ALL PARTIES HAVE CONSENTED TO THE FILING OF THIS BRIEF.

IN THE
SUPREME COURT OF MISSOURI
En Banc

No. SC-84212

IN RE ANCILLARY ADVERSARY PROCEEDING QUESTIONS:

NANCY FARMER, State Treasurer,

Appellant,

v.

JACKIE BLACKWELL, Receiver; COUNTY OF COLE; and the Hon. DEBORAH CHESHIRE, Circuit Clerk,

Respondents.

On Appeal From the Circuit Court of Cole County,
The Hon. Ward Stuckey, Special Judge

BRIEF OF AMICUS CURIAE MISSOURI BANKERS ASSOCIATION IN SUPPORT OF RESPONDENTS

Respectfully submitted,

WADE L. NASH
Mo. Bar No. 24423
General Counsel
Missouri Bankers Association
207 East Capitol — P.O. Box 57
Jefferson City, Missouri 65101
573-636-8151 — FAX: 573-634-8451
Attorney for Amicus Curiae

Table of Contents

Table of Authorities

Constitutional Provisions

Statutes

Rules

Cases

Other Authorities

Jurisdictional Statement

This appeal involves the construction of article IV, section 15, of the Missouri Constitution. Accordingly, this Court has jurisdiction under article V, section 3, of the Missouri Constitution.

Interest of the Amicus

Missouri Bankers Association (MBA) represents almost all of Missouri's commercial banks and savings & loan associations. MBA members include national and state-chartered banks, independent and holding company owned banks, and regional and community banks. Members of the MBA hold approximately ninety-six percent of the Missouri assets of the commercial banking industry.

Out of about 360 members of MBA, approximately 194 have contracted with the State Treasurer to serve as depositories for state public funds in 2002. These depositories are recognized in the Constitution as designated holders of public funds in article IV, section 15. MBA member institutions are otherwise chartered to accept deposits, make loans, and otherwise support the economic development of their communities and the State of Missouri generally.[1]

Bankers do not in fact take their depositors' money from the tellers, lock it up in a vault, and pay it out only when a depositor writes a check or makes a withdrawal. Banking institutions—including commercial banks, savings & loan associations, and credit unions—are able to use substantial proportions of their deposits to make loans based on "fractional reserves." Typically a well-capitalized bank has seven percent capital. Missouri statutes that regulate

---

[1] *See* Mo. Rev. Stat. §§ 362.030, 362.105 & 362.106 (2000). (Unless otherwise indicated, statutory references are to the Missouri Revised Statutes (2000).)

bank capital provide a statutory minimum and other specific requirements.[2] Deposits and funds borrowed by a bank allow it to provide additional capital to consumers and businesses in its lending area. These customers and businesses spend these funds principally in the local economy. The result of this lending and investment is a multiplier effect: the money in the community is used over and over again.

When the voters adopted article IV, section 15, as part of the Missouri Constitution in 1945, all state funds were invested in "banking institutions." Starting in 1956, and as recently as 1998, amendments to this section authorized additional investments that typically send Missouri tax money to the major capital markets of the United States. Over time the proportion of state public funds in Missouri banks has declined. Yet the banking community has had an opportunity to review such changes to the Constitution, and to be heard on the wisdom of making them, because the amendments were debated and voted on by the people. Above all, as long as executives acted within the law, and the courts enforced it as written, bankers like everyone else could conform their behavior to the requirements of the law and make decisions in reliance on it.

Separately and apart from their contracts to serve as depositories for state public funds, MBA members are subject to the "Uniform Disposition of

---

[2] *See* Mo. Rev. Stat. § 362.050. *See also* CONFERENCE OF STATE BANK SUPERVISORS, A PROFILE OF STATE CHARTERED BANKING (17th ed. 1998).

Unclaimed Property Act," Mo. Rev. Stat. §§ 447.500-.595 (UPA). The UPA requires them to pay over certain property that has been unclaimed by its owners as determined by law to the State Treasurer.

The General Assembly enacted the original statute permitting the state to claim unclaimed property in 1978; it provided for the escheat of property to the state and was administered by the Missouri Division of Finance. Escheat is the reversion of property to the state, where such property is vested in the state.[3] The General Assembly repealed this non-uniform statute in 1984, and removed the administration of unclaimed property to the State Treasurer.[4]

These unclaimed property funds are not state public funds within the meaning of Mo. Const. art. IV, § 15. The State Treasurer's authority is limited to "revenue collected and money received by the state which are state funds or funds received from the United States . . . ." Following other custodial statutes, Mo. Rev. Stat. § 447.562 provides that "[a]ny person claiming an interest in moneys or properties . . . may file a claim . . . ." Section 447.585 provides that "[a]t any time after property has been paid for or delivered to the state . . . , another state is entitled to recover the property . . . [on certain conditions]." This former statute contained no time limitation. Because the UPA is a custodial statute rather than revenue-raising statute, the unclaimed

[3] Mo. Rev. Stat. §§ 362.390-.397 (1978) (repealed).

