TAXATION & REVENUE: Change as made in the collection of delinquent real estate taxes, as to hiring of attorneys, does not affect or change the law as it existed in 1929 relative to the hiring of attorneys for the collection of delinquent personal taxes.

April 10, 1934.

FILED

Hon. O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Mr. Kamp:

This is to acknowledge your letter which reads as follows:

"I am writing you for an opinion relative to the taxation and revenue, laws as they now exist with specific reference to the manner of collecting personal taxes. I understand that the collector, under the new law is authorized to set up delinquent tax on personal property against real estate of the party who owes the personal tax.

However, the question on which I am seeking your opinion, is what procedure the collector shall take to collect personal tax against persons who own no real estate and are delinquent on personal tax.

As I understand the new law, which repealed certain sections of the statute and enacted new ones in lieu thereof, it repealed Section 9952 R. S. 1929, which provided for the employment by the collector of a 'tax attorney' to institute suit for taxes, on real estate. Section 9940 R. S. 1929, provides for the method of collecting personal taxes, and also provides that

> 'said actions shall be prosecuted by attorneys employed as provided in ARTICLE 9 of this chapter of the general statutes and the fees and compensation allowed in said article shall apply to the above actions.'
> Section 9940 R. S. 1929, has not been repealed and I presume the collector is authorized to sue for personal tax as always, under the provision of that section, but the provisions for the employment of a tax attorney to prosecute such actions, namely Sec. 9952, has been repealed. Therefore the question is, in what manner shall the collector institute actions for the collection of personal taxes, against parties who do not own real estate against which he can charge the same? "

Article 9, Chapter 59, R. S. Mo. 1929, relates to "Delinquent and Back Taxes." The "delinquent and back taxes" referred to in that article and chapter concern personal and real estate taxes. In said article and chapter a scheme is provided for the collection of these two classes of taxes. The Legislature in 1933 made radical changes as to the collection of delinquent back real estate taxes (Laws of 1933, p. 425, Senate Bill 94; and Laws of 1933, p. 465, Section 9952, House Bill 44).

Senate Bill 94 was approved by the Governor April 7, 1933, without an emergency clause, which made that act become effective 90 days after the adjournment of the Legislature, to-wit, July 24, 1933. House Bill 44, supra, was approved April 28, 1933, with an emergency clause, becoming effective upon that date.

Your inquiry concerns the right of the collector to hire attorneys to collect and/or place in judgment delinquent personal taxes. As stated above, the Legislature by changes in the law confined their efforts to delinquent real estate taxes and in so doing have overlooked to some extent collection of personal delinquent taxes.

Section 9940, R. S. Mo. 1929, pertains to the collection of personal taxes; said section provides the following:

> "Said actions shall be prosecuted by attorneys employed as provided in Article 9 of this chapter of the general statutes, and the fees and compensation allowed in said article shall apply to the above actions."

And further,

> "This section shall not apply to counties having a population of more than eighty thousand and less than one hundred fifty thousand in which circuit court is held in more than one place."

It is thus seen that provision is made for the employing of attorneys to prosecute actions for the collection of personal taxes.

Section 9952, R. S. Mo. 1929, provides this:

> "* * * * *; and for the purpose of collecting such tax and prosecuting suits for taxes under this article, the collector shall have power, with the approval of the county court * * * to employ such attorneys as he may deem necessary, who shall receive as fees such sum, etc. "

Section 9952 was authority to hire attorneys to prosecute for delinquent real estate taxes as well as personal taxes. Thus, the Legislature, in 1933, in changing the law relative to the collection of delinquent real estate taxes repealed and reenacted said section; doing so by two bills, namely, Senate Bill 94 and House Bill 44.

House Bill 44 repeals Section 9952 and enacts the same section with only one change in it, to-wit:

> "Provided, however, that in all counties of this State that now have or may hereafter have a population of not less than eighty thousand nor more than ninety five thousand, according to the last decennial census of the United States, the collector shall have no power or authority to employ such attorneys, that the prosecuting attorney of such counties shall be the back tax attorney, and that all fees collected as such by the collector shall be paid into the county treasury; and each of the prosecuting attorneys in such counties shall be entitled to such additional temporary clerk and deputy hire as in the judgment of the prosecuting attorney and the county court may deem necessary, for such time and at such salary as may be fixed by the Prosecuting Attorney and the County Court."

This change affects only one county, namely, Greene County, and took away from the collector of that county the right to employ a back tax attorney, and vested that duty in the prosecuting attorney. The emergency clause reads as follows:

> "The financial condition of the counties and of the people therein, to which this act applies, and relief of the same being imperative without delay, creates an emergency in the meaning of the Constitution and this act shall be in force and effect upon its passage and approval."

In determining the legislative intent, it is well settled that the emergency clause may be considered. In State v. Bengsch, 170 Mo. 81, l. c. 109, the Supreme Court of Missouri said:

> "Now, if laws passed at remote periods, laws in pari materia, or cognate-subject

> laws, laws that have expired or been repealed, unconstitutional laws, may have the shell of their legislative nuts cracked by the hammer of judicial investigation, in order to extract the kernel of their intention, then a fortiori, may a similar result be reached where the shell of the legislative nut has been cracked by the legislators them selves, and the kernel of their intention extracted and spread on the platter of an emergency clause ready for immediate use. We hold the emergency clause in this instance as conclusive evidence of the legislative purpose, * *."

