PUBLIC SERVICE COMMISSION:)
FUNDS;)
APPROPRIATION ACT:)

The 1933 Laws remove all doubt but that fees received by any Commission from any source must be placed in the State Treasury; and can only be withdrawn from the State Treasury by an Appropriation Act

September 4, 1935. 9-18

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Public Service Commission
State of Missouri
Jefferson City, Missouri

Attention: Mr. James P. Boyd,
General Counsel.

Dear Mr. Boyd:

This is to acknowledge your letter dated September 3, 1935, as follows:

> "The Public Service Commission of Missouri in conference with Honorable Forrest Smith, State Auditor, decided that it desires an opinion from your department upon the question of the right of the Public Service Commission under Senate Bill No. 161, found at page 322 and following pages in Laws of 1935, especially subsection (b) of Section 5268 and that part of subsection (b) found on page 326 which is in the following words:
>
> 'In the event of the establishment of any port or ports of entry or exit the expense of the establishment and maintenance of each such port shall be paid out of the receipts at each port derived from the sale of temporary permits to interstate carriers.'
>
> "In view of the statute passed and in the Laws of 1933, pages 414 and 415, entitled 'State Treasury and Auditing

Departments: Providing for Depositing of All Fees, Funds and moneys in State Treasury with Certain Exceptions,' has the Commission authority under Senate Bill No. 161, as found in the Laws of 1935 above referred to and especially that sentence quoted above, if it establishes ports of entry and exit, to collect the receipts for temporary permits therein mentioned and first pay out of such receipts the expenses of the establishment and maintenance of each such port of entry or exit and if any balance remains of the receipts at such ports of entry or exit to pay the remainder into the State Treasury? Or will the Commission be compelled, under the Laws of 1933 above mentioned, be required to pay all of the fees and receipts at each port of entry or exit, as above referred to in the Laws of 1935, into the State Treasury, there being no provision in the Laws of 1935, Senate Bill No. 161 above referred to, for the payment of the expense of establishing and maintaining such ports and no appropriation made by the Legislature for that purpose other than by the Bill above referred to?

"The Public Service Commission and Mr. Smith as State Auditor would be pleased if you would furnish to this department and to him the opinion of your office as to the proper construction of said act known as Senate Bill No. 161, above referred to, at your earliest possible convenience, for the reason that unless the expenses of the establishment and maintenance of such ports can be taken first from the receipts received at such ports and not paid into the State Treasury, then it would be impossible to establish such ports of entry, in the view of this department; there would be no funds provided for the establishment and maintenance of such ports."

Laws of Missouri, 1935, page 322, was an Act passed by the 58th General Assembly to amend Section 5268, Laws of Missouri, 1931, page 304, and, as amended, pertains to the issuing of temporary permits to interstate "carriers" operating on the highways and provides that "Such temporary permits shall be issued only upon the payment of such fees as may be designated by the Public Service Commission etc." Said section provides further, "The form of and procedure for obtaining such temporary permit shall be prescribed by the Public Service Commission. Such ports of entry or exit may be established by the Commission as in its judgment may be necessary for the proper administration of this act."

As to the establishment of ports of entry and exit the act reads:

> "In the event of the establishment of any port or ports of entry or exit the expense of the establishment and maintenance of each such port shall be paid out of the receipts at each port derived from the sale of temporary permits to interstate carriers."

Your question concerns whether or not moneys received by virtue of the sale of the temporary permits must be deposited in the State Treasury, or if the expense of establishing and maintaining ports of exit or entry may be paid from said moneys before the balance, if any, is turned into the State Treasury.

It is to be noted that the Legislature has not provided in the act that the moneys received from the sale of such temporary permits shall go into the State Treasury. If the Legislature had so provided, the answer to your question would be comparatively easy, in view of the Constitution of this State. Sans such a declaration on the part of the Legislature, inquiry must be had to determine (1) whether or not the money received from the sale of the temporary permits is public revenue or State money, and also (2) if such act violates the provisions of Article IV, Section 43, and Article X, Section 19, of the Constitution of Missouri or (and) the provisions of Laws of Missouri, 1933, pages 414-415.

In order to understand the intent of the Legislature in enacting Laws of Missouri, 1933, pages 414-415, recourse must be had to various decisions of the Supreme Court interpreting the constitutional provisions (supra) relating to state moneys. A reading of the decisions shows that the Supreme Court of Missouri drew the line of demarcation concerning moneys received by various boards or commissions as to whether or not same was public or State revenue.

There seems to be no question but that if the money collected is directed by the Legislature to be deposited in the State Treasury, then such money may not be withdrawn except in pursuance to an appropriation by the Legislature, in view of Section 19, Article X, of the Constitution of Missouri, which provides:

> "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; * * * * *."

In State ex rel. Kessler et al. v. Hackmann, 264 S. W. 366, l. c. 367, the Supreme Court of Missouri said:

> "Relators cite the case of State ex rel. v. Wilder, 199 Mo. 470, 97 S. W. 940, where this court had under consideration funds of the insurance department, to show that the money in the insurance department was not public money in a sense that it was subject to be appropriated for any general purpose. That was a mandamus proceeding seeking to compel the state auditor to issue a warrant in payment of an account incurred by the insurance department. <u>In that case, however, there was an appropriation by act of the Legislature.</u>
>
> "On the other hand, this court has held that a fund, raised by an act for a special purpose, could not be paid out of the state treasury except upon an

> appropriation by an act of the Legislature. State ex rel. Fath et al. v. Henderson, 160 Mo. 190, loc. cit. 214, 60 S. W. 1093; State ex rel. v. Gordon, 236 Mo. 142, loc. cit. 158, 139 S. W. 403."

In the case of State ex rel. Gordon, cited above, there was an appropriation act under consideration, and the moneys collected were required to be paid into the State Treasury. We quote from the dissenting opinion of Valliant, C. J., page 189 (236 Mo.):

> "As to relator's first point I do not deem it necessary to say more than refer to the game law itself, which requires the money collected for hunter's licenses to be paid into the State Treasury, and then refer to section 43, article 4, of the Constitution * * * * *"

Section 43, Article IV, of the Constitution of Missouri, provides in part as follows:

> "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 money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

It is to be noted that the above constitutional provision pertains to "revenue collected and moneys received by the state from any source whatsoever."

The Supreme Court of Missouri in the case of Ex parte Lucas, 160 Mo. 218, held that the act providing that the

members of the Board of Barber Examiners were to receive compensation of $3.00 a day and railroad expenses, to be paid out of any money in the hands of the treasurer of the board, was not in violation of Section 43, Article IV of the Constitution; having the following to say (page 226):

> "The fourth contention is not well founded for the simple reason that section 43 of article 4, applies only to money provided for and received by the State. The money authorized to be collected under this act is not State revenue, but is simply a provision to make the board of examiners self-supporting."

The above case appears to be determinative of your inquiry, as also do the cases of State ex rel. v. Walker, 240 Mo. 708, and State ex rel. v. Board of Regents, 264 S. W. 698.

In the former case the Supreme Court said (l. c. 723-725):

> "Is the statute which authorizes the payment of reasonable expenses incurred in the collection of this inheritance tax out of that fund while yet in the hands of the county collector a violation of section 43, article 4, of the Constitution? That section is in these words: '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 money to be drawn from the treasury, except in pursuance of regular appropriations made by law.' The language is ample to cover not only all revenue derived from general taxation, but moneys collected by authority of the State from any source whatsoever; it therefore covers moneys derived from the

collateral inheritance tax. It does not apply in a different force or degree to one than to the other. If the literal construction contended for by relator is to be applied to this section, then it means that the General Assembly cannot authorize by statute the payment of fees to any officer or agent out of the money he may collect for the State, but he must pay it all into the treasury, and wait until the General Assembly meets and makes an appropriation to pay him for his services. That has never been the course of dealing between the State and the collectors of its general revenue or of its other taxes. The officers making the collections have always been permitted to retain the fees fixed by statute as their compensation; such was the course of dealing when the present Constitution was adopted, it had been for many years before, and it has been so ever since.

"Relator seems to concede that such has been the practice, but it seeks to draw a distinction between fixed fees and fees that are to be fixed. If we are going to adhere to the letter of this section we must say that it applies to fixed fees as well as fees to be fixed; if we say that it does not apply to fixed fees that have long been allowed, then we depart from the letter and inject an exception by interpretation, and if we make an exception of one for a certain reason we should make an exception of another that comes under the same reason. The convention which framed our Constitution was composed of men who knew what the law on this subject then was and if they had understood that this section was liable to be construed as applying to the payment for services rendered in collecting the

revenue they would doubtless have made some provision to meet that condition, because payment for such services out of the funds before they were paid into the treasury had always been allowed by statute, and also because it would naturally impede or hinder the State in collecting its revenue unless such payments were so allowed.