[4] *See* MO. LAWS 1984 H.B. 1088.

property never vests in the State of Missouri but is perpetually available to be returned to the original owners.

Missouri's bankers have relied on the "hold-harmless provisions" in section 447.545 to protect their institutions when they turn funds over to the State Treasurer under the UPA.[5] This statutory protection would at least arguably depend on the State Treasurer's acting within her authority in receiving the funds from the bankers. If the constitutional authority of the State Treasurer does *not* extend to unclaimed property, what protection do banks have after they have turned over the property?

This statute and others like it have developed throughout the United States. This development has led to conflicting claims by various state legislatures. The first major decision resolving such claims was *Texas v. New Jersey*,[6] which established a set of priorities for claimant states. The Supreme Court of the United States reexamined the issue in *Delaware v. New York*.[7] Although this six-to-three decision made no changes in priorities, it clarified

---

[5] Mo. Rev. Stat. § 447.545.1 provides, in pertinent part: "Any person who pays or delivers abandoned property pursuant to sections 447.500 to 447.595 is relieved of all liability for any claim which then exists or which thereafter may arise or be made in respect to the property."

[6] 379 U.S. 674 (1965).

[7] 507 U.S. 490 (1993). *See also Pennsylvania v. New York*, 407 U.S. 206 (1972) (six to three).

how to determine the identity of the "debtor" or holder under the uniform act. One determines the "debtor" by reference to the state law that creates the property interest; the debtor will generally be an intermediary who holds property in their own name, and not the original obligor who has satisfied their obligation by transmitting payment to the intermediary. The custodial nature of such unclaimed property and the federal interest in providing for its return to its lawful owners is subject to a preemptive rule of the highest court.

While the unclaimed property issue has been pending before this Court, the State Treasurer had bills introduced in the 2002 Session of the Missouri General Assembly to give her still more unconstitutional power over public funds. One bill, H.B. 1735, would have authorized the State Treasurer both to create a "local government investment pool [for the benefit of Missouri political subdivisions] or money market mutual fund, as defined by the Securities and Exchange Commission," and to direct funds to such pools and mutual funds.[8] Both of these proposals go beyond the limitations on the State Treasurer's authority in Mo. Const. art. IV, § 15, considering that the voters refused to give the State Treasurer similar authority in Proposition 2 in 1978. Even though the proposed legislation provided that such mutual funds shall only be invested in *securities* authorized for the State Treasurer under the Constitution, the money market mutual fund provision includes authority for

[8] Introduced Bill Text, available May 20, 2002, at http://www.house.state.mo.us/bills02/biltx102/intro02/HB1735I.htm.

the State Treasurer to venture out into a new medium of investment with its own particular management and risk profiles.

Although bankers have the experience to handle this form of investment for political subdivisions more prudently than an executive department, it is difficult for anyone, regardless of skill, to compete with the government: the State of Missouri does not have nuclear weapons and the power to print money, but in virtually every other respect it is a Behemoth compared with all but the largest businesses. The State Treasurer is currently able to make decisions about letting public-fund contracts with banks in such a way as to influence the banks' conduct toward her; if the State Treasurer is allowed to go into the banking business—for example, through the "pooling" of political subdivision funds and investing them—she will greatly undermine the banks' source of lendable funds with her size and market power. Her power will approach that of a commercial bank. Missouri's bankers had thought the Missouri Constitution had resolved the specific issue by prohibiting the creation of a state bank.[9] One reason why this Court should affirm the judgment of the circuit court is to make clear that the constitutional limitations on the State Treasurer's power *mean something.*

MBA is perfectly aware that the State Treasurer is not going to take these funds home at the end of the day, any more than a bank manager takes her customers' money home at the end of the day. This is not a case about the

[9] Mo. Const. art. XI, § 13 ("No state bank shall be created . . .").

allocation of wealth, but about the rule of law—and the predictability and prosperity which flows from it. The real issue before this Court is not who shall keep a given lot of money for a given period of time. It is whether a written constitution is a reliable check on the ambitions of powerful men and women. MBA speaks with knowledge and concern about the consequences of a decision against the judges, the receivers, the clerk, and the county in this case, because such a decision would imperil its members' ability to provide the stable banking services on which all citizens rely for the simplest of transactions. But the issue transcends MBA. Patriotic Americans since Hamilton and Jefferson have differed over the proper demarcation between the public and private sectors since the creation of the Republic. What has united them, what they took for granted, is what makes America an environment in which business thrives: the rule of law. If an individual toils under the hot sun or burns the midnight oil or risks their capital to create wealth, and a ruler can take it away without an effective legal check, then it should come as no surprise that people are less productive. That is one of the reasons the free societies prevailed in the Cold War.

