

No. 393

STATE TREASURER—TRUST FUNDS

Held: Where money has been deposited with State Treasurer, as provided by Chapter 142, Volume 4, Revised Codes of Montana, 1935, such funds are trust funds, and State Treasurer may deposit same in the controlling fund, designated State Trust and Agency Fund, to be held in trust for the minors and to be paid out under certificate of the Court as in said chapter provided. Where State Treasurer has inadvertently or erroneously placed such funds in the escheated account fund, the same may be transferred to the state trust and agency fund, in conjunction with State Auditor's making proper notations of such transfer.

April 8, 1942.

Mr. Thomas E. Carey
State Treasurer
Capitol Building
Helena, Montana

Dear Mr. Carey:

Re: Matter of the Estate of Thomas Johnson, Deceased.
No. 1555. In the District Court, Eighth Judicial District, State of Montana, County of Choteau.

You have submitted to me for my opinion the following:

"On April 2, 1940, an order and decree were duly given and made and filed by the judge of the above entitled court under the provisions of Chapter 142, Volume 4, Revised Codes of Montana, 1935, wherein it was decreed that the minor, Jean Scott, was the owner and entitled to the sum of \$203.56, and that the minors, Norman Johnson and Charles Johnson, are the owners and entitled to \$203.57, one-half to each and ordered that John T. Phalen, as such agent, transmit to the Treasurer of the State of Montana the said sum of \$407.13 to the credit of said minor heirs, together with a certified copy of this decree, and take duplicate receipts from said State Treasurer for said sum and file one copy of said receipt with the clerk of this court and one copy with the state auditor.

"That the said sum of \$407.13 was deposited with the State Treasurer as ordered by the court and duplicate receipts were issued and filed as directed.

"That the State Treasurer erroneously credited and deposited the said sum to the escheat fund in said State Treasurer's funds account, where said money has been held to date.

"That on the 24th day of January, 1942, the Judge of the above District Court by certificate duly given and made and entered in conformity with Section 10351, Revised Codes of Montana, 1935, of said Chapter 142 of Volume 4, Revised Codes of Montana, 1935, authorized and directed that the said certificate for the payment by warrant by the said State Treasurer of the sum of \$203.57 to C. E. Scott, Guardian of Jean Scott, a minor, the amount so ordered to be deposited with the State Treasurer, by order of April 2, 1940."

There is no question about the money's being on deposit with the State Treasurer. The question is: the sum being erroneously placed by the State Treasurer in the escheat fund in the name of "The escheated estate of Thomas Johnson" for credit of minor heirs, how may the State Treasurer now honor the court's certificate of payment?

It will be noted Sections 10346 to 10351, inclusive, comprising Chapter 142 of Volume 4, Revised Codes of Montana, 1935, were first enacted by our legislature in 1877.

Section 187.1, Revised Codes of Montana, 1935, in part provides:

"The state treasurer must keep a separate account of each fund in his hands . . ."

Section 198.1, Revised Codes of Montana, 1935, provides for the controlling fund accounts of the state treasurer. Among those designated is the "State Trust and Agency Funds."

Section 198.3, Revised Codes of Montana, 1935, provides in part:

"The fund account above designated as the State Trust and Agency Funds Account shall be a general controlling account, recording all financial operations in anywise affecting the funds now carried in the books of the state treasurer and state auditor . . ."

In reading the statutes relative to the accounts of the State Treasurer, it is apparent the "State Trust and Agency Fund" is a sort of catch-all fund for all trust funds and agency funds not otherwise specifically provided for.

It therefore appears such funds as are deposited with the State Treasurer under the provisions of Chapter 142, Volume 4, Revised Codes of Montana, 1935, should be deposited in the State Trust and Agency Funds account, to the credit of the person so designated in the court decree or order.

Such funds are deposited with the State Treasurer for safe keeping only by mandate of the legislature and are trust funds, in every import of the legislation.

Therefore it is my opinion where, as here, the Treasurer has erroneously credited such trust funds to the wrong account, the Treasurer should transfer by proper entries such funds to the proper account with full notes of explanation.

One of the oldest and best, known equitable maxims of jurisprudence is:

"That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due."

Our Supreme Court has held:

The equitable doctrine that that which ought to have been done must be regarded as done does not operate in favor of every person, but only in favor of him who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved.

Morton v. Union Central Life Ins. Co., 80 Mont. 593, 609, 261 Pac. 278.

The funds so deposited in trust with the State Treasurer for said minor should be transferred to the proper fund as above set forth and the State Treasurer and State Auditor by proper corrective notations may correlate their respective records so as to honor the court's certificate, dated the 24th day of January, 1942, by making the payment of \$203.57 to C. E. Scott, Guardian of Jean Scott, a minor, and by taking proper receipts therefor.

Sincerely yours,

JOHN W. BONNER
Attorney General