IN THE
SUPREME COURT OF MISSOURI

No. SC84210

IN RE ANCILLARY ADVERSARY PROCEEDING QUESTIONS

Cole County Consolidated
Case Nos. 28594 and 28604

APPEAL FROM THE COLE COUNTY CIRCUIT COURT
HONORABLE WARD B. STUCKEY
SPECIAL JUDGE

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JURISDICTIONAL STATEMENT

The trial court, in its Order and Judgment, determined that inasmuch as Art. IV, § 15, Mo. Const., restricts the duties that may be imposed upon the State Treasurer to those relating to "the receipt, investment, custody and disbursement of state funds and funds received from the United States government" and inasmuch as "the funds in question are not state funds or funds received from the United States government," the "State Treasurer had no standing or right to assert claims against the funds in Consolidated Case Nos. 28594 and 28604" (L.F. 593; App. A to this Brief). In effect, the trial court held Section 447.575, RSMo, authorizing the State Treasurer to take actions to collect unclaimed property was unconstitutional because it assigned such duty to the State Treasurer contrary to the provisions of Art. IV, § 15, Mo. Const. Because the validity of a statute is involved, this Court has exclusive jurisdiction of this appeal under Art. V, § 3, Mo. Const.

STATEMENT OF FACTS

Because of inadequacies in Appellant's Statement of Facts, this Respondent does not adopt the Appellant's Statement of Facts. Instead, we restate certain facts and supplement with additional facts which we believe are needed or helpful to this Court in considering the issues posed in this appeal.

The Commencement of the Case

The Missouri Public Service Commission ("PSC") in 1976 entered orders which authorized privately-owned electric utility companies to impose a fuel adjustment surcharge upon electric rates. In effect, the orders allowed the utilities to impose a rate surcharge which would periodically fluctuate because of the cost of fuel utilized by the utilities to generate electricity. The Utility Consumers Council of Missouri and the Office of the Public Counsel ("Public Counsel") each filed petitions in the Cole County Circuit Court which challenged the PSC's orders. Those Petitions were docketed as Case Numbers 28594 and 28604. L.F. 1, 23, 54.

The electric utilities who were parties and whose rates were involved included Union Electric Company ("Union Electric"), Kansas City Power & Light Company, Missouri Public Service Company, The Empire District Electric Company, Arkansas-Missouri Power Company, Missouri Edison Company, Missouri Power & Light Company, Missouri Utilities Company ("Missouri Utilities") and the St. Joseph Light & Power Company (the "electric utilities"). See, e.g., L.F. 65. There was no stay of the PSC orders authorizing the fuel adjustment surcharges during the period while the PSC orders were being reviewed by the Courts. See docket sheets at L.F. 1-3 and 23-26. On May 31, 1977, Judge Kinder entered a Judgment affirming the PSC. L.F. 58. Appeals were filed.

Supreme Court Decision

In *State ex rel. Utility Consumers Council, Inc. v. Public Service Commission*, 585

S.W.2d 41 (Mo. banc 1979), the Court held that the PSC had no authority to authorize the electric utilities to impose a fuel adjustment surcharge above their authorized electric rates. The Supreme Court in its Opinion directed the Circuit Court, as follows:

> "We remand to the circuit court for a determination by it of the amounts due as a result of the surcharge and to whom, the proper method of restitution, and in connection therewith a determination of such other matters and the making of such other orders as are necessary to and consistent with this opinion." 585 S.W.2d at 60.

The October 19, 1979, Refund Order

Upon remand, the electric utilities, the PSC, Public Counsel and Intervenors submitted suggestions to the Court re the refund process. L.F. 3, 4, 26, 27. The Circuit Court then entered its Order of October 19, 1979, directing the electric utilities to make restitution of the fuel adjustment surcharges which had been collected. L.F. 65. The Court further directed in its Order:

> "5. For a period of one year beginning November 1, 1979 and ending October 31, 1980, utilities shall make refunds to all classes of customers who had previously paid the surcharge. A written explanation shall be given to those current customers who are due a refund and a refund shall be promptly made to them. As concerns those customers . . . who were not paid a refund as provided in the preceding sentence, it shall be the duty of [the] utilities to serve notice to those customers in which a claim for a refund may be made. . . . Notice . . . shall also be given by publication in newspapers of general circulation in each utility's service area at least once each quarter during the . . . year period.
>
> "6. Each utility shall, prior to beginning refunds, file . . . a plan of refund procedure,

containing amounts to be refunded to various classes of customers and schedules for such.

"7. Any amount of unrefunded surcharges remaining at the end of the twelve month period shall be paid into the registry of this Court. (Emphasis added).

"8. At the end of the twelve month period each utility shall file a written report with the Commission [PSC] and Public Counsel showing the amount refunded and the amount paid into the registry of the Court. The Commission [PSC] staff will review the utilities' reports and file a report with this Court with regard to the accuracy of the information furnished by the utilities.

"9. For purposes of appeal, this judgment shall be final as to paragraphs 2, 3 and 4; for all other purposes, this Court retains continuing jurisdiction of this matter." L.F. 67.

A separate Order was entered on October 25, 1979, with respect to Citizens Electric Corporation which directed that refunds be paid in accordance with the provisions of its By-Laws. L.F. 610.

The electric utilities filed their respective detailed refund plans. See plans at L.F. 602, 606, 614, 617, 618, 622, 624, 629, 641, 646. Those plans reflect (with some minor variances between companies) that the fuel adjustment surcharges had been imposed during the time period of July 1, 1976, to September 30, 1977. L.F. 603, 606, 615, 618, 622, 625, 630, 642, 646.

Appeal to the Court of Appeals Re Interest Issues

The Public Counsel filed an appeal from the October 19, 1979, Order. The issues on that appeal were limited to the time over which interest on the fuel adjustment surcharges should accrue and the rate of interest. See, *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 602 S.W.2d 852, 856 (Mo. App. W.D. 1980), which granted appellate relief

and held that interest should accrue from the times of payment of the fuel adjustment surcharge and that the rate of interest should be adjusted from 6% to 9% on September 28, 1979.

Additional Stipulations and Orders Re Interest Refunds

The Public Counsel and the respective electric utilities then entered into Stipulations with respect to the procedures to be followed in making the additional refunds of interest required by the Court of Appeals Opinion, and these Stipulations were then approved by the Court and ordered into effect. L.F. 650, 654, 656, 659, 661, 670, 673, 675, 678, 680, 684, 686, 689.

Undistributed Monies Paid Into Circuit Court Registry

The chart which follows shows (i) the total fuel adjustment surcharge amounts to be refunded without inclusion of interest as reflected in the utilities' plans and (ii) the amounts remaining which were paid into the Court registry after giving notices and making refunds as directed in the Circuit Court's October 19, 1979, Order and the additional stipulations and Orders with respect to additional interest:

Electric Utility	Surcharges to be Refunded Without Accrued Interest	Paid Into Court Registry Including Accrued Interest
Union Electric (L.F. 602, 73)	$5,693,242	$557,175.09
Kansas City Power & Light (L.F. 606, 617, 74)	2,755,102	502,971.78
Missouri Public Service (L.F. 625, 85)	1,288,544	246,871.94
Arkansas-Missouri Power Company (L.F. 630, 71)	1,285,346	2,390.39
St. Joseph Power & Light (L.F. 622, 72)	1,007,338	40,671.38

Electric Utility	Surcharges to be Refunded Without Accrued Interest	Paid Into Court Registry Including Accrued Interest
Empire District Electric (L.F. 616, 72)	741,397	98,709.43
Missouri Power & Light (L.F. 642, 80)	631,735	112,617.90
Missouri Utilities (L.F. 619, 727)	444,231	67,197.52
Missouri Edison (L.F. 646, 80)	243,417	37,921.64

Orders Appointing Receiver

On August 31, 1981, Judge Kinder entered an Order Appointing Receiver, in which he appointed Marcella Wright as Receiver of the funds paid or to be paid by the electric utilities into the registry of the Court. L.F. 75. A copy of that Order is set forth as Appendix E to this Brief. A-56. The Court in that Order found:

> "From the Court's experience to date with respect to the administration of these funds, it is apparent that it will be necessary to hold and administer these funds for a lengthy period of time. The Court has concluded as well that the expense of administering those monies held now in the registry of the Court should be funded from the funds themselves – and, in particular, from the interest being generated from the investment of those funds. The responsibility for administering those funds now falls upon the undersigned judge. . . . The Court further does not believe that it is fair to impose upon the Circuit Clerk herself the additional responsibilities that are engendered by a close monitoring of

the investment of those funds. . . . The Court also intends that those responsibilities be exercised only by someone in whom this Court has complete confidence and also by one who is readily available to the Court. . . . The Court believes as well that the investment decisions with respect to those funds should be retained by the Court itself. . . ." L.F. 75-76.

The Court then considered the provisions of Rule 68.02 authorizing a circuit court to appoint a receiver to "keep, preserve and protect any . . . money . . . deposited in court." L.F. 76. The Court's Order directs:

"2. That as such receiver she is directed to perform those administrative duties which, absent the appointment of a receiver, would be performed by the Circuit Clerk under the provisions of Section 483.310, RSMo – with the provisions of Section 483.310, RSMo, continuing to govern the investment of funds and the application of interest received from the fund.

* * *

"4. That the Court reserves unto itself the final investment decisions. . . .

"5. . . . All such valid claims submitted and approved by the Court shall be paid by the receiver.

"6. . . . [T]hat interest received from such investments shall be paid over directly to the receiver. . . . From such interest which is received the receiver shall first pay therefrom the lawful expenses of the administration of the funds . . ., there shall next be paid therefrom such amounts as may be lawfully requisitioned by the Circuit Clerk of Cole County for the purposes specified and allowed for such Clerk in subsection 2 of

Section 483.310, RSMo, and the remaining balance shall be paid into the general revenue fund of Cole County as provided in subsection 2 of Section 483.310, RSMo.

"7. That the receiver is directed to secure and maintain a bond. . . .

"8. That the receiver is authorized and directed to pay over to herself personally from such interest so received the sum of Two Hundred Dollars ($200.00) per month as compensation for her services as receiver. . . .

"9. That until the further order of the Court the receiver is authorized from time to time to pay such other expenses in the administration of the receivership as may from time to time be necessary; provided, however, (a) that no such expenditures for such other expenses in excess of $250 shall be made without the written approval of the Court. . . ." L.F. 77-79.

Subsequent Orders with respect to the Receiver have (i) on August 25, 1983, changed the amount of the monthly compensation (L.F. 769), (ii) on December 5, 1988, appointed Brenda Keys as successor Receiver using the same form of Order, except to change the amount of the monthly compensation and the amount of bond (L.F. 229), and (iii) on January 22, 1999, appointed Julie Smith as successor receiver to serve "under the same terms and conditions contained in the Order Appointing Receiver previously entered by the court in this case" (L.F. 342). No other changes have been made in the August 31, 1981, Order Appointing Receiver. No motions have been filed to change any of the provisions of the Orders of August 31, 1981, August 25, 1983, December 5, 1988, or January 22, 1999, nor has any appeal been taken or attempted with respect to any of those Orders. L.F. 1-46.

Order Denying Expenses to Utilities and Determining That the Utilities Had No Interest in the Funds in this Case

Union Electric and Missouri Utilities filed motions to recover from the funds paid into the registry of the Court expenses in the amounts of $103,308.57 and $8,938, respectively, which those electric utilities incurred in making the fuel adjustment surcharge refunds. L.F. 735 and 728. Union Electric filed supporting Suggestions. L.F. 741. The attorney for the Receiver filed opposing Suggestions. L.F. 105. On August 3, 1983, Judge Kinder entered his Memorandum and Order denying the motions which effectively determined that the electric utilities had no interest in the funds held by the Receiver. L.F. 129. No appeal was taken or attempted to be taken from the August 2, 1983, Memorandum and Order.

Uniform Disposition of Unclaimed Property Act Enacted in 1984

In 1984 the General Assembly enacted the Uniform Disposition of Unclaimed Property Act (the "Unclaimed Property Act") which was codified as Sections 447.500 to 447.595, RSMo, and which became effective August 13, 1984. From August 13, 1984 until July 1, 1993, the Director of the Department of Economic Development had the statutory authority under the Unclaimed Property Act to commence actions to recover unclaimed property subject to the Unclaimed Property Act. See Section 447.575, RSMo 1986.

Collection and Administrative Duties Imposed on State Treasurer in 1993

Since July 1, 1993, Section 447.575, RSMo 1994 (and 2000), has provided that the State Treasurer has the duty to collect unclaimed property subject to the Unclaimed Property Act and to then generally administer the Act. See generally, Section B of House Bill 566 enacted in 1993.

No Ownership Rights Determined or Claimed

The Circuit Court files do not reflect the name of any person or entity who has an ownership interest in or ownership right to any of the funds which are now held by Receiver Smith under the

supervision of Judge Kinder in Case Nos. 28594 and 28604.

Proceedings Re the Unclaimed Property Act

The Circuit Court files and the record reflect that the PSC, the Public Counsel, the Missouri Attorney General, the Missouri Director of Economic Development, the Missouri State Treasurer, the Missouri State Auditor or the Missouri Attorney General did not make any claim or assertion from August 13, 1984, until January 4, 2000, that the funds in Case Nos. 28594 and 28604 should be paid over to the Director of Economic Development or the State Treasurer as unclaimed property pursuant to the Unclaimed Property Act. Earlier audits of the Cole County Circuit Court had been conducted by the State Treasurer. On January 4, 2000, State Auditor Claire McCaskill issued Audit Report No. 2000-01 with respect to the Nineteenth Judicial Circuit in which she ". . . recommended the circuit judges review these receivership cases and determine whether the receivership assets should be distributed to the state Unclaimed Property Section or should be disposed of in another manner" (Emphasis added, Appellant's Brief, App. 2).

On April 30, 2001, the Attorney General filed a Petition for Writs of Prohibition and of Mandamus in the Western District of the Missouri Court of Appeals styled "State ex rel. Jeremiah W. (Jay) Nixon, Attorney General, Relator v. Cole County Circuit Judges Byron L. Kinder and Thomas J. Brown, III, Respondents", and docketed as Case No. WD 59910, requesting the issuance of writs directing that the funds and interest thereon in these cases and the three companion cases be transferred to the State Treasurer pursuant to the Unclaimed Property Act. L.F. 773, 386. Prior to the filing of the Petition in the Court of Appeals, the Attorney General did not seek relief by motion or petition filed in these cases or in the three companion cases. State Treasurer Farmer advised Judges Kinder and Brown that the action in the Court of Appeals was filed by the Attorney General without consulting with

or notifying the State Treasurer. The State Treasurer further advised Judges Kinder and Brown that she had no claim to any interest on the funds. L.F. 773-774. On May 3, 2001, Judges Kinder and Brown appointed Alex Bartlett as counsel for the Receivers and Trustee in these cases and the three companion cases, directed that he file opposing suggestions in the Attorney General's action in the Court of Appeals, directed that he attempt to negotiate a settlement and authorized him to take additional necessary or appropriate actions. L.F. 775-776. The Attorney General's Petition for Writs of Prohibition and Mandamus in the Western District of the Missouri Court of Appeals was denied on May 30, 2001. L.F. 386.

On June 28, 2001, the Attorney General filed a quo warranto action against Judges Kinder and Brown in the Osage County Circuit Court which was docketed as Case No. 01CV330548 with notice being given by telephone that morning to attorney Alex Bartlett in Jefferson City. At noon on the same day the Attorney General presented the Petition in Case No. 01CV330548 to Circuit Judge Jeff W. Schaperkoetter in Union in Franklin County. The Attorney General secured the issuance of a Preliminary Order in Quo Warranto which deviated from Supreme Court Form 12 and provided that Judges Kinder and Brown "are restrained and enjoined from appropriation or expending" any of the funds in this case and the three companion cases. L.F. 386-387. The Attorney General's appeal from the dismissal of that case by Circuit Judge Gael Wood now pends in this Court as SC84301.

