Opinion No. 11.

Constitutional Law—Enabling Act—Land Grant Funds—Trusts—Constitution, Article XXI, Sections 6, 7, 8, 9, 10 and 11.

HELD: Insofar as Sections 6 and 9 of Article XXI of the Montana Constitution, as amended, attempt to divert the income from land grant funds to other purposes than directed by the Enabling Act, they are invalid, being contrary thereto and the Federal Constitution.

Land grant funds and the interest thereon are trust funds and cannot be diverted from the purpose of the trust.

The state may not divert for other things, interest on land grant funds pledged to payment of bonds issued.

The Enabling Act constitutes a pact between the U. S. and the state, which neither party may violate without the consent of the other.

January 5, 1939.

Honorable Howard A. Johnson
Chief Justice, Supreme Court
of Montana
The Capitol

Dear Mr. Chief Justice:

On behalf of the Justices of the Supreme Court of the State of Montana, as the supervisory board over the administration of the Montana trust and legacy fund, you have requested my opinion concerning the questions raised in a letter addressed to you by the Hon. Ray N. Shannon, State Treasurer, relating to the amendments to Sections 6, 7, 8, 9, 10 and 11 of Article XXI of the Montana Constitution, which were submitted to a vote of the electors and approved at the recent election.

First, we call attention to the following facts: Section 6, as amended, provides that the public school permanent fund and the other permanent funds originating in land grants from the United States for the support of higher institutions of learning, and for other state institutions, as well as all other funds in the custody of any officer or officers of the state, subject to investment, that the legislative assembly may prescribe, "shall be invested as parts of the Montana trust and legacy fund."

Section 7, as amended, requires that the state "shall accept for investment and administration as parts of the Montana trust and legacy fund, sinking funds, permanent funds, cumulative funds and trust funds belonging to or in the custody of any of the political subdivisions of the state when requested to do so by the governing board of such political subdivision." This section also provides that the legislative assembly may provide for the investment and administration as a part of the Montana trust and legacy fund of any other fund subject to its power. Section 9, as amended, reads:

> "On the last day of March, of June, of September and of December of each year, the State Treasurer shall apportion all interest collected for the Montana trust and legacy fund during the three month period then terminating to all the separate and integral funds which constitute such fund on the day of such apportionment and which constituted parts of the fund on the first day of the three month period then terminating. The basis of apportionment shall be the average amount of each such fund between the first day and the last day of the three month period."

It will be observed that Section 9 requires the commingling in one fund of all interest collected on the various investments of the trust and legacy fund, including interest on the public school permanent fund and the other permanent funds originating in land grants from the United States for the support of higher institutions of learning and for other state institutions, and the apportionment thereof to each integral fund of its proportionate share on the basis of the average amount of each integral fund during the three month periods. To illustrate: Assume that County "A," a political subdivision of the state, on January 1, having $1,000 in one of the funds mentioned in Section 7, as amended, which we will call the "X" fund in the trust and legacy fund, on March 10 added thereto $100,000, which remained in the fund until the end of the three month period. The average amount of the "X" fund in the trust and legacy fund for the three months, or ninety day period, would be something over $24,000, for which

"X" fund would receive its proportionate share of all the interest collected on all of the funds for ninety days. The "X" fund would receive such share regardless of the fact that the money in the "X" fund was not invested. As a practical matter, as determined from experience, there would not be much likelihood that the $100,000 dumped into the trust and legacy fund near the end of the ninety-day period could be invested at all for the balance of the period.

The "X" fund would participate in the higher rate of interest that the permanent funds command. At the present time, as pointed out in Mr. Shannon's letter, all permanent funds are invested in high interest-bearing bonds, a majority paying 4%, and some as much as 6% interest per annum. On the other hand, short term investments for the past year have averaged less than 3½%, with the possibility that the rate may be lower in the future. We are advised by Mr. Hosking, State Accountant, that the average uninvested permanent funds for the last six years ending June 30, 1938, have been $718,000, or nearly 4% of the approximate total of the permanent funds of $18,000,000. If only $500,000 was received into the trust and legacy fund, as required by these amendments, there would be about 6% uninvested funds which would participate in the earnings and thus lower the income of each of the permanent funds originating in land grants from the United States for the support of higher institutions of learning and for other state institutions and the public schools.

Since the permanent school fund amounts to over $14,000,000, and the earnings from this fund are to be used to support the public schools, it is obvious that the public schools would suffer the greatest losses. It is also clear that all of the institutions of higher learning and the other state institutions will also be required to share a part of their revenue, every ninety days, with the other funds in the trust and legacy fund mentioned in Sections 6 and 7, as amended. The inescapable effect, therefore, of Section 9, as amended, will be to place the various funds mentioned in said Sections 6 and 7, as amended, on the same basis as the land grant funds supporting the higher institutions of learning, the other state institutions and the public schools even though such funds other than the land grant funds may not be actually invested, or, if invested, invested on a lower interest rate than such land grant funds. Consequently, part of the income from the land grant funds would be diverted in order to pay interest on these other funds mentioned in Sections 6 and 7.

