Opinion No. 374.

State Insurance—Initiative and Referendum—Contracts—Statutes —Counties—School Districts.

HELD: 1. State Insurance Fund Law (Chapter 179, Laws of Montana, 1935), having been defeated by the people at referendum election becomes void, and all contracts of insurance issued thereunder are nullities.

2. State officers are without legal authority to refund unearned portions of premiums, but such refunds give rise to a moral obligation which the legislature alone may discharge.

3. School districts and counties have moral obligation to pay premiums in arrears for protection given at least on pro-rata basis, but upon refusal so to do, doubtful if recovery by the State may be had on **quantum meruit** basis.

November 30, 1936.

Hon. John J. Holmes
State Auditor
The Capitol

We quote from your letter of November 10th:

"Where it now appears from information released by the Associated Press that the people of the State of Montana declared by their vote on Referendum No. 37 that the State Insurance Fund Law (Chapter 179, Laws of Montana, 1935) is no longer to be continued in full force and effect on the statute books of this state, a goodly number of inquiries are being received in the Montana Insurance Department relative to the status of contracts of insurance issued by the department during the period of time the law was being administered by the department.

"Your opinion is respectfully requested as to the status of all contracts of insurance issued by the Insurance Department to the various political subdivisions under the provisions of Chapter 179, Laws of Montana, 1935, at and when the result of the vote on Referendum No. 37 is proclaimed by the Governor of the State of Montana."

Section 1 of Article V of the Constitution of Montana provides:

"* * * but the people reserve to themselves * * * the power, at their own option, to approve or reject at the polls any act of the legislative assembly, except as to laws necessary for the immediate preservation of the public peace, health or safety, and except as to laws relating to appropriation of money, and except as to laws for the submission of constitutional amendments, and except as to local or special laws as enumerated in Article V, Section 26 of this Constitution. * * *

"Any measure referred to the people shall be in full force and effect unless such petition be signed by fifteen per cent of the legal voters of a majority of the whole number of the counties of the state, in which case the law shall be inoperative, until such time as it shall be passed upon at an election, and the result has been determined and declared as provided by law. * * *."

The effect of this constitutional provision has been considered by the Supreme Court of Montana in four cases: State ex rel. Hay v. Alderson, 49 Mont. 387, Ann. Cas. 1916B, 39, 142 Pac. 210; In re McDonald, 49 Mont. 454, Ann. Cas. 1916A 1166, L. R. A. 1915 "B", 988, 143 Pac. 947;

State ex rel. Esgar v. District Court, 56 Mont. 464, 185 Pac. 157; State ex rel. Goodman v. Stewart, 57 Mont. 144, 187 Pac. 641.

We invite your attention particularly to the opinions promulgated in the Esgar case and to the views expressed there by Mr. Justice Holloway in his concurring opinion to the effect that a legislative enactment becomes void ab initio upon the passage of a referendum measure by the people.

Whether or not the Court would follow Mr. Justice Holloway's view and hold that Chapter 179, Laws of Montana, 1935, becomes void ab initio upon the proclamation of the Governor is not necessary for your purposes to determine at this time, and we reserve our judgment on the matter.

There can be no doubt, however, that upon the proclamation of the Governor said Chapter 179 is then and there repealed, and that at the same time all contracts executed thereunder are at an end, for the contracting parties are presumed to know that their agreement was afflicted with the infirmity created by Article V, Section 1 of the Constitution.

"The Constitution is a part of all State contracts, and where a public officer is directed by law to contract for the State, the law under which he acts is as much a part of the contract made by him as if it were formally embodied in the contract." (59 C. J. 171.)

The action of the people in refusing to approve said Chapter 179 prevents the state from performing its promise to insure the property of the school districts and counties under the policies issued (13 C. J. 646; 3 Williston on Contracts, 1938), and the Governor's proclamation of the results of the referendum vote operates as a discharge of the contracts. (Sections 7407, 7452, R. C. M. 1935; 5 Page on Contracts, and 1919-1929 Supplement Section 2697. See also Stratford Inc. v. Seattle Brewing & Malting Co., 162 Pac. 31.)

What, then, shall be done with the moneys received by the State as premiums, particularly the unearned portions thereof? We believe the problem is one which may be solved only by the legislature.

It is too elementary to require citation of authority that public officers have only the powers granted to them by law. Where is the authorization to any officer to refund the moneys paid to the State as premiums? We find none. On the contrary, Section 10 of Article XII of the Constitution of Montana provides: "No money shall be drawn from the (state) treasury but in pursuance of specific appropriations made by law," and again, in Section 34 of Article V it is declared: "No money shall be paid out of the treasury except upon appropriations made by law and on warrant drawn by the proper officer in pursuance thereof * * *." First National Bank v. Sanders County, 85 Mont. 450, 279 Pac. 247; In re Pomeroy, 51 Mont. 119, 151 Pac. 333; State v. Kenney, 10 Mont. 496, 26 Pac. 388; State ex rel. Journal Publishing Co. v. Kenney, 9 Mont. 389, 24 Pac. 96.)

We have not overlooked Section 173.6, R. C. M. 1935, nor that part of the Montana Supreme Court's decision in State v. Holmes, 100 Mont. 256, 47 Pac. (2d) 624, wherein the court held that said Chapter 179 did not violate either of these constitutional prohibitions because the act created a special fund for a specific purpose, but it will be observed that under the conclusion we expressed supra, each part of the act fails, as well as the whole thereof, and Section 173.6 as well as Section 173.12 become as inoperative as if they had never been written.

Again we might add, even if it might be said that the Insurance Commissioner or the State Treasurer could return the premiums paid, upon what basis should such refunds be made? Should the full amount be returned, or should the state retain the customary short rate, or may the accounts be adjusted pro rata? Because there is no law to follow, in solving these difficulties, the necessity for further legislative action becomes more palpable.

Clearly the legislature has full power to deal with the matter. There is an obvious moral obligation upon the state to return at least the unearned portions of the premiums paid, either

upon a short term or pro rata basis, for it would be unconscionable for the state to retain the full three years' premium for a few months or less protection. Such a moral obligation is ample justification to support an appropriation by the legislature. (1 Page on Contracts, Section 633.)

What should be done concerning the premiums due and owing the state upon policies already issued? Possibly an action quantum meruit might successfully be brought against the school districts and counties in arrears to recover at least the pro rata amount due for the protection given. (Section 7454, R. C. M. 1935; French v. Lewis and Clark County, 288 Pac. 455; School District 18 v. Pondera County, 297 Pac. 498.) But see 13 C. J. 647. Certainly the moral obligation of the counties and school districts to pay for the protection given on the one hand weighs as heavily upon them as the obligation of the State on the other to refund the unearned portions of the premiums paid.