

OFFICERS: County can recover on county treasurer's bond after settlement where a fraudulent settlement was made.

December 16, 1941

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Prosecuting Attorney
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New London, Missouri

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Dear Sir:

We are in receipt of your request for an opinion from this office under date of December 12, 1941, which is as follows:

"Our County Treasurer has embezzled about \$13000.00 according to his own admissions and I have him under bond. His misdeeds cover the period from July 1st, 1939 to the present time.

"I would like an opinion from your office as to the effect of the semi-annual settlements as to the recovery from the Surety Company. Can we recover for the full amount of his shortage or only the shortage since the July 1st, 1941 settlement? There is no way to tell how frequently and the amounts held out by him when he made deposits in the County Depository. The discrepancy is only apparent at settlement time.

"He altered the balance shown in his pass book, each time, to correspond with the amount the County Clerk's and the Treasurer's books show he had in the depository."

Section 13795, R. S. Missouri 1939, provides as follows:

"The person elected or appointed county treasurer under the provisions of this article shall, with-

in ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

Section 13798, R. S. Missouri 1939, provides as follows:

"The county treasurer shall keep his office at the county seat of the county for which he was elected, and shall attend the same during the usual business hours. The county court shall provide said county treasurer with suitable rooms, and a secure vault in the court house or other building occupied by other county officers, and the county treasurer shall keep his office and records in such rooms and vault provided by the county court. He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

Under the two above sections the county treasurer must give a bond in an amount not less than Twenty Thousand Dollars as approved by the county court conditioned on his faithful performance of the duties of his office. It is also his duty to receive all moneys payable into the county treasury and disburse the same on warrants drawn by order of the county court.

Section 13814, R. S. Missouri 1939, provides as follows:

"He shall settle his accounts with the court semiannually, at its first and third regular terms in each year; and at the end of his term, or if he resign or be removed from office, he, or if he die, his executor or administrator, shall immediately make such settlement,

and deliver to his successor in office all things pertaining thereto, together with all money belonging to the county; and at each settlement the court shall immediately proceed to ascertain, by actual examination and count, the amount of balances and funds in the hands of such treasurer to be accounted for, and to what particular fund or funds it appertains, and cause to be spread on its records, in connection with the entry of such settlement, the result of such examination and count."

Under the above section the county treasurer shall make a semiannual settlement with the county court, or if he resigns or is removed from office he shall make such a settlement. It is the duty of the county court in the settlement to ascertain, by actual examination, the amount of balances and funds in the hands of the treasurer to be accounted for, and make a entry in the court records of this examination and count.

Under Section 13816, R. S. Missouri 1939, if any county officer refuses to make a settlement, the county court can estimate the balance due the county. Under the facts in your request the county treasurer made a settlement semiannually but fraudulently used as evidence a false balance used in his bank pass book so that it corresponded with the amount of the county clerk's and treasurer's books.

The main question in your request is whether or not the county can only recover the shortage since the last settlement in which the shortage was probably discovered, or whether the suit on the bond can be had for the full amount of the shortage. In asking this question I am assuming that you are confusing the settlement of the county treasurer with that of a settlement of other county officers, such as clerks of circuit courts and clerks of county courts. The procedure of other officers other than that of county treasurers differs in many respects in reference to the filing of a suit upon the officer's bond but in all instances of suits on county officers' bonds where the officer has not followed the statutes in reference to his settlement and covers up violations of law by fraudulent settlements it is not necessary for the county court to make a demand for the shortage

and the county is not limited to filing a suit upon the bond to the amount discovered in the single settlement in which the fraud is discovered. In the case of State ex rel. Christian County v. Gideon, 158 Mo. 327, l. c. 337, the court, in holding that a recovery could be had on a bond upon a fraudulent settlement without following the mode of procedure as set out where a lawful settlement was made, said:

"While the statute prescribes the mode of procedure for the recovery of the balance ascertained to be due upon the quarterly settlements of the clerk, and in such an action, it was held in State ex rel. v. Dent, 121 Mo. 162, that an order, requiring him to pay over the excess to which he was not entitled, and in case of his failure to do so, an order requiring suit to be brought on his bond, were conditions precedent, without which such action could not be maintained. It did not undertake to prescribe the mode of procedure for the recovery of damages for a breach of duty by the clerk in failing to make true and proper returns as required by the statute. The breaches assigned in the petition in this case are not for failure to pay over the excess found to be due on the settlements with the clerk, but for his failure to make true returns by which such excess could have been properly ascertained. To such a case the orders required by this statute are obviously not applicable, and their existence or averment is not essential to plaintiff's cause of action, as has been expressly ruled by this court. * * * * *

The law is fully set out in the case of State v. Hunt, 152 S. W. (2d) 77, l. c. 81, where the court said:

"In State ex rel. Callaway County v.

Henderson the petition alleged that the county clerk had made false quarterly returns, omitting therefrom the fees sued for and concealing the fact that he had collected them. There was no averment in the petition that the county court had complied with the statutory requirement that it ascertain the amount of excess, etc., and make an order directing the clerk to pay it into the county treasury. The court distinguished the Dent case on that point, as was done in State ex rel. Jackson County v. Chick, supra, and held that as to the fees received by the clerk and not reported it could not be said they were acted upon by the county court and that: 'The partial returns made by the clerk and approved by the court, do not stand in the way of an action at law for money had and received to the use of the county; for they only cover a certain class of fees, and were so understood by both the clerk and the court.' (142 Mo. 598, 44 S. W. 739.) In that case, however, the petition alleged that the county court had made an order directing suit to be brought for the excess fees. The petition was held to state a cause of action.

"In Callaway County v. Henderson, supra, the Dent case is not referred to but the petition alleged that the clerk had made a 'pretended return' purporting to show the total amount of fees received by him but that said return was false in that it omitted fees (those sued for) which he had collected.

"State ex rel. Christian County v. Gideon et al., 158 Mo. 327, 59 S. W. 99, was a suit against the circuit clerk and ex officio recorder and his bondsmen to recover fees alleged to have

been collected in excess of the sums he was entitled to retain. The suit was brought after the expiration of Gideon's term of office. The petition alleged that Gideon had failed to keep correct accounts of fees received and that, while he had made returns to the county court purporting to show all fees received such returns were false, omitting many fees (set out) which he had collected and had not reported; that the county court, in ignorance of the falsity and omissions of the quarterly returns, had approved them, but upon discovery of the facts had made an order directing Gideon to pay into the county treasury the excess ascertained by the court to be due and when he failed to do so within fifteen days ordered suit brought on his bond. The trial court sustained a demurrer to the petition. This court reversed that action, holding the petition sufficient and again distinguishing (but not disapproving or criticizing) the Dent case, saying, 158 Mo. loc. cit. 337, 59 S. W. loc. cit. 101: 'While the statute prescribes the mode of procedure for the recovery of the balance ascertained to be due upon the quarterly settlements of the clerk, and in such an action, it was held, in State (ex rel. Hickory County) v. Dent, 121 Mo. 162, 25 S. W. 924, that an order requiring him to pay over the excess to which he was not entitled, and, in case of his failure to do so, an order requiring suit to be brought on his bond, were conditions precedent, without which such action could not be maintained, it did not undertake to prescribe the mode of procedure for the recovery of damages for a breach of duty by the clerk in failing to make true and proper returns as required by the statute. The breaches assigned in the petition in this case are not for failure to pay over the excess

found to be due on the settlements with the clerk, but for his failure to make true returns by which such excess could have been properly ascertained. To such a case the orders required by this statute are obviously not applicable, and their existence or averment is not essential to plaintiff's cause of action, as has been expressly ruled by this court.' Citing State ex rel. Jackson County v. Chick, State ex rel. Callaway County v. Henderson and Callaway County v. Henderson, supra."

It was also held in the case of State v. Maryland Casualty Co., 66 S. W. (2d) 537, par. 3, that where the county treasurer did not follow the statutes in reference to making this settlement the county court, the bonding company or the sureties were still liable for the full amount of the shortage on its bond. The court in that case, paragraph 3, said:

"In this connection defendant contends that the quarterly statements of the Matkins, as treasurer, submitted to the county court furnished no ground for liability on the bond for the reason Matkins, as ex officio collector, did not comply with sections 9927 and 9932, R. S. 1929 (Mo. St. Ann. sections 9927, 9932, pp. 7972, 7974).

