cal.) 54 Pac. 905, also *Sheldon v. Purdy* (Wash.) 49 Pac. 228, and *Board v. McMillan* (N. D.) 96 N. W. 310.

From the foregoing it is apparent that Interest and Income Fund of the State School of Mines, consisting of interest on the permanent fund and rentals, may be used only for the "maintenance and perpetuation" of the institution, and may not either be borrowed or applied to building purposes, and it is my opinion that it would not be legal for the State Board of Examiners to authorize the payment of claims on account of further construction work on the Metallurgical Building from said fund, the same to be reimbursed from the proceeds of the sale of the State Educational bonds authorized at the general election of November, 1920.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.