

Opinion No. 18-2138

October 14, 1918

BY: HARRY L. PATTON, Attorney General

TO: Mr. R. F. Ballard, County Clerk, Roswell, N.M.

No Refund on Liquor Licenses Rendered Useless by Prohibition.

OPINION

We have your letter of recent date, wherein you ask whether the Board of County Commissioners should pay a refund claimed by certain liquor dealers on a liquor license issued for a full year from November, 1917, and which, owing to the prohibition law, has not and cannot be used since October 1st.

The question you present involves some close distinctions. In the first place, this office held on November 15th last year in an opinion to Jacob Posner at Questo, New Mexico, that there was no authority in our statutes for the issuance of a license for less than a year period, neither is there any provision for the refund of any portion of an unused license fee, except in the case of district local option. In this connection Section 2939 of the 1915 Codification provides that where liquor is being sold within the limits of any district under a license issued at the time prohibition goes into effect, there shall be refunded to the holder of the license according to the portion of the year in which said license shall not be used, but this statute refers only to district local option, and, in the opinion of this office, has no application to the present case.

The authorities on this question are varied. In one of the latest cases, that of *Allsman vs. Oklahoma City*, 95 Pac. 468, 16 L. R. A. (N. S.) 511, the question decided was whether the licensee could recover back the unearned portion of the license fee where the license had failed without fault of the licensee, and which failure was due to the going into effect of the state-wide prohibition law subsequent to the issuance of the license. After an exhaustive review of the authorities, the Oklahoma court held the unearned portion of the fee should be returned. Likewise the Supreme Court of Washington, in the case of *Bart vs. Pierce County*, 111 Pac. 582, held the unearned portion of the fee should be returned. Both the Oklahoma Court and the Washington Court say that the right to recover the unearned portion of the fee is based "on the plainest principles of natural justice." The authorities relied upon by both these courts in arriving at this conclusion are Nebraska, Ohio, and Missouri decisions.

Opposed to these authorities are numerous decisions holding to the contrary. In the Washington case it is said the rule they announce is not supported by the weight of authority in other jurisdictions. In the case of *Sharp vs. Carthage*, 48 Mo. App. 26, wherein the district court held that where a liquor dealer was required to have both a city and county license, and having taken out a city license was thereafter unable to obtain a

county license because of a vote taken by the city in the meantime prohibiting the sale of intoxicating liquors, the city, by its act having rendered the license worthless, was bound to refund an appropriate part of the money paid even though the city license was taken out the day before and in view of the election to be held the following day there was a strong dissenting opinion by Justice Thompson, who said:

"The plaintiff, by attempting to take out a new license for a year before the old license had expired, in anticipation of the election about to be held and in order to defeat for nearly a year the will of the voters, so far as he was concerned, attempted a fraud on the law, and is, therefore, in no condition to have the aid of a court of justice in recovering his money back. Nor do I see that the city has done, or threatened to do, anything to defeat the privileges granted by its license. It does not offer to prosecute him for keeping open his dramshop, and it has not guaranteed him against prosecution by the state for not having county license. * * * The city is clearly estopped by its license from prosecuting the plaintiff. * * * I cannot see any difference between this case and the case which would be presented if a dramshop keeper should take out city and county licenses, and then fail to make them available because he could not, for some reason, procure a government license, -- in which case, I suppose no one would contend that he could sue for and recover back the money paid for his city and county licenses."

In *Chamberlin vs. Tecumseh*, 43 Neb. 221, 47 Am. St. Rep. 753, 61 N. W. 632, which is one of the cases cited by both Washington and Oklahoma Courts, the court, while agreeing that it was a settled law of the state that where a liquor dealer had been issued a license by the city council, and on appeal such license was cancelled, that the licensee was entitled to repayment pro tanto of the sum paid, also said that each member of the court as it was then constituted, entertained doubt as to the soundness of the doctrine laid down by the Nebraska decisions, but that they did not feel justified in disturbing a rule which had been so long recognized by their courts.

The Supreme Court of Georgia in the case of *Fitzgerald vs. Witchard*, 130 Ga. 552, 61 S. E. 227, 16 L. R. A. (N. S.) 519, held that where the city had received a fee and issued a license for the sale of intoxicating liquors for the remainder of the year, but before the expiration of the time a law was enacted providing for a higher license fee, because of which law he was compelled to quit business, that neither equity nor good conscience required the city to refund the money.

In *Nurnberger vs. Barnwell*, 42 S. C. 158, 20 S. E. 14, it was held that where, after the passage of the dispensary act providing that no license for the sale of spirituous liquors should be of any force after a certain date, but that licenses might be extended to such date upon payment of one-half of the annual fee, a liquor dealer, after having complied with the requirements for obtaining a license, tendered to a town council one-half the license fee, demanding a license for six months, expiring on the day mentioned in the dispensary act, which fee the town council refused to accept and demanded the full amount of the annual license fee, which was paid by the dealer under protest, and upon the promise of the council that if the license should be void after the date mentioned in

the dispensary act the council would repay the excess, the licensee upon being compelled to discontinue business after such date was entitled to recover the excess amount paid for the annual license fee, and that such money did not properly belong to the municipality.

In *Alexander vs. State*, 77 Ark. 294, 91 S. W. 182 it was said that one who obtained a license upon the revocation of the prohibition order was not entitled, upon reinstatement of said prohibition order, to the return of the money paid for the license.

In *Peyton vs. Hot Springs Company*, 53 Ark. 236, 13 S. W. 764, the same rule was announced.

The foregoing authorities are sufficient to show that the law covering the question you ask is very unsatisfactory, and it is hard to determine just what the true rule may be. The authorities holding that a person is entitled to recover the unearned portion of the fee seem to so hold upon the theory that it is but right for the county to make such return, and also that the party issuing the license is responsible for its becoming inoperative. The Washington, Nebraska, Oklahoma and Missouri cases seem to be based upon this view. But in our opinion these cases are not controlling in this state upon this question for the reason that the county is not to blame, nor responsible for the license becoming of no effect. So far as the county which granted the license is concerned it is valid. The liquor dealer may go ahead and sell under the license. No prosecution could be instituted by the county and none would be. The state, and not the county, is responsible for the prohibition law which makes the license valueless. Had the county, the party granting the license, by its act rendered the license ineffective, the cases mentioned might be controlling, but in view of the fact that it was the state, and not the county, which put into effect our state-wide prohibition law, we do not think it can be said that the licensee has been deprived of his right by the act of the county. We conclude the cases which hold that fees can be recovered on this reason are not conclusive, but rather, in our opinion, the unearned portion of the fee should not be refunded.

Another reason why the unearned portion of the license fee cannot be refunded is that under our laws the money paid for a license is distributed by the county treasurer in the different funds. The fee paid has passed beyond the control of the county authorities; and it may be the county is not liable for its refund for this reason alone.

We are further inclined to render this opinion, for by so doing we will work no injustice. If our conclusion is incorrect and the courts should hold they are entitled to a return of this fee, the licensee has his remedy by going into court and can recover, but if we should hold he was entitled to recover and the county should pay it out, the county would have no recourse, and the question could not be judicially determined.

Therefore, you are advised that it is the opinion of this office that this claim should be rejected.