By letter dated July 16, 2001, the Attorney General, on behalf of the State Treasurer, demanded that Respondent Smith deliver the funds she holds as Receiver in this case to the State Treasurer by 5:00 p.m. on July 20, 2001, or face a personal penalty of up to $10,000 per day. L.F. 387, 388, 397, 398. At that time, Respondent Smith, under the Orders Appointing Receiver, was prohibited from making such a disbursement without an order from Judge Kinder, and Judge Kinder

was prohibited by the Preliminary Order in Quo Warranto from appropriating or expending the funds. L.F. 387-388.

On July 20, 2001, Respondent Smith filed her "Motion and Petition for Joinder of Additional Parties and for Relief in an Ancillary Adversary Proceeding in the Nature of Interpleader and for Other Relief" ("Motion and Petition"). L.F. 382. In her Motion and Petition the Respondent Receiver noted the contentions of the Attorney General, the July 16 demand to turn over the funds which she held, the extant orders of the Court which prevented her from doing so and the extant order in the Quo Warranto action against Judges Kinder and Brown which prevented them from entering any order transferring the funds. L.F. 386-388. The Respondent Receiver further reported that efforts to settle the disputes with the State Treasurer had been thwarted by the Attorney General. L.F. 388. The Respondent Receiver asserted that the Court is not required to turn over the funds to the State Treasurer pursuant to the Unclaimed Property Act, but instead has authority to make a different disposition of the funds. L.F. 392.

The Respondent Receiver requested that the Court direct that there be separate ancillary adversary proceedings to determine the following questions:

"a. Whether the interest income upon the funds in this case for as long as they are held by the Receiver or under the control of the Court can be used (i) to pay the expenses incurred in preserving the funds, and (ii) to pay court-related expenses as provided in Section 483.310, RSMo; and (iii) whether the remainder of the interest income monies are payable to Cole County.

"b. Whether the funds in this case must be distributed now or whether they can continue to be held in the registry of the Court.

"c. If it is determined that the funds can no longer continue to be held in the registry of the Court, whether the funds must be disbursed to the State Treasurer to be administered under the Missouri Uniform Disposition of Unclaimed Property Act or whether the Court can make a different disposition of the funds."

L.F. 394.

The Motion and Petition requested that the proceedings be denominated as "Ancillary Adversary Proceedings", that no other questions should be considered in the Ancillary Adversary Proceedings, and that if it was determined that the funds in this case were not required to be disbursed to the State Treasurer pursuant to the Unclaimed Property Act, the continued holding or the disposition of the funds should be determined in further proceedings. L.F. 394.

The Motion and Petition asked that the State Treasurer, the Circuit Clerk and Cole County be joined as parties in the Ancillary Adversary Proceedings to assert any claims they might have to the funds. L.F. 395. The Motion and Petition noted that in *Crist v. ISC Financial Corp.*, 752 S.W.2d 489 (Mo. App. W.D. 1988), it had been held that the Circuit Clerk and Cole County (L.F. 393) were indispensable parties when the matter of interest on funds, held under the Circuit Court's authority, were in question.

On July 20, 2001, Judge Kinder entered an Order which sustained the Motion and Petition of the Receiver. L.F. 399. That Order provided:

"2. A separate trial and proceedings are hereby ordered with respect to the Ancillary Adversary Proceedings Questions as defined in the Receiver's Motion and Petition, which shall be known as the Ancillary Adversary Proceedings and shall be captioned as [In Re Ancillary Adversary Proceedings Questions]. . . .

"3. The only issues for determination in the Ancillary Adversary Proceedings shall be the Ancillary Adversary Proceedings Questions . . . and the joinder . . . shall not make such person or entity a party for any other purpose in this case.

"4. The Honorable Nancy Farmer as State Treasurer of Missouri, is hereby ordered added as a party to the Ancillary Adversary Proceedings, and it is ordered (i) that a copy of this Order and the Receiver's Motion and Petition be served upon the Honorable Nancy Farmer, (ii) that the . . . State Treasurer within 30 days of such service file . . . a pleading, asserting any claims which she . . . has under the . . . Unclaimed Property Act to the funds in this case. . . .

"5. Cole County and Ms. Debbie Cheshire as the . . . Circuit Clerk are hereby added as parties to the Ancillary Adversary Proceedings. . . .

"6. The Receiver . . . through her attorney . . . is hereby authorized and directed to participate in the Ancillary Adversary Proceedings to insure that there is a full presentation and exposition of the facts and legal issues. . . .

"7. . . . [O]ther persons . . . may be allowed to intervene . . . as an interested person or to appear amicus curiae. . . ." (Emphasis added) L.F. 400-401.

In his July 20, 2001, Order, Judge Kinder noted the pendancy of the quo warranto action in the Osage County Circuit Court. He then recused himself from a determination of the Ancillary Adversary Proceedings Questions for which a separate trial and proceedings had been ordered, requested that the Supreme Court assign a Special Judge to hear and determine the Ancillary Adversary Proceedings Questions and "retain[ed] jurisdiction with respect to all other issues and matters in this case, including . . . the determination of the holding or disposition of any funds which are determined in the Ancillary

Adversary Proceedings to not be required to be disbursed to the State Treasurer by reason of the . . . Unclaimed Property Act." L.F. 401-402. See Appendix C and D of Respondent Blackwell's Brief for a copy of the Motion and Petition filed and the Order entered by Judge Brown in that companion case. The Motion and Petitions and the Orders entered on July 20, 2001, in SC84210, SC84211, SC84212 and SC84213 are substantially similar.

On July 25, 2001, the Supreme Court assigned the Honorable Ward B. Stuckey as Special Judge in "In Re Ancillary Adversary Proceedings Questions, Case No. 28594 and 28604". L.F. 404.

On July 25, 2001, the Attorney General filed a Petition in the Circuit Court for Petitioner Nancy Farmer against Judge Kinder, Judge Brown, this Respondent Smith, Elaine Healey (Respondent in SC84211), Jackie Blackwell (Respondent in SC84212) and Sharon Morgan (Respondent in SC84213). Insofar as the funds in this case are concerned, in that Petition the Attorney General sought a mandatory injunction directing Judge Kinder and Respondent Receiver to turn over the monies held by the Receiver and interest previously earned and an order directing Judge Kinder and Respondent Smith to pay penalties personally. L.F. 8 in SC84328.

The State Treasurer on August 20, 2001, filed a Motion to Vacate and Disqualify in the Ancillary Adversary Proceedings which requested that the July 20, 2001, Order be vacated and that Judges Kinder and Brown be disqualified. L.F. 405. On September 10, 2001, Cole County filed its Pleading in Response to Court Order in the Ancillary Adversary Proceedings and on September 20, 2001, the Claims and Position of the Cole County Circuit Clerk were filed in the Ancillary Adversary Proceedings. L.F. 443, 448.

On October 12, 2001, Respondent Smith and the other Receivers and Trustee filed their Motion for Judgment on the Pleadings in the Ancillary Adversary Proceedings in this case and in the

cases that are now on appeal to this Court as SC84211, SC84212, SC84213 and SC84328, as well as in Case No. 01CV325409 which remains pending before Judge Stuckey in the Cole County Circuit Court. L.F. 468. That Motion incorporated by reference the pleadings and motions in the other cases into this case, including Respondent Smith's First Amended Motions in Case No. 01CV324800 (L.F. 50 in SC84328).

The State Treasurer's Motion to Vacate, the Motion for Judgment on the Pleadings of the Receivers and Trustee, a Motion for Judgment on the Pleadings by Judges Kinder and Brown in Case No. 01CV324800 (L.F. 36 in SC84328) and Judge Brown's Motion for Consolidation (L.F. 220 in SC84328) were all noticed for hearing on October 18, 2001, before Judge Stuckey.

On October 18, 2001, prior to the commencement of the hearing before Judge Stuckey, Respondent Smith filed her Motion for Order Directing Hearing After the Conclusion of the Ancillary Adversary Proceedings to Consider Disposition of Funds. That Motion requests, if it be determined in the Ancillary Adversary Proceedings that the Court has authority to distribute the funds other than to the State Treasurer pursuant to the Unclaimed Property Act, the trial court to enter an order directing public notice of a hearing at which time interested persons could be heard re the disposition of the funds in this case. L.F. 777. On October 18, 2001, the State Treasurer filed her Objections to Various Motions (L.F. 478-485) and her Suggestions in Opposition to Various Motions (L.F. 486-584).

On October 18, 2001, a hearing was held before Judge Stuckey with respect to the Motions that had been noticed for hearing, and the Motions (except for the Motion to Consolidate, which was withdrawn) were taken under advisement. L.F. 585.

Legal Aid of Western Missouri, Legal Services of Eastern Missouri and Mid-Missouri Legal Services later appeared as Amici Curiae and submitted Suggestions (L.F. 787, 945) and an Appendix

of Selected Cases (L.F. 801).

On November 27, 2001, Judge Stuckey entered his Order and Judgment. L.F. 585; set forth in Appendix A at A-1.

POINTS RELIED ON

I.

The trial court did not err as asserted in Appellant's Points I through X inasmuch as the State Treasurer had and has no authority or standing to collect unclaimed property or administer the Uniform Disposition of Unclaimed Property Act because those are duties imposed by statute which cannot constitutionally be imposed upon the State Treasurer because of the provisions of Article IV, Section 15, Missouri Constitution, prohibiting the imposition of any duty by law which is not related to the "receipt, investment, custody and disbursement of state funds and funds received from the United States government" and, alternatively, because the statutes imposing collection and administrative duties under said Act were enacted in violation of the "single subject" and "clear title" provisions of Article III, Section 23, Missouri Constitution.

Cases

Board of Public Buildings v. Crowe, 363 S.W.2d 598 (Mo. banc 1962)

Director of Revenue v. State Auditor, 511 S.W.2d 779 (Mo. 1974)

Carmack v. Director, Department of Agriculture, 945 S.W.2d 596 (Mo. banc 1997)

Other Authorities

Article IV, Section 15, 1945 Missouri Constitution

Debates, Missouri Constitutional Convention – June 1944

Article IV, Sections 13, 14 and 22, 1945 Missouri Constitution

Article IV, Section 15, Missouri Constitution, as amended in 1986

Article III, Section 23, Missouri Constitution

Conference Committee Substitute for Senate Committee Substitute for House Committee Substitute for House Bill No. 566, 87th General Assembly, First Regular Session

Sections 447.575, 447.532.1, 447.503(7), 447.539, 447.543 and 447.517, RSMo 2000

Opinion No. 110 of Attorney General Danforth, January 12, 1970

II.

The trial court did not err as asserted in Appellant's Points I through X because the Cole County Circuit Court has the authority to make a disposition of the funds (including interest thereon) in this case even if *arguendo* the State Treasurer has the authority to assert claims and collect unclaimed property pursuant to the Uniform Disposition of Unclaimed Property Act.

Cases

State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69 (Mo. banc 1982)

Van Gemert v. Boeing Company, 739 F.2d 730 (2nd Cir. 1984)

State v. Levi Strauss & Co., 715 P.2d 564 (Cal. Bank 1986)

Friar v. Vanguard Holding Corporation, 509 N.Y.S.2d 374 (N.Y. App. Div. 1986)

Other Authorities

Article V, Sections 1, Missouri Constitution

Article V, Section 14, Missouri Constitution

Article V, Sections 3, 4 and 8, Missouri Constitution

Article II, Section 1, Missouri Constitution

Section 447.532, RSMo 2000

Kevin M. Forde, *What Can A Court Do With Leftover Class Action Funds? Almost Anything!"*, 35 Judges Journal 19 (Summer 1996, American Bar Association)

III.

The trial court did not err as asserted in Appellant's Points I through X because the Appellant State Treasurer is not in a position to make any claim to the funds in this case pursuant to the Uniform Disposition of Unclaimed Property Act.

Cases

State ex rel. Eagleton v. Champ, 393 S.W.2d 516 (Mo. banc 1965)

Citronelle-Mobile Gathering, Inc. v. Boswell, 341 So.2d 933 (Ala. 1977)

Douglas Aircraft Co. v. Cranston, 374 P.2d 819 (Cal. 1962)

Other Authorities

Section 447.532.1, RSMo 2000

Section 447.503(7), RSMo 2000

IV.

The trial court did not err as asserted in Appellant's Point III inasmuch as interest upon the funds in this case may be used and disbursed as provided in the Orders Appointing Receiver and in Section 483.310.2, RSMo.

Other Authorities

Section 483.310, RSMo 2000

V.

The trial court did not err as asserted in Appellant's Point IV inasmuch as the Motion for Judgment on the Pleadings incorporated other pleadings and motions, that Motion could be considered as a motion to dismiss and the trial court could properly conclude that the State Treasurer could not assert a claim to the funds or had not properly asserted a claim to the funds.

Cases

Angelo v. City of Hazelwood, 810 S.W.2d 706 (Mo. App. E.D. 1991)

VI.

The trial court did not err as asserted in Appellant's Points V, VI, VII, VIII, IX and X inasmuch as the Cole County Circuit Court had and continues to have jurisdiction over the funds in this case, any claim to the funds held in this case must be asserted in this case, the Circuit Court has the authority to require persons claiming funds held in this

case to appear and show their entitlement to the funds, the Appellant was properly served with the July 20, 2001, Order and the Motion and Petition, and the Appellant is not entitled to any order of disqualification.

Cases

State ex rel. Sullivan v. Reynolds, 107 S.W. 487 (Mo. banc 1907)

Brady v. Ansehl, 787 S.W.2d 823 (Mo. App. E.D. 1990)

Robin Farms, Inc. v. Bartholomew, 989 S.W.2d 238

State ex rel. Gleason v. Rickoff, 541 S.W.2d 47 (Mo. App. E.D. 1977)

Other Authorities

Supreme Court Rule 66.02

Supreme Court Rule 52.07

Supreme Court Rule 54.01

Supreme Court Rule 44.01(d)

ARGUMENT

I.

The trial court did not err as asserted in Appellant's Points I through X inasmuch as the State Treasurer had and has no authority or standing to collect unclaimed property or administer the Uniform Disposition of Unclaimed Property Act because those are duties imposed by statute which cannot constitutionally be imposed upon the State Treasurer because of the provisions of Article IV, Section 15, Missouri Constitution, prohibiting the imposition of any duty by law which is not related to the "receipt, investment, custody and disbursement of state funds and funds received from the United States government" and, alternatively, because the statutes imposing collection and administrative duties under said Act were enacted in violation of the "single subject" and "clear title" provisions of Article III, Section 23, Missouri Constitution.

Introduction

We assert in our Point I that the duties imposed by the Unclaimed Property Act upon the State Treasurer to perform collection and administrative functions with respect to unclaimed property are duties which Article IV, § 15, Missouri Constitution, prohibits from being imposed by law upon the State Treasurer. Alternatively, we assert that the legislation which purported to impose those duties upon the State Treasurer was adopted in violation of Article III, § 23, and was therefore ineffective in imposing such duties. Therefore, the State Treasurer cannot as a matter of law assert any claim to the funds in this case pursuant to the Unclaimed Property Act.

For if the State Treasurer cannot collect or assert claims for unclaimed property under the Unclaimed Property Act, then the State Treasurer has no authority to assert any claims with respect to the funds (including interest thereon) in this case, and all of the issues raised in the Appellant's remaining Points are either moot or at most harmless error and need not be considered further.

