

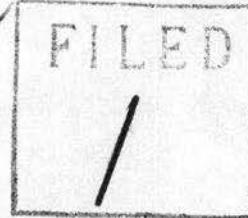
FOOD AND DRUGS:
SANITATION REGULATIONS:

The Division of Health of the State of Missouri may not publish a closing order issued by said Division in any newspaper and they may not place a notice or plaque on the door or window of a closed establishment stating that said establishment has been closed for sanitary reasons.

December 28, 1949

Dr. C. F. Adams
Director, Division of Health
Bureau of Food and Drugs
Department of Health and Welfare
Jefferson City, Missouri

Dear Sir:



I.

This will acknowledge receipt of your letter in which you requested an official opinion from this department on the following questions:

"Under Article 3, Sanitation, Chapter 58 of the Revised Statutes of Missouri, 1939, under Sections 9898 through 9901, the Food and Drug Commissioner or his authorized deputy is permitted to issue a closing order in certain food handling establishments when such establishments maintain or operate their places of business in such manner as to constitute a menace to the public health.

"1. 'If a written closing order is issued, may we legally send a copy of such an order to the local newspapers for publication?'

"2. 'If such action is not legal, may we legally place a plaque on the door or window of such a closed establishment stating that this establishment has been closed by the Bureau of Food and Drugs, State Health Department, for sanitary reasons?'"

II.

In answer to your first question we cannot find any statutory authority for you to publish a copy of any closing order in any newspaper. You cannot publish such a notice in any newspaper without direct or express authority from the General Assembly of this

state. We have carefully read Article III, of Chapter 58 of the Revised Statutes of Missouri, 1939, and we cannot find any provision therein for publishing a notice of closing an establishment for violation of the sanitary regulations set forth in that article. Such a notice, if published, might be libelous if the facts did not substantiate that unsanitary conditions existed in said establishment to justify such closing orders. A general notice of closing of all establishments dealing with the public, in the event of an epidemic, might be proper. Appropriate health regulations will always be sustained where danger of epidemic actually exists, but extraordinary measures are not suitable, and are not regarded as reasonable at ordinary times or in individual cases. (39 C.J.S., p. 825.)

In answer to your second question, we have carefully considered Sections 9898; 9899; 9901 and 9904 of said Article III of Chapter 58 of the Revised Statutes of Missouri, 1939. Said sections do not provide for the posting of a copy of the closing order on the door or window or entrance of the establishment closed. We realize that Section 9735, R.S. Mo. 1939, makes it the duty of the State Board of Health, now the Division of Health of the Department of Public Health and Welfare, to safeguard the health of the people in the state, counties, cities, villages and towns. We also realize that the Supreme Court of Missouri has held on different occasions that "it is the duty of the State Board of Health 'to safeguard the health of the people in the state, counties, cities, villages and towns.'" *Riggs v. Springfield*, 344 Mo. 437, 126 S.W.(2d) 1145; *State ex rel. Shartel v. Humphreys*, 338 Mo. 1099, 93 S.W.(2d) 924. It could be argued that it is necessary to post a notice of the closing of an establishment for violation of the sanitation regulations in order to protect the health of the people who might enter therein if the owner or operator of the establishment violated the closing order and continued to do business.

We realize that the Missouri Supreme Court has held that powers conferred upon boards of health to enable them effectually to perform their important functions in safeguarding the public health should receive a liberal construction (*State ex rel. Horton v. Clark*, 9 S.W.(2d) 635, 320 Mo. 1190, l.c. 1199)

But the Legislature has prescribed the procedure and method for the enforcement of the sanitation closing order by Section 9904, R. S. Mo. 1939, which provides:

"Any person who shall fail, or refuse, to obey any order of the state food and drug commissioner to close any place, or places, mentioned in section 9898, or who shall exhibit or expose for

sale in any show-window upon any sidewalk, any vegetables or other articles or commodities whatsoever intended for human food, in violation of any order of the food and drug commissioner, or who shall, in any way, resist or interfere with the state food and drug commissioner in the enforcement of this chapter, or any order of the state food and drug commissioner made pursuant to the authority of this law, shall be deemed guilty of a misdemeanor."

This section makes it a criminal offense to violate the order of the Division of Health closing an establishment for violation of sanitary regulations.

The Courts cannot enlarge and change the scope of the statutes. State ex rel. Knisely v. Holtcamp, 181 S.W. 1007.

The Courts will not import language into the body of a legislative enactment not necessarily required in order to accomplish the purpose for which it was enacted. Head v. N.Y. Life Ins. Co., 147 S.W. 827, 241 Mo. 403, 34 Supreme Court 879; Mills v. Allen, 128 S.W.(2d) 1040, 344 Mo. 743; Sayles v. K.C. Structural Steel Co., 128 S.W.(2d) 1046, 344 Mo. 756.

A statute which is penal in nature must be strictly construed. McClaren v. G. S. Robbins, 162 S.W.(2d) 856, 349 Mo. 653.

This also means that the Department does not have the power to provide under its rule-making power a new method of enforcement of said closing order or to provide additional penalties.

Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise. Dietrich v. Jones, 53 S.W.(2d) 1059, 227 Mo. App. 365. The Supreme Court in Keane v. Strotzman, 18 S.W.(2d) 896, construed Section 8702, R.S. Mo. 1919, and held:

"Certainly where, as at bar, the statute (section 8702) limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. This is the general rule as to the application of the maxim. Even more relevant under the facts

in this case is the interpretation given to it by the Kansas City Court of Appeals in Dougherty v. Excelsior Springs, 110 Mo. App. 623, 626, 85 S.W. 112, 113, to this effect; 'That when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power,' that exercise is 'within the provision of the maxim * * * and * * * forbids and renders nugatory the doing of the thing specified except in the particular way pointed out.'

The Supreme Court in State ex rel. Tummons v. Cox, 282 S.W. 694 said: (l.c. 695)

"* * * a reasonable construction of an administrative statute is that in its application it is to be limited to its plain, unequivocal terms. * * *"

The posting of a notice of closing upon the entrance of a business establishment would cause a serious loss of business even after the cause for the closing had been corrected and the order of closing had been removed, and would therefore be an additional penalty upon the owner or operator of such a business.

We have studied the opinion written by John R. Baty, Assistant Attorney General, on March 10, 1949, to William Lee Dodd, prosecuting attorney of Ripley county, State of Missouri, in which this department considered the rule-making power of the Division of Health and the use of the writ of injunction to prevent the continuance of a public nuisance or to prevent the creation of a public nuisance. We assume you have a copy of this opinion.

We believe that the rule-making power set forth in this opinion cannot be extended to include the right to post a notice of closing upon the entrance of a business establishment ordered closed.

III.

CONCLUSION

It is, therefore, the opinion of this department that the

Dr. C. F. Adams

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Division of Health of the State of Missouri may not publish a closing order issued by said Division in any newspaper and they may not place a notice or plaque on the door or window of a closed establishment stating that said establishment has been closed for sanitary reasons.

Respectfully submitted,



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Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SJM:mw

