

TAXATION: Respecting Attorneys fees in delinquent personal tax cases.

2-4
January 30, 1936.



Honorable Wallace Cooper
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

Dear Mr. Cooper:

This office is in receipt of your request for an opinion on the following matters:

"1. Is the delinquent tax attorney provided for in Section 9940 R. S. Missouri 1929, appointed in accordance with the provisions of Section 9952 as amended by the Laws of 1933 and entitled to the compensation therein provided?"

2. Is the per centum fee agreed upon by the attorney, the collector and the County Court taxed as costs in case of suit and added to the judgment along with the \$3.00 fee provided for, or is the \$3.00 fee alone taxed as costs and the percentage to the tax attorney paid to him out of the amount paid in as taxes?"

3. In case it is not necessary for the tax attorney to bring suit for the collection of delinquent personal taxes, is his fee which is based on an agreed percentage of the amount paid into the collector paid out of the delinquent tax paid or is this percentage added to the tax and the total amount paid by the delinquent personal taxpayer?"

We shall answer your questions in the order presented.

I.

DELINQUENT PERSONAL TAX
ATTORNEY APPOINTED AS PRO-
VIDED IN SECTION 9952, R.S.
Missouri 1929.

On January 3, 1935, this office issued an opinion to Jones & Wesner, Attorneys for the Collector of Pettis County, Missouri, wherein this conclusion was reached:

"It is our further opinion that delinquent personal taxes should be collected under the provisions of Section 9940 R.S. Mo. 1929, and that into such section there should be incorporated that part of Section 9952 R. S. Mo. 1929 which reads:

'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 issue presented to this office in the Jones & Wesner opinion was the authority for employing a delinquent tax attorney to collect delinquent personal taxes. That opinion did not go into the question as to the compensation which should be allowed for the collection of delinquent personal taxes. Section 9940 R. S. Missouri 1929, provides in part:

"* * * 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:* * *"

Without question this phrase incorporates into Section 9940 the procedure established for the employment of delinquent tax attorneys and the fees and compensations allowed. The real issue is this, does such provision of Section 9940 incorporate the present provisions of Section 9952 into such section or did it incorporate the fees and commissions allowed at the time Section 9940 was first enacted. By referring

to the original enactment of what is now Section 9940 we find that on April 5, 1887 "An Act to provide for the collection of personal taxes" came into the statutory law of this state. The phrase under consideration as originally contained in said Act of 1887, page 242, Laws of 1887, read as follows:

"Said action shall be prosecuted by attorneys employed as provided in Article VI of Chapter 145 of the General Statutes and the fees and compensation allowed in said article shall apply to the above actions; provided, however, that in no case shall the state, county, city or collector be liable for any costs, nor shall any be taxed against them or any of them."

Article VI of Chapter 145 of the General Statutes referred to above was a part of the Revised Statutes of Missouri 1879 of which Section 6836 was a part. This Section was the predecessor of our present Section 9952 and in respect to the issues here at hand stated:

"* * *for the purpose of prosecuting suits for taxes under this act the collector shall have power, with the approval of the County* * *to employ such attorneys as he may deem necessary, who shall receive as fees in any suit 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 sums 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* * *"

The compensation there provided was a straight commission of not to exceed ten per cent "in any suit". No suit fee of any kind was provided for. In 1921 this Section was amended so as to strike out the phrase "in any suit" and also to allow a suit fee of Three Dollars (\$3.00) in cases where publication was not necessary and of Five Dollars (\$5.00) in cases where publication was necessary. The problem confronting us is whether or not the Act of 1887 adopted the then provisions of Section 6836 in its existing form or whether the Act of 1887 contemplated the adoption of the provisions of Section 6836 together with any subsequent amendments.

Endlich on Interpretation of Statutes, Section 85, states:

"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."

