MOTOR VEHICLES: Inspector not liable on bond unless loss results and is neglect and proximate cause;
GASOLINE TAX: Inspector's function of revoking license is discretionary.

May 1, 1942

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FILE 61

Mr. George Metzger
State Oil Inspector
Jefferson City, Missouri

Dear Sir:

In your letter of March 12, 1942, our attention is directed to that portion of Section 8438, R. S. Missouri, 1939, which pertains to your authority to revoke licenses. As concerns your duties under the statute, you ask, (1) as to your liability on your bond for any dereliction of duty on your part in connection with the revocation of a license, and (2) is the abatement of penalties by any state officer sufficient reason for you to refuse to revoke a license? We assume the facts to be that a penalty has been determined to be due by the Oil Inspector, a statement thereof sent to the Treasurer as provided in Section 8419, R. S. Missouri, 1939; that the Treasurer has determined such penalty not to be due and refuses to collect the same.

Section 8438, R. S. Missouri, 1939, provides:

> "* * * Any license issued by said inspector, as herein provided, shall be revoked by him whenever such licensee * * * * * * * * * * * shall fail, neglect or refuse to pay any penalty * * * * * as provided by law, and be and remain in default thereof for a period of fifteen days after the time such * * * penalty * * * should have been paid. * * * * * * * * * * * *."

Section 8419, R. S. Missouri, 1939, is quite lengthy, but, in substance, it provides that, if any licensed dis-

tributor shall fail to pay, within the time required by law, any tax the inspector shall prepare a statement showing the amount of tax due, "adding to the amount of such license tax a penalty of five per cent (5%) thereof for each calendar month or fraction thereof during which such distributor shall be delinquent." This statement is to be sent to the Treasurer for collection. If not paid to that officer within thirty days after such statement is placed in his hands, he is to certify "such fact and the statement and all other papers and information in his hands concerning the matter to the Attorney-General", who is to bring suit to collect the items due.

Taking up the liability on the bond question, we find that such bond was given under Section 14686, R. S. Missouri, 1939, and is "conditioned for the faithful performance of the duties of his office." In San Bruno v. National Surety Co., 5 P. (2d) (Cal.) l. c. 953, we find this rule:

> "It is well settled that a mere dereliction without damage is insufficient to sustain an action on an official bond, and that the liability on such bond extends only to cases where the neglect or misconduct is the proximate cause of the loss."

Again, in Murfree's Official Bond, Section 487, it is stated:

> "although the state may maintain a civil action on a * * * official bond for official delinquency * * * * *, yet unless some damage results from the breach of the bond, the action cannot be sustained."

As we understand this rule, it means that before liability arises on an officer's bond it must be shown that some damage resulted and that his dereliction was the proximate cause of the damage or loss. Applying this rule

to the instant question it appears that first, there is doubt as to whether there is a loss sustained, that is, the Inspector thinks the penalty was owed and the Treasurer holds a contrary view; and, second, whatever loss or damage, if any, resulted, did not result from a dereliction of the State Oil Inspector. In this situation there can be no liability on the bond of the Oil Inspector.

Your second question turns on the meaning to be ascribed to the above quoted portion of Section 8438. The statute says that the license "shall" be revoked. The determining factor is, we think, whether the word "shall", as there used, is mandatory or permissive.

In State v. City of St. Louis, 2 S. W. (2d) 713 (Mo. Sup.) the statute under consideration stated that "such mayor and common council shall direct the proper officer to give notice." The question was whether the use of "shall," underlined above, made the statute mandatory or directory, that is, permissive. The court held it to be permissive, saying l. c. 727:

> "The word 'shall' when used in a statute, is often construed to mean 'may.' It is imperative where the public or persons have rights which ought to be exercised or enforced; but, where no right or benefit depends upon its imperative use, it may be held directory only."

In State v. Heath, 132 S. W. (2d) 1001 (Mo. Sup.) the rule is thus stated, l. c. 1003:

> "'If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory."

Applying these rules to Section 8438, it nowhere appears that the public or persons have any right or benefit depending upon the revocation of a license, but rather the right or benefit depends upon the existence of the rights under the license unrevoked.

Examination of the whole of Article II, Chapter 45, R. S. Missouri, 1939, pertaining to "Motor Vehicle Fuel Tax", does not disclose that the law prescribes the result that is to follow if the inspector should fail to revoke a license, even assuming that the tax or penalty was due. In this situation we are of the opinion that Section 8438, pertaining to the inspector's duties on license revocations is directory and that in every instance of delinquency the inspector is not under the mandatory duty to proceed to revoke the license of the delinquent.

Further, in the case of State v. City of St. Louis, supra, at l. c. 727, it is stated:

> "The word (shall) is held to be permissive and not mandatory when necessary to sustain or accomplish the purpose of the legislativeaact."

We think the act, in other provisions, indicates this revocation provision was not intended to be mandatory. Section 8419 provides that the penalties are to be cumulative to twenty-five per cent (25%), at the rate of five per cent (5%) for each month or fraction thereof. These penalties, of course, are imposed to coerce payment of the tax on the date fixed. But if the law contemplated that, on every delinquency that the license must lose his license, why graduate the penalty over a period of five (5) months. This graduation of penalties indicates that the licensee might pay up, say, at the end of the third month with the three penalties, and continue on in business. If this were not the intent of the law, and every licensee must lose his license on being delinquent, then there can be no reasonable purpose attached to the graduation of penalties over five months. If this was not contemplated, the Legislature can only be said to have had in mind the additional funds

that the state would get from the penalties. That could have been obtained by fixing a flat penalty of twenty five per cent (25%), with no need of extending the period of cumulation over a five month period.

It is, therefore, our opinion that that portion of Section 8438, pertaining to license revocations, is only directory and that the inspector is under no duty to revoke a license in every case of delinquency. This being so, the question of whether the Treasurer's view, that the penalty was not owed, furnishes reason for you to refuse to revoke a license, needs to be restated, in that, we think it affords reason for you to determine to refrain from revoking the license, it being a discretionary function of the inspector.

Yours very truly,

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APPROVED:

ROY McKITTRICK
Attorney-General

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