Another example of the operation of the apportionment of interest to all funds alike, as provided by section 9, as amended, is seen in the following: The Capitol building bonds have been and are in default; the state owes about $50,000, or two years' delinquent interest. The interest due on such bonds held by the Agricultural College permanent funds to December 31, 1938, was as follows: Interest due on second issue, $17,983.33; interest due on third issue, $7,700; total interest due college, $25,683.33. Should the Twenty-sixth Legislative Assembly refund these bonds and pay up the delinquent interest and principal, the interest would be thrown in the common fund of interest, or jackpot, as provided by said Section 9. Thereupon, each integral fund constituting the trust and legacy fund would receive such proportionate share of this interest fund as the amount of each integral part bears to the total of all the permanent funds. Since the college permanent fund amounts to $541,754, it would receive only 541,754/18,000,000ths of the $25,-683.33, the interest due December 31, 1938, on the Capitol building bonds, or only the sum of $744.82 instead of the total amount of interest to which it would otherwise be entitled. It may be argued that the Agricultural College permanent fund would in turn receive its proportionate share of interest from the other funds, but the other funds have already received their interest which was paid under the old system, whereas the interest on the Capitol building bonds will be for a period of two years.

It is also a fact that the earnings from the State University land grant have been pledged to the care of outstanding bonds issued to pay for buildings constructed. This is also true of the other educational institutions and of the Capitol land grant. Section 9, as amended, requires that such earnings be diverted to the common fund

in order to pay interest on each integral fund according to its proportionate share in the trust and legacy fund.

Section 11 of the Enabling Act provides:

" * * * With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various state institutions for which the lands have been granted. Rentals on leased lands, interest on deferred payments on lands sold, interest on funds arising from these lands, and all other actual income, shall be available for the maintenance and support of such schools and institutions. Any state may, however, in its discretion, add a portion of the annual income to the permanent funds."

Section 14 of the Enabling Act further provides:

" * * * but said act of February eighteenth, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said states severally, and the income thereof be used exclusively for university purposes."

Section 1, Article XVII of the Montana Constitution reads in part:

"All lands of the state that have been, or that may hereafter be granted to the state by congress, and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised; * * *."

The plain intent of these provisions is that the land grant funds and the income and interest thereon shall be kept separate and their identity not lost in order that they may be available for the maintenance of the schools, the institutions of higher learning and the other institutions of the state. Since Section 9, as amended, compels the payment of all interest into a common fund and the distribution thereof according to the average amount of each fund at the end of each three months period, it is clearly in conflict with Sections 11 and 14 of the Enabling Act. The Enabling Act constitutes a pact between the United States and the State of Montana, which neither may abrogate nor modify without the consent of the other party to the pact.

This court has repeatedly held that the funds created from the sale of lands granted to the state by Congress for a particular purpose are trust funds and that the revenues derived therefrom should be faithfully applied to the support of the institutions created and not be diverted to other purposes.

In State ex rel. Bickford v. Cook, 17 Mont. 529, 43 Pac. 928, it was held that lands granted by Congress to provide for the erection of the State Capitol, and accepted by the state, became a trust fund to be devoted exclusively to the purpose of the trust. On page 535, the court, speaking by Justice Hunt, said:

" * * * The state cannot use the fund created by this act for any purpose except as provided by the act of Congress. The state officers have no control over it, except to carry out the trust relation; and the treasurer is merely an agent for receiving and disbursing the fund under the act of Congress, and in manner provided by the law of the state."

Again in State ex rel. Dildine v. Collins, 21 Mont. 448, 54 Pac. 1114, it was held that the State University bond fund was a trust fund and that the state acted in connection with it as a mere agent to execute the trust. Concerning the donations of public lands to the states, including Montana, and the funds derived from the sale thereof, the court, again speaking by Justice Hunt, said (p. 454):

"It is really a donation by the federal government, and is upon a different footing, entirely, from funds arising by taxation, and out of which

are built, for instance, reform schools, soldiers' homes, arsenals, penitentiaries and asylums, not included in the enabling act, all of which are state funds, to be disbursed as expenditures of the state, and which are brought fairly within the meaning of the constitutional limitations and restrictions. So that, upon reconsideration of the views expressed in the Cook case, we feel that they must stand as correct."

Likewise in State ex rel. Koch v. Barret, 26 Mont. 62, 66 Pac. 504, it was held that rents from lands granted to the state, belonging to the State Agricultural College, the institution for whose benefit the lands were granted, were not subject to Section 20, Article VII of the Montana Constitution and could not be diverted by the State Treasurer for other purposes. Chief Justice Brantly, speaking for the court in this case, said (p. 64):

"Under the Act of Congress approved February 22, 1889, commonly known as the 'Enabling Act,' providing for the admission of Montana into the Union as a state upon equal footing with the original states, there were granted to the state, subject to the provisions of the Act of Congress approved July 2, 1862, certain lands for the use and benefit of State Agricultural Colleges. The lands so granted were accepted on behalf of the state, subject to the prescribed conditions, both by the constitutional convention (Ordinance No. 1, Subdivision 7) and by the State Legislature (Session Laws of 1893, pp. 171-173; Political Codes, Sec. 1628). By reference to the Act of Congress of July 2, 1862, and particularly Section 4 thereof, it will be seen that it was contemplated by Congress that the lands granted by the Enabling Act should be sold; that the proceeds should be profitably invested, so that the principal should be forever preserved as a permanent endowment fund; and that the interest thereof should be devoted to the support of the college or colleges established pursuant to the declared purpose of the grant."

