

Opinion No. 223**Taxation—"Protested Tax Fund"—
State Treasurer—Legislative
Assembly.**

HELD: The legislature has no power to divert money placed in the "Protested Tax Fund" into the general fund of the state, or into the "Common School Income and Interest Fund," and it is the duty of the State Treasurer to return such money to the owner whose protest has been upheld by the Supreme Court.

May 29, 1933.

You have asked us for advice as to the course you should take about paying the judgment which the Fruit Growers Express Company holds against F. E. Williams, State Treasurer.

It appears from the record that in the month of January, 1932, the Fruit Growers Express Company brought suit in the District Court against F. E. Williams, as State Treasurer, to recover the sum of \$17,080.27, being taxes paid under protest by it to him in November 1931. On or about July 5, 1932, the plaintiff was given judgment for the full amount. Recently the Supreme Court declared the statute under which the tax was exacted invalid and affirmed the judgment.

The legislature, in anticipation, perhaps, of an unfavorable ruling on the part of the Supreme Court, attempted to dispose of these and similar taxes heretofore paid through the passage of Chapter 134, Laws of 1933.

But the State Treasurer placed the money in question in the "Protested Tax Fund" and it is still there. The money was and is a trust fund and the right of the plaintiff thereto became, under the circumstances, a vested right, which the legislature could not disturb, at least as early as the entering of the judgment on July 5, 1932, by the District Court. It is our view, therefore, that the money has never found its way into the general fund of the state or into the "common school income and interest fund," but is still in the hands of the State Treasurer, and that notwithstanding Section 10 of Article XII of the Constitution he has the power, and it is his duty to return it to the owner. (*Kittridge v. Boyd*, 18 Pac. (2d) 563, rehearing denied 20 Pac. (2d) 811; *McCullough v. Commonwealth*, 172 U. S. 102, 43 L. Ed. 382; *Atchison, Topeka & Santa Fe v. O'Connor*, 223 U. S. 280, 56 L. Ed. 436; *Scottish Union etc., Co. v. Herriott*, 80 N. W. 665; *Ward v. Love County*, 253 U. S. 17, 64 L. Ed. 751; *DuBois v. Board of Commissioners*, 37 N. E. 1056; *Champlain Realty Co. v. Town of Battleboro*, 121 Atl. 580; *Board of Education v. Thurman*, 247 Pac. 996; *American Mills Co. v. Fifer*, 146 N. E. 870; *Ocean Grove, etc., Assn. v. Bradley Beach*, 103 Atl. 812; *Pearl River County v. Lacey Lumber Co.*, 86 So. 755; *German Alliance Ins. Co. v. Van Cleave*, 61 N. E. 94; *Ettor v. City of Tacoma*, 228 U. S. 148, 57 L. Ed. 773; *International Paper Co. v. Burrill*, 260 Fed. 664; 61 C. J. 984; 6 R. C. L. 319; 1 *Cooley on Taxation*, Sec. 134.)

It has been suggested that the Fruit Growers Express Company should file a claim for the amount of the judgment with the State Board of Examiners before requesting affirmative action on the part of the State Treasurer. That may be done with propriety, but it is not necessary.