

**State Board of Land Commissioners, Authority to Employ
Counsel.**

It is not within the power of the Board of Land Commissioners to employ special counsel to prosecute a case before the supreme court to test the constitutionality of acts authorizing the issuance of bonds pledging the land grants of educational institutions, for the Board is not the party beneficially interested and there is no fund from which it could legally authorize payment to be made for such expenses.

However, upon the theory that the bonding of such land grants affects their maintenance, the educational institutions interested might with propriety, though their board of trustees, authorize the payment of a reasonable fee for such purpose, and the State Board of Examiners could properly allow and approve such a claim.

Helena, Montana, Nov. 18, 1905.

State Board of Land Commissioners, Helena, Montana.

Gentlemen:—Your letter of the 14th instant, enclosing letters ad-

dressed to you from the Executive Board of the Montana State Normal College, from the Local Board of Trustees for the School for the Deaf and Blind and from the Board of Trustees of the Montana State School of Mines, received. All these letters relate to the employment of counsel by the State Board of Land Commissioners for the purpose of testing the constitutionality of the law authorizing the issuance of \$75,000 worth of bonds and pledging the proceeds received from land granted by the Enabling Act to the State Normal School for the payment thereof.

The question submitted by your letter to this office for an opinion is as follows: "Is it within the power of the Board to employ special counsel to prosecute a case before the supreme court to test the constitutionality of acts authorizing the issuance of bonds pledging the land grants of educational institutions?"

This question is very broad and does not indicate in what particular manner the Board wishes to bring the matter into court or in what kind of proceeding they may desire to employ special counsel. The State Board of Land Commissioners would not be the proper party to make complaint or to apply for a writ of mandate in such a proceeding. The Board is not the party beneficially interested. It is simply one of the agents of the State, as is also the State Treasurer. The funds involved are all state funds, or funds held in trust by the state. So, to avoid the danger of having any action that might be instituted dismissed by the court for want of proper parties thereto, and thereby not get a decision upon the merits, we are of the opinion that whenever an action is started to determine the constitutionality of these acts it should be in the name of the owner of a warrant issued for work done in connection with the buildings at the State Normal College or by a private owner of bonds or interest coupons issued in the name of one of the state educational institutions affected by the opinion of this office. The matter, therefore, resolves itself into a question of the State Board of Land Commissioners' authority to employ special counsel to prosecute an action in the name of some private person holding a warrant, bond or interest coupon payable out of such funds and if the Board should employ special counsel for such purpose, out of what funds would his fees be paid.

The fee could not be paid out of the general fund of the State, as section 10, article 12, of the constitution, provides that "no money shall be drawn from the treasury but in pursuance of specific appropriations made by law." (See also, Sec. 34, Art. 5, Constitution; State ex. rel. Donovan v. Barret, 30 Mont. 203.) No appropriation was made by the legislature to be used for the purpose of employing counsel in any such action or proceeding.

Owing to the importance of the question raised by the opinion of this office, and in view of the fact that such opinion directly affects the maintenance funds of the several educational institutions of the State and necessarily causes more or less confusion in the handling of such funds, until such time as the law can be settled by the supreme court, we desire that the question be presented to the supreme court at the earliest date possible. Therefore, any method of employing special counsel to present such question to the court, which is not in direct violation of law, would meet with the hearty approval of this office.

The interest received from investments of the proceeds received from the sale of lands granted to the educational institutions, and the income received from the leasing of such lands not yet sold, constitutes a fund which, under section 12, article 11, of the constitution "shall be devoted to the maintenance and perpetuation of these respective institutions." Considering the interest of the state educational institutions in the matter, as stated above, it would appear that a reasonable attorney's fee for attorneys employed to present this question to the supreme court would be a proper charge against the funds derived from interest on invested proceeds and income from leases of land of the respective educational institutions, such attorney's fee to be pro rated and paid out of the respective interest and income funds of the different institutions. But a serious objection to this method of paying the attorney's fee is the fact that the various acts of the legislature authorizing the bond issues have pledged this interest and income fund for the payment of such bonds and interest thereon. While this office is unalterably of the opinion that such acts so pledging the proceeds or interest and income are unconstitutional, nevertheless until the supreme court has passed upon such laws it would be better not to pay such attorney's fee out of these funds. Until these acts are declared unconstitutional by the court every cent received from the interest and leases is pledged for the payment of the bonds issued pursuant to such acts.

The proceeds received from the sale of sections 16 and 36 constitutes a permanent fund, no part of which can be used for any purpose whatever, and all interest received from investments of such proceeds, and all moneys received from the leasing of sections 16 and 36, under section 5, of article 11, of the constitution, is to be apportioned to the several school districts of the State in proportion to the number of school children. So, it would be a direct violation of law to use any part of these funds for the purpose of paying attorneys' fees in any kind of a suit or action, whether brought by a state officer or board or by or in the name of a private person.

We are of opinion that the method of paying such an attorney's fee out of public money, which is open to the least objection from a legal standpoint, would be for the various state educational institutions affected by the opinion of this office, which includes all educational institutions for which lands were granted by congress, to pay the attorney's fee out of the appropriations made by the legislature for the maintenance of such institutions, such expense to be pro rated between the respective institutions. The question to be presented to the court affects matters relating to the maintenance of all these institutions, and therefore the expenses incurred in settling such question could be in justice charged against the legislative appropriations made for the maintenance of such institutions. While an attorney's fee would be an unusual charge against such appropriations, still the circumstances of the case, in our opinion, would justify such a course, if it was seen fit to adopt it, and we know of no legal objection thereto sufficient to justify the Board of Examiners in refusing to audit and approve such a claim, pro rated against the various appropriations for maintenance of the educational institutions. The State

Board of Examiners, upon written request of the Boards of Trustees of the various institutions, might properly authorize the employment of an attorney and agree upon a reasonable attorney's fee to be paid out of the funds last above mentioned. The attorney so employed could then present his claim for services rendered to the Board of Examiners, and they could properly audit, approve and pro rate the same against the maintenance fund of each institution.

This is the only method we can find of using public money for such a purpose which would not be a plain and direct violation of the law.

Respectfully yours,

ALBERT J. GALEN,
Attorney General.