

NOTATION: Tax sale under execution to highest bidder--costs to be first paid.

January 31, 1936.



Honorable W. C. Rose  
Prosecuting Attorney  
Putnam County  
Unionville, Missouri

Dear Sir:

This office is in receipt of a request for an opinion to be directed to you upon the following propositions:

First, May the County Court receive and accept a sum less than the total taxes, penalties, interest and costs assessed against a tract of land, the payment of which taxes has been enforced by means of a suit instituted prior to the effective date of the Jones-Munger Law?

Second, In the event the proceeds received are insufficient to pay the total tax, penalties, costs and fees how should this be prorated?

Preliminary to the rendering of our opinion on the foregoing questions it should be observed that these questions involve taxes which have been collected pursuant to the provisions of Article IX, Chapter 59, R. S. Missouri 1929, by means of a suit instituted for delinquent real estate taxes prior to July 24, 1933. Although this procedure of collecting taxes by suit was replaced by the procedure provided for in the Jones-Munger Law enacted by the 57th General Assembly, yet the latter enactment provided that in the event suit had been instituted for the collection of delinquent taxes such suit could be proceeded upon to final judgment and execution just as though the provisions of Article IX, Chapter 59 had not been repealed. Section 9962b, page 444, Laws of Missouri 1933. There-

fore, these problems are to be answered in the light of the law as contained in the 1929 revision and not as changed by the law operative in 1933. Probably some confusion has arisen on the problems presented because of the provisions of Section 9953, page 432, Laws of Missouri 1933, which prohibits the sale of property for delinquent taxes if a sum less than the total tax, interest, penalties and costs is bid at the first two sales at which the property is offered. However, this Section applies only to such taxes as are being enforced under the provisions of the Jones-Munger law and has no application to the instant problems.

## I.

PROPERTY MAY BE SOLD FOR  
TAXES AT EXECUTION SALE  
FOR LESS THAN SUM DUE.

Section 9956 R. S. Missouri 1929 provides for the form of the judgment for delinquent taxes, if against defendant, and also provides:

"\* \* \*and a special fieri facias shall be issued thereon, which shall be executed as in other cases of special judgment and execution,\* \* \* \*".

Section 1202 R. S. Missouri 1929, referring to sales under execution provides:

"All property taken in execution by any officer shall be exposed to sale on the day for which it is advertised, between the hours of nine in the forenoon and five in the afternoon, publicly, by auction, for ready money, and the highest bidder shall be the purchaser."

It therefore appears that there is no restriction upon sales under execution as to the amount for which the property may be sold when it is sold at execution sale. Certainly there is no specific statutory provision under the old law as is provided for in Section 9953 of the Jones-Munger Act forbidding the sale unless it has been twice offered without a sufficient

bid to pay the taxes, interest and costs. As will be seen from the cases referred to under part two of this opinion the Courts have recognized the fact that no such restriction existed under the old law and have laid down rules for the distribution of proceeds of tax sales under execution when such proceeds were insufficient to pay the full amount of taxes, penalties, interest and costs.

#### CONCLUSION.

It is therefore the opinion of this office that there is no prohibition against the execution sale of property for delinquent taxes in the event the bid received is insufficient to pay the whole amount of taxes, penalties, interest and costs, although the duty rests upon the Sheriff not to sacrifice the property. Davis vs. McCann, 143 Mo. 172, Shaw vs. Potter 50 Mo. 281.

#### II.

COSTS, OTHER THAN COLLECTORS  
COMMISSION AND ATTORNEY FEES,  
TO BE FIRST PAID FROM PROCEEDS  
OF SALE AND COLLECTORS AND  
ATTORNEYS PERCENTAGES TO BE  
CALCULATED ON BALANCE AND  
REMAINDER PAID INTO COUNTY  
TREASURY.

The early case of State ex rel. Kemper vs. Smith, 13 Mo. App. 421, was the first case in which this issue was presented. The leading case in this State on the question is that of State ex rel. Gottlieb vs. Wilson, 174 Mo. 505. The Supreme Court in that case stated at page 509 et seq. as follows:

"The rule as to ordinary actions is that the parties to the suit are primarily liable for the costs that they directly incur by the institution of the suit, or the defense of it. The very terms of the statute indicate this, and presuppose this primary liability for the costs incurred, for it provides that the prevailing party shall recover his costs.

The only purpose in the provision of the statute in these tax proceedings by the State in which it provides 'that in no case shall the State, county or city be liable for any such costs, nor shall the county court or State Auditor allow any claims for any costs incurred by the provisions of this chapter,' was to bring the State within the exception to the general rule that parties asserting a claim in court are liable for at least the cost that they incur; but it was by no means intended by that provision to adopt a different method to the one universally applied in civil actions; that is, that out of the proceeds of sale under an execution, you first apply the same to the payment of costs; the remainder, if any, is applied to the payment of the debt.

