Opinion No. 109.

State Treasurer—Escheated Estates—Trust and Legacy Fund—Constitutional Law—Inves'ments—Public School Fund.

Held: All money or property, which was at the time of the passage and approval of Chapter 184, Laws of 1943, in the hands of the state treasurer, from escheated estates, including interest earned thereon, shall be placed in the public school fund of the State of Montana.

Sections 7089 and 7090, Revised Codes of Montana, 1935, are repealed by the provision of Chapter 184, Laws of 1943, and the latter section is hereby declared to be in violation of the provisions of Section 2, Article XI of the Constitution of the State of Montana.

All interest heretofore earned from escheated estates prior to the enactment of Chapter 184, Laws of 1943, shall be placed in the public school fund of the State of Montana.

All money or property, which was at the time of the passage and approval of Chapter 184, Laws of 1943, in the hands of the State Treasurer, from escheated estates, including principal and interest earned thereon, shall be placed in the public school fund of the State of Montana and invested as a part of the Montana trust and legacy fund in accordance with the constitutional and statutory provisions applicable thereto.

August 17, 1943.

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

Dear Mr. Carey:

You have submitted the following questions for our consideration and ask that an official opinion be rendered thereon:

"At the present time the treasurer is holding certain estates and distributed shares of estates for various heirs who are minors or whose residence is unknown at the time, which were paid to the treasurer by various agents and administrators, and are held by the treasurer in a fund known as the 'undistributed estates fund.' From time to time these estates are paid to claimants

upon the presentation of a court order. Does Section 7, Chapter 184, Laws of 1943, prohibit the treasurer from accepting such deposits to the undistributed estate fund? What effect, if any, does this section have on sections 7089 and 7090, Revised Codes of Montana, 1935?

"Section 10, Chapter 184, Laws of 1943, provides that 'all money or property, which is at the time of the passage and approval of this act, in the hands of the state treasurer, from escheated estates, shall be placed by him in the public school fund of the State of Montana . . .' On March 5, the Treasurer had on deposit from escheated estates the amount of $219,774.22. This balance is carried in two funds, $75,000.00 in the public school permanent fund (representing a transfer from the escheated estates fund in June, 1928, by joint order of the Land Board and the Board of Examiners); and $144,774.22 in the escheated estates fund. There is also carried in the escheated estates fund the sum of $80,605.14 representing interest earned by the escheated estates fund from investment in general fund warrants and in the Montana trust and legacy fund. What disposition is to be made of the interest earned by this fund?

"Section 13 of the same bill provides that 'all money from escheated property in the public school fund of this state may be invested in the state general fund warrants by the board of examiners.' At the present time the public school fund constitutes a portion of the Montana trust and legacy investment fund, which is invested in various securities by the State Land Board subject to review by the Supreme Court acting as an ex-officio body. May that portion of the public school fund representing escheated estates be invested as a part of the trust and legacy fund in various securities or must it be held apart from the trust and legacy fund and invested only in general fund warrants by the Board of Examiners?"

In answer to your first question, the provisions of Section 7 of Chapter 184, Laws of 1943, not only provides:

"Whenever the personal property in an estate remains in the hands of an agent, unclaimed for two (2) years and it appears to the court or judge that it is for the best interest of the estate and those interested therein, such property shall be sold under the order of the court or judge and the proceeds, after deducting the expenses of the sale allowed by the court or judge, must be paid into the state treasury, and upon the receipt of such proceeds it shall be the duty of the state treasurer to deposit the same in the public school fund of the state of Montana."

but Section 1 of the act provides:

"This Act is to be known as the 'escheated property act,' and it provides the exclusive method for vesting title in the State of Montana of all **unclaimed property.**" (Emphasis mine.)

and Section 10 of the act provides:

"All money or property, which is at the time of the passage and approval of this act, in the hands of the state treasurer, from escheated estates, shall be placed by him in the public school fund of the State of Montana and any person claiming such money or property at any time thereafter shall have two (2) years after the pasasge and approval of this act in which to file and bring an action for the recovery of the same as hereinabove provided."

In fact, the whole act definitely indicates a legislative intent to provide for an exclusive method of vesting title in the State of Montana of all money and property, which at the time of its passage and approval was in the hands of the state treasurer, from escheated estates.

Section 2 of said Chapter 184 provides:

"Whenever the title to any property, either real, personal, or mixed, fails for want of heirs or next of kin, such title shall vest in the State of Montana immediately upon the death of the owner without an inquest or other proceeding in the nature of office found, and there shall be no presumption that such owner died leaving heirs or next of kin."

Prior to the enactment of this provision of Chapter 184, it was the legal presumption that a decedent had heirs. The rule, applicable under our statutes, was given recognition by the supreme court of California in People v. Roach, 76 Cal. 294, 18 Pac. 407, as early as 1888. As to property escheating to the state under statute, the supreme judicial court of Massachusetts as early as 1834, pronounced the correct doctrine, which appears fundamental to us under our statutory provisions:

> "Where a subject died intestate, as estate descends to collateral kindred indefinitely, the presumption of law is that he had heirs, and this presumption will be good against the commonwealth until they institute the regular proceedings by inquest of office, by which the fact whether the intestate did or did not die without heirs can be ascertained, and if this fact is established in favor of the commonwealth, it rebuts the contrary presumption, and the commonwealth, by force of the judgment and of the statute before cited, becomes seized in law and in fact. In such case therefore, the courts are of the opinion, that an inquest of office is necessary, and that the commonwealth cannot be deemed to be seized without such inquest." (State v. Kearns, 79 Mont. 299, 310, 257 Pac. 1002.)

By the enactment of said Section 2, aforesaid title vests in the State of Montana immediately upon the death of the owner without an inquest or other proceeding in the nature of office found, and there shall be no presumption such owner died leaving heirs or next of kin.

Therefore, the undistributed estates fund, to which you refer, (as well as any other fund, by whatever name called, containing money or property belonging to the public school fund) loses its identity and the same is transformed into the public school fund as its property, and thenceforth all property received by the state treasurer derived from estates, or distributive shares of estates that may escheat to the state (Section 2, Article XI, Constitution) and all unclaimed property (Chapter 184, Laws of 1943) shall be placed in and credited to the public school fund, as will more fully hereinafter appear.

As to what effect Section 7, Chapter 184, Laws of 1943, or the entire act, for that matter, has upon the provisions of Sections 7089 and 7090, Revised Codes of Montana, 1935, I am of the opinion said sections are repealed by implication. While such repeals are not necessarily favored by the courts, however, it is an established rule of law that if one statute conflicts with a portion of another, so as to exhibit an inconsistency, the inconsistent portion of the previous statute cannot stand, and is said to be repealed by implication (State v. District Court, 56 Mont. 464, 185 Pac. 157).

Insofar as the provisions of Section 7090, supra, are concerned, our Supreme Court in Bottomly v. Meagher County, 133 Pac. (2nd) (Mont.) 770, declared the same to be in violation of the Constitution of Montana. It was held:

> "The statute providing that interest in the estate of a nonresident alien, who fails to claim such interest within five years after death of decedent, shall be placed to the credit of the state's general fund, is invalid as violation of Constitutional provision requiring escheated property to go to state public school fund."

In answer to your second question, Section 2 of Article XI of the Constitution of the State of Montana, insofar as pertinent here, provides:

> "The public school funds of the state shall consist of the proceeds of . . . all estates, or distributive shares of estates that may escheat to the state . . ."

This section of the Constitution clearly indicates the proceeds of all estates or distributive shares of estates that may escheat to the state are property of the public school fund. The question whether the same was carried in the escheated estates fund, the undistributed estates fund or the general fund, prior to the enactment of Chapter 184, supra, is immaterial as said funds are trust fund property to which the public school fund is entitled. The question as to the procedure by which an estate may escheat to the state; the time when an escheat may become effective and is complet-

ed; the proceedings by which a claim to the estate or its proceeds may be established and the same withdrawn from the treasury and paid to the proper person; the authority of the State Treasurer to repay the proceeds to the lawful claimant or person entitled thereto; and the disposition of the moneys which have escheated to the state under the laws prior to the enactment of Chapter 184, supra, are matters with which we are not necessarily concerned here, inasmuch as Chapter 184 repeals by implication those provisions with reference to escheats which conflict with it and leaves us with Chapter 184 as the exclusive method of vesting title in the State of Montana of all unclaimed property, where the same does not in any way conflict with constitutional provisions. However, in order to reconcile some features of the escheat law and more clearly to elucidate the points raised by your inqury, it is necessary to detail some matters which would otherwise be unnecessary. (See Volume 8, page 448, Report and Official Opinions of the Attorney General.)

You state that, on March 5, 1943, the Treasurer had money on deposit from escheated estates in the amount of $219,774.22; that this balance is carried in two funds, i. e., $75,000.00 in the public school permanent fund and $144,774.22 in the escheated estates account. You state that there is also carried in the escheated estates fund the sum of $80,605.14, representing interest earned by the escheated estate fund from interest invested in general fund warrants and investments made by the Montana trust and legacy fund. Your second inquiry concerns the disposition of the $80,605.14. Inasmuch as Section 2 of Article XI provides the public school fund of the state shall consist of the proceeds of all estates, or distributive shares of estates which may escheat to the state; Section 5 of said Article XI provides for the distribution of interest received on school funds, and Chapter 184, supra, directs all money or property which is at the time of its passage and approval in the hands of the State Treasurer, from escheated estates, shall be placed in the public school fund of the state of Montana, there should be no question as to the ownership of the interest in question. I say this without reservation, and the fact $6,166.72 of said interest amount was earned from investment in general fund warrants under the provisions of Section 270, Revised Codes of Montana, 1935, and the balance of said interest was earned from investments in the trust and legacy funds should make no difference whatsoever, in that said interest earned by said escheated estates fund is property belonging to the public school fund.

