

Horticulturist, Duty Of. Nursery Stock, Inspection Of. Foreign Nurseries, License Of. License, to Sell Nursery Stock. Fees, Remitted to State Treasury. Inspectors, Duty to Remit Fees.

By the provisions of Sec. 1935, Chap. 121, Laws of 1911, a license cannot be required of a nursery in a foreign state who supplies his stock upon mail orders and directly to the consignee. However, such stock may be inspected by the inspectors and if objectionable because of disease or pests may be

quarantined or destroyed in the same manner as that supplied by a local nursery.

May 24, 1911.

Mr. M. L. Dean,
State Horticulturist,
Missoula, Montana.

Dear Sir:

I am in receipt of your letter of the 18th inst., in which you request an opinion and construction of Section 1935, Chapter 121, Laws of 1911, which provide as follows:

"No person, firm or corporation shall engage or continue in the business of selling within the state, or importing fruit trees, plants, or nursery stock into the state, without first having obtained a license to do business in this state, as in this act provided."

and upon said section you ask the following question:

"We have contended that outside nurseries doing a catalogue business only in this state, not having any agents in person, were under the same regulations as though they had personal agents, consequently we claim the right to withhold the delivery of stock until the law is complied with and the license is secured. Does this ruling conflict with federal interstate laws?"

On April 7th, 1910, construing said section, which was then Sec. 1937, Revised Codes, this office held that a license must be procured by every person engaging in the business of selling nursery stock within the state but from a reading of that opinion it will be seen that this referred to persons maintaining a business establishment within the state either through agencies or through other persons engaged in the nursery business.

The provisions of the horticultural law above referred to are in the nature of an inspection law and such acts have been upheld as within the jurisdiction of the state upon numerous instances and it has been held that the removal or destruction of unsound articles even though shipped into the state from a foreign state is a proper part of the inspection law and is an exercise of the power to inspect.

See 7 CYC, and other cases cited therein.

Where, as is indicated from the facts stated in your letter and from the information furnished me over the telephone, that the shipments concerning which you speak are made as a result of correspondence by mail between the consignor and the consignee, in my opinion there is no manner in which you could compel the consignor, who is a resident of a foreign state, to take out or procure a license. However, in view of the authorities above referred to, when the goods have arrived within the state at the point to which they were consigned, then it is my opinion that the provisions of said Chapter 121, Laws of 1911, will apply, and that your power of inspection can be enforced the same as upon nursery stock shipped from one point in the state to

another, and that if the stock is found to be objectionable because of disease or pests, the same may be quarantined by you and reshipped to the consignor, or may be destroyed. However, unless the objectionable features appear in the stock, delivery should be made to the consignee.

You also ask my construction of Sec. 1933, relating to the disposition of fees and fines collected and in which you state:

“They are reported to the board and credited to the state as cash received, but for each inspector to transmit those moneys to the state, then in turn the state send them back for services rendered, would be unnecessary and conflict the work.”

From examination of said Section 1933, and of Section 1935, of the Revised Codes of 1907, of which Section 1933 is a re-enactment, it will be seen that the only manner in which said Sec. 1935 is amended, was by inserting the word “fees” and it is my opinion that the provisions of that section, namely, Sec. 1933, are mandatory, and that all sums of money whether collected as fees or as fines for the violation of any of the provisions of the act shall be turned into the state treasury. In other words, the inspector is not permitted to deduct from any sums that he may have collected, on account of compensation due him, and to turn into the state treasury the balance—but that the full sum must be turned into the state treasury and the amount due the respective inspectors paid out of such funds upon proper claim being presented and allowed.

Yours very truly,

ALBERT J. GALEN,
Attorney General.