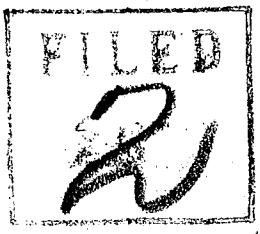
FOOD AND DRUGS:

DIVISION OF HEALTH MAY EMBARGO FOOD AND DRUGS WHEN:



(1) Div. of Health legally unauthorized to embargo food, drugs, devices or cosmetics under Sec. 196.030,RSMo 1949, or any other of Missouri's Food and Drug Act for sole purpose of holding same until such goods can be seized by Federal Government in Federal Court proceedings under Federal food and drug laws. (2) Div. of Health can embargo food or drugs for purposes mentioned in Sec. 196.030 and may use results of examination, analyses or laboratory tests made by the Federal Government as evidence in any case instituted for violation of Mo. food and drugs laws. (3) Criminal proceedings for violation of Mo. food and drug laws may be brought even though same offense is crime under Federal statute. Defendant may be prosecuted, convicted and punished for same act on same evidence under both statutes.

April 21, 1955

Honorable James R. Amos, M.D.
Director, Division of Health
Jefferson City, Missouri

Dear Dr. Amos:

This department is in receipt of your request for a legal opinion which reads in part as follows:

> "The Missouri Food and Drug Laws and Regulations are very similar to the Federal Food and Drug Laws. Section 196.050 RSMo, 1949, prevents us from adopting regulations more stringent than the federal act. We coordinate our activities with FDA to prevent duplication of activities and we receive help and assistance from FDA, and they receive help and assistance from us.
>
> "One of the ways we have helped FDA is to embargo foods, drugs, and devices which they believe are in violation of the federal act; since all seizure action must be approved by the Washington office, it requires from one to three weeks for FDA to obtain a federal seizure order. The FDA has no authority under their laws to embargo foods, drugs, and devices, and they have therefore asked the states to embargo the goods until they could obtain a federal seizure order.
>
> "Recently our authority to embargo goods

> and hold them pending federal seizure has been questioned.
>
> "Can we under Section 196.030 or any other appropriate Section in the Act embargo such goods holding them until the federal seizure order is obtained? Can we embargo such goods and use the federal laboratory or other tests made by FDA as the basis for filing a state case? If the FDA files a federal case, can we also file a state case against the same firm, and use the same laboratory results or inspectional data for the state case? * * * "

We construe the first inquiry to be whether or not the Division of Health is authorized to embargo any food, drug, device or cosmetic, under the provisions of Section 196.030, RSMo 1949, or any other section for the sole purpose of holding them until they can be seized under proceedings instituted by the Federal Government in a Federal Court and brought against such goods or the owner for an alleged violation of the Federal Food and Drug Act. In such instance the Division of Health would take no further action in the matter.

Section 196.030, RSMo 1949, authorizes the Division of Health to embargo food, drugs, devices or cosmetics for the purposes stated therein, and also prescribes the procedure the Division of Health shall follow after it has embargoed such articles. Said section reads in part as follows:

> "1. Whenever a duly authorized agent of the division of health finds or has probable cause to believe that any food, drug, device, or cosmetic is adulterated, or so misbranded as to be dangerous or fraudulent, within the meaning of sections 196.010 to 196.120, he shall affix to such article a tag or other appropriate marking, giving notice that such article is, or is suspected of being adulterated or misbranded and has been detained or embargoed, and warning all persons not to remove or dispose of such article by sale or otherwise until permission for removal or disposal is given by such agent or the court. It shall be unlawful for any person to remove or dispose of such detained or embargoed article by

sale or otherwise without such permission.

"2. When an article detained or embargoed under subsection 1 has been found by such agent to be adulterated, or misbranded, he shall petition any magistrate, or judge of the circuit court, or court of common pleas, in whose jurisdiction the article is detained or embargoed for an order for condemnation of such article. When such agent has found that an article so detained or embargoed is not adulterated or misbranded, he shall remove the tag or other marking.

"3. If the court finds that a detained or embargoed article is adulterated or misbranded within the meaning of sections 196.010 to 196.120, such article shall, after entry of the decree, be destroyed or sold under the supervision of such agent as the court may direct, but no such article shall be sold contrary to any provisions of said sections, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the general fund of the state of Missouri; provided that when the adulteration or misbranding can be corrected by proper labeling or processing of the article, the court after entry of the decree and after such costs, fees, and expenses have been paid and a good and sufficient bond, conditioned that such article shall be so labeled or processed, has been executed, may by order direct that such article be delivered to the claimant thereof for such labeling or processing under the supervision of an agent of the division of health. The expense of such supervision shall be paid by the claimant. When the article is no longer in violation of section 196.010 to 196.120, and the expenses of such supervision have been paid, the division of health shall present these facts to the court, and such bond shall then be returned to the claimant of the article."

As we read Section 196.030, supra, it is apparent that

the legislative intent and purpose of this section are clear; that the language used therein is without ambiguity; and that the food, drugs, devices or cosmetics are to be embargoed only for the reasons stated therein.

After the products have been embargoed for the purposes authorized, the duties and procedure that must be followed by the Division of Health are set out in detail by this section. Such duties and procedure are mandatory, and the Division of Health is legally unauthorized to follow some other procedure however reasonable or commendable it may be.

Said section specifically provides that the duly authorized agent of the Division of Health, upon embargoing the products, for the reasons stated, shall tag, or mark them in some other appropriate manner until such time as he can determine if said products have been misbranded or adulterated in violation of the applicable statutes. If the products are found to be misbranded or adulterated, then he must apply to any of the courts named, and having jurisdiction for an order to condemn said goods and to sell or destroy same as the court may order. However, if the agent finds the goods not to be misbranded or adulterated within the meaning of Sections 196.010 to 196.120, RS Mo 1949, he shall remove the tags or other markings therefrom and the property may be turned over to the owner, thereby putting an end to further proceedings in the matter.

Neither this section nor any other of the Missouri food and drug statutes provide that the Division of Health shall have power to embargo foods, drugs, devices or cosmetics, and turn them over to the Federal Government or any of its agencies, for the purpose of bringing any procedure against the goods or their owner for some violation of the Federal Food and Drug Act.

The Division of Health's power to embargo food and drugs is limited to that granted by Section 196.030, and since this section does not permit it to do so, the Division of Health is without any legal authority to embargo food, drugs, devices or cosmetics and turn over possession of same to the Federal Government or any of its agencies for the purposes mentioned above. Therefore, our answer to the first inquiry is in the negative.

If the Division of Health has embargoed food or drugs under the provisions of Section 196.030, it must then be determined if same are misbranded or adulterated within the meaning of the statute. This determination must be made in accordance with the provisions of Sections 196.070, 196.075, 196.095, 196.110 and 196.115, RSMo 1949. Before discussing this question further, we

feel it proper to clarify the term "state case."

We were not sure as to what meaning was intended to be given the term "state case" used in the second inquiry and have requested you to explain same to us. In accordance with our request, you have informed us that the term "state case" referred to in the above inquiry had reference to any civil or criminal proceeding which might be instituted by the Division of Health in courts having jurisdiction of any alleged violation of the Missouri food and drug statutes.

Section 196.055 allows the Division of Health or its agents to have access into places where food, drugs, devices or cosmetics are manufactured or kept and reads as follows:

> "The division of health or its duly authorized agent shall have free access at all reasonable hours to any factory, warehouse or establishment in which foods, drugs, devices, or cosmetics are manufactured, processed, packed, or held for introduction into commerce, or to enter any vehicle being used to transport or hold such foods, drugs, devices, or cosmetics in commerce, for the purposes:
>
> "(1) Of inspecting such factory, warehouse, establishment, or vehicle to determine if any of the provisions of sections 196.010 to 196.120 are being violated; and
>
> "(2) To secure samples or specimens of any food, drug, device or cosmetic after paying or offering to pay for such sample. It shall be the duty of the division of health to make or cause to be made examinations or analyses of samples secured under the provisions of this section to determine whether or not any provision of sections 196.010 to 196.120 is being violated."

It is noted that this section authorizes agents of the Division of Health to secure samples or specimens of any food or drugs, and to make or cause to be made any examination or analyses of same in order to determine whether or not any provisions of Sections 196.010 to 196.120 are being violated.

Said section, nor any others of the Missouri food and drug statutes provide that the samples of food or of the products taken shall be examined or analyzed only by the Division of Health or its agents, and at a particular time or in a particular manner. As we understand this section, the Division of Health agents may, within their discretion, make such examination themselves, or may have it made by others, under careful direction of said agents.

Since the making of examinations of this nature is not limited to any particular persons who may perform same for the Division of Health, it is believed that such examination or analyses could be made in a laboratory of the Federal Government by Federal employees.