While we do not believe that the State Treasurer can constitutionally administer the Unclaimed Property Act, we do not believe that the Court in this case needs to go that far. The Court, we believe, only needs to reach the issue of whether the State Treasurer can exercise the collection-related functions, i.e., requiring those who hold unclaimed property to report and turn over unclaimed property to the State Treasurer, asserting claims for unclaimed property and bringing actions to recover unclaimed property.

Missouri's first Unclaimed Property Act became effective on August 13, 1984. See, House Bill No. 1088, 82nd General Assembly, Second Regular Session. Under House Bill No. 1088, the collection functions and the other administration duties under the Unclaimed Property Act were vested in the Director of the Department of Economic Development.

On July 1, 1993, the collection functions and the other administrative functions under the Unclaimed Property Act were transferred to the State Treasurer by a Type I transfer under the provisions of Conference Committee Substitute for Senate Committee Substitute for House Committee Substitute for House Bill No. 566 enacted in 1993 during the 87th General Assembly, First Regular Session. This Court has heretofore found C.C.S.S.C.S.H.C.S.H.B. No. 566 to be fatally flawed. *Carmack v. Director, Department of Agriculture*, 945 S.W.2d 956 (Mo. banc 1997). See further discussion, *infra*.

The only interest Appellant Farmer has with respect to the funds in this case is because of the

statutory collection-related duties and other administrative duties vested in her under the Unclaimed Property Act.

There are several different versions of the "Uniform Disposition of Unclaimed Property Act."[1] Missouri appears to have adopted portions of the revised 1966 version of the Uniform Act. See Vol. 23A, *Vernon's Annotated Missouri Statutes*, page 270. Other versions of the Uniform Act on the subject include the Uniform Disposition of Unclaimed Property Act of 1954 and the Uniform Unclaimed Property Acts of 1981 and 1995. For reference purposes in this Brief, we refer to Missouri's version of the Uniform Act as the "Unclaimed Property Act," which includes Sections 447.500 to 447.595, RSMo.

Under Points I and II of her Brief, the Appellant State Treasurer relies upon and references Sections 447.575, 447.532.1, 447.503(7), 447.539, 447.543, and 447.517, RSMo.

- Section 447.575 on its face imposes a collection duty upon the State Treasurer with respect to "property" – "the treasurer shall bring an action in a court to enforce . . . delivery" (Emphasis added).
- Section 447.532.1 contains provisions with respect to "intangible personal property held for the owner by any court" (Emphasis added).
- Section 447.503(7), as noted at page 34 of Appellant's Brief, defines "Owner" to include "any person having a legal or equitable interest in property subject to "the Act"

1 We note that the Appellant's Brief erroneously refers to the "Uniform Distribution (sic) of Unclaimed Property Act." See, e.g., pages 26, 32 and 38. The correct title for the Act uses the word "Disposition" rather than the word "Distribution." See, Section 447.500, RSMo 2000.

(Emphasis added).

- Sections 447.539 and 447.543 relate to collection functions of the State Treasurer, with provisions being set forth for the filing of reports with the State Treasurer.
- Section 447.517 relates to "funds held or owing by a utility." (Emphasis added). This section has no relevance here. The funds in question are not "held" by a utility; rather they are "held" by the Respondent Receiver under the supervision of the Court. They are also not "owed" by a utility inasmuch as once the electrical utilities paid the funds into the registry of the Court pursuant to paragraph 7 of Judge Kinder's Order of October 19, 1979 (L.F. 67), those funds ceased to be "owed" by the electric utilities. Therefore, the provisions of Section 447.517 are not pertinent to any issues in this case.

A *sine qua non* of the Unclaimed Property Act involves the concept of a person being an "owner" who has a "legal or equitable interest" in property. When monies, intangible personal property or even tangible personal property are delivered to the State Treasurer, the underlying concept and scheme of the Unclaimed Property Act is that the State Treasurer will hold the property of an owner "having a legal or equitable interest" so that that owner can file a claim to effect a recovery.

The property which the statutes purport to authorize the State Treasurer to recover is not the state's property. Rather, it is unclaimed property of an "owner" who has a "legal or equitable interest" in that property. The State Treasurer in Suggestions filed before Judge Stuckey characterized the property as follows:

> "The Unclaimed Property Division [of the State Treasurer's Office] currently holds more than $155,000,000 in more than one million owner accounts. Statistically one of every ten Missourians has unclaimed property being held by the state's Unclaimed

Property Division." (L.F. 488).

Consequently, when the State Treasurer pursuant to the Unclaimed Property Act seeks to recover funds or other property, it is not state funds or state properties that she is seeking to recover. Instead, it is funds or properties in which particular owners have a legal or equitable interest. While under the statutory scheme of the Unclaimed Property Act portions of the monies collected are swept into general revenue after a period of time and the State uses the "float", such does not modify the owner's "legal or equitable interest" in the monies, and the owner can recover monies in an amount equivalent in value to his monies or other property seized by the State Treasurer – subject to (i) the owner being able to establish his entitlement and (ii) appropriation.[2]

Article IV, § 15, Re No Additional Duties Upon the State Treasurer

We turn now to a consideration and discussion of those provisions of Article IV, § 15, Missouri Constitution, limiting the duties which may be imposed upon the State Treasurer by statute:

> "No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds and funds received from the United States government."[3] (Emphasis added).

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2 Collection of an owner's unclaimed monies by the State Treasurer rather than by the Director of Revenue or other agency or official under the Governor presents another problem. Once the owner's unclaimed monies reaches the State Treasurer, the money can only be withdrawn from the state treasury by appropriation. Article III, § 36, Missouri Constitution. Such implicates yet further constitutional problems.

3 The full text of Article IV, § 15, Missouri Constitution is set forth in Appendix B to this Brief at A-5

Any statutory duties which the State Treasurer has under the Unclaimed Property Act to assert any claims to the funds in this case or to require any reports with respect to those funds cannot be constitutionally exercised because of the above-quoted constitutional provision in Article IV, § 15 inasmuch as –

1. Unclaimed properties are not "state funds" or "funds received from the United States government". The administration of the Unclaimed Property Act does not relate to "state funds" or "funds received from the United States".

2. Even if, *arguendo*, unclaimed properties relate to "state funds" or "funds received from the United States", the State Treasurer can only exercise duties with respect to unclaimed properties involving the "receipt, investment, custody and disbursement" of such unclaimed properties. The State Treasurer cannot exercise the collection duties of asserting claims to unclaimed properties, bringing actions to recover unclaimed properties or requiring reports with respect to unclaimed properties to be filed with her.

We have set out in Appendix C (A-7 – A-12) to this Brief the constitutional provisions relating to the constitutional duties and limitations which predate the current version of Article IV, § 15, as well as the "limitation" of duty provisions for the State Auditor and the Secretary of State which are in *pari materia* to those applying to the State Treasurer. There were no provisions in the 1820 or 1865 Constitution which set forth duties or limitations on duties of the State Treasurer.

The 1875 Constitution did not set forth any duties or limitations on duties of the State Treasurer within Article V of that Constitution relating to the "Executive Department." The 1875 Constitution,

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and A-6.

however, did have provisions in Section 15 of Article X relating to "Revenue and Taxation" which set forth provisions providing for the deposit of funds in depositories selected by the State Treasurer with the approval of the Governor and the Attorney General. See Article X, § 15, 1875 Missouri Constitution, set forth in Appendix C to this Brief at A-7. The 1875 Constitution did not have any provision limiting the duties which could be placed upon the State Treasurer.

The present provisions of Article IV, § 15, which limit the duties that may be imposed upon the State Treasurer derive from the 1945 Constitution as formulated by the 1944 Constitutional Convention during its debates in June of 1944. Article IV, § 15, as formulated by the 1944 Constitutional Convention and adopted by the people in 1945 is set forth in Appendix C to this Brief at A-7 – A-8. The provisions of Article IV, § 15, 1945 Constitution, which limited the duties of the State Treasurer were as follows:

> "No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

At the same time as the 1944 Constitutional Convention was adopting a limitation of duties that could be placed by statute upon the State Treasurer, the Constitutional Convention also formulated limitations of duties that could be placed upon the State Auditor and the Secretary of State. See Article IV, § 13, 1945 Constitution, with respect to the State Auditor:

> "No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds." (A-8).

See Article IV, § 14, 1945 Constitution, with respect to the Secretary of State:

> ". . . [N]o duty shall be imposed on him by law which is not related to his duties as prescribed in this Constitution." (A-8 – A-9).

Constitutional Convention Debates – June 1944

It is clear from the Debates in the 1944 Constitutional Convention that the limitation of duties provisions of Article IV, § 15, were intended to foreclose the imposition by statute of precisely the type of duties which the Unclaimed Property Act purports to impose upon the State Treasurer.

Appendix D to this Brief at pages A-13 through A-55 contains copies of pertinent pages from the transcript of the Debates of the Constitutional Convention on June 12, 13, 14, 15 and 22, 1944. Appendix D is a part of an Exhibit presented to Judge Stuckey at the hearing on October 18, 2001, and the highlighting in the Appendix is as set forth in that Exhibit. At A-14 is a listing of the names and positions of certain convention delegates participating in the Debates. At A-15 – A-17 is an Index to the Debate excerpts which has been prepared as a convenience to this Court.

The Debates were thoughtful and encompass historical analyses, political science theory, governmental experience, pragmatic considerations and political compromise. The major "players" as delegates in the Debates of these issues in June of 1944 were former Governor Guy B. Park (Governor 1933 to 1937); former State Treasurer Richard R. Nacy (Treasurer from 1933 to 1937, Second Vice President of the Convention, President of Central Missouri Trust Company, and longtime Missouri political figure); Allen McReynolds (Senator from Carthage from 1935 to 1944); Dr. Lewis E. Meador (Professor of Economics and Political Science at Drury College); Dr. Franc L. McCluer (Chairman of the Convention Committee relating to Finance, served as President of Westminster College); and Marshall E. Ford (Chairman of the Convention Committee on the Executive Department, served as State Senator). Also participating in the Debates was Clem F. Storckman, who later became a member of this Court.

The Constitutional Convention Committee chaired by Mr. Ford reported a proposed

Constitutional Article relating to the Executive Department. Section 14 of that proposed Article set forth the offices of Governor, Lieutenant Governor, State Auditor, Secretary of State, and Attorney General and provided for several executive departments, but did not provide for an office of State Treasurer. Instead, a "Department of Finance" was proposed. See text of proposed Section 14 at DTr. 3995 (A-18),[4] and explanation of Mr. Ford at DTr. 3995-6 (A-18 – A-19). Consideration of Section 14 was deferred until the Convention decided whether "we want a cabinet form" of Executive Department. DTr. 4010 (A-21).

Section 18 of the Committee proposed the Executive Department Article provided that only the Governor, Lieutenant Governor and State Auditor would be elected. Other state officials would be appointed. DTr. 4017 (A-22). Mr. Ford in presenting Section 18 discussed the desirability of a "short ballot" and a "cabinet system". DTr. 4018 (A-23). Dr. Meador then spoke at length on the cabinet form of government, including going into English history, the cabinet system developed during Washington's presidency which has persisted, and the problems of a weak executive in state government. DTr. 4051-4054 (A-24 – A-28). Professor Meador summarized:

> "We have established in the state government in recent years a large number of boards and bureaus that, for all practical purposes, are beyond the control of the executive. The only real control over many of the existing boards and bureaus of this state is through the legislature. If we desire to maintain the principle of separation of powers in state government, the control over these boards should be vested in the governor. The

4 The "DTr." reference is to the page of the Debates transcript. The "A" reference is to the page in the Appendix to this Brief.

establishment of a cabinet to advise the governor, together with the reorganization of all these boards and bureaus under the executive department would accomplish this purpose." DTr. 4053-54 (A-27 – A-28).

Governor Guy B. Park, Democratic Governor from 1933 to 1937, spoke at length in support of the cabinet system, related his experiences as Governor, and indicated that in advocating the cabinet system, he was also authorized to advise the Convention that Governor Henry S. Caulfield, the Republican Governor from 1929 to 1933 concurred in his views also supported the cabinet system. DTr. 4061-4065 (A-29 – A-33). Park related that being "inexperienced in governmental matters but thinking I was right", he proposed in his inaugural address that "auto licenses be issued by county officers" so that that would save the state money. Park then indicated that "within two days after that recommendation was made an official [the Secretary of State] and one of his deputies who was in charge of the auto department berated me for making such a proposal. I'm not using their language but it is what it meant." DTr. 4062 (A30). Park related that in order to pay state obligations during the depression he felt it necessary to propose a sales tax and that instead of "buying" auto license plates at a "high price" he proposed having them made by "idle men in the penitentiary", but that such was opposed by statewide elected officials of his same party. DTr. 4062 (A30).

Park then recounted the realities of political patronage and having "five governors" in Jefferson City:

"Here is another thing that I observed resulting from the <u>five Governors by the people of this state at the same time</u> I was. <u>Officials did not hesitate in</u> violation of, at least the spirit of the Constitution, <u>to appoint members of the Legislature, their children, their fathers and their intimate friends</u> to positions in their offices. The result was that in the

cause of such a multiplicity of duties being viven (sic) to the different departments of this state, by that influence exercised by them for possible honest but certainly political purposes they have been able to accumulate such a large patronage and such a large payroll. I refer to those few things to illustrate that no matter if you belong to the same party, it is natural with human beings to be somewhat selfish if they have political ambitions, to forward those ambitions and it has been done and is still being done in this state and every other state in the union that has the same system of government. And what does it mean to the taxpayers of this state? What would the adoption of this plan mean to the taxpayers of this state and I am here not critical of my fellow officers, not impugning their motives but I am here representing the taxpayers of this state and I say to you that by centralizing this government, by adopting this system that is being proposed, it will relieve the taxpayers in many ways of many, many unnecessary tax burdens. . . .

* * *

"No business, however small, no wholesale house, no railroad can be operated economically, intelligently and successfully if those in charge of the business are divided and don't see eye to eye.

* * *

". . . but I am simply relating a condition that existed during my administration that existed, according to Governor Caulfield, during his administration and existed, I am sure, during the administration of all of the Governors that we have had in the last twenty or twenty-five years." (Emphasis added) DTr. 4063-4064 (A-31 – A-32).

In concluding, Governor Park stated:

> " . . . I have and could have no political ambitions. . . . I owe them [the people of Missouri] the greatest debt. . . . They are my people; they are your people and I think that a shorter better business system installed in this state will be more beneficial to the people of this state, not only from a governmental standpoint but from the standpoint of the taxpayer and, by the way, it is high time that the taxpayer was being remembered. DTr. 4064-65 (A-32 – A-33).

In one of the few such notes in the Transcript of the Debates, the reporter noted at the end of Governor Park's presentation –

> "(Loud applause)"

Dick Nacy then promptly moved for a recess, which was effected. Governor Park's "five governors" speech was to have a profound effect upon the Convention in limiting the duties that could be given by statute to the State Treasurer, the State Auditor and the Secretary of State.[5]

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5 While the Convention ended up providing specified constitutional duties for the State Treasurer, the State Auditor and the Secretary of State (Article IV, §§ 15, 13 and 14), Article IV of the 1945 Constitution did not provide <u>any</u> constitutional duties for the Attorney General – and in fact removed his "approval" of depositories of state funds function which was specified in Article X, § 15, of the 1875 Constitution. The depositories "approval" function of the Attorney General in the 1945 Constitution was transferred to the State Auditor. Article IV, § 15.