And further on page 70:

"We think the manifest intention of Congress was to create a permanent endowment, which was to be preserved inviolate; and to require that the revenues derived therefrom should be faithfully applied to the support of the institutions created, and not be diverted to other purposes."

In State ex rel. Galen v. District Court, et al., 42 Mont. 105, 112 Pac. 706, the court said (p. 114):

"It has been repeatedly held that the fund created from the sale of lands granted to the state by the federal Congress for a particular purpose is a trust fund 'established by law in pursuance of the Act of Congress.'"

And again on page 116:

" * * * and we know of no authority which has the power to question the right of the grantor to make such terms as it saw fit. Neither is there any authority in the state to change the terms of the grant without the consent of the Congress of the United States. The framers of the state Constitution did not attempt to do so. They expressly agreed, for the state, not to dispose of any lands granted by the United States in any case in which the manner of disposal was prescribed in the grant, except in the manner prescribed, without the consent of the United States."

See also:

State ex. rel. Gravely v. Stewart, 48 Mont. 347, 137 Pac. 854; Rider v. Cooney et al., 94 Mont. 295, 23 Pac. (2nd) 261; State ex rel. Blume v. State Board of Education et al., 97 Mont. 371, 34 Pac. (2nd) 515;

State ex rel. Wilson v. State Board of Education, 102 Mont. 165, 56 Pac. (2nd) 1079.

The constitutional convention adopted Ordinance No. 1, whereby the state accepted the grants of lands from the United States to the State of Montana upon the terms and conditions of the Enabling Act. In the preamble to the Montana Constitution it was declared to be the purpose of the framers of the Constitution to "ordain and establish this constitution in accordance with the Enabling Act." As an extra precaution

and additional safeguard the convention at the same time included in the Constitution Section 12 of Article XI, pledging that the funds of the State University and of all other state institutions of learning should forever remain inviolate and sacred to the purpose for which they were dedicated, and added: "The interest of said invested funds, together with the rents from the leased lands or properties shall be devoted to the maintenance and perpetuation of these respective institutions."

We think it is clear that the acceptance of the lands granted by Congress in the Enabling Act and Section 12, Article XI of the Montana Constitution constituted a pact between the United States and the state, which neither party may abrogate nor modify without the consent of either party to the pact.

Newton v. State Board of Land Commissioners (Ida., 1923), 219 Pac. 1053;

State v. Rice, 33 Mont. 365, 83 Pac. 874, 204 U. S. 291, 27 Sup. Ct., 281, 57 L. Ed. 490 (Affirmed).

Not only the land grants but the funds derived from the sale thereof and interest thereon are trust funds and must be used exclusively for the respective institutions for which, under the Enabling Act, they were intended.

Any act of the state, whether by way of legislation or constitutional amendment, which conflicts with the Enabling Act, must yield thereto, for the Act of Congress, in making such grants, is the supreme law of the land. If, as we have stated above, the acceptance of the grant, according to the terms and conditions thereof, constitutes a contract between the United States and the state, any act of the state inconsistent therewith is within the prohibition of Section 10, Article I of the Constitution of the United States, which declares that "no state shall * * pass any * * law impairing the obligation of contracts, * *." Since the effect of said amendments, as we have shown, is to impair the obligation of the bonds issued by the State Board of Education for the construction of buildings, for the payment of which the interest from land grant funds is pledged, it also violates that constitutional provision.

It is therefore my opinion that insofar as Sections 6 and 9 of Article XXI of the Montana Constitution, as amended, attempt to divert trust funds from the purposes for which they were intended by the Enabling Act, to-wit: The maintenance and support of the public schools, the higher institutions of learning and the other state institutions, and to use them for other purposes, to-wit: the payment of interest on other funds belonging to the state and the legal subdivision thereof, as provided by Sections 6, 7 and 9, as amended, said Sections 6 and 9 are in direct conflict with the Enabling Act and are contrary to Section 10, Article I of the United States Constitution and they are therefore void.

We have reached our conclusion with reluctance. We should hesitate to give an official opinion holding unconstitutional and invalid a legislative act. It is with even greater reluctance that we express an opinion holding a provision of the State Constitution, voted on by the people, inoperative and invalid. Since the facts submitted are beyond dispute and the law seems clear, we are unable to do otherwise. We are constrained to add, however, that we feel that in voting for these constitutional amendments many voters were unaware of the legal effect upon the public schools and higher institutions of learning which they would wish to suffer no impairment from loss of income for support and maintenance.