An executive acting without constitutional limits that the courts will enforce is far more dangerous than an individual lawbreaker.[10] In the long run it is all the more dangerous that the executive is a person of vision and integrity.[11] No one questions the honesty of the State Treasurer. But in the long run it is more important that she act within the powers the People of the State of Missouri have conferred on her than that she administer a given fund

---

[10] 2 J. LOCKE, TWO TREATISES OF GOVERNMENT § 93 (1690) ("In absolute monarchies indeed, as well as other governments of the world, the subjects have an appeal to the law, and judges to decide any controversies, and restrain any violence that may happen betwixt the subjects themselves, one amongst another. This every one thinks necessary . . . . To ask how you may be guarded from harm, or injury, on that side where the strongest hand is to do it, is presently the voice of faction and rebellion: as if when men quitting the state of nature entered into society, they agreed that all of them but one, should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by pole-cats, or foxes; but are content, nay, think it safety, to be devoured by lions").

[11] *Id.* § 166 ("the reigns of good princes have been always most dangerous to the liberties of their people; for . . . their successors, managing the government with different thoughts, would draw the actions of those good rulers into precedent and make them the standard of their prerogative").

in a given manner. If this Court allows her to take over funds beyond her authority under Mo. Const. art. IV, § 15, in the obscure instance of these leftover payments from the resolution of consumer disputes, a later executive in the same office or another executive altogether will use this decision as precedent for the weakening of enforceable constitutional limitations generally.

Statement of Issues

Mo. Const. art. IV, § 15, provides that "[n]o 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." Mo. Rev. Stat. § 447.532 confers on the Treasurer the right to "intangible personal property held for the owner by any court . . . that has remained unclaimed by the owner for more than seven years or five years as provided in section 447.536."

I. Is this grant within the constitutional limits on the Treasurer's authority?

II. Are the funds in the court registry "state funds"?

III. What is the remedy if the answers to the previous questions are in the negative?

Statement of Facts

In this case and its companion cases (SC-84210, SC-84211, SC-84213 & SC-84328), the Circuit Court of Cole County has held in its registry substantial funds that were paid into court in consumer litigation, and has continued to hold them after the underlying litigation concluded. The Attorney General sought to compel the judges and the receivers they had appointed to pay these funds to the State Treasurer on the theory that the funds were "unclaimed property" within the meaning of the "Uniform Disposition of Unclaimed Property Act," Mo. Rev. Stat. §§ 447.500-.595 (UPA). (L.F. 204-06.) In their amended motion to dismiss the petition for delivery of unclaimed property, the receivers answered that the assertion of power over court registry funds was beyond the constitutional power of the State Treasurer. (Appeal No. 84328, L.F. 57-58.)

This Court appointed a special judge from outside Cole County. After briefing and argument he held that because the funds the Attorney General sought were "not state funds or funds received from the United States," the State Treasurer had "no standing or right to assert claims against the funds" in the court registry in light of the constitutional limitations on her powers in Mo. Const. art. IV, § 15. (L.F. 317.)

Points Relied On

I. The circuit court did not err in holding that the statute purporting to confer on the State Treasurer the right to the funds in the court registry was invalid, because the claims made on her behalf in this action violate the limitations on the constitutional powers of the office, in that Mo. Const. art. IV, § 15, forbids the General Assembly from expanding the State Treasurer's duties beyond "the receipt, investment, custody and disbursement of state funds and funds received from the United States government," and the funds in the circuit court's registry are not such funds.

Mo. Const. art. IV, § 15

II. The circuit court did not err in holding that the statute purporting to confer on the State Treasurer the right to the funds in the court registry did not do so, because the current Unclaimed Property Act and the national scheme for administering unclaimed property of which it is a part require that such property be neither "state" nor "nonstate" funds, in that title to these funds does not vest in the State or a political subdivision of the State.

Mo. Const. art. IV, § 15

III. The circuit court did not err in holding the UPA unconstitutional, because the principles of separation of powers and constitutional government generally require judicial enforcement, in that the State Treasurer's powers are limited to "the receipt, investment, custody and disbursement of state funds

and funds received from the United States government," and unclaimed property is neither, and there is a need for guidance as to the scope of permissible statutory extensions of power to the State Treasurer.

Mo. Const. art. II, § 1

Mo. Const. art. IV, § 15

Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803)

Myers v. United States, 272 U.S. 52, 293 (1926)

State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228 (Mo. banc 1997)

Missouri Coalition for Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997)

Argument

The Attorney General complains that receivers whom the judges of the Circuit Court of Cole County appointed did not pay to the State Treasurer certain funds from accounts maintained by the receivers under orders of the same judges. In this case and its companion cases (SC-84210, SC-84211, SC-84213 & SC-84328), the plaintiffs allege that the respondent judges and their receivers have held in the registry of the court four funds, totaling approximately $2.75 million, for a longer period of time than that permitted by Missouri's Uniform Disposition of Unclaimed Property Act (*e.g.*, L.F. 204-06.) Plaintiffs acknowledge that the respondents maintain that the statutory provisions on which the plaintiffs rely are either unconstitutional or do not apply to the funds at issue. (L.F. 211-15.)

In the court below, a special judge whom this Court appointed agreed with the respondent judges and receivers, holding that because the funds the Attorney General sought were "not state funds or funds received from the United States," the State Treasurer had "no standing or right to assert claims against the funds" in the court registry in light of the constitutional limitations on her powers in Mo. Const. art. IV, § 15. (L.F. 317.)

Plaintiffs complain that the circuit court "was without authority to reach them [the respondent judges and receivers] in light of the jurisdictional and procedural irregularities present in this proceeding and its three companion cases." According to the plaintiffs—the Attorney General and the State Treasurer—they

> made independent efforts to resolve this matter short of litigation, but all such efforts proved unavailing as the judges and their appointed receivers continued in their refusal to follow the dictates of the law. It is unconscionable and unlawful, that the judges and their appointed receivers have spent millions of dollars in interest generated on money they hold for others while undertaking no serious efforts to locate the rightful owners. . . . Under these circumstances, appellant is compelled to advance the principle that no one is above the law.

These efforts to capture "unclaimed property" may in fact demonstrate a lack of capacity to administer the "unclaimed property" statute. The party who seeks power over another independent arm of government takes on an additional burden, and calls his own claims into question.

Article II, section 1, of the Missouri Constitution decrees that "[t]he powers of government shall be divided into three distinct departments . . . . the legislative, executive and judicial . . . . each of which shall be confided in a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments shall exercise any power belonging to either of the others, except in the instances in this constitution expressly directed or permitted." Two broad categories of acts violate the constitutional mandate of separation of powers: first, when one

branch interferes impermissibly with other's performance of its constitutionally assigned power, and second, when one branch assumes power that more properly is entrusted to another branch.[12] Here, the power which is asserted on behalf of the State Treasurer may be beyond the legal power of government altogether under the laws as they existed at the time of the underlying acts.

[12] *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997).

I. The circuit court did not err in holding that the statute purporting to confer on the State Treasurer the right to the funds in the court registry was invalid, because the claims made on her behalf in this action violate the limitations on the constitutional powers of the office, in that Mo. Const. art. IV, § 15, forbids the General Assembly from expanding the State Treasurer's duties beyond "the receipt, investment, custody and disbursement of state funds and funds received from the United States government," and the funds in the circuit court's registry are not such funds.

Article IV, section 15, of the Missouri Constitution places a limit on the duties which may be imposed on the State Treasurer:

> 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.*[13]

Appellant argues that the General Assembly could, by statute, lawfully confer on the State Treasurer the right to receive property under the "Uniform Disposition of Unclaimed Property Act," Mo. Rev. Stat. §§ 447.500-.595 (UPA). The circuit court held that it could not.

---

[13] Mo. Const. art. IV, § 15 (as amended November 3, 1998) (emphasis supplied).

A. From its inception, the Missouri Constitution of 1945 has expressly limited the duties which could be conferred on an elected State Treasurer in order to avoid the proliferation of executive power among the constitutional officers.

The history of article IV, section 15, of the Missouri Constitution from the Constitution Convention in 1944 to the present shows that more than many other provisions, that this section was intended to be strictly construed as a limitation of power on the State Treasurer.

In the Constitutional Convention in June 1944, there is a discussion of Draft Amendment 16 limiting the State Treasurer's duties. Richard R. Nacy of Jefferson City was then a politically influential banker; he had himself served as State Treasurer from 1933 to 1937, and would again serve in the office, from 1948 to 1949, when appointed to fill out the term of an incumbent who died.[14] A graduate of the University of Chicago and Columbia University, Lewis E. Meador was a professor of economics and political science at Drury College.[15]

---

[14] "Richard R. Nacy, 1933-1937; 1948-1949," State Treasurer's Office Web Site, available May 20, 2002, at http://www.sto.state.mo.us/RichardRNacy.doc.

[15] R674—LEWIS ELBERT MEADOR, PAPERS, 1904-1982—INFORMATION SHEET, Western Historical Manuscript Collection-Columbia, available May 19, 2002, at http://www.umr.eduj/~whmcinfo/shelf27/r674/info.html.

Allen McReynolds of Carthage served as a state senator from 1935 to 1944, and also served as a Curator of the University of Missouri.[16]

Respondent Blackwell presents "Debates of the Constitutional Convention Consideration of File 16 concerned with the Executive Department" as Appendix D to her brief in Appeal No. 84212. At A-49, there appears a draft including this limitation on the powers of the State Treasurer under the new Constitution: "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." Marshall E. Ford, Chairman of the Convention's Committee on the Executive Department, reported that this section was the work of Sen. McReynolds and Prof. Meador. (A-20.) Judge Mayers supported this limitation because he was concerned with the proliferation of duties among elected state officials, so that there are "five or six governors up at Jefferson City" (A-52). The Convention adopted this language as part of what the People of Missouri adopted as their Constitution in 1945: "No duty shall be imposed on the state treasurer by law

[16] MCREYNOLDS, ALLEN (1977-1960), PAPERS, 1842-1970 (C3605), Western Historical Manuscript Collection-Columbia, available May 19, 2002, at http://www.system.Missouri.edu/whmc/invent/3605.html.

which is not related to the receipt, custody, and disbursement of state funds."[17]

In 1977 the General Assembly passed Senate Joint Resolution 19 that was submitted to the voters on August 8, 1978, as Proposition 2. This provision would have allowed the State Treasurer to place state funds on time deposit (not to exceed two years), with savings & loan associations as well as banks; it would have lengthened the maturity period for federal obligations; it would have allowed the State to enter into repurchase agreements. It would also have authorized the State Treasurer to take on additional duties beyond those included in the existing article:

> Other provisions of this article notwithstanding, the treasurer may, when so authorized by law, serve as the investing agent for any department, agency or other entity of the state or of any political subdivision of the state, and may make such investments as may be prescribed by law.[18]

[17] Respondent Blackwell provides additional versions of the same section as Appendix C to her brief in Appeal No. 84212.