Consequently, the Attorney General can only exercise Missouri statutory powers and common law powers as they existed in England prior to 1607. By 1607 the powers of the English Attorney

Judge Storckman expressed his views with respect to the cabinet system:

> "At least, since the Constitution of 1865 it has been provided that the Supreme Executive Power of the State shall be vested in the Governor. Supreme needs no definition. It is the highest. . . . On the other hand, we have found that, in practice, the Governor has been hamstrung to a point where he cannot exercise the supreme executive power that the people have many times said that he should have – the power that is given to him under the present Constitution and which we propose to give him

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General had not advanced to a cabinet position in the English government. It was not until after that date that the Attorney General became the attorney for the government as a whole. Cooley, "Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies", *The American Journal of Legal History*, Vol. 2, page 304, 307 (1958). As late as 1768 Lord Chief Justice Wilmot, in allowing a suit to proceed which had been filed by the King's Solicitor General rather than by the Attorney General, reasoned:

> "The arguing that the Attorney General only, and no other officer was entrusted by the Constitution to sue for the King, either civilly or criminally, is a fundamental mistake." *Wilkes v. The King*, (1768) Wilm. at pp. 327.

See also, *Kelly v. Hanson*, 931 S.W.2d 816 (Mo. App. W.D. 1996) (State Auditor could sue by her own attorneys); and *State v. Planned Parenthood*, 66 S.W.3d 16 (Mo. banc 2002) (Attorney General subject to rules the same as other attorneys). Consequently, the Attorney General's authority is also limited.

under Section 1 of our present draft which we have approved." DTr. 4109 (A-34).

An amendment was thereafter proposed by Mr. Rex Moore to make the State Treasurer an elected officer. DTr. 4124 (A-35). Mr. Moore pointed out that if the State Treasurer was appointed by the Governor, then –

". . . [Y]ou are placing in the hands of the Governor and the Governor alone the power to select the depositories of all state money." DTr. 4125 (A-36).

Mr. Moore quoted Governor Park as saying it would not be "good public policy to give one man full and complete power to select the depositories of state money". DTr. 4125 (A-36). Mr. Moore then yielded to Mr. Nacy to explain the work of the Treasurer's office. DTr. 4127 (A-37).

Former State Treasurer Nacy then presented the following views:

"The Treasurer's office has no patronage to speak of. It is not a large office, but it is an important office. It's an office that the founders of the present Constitution thought so important that they prohibited the State Treasurer from succeeding himself and there was a reason for that because if there was any malfeasance in office or any shennanigans going on with the money of this state, that it could be found out in four years, so that the State Treasurer's office is important.

"Now, there <u>are some tax collection agencies in the State Treasurer's office which I doubt ought to be there</u>." (Emphasis added). DTr. 4128 (A-38).

Mr. Nacy then discussed the tax collection functions which he "doubt[ed] ought to be there".

Mr. Nacy next advocated the election of the State Treasurer. Nacy then spoke in favor of limiting the "collection" functions of the Treasurer's office:

"Now, I agree with Mr. Moore that <u>there are certain functions that ought not to be in</u>

the office of the State Treasurer. I doubt sincerely whether the State Treasurer ought to be a tax collector. I think this; that he ought to be the complete tax collector or ought not to be any tax collector. I think there ought to be established a Department of Revenue in this state and when Governor Park was elected Governor he made that recommendation in his inaugural address, but as I recall, did not follow it out. I rode to St. Louis the next day with Governor Park and told him that insofar as the State Treasurer's office was concerned we had no objections to any such program as that because it meant nothing insofar as the patronage was concerned. It was more responsibility and really responsibility that ought not to be in the office of the State Treasurer. So I am not one of those who contends that you ought to load up some of these departments with functions that are really not as this article says, germane to the functions of the office proper." (Emphasis added). DTr. 4129 (A-39).

Dr. McCluer then made the following inquiry of Mr. Nacy –

"MR. MC CLUER: Mr. Nacy, you have just spoken in favor of the Department of Revenue and separating it from the Treasurer, separating the functions of tax collection. Do I take it that you advocate the election of a Treasurer who would be the custodian of the funds and such related activities related to the custody of funds like the selection of a depository, but that you do not propose to have the elected Treasurer the head of the Department of Revenue which has been recommended by the Committee on State Finance?

"MR. NACY: Your first opinion I agree with. What I mean to say is yes, I think he ought to be the custodian of the revenues. . . . Period." (Emphasis added).

DTr. 4130 (A-40).

Dr. McCluer then inquired as to whether, if the Convention voted to amend the Committee's proposal to make the State Treasurer an elective office, Mr. Nacy would be in favor of making "the State Treasurer the head of the Department of Revenue" or whether "the head of this Department of Revenue should be an appointee of the Governor". Nacy responded that –

"I do not think the Treasurer should be head of that Department." DTr. 4130 (A-40).

Nacy also indicated that the "head of that Department" should be an appointee of the Governor rather than an elected officer" –

"I think we should not create any more elected officers." DTr. 4130 (A-40).

Mr. Ford, Chairman of Executive Department Committee, shortly thereafter requested a 15-minute recess so that –

". . . I think we might work out something that it will save a good deal of time and perhaps meet with more harmonious results than otherwise." DTr. 4134 (A-43).

During the recess Senator McReynolds and Mr. Nacy drafted a proposed new section relating to State Treasurer. See DTr. 4171 (A-49). After the recess, Senator McReynolds read the proposed new section for the information of the delegates, but did not attempt to formally offer it for consideration at that juncture. The McReynolds/Nacy proposed new section provided –

"The State Treasury (sic) shall have custody of all state funds and shall immediately upon the receipt thereof deposit the same to the credit of the State for the benefit of the funds to which they respectively belong in such banks, trust funds to companies or other banking institutions as he may from time to time, with the approval of the Governor and the State Auditor select, and shall, from time to time, make such disbursement of the

same as shall be provided by law. Provided, however, that no law shall be passed by the General Assembly authorizing or permitting the State Treasurer to assume duties of any other kind than the custody and disbursement of state funds as above set out; Provided, further, that the State Treasurer shall not be eligible for re-election."

(Emphasis added) DTr. 4135 (A-44).

An attempt to refer to committee Section 18 with the pending Amendment No. 11 to make the State Treasurer an elected officer failed. DTr. 4135 (A-44). There was some further limited debate. Governor Park closed the debate by making it clear that there was an understanding among a number of the key delegates that passage of the amendment making the State Treasurer an elected office was dependent upon passage of the McReynolds/Nacy section limiting the duties of the State Treasurer:

"MR. PARK: * * * I understand from the direct statement of Judge Moore and Mr. Nacy, and I will soon have their statement as their bond, and I know their word is good, and I know that other delegates share the same opinion, the effective part, the part for which I argued most strenuously, was not that the people shouldn't select these officers, but the principle back of it that these officers should not be permitted to usurp the power that naturally belongs to the Chief Executive of the State, and I am sure that when the vote is taken that Jones Parker will do as he says, that every delegate in this house will do as the dictates of his conscience prompt, and that the real objection to the Majority committee Proposal will be overcome and that this delegation, when the Treasurer and Secretary of State are elected, this Convention will see to it that the condition that now exists will no longer be present. Therefore, I am going to vote for the amendment of Mr. Moore. (Emphasis added).

"PRESIDENT: The Secretary will call the roll."

The roll call reflected 48 Ayes and 26 Nos. DTr. 4140 (A-46).

Shortly thereafter Section 14 was amended to specifically provide for a "Department of Revenue". DTr. 4159-60 (A-47 – A-48).

Then the proposed new McReynolds/Nacy section (Section 16a) was formally presented by Mr. Ford as an amendment to the Committee "File" relative to the Executive Department:

> "Section 16a. The State Treasurer shall have custody of all state funds and shall immediately upon the receipt thereof deposit the same to the credit of the state for the benefit of the funds to which they respectively belong in such banks, trust companies or other banking institutions as he may from time to time, with the approval of the Governor and the State Auditor, select; and shall, from time to time, make such disbursement of the same as shall be provided by law. Provided, however, that no law shall be passed by the General Assembly authorizing or permitting the State Treasurer to assume duties not related to the receipt, custody and disbursement of state funds." (Emphasis added) DTr. 4171 (A-49).

There was a brief discussion why the state auditor was substituted for the attorney general as the one whose approval was required to approve a bank or trust company as a "depository". Professor McCluer responded that it was because the State Auditor "deals with fiscal matters". DTr. 4172 (A-50). By a voice vote, Section 16a was adopted by the Convention. DTr. 4172 (A-50). The only subsequent changes in the language which became Article IV, § 15, of the 1945 Missouri Constitution, were stylistic by the Committee on Phraseology in putting the language in final form for final Convention action and submission to the voters. There were no subsequent changes in substance.

There was later considerable debate when the section [now Article IV, § 14] prescribing the duties of Secretary of State came before the Convention. Mr. Mayer moved the adoption of a substitute amendment which proposed the following additional language:

> "Provided, however, that the General Assembly shall not authorize or permit the Secretary of State to perform any duties not related to his duties prescribed in this Constitution." (Emphasis added) DTr. 4211 (A-51).

This was seconded by Professor Wood.[6] Mr. Mayer then spoke in favor of the foregoing substitute amendment limiting the duties of the Secretary of State. He next discussed generally the need to specifically limit the powers and duties of the State Treasurer, the Secretary of State and the State Auditor:

> "Now, we started in yesterday to strip these offices of too many appointees. Some people say, 'Well, you ought to take the taxes out of his office and that would be enough'. I have nothing against the Secretary of State but all the criticism of electing these officers has been that the Legislature has given them some duties and some appointees that they actually become stronger than the government or at least as strong. The talk around here was we have got five or six Governors up at Jefferson City. Now everybody agreed yesterday in the discussion that while they ought to be elected, I

6 "Mr. Wood of Johnson" was Professor Rolla F. Wood who was a Professor of History and Political Science at what is now Central Missouri State University in Warrensburg. Mr. Wood was active in the Committee of the Convention which formulated "File 16" relating to the Executive Department. DTr. 3995 (A-18).

mean those who supported that side, while they ought to be elected and all of the powers ought to be taken from them. This takes nothing from them that a Secretary of State ought to have. The Legislature, for instance, the auditor now has charge of all the escheat funds of the state. Well, that is alright. I have no doubt he has handled them perfectly and yet nobody else would give the auditor not only the right to collect taxes but to handle escheat funds and nobody ought to be but himself.

". . . And so I say while we have all agreed these officers should be elected, I think it was agreed by both the proponents and the opponents that they ought to be stripped of all these various powers and it seems to me this amendment strips him of no power that he ought to have and, therefore, I hope it will be adopted and then I shall be glad to vote for the Cope amendment." (Emphasis added). DTr. 4212 (A-52).

In the context of this case it is significant that even though the State Auditor [Forrest Smith, who would become Governor in 1949] had handled the escheat funds "perfectly", and that even though the "Legislature" had given the State Auditor the duty to administer the escheat funds, "nobody else [but the Legislature] would give the auditor not only the right to collect taxes[7] but to handle escheat funds. . . ." (Emphasis added). Consequently, there was the concept expressed that the State Auditor under the

7 Prior to the 1945 Constitution the State Auditor was in charge of the collection, *inter alia*, of sales taxes. There remained a dispute between State Auditor Smith and Attorney General McKittrick as to whether Smith's lawyers (e.g., John Hendren and Elmo Hunter) would do the in-court collection work, or whether attorneys under McKittrick would do that work. Hendren, et al., continued to do work for Smith.

limitation of duty provisions formulated by the Convention should not administer the escheat law. The administration of the escheat laws would be transferred by statute to the Department of Revenue.

Senator McReynolds spoke in favor of the Mayer amendment limiting the duties that could be imposed upon the Secretary of State:

> "The effect of the proviso is to take away from the office duties which are unrelated to the Secretary's office and which ought not to be lodged there. I think practically everybody here, most of them, are aware of the situation which has existed in the state affairs. The state on finances, and I don't say this critically, I merely state it as a fact, have been delegates (sic) a great many duties which were arbitrary to the original concept of their office and finally the thing got off into a competitive basis where each one of them was engaged in enlarging, if he could, the operations of his particular branch of government. Well, perhaps that is a laudible ambition. Laudible or not, it was engaged in and I don't think it has been a healthy situation. <u>All that this restriction undertakes to do is to restrict as it does in the case of the treasurer which was accepted promptly by Mr. Nacy, as it does in the case of the auditor where it limits operations to the field of auditing and accounting</u>, to restrict the office of the Secretary of State to a field which is suitable to that office and prevents the development of a situation that exists at the present time. I hope the Mayer amendment will be adopted." (Emphasis added). DTr. 4214 (A-53).

Mr. Mayer in closing his speech upon his amendment limiting the duties of the Secretary of State concluded:

> "We have limited the Auditor, we have limited the Treasurer and although this [the

> Secretary of State's Office] is the most aggressive one now, as it always is, there is no reason why it shouldn't be limited just as the others have been and I say that without any feeling except earnestness, without any feeling but a sincere belief that the people of Missouri expect us to limit these departments to where we will have one Governor and not five." DTr. 4221 (A-54).

Mr. Mayer's amendment was adopted. DTr. 4222 (A-55).

It is clear from all of the foregoing that there were extensive, thoughtful and careful debates relative to the limitation of the duties of the State Treasurer, the Secretary of State and the State Auditor.[8] The debates reflect a unique combination of governmental and political history, theory, experience, practicality and the law coming together. On the side of political experience and practicality were former Governor Guy Park, former State Treasurer and statewide political figure Richard Nacy, Senator Allen McReynolds and Marshall E. Ford (Chairman of the Convention Committee on the Executive Department who had served as a State Senator). On the side of history and theory were Dr. Lewis E. Meador (Professor of Economics and Political Science at Drury College), Dr. Franc L. McCluer (Chairman of the Convention Committee on Finance and President of Westminster College), Dr. William Bradshaw (Dean of the School of Business and Public Administration at the University of

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8 Not all the debates relative to limiting the duties of these offices have been discussed in the Brief, nor does the Appendix contain the transcript of all of the Debates on the subject. For example, Dr. William Bradshaw, Professor and later Dean of the School of Business and Public Administration at the University of Missouri, Columbia, spoke with respect to the duties of the State Auditor. DTr. 4222 (A-55).

Missouri, Columbia) and Professor R. F. Wood (Professor of History and Political Science at what is now Central Missouri State University). Those on the law side included Clem F. Storckman who would later become a Judge of this Court. The limitation of duties provisions with respect to the offices of State Treasurer, Secretary of State and State Auditor were not accidental, but came as a result of a broad consensus that the previous practice of duties being added to these offices by legislative action should be strictly limited for the reasons reflected in the debates.

The reasons for limiting the duties of the State Treasurer, the State Auditor and the Secretary of State are as valid now as they were in 1944 – perhaps even more so now because they do not have the "bully pulpit" of the Governor. There is the perceived need by many other elected officials to publicize the "performance" of their "duties" through media staff and internet websites to get a favorable "sound bite", editorial or news story to promote their political future.

The original concept of the "File 16" proposed Article which was reported to the Convention floor by the Convention Committee on the Executive Department did not provide for a State Treasurer – rather it provided for a Department of Finance. It also provided for an appointed Secretary of State. This was because of the desire to enhance the powers of the Governor under a cabinet system within the Executive Department. It was the clear sentiment of the Convention, both in the debates and in the actions taken, that the Legislature had been too prone to place duties with elected state officials other than the Governor, with the result that gubernatorial authority had been greatly weakened. In the process, the lesser statewide elected officials had more patronage, extended patronage favors to the members of the legislatures, and used their expanded "duties" to get their names before the public so they could run for higher office. As a result, government operations had become more costly for the taxpayers.

There was resistance, however, to the idea that there should no longer be an elected State Treasurer or an elected Secretary of State. A compromise was then struck by providing that the State Treasurer, the Secretary of State and the State Auditor would continue to be elected. As a part of that overall compromise, the duties that could be assigned to the State Treasurer, Secretary of State and the State Auditor were spelled out in the constitutional provisions formulated by the Convention and prohibitions were written into what have become Sections 13, 14 and 15 of Article IV strictly prohibiting the imposition of any additional duties upon the State Treasurer, the Secretary of State and the State Auditor. As a result, some duties which those officials had been exercising could no longer be legally exercised after the adoption of the 1945 Constitution.

