STATE PURCHASING AGENT ACT: Effective July 24, 1933, and the exclusive authority for purchase of supplies therein contemplated

September 14, 1933

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

My Dear Mr. Smith:

Acknowledgment is herewith made of your request for an opinion of this office dated August 29th in respect to the State Purchasing Agent Bill. Your request reads as follows:

> "The last Legislature passed a bill known as the State Purchasing Agent, found on page 411 of the 1933 Missouri Laws. This bill became a law July 25, 1933.
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> "Will you please advise me if I am liable on my bond for auditing accounts and Mr. Nacy, State Treasurer, is liable on his bond for the payment of these accounts, even though at this time the Purchasing Agent has never qualified. If we are liable, should we require all small purchases to be okayed by the Purchasing Agent?
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> "I would appreciate an early opinion as it affects a number of bills now on file in this office."

After the receipt of the foregoing communication we received an additional request from your office reading as follows:

> "The State Purchasing Agent Bill became effective July 24, 1933, but no State Purchasing Agent was appointed by the Governor until sometime later. Is the State Auditor authorized to audit accounts made for state purchases July 24th to the date of the appointment of the State Purchasing Agent?"

The State Purchasing Agent Act, known as Senate Bill 192, is found at page 410 et seq. Laws of Missouri 1933. We shall not quote the entire Act here but will refer to such portions of the Act as are appropriate as we deal with your inquiry. Generally speaking, this act creates a public office known as the State Purchasing Agent. This agent is to be the central agency for the purchase of all supplies for the various State boards, bureaus, commissions and departments. It defines his powers and duties in very broad terms, provides penalties for failure to comply with the Act and repeals all parts of law inconsistent therewith.

In determining your problem, we are first confronted with the issue as to when this Act became effective. There being no emergency clause appended to this law, it would under the constitutional provision be effective ninety days after the adjournment of the 57th General Assembly. Upon an examination of this Act we can see no reason for this general rule being inapplicable. As heretofore stated, this bill creates a public office, this by virtue of the very first sentence of the first section of the Bill:

> "There is hereby created and established the office of the State Purchasing Agent."

This public office came into existence on the 24th day of July, 1933. In our view of the case whether or not this office was promptly filled has no bearing upon the effective date of the act. Section 2 of the Act provides as follows:

> "SEC. 2. SHALL PURCHASE SUPPLIES.--The Purchasing Agent shall purchase all supplies except printing, binding and paper, as provided for in Chap. 115, R. S. 1929, for all departments of the State, except as in this Act otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

Section 14 of this Act provides as follows:

> "SEC. 14. REPEALING INCONSISTENT OR CONFLICTING ACTS.--All acts or parts of acts inconsistent or in conflict with this Act are hereby repealed to the extent of such inconsistency or conflict."

Therefore, on the effective date of this Bill the Purchasing Agent was authorized and required to purchase any and all supplies for the various departments, and all parts of existing laws inconsistent therewith were thereby repealed. No power or authority remained with the various boards, bureaus and commissions affected to purchase these supplies, but all such authority was vested in the office of State Purchasing Agent. It seems that the Legislature was not satisfied with the enactment of the repealing clause above referred to but went further to insure that all purchases be made through the office created and by virtue of the provisions of the Act. The following section is indicative of their vowed intention to prevent purchases except as provided for in the Bill:

> "SEC. 10. VIOLATION OF ACT RENDERS CONTRACT VOID.--Whenever any department or agency of the State government shall purchase or contract for any supplies, materials, equipment or contractual services contrary to the provisions of this Act or the rules and regulations made thereunder, such order or contract shall be void and of no effect. The head of such department or agency shall be personally liable for the costs of such order or contract, and, if already paid for out of state funds, the amount thereof may be recovered in the name of the state in an appropriate action instituted therefor."

Accordingly, from and after the 24th of July, 1933, no department or agency of the State Government had any power or authority to purchase or contract for any supplies as defined in the law, but all such supplies were required to be purchased under the provisions of the act and through the office of the State Purchasing Agent.

