

PENAL INSTITUTIONS:

Concerning leasing of property; use of convicts for service, and sale of articles manufactured in the various penal institutions.

October 17, 1941

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

This Department is in receipt of your request for an official opinion concerning certain legal questions contained in the Audit of the Department of Penal Institutions from January 1, 1939 to December 31, 1940, which was submitted to you by the Honorable Forrest Smith, State Auditor, in compliance with Section 13099, R. S. Missouri 1939. The questions contained therein are as follows:

(1) May the Commission of the Department of Penal Institutions lease temporarily, property owned by the Department, and which, at the time of leasing, the Department has no use therefor?

(2) Are all or any of the following entitled to the use of convicts or inmates as servants: the Commissioners; the Warden; the Deputy Warden; the Superintendent of the Intermediate Reformatory for Young Men at Alcoa; the Superintendent of the Missouri Reformatory at Boonville; and the Superintendent of the Auxiliary Prison?

(3) If any of the above are entitled to the use of convicts or inmates as servants, then may fifty cents per day subsistence money for each convict so used be paid by the Commission to the person using the convict or inmate?

(4) May private individuals purchase from various industries employing inmates of the State Penitentiary, furniture and clothing?

We shall take your questions up in the order in which they are stated.

At the outset we wish to call your attention to the statement in 6 Corpus Juris 811, which is as follows:

"It is the duty of the Attorney General to give his opinions on questions of law only, and not to decide disputed questions of fact, or matters of propriety involving executive judgment or discretion."

This reference is so made because some of the questions presented in the Audit deal with the propriety of the acts of the various penal officials and whether or not they abused their discretion, and also the adequacy of the price demanded by the officials has been questioned. With this phase of the Audit this Department is not concerned, but in this opinion restrict ourself entirely to the questions of law presented.

I.

A DEPARTMENT OF THE STATE HAVING
CONTROL OF PROPERTY CANNOT LEASE
SAME IN THE ABSENCE OF STATUTE.

The first question presented is whether the Commission of the Department of Penal Institutions may lease certain properties owned by the Department for which properties the Department at the present time has no use.

From the facts shown in the Audit the Department of Penal Institutions owns various properties upon which are situated houses. This land was bought for use in the expansion program of the penal institutions. However, this land is not needed at the present time for use as buildings of the Penitentiary, so the buildings have been leased to various individuals for use as living quarters.

Section 8987, R. S. Missouri 1939, provides as follows:

"The Commission of the Department of Penal Institutions shall, with the approval of the Governor, have authority

to lease or purchase lands for farming, rock quarries, grazing, or for any or all purposes deemed by the Commission necessary and proper to be used for the employment at useful work of the prisoners in the penitentiary, and for training the same so that they may on leaving the penitentiary be of good health and character and competent to earn an honest livelihood. The Commission is authorized to erect on such lands when leased or purchased such buildings for hospitals, dormitories, reformatories and other structures or improvements as it may with the approval of the Governor, deem necessary and proper for the welfare of the prisoners. Such lease or purchase of said lands by the Commission shall be on behalf of the State of Missouri at such terms as the Commission may deem fair and reasonable, and a lease or a deed taken therefor to the State of Missouri; * * * * *

A reading of this statute discloses that the right given to the Commission to lease lands is used in the same sense as "purchase," that is, by said section the Commission is given the power to acquire land. The statute in no way can be construed to give authority to the Commission to dispose of land by lease, and, therefore, Section 8987, supra, is no authority for the question submitted.

A thorough research of the cases in Missouri discloses no cases in which the right of the State to lease lands has been raised. However, in regard to counties and cities, the rule in this State is that in the absence of a statutory enactment empowering it so to do a county or municipal corporation has no power to rent to private persons municipal property which it holds for public use. *Matthews v. Alexandria*, 68 Mo. 115; *Shopp v. St. Louis*, 117 Mo. 131, 22 S. W. 898; *Illinois and St. Louis Ry. & Canal Co., v. St. Louis*, 2 Dill. 70, Fed. Cas. No. 7,007. This is the majority rule in the other jurisdictions of this country, which cases are cited in 133 A. L. R. 1242 and 63 A. L. R. 614. The later cases of *Hagar v. St. Louis*, 323 Mo. 1031, 20 S. W. (2d) 665, and

Harris v. St. Louis, 233 Mo. App. 911, 111 S. W. (2d) 995, do not in any way change the rule above cited. In the Hagar case there was a specific charter provision giving authority to "lease or otherwise dispose of property." In the Harris case, supra, the court held that the power to lease was necessarily inferred from the statute authorizing the creation of the property.

We are unable to find any statutory provision that gives authority to the Department of Penal Institutions to lease the property held by them, and we believe the rule laid down by our Supreme Court in regard to the right of counties and cities to lease property, is equally applicable to the right of the State, and we therefore rule that the Department of Penal Institutions has no authority to lease property held by it in its governmental capacity.

II.

THE DIRECTOR OF THE DEPARTMENT OF
PENAL INSTITUTIONS, THE WARDEN AND
THE DEPUTY WARDEN OF THE STATE PENI-
TENTIARY ONLY ARE ENTITLED TO THE
USE OF CONVICTS AS SERVANTS IN THEIR
HOMES.

Section 9042, R. S. Missouri 1939, provides in part as follows:

"* * *; but nothing in this article shall be construed as forbidding the warden and deputy warden from using convicts as servants in their own families, subject to such rules as may be prescribed by the commission."

Section 8984, R. S. Missouri 1939, provides:

"The director of penal institutions shall have and exercise all the rights, powers, and privileges with reference to the residence provided for the warden of the Missouri state penitentiary, and the employment of prisoners therein, heretofore by law granted to and

conferred upon said warden with reference thereto."

It will be seen that under the above statutory provisions that the Director, the Warden and the Deputy Warden are allowed to use convicts as servants in their homes. The number that may be used is something that is entirely within the discretion of the Board, and is a matter upon which we do not feel competent to pass.

As to the other persons listed in the Audit who had the use of convicts as servants, to-wit, the two remaining Commissioners, the Superintendent at Alcoa, the Superintendent at Boonville, and the Superintendent of the Auxiliary Prison, we find no authority for such allowance. Of course, the above statement applies to the use of convicts as servants in the home.

Section 8986, R. S. Missouri 1939, provides that the Department of Penal Institutions may provide any employee of the Institution or Institutions under its care with board and living quarters, except that this section does not apply to the State Penitentiary. Neither does it apply to the Intermediate Reformatory, with the exception of the guards and attendants at said institution. Therefore, if the Superintendent at the Reformatory at Boonville resides upon the premises we believe that the use of convicts as servants would be proper.

In this connection we wish to call your attention to an opinion rendered by this Department on March 31, 1934, to the Honorable Forrest Smith, State Auditor, which was an answer to a request from the then Director of Penal Institutions as to the use of convicts as servants. This Department held in that opinion that only the persons mentioned above, that is, the Director, Warden and Deputy Warden, were entitled to the use of convicts as servants in their homes; and that is the holding in this opinion.

III.

THE DIRECTOR, WARDEN AND DEPUTY WARDEN NOT ENTITLED TO CASH RE- IMBURSEMENT FOR SUBSISTENCE OF SERVANTS.

In view of the holding above, that only the Director,

the Warden and the Deputy Warden are entitled to the use of convicts as servants in their homes, the question next arises as to whether the allowance by the Commissioners of the Department of Penal Institutions of fifty cents a day to such persons as subsistence for each convict so used, was proper.

The general rule is stated in 9 Cyc. 876, as follows:

"A person convicted of a felony and sentenced to confinement in the State Penitentiary is in contemplation of law, in prison until he serves his term or is pardoned, although he may be hired out to work for a contractor for convict labor, for the State cannot surrender the police power of the State over the convicts."

Section 9040, R. S. Missouri 1939, provides in part as follows:

"Said commission shall prescribe the articles of food and the quantity and quality of each kind which shall be provided for said convicts. * * * * "

Section 9065, R. S. Missouri 1939, states in part:

"The convicts shall be clothed in the uniform prescribed by said commission, and shall receive the allowance of food prescribed by the rules, and no other; but the convicts under the care of the physician shall be allowed such diet as he may direct. * * * * * "

Therefore, it will be seen that the Commission is to prescribe the food that is to be given to the convicts and every convict must receive the same kind of food. That this was the intention of the Legislature is apparent because of the words "no other" in Section 9065, supra. The General Assembly was specific in its statement that all convicts were to receive a certain allowance of food, and that only. This view is further carried out by the clause following, in which it is provided that convicts under the care of the physician shall be allowed such diet as he directs, thereby by a specific statement excepting sick convicts from the scope of the statute.

It is further the rule, as stated in 50 Corpus Juris, 360, that:

"Express provision is usually made by a statute for the maintenance and care of prisoners and these statutes must be looked to primarily to determine the right of the sheriff or other officers to particular compensation for such maintenance and care, and the amount thereof, and for expenses incurred therein, and the liability of the state, county or municipality therefor."

Since our Legislature has with definite clearness declared how convicts should be fed, we believe that this method is exclusive and any attempt by the Commissioners of the Department of Penal Institutions to alter this method is illegal and cannot be countenanced.

Therefore, we rule that a payment of fifty cents per day for each convict used by the Director, Warden and Deputy Warden as servants, to be used to cover the cost of feeding said servants, is illegal and contrary to the statutes of Missouri.

IV.

FURNITURE AND CLOTHING MADE BY CONVICTS IN THE PRISON INDUSTRIES MAY BE SOLD TO PRIVATE PERSONS.

The last question presented is whether private persons may purchase furniture and clothing from the prison industries.

Section 8988, R. S. Missouri 1939, provides in part as follows:

"* *, said board may purchase or lease upon reasonable terms such machinery as may be necessary for the manufacture and production of any other articles or products that may be disposed of upon the open market at a profit to the state, including shoes, clothing, floor mats,

mops, rugs, carpets and other articles
of furniture, such as beds and bedding
of all kinds; also desks, chairs, tables,
farm implements, fertilizer, brick or any
other articles agreed upon by the board.
* * * * *

In view of the above section, we are of the opinion that the Department of Penal Institutions may sell to private persons articles made by the convicts in the prison industries so long as said articles are sold at a profit. As stated at the outset, we do not in this opinion pass upon the adequacy of the prices obtained for the articles listed in the Audit but content ourself with citing to you the law upon the matter.

Section 8990, R. S. Missouri 1939, which provides that in case of any excess production from any of the industries before mentioned that it shall be the duty of said Commission to sell the same at the market price, does not apply to the instant facts. That statute applies to the situation when the various state departments and institutions make requisitions for articles to be made or manufactured in the prison industries. If said departments and institutions do not take the entire number of the articles so requisitioned, then the excess can be sold upon the open market at the then market price.

We believe that the above conclusions answer all the questions presented in the audit and, therefore, respectfully submit this opinion.

Yours truly

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