RAILROADS--INCORPORATION TAX--CERTIFICATE TO CARRY ON BUSINESS IN MISSOURI.

: A foreign railroad corporation newly organized in another State to purchase, and which does purchase, the assets and property at a foreclosure sale of a former liquidated railroad must pay incorporation tax under Sec. 113, page 470, Laws of Missouri 1943. Secretary of State not authorized to issue certificate to such corporation to carry on a railroad business in this State until such tax is paid.

December 19, 1945

1-11-46

FILED 6

Honorable Wilson Bell
Secretary of State
Jefferson City, Missouri

Attention: Honorable Russell Maloney
Supervisor, Corporation
Registration.

Dear Secretary Bell:

The letter written by Mr. Russell Maloney, Supervisor, Corporation Registration, to this Department, calling attention to a letter from your Department, directed to Honorable Roy McKittrick, Attorney General of Missouri, requesting an opinion whether the Wabash Railroad Company, under the facts stated in the letter to General McKittrick, is required to pay incorporation organization tax before it may lawfully operate its lines of railroad in this State, has been received. Your letter quoting the letter to General McKittrick, is as follows:

> "Will you please refer to our letter of July 29, 1943, which reads as follows:
>
> "'Hon. Roy McKittrick
> Attorney General
> Supreme Court Building
> Jefferson City, Missouri
>
> "'Dear Sir:
>
> "'On April 14, 1916, the Wabash Railway Company, a railroad corporation organized under the laws of the State of Indiana, was licensed to do business in Missouri as a foreign corporation pursuant to the requirements of Section 3039 of the Revised Statutes of Missouri of 1909. At that time the Wabash Railway Company paid to the State Treasurer of the State of

Missouri, the sum of $19,671.50, that being the amount required by said Section 3939, Revised Statutes of Missouri, 1909, to be paid in to the State Treasury of Missouri upon the proportion of the capital stock of said company represented by its property and business in Missouri as incorporating tax and fees and as a fee for the issuing a license authorizing said company to do business in the State of Missouri.

"'Section 3039, Revised Statutes of Missouri, 1909 is now Section 5074, Revised Statutes of Missouri, 1939. The license so issued to the Wabash Railway Company in 1916 was forfeited on January 1, 1943, for the reason that said Indiana corporation did not file its annual registration, annual statement and anti-trust affidavit for 1942 as required by Sections 5085, 5086 and 5087, Revised Statutes of Missouri, 1939. The action of the Secretary of State in forfeiting said license was in accordance with Section 5091, Revised Statutes of Missouri, 1939.

"'Subsequent to the original licensing it operated a line of railway into and through the State of Missouri. The lines of railway so operated by said Indiana corporation were acquired by it through a foreclosure sale of the railroad properties of the Wabash Railroad Company pursuant to a decree of foreclosure and sale entered on or about January 30, 1914, by the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

"'The said Wabash Railway Company, an Indiana corporation, which was licensed to do business in Missouri in 1916, was reorganized in an equity receivership in the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, and, pursuant to a decree of foreclosure and sale and orders of said court, and orders of the Interstate Commerce Commission,

the properties of the said Wabash Railway Company, were conveyed to Wabash Railroad Company, a new Ohio corporation, incorporated in said state of Ohio on September 2, 1937. The new Ohio corporation has been operating said properties, including said lines of railway in this state, since January 1, 1942. The deed to said properties as approved by the United States District Court in said reorganization proceeding is dated December 31, 1941 and was delivered to said new Ohio corporation on June 18, 1942. (Attached hereto are copies of the decrees and orders of the court approving a plan of reorganization and authorizing the conveyance of said properties.)

"'It is the contention of this department that the new corporate entity, Wabash Railroad Company, organized under the laws of the State of Ohio on September 2, 1937, should be licensed as provided for by Section 5074, Revised Statutes of Missouri 1939, and should pay into the State Treasury of Missouri the incorporating tax required by said Section together with the fee for the issuance of a certificate authorizing it to do business in this state. It is the further contention of this department that it cannot accept the filing of the annual registration, statement and anti-trust affidavit required by Sections 5085, 5086 and 5087, Revised Statutes of Missouri 1939, or furnish the blanks for such purpose as provided by Section 5096, Revised Statutes of Missouri 1939, unless and until said new Ohio corporation is licensed to do business in this state.

"'The contentions of the Wabash Railroad Company with respect to the questions involved are set out in the attached memorandum prepared by Mr. Carleton S. Hadley, General Counsel for the Wabash Railroad Company.