Directing your attention now to Senate Bill 94, Laws of Missouri, 1933, p. 429, the following is found:

> "That sections 9952 * * * * *, Article 9, Chapter 59, Revised Statutes of Missouri, 1929, entitled "Taxation and Revenue", and relating to "Delinquent and Back Taxes", be and the same are hereby repealed and fifty-one new sections enacted in lieu thereof, pertaining to the same subject, to be known as sections 9952 etc."

Section 9952 then as enacted makes no provision for the hiring of attorneys for the collection of delinquent taxes because the Legislature was only attempting to change the law respecting collection of delinquent real estate taxes. And, in so doing, repealed Section 9952 R. S. Mo. 1929, which was the only section under which attorneys could be employed. The collection of delinquent real estate taxes now does not need the aid or assistance of an attorney.

The determination of this question, then, is a matter of statutory construction.

The Supreme Court, en Banc, in Gasconade County v. Gordon, 241 Mo. 569, said the following:

> "Especially is it true that legislative enactments passed upon the same day or at the same session, and relating to the same subject, are to be read as part of the same act."

Section 9940, supra, provides that "said actions shall be prosecuted by attorneys employed as provided in article 9 of this chapter of the general statutes." And, as shown above, in 1933 the Legislature twice repealed Section 9952 R. S. 1929 (Senate Bill 94 and House Bill 44, supra); but House Bill 44 leaves Section 9952 whereby attorneys may be employed to prosecute delinquent personal tax actions. True, Senate Bill 94 likewise repealed Section 9952 R. S. Mo. 1929, and it being unnecessary at this time to determine the issue as to whether House Bill 44 was intended to be operative only and insofar until Senate Bill 94 became effective, we do not determine same (however, see our opinion dated August 8th, 1933, to the State Tax Commissioner, copy of which is hereto attached.). Thus, our present duty is (1) to harmonize these statutes (9940 and Senate Bill 94 and House Bill 44), if possible, and (2) determine if Section 9952 R. S. Mo. 1929 (even though repealed ?) remains and is incorporated into Section 9940.

Section 9940 refers and adopts into it any sections pertaining to the employment of attorneys found in article 9, chapter 59, so that section 9952 by the method of adoption was incorporated into Section 9940, and became a part thereof.

In Crohn v. Telephone Co., 131 Mo. App. 313, l. c. 320, the Kansas City Court of Appeals, in discussing such a method of adoption by reference in statutes, said the following:

> "In Endlich on Interpretation of Statutes, section 85, it is said: 'An act adopting by reference the whole or a portion of another statute, means the law as existing at the time of adoption and does not adopt any subsequent addition thereto or modification thereof.' This rule is generally recognized. (Sutherland on Statutory Construction, section 257; 26 Am. and Eng.

Ency. of Law (2 Ed.), 714; Postal Tel. Co. v. Railroad, 89 Fed. 190; Jones v. Dexter, 8 Fla. 276; Culver v. People, 161 Ill. 96; 43 N. E. 812; Darmstaeter v. Maloney, 45 Mich. 621, 8 N. W. R. 574; Matter of Main Street, 98 N. Y. 454; Commonwealth v. Kendall, 144 Mass. 357; Gaston v. Lamkin, 115 Mo. 20.) Further it is said by the same author (section 492): 'Where the provisions of a statute are incorporated by reference in another (where one statute refers to another for the powers given or rules of procedure prescribed by the former), the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute, obviously continue in force, so far as they form part of the second enactment.' To the same effect is Gaston v. Lamkin, 115 Mo. 20, where the Supreme Court of this State said: 'The general rule governing in such cases seems to be that where one statute refers to another for rules of procedure prescribed by the former, the former statute, if specifically referred to becomes a part of the referring statute, and the rules of procedure prescribed by the earlier statute so far as they form a part of the second enactment, continue in force, although the earlier statute be afterwards modified or repealed.'

Under these rules, that part of section 2864 relating to parties and procedure became by adoption an integral part of section 2866 to the same extent as though it had been written into the latter statute and neither a subsequent amendment nor repeal of section 2864 could affect the referring section."

The above case is analogous to the situation at hand and is authority for our conclusion.

It is our opinion that when Section 9940 is now read that the following should be incorporated and read into it, namely, that part which is found in Section 9952, R. S. Mo. 1929, and/or House Bill 44, Laws of Missouri, 1933, page 465, to-wit:

> ";and for the purpose of collecting such tax and prosecuting suits for taxes under this article, the collector shall have power, with the approval of the county court * * * * *, to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed etc.";

the force and effect of our opinion being, that the collection of delinquent personal taxes is in the same category as formerly and that attorneys may be employed in the same manner as before the repeal of Section 9952 by Laws of Missouri, 1933, page 425 (Senate Bill 94).

We are also enclosing copy of opinion rendered by this Department to Hon. William S. Gabriel, on January 18th, 1934.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG