Opinion No. 149

**Inspections—Fees—Livestock—
Livestock Commission—
Forestry Service.**

Held: Livestock inspection laws and fees, of the State of Montana are not applicable to livestock used in and transported from one county to another, or from state to state, where federal bureaus, departments and instrumentalities use and transport such livestock in performance of functions of the federal government and in pursuance of Congressional law.

November 27, 1948

Mr. Ralph Miracle
Executive Officer
Montana Livestock Commission
Capitol
Helena, Montana

Dear Mr. Miracle:

You have requested my opinion as to whether or not the terms of Chapter 59, Laws of 1943, as amended by Chapter 176, Laws of 1945 as amended by Chapter 210, Laws of 1947, applies to the livestock owned by the United States Department of Agriculture Forest Service, and, if an inspection fee may be collected from the officers and agents

of said Federal Department as pro vided by our statute. This is a very important matter.

At the outset, in answering your inquiry, it should be pointed out that the reason and purpose of the livestock inspection act was, and is, to prevent the theft of livestock.

This office has heretofore held that these inspection laws do not apply to livestock owned by the State of Montana. Opinion No. 43 of Volume 18 and Opinion No. 217 of Volume 20, Reports and Official Opinions of Attorney General.

It should be further pointed out that we live under a dual sovereignty. The sovereignty of the state and the sovereignty of the United States of America.

Upon becoming one of the States of the Union, the State of Montana adopted the constitution of the United States of America, by Section 5 of Ordinance I, which is as follows:

> "That on behalf of the people of Montana, we in convention assembled, do adopt the constitution of the United States."

By such adoption, every constitutional officer of our State takes an oath of office to support and protect and defend the constitution of the United States and the constitution of the State of Montana.

The constitution of the United States contains a very important Article, which is pertinent to this discussion. This Article is often overlooked in considering such questions, It is Article VI thereof. Said article is often referred to by the Courts as the supremacy Article; the pertinent part thereof to this important matter is as follows:

> "This Constiution and **the laws of the United States** which shall be made in pursuance thereof, ... **shall be the supreme law of the land;** and the judges in every **State shall be bound thereby,** anything in the **constitution or laws of any state to the contrary notwithstanding."** (Emphasis supplied)

Keeping the foregoing constitutional provision in mind, we will examine some of the decisions of the Supreme Court of the United States, wherein analogous questions have been determined.

In the case of Johnson vs. Maryland, we find that a mail carrier, using a truck for the delivery of U. S. Mail, did not and would not obtain a state driver's license as required by the Maryland State Statute. He was arrested and fined in the State Court. Upon the case reaching the high Court, it was held:

> "It seems to us that the immunity of the instruments of the United States from State control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient."

The Court held the State law was not applicable to the Government employee.

Johnson v. Maryland
254 U. S. 51

In the case of Ohio vs. Thomas, 173 U. S. 276, the Supreme Court of the United States had under consideration the question as to whether a state law of Ohio applied to a Federal Soldiers' home located in Ohio, which home has been provided by, and operated under authority of, an act of Congress. In answering the question, the said Court held in part:

> "Whatever jurisdiction the State may have over the place or ground where the institution is located it can have none to interfere with the provisions made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and the Congress. Under such circumstances the police power of the State has no application."

See also McPherson v. Blacker 146 U. S. 1, 41.

In a recent case decided in 1943, the Supreme Court in considering the question whether a California Statute, applying to the processing and sale of milk to an army post located in California was binding on the Federal Government, stated as follows:

"In preserving the balance between national and state power seemingly inconsequential differences often require diverse results. This must be so, if we are to accord to various provisions of fundamental law their natural effect in the circumstances disclosed. . . To hold otherwise would be to affirm that California may ignore the constitutional provision that, "This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be in the supreme law of the land. . ." Art. VI.

Pacific Coast Dairy, Inc. vs. Department of Agriculture of California, et at, 318 U. S. 285.

In another recent case decided in June, 1943, where the Court had under consideration a question involving this vexatious problem of dual sovereignty, as to whether a Florida Statute requiring all fertilizer shipped into the State of Florida for use therein to be inspected by officers of Florida and an inspection fee exacted, the Court held:

"Since the United States is a government of delegated powers, none of which may be exercised throughout the nation by any one State, it is necessary for uniformity **that the laws of the United States be dominant over those of any state.** Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the constitution states this essential principal. Article VI. **A corollary to this principal is that the activities of the Federal Government are free from regulation by any State.** McCullough v. Maryland, 4 Wheat, 316, 427; (Emphasis supplied) Ohio v. Thomas 173 U. S. 276, 283; Owensboro National Bank v. Owensboro 173 U. S. 664, 667; Johnson v. Maryland 245 U. S. 51; Arizona v. California 283 U. S. 423, 451. No other adjustment of competing enactments or legal principles is possible."

"These fees are like a tax upon the right to carry on the business of the postoffice or upon the privilege of selling United States bonds through federal officials. Admittedly the State Inspection service is to protect consumers from fraud, but in carrying out such protection, **the Federal function must be left free.** This freedom is inherent in sovereignty." (Emphasis supplied) Mayo v. U. S. 319 U. S. 441.

In the most recent case before the Supreme Court of the United States involving a question of dual sovereignty decided in 1944, and entitled: Samuel Feldman v. United States, the Court stated again, as follows:

"A State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations of the two Governments within their respective spheres is basic to our Federal Constitutional system, howsoever complicated and difficult the practical accommodations to it may be."

Samuel Feldman v. United States of America 322 U. S. 487

We have here the fact of the Congress of the United States creating the Bureau of Forestry, under the department of the Secretary of Agriculture. This segment of the Federal business is usually referred to as the "Forest Service."

The Congress has delegated to the Secretary of Agriculture broad powers in regard to the "Forest Service," in the administration of the forests and forests lands, the officers, agents and employer thereof. He may promulgate rules and regulations for the administration thereof violation of the same is a misdemeanor with a penalty of fine and imprisonment.

"The Forestry Service" is charged with cooperating with the States in fire prevention, fire protection, in

matters concerning fish and game and other conservation programs relating to waters and natural resources.

The "Forestry Service" in this state has cooperated with the State of Montana in every particular. It has cooperated with the State in preventing forest fires on state and private lands; has sent fire fighters to suppress fires on State, private or Federal Forest lands. Fire and diseased of trees do not respect county or State lines.

Every fire in the forest lands is an emergency. When a fire is reported, the whole "Forest Service" force in that area is galvanized into immediate action, the officers, agents and employees of the area affected, together with their horses and equipment, are rushed from their central stations, their slogan being "get on the fire with least possible delay." In doing so they may cross several counties or state lines. They are carrying out the mandate of our Congress, under Federal law, In doing their duty in such matters ,the "Forestry Service" is implementing one of the most beneficial programs of our Government and in the best tradition of conservation.

The "Forestry Service" and our State departments are both working for the best interests of the people of the State. We must all cooperate fully to the end of accomlpishing the highest good for the people of the State. I am sure all departments will cooperate to bring about this result.

The Livestock Commission, with their officers, inspectors and agents, I know, work closely with the "Forest Service" personnel and the Forest Rangers and others often give information to our agents of livestock thefts.

It is to be presumed the "Forest Service" handle only such livestock in their governmental function as is under their own control and management.

Therefore, the reason for our inspection law, that is to prevent theft, would not apply to such a Governmental Agency. Our statute, Section 8739 R.C.M., 1935, provides that: "When the reason of a rule ceases, so should the rule itself." Our Supreme Court has quoted this maxim many times. In re Irvine's Estate, 114 Mont. 577.

With the proper cooperation, which I am sure will be mutually practiced, it would appear that no serious problems will be presented.

However, we are confronted with our dual Governmental system, and it is the responsibility of all of us to make it work satisfactorily. As the Supreme Court has stated: "The distinctive operations of the two Governments within their respective spheres is basic to our Federal Constitutional system, however complicated and difficult the practical accommodations to it may be." Feldman vs. U. S., supra.

Therefore, from the facts given, the statutes concerned, our constitutions and the decisions of the Supreme Court of the United States, it is my opinion that the inspection laws and fee therefor, herein discussed, cannot apply to the livestock being used and transported from one county to another or from State to State by Federal Bureaus, departments and instrumentalities in the performance of Federal Governmental functions and in pursuance of congressional law.

Sincerely yours,
R. V. BOTTOMLY
Attorney General