"'It is the position of this department that

the proviso in Section 5074, Revised Statutes of Missouri, 1939 exempting from the payment of incorporating taxes and fees, railroad companies which have heretofore built their lines of railway into or through this state, was intended by the General Assembly of Missouri, to apply only to those railroad companies owning and operating lines of railway in this state at the time of the original enactment of said law in 1891. See Laws of Missouri 1891, page 75.

"It is respectfully requested that we may have the benefit of your opinion concerning the questions stated.

Yours very truly
Russell Malone, Supervisor
Corporation Registration

by: W. R. Murrell, Deputy Supervisor
Corporation Registration.'"

"Upon checking our records, it appears we have never received a reply to the above quoted request and we will appreciate it if you will give the matter your attention."

Your letter has been very helpful in giving the facts of the case whereby it appears that the property of the original Wabash Railroad Company was sold under a foreclosure decree of the United States District Court for the Eastern Division of the Eastern District of Missouri, on or about January 30, 1914, and that all of the property, real and personal, of the original company was purchased by the Wabash Railway Company, a corporation organized at about that time under the laws of the State of Indiana. It is said the then new Wabash Railway Company was licensed to do business in Missouri in 1916. It is said that at the time the Wabash Railway Company was permitted to enter into this State to operate its railway business, the company paid the corporation organization tax required by Section 3939, R.S. Mo. 1909, which said Section was the same as Section 5074, R.S. Mo. 1939, and both of which said Sections were the same as our present Section 113, Laws of Missouri, 1943, page 470, in our new

Corporation Code of this State. Section 5074, R.S. Mo. 1939, was repealed by the Laws of Missouri, 1943, page 410, and said Section 113 was enacted in place thereof. The said Ohio Corporation, has failed and refused to pay the incorporation organization tax required by said Section 113, Laws of Missouri, 1943, on the ground that it "stepped into the shoes" of the Wabash Railway Company, and that the Secretary of State of Missouri has no right or authority to demand the payment of such organization corporation tax.

Your letter states that it is the position of your Department that the proviso in our said former Section 5074, R.S. Mo. 1939, and carried into the amendment of 1943, as said Section 113, Laws of Missouri, 1943, page 470, exempting from payment of incorporation taxes and fees, railroad companies which have heretofore built their lines of railway into or through this State, was intended by the General Assembly of Missouri to apply only to those railroad companies owning and operating lines of railway or railroad at the time of the original enactment of said law in 1891.

We think you are correct in the position you take in this matter. We believe that the new Ohio corporation is required by the statutes of this State to pay such incorporation organization tax and the other fees mentioned in your letter, and that it must otherwise comply with the requirements which you set forth in your letter, before you would be empowered to issue a certificate authorizing the new Wabash Railroad Corporation to do business in this State, and that you cannot lawfully accept the filing of the annual registration, statement and anti-trust affidavit from said company as is required by the statutes of this State, or furnish said company such blanks for such purpose unless and until said Wabash Railroad Company is licensed to do business in this State.

That part of our said Section 113, Laws of Missouri, 1943, page 470, requiring corporations when organized to pay the organization incorporation tax therein provided, is as follows:

> "No corporation shall be organized under this act unless the persons named as incorporators shall at or before the filing of the articles of incorporation pay into the State Treasury $50.00 for the first $30,000.00 or less of the authorized shares

> of such corporation and a further sum of $5.00 for each additional $10,000.00 of its authorized shares, and no increase in the authorized shares of such corporation shall be valid or effectual until such corporation shall have paid into the State Treasury $5.00 for each $10,000.00 or less of such increase in the authorized shares of such corporation, and it shall be the duty of said corporation to file a duplicate receipt of the State Treasurer for the payments herein required to be made with the Secretary of State as is provided by this Act for the filing of articles of incorporation; provided, that the requirements of this section to pay incorporation taxes and fees shall not apply to foreign railroad corporations which have heretofore built their lines of railway into or through this state. * * * ".

Prior to 1891, railroad corporations organized in States other than Missouri, were permitted to come into this State, construct their lines of railway, and operate their business without the payment of any corporation tax, such as was required of domestic corporations. The Legislature of this State took notice of the inequality of such laws giving foreign corporations such preference over domestic corporations, and thereupon enacted the section that is presently our said Section 113, Laws of Missouri, 1943, page 470.

The original Act, Laws of Missouri, 1891, Section 2, page 75 was passed with an emergency clause, and consequently took effect on the date of its approval, April 21, 1891. The words of the proviso of said Section 113, supra, are precisely the same as were contained in the proviso of the said original Act of 1891, and the same as were carried along in each revision of our statutes down to, and including, the revision of 1939, except, in the amendment of 1943, where it will be observed that the word "foreign" appears in said Section 113 immediately preceding the words railroad corporations which did not before appear. Said proviso in said Section 113, is as follows:

> "provided, that the requirements of this section to pay incorporation taxes and fees

> shall not apply to foreign railroad corporations which have heretofore built their lines of railway into or through this state."

The Supreme Court of Missouri had before it, for construction, the original Act of April 21, 1891, imposing the tax in question upon railroad companies in the case of State vs. Cook, Secretary of State, 171 Mo. 348. The case involved the exact question before us here. That case was one where a railroad company, organized under the State of Kansas, had, prior to enactment of the said Act of 1891, built its line of railway from the State of Kansas into the State of Missouri. Some time after the passage of the Act of 1891, the said Kansas corporation constructed other and further lines of its railroad in this State. The company applied for its certificate of authority to operate a railroad in the State of Missouri. The company maintained that because it has built a part of its lines of railway before the passage of the Act of 1891, it was immune and exempted by the terms of the proviso of the Act of 1891 from paying any organization tax, and that the construction of that part so built before 1891, took care of the whole situation, including that part of its lines of railways built after the passage of the Act of 1891. The Secretary of State refused to grant the certificate, on the ground that the company had not built all of its lines of railway prior to the passage of the Act of 1891, and, therefore, must pay the organization incorporation tax on its increased capitalization, by reason of the newly constructed lines of railway.

The railroad filed a mandamus suit to compel the Secretary of State to grant the certificate of authority for the company to carry on business in this State without the payment of said tax. The issuing of the alternative writ of mandamus was waived, and a demurrer was filed by the Secretary of State. Of the demurrer, the Court in its opinion, l.c. 355, said:

> "The main ground on which the demurrer is rested, is, that on the facts stated in the petition, the relator is not entitled to the certificate or license demanded, because it has not paid into the State treasury the amount of the tax or fee that a railroad company asking to be incorporated under the laws of this State, with the same or similar rights, would be required to pay."

The Court considered and discussed fully the statutes of the State relating to the case. In holding that such previous part of construction did not constitute a compliance with the Act of 1891, with respect to the construction afterward of its complete lines of railway, and that the railroad was liable for the tax, the Court, l.c. 359, further said:

> "* ** The company can not, for the purpose of relieving itself of the tax imposed by the statute, say this fifty miles constitutes its road, and then for the purpose of obtaining the license authorized by the statute, say it constitutes only a small part of its road. If one of the foreign railroad companies owning railroads built prior to 1891, reaching from St. Louis to Kansas City, should now seek to build a new line over a route not before occupied by it, it could do so only on the same terms that a domestic corporation could. And so a company found with an unfinished road when the Act of 1891 went into effect, if it was entitled to any exemption from the incorporating tax therein required, it was so only to the extent to which it had then built its road into the State, and as to its future building it must stand on a plane with domestic corporations and with other foreign corporations who might now seek to build over new routes."

The Court concluded its opinion in the case by denying the writ of mandamus to the railroad, and dismissed the case.

The opinion of the Supreme Court in the Cook case, supra, fully sustains the position taken by your Department, that the proviso in former Section 5074, now Section 113, Laws of Missouri, 1943, page 470, exempting from the payment of incorporating taxes and fees, railroad companies, which have heretofore built their line of railway into or through this State, was intended by the Legislature to apply, and does apply, only to those railroad companies owning and operating lines of railway in this State at the time of the original enactment of said Law in 1891. Such exemption, it will be seen, could not include the present Wabash Railroad Company, the Ohio corporation herein named, because said Company was

not in existence on April 21, 1891, having been incorporated in the State of Ohio in 1937, nor has it built any line of railroad in this State since its organization.

The Federal Court could not, and its decree as we read it, does not undertake to convey from the Wabash Railway Company, the Indiana corporation, to the Wabash Railroad Company, the Ohio corporation, any right to transact business in Missouri, exempting it from paying the organization corporation tax imposed by our said Section 113.

