LOAN & INVESTMENT COMPANIES-
Claim for refund on unused license fees: Loan and investment companies may present a claim against the State to the Legislature for an appropriation as a refund for unused part of annual license fee, where the license has become inoperative by law. But they may not sue the State.

July 25, 1946

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Honorable H. G. Shaffner
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Shaffner:

This will acknowledge your request for an opinion from this Department upon the subject expressed in your letter, which is as follows:

> "We are in receipt of the following letter from the Citizens Loan & Investment Company, Joplin, Missouri:
>
> > "'In January of this year we paid a license of $150 to operate under the loan and investment act for one year. Inasmuch as this law went out July 1, we are of the opinion that we are entitled to a refund of $75.'
>
> "Kindly favor this Department with an opinion in this connection."

We find in our research on the question you submit, the following authorities on the right of a licensee to recover the unused part of a license fee previously paid, where the benefits anticipated from the unused part thereof are denied him through no fault of his.

37 C.J. 255, contains the following text on the subject, to-wit:

> "The unearned portion of the money paid for a license may be recovered

> by the licensee, where the license has become inoperative by acts or circumstances over which he has no control and without his volition, as where he is deprived of his license by a statute or ordinance which prohibits the occupation for which the license was obtained, * * * ".

The above text at foot-note 88, cites 48 Mo. App. 26. That case, Sharp vs. The City of Carthage, was a case where an applicant for a saloon license paid into the city treasury the fee required by the city for keeping a dram shop for one year. The next day, it appears, the City of Carthage voted affirmatively establishing the local option law. Later, the applicant applied to the County Court of Jasper County for a county license to keep a dram shop. The county license was refused him because the City of Carthage had previously established local option.

The law in force at the time the application was made for the licenses, prohibited a dram shop keeper from selling liquor without taking out a county license, under the penalty of a heavy fine. The applicant sued to recover the balance of the unused license fee. The St. Louis Court of Appeals holding that the applicant was entitled to recover at l.c. 30, 31, said:

> "* * * The controlling question here is, can money be recovered back when the object for which it is paid is frustrated, not by accident nor by the act of the party paying it, but by the act of the party to whom it is paid? The license issued by the city of Carthage to the plaintiff created a contract between that city and the plaintiff, which even the local-option law recognized as a property right by providing that its adoption after the grant of the license should not interfere with rights acquired under it. That such a contract cannot be annulled by the

> city without cause has been frequently decided. State ex rel. Shaw v. Baker, 32 Mo. App. 98, 101, and cases cited. The plaintiff did not pay $800 for a piece of worthless paper, but for the privilege of carrying on a dramshop within the city for a period of one year without interference by the city while he complied with other legal requirements. When the city immediately thereafter voted against the sale of intoxicating liquors within its boundaries, it thereby effectually prohibited the county court from granting a license to plaintiff, and rendered its own license worthless. The case is not distinguishable on principle from one, where the city, having power to revoke a license, would on one day issue license for a year, pocket the proceeds, and then revoke it the next day without cause, because the case concedes that the only reason, why the county court failed to issue a license to the plaintiff, was that the city by its vote had prohibited it from so doing. The principle governing an action for money had and received is that the possession of money has been obtained which cannot be conscientiously withheld. * * * ".

The case of Douglas, Appellant, vs. Kansas City, Appellant, 147 Mo. 428, was also a case involving the issuance of a dram shop license. Three parties had been carrying on such a saloon business outside of the City of Kansas City, but the City undertook to extend its boundaries to include the territory where such parties were carrying on such business. The City demanded the payment of a dram shop license tax from the saloon keepers. The attempted extension of the City limits to include the place where these parties were carrying on their liquor business was later declared invalid. In the meantime, however, the parties were arrested for non-payment of the tax, and only secured their release from custody upon its payment. The parties assigned to plaintiff in the case

their claims against the City for the money so obtained from them. Suit was filed against the City, and the plaintiff obtained a judgment for something less than the full amount he sued for, because he had failed to supply evidence of certain items included in his petition. Our Supreme Court in the above styled case, in affirming the judgment for plaintiff for so much of his claim as he did recover, l.c. 439, said:

> "If the officers and agents of a city exact in its behalf an unauthorized and illegal license tax, under threat of immediate arrest in case of refusal, and they are clothed with power to carry their threat into execution at once, a payment made to avoid such consequences is not voluntary and the money may be recovered back. * * * ".

The principle underlying the cases above cited, and from which excerpts are quoted, is that of the right to sue for money had and received.

The case of Propst et al. vs. Sheppard et al., 174 S.W. (2d) 359, was a case before the St. Louis Court of Appeals, in a suit to recover money had and received. In affirming a judgment for recovery in that case the St. Louis Court of Appeals, l.c. 363, in quoting a late text work said:

> "In 4 Am. Jr., Assumpsit, Sec. 20, page 509, it is said that the action for money had and received is 'less restricted and fettered by technical rules and formalities than any other form of action.* * * The action for money had and received is founded upon the principle that no one ought unjustly to enrich himself at the expense of another * * * .' * * *".

Section 5425a, Laws of Missouri, 1943, page 505, is in part, as follows:

> "The Commissioner of Finance shall have and exercise the same supervision, authority and power over, and shall be charged with the same duties toward all corporations organized under the provisions of

> Article 8, Chapter 33, Revised Statutes of Missouri, 1939, as he now has and exercises and is charged with by law with reference to licensees under the provisions of Article 7, Chapter 39, Revised Statutes of Missouri, 1939, as far as the same may be applicable, * * * ".

