FINES: Fines in Seagram Anti-Trust Case go into general revenue.

February 2, 1950

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Honorable R. E. Copher
Collector of Revenue
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

> "I am in receipt of a check in the amount of $42,500.00 from the Clerk of the Supreme Court covering the Fines in the case of the State of Missouri against:
>
> Seagram-Distillers Corporation
> All-State Distributors, Inc.
> Stickney-Hoelscher Cigar Company and
> McKesson and Robbins, Inc.
>
> "I am unable to determine what disposition should be made of these funds; that is, what fund they should be credited to."

The fines mentioned in your opinion request were imposed by the Supreme Court of Missouri in the case of State of Missouri on the information of J. E. Taylor, Attorney General, Relator, v. Seagram-Distillers Corporation, et al., Respondents.

The information filed in this matter contained the following:

> "Comes now J. E. Taylor, Attorney General of the State of Missouri, who prosecutes this action in behalf of the State of Missouri and causes the Court to understand and be informed as follows:
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> "1. This information in the nature of quo warranto is filed and these proceedings instituted as an original action before

> this court under and by virtue of Chapter 43, Article I, Section 8307, Revised Statutes of Missouri, 1939, and charges violations of Sections 8301, 8302 and 8303 of said Chapter 43, Article I, as hereinafter more fully set out."

The Respondents are charged in the information with having entered into a combination to control the price at which Seagram Liquor products are sold in the State of Missouri. The information specifically charged that the respondents "offended against the laws of the State of Missouri and more particularly Sections 8301, 8302 and 8303, R. S. Missouri, 1939, and have thereby wilfully abused and misused their rights, authority, privileges and franchises to the injury of the people." The decree of the court contains the following:

> "NOW, THEREFORE, before the taking of any testimony herein and pursuant to a stipulation and agreement among all the parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED as follows:
>
> "1. That respondents, and each of them, are hereby ousted from the practice of so exercising their respective franchises, privileges, rights and licenses bestowing upon them the right to engage in the business of buying and selling intoxicating liquor within the State of Missouri in such a manner as to create or enter into agreements or combinations to regulate, control or fix the resale price at which said intoxicating liquor products are sold at wholesale or retail within the State of Missouri, and from the practice of enforcing said agreements to so regulate, control or fix prices in any manner or means whatsoever.
>
> "2. That the respondent, Seagram-Distillers Corporation, for its violation of the laws of this State, as alleged, be fined in the sum of Thirty-five Thousand ($35,000.00) Dollars."

Fines are similarly assessed against All-State Distributors, Incorporated, in the amount of Twenty-five Hundred ($2500.00) Dollars; Stickney-Hoelscher Cigar Company, in the amount of

Twenty-five Hundred ($2500.00) Dollars; and McKesson and Robbins, Incorporated, in the amount of Twenty-five Hundred ($2500.00) Dollars.

The question in the handling of this money arises by reason of the provision of Section 7 of Article IX of the Constitution of Missouri, 1945, that "the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state, * * * shall be distributed annually to the schools of the several counties according to law." The Supreme Court recently considered the application of this provision in the case of New Franklin School District v. Bates, et al., No. 41308, decided January 9, 1950. In that case the problem considered was whether or not the constitutional provision, above referred to, controlled the distribution of a fund of $2,090,000, paid to the Clerk of the Supreme Court by certain insurance companies pursuant to a judgment entered by the Supreme Court in the case of State on inf. Taylor v. American Insurance Company, et al., 355 Mo. 1053, 200 S.W. (2d) 1. In the New Franklin case opinion, the court described the action in which the fines were levied as follows:

> "Respondents offered in evidence the pleadings and judgment in the case of State on inf. Taylor v. American Ins. Co., supra, the cause in which the fund was collected. There is no dispute as to the type and kind of action. It was in the nature of quo warranto and the issues presented clearly appear from the opening paragraphs of the opinion of this court. The court found that 'the said respondents, and each of them, did enter into a conspiracy to cheat and defraud, their policyholders and the State of Missouri, and did bribe the Superintendent of Insurance of the State of Missouri to compromise and settle certain litigation effecting insurance rates in Missouri, and to recover certain impounded funds in rate litigation and to approve a new schedule of insurance rates, all as charged in the information filed; (and) that said acts of the respondents as set out constitute an abuse and misuse of their corporate franchises to do business in this State.' It was considered and adjudged by the court that each of the respondents 'for such abuse and misuse of its corporate franchise' should pay as a penalty

a fine in the sum therein specified. (200 S.W. (2d) 1, 49 et seq.)

"The action was instituted by the Attorney General by virtue of his office, upon his own information, in the exercise of his common law powers. * * *

"The action was essentially based upon a breach of the implied contract of each of the several respondent corporations with the State. The nature of the action was fully discussed and determined in the opinion of this court and authorities were cited. * * *" (Underscoring ours.)