The text writers and Courts of other jurisdictions have considered the principles here involved. It is the uniform holding in both text and decision, that where a reorganization or a reincorporation eventuates into the forming of a new corporation it must pay such organization tax as the statute of any State demands. 14 A C.J., page 1039, states this text on the subject:

> "Organization tax. Where the reincorporation does not create a new corporation the reincorporated company is not liable for an organization tax imposed on new corporations. Where the reincorporation constitutes a new corporation the tax applies."

The identical state of facts, and the identical principles involved here were before the Supreme Court of the State of New York in the case of In Re N.Y. & Surburban Inv. Co., 16 N.Y.S. 213. The Court held that under a reorganization plan the reorganization constituted a new corporation, and as such it was subject to the franchise tax imposed by the Laws of the State of New York. The Court in the case so holding, l.c. 215, 216, said:

> "* * * It can make no difference that the individuals forming the new corporation are already organized as a body corporate under another act. It is as individuals, and not as a corporation, that they act in making and filing the new certificate, thereby forming themselves into a new corporation. By their reorganization under the new law they become a new corporation, formed by a new process having all the rights and powers of the old corporation, but having also new rights and powers, the result of the new incorporation. Upon filing the new certificate, the old corporation is at an end. A new one

> has taken its place. 'From the time of such filing such corporation shall be deemed to be a corporation organized under the act of 1890,' and, although the existing liabilities of the old corporation are not in any way affected by the reorganization, it has no longer any corporate existence. * * * ".

Another case so holding, decided by the Court of Appeals of New York is People ex rel. Schurz vs. Cook, reported in 18 N. E. 113, and also reported in 110 N.Y. 443. The Court held that the statutes requiring an organization tax applied to all new corporations. The Court on the point, l.c. 114, said:

> "We think none of the claims is well founded. The act by its terms applies to every corporation, and the tax is payable upon its incorporation, and hence it cannot be restricted in its meaning to those cases only in which the state directly grants some franchise to a corporation other than the franchise to be a corporation. There is nothing in the context which should so restrict the provisions of the act, and there is no view of the question in which such a narrow construction could be even plausibly maintained as against the plain language of the law.
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> "We think it is also plain that, under the reorganization acts above mentioned, when the purchasers at the foreclosure sale undertake to reorganize under those acts, and for that purpose to file in the secretary's office a certificate, upon the filing of which they become a body politic and corporate, the corporation thus formed is a new and an entirely different one from that whose property and franchises the purchasers may have bought under the foreclosure proceedings. It is true that the corporation about to be formed by the filing of the certificate

> has by force of the statute when formed all the rights, franchises, powers, privileges, and immunities which were possessed before such sale by the corporation whose property was sold; but that does not make the corporation the same by any means. The right to be a corporation, which the old corporation had, was not mortgaged and was not sold, and did not pass to the purchasers; and they only obtain such a right upon filing the certificate mentioned; and then they obtain it by direct grant from the state, and not in any degree by the sale and purchase of the franchises, etc., of the old corporation."

The above cited case of People ex rel. Schurz vs. Cook, was taken by writ of error to the Supreme Court of the United States where the decision of the New York Court was affirmed. It is reported in 148 U.S. 397.

The Supreme Court of the United States had before it the same question in the case of Morgan vs. Louisiana, 93 U.S. 217. In holding that upon the sale of property and franchises of a railroad corporation under foreclosure decree, such immunity is a personal privilege of the company, and is not transferable, the Court, l.c. 221, 222, 223, said:

> "* * * The question presented is, whether, under the designation of franchises, the immunity from taxation upon its property possessed by the railroad company accompanied the property in its transfer to the defendant, or whether that immunity was a mere personal privilege of the company, and therefore, not transferable to others. * The condition of the exemption in terms makes the exemption applicable to the property only so long as that belongs to the debtor. A similar condition attached by its terms to the exemption from taxation of the property of the railroad company here, and a like result must be deemed to have followed its change of ownership. In our judgment, the

> exemption ceased when the property of the company passed to the defendant.
>
> "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction."

A statute imposing a corporation organization tax upon a new corporation is the exercise of the police powers of the State.

In a memorandum supplied by counsel for the Wabash Railroad Company, they take the position that because the old Wabash Railway Company was liquidated, and its assets sold under the decree of the Federal Court, with the consent of the Interstate Commerce Commission, the company is not required to qualify as a new corporation to do business in this State. We do not believe that any provision of the Interstate Commerce Act or anything adjudged in the Federal Court decree gives basis for any such claim.

The States never surrendered to the Federal Government their sovereign right to the exclusive exercise of police powers within each individual State. Under the subject of Constitutional Law, 12 C.J., page 910, states the following text.

> "Under the American constitutional system, the police power, being an attribute of sovereignty inherent in the original states, and not delegated by the federal constitution to the United States, remains with the individual states. * * * "

The Supreme Court of the United States had before it the case of Chicago, Rock Island & Pacific Railway Co., vs. State of Arkansas, reported in 219 U.S. Rep., page 453, on the question of the right of a State to impose conditions in the exercise of its police powers in regard to the State law requiring certain equipment of railway trains, to the effect that no railroad company engaged in business in the State of Arkansas should equip any of its freight trains with a crew of less than six trainmen. The railroad named, neglected to obey this law. The State filed two suits against the railroad company asking a judgment in each case against the company for $500. The company filed in each case both an answer and a general demurrer. The Supreme Court of Arkansas held the company liable on appeal. The case then went to the United States Supreme Court by writ of error. The Supreme Court in its opinion discussed many cases involving the same legal principles. In affirming the judgment of the Supreme Court of Arkansas to the effect that the requirement of the statute of Arkansas was a proper exercise of its police power, and that the statute was constitutional, the Court, l.c. 465, said:

> "The principles announced in the above cases require an affirmance of the judgment of the Supreme Court of Arkansas. It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the safety of all engaged in business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the State. * * *"

There are many other decisions by the Supreme Court of the United States to the same effect, and many decisions from the highest Courts in nearly all the States to the same effect. But we believe the above cited cases will suffice here on the point.

We believe that before the Wabash Railroad Company could claim tax exemption under the proviso of said Section 113, supra, or under the old Section 5074, R.S. Mo. 1939, which was the statute in effect when this controversy arose, it would have to show that the said company had constructed its lines of railroad now operated by it, prior to April 21, 1891. This it cannot do.

The Supreme Court of Missouri, the highest Courts of other States, the United States Supreme Court, and the text writers of the law, hold uniformly that statutes creating exemptions of persons or property from payment of taxes must be strictly construed against such exemptions.

59 C.J. 1135, under the subject of "Construction of Statutes", states the rule as follows:

> "Exemptions. In pursuance of the beneficient public policy which favors equality in the distribution of the burdens of government, all exemptions of persons or property from taxation are to be construed strictly against the exemption; * * * "

61 C.J. 392, under the subject of "Taxation" further states the same rule as follows:

> "Unlike the rule of liberal construction which has been generally adopted with reference to exemptions from levy and sale for the payment of debts, an alleged constitutional or statutory grant of exemption from taxation will be strictly construed. * * * ".

In the case of B.P.O.E. vs. Koeln, 262 Mo. 444, l.c. 445, our Supreme Court in following the same rule of strict construction of exemptions, held as follows:

> "* * * 'It must be conceded to the state that whether a tax-exempting clause be viewed from the standpoint of the State down to the people, or from the standpoint of the people up to the State there must be unbending and inviolate rules which as sure words of the law are always to be reckoned with; and those rules (from the standpoint of the State) are that an abandonment of the sovereign right to exercise the vital power of taxation can never be presumed. The intention to abandon must appear in the most clear and unequivocal terms * * * '".

In the case of State ex rel. Y.M.C.A. vs. Gehner, 11 S.W. (2d) 30, l.c. 34, our Supreme Court upheld the rule by saying:

> "'In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is liable to taxation, exemption, the exception, and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. It is in no case to be assumed that the law intends to release any particular property from this obligation; and no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption.' * * *.".

CONCLUSION

1) It is, therefore, the opinion of this Department that the new corporate entity, the Wabash Railroad Company, organized under the laws of the State of Ohio on September 2, 1937, should be licensed as provided for in Section 5074, R.S. Mo. 1939, now Section 113, Laws of Missouri, 1943, page

470, and should pay into the State Treasury of Missouri the incorporating tax required by said Sections, together with the fee for the issuance of a certificate authorizing it to do business in this State.

2) That your Department is not authorized by law to accept the filing of the annual registration, statement, and anti-trust affidavit required by Sections 5085, 5086 and 5087, R.S. Mo. 1939, now Sections 114, 115 and current sections, Laws of Missouri, 1943, l.c. 471, 472, or furnish the blanks for such purpose as provided by Section 5096, R.S. Mo. 1939, now Section 112, Laws of Missouri, 1943, l.c. 473, unless and until said new Ohio corporation, to-wit: the said Wabash Railroad Company, is licensed to do business in this State.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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