

Opinion No. 275

**Legislative Assembly—Appropriations
—Warrants—Common School Perma-
nent Fund—Refunds—State Land
Board—State Auditor.**

HELD: Since the legislature has never made any appropriation to meet the situation created by Sec. 116, Chapter

60, Laws of 1927, the state auditor may not draw a warrant against the common school permanent fund to refund money paid from the proceeds of timber cut on land incorrectly surveyed as under the jurisdiction of the State Land Board.

July 15, 1933.

We have your letter which in part is as follows:

"The State Land Board has filed a claim with the Auditor of the State of Montana pertaining to refunding of money out of the Common School Permanent Fund.

"From the claim it appears as if an incorrect survey led to the cutting of timber on land not under the jurisdiction of the Board. The proceeds of the timber so cut were evidently deposited in the Common School Permanent Fund and the Board is now endeavoring to correct the error by refunding the money to the owner of the timber.

"The Board takes the position that Section 116, Chapter 60, Laws of 1927, gives it due authority to issue a claim against the Common School Permanent Fund for the purpose of making the refund. * * *

"Kindly advise as to the constitutionality of Section 116, Chapter 60, Laws of 1927, where the same is being urged for the purpose of withdrawing money from a Permanent School Fund deposited with the State Treasurer and whether the State Auditor has lawful right to issue a warrant on a claim drawn by the Land Board against such a fund."

Section 116, Chapter 60, Laws of 1927, reads as follows:

"If any money has been erroneously paid or shall hereafter be erroneously paid to the state on any permit, lease, certificate of purchase, patent or loan or in any other transaction, it shall be the duty of the State Board of Land Commissioners to cause such money erroneously paid to the state to be refunded to the person entitled thereto from the proper fund."

In its purpose and scope this section is not unlike Section 2222, Revised Codes 1921. In discussing the latter in

the case of *First National Bank v. Sanders County*, 85 Mont. 450, the Supreme Court said:

"That portion of the section which assumes to provide for a refunding" (to the county) "of the state's share of taxes returned to the taxpayer is inoperative. As we have seen, the Code Commission eliminated the phrase, 'upon the approval of the amount by the Board of Examiners,' from the original text. Whether this was because the approval of the state board of examiners was implied is a mere speculation, but neither the auditor nor the board could lawfully follow the statutory direction in the absence of legislative appropriation. (In re Pomeroy, 11 Mont. 119, 151 Pac. 333).

"'All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law.' (Const., Art. XII, Sec. 10.) '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, except interest on the public debt'. (Id., Art. V. Sec. 34.)"

The legislature has never made any appropriation to meet the situation created by said Section 116. We, therefore, consider the case cited determinative of the question, as the rule applied there may with equal propriety be applied here, and advise that the warrant be not drawn.