We have viewed your problem from several angles but the foregoing conclusion seems inescapable. The foregoing construction of the Act places it within the requirements of the constitution, other interpretations which might seem to give relief would for one reason or the other invade constitutional provisions.

Article 3 of the Constitution of Missouri reads as follows:

> "THREE DEPARTMENTS OF GOVERNMENT.--The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

Section 1 of Article 4 of the Constitution of Missouri is as follows:

> "SECTION 1. THE LEGISLATIVE POWER, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'"

The Courts have jealously guarded the rights and powers of the three Departments of Government and have unhesitatingly held statutes void which invaded these rights and powers or attempted to delegate these rights and powers to others. In the case of Merchants Exchange vs. Knott, 212 Mo. 616, the Court held the Grain Weighing and Grain Inspecting Act of 1907 void, as a delegation of the Legislative power. In considering this question Judge Lamm, speaking for the Court, stated on page 640:

> "* * *Section 1, article 4, of the Constitution provides that:
>
> 'The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assmebly of the State of Missouri.'
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> Legislative power in Missouri is, therefore, lodged with the General Assembly and not elsewhere except as to such of it as may be delegated under the provisions of that instrument--for instance, to cities in matters of local concern. Briefly,

> legislative power is the power to make laws. What is a law? 'Municipal law,' says Chancellor Kent, 'is a rule of civil conduct prescribed by the supreme power of a State.' (1 Kent Com. (14 Ed.), 447.) That definition is part of Sir William Blackstone's, which adds, 'commanding what is right and prohibiting what is wrong.'"
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> "Speaking to that part of his definition, Blackstone says (1 Blk., 46): 'For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore, it is requisite to the very essence of a law that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other."
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> "Measured by the foregoing definition of law, can the statute stand? We think not. We are of opinion that the power to bind and loose, to inaugurate or suspend the operation of the law, <u>to say when</u> and where <u>it is law</u> is of necessity an inherent and integral part of the law-making power, not to be delegated to, and wielded by, any commission. True, the act was passed by the General Assembly, approved by the Chief Executive and stands published as authenticated law, but to all intents and purposes it is only a barren ideality, having such life as is thereafter breathed into it from an unconstitutional source." * * *"

It should be noted that the statutes there in question gave a body other than the General Assembly, the power to say when the act there under consideration would be operative and for that reason said act was declared unconstitutional.

In the often quoted case of State ex rel. Maggard vs. Pond, 93 Mo. 606, the Court considered the constitutionality of the Dram

Shop Option Law. The Court, after making the general statement that laws may be passed subject to a condition (such as a law giving to School Districts a portion of a school fund on condition that such districts will raise an equivalent or proportional sum) declared as follows:

> "* * * These are good conditions, capable of being performed without in any way interfering with the legislative will. But the law declaring an offence, or providing a punishment, or repealing an existing law, on condition that the Governor or any other individual shall assent to it, is as plainly unconstitutional. It is the naked veto power. It substitutes for, or rather adds to, the legislative will another will, which it makes necessary to the existence of the law. This is unconstitutional; no one doubts it; no one will pretend that a law with such a condition would be good. Per Harrington, Judge, in Rice v. Foster, 4 Harrington, 499. See Parker v. Commonwealth, 6 Barr (Penn.) 510;* * * *"

The Supreme Court of Ind. in the case of Isenhour vs. State, 62 N. E. p. 40, had the Food and Drug Act under consideration. The appellant in the case had been convicted under this Act for selling milk containing formaldehide. One of Appellant's defenses as set forth at page 41, is as follows:

> "* * *The pure food law provides that 'within 90 days after the passage of this act the board of health shall adopt such measures as may be necessary to facilitate the enforcement thereof, and shall prepare rules and ordinances where and when necessary regulating minimum standards of foods and drugs, defining specific adulterations, and declaring the proper methods of collecting and examining drugs and articles of food.' From this provision it is argued that the law could not become effective and 'could not be violated until the state board met, within 90 days, prepared its rules, and passed its ordinances regulating minimum standards, defining adulterations, and declaring the methods of collecting and

> and examining foods,' and, in substance, an attempted delegation of legislative power to the State Board of Health."****"

