

STATE BOARD OF HEALTH: Although a hotel is exempt from property tax it is not exempt from hotel license fees. Deputy of State Board of Health must follow the statutes in condemnation and forfeiture of food and drugs.

October 9, 1941

James Stewart, M. D.
State Health Commissioner
The State Board of Health
of Missouri
Jefferson City, Missouri



Attention: Mr. W. D. Cruce, Supervisor
Division of Food and Drugs

Dear Sir:

Your request of October 7, 1941, in reference to two questions upon the powers and duties of the State Board of Health, is answered by the following opinion.

I.

Your first question is as follows:

"The matter has been brought to my attention under the hotel act Article 6, R. S. 1939, by the Young Men's Christian Association at Springfield, Missouri, that they should be exempt from paying the hotel license fee. I should like your opinion on this matter.

"Also, we have numerous apartment hotels which claim they should not pay. Can I have your opinion on this matter?"

Section 9931, R. S. Missouri 1939, provides as follows:

"That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms

are furnished for the accommodation of such guests, whether with or without meals, shall for the purpose of this article be deemed a hotel, and upon proper application the food and drug commissioner shall issue to such above described business a license to conduct a hotel: Provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the food and drug commissioner."

The above section states, "approved by the food and drug commissioner," and under Section 9855, R. S. Missouri 1939, the duties of the food and drug commissioner were transferred to the Commissioner of Health and interpreting the statutes, the Commissioner of Health is substituted in Section 9931, supra.

Section 9932, R. S. Missouri 1939, specifically states that anyone conducting a hotel, as defined under Section 9931, supra, must procure a license for each hotel.

Section 9933, R. S. Missouri 1939, specifically provides the fee to be charged for the license which amount depends upon the number of rooms contained in the hotel.

Section 9934, R. S. Missouri 1939, specifically provides that in estimating the number of rooms so as to arrive at the amount of the license fee to be charged for operating a hotel, the parlor, dining room, kitchen and office shall be construed to mean guest rooms. The exemption from the paying of taxes has been set out in Section 6, Article X of the Constitution of Missouri and provides as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such

cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Under the above section of the Constitution the latest case decided by our Supreme Court is Young Women's Christian Association et al. v. Baumann, Collector of the City of St. Louis, 130 S. W. (2d) 499. In this case the court, in passing upon the taxation of property owned by the Young Women's Christian Association, specifically held that they were exempt from taxation if the building was used exclusively for the benefit of the association. In that case they also cited several cases which involved the Young Women's Christian Association and Young Men's Christian Association where it was held that the associations are liable for property tax when the building and property was not used exclusively by the associations. They approved those cases for the reason that in the cases the associations had leased part of the property to other persons for business not connected with the educational or charitable purposes of the association. The above only applies to property tax.

It has been held in this state that excise taxes and licenses do not come within the prohibition set out in Section 6, Article X of the Constitution of Missouri. In the case of State v. Distilling Co., 236 Mo. 29, the court, in holding that a license issued under the police power was for the purpose of regulation and was not a taxation for revenue, at page 291, said:

"The authorities reviewed, among other things, established the three following propositions: First, That the burdens imposed by section five of the act in question are not taxes upon occupations, persons or property within the meaning of the Constitution. Second, That the class of cases which hold that a statute which imposes a

tax, under the taxing power of the State, upon persons, property or any lawful business, is unconstitutional, if it is not uniform in its operation; and third, That where a person has no natural, absolute or lawful right to engage in a business, and can only do so under a license from the State, the State may grant or withhold such license as the Legislature may deem wise and proper, and if granted it may do so upon such terms and conditions as the lawmaking power may impose (not inconsistent with the State or Federal Constitution) including a requirement that the applicant therefor shall pay or agree to pay the license fees, in consideration of the license, or right, to conduct said business; and that said fees are in no sense a tax upon the business licensed, nor upon the person or property engaged therein."

Also, the court, at pages 268-270, cited as follows:

"Black on Intoxicating Liquors says in section 117: 'It will be apparent that three leading ideas are involved in the definition of a license under the liquor laws. First, it confers a special privilege or franchise, upon selected persons, to pursue a calling not open to all. Second, it legalizes acts which, if done without its protection, would be offenses against the statute. Third, it is a privilege granted as a part of a system of police regulation, and herein is distinguishable from taxation A license fee is exacted primarily as a means of restricting or regulating a trade, and it continues to be such although, incidentally, it may produce an addition to the public revenue.'

