

LIQUOR BONDS: Sureties on liquor bonds not liable for
SALES TAX: payment of sales tax.

October 21, 1938

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

We have received your letter of September 26
which reads as follows:

"As I understand the law, each applicant when he receives a license to sell intoxicating liquor in the State of Missouri is required to post a bond with the State Department of Liquor Control.

"In the collection of Sales Tax, I am finding that a number of taverns and persons licensed to sell liquor are going out of business and owe the state large sums on Sales Tax.

"I would like an opinion from your department as to whether I can bring suit on the bond which they filed with the State Department of Liquor Control, for the amount of delinquent sales tax due the State of Missouri."

Section 19 of the Liquor Control Act, Laws of Missouri, Extra Session 1933-34, p. 83 requires that each

applicant for a liquor license shall give a bond to the State of Missouri. The statute sets out the terms, requirements and conditions which each bond shall contain. The pertinent part of this section reads as follows:

"Before any application for license shall be approved the Supervisor of Liquor Control shall require of the applicant a bond, to be given to the state, in the sum of Two Thousand Dollars, with sufficient surety, such bond to be approved by the Supervisor of Liquor Control, conditioned that the person obtaining such license shall keep at all times an orderly house, and that he will not sell, give away or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquor in any quantity to any minor, and conditioned that he will not violate any of the provisions of this act and that he will pay all taxes, inspection and license fees provided for herein, together with all fines, penalties and forfeitures which may be adjudged against him under the provisions of this act."

Referring particularly to the matter of taxes the above statute provides that the bonds shall be conditioned to the effect that any such licensee shall not violate any of the provisions of "this act," that he shall pay all taxes, inspection and license fees "provided for herein," together with fines, penalties and forfeitures which may be adjudged against him "under the provisions of this act." This section very apparently refers solely to the violation of the Liquor Laws only and to the taxes, inspection and license fees provided for in those laws. The language used in the statute cannot, in our opinion, be construed to refer, nor was it ever apparently intended that the same should apply to the payment of taxes or penalties other than those

specifically provided for in the Liquor Control Act.

In this connection it is sufficient to say that the laws authorizing the levying and collection of the sales tax are not a part of the Act governing the manufacturing, sale and distribution of intoxicating liquors and the supervision of same by the Supervisor of Liquor Control as set forth in the Liquor Laws.

Section 13a Laws of Missouri, Extra Session 1933-34, p. 82 also refers to surety bonds. This section provides in part as follows:

"In each instance, (that is in the sale of intoxicating liquor at retail in cities authorizing the sale of the same), a bond in the sum of two thousand (\$2,000.00) dollars, with sufficient surety, to be approved by the Supervisor of Liquor Control, must be given for the faithful performance of all duties imposed by law upon the licensee, and for the faithful performance of all the requirements of this act, and any violation of such conditions, duties or requirements shall be a breach of said bond and shall automatically cancel and forfeit the license granted hereunder." (Parenthesis ours.)

In other words, this section requires the faithful performance of all the duties "imposed by law upon the licensee" and the faithful performance of all the "requirements of this act." The only duties imposed by law "upon the licensee" as such are those contained in the Liquor Control Act. To say otherwise would lead to absurd results. For instance, the Missouri Statutes provide that it shall be the duty of the owner of a dog to kill such dog or have it immunized when it has been bitten by or exposed to any other dog with the rabies. The statutes also require each owner of a motor vehicle which shall be operated or driven upon the highways of this state to file by mail or otherwise in

the office of the commissioner an application for registration of such motor vehicle on a blank furnished by the commissioner for that purpose. The laws also provide that it is the duty of persons to assist the sheriff in making arrests if he shall request a person to do so. The law also makes it the duty of a person to serve as a juror if he is summoned for that purpose and has not been excused by the court. The laws also prohibit persons from speeding in certain incorporated areas. Other laws prohibit persons from spitting on the streets. Many other similar examples could be given.

We do not think it can be said that the bond required by the Liquor Laws was ever intended to be conditioned upon the faithful performance of all of the above duties by each licensee. We do not think it can be said that the conditions of the bond would consequently be violated if any of the above mentioned duties were not fulfilled. As the Supreme Court of Missouri said in the case of *State v. Irvine*, 72 S. W. (2d) 96:

"The courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation."

We think the Legislature intended the expression "duties imposed by law upon the licensee" to mean only those duties required of a licensee by the Liquor Control Act. Contrary interpretation would lead to absurd results and would include all the duties and restrictions imposed upon the entire citizenry of this state by all the law in the State of Missouri. The Legislature, in our opinion, did not intend that the conditions in the bonds should be so far reaching and inclusive. Therefore, the language used in section 13a was never intended to include the duty of collecting and paying over the sales tax or any other duty or obligation imposed by law other than those contained in the Liquor Control Act.