This must not be construed as a suit by the officers to recover costs; it is a proceeding by the State to recover a debt; the cost for the services of the officers is a mere incident to the main proceeding. It would be an unjust rule that this proceeding can be instituted by the State, the officers compelled to perform the services, not of their own seeking, and then for the party asserting the claim to say that there is not enough to pay us all out of the proceeds, but we will divide with you.

While the State, under section 9309, Revised Statutes 1899, is exempted from the primary liability for costs it incurs, yet if proceeds are realized from the assertion of its claim and in the hands of the sheriff, it can not compel the officers, indirectly, to contribute to the part payment of the cost of the proceeding instituted by the State by deducting a part of their fees and applying it to the payment of its claim. If the services are performed by the officers, they are

entitled to full compensation out of the fund realized from such services; and if their fees are to be reduced in order to partly pay the claim of the party instituting the suit, it is in effect making them bear part of the burdens of litigation they had nothing to do in originating. Real Estate being assessed and taxes levied, the statute points out the method of enforcing the lien of the State by appropriate proceedings in the circuit court. The State must know in instituting the proceeding to enforce its lien, that certain costs must accrue, and while it is not liable for any of the costs, it certainly contemplates that its claim and no part of it, can be satisfied out of the fruits of that suit, until the cost it had full knowledge of before instituting the proceeding, has been paid.

\* \* \* \* \*

The only case to which our attention has been called, which determines directly the point involved in this controversy, is State ex rel. Kemper v. Smith, 13 Mo. App. 421. The court speaking on this subject, said: 'The money realized from the sales which took place under this execution should have been applied to the payment of the costs in the cause other than the commissions of the collector and his attorneys. The balance should have been treated as a public revenue out of which the collector should have retained his statutory commission of four per cent and his attorneys their commission of ten per cent allowed by law and by their contract with the collector, approved by the county court, which has been put in evidence. The balance should have gone into the public treasury, to be applied according to law.'

It is insisted by appellant that the rule as announced in that case was a mere dictum, that the question was not involved. It may

be true that to reach a conclusion upon the controverted proposition in that case, it was not necessary to announce the rule herein quoted. We will say, however, whether involved or not, it announces what seems to be, in our opinion, not only the correct but as well the just and equitable rule in respect to the application of the proceeds of the sale of real estate in proceedings of this character. It has been universally followed by all the courts in distributing proceeds realized upon execution, and we find no legal reason for a departure.\* \* \*"

From the foregoing it plainly appears that the court costs incurred in the enforcement of taxes by suit are first charged against the proceeds of the execution sale and must be paid in full. After such expenses have been met, the County Collector is entitled to his percentage upon the balance. This by reason of the provisions of Section 9969 R. S. Missouri 1929 reading:

"Fees shall be allowed for services rendered under the provisions of this article as follows:

To the collector except in such cities, four percent of all sums collected;

In such cities two percent on all sums collected.\* \* \*"

Thus limiting the county collector to a percentage upon the sums which have been collected as state and county revenue. Likewise, the collector's attorney is also entitled to his percentage upon the balance of the proceeds of the execution sale by virtue of the provisions of Section 9952 R. S. Missouri 1929, which provides in part:

"\* \* \*For the purpose of collecting such taxes 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

January 3, 1935<sup>6</sup>.

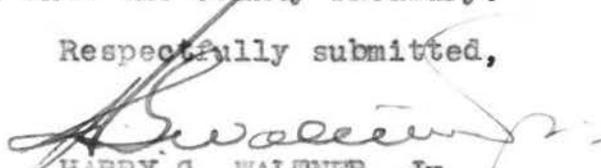
amount of taxes actually collected and paid into the treasury and an additional sum of not to exceed three dollars for each suit instituted for the collection of such taxes, were publication is not necessary, and not to exceed five dollars for each suit where publication is necessary, as may be agreed upon in writing, \* \* \* such sum to be taxed as costs in the suit \* \* \*

So by the specific statutory authorization for the employment of an attorney his percentage fee may only be calculated upon the amount collected and paid into the treasury. We construe this as meaning ten per cent of the balance of the proceeds of the sale after satisfying the costs of the sheriff, circuit clerk, printer, abstractor and such other costs of suit. The principles laid down in the Wilson case supra have been reaffirmed recently by the Supreme Court of Missouri in the case of Chilton vs. Pemiscot County 330 Mo. 468, 50 S. W. (2d) 645, and by the Springfield Court of Appeals in a case bearing the same title, reported at 228 Mo. App. 4, 63 S. W. (2d) 421.

CONCLUSION.

It is therefore the opinion of this office that the proceeds of an execution sale on a judgment for delinquent taxes should be first applied to the payment of the actual costs of suit and that the county collector and the delinquent tax attorney should then receive their percentage fees based upon the balance of such proceeds, and after such percentage fees have been deducted the remaining amount should be paid into the County Treasury.

Respectfully submitted,

  
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Assistant Attorney General

APPROVED:

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JOHN W. HOFFMAN, Jr.,  
(Acting) Attorney General

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