OCTOBER 15, 1954.

HON. ABRAM S. VERMEULEN
Acting Director,
Division of Budget & Accounting
Department of the Treasury
State House,
Trenton, New Jersey

FORMAL OPINON 1954—No. 21.

DEAR DIRECTOR:

This will acknowledge your recent request for an opinion concerning repayment of claims for moneys previously received by the State Treasurer for protective custody under the provisions of Article 3 of Chapter 37 of Title 2A N. J. S.

You inform us that a sum of money has been delivered to the State Treasurer in accordance with a judgment for protective custody duly entered by the Superior Court, Chancery Division. In compliance with an order contained in said judgment the State Treasurer has paid out of said sum of money fees allowed to counsel for plaintiff, counsel for defendant and to the Escheator.

Pursuant to Section 2A:37—32 N. J. S. and within the time limit therein prescribed a number of claims for repayment have been presented to the State Treasurer and you wish to be advised on the following questions which we will answer in order:

1. Is the State Treasurer authorized to determine the validity of all such claims for repayment, without limitation as to amount, or is he limited to determining the validity of only those claims for an amount less than $50.00?

It is our opinion and we so advise you that the State Treasurer may determine, without limitation as to amount, the validity of any claim for repayment made pursuant to Section 2A:37—32 N. J. S. The applicable language of Section 2A:37—32 N. J. S.:

> "* * *. If a claim is made to the state treasurer within such period of 2 years, and he shall determine that the claim is valid, he shall pay the moneys so claimed to the person entitled thereto. If the state treasurer shall determine that the claim is not valid, he shall reject the claim. The claimant may thereupon apply to the superior court, chancery division, for a review of his determination, and the claim shall thereupon be heard and determined, de novo."

indicates quite clearly that there was no intention to limit the amount of the claims for repayment, the validity of which shall be determined by the State Treasurer.

Nor does Section 2A:37—43 N. J. S. which provides:

> "Whenever it shall appear to the satisfaction of the state treasurer or his representative that a person is the lawful owner of any moneys that have heretofore been received by the treasurer under the provisions of this article, and that such moneys are less than $50 the state treasurer is hereby authorized and empowered to repay to the lawful owner aforesaid the moneys so received without the necessity of reopening the judgment theretofore entered."

impose any such limitation upon the amount of the claims which the State Treasurer may pay if he determines same to be valid. The judgment referred to in Section 2A:37—43 N. J. S. is a judgment in an action to escheat personal property wherein notice has been given to the owner who is unknown or whose whereabouts is unknown, as distinguished from a judgment rendered in a proceeding for custody of the moneys, which proceeding is maintained against the holder of the moneys who is not the owner thereof. The judgment in the custody proceeding, directing the delivery of the moneys to the State Treasurer for protective custody, necessarily determines that the defendant holder of the moneys is not the owner of the said moneys. Under Section 2A:37—33 N. J. S. the holder of the moneys was released and discharged from any claim of the owner when the money was paid to the State Treasurer pursuant to the judgment for custody. The owner, who was unknown or whose whereabouts was unknown, was not a party in the custodial proceeding, and no purpose could be served in requiring said owner to reopen the custodial judgment before he could assert a claim of more than $50.00. It therefore becomes readily apparent that the provisions of Section 2A:37—43 N. J. S. were not intended as a limitation on Section 2A:37—32 N. J. S.

2. Where the State Treasurer has determined that a claim for repayment is valid, shall he pay the full amount of said valid claim or should he deduct a pro rata share of the fees allowed to counsel and to the Escheator?

It is our opinion and we so advise you that the State Treasurer shall deduct from the amount of such valid claim for repayment a pro rata share of the fees allowed to counsel but shall not deduct any pro rata share of the fees allowed to the Escheator.

The authority for the allowance of counsel fees is to be found exclusively in R. R. 4:55—7 (formerly Rule 3:54—7) and the effect to be given to that portion of Section 2A:37—35 N. J. S. which provides:

"* * * the court shall * * * fix and direct the payment of the fees and expenses of the attorney-at-law who shall have prosecuted the action."

is that it removes the statutory obstacles so as to permit the Court to make an award of fees to counsel of the State in these proceedings in the event such an award is authorized by R. R. 4:55—7. *State v. Otis Elevator Co.*, 12 N. J. 1 (1953). Inasmuch as R. R. 4:55—7 contains no specific authorization for allowance of counsel fees in proceedings for protective custody, it is reasonable to assume that the Court must have found that there was a "fund in court" within the meaning of paragraph (b) of said rule. An allowance having been made for fees of counsel out of "the fund" said fund is accordingly diminished and the claimant's share is proportionately reduced. As we said in *Katz v. Farber*, 4 N. J. 333 (1950),

"Chancery considered that the complainant, if he did not create, at least preserved and protected a fund, at his own expense, and brought that fund under the control of the court for the benefit of a class which should, in good conscience, bear their fair share of the burden of the litigation."

See also *Clintas v. American Car & Foundry Company*, 133 N. J. Eq. 301, (Ch. an., 1943), affirmed, 135 N. J. Eq. 305 (E. & A. 1943).

The court having jurisdiction over the fund and the allowances to counsel having been made therefrom for their efforts to preserve and protect the fund, no constitutional problem of due process relative to a claim by a potential claimant is involved.

The Escheator's fee is, however, in a different category. Historically, the Escheator was an officer of the King whose duties were generally to ascertain what escheats had taken place and to prosecute the claim of the sovereign for the purpose of recovering escheated property. He performed a service for the sovereign not unlike the services performed by a sheriff. In some instances, the sheriff would perform the duties of the Escheator. *Hardman, The Law of Escheat,* 4 L. Q. Rev. 318, 339 (1888). The Escheator's fees for the service he performed were at an early date set by statute. See 10 *Vin. Abr.* 159 (1792).

The amount of fee presently to be allowed to the Escheator for his services is set by statute and is contained in Section 2A:37—35 N. J. S. where it is provided:

> "After the judgment directing that the person or corporation shall forthwith deliver said moneys to the state treasurer shall have been compiled with as provided in section 2A:37—31 of this title, the state treasurer shall so inform the court. Whereupon the court shall direct that there be paid to the escheator, if any, 5% of the moneys so paid to the state treasurer, * * *."

Although this allowance to the Escheator, in effect, reduces the amount of the sum over which the State Treasurer shall exercise protective custody, the amount of the fee to be paid to the Escheator is provided by statute. This distinguishes it from the amount of fee allowed to counsel by the court out of the fund in court independent of any statute, as compensation for the preservation and protection of the fund.

The amount of the Escheator's fee being set by statute, in the absence of an expression by the legislature that a deduction of said fee shall be made from a claim for repayment, no such deduction should be made.

The Superior Court in dealing with the protective custody statute said in *State v. American Hawaiian Steamship Co.,* 29 N. J. Super., 116, 133 (Ch. Div. 1953):

> "With respect to the assertation that the owner will be saddled with a portion of the expenses of the action for custody, it is not necessary to consider the constitutionality of a deduction on that account since our statute does not provide for any deduction by reason of the custodial proceedings."

We are satisfied that the court had in mind only deductions provided for by statute. The deduction of the allowance of counsel fee is not made by authority of a statute. No statutory provision exists for the deduction of the fee set by statute to be paid to the Escheator, nor is there any general principle of law sanctioning its deduction. (Cf. *Katz v. Farber, supra. Cintas v. American Car & Foundry Company, supra*).

Yours very truly,

GROVER C. RICHMAN JR.,
Attorney General.

By : CHARLES J. KEHOE,
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CJK:MG