"It is provided in section 9927 that collectors and ex officio collectors shall, on or before the fifth day of each month, file a statement with the county clerk showing the amount of taxes and licenses collected by him during the preceding month, and that they shall, on or before the fifteenth day of the month, pay said amount, less commissions, into the state and county treasuries.

"And it is provided in section 9932 that upon payment by the collector to the treasurer of the amount found due

on said monthly settlements with the county court, the treasurer shall give the collector duplicate receipts therefor, one of which shall be filed in the office of the clerk of the county court, who shall grant the collector a full quietus.

"Defendant Matkins did not comply with these sections. However, as stated, he made quarterly statements and settlements with the county court as treasurer. We do not think that Matkins should be permitted to profit by his failure to perform his duty as an official. Indeed, we have so ruled. In State ex rel. Dunklin County v. Blakemore, supra, we held that a treasurer under township organization and the surety on his bond are estopped to set up the failure of the treasurer to perform his duty as a defense to an action on the bond given to secure the faithful performance of the official duties of the treasurer."

Also, in connection with a suit on the bond of a county treasurer in the case of State v. Blakemore, 205 S. W. 626, 1. c. 628, the court, in holding that the action of the county treasurer in not following the statute did not become a defense that could be set up by the surety, said:

"* * * The bringing of the action for the whole deficiency on the bond involved would have bound the county, as an application of payment, in any other proceeding. Haynes v. Waite, 14 Cal. 446, and cases cited. It was substantial evidence of the county's intent to make the application to the funds mentioned in the instruction. Starrett v. Barber, 20 Me. loc. cit. 461. There is no question of 'shifting responsibilities' by the application made. The bond was executed in contemplation of every applicable principle of law, the law of the application of payments as well as any other.

"The court instructed, in substance, that if Blakemore failed to pay over a balance he owed, and if it was found he mingled the several funds so they lost their identity and it became impossible to tell which fund, if any, was short, 'then defendants are estopped to deny that such shortage belonged to the funds covered by the bond sued on,' etc."

The fact that the county court, previous to July 1, 1941, made a settlement with the county treasurer through fraud on the part of the county treasurer and did not discover the shortage, does not affect a suit upon his bond for the full amount for the reason that the county court is not bound by the fraudulent actions of the county treasurer nor is his fraudulent actions a defense that can be set up by the bonding company on a suit on the bond.

It was so held in the case of United States Fidelity & Guaranty Co. v. Huckstep, 72 S. W. (2d) 838, l. c. 841, where the court said:

"* * In other words, the approval of the county court is final only as to the fees actually reported to the clerk, and upon which it must necessarily have acted. State ex rel. v. Henderson, 142 Mo. 598, 44 S. W. 737; State ex rel. v. Chick, 146 Mo. 645, 48 S. W. 829; State ex rel. v. Gideon, 158 Mo. 327, 59 S. W. 99; Callaway County v. Henderson, 139 Mo. 510, 41 S. W. 241.

"The trouble with all of defendants' argument regarding the applicability of the above statutes is that the suit is not bottomed upon breaches of the bond occurring by reason of noncompliance with such statutes. There is no issue here of Huckstep's having failed to pay into the county treasury the excess in his hands over and above what he was allowed to retain for himself and for his clerk

hire. Rather his bond was breached (taking the petition at its face value), in that he collected from the state and withheld from the county certain sums in excess of the statutory fees due him for making the tax books for certain years. Moreover his indebtedness was not discovered in connection with his quarterly returns to the county court, but upon an examination of his books by the state auditor, whose audit was not made until after Huckstep's death."

The above case applied to the clerk of the county court, but the same law would apply to a county treasurer.

CONCLUSION

In view of the above authorities it is the opinion of this department that Ralls County can recover for the full amount of the shortage of the county treasurer as set out in your above statement of facts and is not limited to the single item of shortage discovered by reason of the county treasurer's settlement on July 1, 1941.

Respectfully submitted

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APPROVED:

VANE C. THURLO
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