[18] 79th General Assembly, S.J.R. 19.

That constitutional amendment was defeated.[19] Missouri's Constitution retains the strict limits that grew out of the Constitutional Convention's concern to keep the statewide elective officer besides the Governor confined to specific functions lest they become "five or six governors." Whether one agrees with their thinking, the language they provided was what the voters adopted, and the only time there was enough support to place on the ballot an expansion of the State Treasurer's powers which would go beyond "state funds" and "funds received from the United States government," the People voted it down.

B. The State Treasurer's jurisdiction over public funds has not been expanded since the adoption of the Constitution of 1945, and the voters rejected the one attempt to expand the State Treasurer's powers broadly enough to reach the funds at issue in these appeals.

There is an exchange in the Constitutional Convention between once-and-future State Treasurer Nacy, Professor Frank L. McCluer (who chaired the Convention's Committee on Finance), and Rex H. Moore, who sponsored the amendment to File 16 to make the State Treasurer elective. They discuss the desirability of confining the duties of the State Treasurer to being the

[19] OFFICIAL MANUAL: STATE OF MISSOURI, 1979-1980 1242 (vote was 295,849 in favor and 585,052 against).

"depository and disbursing officer" and of having a separate Department of Revenue. (Blackwell Appendix D, A-40 to A-42.)

The Convention adopted language "All revenue collected and moneys received by the State from any source whatsoever shall go promptly into the State Treasury." There was no Department of Revenue provided for in the Constitution at that time: Article IV, section 22, which added that institution, was not adopted by the voters until 1958.[20] Section 15 as amended in 1956 makes no change in these words. The 1956 amendment to the Constitution continued to include the substantive limitation on the State Treasurer's duties from the 1945 Constitution: "No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody, and disbursement of state funds."

In 1977 the General Assembly passed Senate Joint Resolution 19 that was submitted to the voters on August 8, 1978, as Proposition 2. This proposed amendment made no change in these words, but, as noted, was defeated.

The 1986 amendment to the Constitution continued to include this limitation on the State Treasurer's duties, but added federal funds that the State received to "state funds": "No duty shall be imposed on the state

---

[20] 1A V.A.M.S. 406 (historical notes to Mo. Const. art. IV, § 22) (1995 & West Supp. 2002).

treasurer by law which is not related to the receipt, custody, and disbursement of state funds and funds received from the United States government."

The 1998 amendment to section 15 continued to include the limitation on the duties which can be assigned to the State Treasurer to "receipt, custody, and disbursement of state funds and funds received from the United States government."

C. The 1986 amendment eliminates the State Treasurer's jurisdiction over "nonstate funds."

This particular limitation is introduced into section 15 with new words, as follows:

> The department of revenue shall take custody of, and invest nonstate funds as defined herein and other moneys authorized to be held by the department of revenue.

At this time the voters also added a definition of "nonstate funds":

> As used in this section, the term "nonstate funds" shall include all taxes and fees imposed by political subdivisions and collected by the department of revenue; all taxes which are imposed by the state, collected by the department of revenue and distributed by the department of revenue to political subdivisions; and all other moneys which are

hereafter designated as "nonstate funds" to be administered by the department of revenue.

The two substantive provisions of this definition cover local revenues. The latter category does not authorize the State Treasurer to take possession of anything, but directs such funds as may "hereafter" be designated as "nonstate" to the Department of Revenue.

The changes adopted in 1986 were not altered in the amendment of 1998.

Although MBA has explained that the phrase "nonstate funds" does not mean "private funds," the fact that "nonstate funds" are directed to the Department of Revenue rather than left with the State Treasurer provides additional support for the premise that she is without constitutional authority to receive funds under the UPA.

D. Regardless of the characterization of the funds at issue, Missouri Constitution bars the State Treasurer from receiving property under the UPA.

The foregoing discussion covers various aspects of section 15, concerning constitutional limits on the State Treasurer's office, as it has developed over the past fifty-seven years. The State Treasurer would have had almost unlimited powers over various funds under the 1978 amendment—but *that* was *defeated*. In amendments that passed, the voters modified section 15 so at least two categories of funds were created: (1) "state funds" and "funds received from the United States government," and (2) "nonstate funds." These

amendments have effectively divided jurisdiction over the funds among at least two agencies: the first of the latter categories is within the State Treasurer's jurisdiction; the second is within the Department of Revenue's jurisdiction.

