Opinion No. 29.

Escheated Estates—State Auditor, Duty to Draw Warrant to Heirs on Order of Court.

HELD: Where the residue of an estate is paid into the State Treasury

on order of the Probate Court but where no escheat proceedings were instituted, the moneys are a trust fund in the hands of the state treasurer, title to which is in the heirs of the estate, and it is proper for the state auditor, on proper order of court, to draw his warrant on the Escheated Estates Fund in favor of the heir without a legislative appropriation.

January 23, 1935.

Hon. John J. Holmes
State Auditor
The Capitol

In your request for an opinion from us is found the following:

"A decree in the matter of the petition of W. C. Cox, as attorney-in-fact for the heirs of Paul A. Demanch, deceased, as made and entered by the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, has been filed in the office of the State Auditor.

"The Court, in its decree, speaking through Judge A. J. Horsky, has ordered 'that the Auditor of the State of Montana, John J. Holmes, be and he is hereby directed to draw his warrant on the State Treasurer against the said escheated estates fund, and in favor of the said petitioner, Walter C. Cox, as attorney-in-fact for the heirs of Paul A. Demanch, deceased, in the sum of $1,118.68.' The question is raised, in light of the opinion of the Supreme Court, in re Pomeroy, 51 Mont. 119, p. 125, as to whether or not the State Auditor may legally draw his warrant pursuant to the order entered by the Court."

It appears that the estate of Paul A. Demanch, deceased, was administered in the District Court of Sanders County through the public administrator of that county. No heirs of the deceased having been found, the court, after settling the final account of the administrator, directed the county treasurer of Sanders County to pay into the state treasury a balance of $1,118.68 belonging to the estate. In the month of June, 1929, the county treasurer remitted the amount to the state treasurer. No escheat proceedings have been instituted under Sections 9959-9962, Revised Codes of 1921.

Section 10001, Revised Codes of 1921, provided: "It is the duty of every public administrator, as soon as he receives the same, to deposit with the county treasurer of the county in which probate proceedings are pending, all moneys of the estate not required for the current expenses of the administration, and such moneys may be drawn upon the order of the executor or administrator, countersigned by a district judge, when required for the purposes of administration. It is the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the executor or administrator, when countersigned by a district judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and for the safekeeping and payment of all such moneys, as herein provided, the said treasurer and his sureties are liable upon his official bond. The moneys thus deposited may, upon order of the court or judge, be invested, pending the proceedings, in securities of the United States, or of this state, when such investment is for the best interests of the estate. After the final settlement of any estate, if there be no heirs, or other claimants thereof, the county treasurer must pay into the state treasury all moneys and effects in his hands belonging to the estate, upon order of the court or judge; and if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates." Chapter 119, Laws of 1929, amended Section 10001 in certain respects but retained the last sentence thereof. It did not take effect, however, until July 1, 1929. (Continental Supply Co. v. Abell, 95 Mont. 148). Section 1 of Chapter 76, Laws of 1931, amended Section 10001 as so amended, but only as to the last sentence thereof which now reads: "At the final settlement of any estate, if their be no heirs or other claimants thereof, the district judge shall make on order directing the administrator to sell all property belonging to the estate and pay the proceeds to the county treasurer, who shall credit the same and all other moneys belonging to said estate to the Escheated Es-

tates Fund, and the county treasurer shall forthwith remit all of said money to the state treasurer with a statement as to the estates to which the money belongs." Section 3 of Chapter 76 provides: "The state treasurer shall credit such money to the Escheated Estates Fund and make proper accounting of the estates to which the same belongs, and, after the same shall have remained in the office of the state treasurer for the period prescribed by law, he shall transfer the same to the Common School Permanent Fund." Apparently the period prescribed by law is twenty years. (Section 9962, R. C. M. 1921; In re Pomeroy, 33 Mont. 69.)

In the brief which counsel for the attorney in fact has kindly handed us, it is contended that Chapter 76 in effect obviates escheat proceedings on the part of the attorney general in a case where the public administrator has administered an estate and there remains money belonging to it, but no heirs to take. We are disposed to agree with that contention. (In re Pomeroy, 51 Mont. 119; State v. Kearns, 79 Mont. 299). It is further contended therein that the provisions of Chapter 76 apply to the money in question. If this be so, then the rule laid down in In re Pomeroy, 51 Mont. 119, is controlling, namely that an appropriation by the legislature is necessary, since the mandate of Chapter 76 is equivalent to a judgment of escheat.

But our view is that Chapter 76 does not touch moneys which reached the state treasury in accordance with the provisions of Section 10001. Besides, it operates prospectively only. (Styles v. Byrne, 89 Mont. 243).

We think it is clear from the foregoing, then, that the Demanch estate money is held by the state treasurer under different conditions from those which would exist had it come into his possession through a judgment of escheat or by virtue of the provisions of Chapter 76 and is credited, if at all, to the Escheated Estates Fund for convenience only. It is essentially a trust fund to which the heirs of Demanch are entitled as has been adjudged by the district court. (In re Pomeroy, 51 Mont. 119).

It has been held by our Supreme Court and by the supreme courts of other states with a statute like our Section 10001 that an order of the probate court reciting that the affairs of an estate had been finally settled and that there were no heirs or other claimants thereof, and ordering that the county treasurer forthwith pay into the state treasury all moneys and effects in his hands belonging to such estate, did not ipso facto operate to vest in the state the title to the fund ordered to be deposited in the state treasury, as upon a decree in an action brought to escheat the same. (In re Pomeroy, 51 Mont. 119; State v. Kearns, 79 Mont. 299; In re Miner's Estate, 76 Pac. 968; Delaney v. State, 174 N. W. 290; In re McClellan's Estate, 129 N. W. 1037; Connolly v. Probate Court, 136 Pac. 205; 21 C. J. 854.)

The facts in this case are practically identical with those in In re Miner's Estate. In that matter the Supreme Court of California affirmed a judgment in favor of the heirs of James Miner, deceased, and against the State Controller and the state treasury for the money belonging to the estate of said deceased which had theretofore been deposited in said state treasury upon order of the probate court.

The money in question being a trust fund in the hands of the state treasurer, the title to which was always in the heirs of Demanch (In re Pomeroy, 51 Mont. 119), and being credited to the Escheated Estates Fund merely as a matter of convenience, we incline to the view that it is proper for the state auditor to draw a warrant on such Escheated Estates Fund in favor of Walter C. Cox for the sum of $1,118.68, without a legislative appropriation. (State ex rel. Bonner v. Dixon, 59 Mont. 58; State v. Pape, 174 Pac. 468; Riley v. Forbes, 227 Pac. 768; 59 C. J. 228, 240.)