The conditions in the bonds which the Supervisor of Liquor Control has required of applicants are worded in

practically the same language as the statutes. The pertinent part of these bonds reads as follows:

"NOW, THEREFORE, The Condition of This Obligation is Such, That, if the said Principal does not violate any of the provisions of Committee Substitute for Senate Bills Nos. 6, 21, 22, 23, 24 and 25, passed by the 57th General Assembly in Extra Session, and any acts amendatory thereto, or any rule or regulation of the Supervisor of Liquor Control; and if said Principal shall at all times keep an orderly house and does not sell, give away, or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquor in any quantity to any minor; and if said Principal shall pay all taxes, inspection and license fees provided for by law, together with all fines, penalties and forfeitures which may be adjudged against the Principal under the Liquor Control Act and amendatory acts thereto; and if said Principal shall faithfully perform all requirements of said Act while said license is in effect, then this obligation shall be null and void; otherwise to remain in full force and effect."

The language used and the conditions contained in the bond, it will be noted, are the same as are required by the statutes. Therefore the bond is a statutory bond. As said in 9 C. J. 24:

"A bond to be good as a statutory bond should in general comply in respect to its conditions and execution with the requirements of the act under which it is given, * * * but if a bond is in the precise language of the statute, it is valid* *."

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A statutory bond is also defined in 9 C. J. 35 as follows:

"Generally a statutory bond is one required by some statute."

As we observed above, the conditions in the bonds made necessary by the statutes do not contain a provision to the effect that the sales tax or any other tax other than those provided for in the Liquor Control Act must be paid or satisfied. And apparently if the bonds did definitely so provide as to the sales tax or if the language used in the bonds could be so construed, the extra condition not imposed or authorized by statute could not be enforced. The general rule as to statutory bonds is thus stated in 9 C. J. 26:

"Where a bond contains the conditions prescribed by statute, and also contains conditions in excess of those so required, if the excess can be separated from the authorized portion without destroying the latter it may be rejected as surplusage and the rest of the bond held valid, in the absence of a statutory provision expressly or by implication making it void, * * *."

In the case of Rubelman Hardware Company v. Greve, 18 Mo. App. 6, the court was called upon to enforce a condition in a statutory bond which was not imposed by statute. In refusing to enforce such provision the court said:

"It is exceptional in the fact that, while the bond sued on is legitimately statutory, and has affected its statutory purpose, it is not here proposed to enforce a statutory condition. All the cases show that the interpolation of extra-statutory conditions will not modify the force of a statutory bond, or impair the efficacy

of its statutory stipulations. But that an extra-statutory stipulation in such a bond may be enforced alone, is quite another proposition. The statute offered to the obligor a restraining order upon certain conditions, and subject to certain consequences in specified contingencies. The terms of the present bond subject him to a condition not imposed by the statute, and this action seeks to fix upon him consequences which were not suggested in the statutory proposal, and which curtail its benefits in a way not warranted by the law. Such a condition is contrary to the manifest policy of the law, and is therefore void. If the obligor has realized the benefits for which the bond was given, he has, in the statutory undertakings, supplied the whole consideration for them which the law exacted.* * * The extra-statutory undertaking is without any consideration which the law will recognize. Precedent and authority are not wanting for these conclusions. 'When a bond is taken under a statute, it ought to conform in substance to the requisitions of the law; and if it goes beyond the law it is void, so far as it exceeds those requisitions.' *Armstrong v. U. S.*, 1 Peters C. C. 46. 'Where a statute requires an official bond, and prescribes substantially the terms of it, it must conform to the requisitions of the statute; and if it goes beyond them it is void, so far at least as it exceeds those requisitions.' *U.S. v. Howell*, 4 Washington 620.'* * * But where the statute only directs the condition of the bond, and does not avoid it, if it should not conform to the directions, and something more than that condition is added to it, the bond may be allowed to cover the authorized part of the condition, and so much may be recovered under it, and no more.' *U. S. v. Brown, Gilpin* 179. 'A bond may, by mutual mistake or accident, and wholly without

design, be taken in a form not prescribed by the act * * *. Where the act speaks out, it would be our duty to follow it; where it is silent, it is a sufficient compliance with the policy of the act, to declare the bond void, as to any conditions which are imposed upon a party beyond what the law requires. This is not only the dictate of the common law, but of common sense. We think, then, that the present bond, so far as it is in conformity to the act * * * is good; and for any excess beyond that act * * * it is void, pro tanto.' U. S. v. Bradley, 35 U. S. 384."

In the case of Woods v. State of Missouri, 10 Mo. 698, the court said:

"The objection is not that the bond sued upon does not contain every stipulation set forth in the statute above referred to, but that it contains more than the statute requires. * * * The stipulations in the bond not required by the statute may be rejected as surplusage, and the bond still be regarded as a statutory bond, and sued upon as such. See the case of Grant & Finney v. Brotherton, 7 Mo. R. 458."

Conclusion

Sections 13a and 19 of the Liquor Control Act require bonds to be filed by each liquor licensee and set out the conditions such bond shall contain. The statutes

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however, do not provide that such bonds shall contain a provision to the effect that the sales tax shall be paid before the surety is discharged. Consequently, such bonds, being required by statute and therefore strictly statutory bonds, are not subject to an action for the collection of sales tax and the sureties thereon are not liable therefor.

Yours very truly

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA/w