"Nonstate funds" are

> all taxes and fees imposed by political subdivisions and collected by the department of revenue; all taxes which are imposed by the state, collected by the department of revenue and distributed by the department of revenue to political subdivisions; and all other moneys which are hereafter designated as "nonstate funds" to be administered by the department of revenue.

This relatively new language in section 15 did not add a category of funds to the State Treasurer's jurisdiction, but removed some of the public funds formerly administered by the State Treasurer from her jurisdiction. After this change, the State Treasurer is authorized to select depositories and make investments for "state funds" and "funds received from the United States government," and the Department of Revenue is authorized and required to exercise jurisdiction over "nonstate funds," with the result that *it* also selects depositories for these public funds and, in addition, invests them in securities.

By this reduction in jurisdiction over public funds, art. IV, section 15, stands as a barrier to the increase in the State Treasurer's duties that the Unclaimed Property Act purported to create. Until the effective date of the 1986 amendment, the Constitution provided that "[a]ll revenue collected and moneys received by the State from any source whatsoever shall go promptly into the State Treasury."

When the 1986 amendment became effective, the State Treasurer's jurisdiction was *reduced* by the Constitution to exclude "nonstate funds" as reviewed above. In the next point of its brief, MBA will develop that the State Treasurer at this point no longer has jurisdiction over unclaimed property, since such unclaimed property is neither "state funds" or "funds received from the United States government," nor is it "nonstate funds" within the meaning of section 15.

Should the General Assembly choose to do so, the Constitution provides that unclaimed property *could* be added by law to the "nonstate funds" category. In its last sentence, section 15 defines "nonstate funds" to include "all other moneys which are hereafter designated as 'nonstate funds' to be administered by the department of revenue." Put another way, this constitutional provision says that any moneys "hereafter [*i.e.*, by legislation] designated as 'nonstate funds'" are "to be administered by the department of revenue" and *not* by the State Treasurer.

Unclaimed property is *neither* "state funds" *nor* "funds received from the United States government," *nor* "nonstate funds." It is the *owners'* funds. It

should not go to *either* the State Treasurer *or* the Department of Revenue. This property is not escheated to the state; the UPA is a custodial statute, not an escheat statute. It does not extinguish the rights of private persons to the funds; these funds are held in perpetuity for the owner.

If one were searching for a Missouri state administrator of such funds today, one could look back to the period 1978-84 when the "unclaimed property" escheat statute was administered by the Division of Finance. In Missouri the first unclaimed property law relating to depositories (as ongoing businesses) was passed in 1978.

E. The fundamental principles of separation of powers and constitutional government require that unconstitutional delegation of power be held invalid.

Using language from the Constitution of 1945, the present constitutional language defining the State Treasurer's powers limits the State Treasurer's potential power over funds to two categories:

> 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.*[21]

[21] Mo. Const. art. IV, § 15 (as amended November 3, 1998) (emphasis supplied).

By saying "[n]o duty shall be imposed . . . by law," the People of the State of Missouri spoke not so much to the State Treasurer herself, but primarily to the General Assembly and secondarily to the courts. As usual, the passive voice masks the attribution of responsibility: a clearer way of saying the same thing would be that the General Assembly may not pass a statute purporting to give the State Treasurer custody over funds other than state funds or funds received from the United States government, and the courts shall not give the State Treasurer power over additional funds under color of construction.

II. The circuit court did not err in holding that the statute purporting to confer on the State Treasurer the right to the funds in the court registry did not do so, because the current Unclaimed Property Act and the national scheme for administering unclaimed property of which it is a part require that such property be neither "state" nor "nonstate" funds, in that title to it does not vest in the State or a political subdivision of the State.

A. The early history of the UPA demonstrates that it is a custodial statute, not an escheat statute.

This statute and others like it have developed throughout the United States. This development has led to conflicting claims by various state legislatures. The first major decision resolving such claims was *Texas v. New Jersey*,[22] which established a set of priorities for claimant states. The Supreme Court of the United States reexamined the issue in *Delaware v. New York*.[23] Although this six-to-three decision made no changes in priorities, it clarified how to determine the identity of the "debtor" or holder under the uniform act. One determines the "debtor" by reference to the state law that creates the property interest; the debtor will generally be an intermediary who holds

[22] 379 U.S. 674 (1965).

[23] 507 U.S. 490 (1993). *See also Pennsylvania v. New York*, 407 U.S. 206 (1972) (six to three).

property in their own name, and not the original obligor who has satisfied their obligation by transmitting payment to the intermediary. The custodial nature of such unclaimed property and the federal interest in providing for its return to its lawful owners is subject to a preemptive rule of the highest court.

B. Tracing the recent development of Missouri unclaimed property statutes shows that the present statute is custodial rather than escheat.

All depositories are subject to the "Uniform Disposition of Unclaimed Property Act," Mo. Rev. Stat. §§ 447.500-.595 (UPA). The UPA requires such depositories to pay over to the State Treasurer certain property that has been unclaimed by its owners as determined by law. The General Assembly enacted the original statute permitting the state to claim unclaimed property in 1978; it provided for the escheat of property to the state and was administered by the Division of Finance.

Escheat is the reversion of property to the state, the effect of which is that the property is vested in the state.[24] Subsection 3 of Mo. Rev. Stat. § 362.396 provided in part that:

> A claim may be filed at any time within twenty-one years after the date on which such abandoned funds were first presumed abandoned pursuant to the terms of sections 362.390 to 362.397, notwithstanding the

[24] Mo. Rev. Stat. §§ 362.390-.397 (1978) (repealed).

> expiration of any other period of time specified by statute or court order during which an action or proceeding may be commenced or enforced to obtain payment of deposits.

The General Assembly repealed this non-uniform statute in 1984, and removed the administration of unclaimed property to the State Treasurer.[25] These unclaimed property funds are not state public funds within the meaning of Mo. Const. art. IV, § 15. The State Treasurer's authority is limited to "revenue collected and money received by the state which are state funds or funds received from the United States . . . ." Following other custodial statutes, Mo. Rev. Stat. § 447.562 provides that "[a]ny person claiming an interest in moneys or properties . . . may file a claim . . . ." Section 447.585 provides that "[a]t any time after property has been paid for or delivered to the state . . . , another state may recover the property . . . [on certain conditions]." Because the UPA is a custodial statute rather than revenue-raising statute, the unclaimed property never vests in the State of Missouri but is perpetually available to be returned to the owners.

[25] *See* MO. LAWS 1984 H.B. 1088.

C. Because the UPA is a custodial statute rather than an escheat statute, the funds to which it applies are not "state funds," and the State Treasurer's constitutional powers cannot extend to them.

From its inception, the Constitution of 1945 provides that the State Treasurer has limited powers, and these do not include unclaimed property. In contradiction to the constitutional limits on her power, the statute now provides that unclaimed property shall be turned over to the State Treasurer. This is more than a question of bureaucratic turf: for all practical purposes, Missouri is using unclaimed property as general revenue. Is this an unconstitutional tax on depositories? "The Missouri Bank Tax, insofar as it applies to national banks, is dependent upon the federal statutes authorizing states to assess taxes against national banks."[26]

Depositories have relied on the "hold-harmless provisions" in section 447.545 to protect their institutions when they turn funds over to the State Treasurer under the UPA.[27] This statutory protection would at least arguably

---

[26] 3 MO. TAXATION LAW & PRAC. § 17.2 (3d ed. 1996 & Mo. Bar CLE Supp. 1999).

[27] Mo. Rev. Stat. § 447.545.1 provides, in pertinent part: "Any person who pays or delivers abandoned property pursuant to sections 447.500 to 447.595 is relieved of all liability for any claim which then exists or which thereafter may arise or be made in respect to the property."

depend on the State Treasurer's acting within her authority in receiving the funds from the bankers. If the constitutional authority of the State Treasurer does *not* extend to unclaimed property, what protection do *banks* have after they have turned over the property?

III. The circuit court did not err in holding the UPA unconstitutional, because the principles of separation of powers and constitutional government generally require judicial enforcement, in that the State Treasurer's powers are limited to "the receipt, investment, custody and disbursement of state funds and funds received from the United States government," and unclaimed property is neither, and there is a need for guidance as to the scope of permissible statutory extensions of power to the State Treasurer.

Whereas the principle of the separation of powers in the Constitution of the United States is induced from the structure established by its express enumeration and delegation of powers, and from the debates of Framers and the philosophical writings known to have influenced them, the Missouri Constitution *expressly* establishes this principle as a guide for action and construction, in a separate section entitled "Three departments of government—separation of powers":

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise

> any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.[28]

The West Group's editors note that the "Source" of this text is the Constitution of 1875, article III, "without change." They add that "Const. 1865, Art. 3, and Const. 1820, Art. 2, contained provisions substantially similar to those of this article."[29] From the establishment of the State of Missouri, therefore, the People have gone beyond the Framers of the Constitution of the United States to assure that the separation of powers is a prominent feature of their government and a check on the individuals to whom they commit it.

In the first point of this brief, MBA has traced the creation of the office of the State Treasurer under the Constitution of 1945. These statesmen extended the separation of powers from beyond the legislative, executive, and judicial, to the limitation of the subsidiary constitutional officers in order to augment the powers of the Governor.

This Court has had occasion to explain the fundamental character of the guaranty of separation of powers in striking down legislative action as invading the province of the executive:

---

[28] Mo. Const. art. II, § 1.

[29] 1A V.A.M.S. 395 (historical notes on Mo. Const. art. IV, § 15) (1995 & West Supp. 2002).

> 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 . . . (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"). Thus, "[t]he doctrine of the separation of powers [is not meant to] promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 . . . (1926) (Brandeis, J., dissenting).[30]

[30] *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997).