The Court stated on this proposition as follows, l.c. 41:

> "* * * *the duty imposed upon the state board (does not) in any sense postpone the taking effect of the law until the duty is performed. Performance can never be said to be complete. The duty is continuing, and will arise at any time when a new food or drug is put forward. Besides, it is paradoxical to say that the law is not effective until the state board have acted, when it is certain that without the law they could not act at all. And to say that their act puts the law in operation is to excuse them from acting, because no law requires it.* * *"

While the above case was reversed on other grounds, it was held that the duty of the Board of Health to prescribe rules and regulations in no sense varied or affected the penalty prescribed by the statute for any violation of its terms. The penalty was effective from the date the Act became a law. The Court would not construe the law otherwise for to do so would render it unconstitutional.

So in the instant case, to construe this Act as not effective until the Governor exercised his power of appointment is untenable, First, because to do so would delegate to the Governor the power to create a public office, and Second, because to do so would delegate to the Governor the power to determine when, or if ever, the law would become effective.

As heretofore stated, this act establishes a public office. The power of establishing such an office is purely a legislative power, one which must be exercised by the Legislature and which cannot be delegated to others.

In the case of State ex rel. Rosenthal vs. Smiley et al. 263 S. W. 825 l.c. 826, Judge Ragland stated:

> "(1) It is well settled that only the Legislature has the power to create a public office (other than a constitutional office) as an instrumentality of government, and this power it cannot delegate.

State v. Butler, 105 Me. 91, 73 Atl. 560, 24 L.R.A. (N.S.) 744, 18 Ann. Cas. Note 489."

To delay the effective date of this Act to the day that the appointment is made by the Governor would be to delegate to the Governor the power of creating the public office of State Purchasing Agent.

To construe the bill as not taking effect until the Governor appoints the State Purchasing Agent would be to invade the right and power of the Legislature to determine when the act shall be effective, as the power of appointment is in the Governor and it is he who may determine when the appointment is to be made and accordingly, when the act is to be effective. The Governor, having this power would then be the agency determining when, if ever, and whether or not the Act would be effective. Under this theory, in the event he failed to make the appointment, the law would never be operative. It would be just as logical to hold this as to say that upon the death or disqualification of the present Purchasing Agent the law would be repealed and then again revived upon the Governor exercising his power of reappointment. This of course cannot be.

As is seen by the Indiana case above referred to, the penalizing provisions of that law were not in any way abated by reason of the failure of the Board of Health to make its rules and regulations. The penalizing sections of the act were separate and distinct from those requiring the Board to do certain acts provided for in the law. So in the instant case it is our opinion that Section 10 of the State Purchasing Agent Act was effective on the 24th of July of the present year and did not in any manner depend upon the action of the Governor for its validity or effectiveness.

Having determined that the State Purchasing Agent Act is effective on July 24, 1933, we now proceed to consider the further problems presented by your inquiry. One of the first questions which arises is the question as to the failure of the State Purchasing Agent to qualify. By your letter we note that you specifically stated that he has not yet qualified, or at least that some accounts or contracts were incurred prior to his qualification but after his appointment. This presents the proppsition of whether or not he is or was a de facto officer after his appointment but prior to his qualification. We assume of course that he entered into his duties and exercised his powers as State Purchasing Agent upon his appointment.

In 46 C. J. 1053, Sec. 366, we find the following definition of de facto officer:

> "An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. A person will be held to be a de facto officer when, and only when, he is in possession and is exercising the duties of an office, his incumbency is illegal in some respect; he has at least a fair color of right or title to the office."

And as to what is to be considered as color of right or title to office, we find on page 1056 of said C. J. the following:

> "It (color of right or title to office) may also exist where the incumbent, although duly elected or appointed, is ineligible or has failed to qualify," * * *"

Therefore, under the foregoing authorities, having been duly appointed by the Governor as State Purchasing Agent and entering into the duties of such office and representing himself to be fully qualified to act and to carry on those duties, but failing in some respects to qualify as provided by law, we are of the opinion that he would be a de facto officer. This statement however is subject to qualifications as will later appear.