Therefore, our answer to the second inquiry is in the affirmative.

The third inquiry we construe as follows:

If a case is filed in the proper Federal Court for an alleged violation of the Federal Food and Drug Act, can the Division of Health also file a case for an alleged violation of the Missouri Food and Drug laws against the same defendant, involving the same facts, and in such case can it use the same laboratory results, inspectional data or other evidence obtained by the Federal Government. It will be recalled that you have previously informed us that by the term "state case," you have reference to either a civil or criminal case which might be instituted in the court having jurisdiction by the Division of Health, for an alleged violation of the Missouri Food and Drug statutes.

In view of the fact that Section 196.030, supra, referred to in the opinion request deals with the embargoing of foods and drugs when there is probable cause to believe same to be misbranded or adulterated within the meaning of Sections 196.010 to 196.120, our discussion regarding cases which might be filed by the Division of Health will be limited to those regarding misbranding or adulteration of food and drugs.

Our references and any discussion of the Federal Food and Drug statutes will also be limited to that portion of same dealing with the adulteration or misbranding of foods or drugs.

Upon examination of the United States Code Annotated, we find Title 21 is in regard to food and drugs, and that Sections

1 to 15, inclusive, of Chapter 1 of that title are devoted exclusively to the subject of adulteration and misbranding of food and drugs, and that violations of these sections have been held to be criminal offenses by the Federal courts. For example, in the case of United States v. Wells, 225 Fed. 320, the defendant was charged by information with a violation of the Federal Food and Drug Act. By demurrer he questioned the validity of the information and the proceedings thereof. The court reached the conclusion that information was the proper method by which to prosecute alleged violations of that nature, and at l. c. 321 said:

> "There is no doubt that offenses of this character may be prosecuted upon information. The question here is, Is the proceeding by information in conformity with law?"

In the case of United States v. Weeks, 225 Fed. 1017, the defendant was charged under the Federal pure food statutes with misbranding a product labeled "Fruit Wild Cherry Compound" and it was also alleged that the product was adulterated. The court held that the proper method of prosecution was by information, but sustained a demurrer and ordered the information quashed for the reason that no complaint under oath had been filed against the defendant.

Again, in the case of Von Bremem v. United States, 192 Fed. 904, the defendant was charged by information with misbranding a product "salad oil" in violation of the food and drug law. In its opinion the court stated that the case was a criminal one, and in order to convict, the jury must find the defendant guilty beyond a reasonable doubt. At l. c. 906 the court said:

> "The act does not make the intention of the defendants material; but, as the case was a criminal one, the jury was bound to be convinced beyond a reasonable doubt that the article in question was misbranded before they could find the defendants guilty. We think that the proof did not justify such a conclusion, and that the defendant's motion for the direction of a verdict in their favor should have been granted."

In view of the Federal decisions cited above, holding that

the adulteration or misbranding of foods or drugs are criminal offenses, and which decisions appear to be typical ones upon the subject, we shall assume that the reference made in the third inquiry of the opinion request to "federal cases" refers to adulteration or misbranding of foods or drugs under the Federal law and to criminal prosecutions under said law.

This brings us to that point in our discussion when we must determine if an act declared and punishable as a criminal offense under a Federal statute may also be defined and punishable as a criminal offense under a state law; if prosecutions could be had under our statutes, for the same act, and upon the same evidence; and if a conviction under one statute would be a bar to prosecution under the other.

The courts have held that an act may be a criminal offense under a Federal statute and also under that of a State, and one might be prosecuted, convicted and punished under both laws for the reason that the offenses would be separate and distinct ones under two different systems of law. Under these circumstances the defendant would not be put twice in jeopardy within the meaning of the constitutional provision.

Illustrative of this principle, we call attention to the case of In Matter of M. T. January, 295 Mo. 653. This was an original proceeding instituted in the Supreme Court for a writ of habeas corpus. The petition alleged that petitioner was illegally restrained of his liberty by the sheriff of Vernon County, Missouri, who had custody of petitioner by virtue of a commitment issued by the Circuit Court of Vernon County. The case was submitted upon an agreed statement of facts. From such facts it appears that petitioner had been subpoenaed as a witness before the Vernon County Grand Jury and that the foreman inquired of petitioner if he had purchased any intoxicating liquor in that county within the last twelve months. The witness refused to answer the question upon the ground that it might incriminate him, and that he claimed his right to refuse to answer under the provisions of Section 23, Article II of the Constitution of Missouri. For his refusal to answer such question he was found to be in contempt of court and duly committed to jail by court order.