The court further stated:

"It is clear we think from the authorities we have cited, supra, that the right of this court to impose the penalties, forfeitures, or fines, which were imposed and collected in the case of State on inf. Taylor v. American Ins. Co., supra, for a breach of the implied contracts of the insurance companies with the state, were not based upon any statutory enactments authorizing the imposition and collection of such fines and penalties. The proceeding was not a statutory action for the assessment and collection of fines and penalties prescribed by law, nor an action to recover a statutory fine or penalty. It was a common law action for the breach of implied contracts with the state. Penalties were assessed, but they were not the penalties provided by any penal laws.

(Underscoring ours.)

The court concluded as follows:

"We hold that the words 'penal laws of the state' as used in Sec. 7 Art. IX of the present Constitution refer to statutory enactments fixing or providing for penalties,

> forfeitures and fines and for their assessment and collection. The disposition of the fund in question was not controlled by Sec. 7, Art. IX, supra, if otherwise applicable, because it was not collected for a breach of the 'penal laws' of the state, but was a penalty, forfeiture or fine imposed and collected for the breach of the implied contracts of the several corporations with the state, as ruled in the case of State on inf. Taylor v. American Ins. Co., supra."
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> (Underscoring ours.)

The nature of actions for enforcement of the Anti-Trust Laws of this state has been discussed on several occasions by the Supreme Court. In the case of State ex inf. v. Standard Oil Company, 218 Mo. 1, at l. c. 347, the following is found: (The court was discussing and quoting from the case of State ex inf. v. Equitable Loan and Investment Company, 142 Mo. 325)

> "Continuing, in the discussion of the proposition as to whether or not an information in the nature of a quo warranto could be sustained against a corporation for misuse and abuse of its franchise by reason of its failure to comply with a statute, when the Legislature had prescribed certain penalties to be imposed in other proceedings for such violation, he said:
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> "'And the jurisdiction of this court in this regard being conferred by the Constitution, it is beyond the power of the Legislature to take it away, and it will not be intended that a legislative enactment was designed to take such jurisdiction away, although such enactment should confer another and distinct remedy upon some inferior court or board. * * * In consequence of this well-recognized principle, sections 7 and 8 of the Laws of 1895, pages 31 and 32 in relation to the duties of the supervisor of building and loan associations, to institute proceedings in the circuit court against a delinquent

building and loan association, and that such proceeding shall be conducted by the Attorney-General, cannot abate the jurisdiction conferred on this court by the Constitution nor deprive the Attorney-General of his common law and inherent powers to file ex-officio informations, as in the present instance.'

"The statute under which the respondent in the case just mentioned was organized and doing business imposed upon it certain penalties for violating such statutes; and also provided that if any such company should violate the provisions of its charter or laws of the State, the supervisor of building and loan associations 'shall institute proceedings in the circuit court of the city or county in which such association has, or had, its principal office, to enjoin or restrain such association from the further prosecution of its business, either temporarily or perpetually, or for such injunction and dissolution of such association and the settling and winding up of its affairs, or for any and all of said remedies combined, as the supervisor may deem necessary.' (R. S. 1899, secs. 1385, 1392, and 1393.)

"It is thus seen that those sections of the statutes are just as full and explicit, in prescribing penalties, forfeitures and remedies for their violation and in designating the court in which those penalties and forfeitures are to be imposed and adjudged, as are the anti-trust laws now under consideration. But, notwithstanding those ample statutory provisions, this court, in that case, held that an information in the nature of quo warranto would lie to oust the respondent therein of its charter rights for violating its charter powers. It was also held therein that this court derived its jurisdiction from the Constitution, and that even though the Legislature had attempted to deprive

> it of that jurisdiction, by express enactment, it could not have done so, for the reason that such a statute would be unconstitutional and void."
>
> (Underscoring ours.)

The court further stated at 218 Mo., l. c. 352:

> "It is thus seen that a corporation can so offend against the laws of the State as to justify the Attorney-General in proceeding against it by information in the nature of quo warranto to forfeit its corporate franchise; and those offenses may be against the common law as well as against the statute laws of the State.
>
> "And it is wholly immaterial, and the corporation cannot justify or defend its conduct in that regard by a plea, that such conduct was a violation of the criminal laws of the State, by which it and its officers and agents are rendered amenable to the penalties and punishments thereof.
>
> "In other words, the laws of the State authorize and direct the Attorney-General to institute civil proceedings by information in the nature of quo warranto against any corporation to annul its charter and forfeit its franchises whenever it has by misuser, nonuser or usurpation of power so conducted itself as to violate the laws of its being or the criminal laws of the State. If, upon trial, the corporation is found guilty, a decree of forfeiture must go, and the court has the power, in addition, to impose penalties for such violations of the laws as it may deem proper. This, however, does not proceed upon the theory that the corporation has been guilty of a crime and that it is being punished therefor; but upon the idea

> that there is an implied or tacit agreement on the part of every corporation, by accepting its charter and corporate franchises, that it will perform its obligations and discharge all its duties to the public, and that by failing to do so it commits an act of forfeiture which may be enforced by the State in the manner before suggested. (State ex inf. v. Delmar Jockey Club, 200 Mo. 1. c. 70.)
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> "In addition thereto the Legislature has the unquestionable power and authority to declare the acts which will work a forfeiture of the charter shall also constitute a crime, and subject the corporation and its agents and servants to punishment under the criminal laws of the State. * * *
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> "It must, therefore, follow from what has been said, that this is not a criminal prosecution as contended for by respondents; nor is the procedure provided for in section 8971, Revised Statutes 1899, the exclusive remedy available to the State to correct abuses and usurpation of powers by corporations doing business in this State."
>
> (Underscoring ours.)