Touching the validity of his acts as de facto officer, we find this statement in 46 C. J. 1060, Sec. 378:

> "The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party. But to be valid, the acts of a de facto officer must comply with the requirements of applicable law, to the same extent and in the same manner as valid acts of de jure officers." * * *"

In the case of State vs. Dierberger, 90 Mo. 369, the Supreme Court discussed the status of a constable who had been appointed but had failed to qualify by taking the oath of office. The Court on this situation remarked as follows, l.c. 375:

> "* * *The act of the defendant here in question was probably his first act as deputy, but we do not see how that can make any difference, for the constable had the undoubted right to make the appointment, and the appointment was in every way a good, formal and valid appointment. The appointment made and constituted him a deputy; and although he failed to take the oath he was an officer de facto. The principle of law is well settled that the acts of such an officer are as effectual when they concern the public, or the rights of third persons, as though they were officers de jure.* * *"

In the case of In re Oak Street; Kansas City v. McTernan, 308 Mo. 494, the Court considered the validity of an ordinance passed by the common council of Kansas City, which had been passed by a majority of one, one of the aldermen voting for the proposition having removed from the ward from which he was elected, and under the city charter said alderman forfeited his office. The Court stated at page 509:

> "* * *The record shows that Sandler continued to attend the meetings of the Council and to participate officially in its proceedings, including thepassage of the ordinance in question, for a long period of time after his removal from the ward from which he had been elected. The fact of his removal, however, was not at the time known to the other city officials or to the public generally. Under the circumstances he was a de facto alderman, and for reasons of public policy his actions as such must be deemed valid and binding.* * *"

The foregoing ruling seems subject to one qualification, however, and that is this, one of the reasons for clothing a de facto officer with the power and authority of a de jure officer

is to protect third parties and those who rely upon his apparent authority. However, if his shortcomings and disqualifications are well known to those with whom he deals, it cannot be said that his official acts are clothed with even the authority of a de facto officer. This rule is forcefully laid down in the case of State ex rel. Cosgrove v. Perkins, reported at 139 Mo. 106. In this case the Honorable Edward C. Crow presumed to act as Judge of the Circuit Court of Jasper County, two days after his successor had qualified, and assuming such authority passed on two motions for new trial. At the time he passed on these he stated in open court that he knew that his successor had qualified but that he was going to dispose of pending matters. The Court in declaring this action void stated on pages 116 and 117 as follows:

> * * *The foundation stone of this whole doctrine of a defacto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their hurt by relying in good faith upon the genuineness and validity of acts done by a pseudo-officer. However, much color of authority may clothe the person who assumes to perform the functions of an office and discharge its duties, yet, if the public or third persons are not deceived thereby, if they know the true state of the case, the reason which gives origin or existence to the rule which validates the act of an officer de facto ceases; and with it cease also all of its ordinary validating incidents and consequences.
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> In the case before us there was no misapprehension on the part of the public or of third persons, because Judge Crow (whose term of office had indubitably expired at least when Judge Perkins, having been elected, was duly commissioned and qualified) proclaimed from the bench that he knew that Judge Perkins had qualified as judge, that his own term of office had expired, and that he did not claim that he was judge of the court, but was only disposing of business left unfinished on December 31, 1896. This being the case,

> there is no room in this record for the de facto doctrine to occupy. Consequently the acts of Judge Crow were null and void, and should have been thus treated by his successor in office, who should have proceeded as requested by counsel for relators, to pass upon and determine the motions for new trials.* * * **

Under the foregoing ruling, the status of the Purchasing Agent being well know to you, it is the opinion of this office that he is not clothed with the authority of a de facto officer. We realize that the requirements of this rule are that the illegality of his title must be known by those who deal with him. However, under the State Purchasing Agent Act, before the Purchasing Agent can proceed with any contracts or purchases, he is required to obtain a certification from you and you are required to do certain acts which are prerequisite to his involving the rights of third parties or others who might not know of his failure to qualify. In view of this fact it would seem that your knowledge would vitiate the entire proceeding and th t you could not in good faith proceed to authorize any sale or contract under he has duly qualified.

