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COUNTY COLLECTOR:

May not collect over-payment of
taxes from County Court.

October 4, 1933

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Honorable Thomas A. Mathews
Prosecuting Attorney
St. Francois County,
Farmington, Missouri

Dear Sir:

This Department is in receipt of your letter of September 29, in which you request an opinion from this office as to the following state of facts:

"I am herewith inclosing an agreed statement of facts with reference to a claim of Ed. Brewer, former Collector of this County, for the sum of \$1319.23, which is the amount found to be due him according to the statement of facts and audit supplied.

I would like very well to have an opinion from your Office, advising me as to whether or not the County Court should pay or settle this claim with Ed. Brewer.

I would like to have this opinion by October 7, 1933, and at which time I would ask that you return the inclosed statement of facts together with the audit.

Thanking you, I remain,"

According to the agreed statement of facts in this case the claimant, J. Ed. Brewer, as county collector over-paid the State of Missouri the proportionate part of the taxes collected in St. Francois County during his term of office, the sum of \$1,319.23 and that said over-payment to the state was not discovered until the filing of the audit by the State Auditor in the office of the county clerk.

Section 9935 R. S. Mo. 1929, provides for the collector's commissions. The theory of this statute is that the collector should report his commission in his settlements and it is his privilege and duty to retain the commissions allowed by law. The county court did not allow his commissions but the law allows them on his settlements and statements.

In the case here under consideration we find that the collector over-paid the State of Missouri his proportionate part of the taxes collected in St. Francois County during his term of office, the sum of \$1,319.23. The question now is whether or not the county court has the power to refund this money to the collector.

In the leading case of Hethcock v. Crawford County, 200 Mo. 170, plaintiff was collector of Crawford County, his term expiring on December 19, 1902. He presented a written statement of account to the County Court of Crawford County, claiming thereby that the county was indebted to him for five per cent commission on back taxes which commission he alleged he had paid over through a "mistake of facts" and which he demanded paid back. The court held:

"The question, then, comes to this? Having without duress, misrepresentation, or any form of imposition or fraud on the part of defendant's agent, the county court, voluntarily paid this money into the county treasury on the theory it was tax money and belonged to the county treasury - that he had but rendered unto Caesar the things that were Caesar's - can he recover it back, or must he abide the event? Courts have been extremely lenient in seeing a mistake of fact, as distinguished from a mistake of law, but plaintiff has produced no case on all-fours with this one. To the contrary, there is a live line of controlling deci-

sions holding that under such a record, the mistake is not of fact but of law, and that money so paid voluntarily cannot be recovered back. (Clafflin v. McDonough, 33 Mo. 412, and cases cited; Mathews v. Kansas City, 80 Mo. 231, and cases cited; Needles v. Burk, 81 Mo. 569; Price v. Estill, 87 Mo. 378; Norton v. Highleyman, 88 Mo. 623; State ex rel. Scotland County v. Ewing, 116 Mo. 129, and cases cited; State ex rel v. Shipman, 125 Mo. 436; Corbin v. Adair County, 171 Mo. 385; Campbell v. Clark, 44 Mo. App. 249; State ex rel v. Stonestreet, 92 Mo. App. 214.) "

"Here plaintiff had the money. He (misjudging the law) voluntarily parted with it without solicitation, misrepresentation, duress, fraud or undue influence, and, as he made his bed, so he must lie."

In the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, l. c. 624, the court in following the Hethcock case, said:

"Fulks understood that \$9000 was the maximum of commissions and fees he was entitled to retain in any one year. Acting on that construction he had paid to the county treasurer \$4001.80, the four per cent commissions on the delinquent and back taxes for the three years, 1911-12-13. This was a voluntary payment and if he misconstrued the statute it was a mistake of law and not of fact, and he is not entitled to recover the payment from the county. The tax levy of each year is made to meet the expenditures of that particular year. Under our scheme of taxation each year's levy is made to meet 'the conditions of the county treasury and current demands of the county's business and plaintiff may not disturb the county treasury of Crawford County unless he is warranted in so doing by the strict law.' (Hethcock v. Crawford County, 200 Mo. 170, 177; Dameron v. Hamilton, 264 Mo. 103, 121.)."

Honorable Thomas A. Mathews

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October 4, 1933

In view of the foregoing, it is the opinion of this office that the former collector of St. Francois County cannot recover the over-payment of \$1,319.23 from the county court, and that the county court cannot legally pay or settle this claim with the former collector.

Respectfully submitted,

JOHN W. HOFFMAN
Assistant Attorney General,

APPROVED:

ROY MCKITTRICK
Attorney General.

JWH:LC