Duties of the State Treasurer After Adoption of 1945 Constitution

With respect to the office of State Treasurer, after the adoption of the 1945 Constitution:

- The duties were limited to the handling of "state funds".
- "State funds" were funds of the state which were required to be placed into the State Treasury and which could only be withdrawn pursuant to an appropriation.
- Tax collection functions were transferred to the Department of Revenue.[9]
- Article IV, § 15, limited the duties that could be imposed upon the Treasurer and therefore that could be exercised by the Treasurer to those which are related to the

9 Article IV, § 22, a new section in the 1945 Constitution, provided that the "division of collection" of the Department of Revenue "shall collect all taxes, licenses and fees payable to the state, except that county and township collectors shall collect the state tax on tangible property until otherwise provided by law." (Emphasis added).

"receipt, custody and disbursement of state funds".

- The word "and", particularly in light of the Convention debates, must be given effect. Therefore, before a duty can constitutionally be imposed upon the State Treasurer, it must relate to all three activities with respect to "state funds" – (i) "receipt", (ii) "custody" and (iii) "disbursement".
- The words "state funds" must also be given effect. Therefore, before a duty can be constitutionally imposed upon the State Treasurer, it must relate to the "funds" of the "state", not to the funds of "owners" who haven't claimed the funds for a period of time nor to properties other than "funds".[10]
- The 1945 Constitution prohibited the imposition of any "collection" functions (requiring reports and taking collection actions) upon the State Treasurer, even if the "collection" functions were related to "state funds". Consequently, the State Treasurer was stripped of the tax collection functions that had previously been exercised.
- *A fortiori*, since the "collection" functions (requiring reports and collecting actions) with respect to "state funds" could not be imposed upon the State Treasurer by the 1945 Constitution, then the "collection" functions could not be imposed with respect to "funds" of someone other than the "state", i.e., funds of "owner" who has not claimed the funds for a period of time.

In Appendix C (A-7 – A-12) we have set forth the changes which have been made since 1945 in Article IV, § 15. In 1956, § 15 was amended to authorize interest to be paid on funds in

10 The Unclaimed Property Act applies by its terms to both tangible and intangible personal property.

depositories of the state which were "not needed for the payment of current operating expenses" and to invest in obligations of the United States government becoming payable "not more than one year from the date of purchase" subject to "such restrictions and requirements as may be imposed by law". Amendments were also passed in 1986 and in 1998 which authorized additional investments that could be made by the State Treasurer.

Since 1945, there has only been one amendment to Article IV, § 15 concerning the prohibition of additional duties. In 1986 a provision was added which set forth two new categories of funds in addition to "state funds" – (i) "funds received from the United States government" and (ii) "nonstate funds". See Appendix C (A-10).

The permissible duties for the State Treasurer were expanded to include "funds received from the United States government", with the "limitation" of duties language being amended as follows:

> "No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds and funds received from the United States government".

The foregoing language which is underscored was new in 1986.

A related change in § 15 effected by the 1986 amendment was as follows:

> "All revenue collected and monies received by the state which are state funds or funds received from the United States [from any source whatsoever] shall go promptly into the state treasury. . . .
>
> * * *
>
> "Immediately upon receipt of state or United States funds [thereof] the state treasurer shall deposit all moneys in the state treasury. . . ."

The foregoing language which is underscored was new in 1986, and the bracketed language was deleted by the 1986 amendment.

The changes in 1986 removed the provision providing more encompassing language relating to revenues collected and monies received by the state "from any source whatsoever" going into the state treasury over which the State Treasurer could exercise authority. This change in 1986 requires an even more restrictive reading of the limitation of duty provisions in Article IV, § 15.

The 1986 amendment also introduced the concept of "nonstate funds" in Article IV, § 15. "Nonstate funds" as defined in § 15 includes only three categories of funds – (i) taxes levied by local governments and collected by the Department of Revenue, e.g., local sales taxes; (ii) taxes levied by the state, collected by the Department of Revenue and distributed to local political subdivisions, e.g., the local portion of the state imposed motor vehicle fuel taxes; and (iii) other "monies which are hereafter designated as 'nonstate funds'" and which are "to be administered by the Department of Revenue." The 1986 amendment was proposed by the General Assembly and quite clearly was designed to remove certain "revenues" from being considered as a part of "total state revenues" so as to be subject to the limitations of the Hancock Amendment. *Buechner v. Bond*, 650 S.W.2d 611 (Mo. banc 1983), had only recently established the premise that any revenues received into the state treasury would be considered as "total state revenues" for purposes of the Hancock Amendment. The 1986 amendment adding the concept of "nonstate funds" made it clear that taxes collected by the Department of Revenue and distributed to local political subdivisions and later monies "designated as 'nonstate funds'" (presumably by a constitutional amendment, though that is not clear) and collected by the Department of Revenue would not be included within "total state revenues" for purposes of Hancock.

Inasmuch as Article X, § 17(1), defining "total state revenues" for purposes of the Hancock Amendment specifically excludes "federal funds" from being considered as being a part of "total state revenues", it was not necessary to remove "funds received from the United States government" from the custody of the State Treasurer in order to effect an exclusion of those funds from consideration in computing state revenue limitations under the Hancock Amendment. The "funds received from the United States government" provisions in the 1986 revision of Article IV, § 15, therefore mesh with the provisions of the Hancock Amendment.

The concepts of (i) "state funds" which go into the state treasury to be in the custody of the State Treasurer, (ii) "funds received from the United States government" which go into the state treasury to be in the custody of the State Treasurer, and (iii) "nonstate funds" which are collected by the Department of Revenue and continue in the custody of the Department of Revenue without going into the custody of the State Treasurer are not all encompassing of governmental monies that are received by an arm of the State let alone of monies and other property in which an "owner" third party has a "legal or equitable" interest such as those properties which are received and administered by the Unclaimed Property Act. For example, see, e.g., *State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers' College*, 264 S.W. 698 (Mo. banc 1924), holding that nonappropriated funds received by state colleges and universities are not required to be paid to the State Treasurer.

In addition, unemployment taxes collected by the Division of Employment Security of the Department of Labor and Industrial Relations (the "Division") are placed into a "clearing account" maintained by the Division in a Missouri bank and are transmitted to the U.S. Secretary of Treasury. The Division then requisitions funds from Missouri's account in the federal unemployment trust fund,

those funds are then placed into the benefits account of the Division in a Missouri bank, and the Division cuts benefit checks on that account to pay unemployment benefits to individuals who are out of work. The unemployment taxes and the funds from which unemployment benefits are paid never go through the State Treasury or the Department of Revenue. See Sections 288.290 through 288.330, RSMo, and *Howell v. Division of Employment Security*, 215 S.W.2d 467 (Mo. 1948), holding unemployment compensation funds to not be "revenues" of the State.

Other examples where funds do not come into the custody of the State Treasurer or flow through the Department of Revenue are monies and investments which are maintained by the Missouri State Employees Retirement System (Section 104.440, RSMo, providing for the benefits fund to be held and administered by the Board of the System); the Transportation Department Employees' and Highway Patrol Retirement System (Section 104.150, RSMo, providing for the benefits fund to be held and administered by the Board of the System); the funds of The Missouri Bar which is constituted by Rule 7 of the Supreme Court (Supreme Court Rule 7.02, providing that the Clerk of the Supreme Court is the Treasurer, and Supreme Court Rule 6.04 providing for fees to be paid to the Supreme Court Clerk); and the funds of the Missouri Finance Development Board (Section 100.260, RSMo, providing for the administration of funds by the Board).

If the State Treasurer could constitutionally exercise the collection duties and the administrative duties under the Unclaimed Property Act, it would then follow, by the mere passage of legislation, the State Treasurer could exercise collection, administrative and management duties over the funds of the state universities and colleges, the unemployment taxes and unemployment benefit monies, the funds held for the benefit of retired state employees, and/or the monies of the Missouri Finance Development Board. Just as the State Treasurer cannot constitutionally exercise collection and administration duties

with respect to state colleges and universities, unemployment taxes and benefits, state retirement systems and economic development programs, the State Treasurer cannot constitutionally exercise the collection and administrative duties with respect to the Unclaimed Property Act.

The limitation in Article IV, § 15, on the imposition of additional duties upon the State Treasurer was one of the issues considered in *Board of Public Buildings v. Crowe*, 363 S.W.2d 598 (Mo. banc 1962), which involved the issuance of revenue bonds to fund the site acquisition and construction of state buildings, with repayment to be from appropriations paying for the state use of the building. The Board of Public Buildings, not the statute, provided that the revenues in the State Treasury which were appropriated to agencies for building rental purposes would continue to be held in the custody of the State Treasurer and then paid upon the bonds. The Supreme Court rejected contentions that this holding of such funds violated the limitation of duty provisions of Article IV, § 15. The Court noted that –

> "The statutes in question do not provide that the State Treasurer shall be the custodian. . . . The law has not imposed this duty on the State Treasurer; and the prohibition runs against the legislature. There has certainly been no express violation of § 15, Art. 4. . . ." (Emphasis by the Court). 363 S.W.2d at 608.

The Court then continued:

> ". . . [T]he background of the 1945 provision lies in the prior history of a building up of the power and patronage of elected officials by giving to them new functions and duties. One purpose of the new constitution was to limit and define the scope of duties of all executive officials (see § 12, Art. 4), agencies, and departments, including elected officials. A similar prohibition was imposed as to the State Auditor (§ 13) and the

Secretary of State (§ 14). We hold, upon the interpretation stated above, that by the present proposal the essential and substantive duties of the Treasurer are not altered or extended. (Emphasis added). *Id*.

The limitation of duty provisions in Article IV, § 15, was next considered in *Blydenburg v. David*, 413 S.W.2d 284 (Mo. banc 1967), a proceeding to require the Director of Revenue to reinstate a revoked driver's license. Respondent asserted that the Director lacked authority to suspend or revoke a driver's license because the powers purported to be conferred by 564.447-564.444, RSMo were additional duties imposed upon the Director and were not permitted under Article IV, § 22. In rejecting the challenge, Judge Storckman noted that –

"The manner of expressing a constitutional intention of limiting the power of the general assembly to confer on state officers unrelated duties is demonstrated by the concluding provisions of §§ 13, 14, and 15 of Art. 4, dealing with the duties of the auditor, secretary of state and state treasurer, respectively." 413 S.W.2d at 291.

In 1970, the State Treasurer requested an Opinion from Attorney General John C. Danforth relative to a statute which authorized the Director of Revenue to collect a city sales tax, deposit the collected city sales tax funds "with the state treasurer in a special trust fund", and the State Treasurer was to then pay over the funds (less a 2% collection fee) to the city treasurer monthly. In his *Opinion No. 110* to the State Treasurer, issued January 12, 1970, Attorney General Danforth, considered the limitation of duties provisions contained in Article IV, § 15 and considered the Opinion of this Court in *Petition of the Board of Public Buildings, supra*. Attorney General Danforth concluded:

"It is our opinion that to the extent that the legislation imposes duties upon the State Treasurer to retain custody of and to disburse non-state funds, the act is

unconstitutional." (Emphasis added). Op., p. 3.

In *Director of Revenue v. State Auditor*, 511 S.W.2d 779 (Mo. 1974), this Court considered the permissible scope of the State Auditor to post-audit the Department of Revenue and determined that the State Auditor did not have the authority which he asserted. This Court, thereby, avoided a consideration of the limitation of duties in provisions of Article IV, § 13, relating to the State Auditor. The Court noted that consequently, "[a]ll such provisions are thus free of conflict and are consistent with the scheme intended by the Constitutional Convention with respect to the Office of State Auditor" (citing the 1944 Constitutional Convention debates with respect to limitation of duties). 511 S.W.2d at 784.

The Unclaimed Property Act – An Act "Relating to Economic Development"?

The State Treasurer is in a "catch 22" situation because of the 1993 statutory enactment which imposed upon the State Treasurer the collection duties and administrative duties under the Unclaimed Property Act. This statutory enactment was C.C.S.S.C.S.H.C.S.H.B. No. 566 which was enacted by the First Regular Session of the 87th General Assembly. That legislation was a "Christmas tree" bill of towering proportions. See, *Carmack v. Director, Department of Agriculture*, 945 S.W.2d 956 (Mo. banc 1997), which held that the enactment of C.C.S.S.C.S.H.C.S.H.B. No. 556 (sometimes hereinafter "House Bill No. 556") violated the "one subject" provisions of Article III, § 23, of the Missouri Constitution. House Bill No. 556 started out as an act repealing 12 sections and enacting 17 new sections "relating to economic development" and ended up with 88 sections being repealed, 102 new sections being enacted, with 179 full pages of text, and with the title continuing to describe the bill as one "relating to economic development". As originally introduced, House Bill No. 566 did not have any provisions relating to the Unclaimed Property Act. See *Carmack*, 945 S.W.2d at 958-59 for the

subjects contained in the original bill and those contained in the truly agreed and finally passed bill.

In construing the "economic development" language in the bill's title, this Court looked to the constitutional charge in Article IV, § 36(a), which requires the Department of Economic Development to "**administer all programs** provided by law relating to the promotion of the economy of the state, the economic development of the state, trade and business, and other activities and programs impacting on the economy of the state". This Court then concluded:

> "To the extent that H.B. 566 amends or adopts laws affecting programs administered by other executive departments, the bill contains more than one subject." 945 S.W.2d at 961.

Finally, this Court found that a provision of a statute in the truly agreed and finally passed version to be administered by the Department of Agriculture was unconstitutional based upon the "one subject" ground under Article III, § 23.

Under *Carmack* for a statute enacted by House Bill No. 566 to be constitutional, it had to be one that provided by its terms for the Department of Economic Development to administer the duties and activities involved in the program. The provisions of House Bill No. 566 transferring the collection and administrative duties with respect to the Unclaimed Property Act to the State Treasurer do not do so. Hence, that transfer of duties was unconstitutional and ineffectual under the holding in *Carmack*.

In addition to failing the "single subject" test in *Carmack*, the provisions of House Bill No. 566 transferring the collection and administrative duties with respect to the Unclaimed Property Act to the State Treasurer are also unconstitutional because they violate the "clear title" requirement in Article III, § 23, of the Missouri Constitution. See, *Home Builders Association of St. Louis v. State*, Case No. SC83863, 2002 WL 1051989, S.W.3d _____ (Mo. banc May 28, 2002). If "relating to

economic development" is to be interpreted to include the provisions of the Unclaimed Property Act, then the "clear title" requirement of Article III, § 23, as enunciated in *Home Builders Association* is also violated.

The transfer of the collection and administrative duties to the State Treasurer was hung on the "Christmas tree" as "Section B" with 23 new numbered sections to effect the transfer of those duties to the State Treasurer. "Section C" of the final bill was an emergency clause which declared "the immediate need to have the state treasurer's office administer the unclaimed property law of this state".

The "catch 22" situation in which the State Treasurer finds herself is that for the provisions of C.C.S.S.C.S.H.C.S.H.B. 566 to be effective with respect to the collection and administrative duties under the Unclaimed Property Act, such must under *Carmack* (i) be duties that relate to "economic development" and (ii) be duties that <u>are to be administered</u> by the Department of Economic Development. Under *Carmack* and *Home Builders Association*, the statutes were not validly adopted and were therefore ineffective to impose duties upon the State Treasurer. Therefore, because the enactment of Sections B and C of C.C.S.S.C.S.H.C.S.H.B. No. 566 violates the provisions of Article III, § 23, the State Treasurer cannot, for this additional reason, constitutionally exercise collection and administrative duties under the Unclaimed Property Act.

The "catch 22" dilemma does not, however, stop with the foregoing conclusion. The General Assembly declared in its title to C.C.S.S.C.S.H.C.S.H.B. 566 that the statutes enacted, including Sections B and C relating to the Unclaimed Property Act, were sections "relating to economic development". Consequently, because of this characterization by the General Assembly, the duties imposed upon the State Treasurer by Section B of C.C.S.S.C.S.H.C.S.H.B. No. 566 <u>cannot</u> be considered as duties "related to the receipt, custody and disbursement of state funds".

It is therefore clear, beyond cavil, that the Order and Judgment of Judge Stuckey should be affirmed because the State Treasurer cannot constitutionally administer the collection-type duties nor any other administrative duties under the Unclaimed Property Act.

II.

The trial court did not err as asserted in Appellant's Points I through X because the Cole County Circuit Court has the authority to make a disposition of the funds (including interest thereon) in this case even if *arguendo* the State Treasurer has the authority to assert claims and collect unclaimed property pursuant to the Uniform Disposition of Unclaimed Property Act.

Article V, § 1, Missouri Constitution, provides:

> "The judicial power of the state shall be vested in a supreme court, a court of appeals . . . and circuit courts."

Article V, § 14(a), Missouri Constitution, as adopted in 1976, provides:

> "The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal. Such court may issue and determine original remedial writs and shall sit at times and places within the circuit as determined by the circuit court."

The foregoing § 14(a), which became effective on January 2, 1979, expanded the Circuit Court's original jurisdiction to "all cases and matters". Prior to that date, the jurisdiction was limited to certain "cases" and did not comprehend the concept of "matters".

Consequently, the Cole County Circuit Court has jurisdiction to exercise judicial power and authority over "all cases and matters" and to issue and determine "original remedial writs" within Cole County, subject to (i) the right of appeal to the Western District of the Missouri Court of Appeals or the Missouri Supreme Court (Article V, § 3); (ii) the "general superintending authority" of the Western District of the Missouri Court of Appeals and the Missouri Supreme Court (Article V, § 4.1); (iii) the

"supervisory authority" of the Missouri Supreme Court (Article V, § 4.1); and (iv) the "administrative" authority of the Chief Justice (Article V, § 8).

The full judicial power of a circuit court is not detailed in either the Constitution, the statutes of Missouri or the Supreme Court Rules. Even before the more expansive authority granted to the circuit courts by the 1976 amendments to Article V of the Constitution, it was recognized that the circuit courts had additional inherent authority, the full extent of which has never been judicially plumbed. See, *State ex rel. Weinstein v. St. Louis County*, 451 S.W.2d 99 (Mo. banc 1970), recognizing that " . . . within the inherent power of the courts is the authority to do all things that are reasonably necessary for the administration of justice" and holding that the Juvenile Division of the St. Louis County Circuit Court had the authority to select and appoint personnel to carry out juvenile court duties. *Id*. at 101, 102. In concluding that relief should be granted, the Supreme Court also relied upon Article II, § 1, providing for the separation of powers between the three departments of government. *Id*.

The power and authority to hold or make a disposition of the funds which are in question in this case resides in the regular Judge of the Cole County Circuit Court having jurisdiction over this case or matter – not with the State Treasurer or with the Attorney General. Just as this Court in *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228 (Mo. banc 1997), and *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (Mo. banc 1997), held that the Legislative Department could not invade or impinge upon the authority or powers of the Executive Department, so here the State Treasurer as a part of the Executive Department may not invade or impinge upon the judicial power and authority of the Cole County Circuit Court as a part of the Judicial Department. In *State Auditor*, this Court stated:

"The constitutional demand that the powers of the departments of government remain

separate rests on history's bitter assurance that persons or groups of persons are not to be trusted with unbridled power. For this reason, the separation of the powers of government into three distinct departments is, as oft stated, 'vital to our form of government.' *State on Information of Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. banc), *cert. denied*, 400 U.S. 991, 91 S.Ct. 452, 27 L.Ed.2d 439 (1971), because it prevents the abuses of power that would surely flow if power accumulated in one department. *See State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 73-74 (Mo. banc 1982) (separation of powers 'prevent[s] the abuses that can flow from centralization of power')." 956 S.W.2d at 231.

In *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69 (Mo. banc 1982), this Court held it was an unconstitutional invasion by the Executive Department into the Judicial Department for the Administrative Hearing Commission to adjudicate the validity of agency rules. In reaching that conclusion the Court noted:

"In *Gershman Investment Corp. v. Danforth*, 517 S.W.2d 33, 35 (Mo. banc 1974), we noted that the attorney general, as a member of the executive branch, 'has no judicial power and may not declare the law. . . . [T]he judicial power of the state is vested in the courts designated in Mo. Const. Art. V, § 1. The courts declare the law.' *See also Lightfoot v. City of Springfield*, 361 Mo. 659, 669, 236 S.W.2d 348, 352 (1951) (Public Service Commission 'has no power to declare . . . any principle of law or equity'). . . ." 641 S.W.2d at 75.

Here, the Judicial Department has not made an adjudication of who is entitled to the funds in this

case or matter. One will search the record in vain in trying to find a determination that any particular person or entity has legal or equitable ownership in any discrete portion of the funds held in this case or matter. Had the Court made a judicial determination that John Smith had a vested right in and was entitled to $100, then if John Smith did not claim the $100 after a period of time, perhaps the $100 should be paid over to a lawful administrator of the Unclaimed Property Act. However, that situation is not here present here.

It is and remains the judicial function of the Cole County Circuit Court to determine rights in and to the funds and to make disposition of the funds. Because of Article II, § 1, the State Treasurer cannot constitutionally exercise the judicial function of determining entitlement and disposition of the funds in this case or matter.

In this case, the Missouri Supreme Court ordered that a refund of fuel adjustment surcharges should be effected because the PSC had no statutory authority to authorize the electric utilities to impose a fuel adjustment surcharge. The Supreme Court in its Opinion ordered that "restitution" be effected and authorized the trial court to make a "determination of such other matters and the making of such other orders as are necessary to and consistent with this Opinion." 585 S.W.2d at 60.

On October 19, 1979, Judge Kinder, after receiving suggestions from the PSC, Public Counsel, the electric utilities and the Intervenors, entered an Order directing the electric utilities to make refunds, to file "plans" to effect the refunds, and after a 12-month period in which refunds would be made by the electric utilities, those utilities, were directed, as follows:

> "7. Any amount of unrefunded surcharges remaining at the end of the twelve month period shall be paid into the registry of this Court." (Emphasis added). L.F. 67.

While an appeal was taken with respect to issues relating to interest to be paid in connection with the

refunds and the interest provisions were modified as a result of the Opinion of the Western District of the Missouri Court of Appeals and by subsequent Stipulations and Orders, no appeal was taken or attempted to be taken with respect to the provisions requiring the electric utilities to pay undistributed refunds into the registry of the Cole County Circuit Court. Under the provisions of paragraph 9 of the October 19, 1979, Order, Judge Kinder specifically "retain[ed] continuing jurisdiction" of issues with respect to the funds referred to in the above-quoted paragraph 7. L.F. 67. This provision was never modified.

The funds were paid into the Court registry in lump amounts by the respective utilities as more fully detailed in the Statement of Facts. There were no reports to the Court by the electric utilities of any listing of those persons who did not receive a refund, and neither the PSC nor the Public Counsel sought to require any such reports.

In subsequent proceedings, the Circuit Court, in a Memorandum and Order entered on August 2, 1983, held that the electric utilities could not recover their costs incurred in making refunds. L.F. 129. No appeal was taken or attempted to be taken from that Memorandum and Order. By paying the monies into the Court registry, the electric utilities pursuant to the Court's Order, cannot now assert any right or interest in the funds.

The record is devoid of any indication of any person having or claiming any ownership interest in the funds which are now being held by the Respondent Receiver. Those funds are subject to the control and disposition by the Cole County Circuit Court in the exercise of its equitable powers. The "case or matter" of such control and disposition of those funds is within the jurisdiction of Judge Kinder as the regular Judge having jurisdiction, and the Judgment of Judge Stuckey holding that the funds held by the Respondent Receiver are not required to be paid over to Appellant Farmer pursuant to the Unclaimed

Property Act should be affirmed.

In this case the Missouri Supreme Court in utilizing its inherent powers directed that the Circuit Court fashion an equitable remedy and authorized the Circuit Court to broadly exercise its powers. In effecting rate refunds, a court has broad authority. As indicated by the United States Supreme Court in *United States v. Morgan*, 307 U.S. 183, 193-194 (1937), where monies were held by the lower court in rate proceedings:

> "In taking the payments into custody it acted as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect." (Emphasis added).

See, *Market Street Railway Co. v. Railroad Commission*, 171 P.2d 875 (Cal. Bank 1946), quoting *Morgan* with approval and holding that where excessive cable car fares had been collected by a former owner of a cable car system in San Francisco and those excessive fares could not practically be refunded to those who had ridden the cable cars, the trial court in the rate review proceedings had the authority to make a different disposition than escheating the funds to the State of California.

The Cole County Circuit Court, as do other circuit courts, has all the powers of an English Court in Chancery. *State ex rel. South Missouri Pine Lumber Co. v. Dearing*, 79 S.W. 454, 457 (Mo. banc 1904). Furthermore, a Missouri circuit court has long been held to have the

discretionary authority to appoint a receiver.[11] See, *State ex rel. Hampe v. Ittner*, 263 S.W. 158 (Mo. 1924).

In any judicial rate refund proceeding or judicial class action proceeding, there will always be, as here, funds remaining that cannot be distributed after reasonable efforts have been exhausted. The record here reflects that reasonable efforts were made by the electrical utilities, and those efforts were monitored by the Court. Such residuary funds are regularly distributed as determined by federal and state courts in the exercise of the particular court's equitable powers and without reference to federal or state escheat or unclaimed property statutes.

In the leading case of *Van Gemert v. Boeing Company*, 739 F.2d 730 (2nd Cir. 1984), the Second Circuit decided that the trial court had the authority to determine the disposition of funds which were under the control of the Court notwithstanding the provisions of a Federal Unclaimed Property Act which required that the funds be paid to the United States Treasury after five years. These were funds that had been paid by Boeing into a class action fund and which remained undistributed. The United States Attorney and Attorney General of New York asserted that the undistributed funds had to

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11 Here, Respondent Julie Smith was appointed as a successor receiver of funds by the Circuit Court pursuant to the specific authorization contained in Supreme Court Rule 68.02. See Order Appointing Receiver, L.F. 75, 229, 342, 344. A copy of the first Order Appointing Receiver is set forth as Exhibit E to this Brief. The same provisions, except for compensation, continue to govern and to authorize Respondent Smith to act as Receiver. No appeal has been taken or attempted from any Order appointing a Receiver in this case, nor has there been any original writ proceeding challenging the Receiver's authority.

be paid over to the United States Treasury because of the specific provisions of 28 U.S.C.§§ 2041 and 2042. Section 2041 provided:

> "All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.
>
> "This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the discretion of the court."

Section 2042 provided:

> "No money deposited under section 2041 of this title shall be withdrawn except by order of court.
>
> "In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and <u>such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States</u>. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him." (Emphasis added).

The undistributed funds in *Van Gemert* had been held under the Court's control for more than five years. The District Court and the Second Circuit rejected the contentions that the "unclaimed portion of the fund" was required to go into the United States Treasury:

"We hold that § 2041 does not limit the discretion of the district court to control the unclaimed portion of a class action judgment fund. Whether the money has been paid into court or whether an alternative method of administering payment is used, the money held is within the court's jurisdiction and subject to the court's order. Establishing a bank account to collect funds does not strip a court of authority to dispose of the unclaimed portion of the fund in a manner it deems wise and prudent. Sections 2041 and 2042 will control when a court so orders or when the court fails to make any disposition of this type of fund. The statutes referred to do not control when a court fashions a plan for distributing unclaimed funds. In short, we refuse to put the legal shackles of §§ 2041 and 2042 on the hands of a court which strives to do equity." (Emphasis added). 739 F.2d at 735-736.

Section 447.532, RSMo, of Missouri's version of the Unclaimed Property Act, which relates to funds held by a court is not as stringent as the provisions of 28 U.S.C. §§ 2041 and 2042 in requiring funds to be turned over to the State Treasurer. Under Section 447.532, RSMo, funds "held for the owner by any court" which have "remained unclaimed by the owner for more than seven years or five years as provided in section 447.536" are presumed abandoned. Consequently, for Section 447.532, RSMo, to have any application, the threshold question is whether or not the funds are "held for the owner". The undistributed funds in this case were simply ordered to be paid into the registry of the Court. No appeal was taken from that part of the Court's Order of October 16, 1979. That Order did not create any vested right for anyone to be considered to be an "owner". Furthermore, even if, *arguendo*, it is assumed that there is an "owner", the Missouri statute only raises a "presumption" by the passage of time that the "owner" has "abandoned" the property.

Federal courts have repeatedly ordered that undistributed funds from class actions or rate litigation can be used for purposes other than being paid into the United States Treasury, even though 28 U.S.C. §§ 2041 and 2042 have been on the books for many years. See, e.g., *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703 (8th Cir. 1997) (class action employment discrimination case, undistributed funds used for college scholarships for high school students); *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 84 F.3d 451 (D.C. Cir. 1996) (restitution ordered in transit rate case, various options considered, general escheat of the funds rejected, funds ordered transferred to public authority for specified purposes); *Houck v. Folding Carton Administration Committee*, 881 F.2d 494 (7th Cir. 1989) (antitrust class action, Court of Appeals suggests as an example that the undistributed funds be paid over to the Federal Judicial Center Foundation), *on remand sub. nom.*, *In Re Folding Carton Antitrust Litigation*, No. MDL 250, 1991 WL 32857 (N.D. Ill. March 6, 1991) (undistributed funds ordered to be used to fund National Public Interest Law Fellowship Program); *Jones v. National Distillers*, 56 F. Supp. 2d 355 (S.D. N.Y. 1999) (unclaimed securities fraud class action settlement funds ordered distributed to the Legal Aid Society Civil Division, Court specifically rejects payment of the funds to the United States Treasury pursuant to 28 U.S.C. §§ 2041 and 2042); *Northern Natural Gas Co. v. Federal Power Commission*, 225 F.2d 886 (8th Cir. 1954) (undistributed funds in rate litigation ordered distributed to certain municipalities); and *In Re Wells Fargo Securities Litigation*, 991 F. Supp. 1193 (N.D. Cal. 1998) (residue of class action funds distributed to law school clearinghouse that distributed information on pending securities class actions via the Internet).

Other jurisdictions have also recognized that undistributed funds arising from class actions or

rate cases do not have to go to the state pursuant to unclaimed property or escheat laws. See, e.g., *State v. Levi Strauss & Co.*, 715 P.2d 564, 572-73 (Cal. Bank 1986) (Court discusses various options a trial court has in distributing unclaimed class funds, holds that a "general escheat" to the state should only be used "as a last resort for where a more precise remedy cannot be found"; and *In Re Miamisburg Train Derailment Litigation*, 635 N.E.2d 46 (Ohio App. 1993) (affirms order distributing residue of settlement funds, *Van Gemert* Opinion of the Second Circuit quoted with approval and followed).

See also, *Friar v. Vanguard Holding Corporation*, 509 N.Y.S.2d 374 (N.Y. App. Div. 1986), which considered the disposition of undistributed class action funds. The defendant mortgage lender (who had collected mortgage recording taxes from the borrowers in violation of a law providing that the taxes would be paid by the lender) sought to recover the undistributed funds. The Court cited the *Van Gemert* case and stated that:

> ". . . the application of abandoned property statutes to unclaimed class action funds is not required. . . ." 509 N.Y.S.2d at 376.