In another case holding a statute unconstitutional, this Court quoted with approval a previous decision from nearly a century before:

> "[The Missouri Constitution] carefully divides the powers of government into three distinct and named departments; sedulously segregates each from the other; confides each to a separate magistracy; and then, not satisfied with such strict demarkation (sic) of the boundaries of their respective jurisdictions, peremptorily forbids either of such departments from passing the prohibitory precincts thus ordained by the exercise of powers properly belonging to either of the others, and then concludes by giving the sole exception to the unbending rule by saying, "except in the instances in this constitution expressly directed or permitted." . . . Lacking such express direction or express permission, the act done must incontinently be condemned as unwarranted by the constitution . . . . Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to national and state governments, is largely dependent upon the preservation of the distribution of power and

> authority made by the constitution, and the laws made in pursuance thereof.[31]

When one branch of government seeks to infringe on the province of another branch, what is the people's remedy?

> "[W]e presume that [a] statute is valid unless it clearly contradicts a constitutional provision." *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. banc 1993); *see also Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 512 [(Mo. banc 1991)]; *In re Trapp*, 593 S.W.2d 193, 202 (Mo. banc 1980); *Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. banc 1980). Nevertheless, "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803), and to determine the constitutionality of statutes.[32]

Thus, when separation of powers was at issue, this Court did not allow general pronouncements reflecting the natural hesitancy to declare that another branch of government acted beyond its constitutional powers—such

---

[31] *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, 133 (Mo. banc 1997), *quoting Albright v. Fisher*, 164 Mo. 56, 64 S.W. 106, 108-09 (1901).

[32] *Id.* at 132.

as the appellant cites (Appeal No. 84328, L.F. 83)—to deter it from so holding when the facts and the law require. In the case this Court relied on as the leading precedent for judicial review, CHIEF JUSTICE John Marshall wrote—for the Supreme Court of the United States—that Congress had gone beyond its constitutional powers to regulate the jurisdiction of the federal judiciary, by purporting to authorize his Court to exercise original jurisdiction in an area where the Constitution gave it only appellate jurisdiction.[33] He reasoned that if the Framers had not cared whether the Supreme Court would have original or appellate jurisdiction as to certain categories of cases, they would not have specified the resp-ective categories to which its original jurisdiction and its appellate jurisdiction extended.[34] Congress did not have the power to expand the original jurisdiction of the Supreme Court, because the Constitution had limited it. For these limits to have any meaning, the courts must be willing to obey the Constitution rather than statutes when the two conflict:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be

---

[33] 5 U.S. (1 Cr.) at 174.

[34] *Id.* at 174-75.

> restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.[35]

This case is like *Marbury v. Madison* in that the Missouri Constitution gives the State Treasurer certain powers, and says that she shall not be assigned any other powers. In the UPA, the General Assembly sought to give her other powers. In a government with separation of powers and a written constitution, it is this Court's duty to do what Chief Justice Marshall did nearly two hundred years ago: enforce the Constitution.

In this case, however, this Court would precipitate no constitutional crisis by recognizing the limits on the State Treasurer's powers. No State Treasurer in the history of the State of Missouri sought to exercise the specific power that the Attorney General has asserted for her—initially without her support—in the court below. No previous Attorney General asserted this power for any previous State Treasurer. Decades of practice on the watches of a State Treasurer who went on to become Governor and of Attorneys General

[35] *Id.* at 176-77.

who went on to become Governor and Senator—under the same constitutional provisions—give the lie to the Attorney General's rhetoric about no one being "above the law."

Conclusion

WHEREFORE, the judgment of the circuit court should be affirmed.

Respectfully submitted,

WADE L. NASH
Mo. Bar No. 24423

General Counsel
Missouri Bankers Association
207 East Capitol — P.O. Box 57
Jefferson City, Missouri 65101

573-636-8151 — FAX: 573-634-8451

Attorney for Amicus Curiae

Certificate of Compliance

I certify that (1) the foregoing brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains 8266 words, excluding the cover, this certification, the certificate of service, and the signature block, as determined by Microsoft Word 9.0/10.0; and (2) the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and that Norton Antivirus 2002 reports that it is virus-free.

_____

Attorney for Amicus Curiae
Missouri Bankers Association

Certificate of Service

I hereby certify that two (2) true and correct copies—one hard copy and one on disk—of the foregoing were served, this ____ day of May, 2002, on:

G. Alex Bartlett, Esq.
Husch & Eppenburger, LLC
235 East High Street
Jefferson City, Missouri 65102-1251 (hand-delivery)

Dale C. Doerhoff, Esq.
Cook, Vetter, Doerhoff, Landwehr & Medin
231 Madison Street
Jefferson City, Missouri 65101 (hand-delivery)

Henry T. Hershel, Esq.
Blitz Bargett Deutsch L.L.C.
308 East High Street
Jefferson City, Missouri 65101 (hand-delivery)

J. Kent Lowry, Esq.
Armstrong Teasdale, LLP
3405 West Truman Boulevard
Jefferson City, Missouri 65109 (mail)

James Robert McAdams, Esq.
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102 (hand-delivery)

Robert G. Russell, Esq.
Kempton, Russell & Spangler
114 East Fifth Street
Sedalia, Missouri 65301 (mail)

_____
Attorney for Amicus Curiae