We shall next proceed to consider the question of liability on your bond for the payment of accounts created between July 24th and the date the State Purchasing Agent was appointed and qualified.

In considering the question of your personal liability for the payment of these accounts, we shall first refer to the portions of the act which place upon you duties in respect thereto. Section 4 of the Act provides:

> "No department shall make any purchase except through the Purchasing Agent as in this Act provided. The Purchasing Agent shall not furnish any supplies

> to any department without first securing a certification from the auditor that an unencumbered balance remains in the appropriation and allotment to which the same is to be charged and that an unencumbered balance remains in the fund from which payment is to be made, each sufficient to pay therefor. The Purchasing Agent shall be liable personally and on his bond for the amount of any purchase made without such certification and the auditor shall be liable personally and on his bond for the amount of any false certification."

Your duties under the above section are, upon the request of the State Purchasing Agent, to certify to him that there is a proper appropriation for the board, bureau, etc., covering the articles desired to be purchased, that there is a balance in said appropriation which will be sufficient to cover the proposed expenditure and that funds are deposited with the State Treasurer from which the expenditure can be met. In other words, you are required to certify that a proper appropriation has been made for the use of the bureau or department requesting the purchase of the supplies; that the supplies are of a nature and kind which properly fall within such appropriation, that said appropriation has not been exhausted by said bureau or commission or agency, and that there exists funds in the Treasury credited to the agency, board or bureau which are unencumbered by any other demands, and can be applied to the payment of the supplies requisitioned.

In this connection we respectfully direct your attention to Section 43 of Article IV of the Missouri Constitution:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury and the General Assembly shall have no power to divert the same, or to permit the money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

The Supreme Court, construing this Section stated in State ex rel. v. Gordon, 236 Mo. l.c. 158:

> "The language of the foregoing provision of the Constitution is clear and explicit and

> forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have no difficulty in deciding that in the absence of an appropriation made by the General Assembly for that purpose, no funds could be lawfully paid out of the State Treasury for the support and maintenance of the game department."

Respecting the payment from the particular fund of the appropriation, we refer to Section 19 of Article X of the Constitution reading as follows:

> "No moneys shall ever be paid out of the treasury of this state or any of the funds under its management, except in pursuance of an appropriation by law.

And in applying this Section, the Supreme Court stated in State ex rel. v. Hackman, 314 Mo. l.c. 53:

> "It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid and since under the provision of Section 19, Article X of the Constitution, no money may be paid out of the State Treasury except in pursuance of an appropriation by law the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid pursuant to an appropriation act where it is paid out of money specifically appropriated for a different purpose."

Therefore, before issuing any certification to the State Purchasing Agent, you should be sure that all these conditions and requirements are met. In the event of your failure to properly certify these facts to the State Purchasing Agent, the foregoing section makes you liable personally and on your bond for the amount of any false certification. However, the penalty provisions of this act end there. They do not answer or cover the situation as outlined

in your request, but before dealing with this portion of your inquiry under the general statute respecting your general duties and obligations and liabilities, we shall give attention to your suggestion that these various orders and purchases might be okeyed by the State Purchasing Agent and then handled by you in the usual manner after being thus ratified. This act on the part of the State Purchasing Agent would amount to a ratification by him of these contracts which were not made under the provisions of Senate Bill 192.

Section 10 of the Act heretofore quoted provides that when any purchase is made of supplies contrary to the provisions of the Act

> "such order or contract shall be void and of no effect,"

and that the head of the agency or department shall be personally liable and

> "if already paid out of state funds, 'the amount thereof may be recovered.'"

This plainly indicates the intention of the Legislature to put an absolute end to all purchasing of supplies under contract or otherwise by any board, bureau or agency of the State except to the State Purchasing Agent. There cannot be any question as to the Legislative intent respecting the contracts which are made contrary to the provisions of the act. They have in plain and emphatic words declared these to be void and of no effect and have gone further to place the liability elsewhere in the event the act is ignored. We cannot overlook this Legislative intent as written in plain and unequivocal terms.

In respect to such contracts we find in 6 Ruling Case Law, 701, the following statement:

> "A contract directly and explicitly prohibited by a constitutional statute in unmistakable language is absolutely void. That has never been judicially doubted, and is unanimously conceded. To hold such a contract binding would be to enforce that which the legislature has forbidden, to give effect to that which the legislature has declared void,--the repeal of a law by judicial construction." * * *"

And again in regard to the enforceability of such illegal contracts we find on page 830 of said work the following:

> "* * *but there is practically no conflict of decisions on the proposition that a contract void because it stipulates for doing what the law prohibits is incapable of being ratified. Contracts and acts that are absolutely void are contracts to do an illegal act or omit a legal public duty, usually bonds of married women, contracts in a form forbidden by law, official acts of persons having no recognized title to office, contracts to do an impossible thing or that leave uncertain the thing to be done, and the like. These are absolutely void, because they have no legal sanction, and establish no legitimate bond or relation between the parties.* * *"

In keeping with the general rule as above laid down, the St.Louis Court of Appeals considered a contract for the sale of liquor made in violation of a law forbidding such sale and declaring any such contract void, and the terms therefore unenforceable and held such contract to be incapable of ratification. This is the often quoted case of Bick vs. Seal, 45 Mo. A. 475. The Court in determining this matter stated at page 480:

> "* * *It follows, therefore, as a consequence which is entirely unavoidable, that there can be no such thing in law, strictly speaking, as a ratification of a transaction which, at the time of its performance, was prohibited by statute. The parties cannot legalize that which the law has declared illegal. Reeves v. Butcher, 31N. J. L. 224.* * *"

And in the case of Woolfolk v. Duncan, 80 Mo. A. 421, the Court, in holding a promissory note given for a gambling consideration void, stated at page 427:

> "* * *It is well settled that no action will lie upon any contract based upon any unlawful consideration, or which is repugnant to law or sound policy or good morals, ex turpi contractu actio non oritur. And it is equally well settled that if a contract grows immediately out of or is connected with an illegal

> or immoral act a court of justice will not enforce it. And if the contract in fact be only connected with the illegal or immoral transaction and growing out of it, though it be in fact a new contract, it is equally tainted. Hayden v. Little, 35 Mo. 418; Gwinn v. Simes, 61 Mo. 335; Sumner vs. Summers, 54 Mo. 340; Kitchen v. Greenabaum, 61 Mo. 110; Buckingham v. Fitch, 18 Mo. App. 91; Bick v. Seal, 45 Mo. App. 475; Ryan v. Judy, 7 Mo. App. 75; Hill vs. Johnson, 38 Mo. App. 383; Hatch v. Hanson, 46 Mo. App. 323. There is no distinction between a contract that is immoral in nature and tendency and therefore void as against public policy and one that is illegal and prohibited by law. Buckingham v. Fitch, ante.* * * *

In the more recent case ofIsaacson v. Van Gundy, 48 S. W. (2d) p. 208, the Kansas City Court of Appeals affirmed the foregoing ruling in considering a contract for the sale of a motor vehicle void. You will probably recall the Motor Vehicle Act declares any sale of a motor vehicle made otherwise than through a transfer of a certificate of title shall be null and void. In this case the sale was made on the 24th of July, 1928, and the certificate of title delivered some nine days thereafter. At the time of the sale a chattel mortgage was given to cover a balance due. A replevin suit was brought on this note and chattel mortgage but this suit was compromised by the giving of a new note secured by a new chattel mortgage. When the purchaser failed to make the payments called for in the second note a replevin suit was brought by the holder. The court held that the failure to deliver the title at the time of the sale vitiated both the first and second transactions and that the sale was void and incapable of ratification. The Court in denying the recovery stated at page 212 as follows:

> * * *The new note given in the settlement amounted to an extension of time for the payment of the note given for the original purchase price of the GMC truck. There can be no question but that the second chattel mortgage upon which this suit is based is void under the circumstances if the sale of the truck took place on July 24th, 1928.