"The reason for allowing the county collector to retain his commissions is that his services were necessary in collecting the tax, and that reason applies as well to the services of the legal counsel in the collection of the inheritance tax as it does to the services of the collector. We do not say that the one is as necessary as the other, because the services of the collector are indispensable in every instance, whilst the services of an attorney may be necessary in some cases but not in others, therefore the statute has given the State Auditor authority to retain counsel only when in his judgment it is necessary, but when it is thus determined that the services are necessary there is no more reason for allowing the collector to retain his commissions out of the fund collected than there is for the payment of the attorney out of the same fund. It has always been the policy of the State to allow payment out of taxes collected not only to the county collector of general taxes, but to the officer intrusted with the issuance of licenses and the collection of license taxes, and if we should now give to section 43, article 4, the construction contended for by relator we would not only overturn a settled policy, but bring confusion in the collection of the revenues of the State. The General Assembly is forbidden by this

> section to divert from the State treasury the fund arising from the inheritance tax, but it is not a diverting of that fund for the General Assembly to provide for the payment of reasonable compensation for necessary services rendered in its collection.
>
> "The writ of mandamus is denied."

In the latter case the Supreme Court, en Banc, said (l. c. 699):

> "The moving cause for the incorporation of these restrictions in the Constitution was to put an end to an era of extravagance and waste in the use of the revenue, which had prevailed for more than a decade prior thereto--the Constitution of 1865 containing no such limitation as is found in the provision under consideration. This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the state from any source whatsoever.' By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority

> being the Legislature. With this limitation--and the Constitution itself is but an instrument of limitations--it should be strictly construed. Thus construed, the spirit which prompted the adoption of the provision is fully recognized and its purpose is promoted. Unless, therefore, it can be successfully contended, in harmony with well-recognized rules of interpretation, that the board of regents of the college is the state, and that moneys received by it other than from appropriations is state money, the constitutional provision will afford no support to the relator's contention."

From the above cases it is thus seen that prior to 1933 the Supreme Court of Missouri, in interpreting the above constitutional provisions, promulgated two lines of decision: First, that if the act of the Legislature provided that the money was to be paid into the State Treasury, then it took an appropriation act to withdraw it; and second, that if it was not state revenue but solely derived for the purpose of maintaining or supporting a board or commission, and absent legislative act providing that the money should go into the State Treasury, then the money would not have to be placed into the State Treasury, consequently no appropriation act was necessary to the expenditure of the money.

It will be noted that Section 5268, supra (concerning the establishment of ports of exit and entry) does not provide that the money derived from the sale of temporary permits to interstate "carriers" shall go into the State Treasury, and specifically provides that the expense of the establishment and maintenance of each such port shall be paid out of the receipts of each port. However, we believe that now Section 1, Laws of Missouri, 1933, pages 414-415, is conclusive and controlling because it was enacted after the decisions of the Supreme Court were rendered, and we are of the opinion it was the intention of the Legislature to remove the exceptions and limitations placed on the constitutional provision,

pertaining to the placing of moneys into or withdrawing from the State Treasury, by the courts. Said section provides as follows:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. * * * * *"

It is thus seen that the section above quoted from is broader and more comprehensive than the constitutional provisions because it requires all fees received by any commission from whatsoever source to be placed in the State Treasury.

The Public Service Commission is a commission established by act of the Legislature. The Legislature designated as "fees" the amount of money received from the sale of temporary permits. We quote from Section 5268, supra, the following:

> "Such temporary permits shall be issued only upon the payment of such fees as may be designated by the Public Service Commission * * *"

Therefore, it follows that the money received by virtue of the sale of the temporary permits are fees and that the fees are received by a commission, namely, the

Public Service Commission, by virtue of a rule or regulation, and applying the provisions of Laws of Missouri, 1933, page 414, supra, it is seen that all fees from whatsoever source received by any commission, shall, at stated intervals, be placed in the State Treasury and subject to appropriation by the General Assembly.

We are of the conclusion that the cases above cited have no application to the deciding of the question presented because the Act of the 1933 Legislature, requiring all fees received to be placed in the State Treasury, was not on the statute books at the time said cases were decided.

We conclude, and it is our opinion, that Section 1, Laws of Missouri, 1933, page 414, is decisive of the question presented and that all fees received by virtue of the sale of temporary permits to interstate "carriers" must be placed in the State Treasury and that such may not be withdrawn therefrom except in pursuance to an appropriation by the Legislature. It follows that the expense of maintaining and establishing these ports cannot be paid out of the receipts derived from the sale of the temporary permits until after the money is placed in the State Treasury.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

JLH:EG