While it is true said interest or property has not escheated to the state and never would, under the old law, escheat until the necessary proceedings were instituted and had, nevertheless and notwithstanding this, the said $80,605.14 represented income earned from the escheated estates fund, and even though some of it were placed in the general fund and some of it in the escheated estates fund, it is nevertheless a trust fund for the benefit of the public school fund regardless of how long it would remain in either fund prior to its transfer to the public school fund under the provisions of Chapter 184, supra. (Volume 1, page 372, and Volume 8, page 448, Report and Official Opinions of the Attorney General.)

I am not unmindful of the provision of Section 182, Revised Codes of Montana, 1935, which provides, among other things, it shall be the duty of the State Treasurer to deposit, public moneys in his possession and under his control in solvent banks located in the State of Montana, except as otherwise provided by law, and interest paid and collected on deposits shall be by the Treasurer credited to the general fund of the state. It would appear from the provisions of Section 4 of Article XI of the Constitution of Montana the direction and control of public school funds rests with the Board of Land Commissioners and—under the provisions of Section 5, Article XXI of the Constitution—it can be seen the same state board and officers that have charge of the investments and administration of the public school funds have charge of the investments of all funds administered under the provisions of Article XXI, aforesaid. It is fundamental the constitutionality of a statute is to be tested, not by what has been done under it, but what may by its authority be done (Mills v. State Board of Equalization, 97 Mont. 13, 33 Pac. (2nd) 5640).

In answer to your third question, Section 13 of said Chapter 184, supra, provides:

"All moneys from escheated property in the public school fund of this state may be invested in the state general fund warrants by the state board of examiners."

Section 4 of Article XI of the Constitution of the State of Montana, provides:

"The governor, superintendent of public instruction, secretary of state and attorney general shall constitute the state board of land commissioners, which shall have direction, control, leasing and sale of the school lands of the state, and the lands granted or which may hereafter be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be prescribed by law."

Section 5 of Article XXI of the Constitution of the State of Montana provides:

"The same state board and officers that have charge of the investment and administration of the public school fund of the state shall have charge of the investment and administration of all the funds administered under this article. All these funds shall be invested as one common fund to be known and designated as the Montana trust and legacy fund. In case any contribution is in some other form than cash, such board shall convert it into cash as soon as possible."

Prior to the enactment of Article XXI the public school fund was administered under the provisions of Section 4 of Article XI of the Constutution and subsequent thereto it was administered under the provisions of Article XXI thereof.

At the general election November 8, 1938, amendments to Sections 6, 7, 8, 9, 10 and 11 of Article XXI were adopted, and were on December 2, 1938, proclaimed to be an integral part of the Constitution. These amendments of Article XXI appear as Chapter 99, Laws of 1937. This action was, by the Attorney General, declared unconstitutional and contrary to the provisions of the enabling act. (Opinion No. 11, Volume 18, Report and Official Opinions of the Attorney General.) In fact it was held that, 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 to 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, and the enabling act constitutes a pact between the United States and the state, which neither party may violate without the consent of the other.

Subsequent to the rendition of the Attorney General's opinion the matter was submitted to the Justices of the Supreme Court who constitute a supervisory board over the entire administration of all the funds created or authorized by Article XXI and the income therefrom, and as a result thereof the supervisory board concluded there was nothing in the provision of Article XXI as originally adopted, or as amended, which undertakes to do anything contrary to the practice heretofore followed in handling or investing any of the various funds, nor anything additional to that practice, except that the new method prescribed requires possibly a little more bookkeeping in order to separate clearly and distinctly in accordance with the provisions of the Constitution, the various funds physically combined for investment purposes.

The supervisory board said:

"There is nothing whatever in the amendment that necessarily conflicts in any manner with the other provision of the state constitution, or with either the Enabling Act or the Constitution of the United States.

"Even if the amendment were given literal effect irrespective of any other provision, no part of the Enabling Act would be violated. All income derived from the sale of lands ceded to the state for particular purposes must remain inviolate under both the old and the new provisions of our Constitution. The change between the old and new is

merely one of bookkeeping and will not interfere in any manner whatever with the segregation and maintenance of the several distinct and separate funds. The new law is intended to eliminate an antiquated and partially ineffective method of separately investing each of the various funds. There is nothing in the Enabling Act that prohibits the combination of two or more funds for the purpose of investment, and the requirement of the funds for that purpose is practically the only change worked by the amendment. The conclusion is inescapable after an examination of Article XXI as amended.

"The second paragraph of Section 6, Article XXI, provides that the unpaid balances of all present investments belonging to the various trust funds shall be transferred to the new combined 'Montana trust and legacy fund'; and the first sentence of the first paragraph of the section directs that all these funds 'subject to investment' shall be invested as part of the new combined fund. The invested portion of a fund, and the uninvested portion consisting of cash on hand subject to investment, obviously constitute the entire fund, so that it is apparent that each of these funds in toto is intended to become a part of the new combined fund.

"But the last sentence of the first paragraph of the section provides that 'the separate existence and identity of each and every fund invested and administered as a part of the Montana trust and legacy fund shall be strictly maintained."

"It is apparent, therefore, that the transfer of these funds into the new combined fund was not for the purpose of diverting any part of any such fund from its proper application, but merely for the purpose of investment. Obvious benefits to be realized in this respect are the facilitation of their future investment regardless of the small cash balance in any separate fund for investment at any particular time, the elimination of the difficulty of investing any such separate fund for investment individually upon the liquidation of an investment or the other acquisition of money, and the stabilization of income of each fund by releasing it from entire dependence upon the state of the bond market when its own funds become available for investment. Under the separate investment system heretofore followed, it may happen that the fund may be invested in five per cent bonds, but that upon the maturing of the bond issue only one per cent investments are available. While the opposite trend may also be true, it is clear that the trust funds should if possible be freed from such vagaries of the investment market, and the result may be reached without interfering with the vested interests of any fund in the particular investments existing at the effective date of the amendment.

"The construction of Section 9 of Article XXI as requiring the payment into the common fund of the separate income from old investment and its apportionment among the separate funds solely upon the basis of their proportionate principal amounts would seem to involve a violation of the obligation of contracts. Such construction is neither necessary nor permissible. It is too narrow because it ignores the fundamental rule of construction that a statute, a chapter of laws, a constitution, or any other instrument must be construed as a whole.

"We think the entire article as amended must be construed to direct the consolidation of the **principal and interest** of all trust funds as indicated, from and after the effective date of the amendment, but that any income from a specific investment theretofore made for any fund and still outstanding on that date, must continue to belong exclusively to that particular fund until the securities representing such investment mature and have been paid. Upon such liquidation of the investments existing at the effective date of the amendment, the proceeds shall then be carried into and become a part of the consolidated fund for further investment.

"Until the complete liquidation of these old investments it will be necessary, of course, to have a ledger account for each particular fund showing the amount of the old investments and another ledger account for the same fund showing the amount belonging to that parti-

cular fund which has been turned into the common fund — merely a simple matter of bookkeeping. And until that time it will be necessary to continue crediting the income of the old investments to the proper fund and to base the distribution of the income of the consolidated fund among the various trust funds upon the basis of their several contributions to the common fund of money available for investment."

We therefore follow the reasoning laid down by the supervisory board and conclude that the amendments of 1938 are not in violation of any constitutional provisions of our state and federal constitutions. And while the expressions of the supervisory board pertain to matters directly brought to its attention under Volume 18, Report and Official Opinions of the Attorney General, page 11, nevertheless the same reasoning may be sustained with reference to public school funds connected with escheated estates, their administration and investment by the board authorized to administer the same.

General fund warrants being public securities, Section 13 of Chapter 184, supra, would not be inconsistent with the amendments of Article XXI, but would be in conformity therewith; particularly is this true as to the provision of Section 8, Article XXI, as amended, which reads as follows:

> "The Montana trust and legacy fund shall be safely and conservatively invested in public securities within the state, as far as possible, including school district, county and municipal bonds, and bonds of the State of Montana; but may also be partly invested in bonds of the United States, bonds fully guaranteed by the United States as to principal and interest, and Federal Land bank bonds. All investments shall be limited to safe loan investments bearing a fixed rate of interest. In making long term investments preference shall be given to securities payable on the amortization plan or serially. **The legislative assembly may provide additional regulations and limitations for all investments from the Montana trust and legacy fund."** (Emphasis mine).

Therefore investments may be made in general fund warrants if deemed advisable to do so. And while section 13 of Chapter 184, supra, places the matter of investments in general fund warrants with the Board of Examiners, and Section 4 of Article XI and Section 5 of Article XXI places the matter of the investment of public school funds with the Land Board of Commissioners, we are of the opinion that inasmuch as these boards are made up of the same personnel, save as to the Superintendent of Public Instruction, the two boards could act in conjunction, one with the other, in making such investments. The constitutional provisions and the statute aforesaid are not inconsistent and could, so we believe, be harmonized so as to make the same operative.

Sincerely yours,
R. V. BOTTOMLY
Attorney General