The Court then proceeded to affirm a decision of the trial court that had decided that the funds should not revert to the defendant and therefore held that under the circumstances "we cannot say that it was an abuse of discretion to dispose of the unclaimed funds in accordance with the scheme created by the Abandoned Property Law".

And see, Kevin M. Forde, "*What Can a Court Do With Leftover Class Action Funds? Almost Anything!*", 35 Judges' Journal 19 (Summer 1996, American Bar Association), which discusses the broad authority of trial courts over undistributed funds and concludes that unclaimed property and escheat laws do not preclude a court in the exercise of its equitable powers from providing

for a different disposition. A copy of the Forde article is attached as Appendix B to Respondent Healey's Brief in SC84211, and is incorporated here by reference.

It is noted that if the Judgment of Judge Stuckey is affirmed, Judge Kinder can enter an order granting Receiver's motion for a hearing to consider and determine a disposition of the funds and directing broad public notice to be given of the hearing so that suggestions can be received or presented relative to a disposition of the funds. L.F. 777.

For the reasons set forth under this Point II, the Judgment entered by Judge Stuckey should be affirmed.

III.

The trial court did not err as asserted in Appellant's Points I through X because the Appellant State Treasurer is not in a position to make any claim to the funds in this case pursuant to the Uniform Disposition of Unclaimed Property Act.

Additional grounds exist from those discussed under the foregoing Points I and II for the State Treasurer not being in a position to assert claims with respect to the funds in this case under the Unclaimed Property Act.

Assuming, *arguendo*, that the State Treasurer has authority to exercise the collection functions under the Unclaimed Property Act, a jurisdictional prerequisite for property to be subject to that act is there must be "property held for the owner by any court." (Emphasis added). Section 447.532.1, RSMo. A second jurisdictional prerequisite is that the person for whom the property is being held is in fact an "owner" within the meaning of the Act. Section 447.503(7), RSMo, defines an "owner" as being "any person having a legal or equitable interest in property subject" to the Act. (Emphasis

added). As hereinabove discussed, once the funds were paid into the registry of the Court by the electric utilities, no person or entity had any vested rights as an "owner" of a "legal or equitable interest" in any of the funds. While a claim might be made against the funds by a person or entity who could demonstrate that he, she or it had paid the fuel adjustment surcharge in a specific amount and had not received a refund for that amount, all claimants who have made such a claim have, however, been paid. Consequently, because the record here does not reflect that there are any specific "owners" who have a "legal or an equitable" interest in the funds, the jurisdictional prerequisites for the Unclaimed Property Act to be applicable do not exist.

Yet another reason exists as to why the Unclaimed Property Act is not here applicable. The Unclaimed Property Act did not become effective in Missouri until in 1984. Therefore, the funds in this case in any event do not become subject to the provisions of the Unclaimed Property Act. See, *Citronelle-Mobile Gathering, Inc. v. Boswell*, 341 So.2d 933 (Ala. 1977), holding the Uniform Disposition of Unclaimed Property Act to be prospective and not retroactive; *Douglas Aircraft Co. v. Cranston*, 374 P.2d 819 (Cal. 1962) (per Traynor, J.), holding that the Uniform Disposition of Unclaimed Property Act did not apply with respect to funds for which no claim could have been made when the Act was adopted; and *Country Mutual Insurance Co. v. Knight*, 240 N.E.2d 612 (Ill. 1968), which reaches the same conclusion as *Douglas Aircraft* with respect to the Uniform Disposition of Unclaimed Property Act being prospective.

Furthermore, inasmuch as the funds are held by the Cole County Circuit Court in the exercise of its equitable powers, the doctrine of laches and the principle of estoppel are applicable. There has come to be a reliance upon the interest from those funds by Cole County. In *State ex rel. Eagleton v. Champ*, 393 S.W.2d 516 (Mo. banc 1965), the Attorney General took no action against the Village

of Champ and its Trustees from the date of its incorporation on January 14, 1959, until the quo warranto action was filed on September 4, 1962 – an elapsed time of approximately three years and eight months. In *Champ*, this Court found that the Attorney General's action was barred by laches as much time, effort and money expended by city officials would have been wasted.

Here, the State Treasurer and her predecessor administrators of the Unclaimed Property Act took no action with respect to the funds in this case from August 13, 1984, when the Unclaimed Property Act became effective in Missouri until in the summer of 2001 – almost 17 years. The State Treasurer is therefore by laches and estoppel barred from asserting any claims with respect to the funds in this case under the Unclaimed Property Act.

For the further reasons set forth under this Point III, the Order and Judgment of Judge Stuckey should be affirmed.

IV.

The trial court did not err as asserted in Appellant's Point III inasmuch as interest upon the funds in this case may be used and disbursed as provided in the Orders Appointing Receiver and in Section 483.310.2, RSMo.

The simple response to the Appellant's assertions with respect to the matter of interest on the funds in this case is that the Orders Appointing Receiver make specific provision with respect to the interest income upon the funds in this case and how such interest is to be distributed. See, initial Order Appointing Receiver at L.F. 78 and in Appendix E to this Brief:

"6. That all investments shall continue to be made in the name of the Court, but that interest received from such investments shall be paid over directly to the receiver who

shall keep a record with respect thereto. From such interest which is received the receiver shall first pay therefrom the lawful expenses of the administration of the funds as may from time to time be authorized to be paid or be allowed by the Court, there shall next be paid therefrom such amounts as may be lawfully requisitioned by the Circuit Clerk of Cole County for the purposes specified and allowed for such Clerk in subsection 2 of Section 483.310, RSMo, and the remaining balance shall be paid into the general revenue fund of Cole County as provided in subsection 2 of Section 483.310, RSMo."

See also the same provision in the second Order Appointing Receiver (L.F. 232-233) and the subsequent order of appointment incorporating these provisions by reference (L.F. 342).

There has been no appeal taken or attempted to be taken from those Orders. There has been no motion filed by any person to modify the above-quoted provisions of paragraph 6. The Appellant State Treasurer, who has declined to assert her claims in this case, cannot upon this appeal collaterally attack the provisions of the Orders Appointing Receiver. Any action to modify the provisions of the Orders Appointing Receiver must be done by a proper party in the proceedings below who has standing to seek a modification of those Orders.

Respondent Smith incorporates by reference the authorities and arguments set forth under Point III of Brief of Respondent Cole County and under Point III of the Brief of Respondent Cole County Circuit Clerk Deborah Cheshire filed herein.

For the additional reasons hereinabove set forth or incorporated under this Point by reference, the Judgment of Judge Stuckey should be affirmed.

V.

The trial court did not err as asserted in Appellant's Point IV inasmuch as the Motion for Judgment on the Pleadings incorporated other pleadings and motions, that Motion could be considered as a motion to dismiss and the trial court could properly conclude that the State Treasurer could not assert a claim to the funds or had not properly asserted a claim to the funds.

The Appellant State Treasurer in her extensive pleading denominated "State Treasurer Nancy Farmer's Motion to Vacate and Suggestions in Support Thereof" (L.F. 405 through 442) raised various purported jurisdictional issues, sought to avoid becoming a party herein, sought to avoid asserting claims in this case in which the funds are held, and sought to disqualify Judge Kinder (while attempting to become a party).

The record in the underlying case is voluminous. Appellant has filed a Legal File consisting of 601 pages. Respondent Smith has filed a Supplemental Legal File consisting of 363 more pages. Not all of the Court file has been reproduced in the Legal Files.

Since Appellant resists being a party to the Ancillary Adversary Proceedings in this case, Appellant cannot be heard to complaint about any procedural issues in this case.

Furthermore, the Receiver's Motion for Judgment on the Pleadings in this case (L.F. 468, including the Amended Motions by this Respondent and other Receivers and Trustee Respondents filed in the trial court in SC82438 [at L.F. 50-64 in SC82438] which were incorporated by reference into this case) must be considered in connection with the State Treasurer Nancy Farmer's Objections to Various Motions (L.F. 478), the State Treasurer Nancy Farmer's Suggestions in Opposition to Various

Motions (L.F. 486 through L.F. 584, including extensive records in the underlying case which the State Treasurer references), the July 20, 2001, Motion of the Receiver requesting a separate trial denominated as ancillary adversary proceedings (L.F. 382), the Court's July 20, 2001, Order directing a separate trial on the ancillary adversary proceeding questions (L.F. 399), the docket sheets [and hence the Pleadings and Orders reflected thereon] in this and in the underlying cases in SC82411, SC82412 and SC82413. See, *Angelo v. City of Hazelwood*, 810 S.W.2d 706 (Mo. App. E.D. 1991), affirming a judgment entered upon a motion for judgment on the pleadings:

> "'The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss, i.e., assuming the facts pleaded by the opposite party to be true, these facts are nevertheless insufficient as a matter of law.' . . . A motion for judgment on the pleadings should not be sustained where a material issue of fact exists. *Madison Block*, 620 S.W.2d at 345. A motion for judgment on the pleadings should be sustained if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law." 810 S.W.2d at 707.

Here, assuming as true the material facts put in issue by the Appellant State Treasurer and assuming the constitutional authority and the purported statutory authority of the State Treasurer, the Appellant State Treasurer does not have any interest in the funds in this case nor is she entitled to any relief.

This is not a case where there is a single pleading which is being challenged by a motion for judgment on the pleadings as was the case in *Bramon v. U-Haul, Inc.*, 945 S.W.2d 676 (Mo. App. E.D. 1997), cited by the Appellant. It should be noted that in *Bramon* the Court held it was proper for the trial court to nevertheless consider the motion for judgment on the pleadings as a motion to

dismiss so as to traverse the pleadings where there was no material fact at issue.

Appellant's Point V need not be reached, but if it is reached, it should be denied.

VI.

The trial court did not err as asserted in Appellant's Points V, VI, VII, VIII, IX and X inasmuch as the Cole County Circuit Court had and continues to have jurisdiction over the funds in this case, any claim to the funds held in this case must be asserted in this case, the Circuit Court has the authority to require persons claiming funds held in this case to appear and show their entitlement to the funds, the Appellant was properly served with the July 20, 2001, Order and the Motion and Petition, and the Appellant is not entitled to any order of disqualification.

As we have noted in Point II, the Cole County Circuit Court had and continues to have jurisdiction over the funds held in this case or matter. The *res* is held in this case by the Circuit Court.

Because the funds in this case are held by the Receiver under the control of the Cole County Circuit Court, we start with the premise that the Judge assigned to this case has the exclusive jurisdiction to determine all legal issues relative to the disposition of such funds, subject only to (i) the appellate jurisdiction of the Western District of the Missouri Court of Appeals and/or the Missouri Supreme Court, (ii) the superintending jurisdiction of the Western District of the Missouri Court of Appeals and the Missouri Supreme Court, and (iii) the supervisory or administrative jurisdiction of the Missouri Supreme Court and the Chief Justice. No court of coordinate jurisdiction, i.e., another Missouri Circuit Court, nor the State Treasurer, the Attorney General of Missouri or any other official of the Executive

Department or the Legislative Department of the State of Missouri, has the authority to determine such legal issues.

As stated by the Missouri Supreme Court in *State ex rel. Sullivan v. Reynolds*, 107 S.W. 487 (Mo. banc 1907), when the Court prohibited the St. Louis City Circuit Court from interfering with assets which were in the custody of a receiver appointed by the St. Louis County Circuit Court:

> "The authorities heretofore cited, both state and federal, establish beyond question that courts of co-ordinate authority have no power or jurisdiction to encroach upon or intermeddle with the power and authority of each other after one has taken jurisdiction of the case. Whenever a court of competent authority takes jurisdiction of a case, that fact must of necessity, and in the very nature of things, exclude the jurisdiction of all other courts over the same case, as well as all the incidents thereto, excepting only such courts as are given appellate and supervising control over them. The reason for this rule seems to be that, when such a court takes jurisdiction of a particular case, with all the incidents thereto, there remains nothing of it to which the jurisdiction of another court can attach – no case, no parties, no subject-matter is left exposed to the authority of the latter court." *Id*. at 493. (Emphasis added).

The proper procedure and forum for determinations with respect to the funds in this case is by first filing a proper pleading in this case by a person or entity having standing to do so with that person's entitlement being determined in this case or in ancillary adversary proceedings connected to this case – rather than (i) first filing an original action in the Western District of the Missouri Court of Appeals, (ii) first initiating an action in a court "of co-ordinate authority . . . [having] no power of jurisdiction to encroach upon or intermeddle with the power and authority" of the Cole County Circuit Court in this

case [*State ex rel. Sullivan v. Reynolds*, 107 S.W. at 493; Emphasis added], or (iii) by subsequently filing a separate action in the Cole County Circuit Court. Neither the State Treasurer nor the Attorney General followed proper procedures by filing motions in this case to intervene to assert a claim.

The situation which has arisen here with attempts to assert pressures and make threats against the Respondent Receiver and Judge Kinder to subject them to personal liability and penalties without first filing appropriate motions in this case seeking relief are similar to those referred to in *Neun v. Blackstone Building & Loan Association*, 50 S.W.436 (Mo. 1899), where the Court held that threats to try to get control of assets in the hands of a court-appointed receiver through action in another court were improper:

> "In other words, the plaintiffs told the court that they were about to institute a suit to recover the assets that were in the custody of the court for the purpose of administering them themselves, instead of having the court administer them. The blunt terms employed in the application were dangerously near the border line of contempt of court, and the plaintiffs are fortunate that the only result was a denial of their application." 50 S.W. at 438.

The demands to the Respondent Receiver to turn over the funds to the State Treasurer are even more flagrant when one considers that the Receiver would be violating the Circuit Court's Orders Appointing Receiver if she did so.

By letter of July 16, 2001 (L.F. 397), the Attorney General, acting as counsel for the State Treasurer, demanded that the Receiver turn over all of the funds to the State Treasurer by 5:00 p.m. on July 20, 2001 (notwithstanding the prohibition against doing so in the Orders Appointing Receiver and

the then outstanding Osage County Circuit Court Order enjoining Judge Kinder from directing any transfer), or face a fine of up to $10,000 per day.

The Receiver proceeded in a prudent manner by promptly filing her Motion and Petition (L.F. 382) requesting the initiation of Ancillary Adversary Proceedings. On July 20, 2001, Judge Kinder considered the Motion and Petition and issued his Order which ordered a separate trial with respect to the Ancillary Adversary Proceedings Questions, and which directed service of the Order and the Receiver's Motion upon Nancy Farmer as State Treasurer, upon Cole County and upon Debbie Cheshire as Cole County Circuit Clerk. L.F. 399-402. The Order directed the State Treasurer, Cole County, and the Cole County Circuit Clerk to assert any claims they might have to the funds in this case or the interest thereon. L.F. 400-401. Judge Kinder then recused himself from the Ancillary Adversary Proceedings but retained jurisdiction of all other matters with respect to the case. L.F. 401. Personal service of the Order and the Motion and Petition were effected upon the Appellant State Treasurer upon July 23, 2001. See Sheriff's Return of Service at L.F. 403. The Supreme Court then assigned Judge Stuckey to hear and determine the Ancillary Adversary Proceedings Questions. L.F. 404.

Under Supreme Court Rule 66.02, the Cole County Circuit Court had the authority to order a separate trial with respect to the Ancillary Adversary Proceedings Questions. It properly did so by its Order of July 20, 2001.

Under Supreme Court Rule 52.07 and the Court's equitable and inherent powers, the Court had the authority to require the State Treasurer to assert any claims that she might have to the funds in question and the interest thereon in the Ancillary Adversary Proceedings.