Referring to this general rule the Supreme Court of this State in the case of Gaston vs. Lamkin, 115 Mo. 20, 1. c. 33, stated as follows:

"* * *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. But when the subsequent statute, being a general one, does not refer specifically to a former statute for the rule of procedure to be followed, but generally to the established law, by some such expression as 'the same as is provided for by law' in given cases, then the act becomes a rule for future conduct to be found when needed by reference to the law governing such cases at the time when the rule is invoked.* * *"

In the case of Crohn vs. Telephone Company, 131 Mo. App. 313, the Court had for construction what is now Section 3264 which in part provides:

"Damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 3262."

Subsequent to the enactment of Section 3264 Section 3262 was amended so as to provide an additional class of parties which could bring suit under that section. The Court held that Section 3264 adopted the pertinent parts of Section 3262 as they were written at the time Section 3264 was enacted, and that the subsequent amendment of Section 3262 could not extend the classes of parties which could take advantage of the provisions of Section 3264. The Court after referring to the general rules hereinbefore quoted, stated l. c. 321:

"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 foregoing decision is cited with approval and the theory further extended by the Supreme Court In Banc in the case of State ex rel. Great American Home Saving Institution et al. vs. Lee, 233 S. W. 20.

The Supreme Court of Iowa in the case of State vs. Beckner, 198 Northwestern 643 applied the rule in the case of a statute which provided that the defendant shall be punished as provided in the section relating to ravishment.

The Supreme Court of Montana in the case of Gustafson vs. Hammond Irrigation District, 287 Pacific 640, stated the rule:

"The rule is that 'the adoption of statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and therefore is not affected by any subsequent modification or repeal of the statute adopted.' 36 Cyc. 1152. This rule seems to be universal in the case of the adoption of a specific statute as here, as distinguished from the general law relating to a particular subject.* * * *"

In the instant case the Legislature referred to the law adopted as that "provided in Article 6 of Chapter 145 of the General Statutes" and allows fees and compensations as were "allowed in said article" though it did not refer specifically and solely to Section 6386 in so many words. Had it done so there could have been no question whatsoever in view of the rules heretofore laid down. However, as stated in the Gaston case supra:

"The question in such cases always turns however upon the intention of the legislature in a given case."

What was the intention of the Legislature in the instant case? The presumption of course is that the statute is adopted in its form and that subsequent amendments will not effect the referring statute. The Supreme Court of Delaware in Perkins vs. Winslow, 133 Atl. 235, 1. c. 236, stated:

"While always a question of intention, in the absence of anything to indicate a contrary legislative intent, it is likewise true that provisions so adopted and read into other statutes will not ordinarily be affected by the repeal of the adopted statute,* * * * or by any subsequent changes by way of additions, modifications or otherwise in the adopted statute.* * * *"

Therefore, the presumption is that the Act of 1887 adopted the provisions of Article VI, Chapter 145 in its then existing state and especially the provisions of Section 6386 R. S. Missouri 1879, insofar as it prescribed the method of employing delinquent tax attorneys. However, the adopted statute did not end with

proviso that the fees and compensations allowed "in said article" shall apply to such actions. The "fees and compensations", had the legislature intended to apply only to attorneys fees, might likewise have been specifically identified by Section number rather than by Chapter number. However, the Legislature apparently intended to adopt other fees and commissions than those provided for the delinquent tax attorney, to-wit, those fees and compensations provided for in Section 6842 R. S. Missouri 1879, also a part of Article VI of Chapter 145 relating to the Circuit Clerk, the Sheriff and printer. So that it appears that the legislature, rather than enumerating several sections, referred to the article generally. In so doing, they specifically adopted the relative provisions of that Article as then existing as certainly as they would have done had they specifically enumerated the sections. In connection with this statement we have not overlooked the rule as stated in Lewis Sutherland's Statutory Construction, Second Edition, Section 405, wherein it is held:

"There is another form of adoption wherein the reference is not to any particular statute or part of a statute but to the law generally which governs a particular subject. The reference in such case means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied."

In the Gaston case supra this rule was applied to a statute which provided:

"The election herein provided for shall be held and conducted in the same manner and the returns thereof made to the County Clerk and the vote counted in all respects the same as in elections for state and county officers, as far as the laws in relation thereto are applicable.* * *"

Another example of the application of this latter rule is the case of State ex rel. Kell vs. Kramer, 160 N. E. 60, (Ill.). The adopting statute in that case provided:

"As is now provided by law for intermediate registration."

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The Supreme Court of Florida in the case of Williams vs. State, 125 So. 358, also applied the second rule relative to a statute which provided:

"The fees of constables shall be the same as are allowed sheriffs for like services."

While the Courts have been uniform in holding that such general expressions as above referred to adopt the law together with subsequent changes, these cases are not applicable to the instant case as no general phrase was used in the Act of 1887 comparable to the phrase last above referred to. Rather the Legislature chose to designate the law by specific reference, to-wit, "Article VI of Chapter 145". By such specific reference and from a reading of the rest of the section there is no intention evident that any subsequent changes in Article VI of Chapter 145 were to affect the fees and commissions allowed the delinquent personal tax attorney.

There is one thing further that might be added. It was not until 1921 that any set suit fee was authorized. At the time a three dollar suit fee was allowed in cases where no publication was necessary a five dollar suit fee was allowed in cases where publication was necessary. These set suit fees are referable directly to the other provisions of Section 9952 authorizing suit for the collection of land taxes and especially to the provisions of that section providing for service by publication. It is but reasonable that these fees were meant and intended to apply only to a case of suit brought for land taxes. No publication is provided for in personal tax suits, in fact, such is entirely unnecessary as the same facts that would justify an attachment suit being brought, with the attendant publication, authorize and require the County Collector to levy a distress warrant for the collection of the tax.

CONCLUSION.

In view of the foregoing it is the opinion of this office that the compensation allowable to delinquent personal tax attorneys is that prescribed by Section 6836 R. S. Missouri 1879, to-wit:

"for the purpose of prosecuting the suits for taxes* * *the collector shall have power, with the approval of the county court, or in such cities the mayor thereof,

to employ such attorneys as he may deem necessary, who shall receive as fees in any suit 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, etc.* * *"

II.

PERCENTAGE COMMISSION TAXED
AS COSTS AND ADDED TO JUDGMENT.

By comparing the Act approved April 5, 1887, page 422, Laws of Missouri 1887, with Section 9940 R. S. Missouri 1929, it will be seen that both contain the provision

"that in no case shall the state, county, city or collector be liable for any costs, nor shall any be taxed against them or any of them,"

and that the provisions of Section 6836 R. S. Missouri 1879 and Section 9952 R. S. Missouri 1929, are identical in that they provide:

"which sums shall be taxed as costs in the suit and collected as other costs."

By virtue of these specific provisions two things are evident: first, that the attorney fee is to be taxed as costs as any other costs, and second, that it must be collected from the taxpayer and cannot be charged to the state or county, etc. This issue is directly passed on in the case of State ex rel. Bauer vs. Edwards, 144 Mo. 467. The Supreme Court stated, l. c. 471:

"It is complained of the judgment, however, as error, that the amount of the attorney's fees is included in the judgment enforcing the lien against the lands when, as is contended, the statute only provides that the attorney employed to prosecute the suit shall receive as fees in such suit '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..... in such cities by the mayor, before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs.' R. S. 1889, sec. 7681. From which it is argued that the attorney can never have judgment for his fees, until the judgment has been collected and paid into the treasury. This conclusion can not be correct, and ~~results~~ from the reading of a part only of the statute on this subject, when the whole of it should be read and considered together. The statute provides not only that such fees 'shall be taxed as cost and collected as other cost' (as quoted in the brief), but that that sum 'shall be taxed as costs in the suit and collected as other costs.' And that the court 'shall decree that the lien of the State aforesaid be enforced and that the real estate or so much thereof as may be necessary to satisfy such judgment, interest and costs be sold, which shall be executed as in other cases of special judgment and execution.' R. S. 1889, sec. 7683. Thus plainly showing that the attorney's fees are to go into the judgment and be thereby collected as other costs in the suit. While the judgment in the present case is somewhat informal in that the attorney's fees are not first taxed as costs, and judgment rendered form them as costs, but directly as attorney's fees, the result is the same and in no way injurious to the defendant's interest, and for such informality the judgment should not be reversed."

From the above decision it is certain the fees are to be included in the judgment as costs but in this connection we direct attention to the case of State ex rel. Gottlieb vs. Wilson, 174 Mo. 505. In this case it is held that in case the sum received

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to apply on the judgment is insufficient to pay the full amount of the judgment and costs, the costs other than the attorney's fee and collector's commission are to be paid in full and such attorney's fee and collector's commission may only be calculated on the amount remaining which is actually paid into the treasury of the county or other tax receiving body. This case follows the ruling laid down in the early case of State ex rel. Kemper vs. Smith, 13 Mo. App. 421. As a result the collector's commission and the Attorney's fee are only to be calculated upon the sum actually collected and paid into the treasury.

In view of the construction which we have heretofore placed upon Section 9940 it is evident that the amendment of 1921 allowing suit fees of three and five dollars has no application to personal tax suits and such fees are not to be collected.

CONCLUSION.

It is therefore the opinion of this office that the percentage attorney fees agreed upon between the collector and the delinquent tax attorney and approved by the county court are to be taxed as costs in the case; that the three and five dollar fees provided for in Section 9952 R. S. Missouri 1929 have no application to suits for delinquent personal taxes; and that the percentage attorney fees, although taxed as costs, can only be collected based upon the amount of money actually paid into the treasury.

III.

ATTORNEY ENTITLED TO NO FEE UNLESS SUIT BROUGHT.

We must once more direct attention to Section 3686 R. S. Missouri 1879 and to the following phrase:

"who shall receive as fees in any suit such sum not to exceed ten per centum of the amount of taxes actually collected and paid into the treasury* * *and no such attorney shall receive any fee or compensation for such service except as in this section provided."

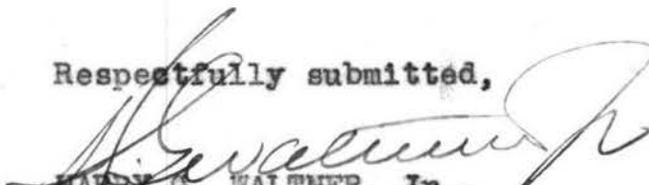
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It is apparent from this phrase that the ten per cent allowance to the delinquent tax attorney is only allowable in "any suit" and that the delinquent tax attorney may not receive any compensation except that specifically provided. No compensation is "provided" except "as fees in any suit". A suit is generally considered as any proceeding in a court of Justice. Bouvier's Law Dictionary. The effect of the phrase "in any suit" is evident when we consider that by the amendment of 1921, this phrase was removed. Page 676, Laws of Missouri 1921. The Legislature had a definite intention in removing this phrase. By removing this phrase, it was intended to allow the commission on land taxes whether suit was filed or not. Such has been the opinion of this office, but we must remember that the compensation allowed to the delinquent tax attorney for personal tax collections is to be determined by the condition of the law existing at the time of the adoption of Section 9940, and that while such amendment of 1921 may have changed the fees allowable for the collection of real estate taxes, it did not change the law in respect to the fees allowable for the collection of delinquent personal taxes.

CONCLUSION.

It is therefore the opinion of this office that delinquent tax attorneys are not entitled to charge any commission or feeson delinquent personal tax bills unless and until suit is filed thereon.

Respectfully submitted,


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