

DELINQUENT TAX) Appointment and compensation must be approved
ATTORNEY:) by county court, Section 9952 R. S. Mo. 1929.

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March 23, 1934.



Hon. George B. Padget
Prosecuting Attorney
Daviness County
Gallatin, Missouri

My Dear Mr. Padget:

Sometime ago you requested an opinion of this office on the following matter:

"Judge Brown, presiding Judge of our county court, has requested me to get your opinion pertaining to the collecting of delinquent taxes, and the methods of procedure in such matters. The judge informs me that some time heretofore, Mr. Troxel, the then Treasurer and ex-officio collector, appointed O. O. Mettle, attorney, to collect such delinquent taxes. He further states that under the Statute, such appointment could be made by him, only by, and with the approval of the county court, and that the said court did not approve of the appointment of Mr. Mettle, but that they, the county court wrote on the paper appointing him by said Troxel, that such appointment is not approved. He further states that there are now some suits pending, brought by Mr. Mettle, acting under the appointment of Mr. Troxel, and he desires your opinion as to whether there is any way whereby these pending suits may be dismissed, and collected under and by virtue of the later law for collection of delinquent taxes.

This county court never did approve of this appointment by said Troxel, but notwithstanding Mr. Mettle did continue to act, and institute suits for the collection of taxes,* * * * * and therefore they desire this opinion from your office.* * * * *

I.

**CONTRACT OF DELINQUENT TAX
ATTORNEY MUST BE IN WRITING
AND APPROVED BY COUNTY COURT.**

We shall first deal with the question as to the status of the delinquent tax attorney under his agreement with the Collector which apparently was not approved by the County Court. Authority for the appointment of a delinquent tax attorney is found in Section 9952 R. S. Mo. 1929 (which section was repealed by the 57th General Assembly). Pertinent portions of this law read as follows:

"* * * *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 ten per cent of the amount of taxes actually collected and paid into the treasury,* * * * as may be agreed upon in writing, and approved by the county court, * * * *before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such services except as in this section provided;* * * *"

From the foregoing it is apparent that the County Collector is authorized first, to appoint some attorney at law as his delinquent tax attorney, and second, to agree in writing with such attorney as to his compensation, which in no event shall exceed ten per cent of the amount collected. It is also required that both of these acts of the County Collector, the appointment of the attorney and the agreement as to fees, must be approved by the County Court. While these exact phrases in this section of the statute do not seem to have been passed upon by our Supreme Court, the case of Butler vs. Sullivan County, 108 Mo. 630, is very helpful in determining the necessity for the approval of the County Court of the appointment and the agreement. The Court considered Section 6893 R. S. of 1879, relative to the employment of special counsel for the prosecution of delinquent railroad taxes. Portions of that Section read as follows:

"The County Collectors shall have power with the approval of the county court,* * * * * to employ such attorneys as may be deemed necessary to aid and assist the Prosecuting Attorney in conducting and managing such suit; and the Court in which suit is brought shall, if plaintiff obtains judgment, allow such attorneys a reasonable fee for bringing and conducting such suit, which shall be taxed against the defendant, and paid as other costs in the case."

Considering the necessity of the approval of the County Court of the contract contemplated by that section, the Court stated as follows, l. c. 638:

"* * * * *The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court.* * * * *"

According to this ruling under the statute there considered, it was necessary for the county court to approve the appointment so as to fix the status of the counsel entitling him to receive the compensation fixed by the statute. However, under the instant statute not only must the County Court approve the appointment so as to fix the status of the delinquent tax attorney, but the County Court must also approve the contract for compensation, so as to fix the compensation to be allowed to the delinquent tax attorney. As we view the situation in the absence of the approval of the County Court of the contract, there would be no basis for the assessment of any attorney fees against the delinquent tax payer in the suit, nor would there be any authority for the collection of such attorneys fees and the payment thereof to the purported delinquent tax attorney. This view point is fortified by the ruling in the case of *Schulte vs. City of Jefferson*, 273 S. W. 170. The ordinances of Jefferson City provided that the City Marshal should appoint police officers with the advice and consent of a majority of the members of the City Council. The facts are found at page 171:

"* * * *It was admitted that plaintiff possessed all of the required qualifications of a police officer; that after the attempted appointment of plaintiff by the marshal, on each of the occasions above referred to, plaintiff began serving as a pretended police officer of the city, and so continued from month to month, acting under order of the marshal and without confirmation by the city council, and was so acting at the time of the commencement of this suit. Plaintiff was never at any time appointed or named as a special officer of the city but has been acting as a regular officer. Plaintiff is suing for pay for services rendered under an alleged 'recess' appointment to fill a vacancy in the office of police officer.* * * *"

The Court's decision as to the status of the police officer so appointed by the marshal but not approved by the Council is tersely stated on page 172:

"(1) It is well settled--

'Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc. p. 1372. Meachem's Public Office and Officers, Secs. 114, 124; 22 R. C. L. p. 433, Sec. 84.

(2) Plaintiff was not a de jure officer until at least confirmed by the council. If anything at all, he was a de facto officer, and such officer is not entitled to the emoluments of the office.* * * *"

We shall next direct our attention to your inquiry as to the authority of the collector to collect these delinquent taxes by virtue of any other law.

II.

COUNTY COLLECTOR MAY DISMISS
SUIT FOR DELINQUENT TAX AND
PROCEED UNDER SENATE BILL 94.

At the regular session of the 57th General Assembly the statutes authorizing the enforcement of the payment of delinquent taxes by suit was repealed and an entirely new procedure established for the collection of delinquent taxes. This new law was known as Senate Bill 94 and is found at page 425 Laws of Missouri, 1933. However, in Section 9962b, page 444, the following saving clause is found:

" * * * * provided however, that nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had been instituted prior to the effective date of this act, but not in final judgment, nor to prejudice the rights of collection of any costs or commissions attaching in such cases which were valid under the tax law existing at the time of institution of such suits. As to taxes merged in judgment at the effective date of this act the foreclosure of the tax lien and proceedings relative thereto shall be had under the provisions of the law as such law existed prior to the passage of this act, and as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

By virtue of the foregoing provision the County Collector is specifically authorized under this law to dismiss pending suits for delinquent taxes and to proceed to foreclose the state taxes

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by publication and sale in November of 1934. This provision is clear and explicit

CONCLUSION.

It is therefore the opinion of this office, from the information given in your inquiry, that the delinquent tax attorney does not have a valid appointment made in accordance with the appropriate law, and that under the provisions of Section 9962b, Laws of Missouri 1933, the County Collector is empowered, if he deems it advisable, to dismiss the pending suits to enforce the payment of delinquent taxes and proceed with the collection of such delinquent taxes under the provisions of Senate Bill 94.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM