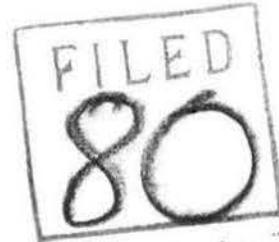


COMPTROLLER:  
CONSTITUTIONAL LAW:  
ATTORNEY GENERAL  
CIRCUIT COURTS:

Obligations may be incurred and payments made out of the Milk Control Fund, pursuant to appropriation made in Section 30 of H.C.S.H.B. 574, pending the decision of the Supreme Court on the constitutionality of the Milk Control law, when the Attorney General holds said law to be constitutional and prosecutes an appeal from a circuit court judgment ruling the law invalid. Section 30 of H.C.S.H.B. is valid.

March 22, 1961



Honorable J. W. Schwada  
Comptroller and Budget Director  
Jefferson City, Missouri

Dear Mr. Schwada:

You recently requested an opinion as follows:

"House Bill 255, 70th General Assembly, provides for the regulation of certain dairy products producers and for collection of fees by the Commissioner of Agriculture in the administration of the law. Since the effective date of the Act, fees have been collected and deposited to a milk control fund, also established by House Bill 255. An appropriation was made against the milk control fund and expenses have been made from it.

"I understand that the milk control law has been held invalid by a circuit court. These questions arise with respect to the operation of this office:

1. May obligations against the milk control fund incurred prior to the date of the above mentioned decision be paid by this office?
2. May obligations be incurred and payments be made from this fund after the date of the decision mentioned above?"

As your request indicates, on January 25, 1961, the Circuit Court of Cole County in the case of The Borden Company v. John Sam Williamson, et al., held that House Bill No. 255, 70th General

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Assembly (Sections 416.410 et seq. V.A.M.S.) is unconstitutional, and enjoined the Commissioner of Agriculture and the Attorney General from enforcing said act. The decision is being appealed to the Supreme Court of Missouri.

This office has advised the Department of Agriculture to continue to enforce the act, at least as against all persons affected thereby other than the Borden Company, pending an authoritative decision of the Supreme Court. Such advice would necessarily imply that the Attorney General is of the opinion that the statute is constitutional and that the Circuit Court's judgment was erroneous. Obviously, the act cannot be effectively enforced absent funds for payment of the expenses of administering such law.

Your opinion request pertains primarily to the validity of the appropriation made by the General Assembly out of the Milk Control Fund for the cost of administering House Bill 255.

House Committee Substitute for House Bill 574, 70th General Assembly, appropriates money for various departments and agencies of the State government and other purposes. Section 30 of that act appropriates to the Department of Agriculture from the Milk Control Fund the sum of \$50,000.00 for the cost of administering House Bill 255. No court has held Section 30, H.C.S.H.B. 574 invalid, nor has this office so ruled.

Certain fundamental principles of constitutional law are here relevant. A statute is presumed to be constitutional until the contrary is made clearly to appear. State ex rel. Wiles v. Williams, 232 Mo. 56, 133 S.W.1, 1.c.7. "An act of the Legislature carries the presumption of constitutionality. The court will not declare an act unconstitutional unless it plainly contravenes the Constitution." Bowman v. Kansas City, Mo. 233 S.W.2d 26,33. "Every presumption must be indulged in favor of the constitutionality of a legislative statute and it will not be declared unconstitutional unless its invalidity is made to appear beyond a reasonable doubt." Ward v. Public Service Commission, 341 Mo. 227, 108 S.W. 2d 136 1.c. 139. "All doubt, if any there be, should be resolved in favor of the constitutionality of a statute." Missouri Electric Power Company v. City of Mountain Grove 252 Mo. 262, 176 S.W.2d 612 1.c.616. So strong is this presumption in favor of the validity of a statute that the Supreme Court in ruling a case will not be bound by the admission of a party respecting the constitutionality of a statute. State ex. rel. Jacobsmeyer v. Thatcher, 338 Mo. 622, 92 S.W.2d 640, 642.

It is of course true that an unconstitutional statute is no law and confers no rights. "This is true from the date of its enactment,

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and not merely from the date of the decision so branding it." State ex rel. Miller v. O'Malley 342 Mo. 641, 117 S.W.2d 319, 1.c. 324. Stated otherwise, an unconstitutional statute is "to be regarded void ab initio, and as though it had never been in existence." Lieber v. Heil, Mo. App. 32 S.W.2d 792. On the other hand, the presumption of constitutionality may be relied on by those officials charged with the enforcement of the statute until it is authoritatively ruled invalid by the Attorney General or the Supreme Court. As was held in Kleban v. Morris, 363 Mo. 7, 247 SW2d 832 1.c. 839:

"Their official duty was to administer the law and not to pass on its legality, its enactment by the Legislature carrying a presumption of its validity."

It is for that very reason that the Department of Agriculture is required to administer the Milk Control Law and to act upon the assumption that it is valid.

The Circuit Court decision is in no sense conclusive or binding except only as between the parties to the litigation and those in privity with them, and then only until the Supreme Court rules on the validity of the statute. State ex inf. Kell v. Buchanan, 357 Mo. 750, 210 S.W.2d 359, 361; Agnew v. Union Construction, Mo. 291 S.W.2d 106 109. The Circuit Court suit was not a class action and affects only the parties to the suit. No other producer has any rights growing out of that decision.

In 16 C.J.S. Constitutional Law § 93, pp 305-6, it is said, citing Allen v. State Board of Veterinarians, 72 R.I. 372, 52A.2d 131, that "unless the constitutionality is determined by the appellate court, the determination of constitutionality by the inferior court will stand only for the case in which it was made." Even if the Circuit Court ruling had been adverse to the Borden Company, such judgment would not preclude other producers from seeking a judgment on their behalf either from the same or another circuit court, respecting the validity of the act.

It is the opinion of this office that the Department of Agriculture, which is charged by law with the enforcement of the statute, may not abandon such enforcement simply because a Circuit Court has held such statute invalid under a judgment which is binding only between the parties thereto, absent acquiescence in such judgment by the Attorney General.

The rule in this state is well settled that ordinarily a public officer may not question the constitutionality of a statute imposing ministerial duties upon him. Our Supreme Court, in State ex rel Missouri & N.A.R. Co. v. Johnston, 234 Mo. 338, 137 S.W.595, 598, ruled as follows:

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"A ministerial officer has no right to pronounce an act of the General Assembly unconstitutional and so disobey it. The power to declare a law enacted by the lawmaking department of the state unconstitutional is entrusted only to the judicial department of the state government; it is not only judicial in its character, but it is of the highest judicial character.

"Obedience to the plain mandate of a statute by a ministerial officer is in no sense a judicial determination or adjudication on his part that the statute is constitutional; he would have no right to disobey it on the ground that, in his opinion, it is unconstitutional. To what confusion would it lead if every ministerial officer in the state was endowed with authority or should assume authority, to pronounce, in advance of any judicial decision, that an act of the General Assembly was unconstitutional, and for that reason he would disobey it."

However, in situations where the officer may be subject to civil or criminal liability he has the right, in appropriate situations, to raise such question of constitutionality. There are a number of decisions in this State holding that where the attorney general has advised the comptroller or other comparable officer that a statute is unconstitutional the officer has not only the legal right but the legal duty of raising the question of constitutionality of the law and to refuse to certify a claim for payment pending a decision of the Supreme Court. The most recent of such decisions is State ex rel State Board of Mediation v. Pigg, 362 Mo. 798, 244 S.W.2d 75. Other cases are State ex rel Wiles v. Williams, 232 Mo. 56, 133 S.W.1 and State ex rel S.S. Kresge Company v. Howard, 357 Mo. 302, 208 S.W.2d 247, 249.

Among the many other cases supporting the general proposition that a public officer may not ordinarily question the constitutionality of a statute are State ex rel Equality Sav. & Bldg. Ass'n. v. Brown, 334 Mo. 781, 68 S.W.2d 55; State ex rel Chicago R.I. & P. Ry. Co. v. Becker, 328 Mo. 541, 41 S.W.2d 188; and State ex rel Volker v. Kirby, 345 Mo. 801, 136 S.W. 2d 319.

The rule derived from the foregoing cases is that where the Attorney General has rendered an opinion that a statute is unconstitutional the officer makes or certifies payments at his peril. Section 33.200 V.A.M.S. provides that if the Comptroller shall knowingly certify a claim for payment unauthorized by law, he is

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guilty of a felony. For that reason the Supreme Court in the Pigg case held, 244 S.W.2d 1.c. 78:

"Upon the attorney general's advice that the payment of relator's salary and expenses was unauthorized, the respondent was justified in refusing (pending an opinion of this court) to approve and certify the items listed in the request."

On the other hand, the administration of laws would be thrown into a state of chaos if the comptroller or other public officer were to question the validity of every statute under which he is required to act. Although there are situations in which an opinion of the Attorney General will not suffice to protect an officer (State v. Thompson, 337 Mo. 328, 85 S.W.2d 594), yet where, as in the instant matter, the question involved is the constitutionality of an appropriation to enforce the Milk Control law, the Comptroller may in good faith rely on the opinion of his official legal adviser. When the attorney general has advised the officer that the statute is constitutional and the Supreme Court has not ruled otherwise, it should follow that the Comptroller has not "knowingly" certified a claim for payment "unauthorized by law". Although it is true that an unconstitutional statute is void ab initio, so that any payments required by such statute would technically be "unauthorized by law", nevertheless the officer would be protected in acting upon the assumption of the validity of the law, under the doctrine of Kleban v. Morris, supra. The words "unauthorized by law" are not used in the technical sense. If they were, the normal functions of government would break down. Miller v. Dunn, 72 Cal. 462, 14 P. 27.

If the Supreme Court were to reverse the decision of the Circuit Court, it would follow that the statute was constitutional from the date of its enactment and not merely from the date of the reversal. See Pierce v. Pierce, 46 Ind. 86; Miller v. Duncan 72 Cal. 462, 14 P. 27; and Jawish v. Morlet (D.C.) 86 A.2d 96. In the latter case it was held, 86A. 2d 1.c.97, that "if the decision is reversed the statute is valid from its first effective date" That is why (the Attorney General being of the opinion the Milk Control law is constitutional) it is necessary to enforce the statute pending an authoritative decision of the Supreme Court. Inasmuch as enforcement carries with it the necessity of incurring expenses to make such enforcement effective, the department may properly incur such expenses within the limitations of the appropriation. For the Comptroller to withhold the necessary funds would effectively prevent enforcement.

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Moreover, the instant situation is not comparable to that involved in the Pigg case where the very statute which was ruled unconstitutional by the attorney general created the officers who were to administer the act and fixed their compensation. The "issue presented" in that case was whether the Mediation Board had "legal official existence and lawful capacity to incur expenses and permit salaries to accrue so that the items listed in the requisition are valid obligations payable out of the state treasury and may be approved and certified by respondent without civil or criminal liability to himself." In the instant situation, the act creates no new office. On the contrary, the act is enforced by the Commissioner of Agriculture. Neither his existence nor that of the Department of Agriculture would be affected by the invalidity of the act if it should be held unconstitutional, and the subordinate employees assigned the task of enforcing the act are regular employees of the Department of Agriculture. Hence, this case does not involve the more difficult problem (ruled by the Pigg opinion) of whether a de facto officer is entitled to compensation.

There is one case in which a somewhat similar situation was ruled, State ex rel Coulter v. Yelle, 183 Wash. 691, 49 P. 2d 465. In that case the Supreme Court of Washington held that an employee of the Department of Agriculture who performed services in connection with the administration of a statute which had been held unconstitutional by the Supreme Court was entitled to compensation for such services out of the appropriations made therefor. The facts of that case are somewhat different than those here presented, and in addition, it did not involve the effect of an inferior court decision. In that case, the Court thought it important that the appropriation was made in the very act which had been held unconstitutional, from the general fund of the state, limited to such amount as should be received from licenses collected under the law. In the instant case, although the Milk Control Fund was established by the act, the appropriation was made by a separate statute out of that fund and not out of general revenue. Although these facts serve to distinguish the two cases, we believe the basic principle is applicable. As the court there pointed out, if it be held that the appropriation section was void ab initio and that there was no appropriation by which any money could "now" be paid out, it would also follow that "there never was a lawful appropriation," so that no warrant should ever have been issued against the fund. The Court, however held that irrespective of the invalidity of the statute, the appropriation was in every sense a valid appropriation, and that since the fund had not been exhausted the relator was entitled to compensation for her services.

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The Cole County Circuit Court did not specifically rule upon the validity of the milk control fund as such, although it held the statute void in its entirety. Every decision must be read in the light of the facts and issues for decision. Even broad language in Supreme Court opinions must "be restricted to the issues and facts of the case. The conclusion only, not the process by which it is reached, is the decision of the Court." Schupeck v. Fidler, 362 Mo. 35, 239 S.W.2d 502, 503. All that was necessary for the Circuit Court to decide was that the Commissioner of Agriculture could not legally require the Borden Company to obtain a license or pay a license fee. Moreover, the Circuit Court decision in nowise necessitated a ruling (nor did it expressly pass on) the validity of the separate appropriation law.

It may be true that if the Supreme Court holds the act unconstitutional in its entirety, the effect may be to eliminate the Milk Control Fund as such, so that the funds therein will become part of the general revenue. However, it is nevertheless equally true that such funds are in fact in the state treasury and simply designated as Milk Control Fund. All of the moneys in that fund were derived from license fees collected under the act and were intended to be used for the administration of the act. It is this money collected for this specific purpose, and not general revenue, which the Legislature has appropriated. Presumptively, the appropriation is valid. Under these circumstances, the attorney general having advised the Commissioner to continue enforcement of the act, it is the opinion of this office that payments may be made out of the Milk Control Fund pending an authoritative decision of the Supreme Court respecting the validity of House Bill 255.

The foregoing answers both of the questions concerning which an opinion was requested. With respect to the first question, a further observation may be made. The opinion which this office rendered to Mr. Pigg under date of April 3, 1951, (which is referred to in the case of State ex rel. State Board of Mediation v. Pigg, supra), expressly ruled that obligations and expenses incurred under the act by the de facto officers prior to the date the Attorney General had ruled the law unconstitutional should be certified and paid. Hence, irrespective of any other consideration, it is our opinion that obligations against the Milk Control Fund incurred prior to January 25, 1961, the date of the Circuit Court judgment should necessarily be paid. As we have further ruled herein, it is our opinion that obligations may continue to be incurred and payments made from such fund, within the limits of the appropriation, until such time as the Supreme Court authoritatively rules upon the constitutionality of the law.

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CONCLUSION

It is the opinion of this office that Section 30 of H.C.S.H.B. 574 is valid. It is the further opinion of this office that inasmuch as the Attorney General has advised the Commissioner of Agriculture to continue enforcement of House Bill 255, 70th General Assembly, thereby ruling the act constitutional, obligations may be incurred and payments made out of the Milk Control Fund pending a final ruling of the Supreme Court of Missouri on the appeal from the Circuit Court decision holding that the act is invalid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

JN:ms