In the case of State ex inf. v. Arkansas Lumber Co., 260 Mo. 212, at l. c. 291, the court stated:

> "It would appear then that we have in this State three methods of proceeding against violators of our anti-trust statutes: (a) by indictment or information as for a felony (if the offender be a natural person); (b) by bill in equity to 'prevent and restrain, under section 10303, which, jurisdiction attaching, and proof being made, draws to it the punishments prescribed by section 10304; and (c) actions at common law by informations in the nature of quo warranto, where all defendants are corporations. If we could proceed against and convict for these offenses a natural person by a proceeding in quo warranto, we could not punish him."

In the present situation the information states that it is brought under and by virtue of Section 8307, R. S. Missouri, 1939. However, it charges that the respondents "wilfully abused and misused their rights, authority, privileges and franchises to the injury of the people." The prayer asks, among other things:

> "(2) That the respondents, and each of them severally, be excluded from all corporate rights and privileges under the laws of the State of Missouri, and their franchises, rights, authority, license and certificate to do business under the laws of the State of Missouri be declared forfeited, and that each and all of them be ousted from their several corporate franchises, privileges, license and authority to do business under the laws of this state."
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> (Compare with the prayer in State ex inf. v. Standard Oil Company, 218 Mo. 1. c. 43.)

The action was an original proceeding in the Supreme Court. Section 4 of Article V, Constitution of 1945, gives the Supreme Court jurisdiction to "issue and determine original remedial writs." No other original jurisdiction is conferred upon the Supreme Court, and inasmuch as they assumed jurisdiction of the instant matter, that court must have considered the action to have fallen within the third category set out by the court in the Lumber Case, supra.

Such is, we feel, the essential nature of the action here under consideration. The statement in the information that the action is brought under Section 8307, R. S. Missouri, 1939, does not, we feel, change the essential nature of the action from a common law proceeding in the nature of quo warranto to a statutory proceeding.

In the Standard Oil Case, supra, the court pointed out that a statutory provision for proceeding against a corporation cannot abate the jurisdiction conferred on the Supreme Court, nor deprive the Attorney General of his common law and inherent powers to file ex officio informations. The information filed in this case is clearly one filed by the Attorney General ex officio.

Insofar as the nature of the action is concerned, it is identical to that involved in State on inf. Taylor v. American Insurance Company

et al., supra. Both were common law actions in the nature of quo warranto filed by the Attorney General by virtue of his common law and inherent powers. In the Standard Oil Case the court clearly held that an action for violation of the Anti-Trust Laws, such as is herein involved, is a common law action in the nature of quo warranto. In the New Franklin Case, supra, the court described the action in the Insurance Case as of the same nature. The court in the New Franklin Case relied strongly upon the decision in the Standard Oil Case in determining the nature of the action. The nature of the action here involved, and that involved in the Insurance Company Case, being the same, the decision in the New Franklin Case, as to whether or not the distribution of the money in question is controlled by Section 7 of Article IX of the 1945 Constitution, is conclusive. As we have already pointed out, the court held in that case that the disposition of the fund was not controlled by Section 7 of Article IX of the Constitution of Missouri, 1945.

Inasmuch as that constitutional provision does not control the distribution of the funds in question, we are of the opinion that they should be deposited in the general revenue fund of the state to be handled as other such revenue. As part of the general revenue of the state, one-third thereof should be set aside and placed in the public school moneys fund under Section 2.120 of House Bill No. 23, Sixty-fifth General Assembly.

In the New Franklin Case the court held that one-fourth of the fund involved should be placed in the public school moneys fund under Section 3 of Article IX, Constitution of Missouri, 1945, which requires that at least twenty-five per cent of state revenue be set apart for support of the free public schools. The Legislative enactment in effect at the time of the receipt of that money had appropriated one-third of the "ordinary general revenue" for the public school moneys fund. (Section 2.120, Laws of Missouri, 1945, page 417.) The word "ordinary" has now been omitted in the Legislative enactment, so that the question of whether or not the funds here involved are "ordinary state revenue" is not involved. (See State ex rel. v. Gordon, 266 Mo. 394, 418; 181 S.W. 1016.)

CONCLUSION

Therefore, it is the opinion of this department that the fines assessed and collected in the Seagram Anti-Trust case should be

considered state revenue, to be placed in the general revenue fund; one-third to be set apart and paid into the public school moneys fund under Section 2.120, House Bill No. 23, Sixty-fifth General Assembly.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

RRW/feh