Under the holding in *Crist v. ISC Financial Corp.*, 752 S.W.2d 489, 492 (Mo. App. W.D. 1988), "[t]here can be no resolution of the underlying competing claims in this case without the joinder

as parties of Cole County, the Circuit Court of Cole County and the trustee [here Receiver]." Consequently, the continued participation of the Receiver as a party, as well as the joinder of Cole County and the Cole County Circuit Clerk, was required in the Ancillary Adversary Proceedings in order that a determination could be made as to whether the funds held in this case were required to be turned over to the State Treasurer by reason of the provisions of the Unclaimed Property Act.

The Receiver in her Motion and Petition demonstrated to Judge Kinder the two requisites for the entry of an order of interpleader. First, there were competing claims – the demand of the State Treasurer for the funds and the Cole County Circuit Court's Order precluding a delivery of those funds (as well as the Osage County Circuit Court's Order enjoining Judge Kinder from authorizing or effecting any transfer of the funds). Second, the Receiver could be subjected to a double liability – liability to the State Treasurer and liability for dispersing the funds contrary to court order. See, *Brady v. Ansehl*, 787 S.W.2d 823 (Mo. App. E.D. 1990), setting forth these two requirements and affirming an order of interpleader. Whether an interpleading party takes a position with respect to interests in the funds is not a factor. *Roosevelt Federal Savings & Loan Association. v. First National Bank of Clayton*, 614 S.W.2d 289, 291 (Mo. App. E.D. 1981).

Here, the Order gave the State Treasurer notice of the Ancillary Adversary Proceedings, and directed the State Treasurer to assert any claim she had with respect to the funds within thirty days. The Order constituted "summons or other process" (emphasis added) within the meaning of Supreme Court Rule 54.01. If it is treated as "other process", the provisions of Supreme Court Rule 54.02 relative to a summons are not applicable. If a "summons" is required to be served upon the State Treasurer pursuant to Supreme Court Rule 54.02, the Order constituted a "summons" within that rule inasmuch as the Order advised any claims must be asserted within thirty days after service. The Order and the

Motion and Petition were personally served upon the State Treasurer. See, L.F. 403. These actions were sufficient to satisfy any due process concerns and the requirements of any Supreme Court Rule for the State Treasurer to be joined for purposes of asserting any claim she might have to the funds in this case under the Unclaimed Property Act.

There are many types of proceedings which may be ancillary to the original proceedings in a case. Garnishment proceedings are ancillary to the main proceedings. Any time a court has funds under its supervision, be they held by a receiver or court clerk, there may well be ancillary proceedings involving parties in addition to the original plaintiff(s) and defendant(s). Similarly, a receiver may initiate proceedings within a receivership case which are ancillary to the receivership to collect funds or to determine interests in funds.

In *American Refractories Co. v. Combustion Controls*, 70 S.W.3d 660 (Mo. App. S.D. 2002), for example, the Court characterized an attachment proceeding as an "ancillary proceeding" and indicated that it must be brought only as a proceeding ancillary to the main case and not as an independent action. See also *State ex rel. Fischer v. Public Service Commission*, 670 S.W.2d 24 (Mo. App. W.D. 1984), which applied the concept of an "ancillary proceeding" to an interim rate increase proceeding in relation to the permanent rate increase proceeding. In *State on Inf. of Attorney General v. Arkansas Lumber Co.*, 190 S.W.894 (Mo. banc 1916), a garnishment or discovery of assets proceeding was commenced out of an original action in the Supreme Court, and it was contended that such a discovery of assets proceeding could only be held in a circuit court and before a jury. The Court rejected those contentions and concluded that specific authorization for the discovery of assets proceeding was not needed:

"Both of those propositions might well be conceded, but it would not, from that fact,

necessarily follow that this court has no jurisdiction to hear this ancillary proceeding; but, upon the contrary, the law seems to be well settled that whenever a court has jurisdiction of the main subject-matter of a cause, that fact gives it jurisdiction over all of the incidents thereof." 190 S.W. at 895.

See also, *Ainsworth v. Old Security Life Insurance Co*., 685 S.W.2d 583, 586 (Mo. App. W.D. 1985), holding that a receivership involves many business-type proceedings which are not really litigation matters, that some proceedings are "adversary civil proceedings", and who is properly a party in a particular "adversary" proceedings is dependent upon the issues involved. See, e.g., cases involving various ancillary and adversary matters pursued in underlying cases – *In re Transit Casualty Co. in Receivership, Pulitzer Publishing Co. v. Transit Casualty Co. in Receivership*, 43 S.W.3d 293 (Mo. banc 2001) (adversary proceedings in the case placing company in receivership between Pulitzer and the receivership re release of information; adversary proceedings heard by a specially assigned Judge); *Clay v. Eagle Reciprocal Exchange*, 368 S.W.2d 344 (Mo. 1963) (adversary proceeding by receiver in an insurance company receivership case claiming assets from an insurance agent; receiver's motion for show cause order in case placing insurance company in receivership sustained and show cause order issued, agent filed response to show cause order; issues between receiver and agent joined and tried; judgment for receiver affirmed except for contempt provisions); and *In Re Transit Casualty Co. in Receivership v. William Blair Realty Partners, II, v. Transit Casualty Co. in Receivership*, 900 S.W.2d 671 (Mo. App. W.D. 1995) (claim against Receivership determined in ancillary proceedings in case placing insurance company into receivership).

Judge Kinder's July 20, 2001, Order was in all other respects proper. As hereinabove

demonstrated, since the funds are held by the Receiver in this case or matter, it is incumbent upon the State Treasurer to pursue any claims with respect to the funds in this case or matter. Determining who is entitled to the funds in this case or matter is a judicial determination which has not yet been made. The State Treasurer, assuming, *arguendo*, she can constitutionally exercise the collection functions under the Unclaimed Property Act, cannot make such a judicial determination. It is therefore the State Treasurer who improperly attempts to exercise judicial powers in violation of Article II, § 1, not the Cole County Circuit Court as the State Treasurer asserts in her Point VI.

The Appellant and her predecessor Treasurer and Directors of the Department of Economic Development had from August of 1984 until July of 2001 to have filed a motion to intervene coupled with a motion asserting a right to the funds in this case and did not do so.

In her Point IV, the State Treasurer challenges Judge Kinder's July 20, 2001, Order "because Judge Kinder was disqualified by Supreme Court Rule 51.07 from issuing the July 20 order in that he had a substantial interest in the outcome and a close relationship with the movant." This assertion is specious at best.

While Judge Kinder was not required under Supreme Court Rule 2, Canon 3, to recuse himself from considering the Ancillary Adversary Proceedings Questions, he did so and the merits of those issues were determined by Judge Stuckey.

Judge Kinder had no financial interest in the outcome of this litigation. His salary and benefits are paid by the State, not by Cole County. He has judicial immunity from any monetary claims the State Treasurer or the Attorney General may assert. The Receiver and the Cole County Circuit Clerk are not related to Judge Kinder.

The record here reflects that Judge Kinder had no animosity against State Treasurer Farmer.

See, the Order of May 3, 2001, which affirmatively reflects the contrary and which recites the direction of settlement discussions following an overture made by Ms. Farmer. L.F. 773.

On July 20, 2001, when the Ancillary Adversary Proceedings were commenced, the only related litigation pending involving Judge Kinder was the quo warranto action brought by the Attorney General, not by the Appellant State Treasurer, in the Osage County Circuit Court. That suit did not include the Receivers and Trustee in SC84210, SC84211, SC84212 or SC84213, Cole County or the Cole County Circuit Clerk, all of whom were necessary or indispensable parties in any litigation involving a determination of the entitlement of the State Treasurer to the funds in this case or matter by reason of the Unclaimed Property Act. The Osage County quo warranto action was fatally flawed for the reasons set forth by Circuit Judge Gael Wood in his judgment of dismissal in that action. See Legal File in SC84301. It was and remains fatally flawed because neither the Osage County Circuit Court nor the Eastern District of the Missouri Court of Appeals has "superintending jurisdiction" under Article V, § 4, over the Judges of the Cole County Circuit Court.

The State Treasurer's action against Judges Kinder and Brown, the Receivers and the Trustee was not commenced until July 25, 2001, five days after the Receiver's Motion and Petition was filed and Judge Kinder's Order to commence the Ancillary Adversary Proceedings in this case or matter and in the three companion cases was entered.[12]

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12 Because the Ancillary Adversary Proceedings in the four cases were commenced before the State Treasurer's action on July 25, 2001, the proper jurisdiction of the issues with respect to the State Treasurer's right to any of the funds held by the Receivers and Trustee should be determined in the four Ancillary Adversary Proceedings. See, *State ex rel. Buchanan v. Jensen*, 379 S.W.2d 529, 531

We do not read Appellant's Brief, however, as asserting that because the Attorney General had filed the quo warranto action in Osage County and had filed the unsuccessful prohibition and mandamus action in the Western District of the Missouri Court of Appeals and because the State Treasurer subsequently filed the action in Cole County, such disqualified Judge Kinder. But if that be the case, the only thing any litigant, e.g., a prison inmate represented by a jailhouse lawyer, would have to do to secure a judge's disqualification would be to file a lawsuit against the judge. Such a conclusion would certainly be "fodder" for a Clovis Carl Green or a Melvin Leroy Tyler. Here, it was not necessary for Judge Kinder to disqualify himself in the separate Ancillary Adversary Proceedings, let alone disqualify himself from entering the Order of July 20, 2001. The fact that he did so cannot beheld against him. That Order was procedural and made no determination with respect to the merits of any claim by the Appellant State Treasurer.

A "judge should never disqualify himself or herself unnecessarily". *Robin Farms, Inc. v. Bartholomew*, 989 S.W.2d 238, 250 (Mo. App. W.D. 1999). "The mere fact that rulings are made against a party does not show bias or prejudice on the part of the judge. *Bruflat v. Mister Guy, Inc.*, 933 S.W.2d 829, 836 (Mo. App. 1996). This is so because any alleged bias or prejudice on the part of the judge, to be disqualifying must stem from an extrajudicial source." 989 S.W.2d at 247 (Emphasis added). Furthermore, even in the case of statements made in an "extrajudicial" context, which are not here alleged, there must be some relationship between the statement made and the Judge's conduct in the proceeding in which the disqualification issue is raised. *State v. Kinder*, 942 S.W.2d 313, 321-324 (Mo. banc 1996). Here, there is no such relationship. Appellant's Point IX is

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(Mo. banc 1964).

therefore devoid of merit.

Finally, Appellant claims that she did not receive adequate notice with respect to the hearing on the Motion for Judgment on the Pleadings on October 18, 2001. Counsel for Appellant had previously contacted Judge Stuckey and had secured that date for a hearing upon Appellant's Motion to Vacate. On October 12, the Respondent Receiver filed her Motion for Judgment on the Pleadings which traverses the pleadings herein and noticed it for hearing on the previously established date. The record does not reflect that a request was made prior to October 18 to set over all motions for hearing at a later date so that counsel for Appellant could prepare. Instead, on October 18, the date of the hearing, the State Treasurer filed her Objections (L.F. 478-485) and extensive Suggestions in Opposition to Various Motions (L.F. 486-584).

By proceeding to hear and consider the Motion for Judgment on the Pleadings on October 18, 2001, Judge Stuckey in effect shortened the five-day notice provision in Supreme Court Rule 44.01(d). Supreme Court Rule 44.01(d) specifically provides that such time may be shortened by the Court. Judge Stuckey also allowed counsel to submit any further written materials they desired to submit after the October 18 hearing date, and the record reflects that additional written submissions were presented to Judge Stuckey. See, L.F. 782-963. Since the issues to be determined were and are issues of law, counsel for the State Treasurer could have submitted further memoranda to Judge Stuckey to amplify his arguments with respect to those issues.

This is not a situation where counsel for the State Treasurer was unaware of the legal issues involved in a claim under the Unclaimed Property Act by the State Treasurer to the funds in this case. The Appendix to Appellant's Brief contains excerpts from a Report of the State Auditor issued on January 4, 2000, in which it was "recommended [that] the circuit judges review these receivership

cases and determine whether the receivership assets should be distributed to the state Unclaimed Property Section [in the State Treasurer's Office] or should be disposed of in another manner". (Emphasis added). App. 2 of Appellant's Brief. That Audit Report came to the attention of the Attorney General. The Assistant Attorney General who made the filings for the State Treasurer in the trial court, who appeared before Judge Stuckey on October 18, 2001, and who appears in this Court with respect to this appeal, also was the counsel for the Attorney General in the attempted Prohibition and Mandamus proceedings in the Western District of the Missouri Court of Appeals in April and May of 2001 (see attorney appearances re Case No. WD59910 on Case.net), was the counsel for the State Treasurer in the separate Cole County case seeking the funds in this case under the Unclaimed Property Act which had been filed on July 25, 2001 (SC84328), and was the counsel for the Attorney General in the Osage County quo warranto action involving Unclaimed Property Act issues which had been filed on June 28, 2001 (SC84301).

In *State ex rel. Gleason v. Rickhoff*, 541 S.W.2d 47, 49-50 (Mo. App. E.D. 1977), the receiver had filed a motion to sell certain assets, and only gave relators a one-day notice of the hearing on the motion. The trial court proceeded with the hearing on the motion, notwithstanding objections with respect to the notice being only one day before the hearing rather than the five days provided in Rule 44.01(d). The Court of Appeals found that it was proper for the trial court to proceed to hear and consider the motion:

> "Civil Rule 44.01(d) authorizes a court to order a period of time different from the five days required for notice of a hearing. Here, the respondent judge overruled relators' objection to each of proper notice and permitted the hearing of August 12 to proceed as scheduled. That was a specific order to shorten the time of notice 'by order of the

court.'

* * *

"The record shows relators were familiar with the receiver's challenge to their custody of company property and that they had been put on inquiry of the receiver's intention to take custody of the property in question."

See also, *Jenkins v. Jenkins*, 784 S.W.2d 640, 643-644 (Mo. App. W.D. 1990). *Orion Security, Inc. v. Board of Police Commissioners of Kansas City*, 43 S.W.3d 467 (Mo. App. W.D. 2001), is not on point. In *Orion*, no notice was given with respect to a hearing on the motion. *Id*. at 470.

Here, counsel for the State Treasurer was fully conversant with the issues presented by Respondent's motion. Counsel for the State Treasurer had noticed for hearing the Treasurer's motion which involved some of the same issues. There was no evidence to be presented at the hearing. Rather, there were oral arguments to be presented on questions of law. The State Treasurer was given the opportunity to submit additional written materials. The Respondent's Motion was served upon the Attorney General's Office on October 12 and the hearing was not until October 18. The Appellant has not shown any prejudice. Appellant's Point X must therefore be denied.

For the additional reasons hereinabove discussed under this Point VI, Appellant's Points V, VI, VII, VIII, IX and X should be denied.

CONCLUSION

For the reasons hereinabove set forth, the Order and Judgment entered by Judge Stuckey on November 27, 2001, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH RULE 84.06

The undersigned certifies:

1. That this Brief complies with Rule 84.06; and

2. That this Brief contains _____ words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.

3. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

4. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

Alex Bartlett

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of the foregoing Brief along with a double-sided, high-density IBM PC compatible disk with the text of the Brief were hand-delivered or mailed via United States Mail, postage prepaid, on June 5, 2002, to Mr. James McAdams, Office of the Missouri Attorney General, P. O. Box 899, Jefferson City, MO 65102, attorney for Appellant Nancy Farmer, to Henry T. Herschel, Blitz, Bardgett & Deutsch, L.C., 308 East High Street, Suite 301, Jefferson City, MO 65101, attorney for Respondent Cole County, and to J. Kent Lowry, Armstrong, Teasdale, LLP, 3405 West Truman Boulevard, Jefferson City, MO 65109, attorney for Respondent Debbie Cheshire.

_____

Alex Bartlett