

RECOVERY OF OVERPAYMENT
OF SALARY:

DEPUTY'S SALARY:

County may recover overpayments paid public officers. The county court is not personally liable. The statute of limitations applies to counties.

October 28, 1955

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Honorable George Q. Dawes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

In your recent request for an official opinion from this office you state:

"During the tenure of office of the county clerk in 1947 through 1950, the county court paid out for additional services for deputies an amount in excess of the amount allowed under the statute. Under Section 51.460(2) and (6) the court is allowed to pay a deputy clerk \$1400.00, but the court paid as much as \$300.00 to \$400.00 annually more than that allowed.

"My question is, 'Upon whom does the responsibility for overpayment fall?' Is the county clerk who was in office at the time liable for the sums paid out over the statutory allowance, or is the county court responsible? If the county clerk is liable, when did the statute of limitations begin to run on this obligation? Is that sum which was paid prior to 1950 outlawed?"

To begin with, we shall assume that you use the terms, "liable" and "responsible" interchangeably. The action of the county court in allowing pay in excess of the statutory limitations we shall conclude was due to a mistake of law or of fact, and we shall conclude that the court did not act maliciously, fraudulently or corruptly in view of the fact that your letter does not suggest such. Nevertheless, the action by the court was illegal and, therefore, the money may be recovered from the person or persons who received it.

In the case of Saline County v. Wilson, 61 Mo. 237, the county court had audited a claim in blank and ordered a war-

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rant in blank, with instructions to the clerk to insert the proper amount in the warrant when the claimant rendered his final account. The claim was excessive. A warrant was issued. The county sued to recover from the payee. The court said that the county court, regardless of "however pure its motives" acted beyond the scope of its authority and that

"County courts are only agents of their respective counties in the manner and to the extent prescribed by law. So long as they continue to tread in the narrow pathway allotted to their feet by legal enactment, their acts are valid, but whenever they step beyond, their acts are void."

Therefore, the court held that:

"* * * there could arise no doubt but that an action for money had and received, which is the nature of the present suit, would lie for the recovery of the money thus obtained."

In Consolidated District No. 2 of Pike County v. Cooper et al., 28 S. W. (2d) 384, the question arose as to the right of one school district to recover from another school district and the county treasurer money belonging to the plaintiff district but paid out to the defendant district under a mistake of law. The defense advanced two theories; one was that money honestly paid out under a mistake of law cannot be recovered. The court said:

"The first of these contentions can be put aside with but scant comment, for the rule that money honestly paid and received, with full knowledge of all the circumstances, but under a mistaken conception of the law, cannot be recovered back, does not apply where all the participants were officers or official bodies, acting solely in their official capacities, since no act of approval, acquiescence, or settlement can be permitted to extend the authority

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of such officers to cover an unlawful act. Lamar Township v. City of Lamar, 261 Mo. 171, 169 S. W. 12, Ann. Cas. 1916D 740; State ex rel v. Scott, 270 Mo. 146, 192 S. W. 90; State ex rel v. Hackmann, 305 Mo. 342, 265 S.W. 532; State ex rel v. Dearing, (Mo. App.) 274 S. W. 477."

See also, State v. Weatherby, 344 Mo. l.c. 856, and Am. Jur., Payments, Section 210.

In the case of County of Nodaway v. Kidder, 344 Mo. 795, the court held that public policy requires that a public officer be denied additional compensation for performing official duties, and that when a public official wrongfully receives public funds, although paid to him under an honest mistake of law, he must restore such funds. Thus, in answer to your question, "Upon whom does the responsibility for overpayment fall?", we conclude that it falls upon the person who received it.

In the case of State ex rel v. Diemer, 255 Mo. 336, in which the question arose as to the personal liability of the members of the county court for overpayment of the salary of the county engineer, the court said, l.c. 354:

"The premises considered it becomes apparent that, although we have held that in the matter of allowing claims against the county they act in a public ministerial, administrative, or auditing capacity, yet in their performance of ministerial duties in allowing claims their acts partake of the nature of judicial acts and are so related thereto in color and substance that they may be deemed not inaptly quasi-judicial. On that account they are protected from personal liability except in the inflamed case of fraud, corruption or malice."

This case was followed in Carter County v. Huett, 303 Mo. 194, when the question of personal liability of the members of the county court arose after overpayment of the county prosecutor's salary.

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Therefore, in view of our stated premise that we conclude there was no malice, fraud, or corruption here, it is our opinion that the members of the county court are not personally liable.

From these cases cited and from an official opinion, a copy of which is enclosed, rendered by this office October 22, 1953, to the State Auditor, we conclude that the county clerk is not liable. In that opinion, Section 51.450(6) was construed when the question arose as to whether or not that section became immediately applicable upon its passage by the Sixty-seventh General Assembly. It was held that it did become immediately applicable because the compensation therein provided was for the deputy, not for the clerk.

Section 51.460(6) is identical in the pertinent aspects with Section 51.450(6), and Section 51.460 currently reads as it has since 1947.

Such a suit for recovery can be brought in the name of the county. Section 50.160, RSMo 1949, gives the court power to enforce collections of money due the county. On this point see, also, *Cole County v. Ballmeyer*, 101 Mo. 57, 13 S. W. 687; see, also, *Counties, Digest, Key No. 217*.

You ask further, if the county clerk is liable, when does the statute of limitations begin to run. On this point, of course, as we pointed out above, the county clerk is not personally liable. It would seem that the statute began to run against the county from the time the salary allowed exceeded the statutory limit, because that is when a cause of action for its return arose. *St. Louis County ex rel Scott v. Marvin Planing Mill Co.*, 228 Mo. App. 1048, 58 S. W. (2d) 769. Since the cause of action arose then the statute of limitations commenced to run from that time. *Cleveland v. Laclede County Christy Clay Products Co.*, 129 S.W. (2d) 12; see, also, *Am. Jur., Limitation of Actions, Section 113*.

We are enclosing an official opinion of this office dated April 1, 1943, to John H. Keith, which concludes that counties are subject to the statute of limitations.

It is our opinion also that the five years, not the three years, section would be applicable in an action for the recovery of the subject overpayments. Such an action would be

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upon a "liability" as mentioned in Section 516.120(1), RSMo 1949, and would not be "against * * * an officer, upon a liability incurred by doing an act in his official capacity and in virtue of his office * * *" as mentioned in Section 516.130(1). Thus those payments made more than five years prior to the filing of any action would be outlawed.

CONCLUSION

From the foregoing, we conclude that in the present case:
(1) The deputy county clerk who received the overpayment of salary from the county court is the person liable to refund it;
(2) That the county clerk is not liable; (3) That, absent fraud, malice or corruption, the members of the county court are not personally liable; (4) That the county may sue in its own name for the recovery of excess salaries paid; (5) That the county is subject to the five years' statute of limitations.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Yours very truly

John M. Dalton
Attorney General

RSN:lc

Enclosures: Opinion to John H. Keith, dated April 1, 1943
Opinion to Haskell Holman, dated October 22, 1953