> 'Modification or abandonment of an illegal contract by mutual agreement can not be a lawful consideration for a new contract based on such original contract, even if there is some additional lawful consideration, as long as the new contract is in any way based upon the subject matter which originally made such contract illegal. So dismissal of an action on an illegal contract is no lawful consideration for a promise based thereon.' 2 Page on Contracts, p. 1838, 1040.* * * **

These purchases and contracts, the subject of your inquiry, being void and unenforceable and not subject to ratification, the only relief that can be obtained is through the Legislature.

In Donnelly on Public Contracts, we find the following statement, l.c. 26:

> ** * *Those dealing with these officials are chargeable with knowledge of the limitations upon their power to contract, and where they transgress the powers, their acts are void and will bind no one. In like manner, even though a contract is not ultra vires but is entirely within the scope of its corporate powers, public bodies are not bound by such a contract executed in its name, if the officer who executes it had no power or authority to enter into the contract.
>
> In this latter class of cases, of course, the public body may ratify the contract, but where the public body had no power to enter into the contract, such a contract cannot be ratified except by the legislature.* * * **

To return to your inquiry respecting your personal liability for the issuance of warrants for payment of any obligations contracted by any board, bureau or agency subsequent to the 24th of July, 1933, we turn to Section 11390 R. S. Mo. 1929, parts of which read as follows:

> "Sec. 11390. BOND OF TREASURER--BOND OF AUDITOR. * * *Immediately after his election or appointment, the state treasurer shall execute and deliver to the governor a bond to the state* * * conditioned for the faithful performance of

> all the duties required or which may be required of him by law,* * *The state auditor shall execute in like time and manner as herein provided for the treasurer, a bond* * * *with like provisions* * * and subject to the same conditions.* * **

Portions of Section 11404 R. S. Mo. 1929, respecting the Auditor's general duties, are as follows:

> "SEC. 11404. GENERAL DUTIES OF AUDITOR.-- He shall: First, audit, adjust and settle all claims against the state payable out of the treasury,* * *second, draw all warrants upon the treasury for money* * * third, express in the body of every warrant which he may draw upon the treasury the particular fund, appropriated by law, out of which the same is to be paid;* * **

Section 11435 provides the penalties in case the Auditor knowingly issues any warrants unauthorized by law, and is as follows:

> "SEC. 11435. PENALTY FOR ISSUE OF UNAUTHORIZED WARRANT BY AUDITOR.--If the auditor shall knowingly issue any warrant upon the treasury, not authorized by law, he shall, upon conviction thereof, be fined in a sum not exceeding fourfold the amount of such warrant, and imprisoned for any length of time not exceeding one year, and shall be deemed guilty of a misdemeanor in office."

There being no authority in law for the issuance of any warrants for the payment of these accounts accrued after the 24th of July, it is the opinion of this office that in the event you issued warrants in payment of the same you would be liable on your bond and subject to prosecution under Section 11435 R. S. Mo. 1929.

In the foregoing consideration of this law, this office has not overlooked the rules of constructions which require that unjust or absurd conclusions be avoided; that the spirit of the law should control and not the letter, and that an inconsistent, inconvenient or impossible construction should not be placed upon any legislative act. However, all of the rules and axioms

arising are but rules of construction and can only be exercised and put into effect where there is an ambiguity in the law construed or when there is no absolute repeal or prohibition attached to acts which might be done consistently with the law where it not for such prohibition or repeal. We refer to Black on Interpretation of Laws, page 103, wherein he considers presumptions in aid of interpretation:

> "It would not be consistent with the respect which one department of the government owes to another, nor with the good of the state, for the courts to impute to the Legislature any intention to exceed the rightful limits of their power, to violate the restraints which the Constitution imposes upon them, to disregard the principles of sound public policy, or to make a law leading to absurd, unjust, inconvenient, or impossible results, or calculated to defeat its own object,* * *"

and states as follows on page 104:

> "* * *At the same time, as we have already remarked, the object of all construction and interpretation is to ascertain the meaning and intention of the legislature. If the meaning is obscure, or the intention doubtful, the courts should seek it out. And in this search they will be aided by the presumptions which we have mentioned. But if the meaning and intention are clear upon the face of the enactment, there is no room for construction. In that event, the literal sense of the statute is to be taken as its intended sense, and the judiciary having nothing to do with considerations of justice, reason, or convenience.* * **

