SOCIAL SECURITY: (1) Moneys paid by employers under a State unemployment insurance law are not necessarily "state funds" within the meaning of Art. IV, Sec. 43, Const. of Mo.

UNEMPLOYMENT INSURANCE:

(2) Such mandatory payment is not violative of the "due process" clause, and if a tax is for a public purpose.

January 7, 1937.

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Senator Allen McReynolds,
Chairman, Social Security Committee,
Jefferson City, Missouri.

Dear Sir:

We have received your request of recent date for an opinion, which reads as follows:

> "Is an amendment to the Missouri Constitution required to meet the requirement as set forth in Sec. 903, Paragraph 3, Title IX, of the Federal Social Security Act, that all money received in the State unemployment fund must immediately be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund?"

I.

As above stated, Sec. 903, Title IX, Federal Social Security Act, reads in part as follows:

> "All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904."

Sec. 43, Art. IV, Constitution of Missouri, reads in part as follows:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

Sec. 15, Art. X, Constitution of Missouri, reads in part as follows:

> "All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney-General, select."

Sec. 19, Art. X, Constitution of Missouri, reads in part as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor."

It will be noted that there is an apparent conflict in the Federal Act and the Missouri Constitution in that the Federal Act provides that the money collected must be paid immediately into the Federal Trust Fund, while under the Constitution the Missouri provision states that "all revenue collected and moneys received by the State from any source whatsoever" must be paid into the treasury and be appropriated by law.

The question comes down to whether funds collected by the State from employers to be paid employees during a period of unemployment are state funds within the meaning of the constitutional provisions, so that said funds must go into the treasury and then be appropriated out by law.

Sec. 45, Art. IV, Constitution of Missouri, was interpreted in State v. Board of Regents, 264 S. W. 698, l. c. 699, when the court en banc, speaking through Judge Walker, said:

> " * * * By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state

> money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. * * *"

The above is a definition of "revenue ", as was noted when the definition was quoted in State v. Hackman, 282 S. W. 1007, l. c. 1011. However, the definition and rules are equally applicable to the phrase "money received by the State from any source whatsoever". Revenue is said to mean "current income of the state from whatsoever source derived. * * * This current income may be derived from various sources." The difference then is that revenue is current income, that is, income received each year, while "moneys from any source whatsoever" applies to single or sporadic receipts. Both must be received by the State before they become state funds and the authority to receive these funds must be given the State by the Legislature.

The rule seems to be that state funds, i. e., revenue and money received by the State, must go into the treasury. It is the intention of the Legislature that must be looked to in determining whether any fund is a state fund. One of the surest indications, on the part of the Legislature, that a fund is to be a state fund, is that it is required to be paid into the treasury. Even then, if the fund is not subject to appropriation for public use, it is not state funds. The Legislature must give the State authority to receive such funds as state funds, and if the intention of the Legislature is that they are not to be state funds, and there are no other constitutional inhibitions, then the funds do not have to go into the treasury, nor be appropriated out by law.

This view has been followed in all the Missouri cases wherein the question has arisen whether certain funds should be paid into the treasury and whether funds already in the treasury must be appropriated before they could be used.

In State ex rel. Stevenson v. Stephens, 37 S. W. 506, money and securities were deposited with the State Treasurer by investment companies for the protection of investors. The question arose whether this money could be paid without a warrant and appropriation. The court, after citing Secs. 15 and 19 of Art. X of the Constitution, said:

> "It is manifest that these provisions only apply to money 'belonging to the state.' The money in question, though it was deposited with the treasurer, was for the specific purpose of making good the security

> intended for the protection of those dealing with bond investment companies, and was not money belonging to the state, within the meaning of the constitution. The securities, whether in money, bonds, or notes, are held by the treasurer in trust, not for the use or benefit of the state, but for the protection of those who may hold the bonds, certificates, or debentures of bond investment companies which are unauthorized to sell such securities on the partial payment or installment plan. * * * It is clear that the legislature did not intend that the money or securities deposited should be paid out or returned under the regulation required in paying out the public money. * * *"

Sec. 5037, R. S. 1899, provided that members of the board of examiners for barbers should each receive $3 per day and necessary traveling expenses, which should be paid out of any money in the hands of the treasurer of the board. Whether this was in conflict with Art. IV, Sec. 43, was raised in Ex parte Lucas, 61 S.W. 218. The court held that the contention was not well founded because "Sec. 43, Art. 4, applies only to money provided for and received by the State. The money authorized to be collected under this act is not state revenue, but simply a provision to make the board of examiners self- supporting."

A similar situation arose in State ex rel. Kerster v. Hackman, 264 S. W. 366. However, in this case the statute in question provides that the fees collected should be paid into the state treasury and the examiners paid from that. The court held that the money must be appropriated because

> "It is manifest that the intention of the Legislature in placing the funds in the hands of the state treasurer was, not only to provide official information as to its disbursement, but to keep the expenses of the department within the limits provided by the Legislature. The Legislature may be presumed to have had the constitutional restrictions in mind when they passed the act creating the fund."

The right of a collector of collateral inheritance tax to retain his fees from the money collected, and before sending it in to the State Treasurer, was questioned in State ex rel. Curators v. Walker, 144 S.W. 866. The court stated that the liberal construction of Sec. 43, Art. IV was not to apply, and it was the

intention of the Constitutional Convention that these fees were not state funds, because such practice had been the custom when the Constitution was adopted, and

> "The convention which framed our Constitution was composed of men who knew what the law on this subject then was, and if they had understood that this section was liable to be construed as applying to the payment for services rendered in collecting the revenue, they would doubtless have made some provision to meet that condition, because payment for such services out of the funds before they were paid into the treasury had always been allowed by statute, and also because it would naturally impede or hinder the state in collecting its revenue unless such payments were so allowed."

In State ex rel. Clerk v. Gordon, 170 S.W. 892, it was held that there was an appropriation and Art. IV, Sec. 43, was not violated.

State ex rel. Thompson v. Board of Regents, 264 S.W. 698, has been referred to above and it involves the question whether insurance received due to the fire in a college building had to be paid into the State Treasury by the Board of Regents, or could be applied by the Board to rebuilding the structure. The court held:

> "In the foregoing discussion of the constitutional provision invoked by relator, we have stated generally that no statute required the payment into the state treasury of the money here in controversy, and that a statutory enactment was a prerequisite to such payment and its receipt and deposit by the treasurer to entitle it, under the Constitution, to be classified as state money. A review of the statutes in relation to the State Teachers' Colleges is therefore not inappropriate as confirmatory of this conclusion. These statutes, so far as applicable to the matter here under review, are to be found in chapter 102, art. 17, R. S. 1919, as follows:"

Then are listed the statutes, and the court concludes with

> "Much space is devoted in the lucid brief filed by the respondent to the nonapplications to the matter at issue of numerous other sections of the statutes relating to the management of public institutions and the receipt and disbursement of their funds from whatever source derived. Without burdening this opinion with their review, it seems sufficient to say that in none of these statutes, either by express enactment or reasonable implication, does it appear that it was within the contemplation or intention of the Legislature that moneys received by the managing boards of educational institutions in the nature of incidental fees should, as a condition precedent to their use by the respective boards, be required to be first paid into the state treasury and appropriated therefrom by the Legislature. * * *"

Finally, in State ex rel. McKinley Publishing Co. vs. Hackman, 282 S.W. 1007, the status of the proceeds from license fees which were paid into the treasury were questioned. The court quoted the definition above from State ex rel. Thompson v. Board of Regents and continued:

> "It is not only levied by the state but is collected by it and paid directly from the motor vehicle owners into the state treasury. * * * It thus appears that not only is the fund public revenue or state money, but is public revenue of a very extraordinary kind, levied, collected, and held by the state for two specific public uses, the major use of which is the payment and retirement of state bonds."

There are many statutes in Missouri, the constitutionality of which has never been questioned, relating to funds in the possession of the State which are not in the treasury, or, if they are, do not have to be appropriated out to be paid, the intention of the Legislature being that they are not state funds.

Sec. 620, R. S. Mo. 1929, relates to the Escheat law and provides that the State Treasurer shall hold certain moneys in escheat, which will be paid out upon request of those who are entitled to the moneys.

Sec. 5303, R. S. Mo. 1929, provides that the Commissioner of Finance shall hold all unclaimed deposits, dividends and interest of corporations or private banks. Under this section, the Commissioner holds the money himself, and pays same out without appropriation.

Sec. 5222, R. S. Mo. 1929, relates to deposits unclaimed in insolvent or closed savings banks. These deposits are to be held by the State Treasurer for the use and benefit of the depositors and paid out on the claim of these depositors.

Secs. 5704, 5706, 5711, 5761, 5765, 5746, 5749, 5750, 6084, 5935, 5802, 5808, R. S. Mo. 1929, provide for the deposit of all securities by insurance companies with the Department of Insurance of the State of Missouri, which deposits are held by the department and returned without ever having been paid into the State Treasury or appropriated out by law.

II.

The question then presents itself whether a state unemployment compensation law would be in conflict with any other provision of the Constitution of Missouri.

Sec. 30, Art. II, Constitution of Missouri, provides:

> "That no person shall be deprived of life, liberty or property without due process of law."

Chamberlin, Inc. v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22, which was affirmed by a divided court of the Supreme Court of the United States, 81 L. Ed. 69, dealt with the New York unemployment insurance law, and in regard to the due process provision it said:

> "Whether or not the Legislature should pass such a law, or whether it will afford the remedy or the relief predicted for it, is a matter for fair argument but not for argument in a court of law. Here we are dealing simply with the power of the Legislature to meet a growing danger and peril to a large number of our fellow citizens, and we can find nothing in the act itself which is so arbitrary or unreasonable as to show

> that it deprives any employer of his property without due process of law or denies to him the equal protection of the laws."

While we do not pass upon the question of whether this legislation is a tax measure or an exercise of the police power, however, if it is a tax, it does not violate Section 3, Article X, of the Constitution of Missouri, which reads:

> "Taxes may be levied and collected for public purposes only."

Again we quote from Chamberlin, Inc. v. Andrews, supra, and the court held:

> "It is said that this is taxation for the benefit of a special class, not the public at large, and thus the purpose is essentially private. The Legislature, after investigation, has found the facts to be that those who are to receive benefits under the act are the ones most likely to be out of employment in times of depression. The courts cannot investigate these facts and should not attempt to do so. The briefs submitted show that the classification or selection made by the Legislature has followed investigation and has sought to reach the weakest spot. Experience may show this to be a mistake. No law can act with certainty; it measures reasonable probabilities. 'Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary. Standard Oil Company v. Marysville, 279 U. S. 582, 586, 587, 49 S. Ct. 430, 73 L. Ed. 856.' Mr. Justice Roberts in Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453, 456, 80 L. Ed._____."

CONCLUSION

A positive and unqualified opinion can not be given by this department on any legislation yet to be enacted, the statutes in their final form being the only basis from which such a conclusion may be drawn. However, it is the opinion of this department, since under similar circumstances the Supreme Court of Missouri has held that certain moneys were not state funds because they were not intended by the Legislature to be such, that moneys paid by employers in the State to be used for the benefit of employees during times of unemployment may not necessarily be "state funds" within the meaning of Section 43, Article IV, of the Constitution, especially so if it is manifestly the intention of the Legislature that such moneys are not to be "state funds".

Such mandatory payment on the part of the employers is not violative of the "due process" clause of the Missouri Constitution (Sec. 30, Art. II), and such a tax, if it is a tax, is for a public purpose as required by Section 3, Article X, of the Constitution of Missouri.

Yours very truly,

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APPROVED:

ROY McKITTRICK,
Attorney General.

AO:HR