The attorney general represented the sheriff and in his argument to the court contended that the purchaser of liquor under the laws of this state is not a party to a crime, therefore petitioner could not legally refuse to answer the question asked him. In passing upon the matter, the court said at l.c. 661 and 662:

> "Concede without deciding the proposition as contended for by the Attorney General, it does not reach the real heart of this case, and therefore does not answer the contention made by counsel for the petitioner, for reason that this is a dual form of government of ours, the State and Federal, both of which have jurisdiction over the crimes for the sale of intoxicating liquor, and both have the power and authority to investigate such crimes, and to try to punish the criminals for such offenses, and each government may separately punish the criminal for the same offense, and the conviction and punishment by the one, in a particular case, is no bar to the right of the other to punish him again upon identically the same state of facts, or, in other words, the doctrine of res adjudicata does not apply."

It is our contention that the general principle of law decided in this case is applicable to those instances when the Missouri food and drug statutes declare an act to be a criminal offense and the same act is also declared to be a criminal offense under the Federal Food and Drug statutes. In such instances the offender may be prosecuted, convicted and punished under both laws for the same act.

In the case of Cleveland Macaroni Company v. State Board of Health, 256 Fed. 376, the claim of defendant was that plaintiff's macaroni was mislabeled "egg noodles" when they failed to comply with the California statutes defining "egg noodles" and the product should have been labelled "plain noodles," or "water noodles."

Plaintiff contended that Congress had legislated on the same subject as that of the state law in question, and the Federal law prescribed the exclusive requirements for the manufacturer to follow. In discussing this matter, the court said at l. c. 379:

> "3. There is nothing in the state law, so far as the provisions here involved are concerned, which would seem to

> transcend the power of the state in the reasonable exercise of its regulatory power. The provisions are evidently aimed at the protection of its inhabitants against deceit and misrepresentation as to the real character of the food presented for their consumption; and it matters not in this respect if plaintiff's goods be, as claimed, healthful and nutritious food and free from deleterious matter. It is a question of requiring them to be labeled and sold for what they really are, and not as something else; one of fair dealing with the public. The Hebe Co. v. Shaw, 248 U.S. 297, 39 Sup. Ct. 125, 63 L.Ed.--.
>
> "(3) 4. It was perfectly competent for the state act to adopt as a standard of purity for the enforcement of its regulations the determinations of the Department of Agriculture, and such enactment involves no obnoxious delegation of legislative power. Ex parte Gerino, 143 Cal. 412, 77 Pac. 166, 66 L.R.A. 249; Arwine v. Board Medical Examiners, 151 Cal. 499, 91 Pac. 319; St. Louis, I.M. & S. Ry. Co. v. Taylor, 210 U.S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061."

From the foregoing it is beyond question that an act may be a violation of the Missouri food and drug statutes pertaining to misbranding and adulterating, and at the same time be a violation of the food and drug laws prohibiting misbranding and adulterating of food and drugs. It is our thought that one may be prosecuted under both statutes for an act declared to be a criminal offense under each statute, and that the same laboratory results, inspectional data or other evidence may be used by the prosecution in each case.

CONCLUSION

It is the opinion of this department:

(1) That neither the provisions of Section 196.030, RS Mo 1949, nor any other section of the Missouri food and drug statutes authorize the Division of Health to embargo foods,

drugs, devices or cosmetics for the sole purpose of holding them until they can be seized by the Federal Government under proceedings instituted in a Federal court against such goods or the owner for an alleged violation of the Federal food and drug statutes.

(2) That the Division of Health may embargo food, drugs, devices and cosmetics under the provisions of Section 196.030, RSMo 1949, for the purposes therein provided, and may use the results of any laboratory examinations, analyses or tests made by the Federal Government or its employees, as evidence in any civil or criminal case instituted by the Division of Health for an alleged violation of any of the provisions of the Missouri food and drug statutes.

(3) The Division of Health may have criminal proceedings instituted in the court having jurisdiction for certain alleged criminal violations of the Missouri food and drug statutes even though the same offense is declared to be a crime and punishable as such under the Federal food and drug laws. In such instances the defendant may be prosecuted, convicted and punished for the same offense upon the same evidence under both State and Federal statutes, and prosecution under one such statute will not be a bar to prosecution under the other.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:ma:da