"If we read this act in the light of the foregoing definitions of the word 'license,'

it seems clear to us that it does not purport to impose a tax upon any occupation, person or property, but is simply an act requiring all persons who wish to engage in the business therein mentioned, to first procure a license from the proper authorities granting them the permission to do so, and at the same time imposes a license fee which must be paid by each and all licensees, in consideration of the right and privilege so granted. Such licenses must be actually paid for, or agreed to be paid for (according to the provisions of the act under which they are issued), by the applicant therefor, before the same can lawfully issue. That agreement may be in express terms, or it may be implied from the acceptance of the license, which in contemplation of law, has the act under which it is issued written therein, and constitutes a part thereof. That being indisputably true it seems clear to us, that it would be a physical impossibility, as it were, to hold that such consideration so required to be paid for said privilege, which evidenced by the license, is a tax upon the occupation, person or property mentioned therein, for the obvious reason that there could be no such lawful occupation, as shown by the authorities previously cited, until the license had been issued and paid for before its issuance; and if there could be no such business in existence until after the issuance of the license, then it is self-evident that no one could engage therein until after its issuance; and likewise no property could be employed in a business before the business itself is established."

Also, in the case of State ex rel. Cement Co. v. Smith, 338 Mo. 409, 1. c. 413, the court said:

"* * * 'Excises, in their original sense, were something cut off from the price paid on a sale of goods, as a contribution to the support of government. The word however has come to have a broader meaning and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excises include every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.' (26 R. C. L., sec. 18, p. 34.) The same text, in pointing out the distinction to be drawn between property taxes and excise taxes, says 'If a tax is imposed directly by the Legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise.' (26 R. C. L., sec. 19, p. 35.) 1 Cooley on Taxation (4 Ed.), section 42, page 127, defines excises as 'taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Under these general definitions of the term, as well as upon the authority of the many adjudicated cases, we think it so clear as not to be open to question that the tax in controversy is an excise, and not a property tax. (See Independent School District v. Pfof, 51 Idaho, 240, 4 Pac. (2d) 893, 84 A. L. R. 820; Crockett v. Salt Lake County, 270 Pac. 142, 60 A. L. R. 867; Portland v. Kozier, 108 Ore. 375, 217 Pac. 833; Standard Oil Co. v. Brodie, 153 Ark. 114, 239

S. W. 753; Wiseman v. Phillips (Ark.), 84 S. W. (2d) 91; Pierce Oil Co. v. Hopkins, 282 Fed. 253; Monometer Oil Co. v. Johnson, 292 U. S. 86.) It will be observed that the exemptions granted by the Constitution and the statute, supra, are limited by express terms to the real and personal property of the several bodies mentioned. Accordingly, Article X, Section 6 of the Constitution has been held to have no application to collateral inheritance taxes (State ex rel. v. Henderson, 160 Mo. 190, 60 S. W. 1093), nor to license fees (State v. Distilling Co., 236 Mo. 219, 139 S. W. 453). And we think in this instance the statute does not impinge upon the constitutional provision pointed out, nor violate the statute relied on, and is valid.

"We pass now to the question of the intent of the Legislature with respect to imposing a tax on sales or transactions wherein a subordinate branch of the executive department (which the highway department was held to be in State ex rel. v. Hackmann, 314 Mo. 33, 282 S. W. 1007) becomes the purchaser. Respondent invokes the rule that exemption from property taxes does not extend to excise taxes, and asserts the language of the act itself, together with the record of the General Assembly in considering this particular legislation, evinces a legislative intent to impose the tax upon such agencies. The weight of authority seems to be that, as applied to counties, municipalities and other subdivisions, exemption from property taxes does not ordinarily extend to excise taxes. (See Independent School District v. Pfost, and other cases cited, supra.) But the rule is not absolute, and is dependent upon the circumstances of each case."

CONCLUSION

In view of the above authorities we hold that even if the Young Men's Christian Association at Springfield, Missouri, has not rented any part of its building to any private individual for other commercial purposes, and comes within the definition of a hotel as set out in Section 9931, supra, it is still subject to the payment of a license fee as set out under Section 9933, R. S. Missouri 1939.

II.

Your second question is as follows:

"Also, I should like your opinion as to the authority of this department in regard to seizure and destruction of articles of food, which might be unfit for human consumption, such as bulged canned goods, filthy or wormy confections, rat-and-insect-infested flour, etc. The Federal Food and Drug Department has specified seizure laws, which they cannot enforce in case of intrastate laws.

"Every day matters of this kind are turned to me, and I do not know under our statutes how much authority this department has. Will you please clarify this situation for me?"

The sections of the statutes applicable to this question are very lengthy and we will be compelled to refer you to the numbers of the sections applicable to your question. I believe your department has most of this law in pamphlet form.

Section 9855, R. S. Missouri 1939, specifically states that the duties heretofore vested by law in the Food and Drug Commission are now transferred to and vested in the State Board of Health and that wherever the words "commissioner" and "food and drug commissioner" are used in Chapter 58, they shall be construed to mean the State Board of Health of Missouri, or its deputies.

Section 9857, R. S. Missouri 1939, authorizes the State Board of Health to enforce all the laws that now exist, or that may hereafter be enacted, regarding the manufacture and sale of certain food and drug products. It authorizes the State Board of Health, or its deputies, under certain conditions, to arrest and prosecute, or cause the arrest of certain individuals violating the laws of the Food and Drug Act.

Section 9858, R. S. Missouri, authorizes the State Board of Health, or any of its deputies, to enter certain places of business under certain conditions and obtain samples which should be analyzed by the chemists of the state experiment station, and it further authorizes the deputies to open any cask, tub, or other vessel therein described to obtain articles of food or drugs and to take samples thereof in the presence of a witness and then tender at the time of taking to the person having custody of the same, the value of the samples. It further provides that the samples may be purchased in the open market and that the collector, that is, the man who purchases the samples, shall keep a memorandum of all names and other matters so that it can be used as evidence in court. It further provides that when samples are taken they shall be divided into three parts, each labeled with identifying marks. One of the parts shall be delivered to the person from whom the purchase was made, one of the parts so labeled shall be sent to the chemist of the state experiment station and one part shall be held under seal by the State Board of Health.

Section 9860, R. S. Missouri 1939, provides the procedure for the prosecution of the case after the samples so analyzed show that it was in possession with intention of sale by the defendant and was either misbranded, was unwholesome and was a violation as set out in Chapter 58 as being a violation of the law therein. Under this section the State Board of Health must notify the parties from whom the sample was obtained that they should appear at a certain date, hour and place of hearing upon the question involved by the taking of the samples. This hearing should be private and take place at the office of the State Board of Health or some other place designated by the State Board of Health. It further provides that after such a hearing the State Board of Health, if it finds that the laws of Chapter 58 have been violated, may file a complaint before any justice of the peace

having jurisdiction, providing the value of the samples shall not be greater than the amount within the jurisdiction of the said justice. The justice of the peace shall thereupon issue his summons to the person in possession of the goods directing him to appear not less than five nor more than ten days from the date of issuing said summons, and show cause why said goods shall not be condemned and disposed of. It also further provides, where no one can be found in possession of the goods, for service by the same procedure as is set out in other civil matters. It further provides that if upon trial the goods shall be found to be in violation of any of the provisions of Article 1, Chapter 53, it shall be the duty of the said justice of the peace to render judgment that the property be forfeited to the State of Missouri, and that said goods be destroyed or sold for any purpose other than to be used as food. It also provides for an appeal from the judgment of the justice of the peace.

There is a provision in this section that if the owner or party claiming the property declared forfeited by the justice of the peace can produce and prove a written guarantee of purity, signed by the wholesaler, jobber, manufacturer or other person residing in this state from whom said articles were purchased, then the proceeds of the sale of such articles, over and above the cost of forfeiture and sale, including witnesses fees, shall be paid over to such owner or claimant. It also provides that where the goods from which the samples are taken exceeds the jurisdiction of the justice of the peace, complaint shall be filed in the circuit court and not in the justice court. This section is to the effect that first, samples must be taken, and after an examination by the state experiment station if it can be proven that the samples violated some law in Article 1, Chapter 53, then the justice of the peace or the circuit court, upon a hearing, find that the samples are a violation of some law in article 1, Chapter 53, the justice of the peace or the circuit court may order the food or drugs, from which the samples were taken to be condemned and forfeited by the state as set out in this section.

26 Corpus Juris, page 751, Section 2, in stating the rule in reference to unwholesome foods, said:

"The selling of unwholesome provisions

was an offense at common law. But the common law was inadequate to the complete protection of the public against abuses in connection with the production and sale of food, and it has accordingly been reenforced and supplemented by federal statutes, and by numerous state statutes and municipal ordinances, regulating the manufacture and sale of articles of food with a view to the preservation of health and the prevention of fraud. Similar regulations also exist in England and in Canada."

Also, in 26 Corpus Juris, page 752, Section 3, in stating the rule setting out power to make regulations by the state, it is said:

"Under the police power inherent in the states and reserved to them in the federal constitution, statutes or municipal ordinances may be enacted, making reasonable rules as to the production and sale of articles of food."

Also, the same authority, on page 755, Section 5, states the rule as to condemnation as follows:

"In the exercise of its police power to condemn and destroy articles of food endangering the health of the community, the state may authorize the condemnation and destruction of food products deleterious to health."

Very few of the sections set out in this opinion have been passed upon by the Supreme Court, especially as to unwholesome foods. Most of the cases which have reached the Supreme Court are on misbranding and adulteration.

CONCLUSION

In conclusion we can only say that the statutes must be specifically followed in the condemnation and forfeiture

James Stewart, M. D.

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of food and drugs and if not followed, the deputy of the State Board of Health may be liable to civil damages.

Respectfully submitted

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APPROVED:

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