On page 506, Laws of Missouri, 1943, said Section 5425a is continued, and provides that loan and investment companies on or before December 20 of each year shall pay an annual license fee of $150 for the next succeeding calendar year. It provides that failure to pay such annual fee at the time specified shall work a forfeiture of such license as of the 31st day of December following.

Neither Article 8 of Chapter 33, R.S. Mo. 1939, our article dealing with loan and investment companies, nor the amendment in the Act of 1943, Laws of Missouri, 1943, page 502, etc., provide any general penal section for violation of the terms of said article or the amendment thereto. However, Section 5422 of the amending Act of 1943, Laws of Missouri, 1943, l.c. 504, does provide that loan and investment companies violating the terms of said Section 5421, Laws of Missouri, 1943, pages 503, 504, shall be deemed guilty of a misdemeanor. This does not reach violations of any other section of said Article 8, or said amendment of 1943 thereto. However, under the rule announced by our courts all corporations obtaining franchises or licenses from the State, contract thereby with the State to obey all laws of the State. And while, as stated, there is no provision for penalty except in the said Section 5422, for the violation of the provisions of said Section 5421, Laws of Missouri, 1943, any loan and investment company would, we believe, for violation of any of the provisions of said Article 8, Chapter 33, or the amendment thereto, in said Act of 1943, be subject to ouster by quo warranto. We believe then that the same rule of law would apply to loan and investment companies who may have paid their annual license fee in advance as

was applied by our Appellate Courts in the Carthage case, supra, and in the Kansas City case, supra. That is to say, where the license was paid under conditions involving penalities and forfeiture, the right to recover in assumpsit for money had and received would inure to the licensee where a failure of consideration interposes on the ground that through no fault of the licensee the benefits of a part of the period for which the license was granted was denied him.

Said Section 5425a, lc. 506, specifically provides that the license to conduct a loan and investment business shall remain in force "until it is surrendered by the licensee or forfeited or revoked by the Commissioner of Finance".

We believe under the language of the statutes quoted, and the rulings by our Appellate Courts in the decisions cited and quoted above, that the licensee in the case mentioned is entitled to recover from the State the unused part of its license fee. We can see no difference in a case where a county receives a dram shop license fee and a case where the State receives a loan and investment license fee in the application of the principle that the unused part of the annual license fee may be recovered on the basis of money had and received for the reason that in either case the county or the State never became the real owner thereto, because of a part failure of consideration.

There is also accompanying your letter requesting this opinion, your reply by letter, to the communication from the Citizens Loan & Investment Company of Joplin, Missouri. Your said reply is as follows:

> "We are in receipt of your letter dated July 8 in which you express the opinion that you are entitled to a refund of $75.00 on your license fee of $150 to operate under the Loan and Investment Act for one year.
>
> "There have been no provisions made for this Department to make a refund. Therefore, this matter has been referred to the office of the Attorney General of the State of Missouri."

A part of said Section 5425a, Laws of Missouri, 1943, page 505, l.c. 506, is as follows:

> "All fees collected under this section shall be paid directly into the state treasury by the Commissioner of Finance and credited to the state banking department fund."

We do not believe your Department has any duty to perform in this kind of case.

The fees collected from loan and investment companies having been paid into the State Treasury it may only be withdrawn under the terms of Section 28, Article IV of the new Constitution of this State, which is as follows:

> "No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

Section 15, Article IV of the present Constitution of this State outlineing the duties of the State Auditor is in part, as follows:

> "The state treasurer shall be custodian of all state funds. All revenue collected

> and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. * * * ".

It would thus appear to be a private matter on the part of the loan and investment company to obtain from the State a refund of the unused part of the license fee mentioned.

It is an axiom of the law that the State cannot be sued without its consent. 59 C.J. 300 states the rule as follows:

> "A state, by reason of its sovereignty, is immune from suit and it cannot be sued without its consent, in its own courts, * * * ".

In the case of State ex rel. State Highway Commission vs. Bates, 317 Mo. Rep. 696, l.c. 700, our Supreme Court said:

> "* * * 'It is fundamental that the State, being sovereign, cannot be sued without its consent.' * * * ".

Under these authorities and many others which might be cited the said company may not sue the State without its consent, and such consent nowhere appears in our statutes or Constitution. The company then is left to the proceeding of presenting its claim to the Legislature for an appropriation to refund said unused fee. The said company may have a just claim against the State, but it cannot sue the State for it. When and if the Legislature should make an appropriation in behalf of the company for

such purpose, we believe the company would then present the claim to the comptroller under the last clause in Section 22, Article IV of the new Constitution, which is as follows:

> "* * * The comptroller shall be director of the budget, and shall preapprove all claims and accounts and certify them to the state auditor for payment."

The State Auditor then would no doubt issue his requisition upon the State Treasurer who would issue his warrant in discharge of the claim.

CONCLUSION.

1) It is, therefore, the opinion of this Department under the above cited authorities that the named loan and investment company has a lawful claim for reimbursement for the unused part of its license fee paid to the State for the year 1946.

2) That your Department has no duty to perform in the matter.

3) That the loan and investment company may not sue the State for the claim but its reimbursement lies with the Legislature under the Constitution of this State, and such legislation as may be in force in relation thereto.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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