On page 126 this author states:

> "It is always to be presumed that the legislature intends the most reasonable and beneficial construction of its enactments, when their design is obscure or not explicitly expressed, and such as will avoid inconvenience, hardship, or public injuries. Hence

> if a law is couched in doubtful or ambiguous phrases, or if its terms are such as to be fairly susceptible of two or more constructions, the courts, having this presumption in mind, will attach weight to arguments drawn from the inconvenient results which would follow from putting one of such constructions upon the statute, and will therefore adopt the other.* * *"

But qualifies the foregoing with this statement on pages 127 and 128:

> "* * *But if there is no doubt, obscurity, or ambiguity on the face of the law, but its meaning is plain and explicit, the argument from inconvenience has no place. 'It may be proper, in giving a construction to a statute, to look to the effects and consequences when its provisions are ambiguous, or the legislative intent is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can be avoided only by a change of the law itself, to be effected by legislative and not judicial action.* * *"

There is another rule which states it is desirable and necessary to consider the effects and consequences of any given construction, and we find that these remarks by this well known author are on page 100:

> "If the language of a statute is ambiguous, or if it is fairly open to either of two constructions, the court may and should consider the effects and consequences which will follow from construing it in the one way or in the other, and adopt that construction which will best tend to make the statute effectual and produce the most beneficial results.
>
> But if the statute plainly expresses the legislative purpose and meaning on its face, it must be enforced exactly as it stands and without any regard whatever to the results which will flow from it.* * *"

Our Courts, in recognizing and applying the foregoing rules, have always recognized the exceptions thereto to-wit, that when a law is positive and explicit it must be construed as read.

In the case of State ex rel. v. Cook 178 Mo. l.c. 193, we find the following statement:

> "It is our opinion that the sixty days' notice does not apply to conditions like the present, and that the construction of a constitutional or statutory provision should never be adopted which results in the requirement of useless and absurd acts, except where its terms are positive and unavoidable."

And in the case of State v. St. Louis-San Francisco Railway Company, 300 S. W. l.c. 277, the Court stated as follows:

> "* * *A construction should never be given to a statute or a constitutional provision which would work such confusion and mischief, unless no other reasonable construction is possible.* * *"

And in the case of State v. Sanderson, 217 S. W. l.c. 63, the Court remarked:

> "* * *When the law expressly attends a judgment with a particular effect, or imposes specific penalties upon a transgressor, an argument about the hardships thereby entailed is of no weight to mitigate the rigor of the consequences.* * *"

And in the later case of State ex rel. Gorman v. Offutt, 26 S. W. (2d) l.c. 832, the Court stated as follows:

> "* * *Respondent says, however, that this construction would work an absurdity, because it would of necessity require the superintendent of one county to accept, against his judgment, the judgment of the superintendent of another county, and therefore that it is reasonable to believe that the change from 'may' to 'must' was through a clerical error.

> But that is entirely speculative and is not in accord with what seems to have been the intention of the Legislature when considered in the light of the other provisions of the statute. We are bound to construe statutes as written, without regard to the results of the construction or the wisdom of the law as thus construed." * * "

It would seem that the remarks of the Court in the Sanderson case supra, are particularly appropriate to the instant problem, as in the State Purchasing Act we have a section of that act which specifically lays a penalty for the making of any contract except in accordance with the Purchasing Agent Act. The penalty section of the Purchasing Agent Act together with the repeal section thoroughly indicate the intention of the Legislature to make the State Purchasing Agent Act the one and only method of purchasing State supplies. They have thrown up such safeguards and barriers as to make in avoidance of the act impossible. There is but one way and that way is straight and narrow.

There is one further observation to be made and that is that any and all purchases or contracts made by any board, bureau, commission or department by virtue of any constitutional power vested in such body cannot in any way be effected by the State Purchasing Agent Act. This is a general statement, but only such as can be made to your general inquiry.

We sincerely trust that the foregoing may be of some value to you in disposing of your problems.

Respectfully submitted,

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APPROVED:

Attorney General.

HGW:MM