OFFICERS: Excess fees - recovery may be had.

January 26th, 1939.

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Honorable Noah Bell,
Presiding Judge,
Oregon County Court,
Alton, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of January 17, 1939, requesting our opinion on the following questions:

> "No. 1. The sheriff is claiming fees for days the County Court was out taking up right of way, (Court in Vacation). Is he entitled to pay for these days? If so, does it outlaw, and how long before it does?
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> No. 2. The ex-sheriff drew fees as a member of Board of Equalization. Can those fees be recovered by the County? Will that outlaw and if so in what time?
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> No. 3. The last six months of 1933 and all of 1934 the Sheriff drew about $52.00 more than the law allowed for taking each patient to insane hospital. Can that be recovered at this time?"

In answer to your first question, we are enclosing a copy of an opinion rendered, on August 15, 1938, to L. L. Robinson, Chamois, Missouri, in which it is held; that the sheriff is only required to be in attendance upon the courts of record in his county when said courts are in session; that he is only to be paid for <u>actual</u> attendance upon the court at the time it is in session.

We shall treat your remaining questions together.

Section 9811, R. S. Mo., 1929, is in part as follows:

> "There shall be in each county in this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year: Provided, that in any county having adopted township organization, the sheriff of said county shall be a member of said board of equalization: Provided further, that in counties containing a population of more than seventy thousand, such board shall meet upon the first Monday of March in each year."

Under this statute the sheriff in counties not under township organization (Oregon County being such), not being a member of the Board of Equalization, is not entitled to the fee granted to members of said board.

The last question does not ask for our opinion on the legality of the fees received by the sheriff for transporting patients to state hospitals, so we assume that you are satisfied that the amount received was excessive.

Thus, we have the sheriff receiving fees, in one instance, to which he had no right, and in the other, fees which were in excess to that which the law allowed. In this situation, the question before us is: May said sums, which we assume were paid to the sheriff under mistake of law, be recovered from the sheriff, and if so, are they barred by the statute of limitations?

The authorities are in dispute on the answer to this proposition.

In State ex rel, Scotland Co. v. Ewing 116 Mo. 129, (Div. 1), a county collector had received commissions in excess of that which the law permitted. On attempt being made to recover said excess, it was shown that the collector had made his settlement with the county court, receiving the court's approval of the fees received. They held the settlement not to have the conclusiveness of judgments, and said l. c. 136:

> "The final inquiry then is whether these settlements, giving them only the force of settlements between individuals, can be avoided on account of an error of law committed by the county court, and the commissions voluntarily paid, or allowed, which comes to the same thing, recovered back. The rule is that a settlement can only be opened for fraud or for errors or mistakes of fact. Moore v. McCullough, 8 Mo. 401; Kronerberger v. Bintz, 56 Mo. 122; Quinlan v. Keiser, 66 Mo. 603.

further at l. c. 138, the court said:

> "The supreme court of Indiana denied a county the right to recover back excessive fees which had been allowed a treasurer by the county commissioners, under circumstances very similar to those disclosed in this case. The court held that the money was voluntarily paid, upon a mistake of law, and without fraud or mistake of fact; and in ordinary cases, in transactions between individuals, money this paid could not be recovered back. The court held further that the commissioners having authority to make the settlment in behalf of the county, it could not be impeached. Snelson v. State, 16 Ind. 31.

In State ex rel, v. Shipman, 125 Mo. 436 (Div.2) a situation the same as in the preceding case existed. The court adhered to the Ewing case, and said:

"This question has been recently decided by division number one of this court in State ex rel. v. Ewing, 116 Mo. 129, in which it was held that, in the absence of fraud, collusion or mistake of fact, the settlement made by a collector with the county court was binding on the county.

We have considered the argument of counsel for the county, calling in question that decision, but we are satisfied that it announces correct principles, and approve it."

This ruling was followed in State ex rel, v. Hawkins, 169 Mo. 615 (Div. 2). Again in State ex rel, v. Sanderson, 336 Mo. 114, 118 (Div. 2), the court held the same by saying:

"The annual settlement, which is required to be made, is recognized by law as something more than a mere report of the collector of the amounts collected and taxes remaining delinquent. It partakes of the nature of a settlement of the collector's accounts with the county and State. The county court has been designated by the Legislature as the agency to represent the State and county. It was held in State ex rel v. Shipman, 125 Mo. 436, 28 S. W. 842, and State ex rel. v. Ewing, 116 Mo. 129, 22 S. W. 476, that in the absence of fraud, collusion or mistake of fact, settlements made by a county collector were binding on the county. It was held that excessive commissions paid to the collector in those cases could not be recovered because they were paid under a mistake of law. On the same theory a collector was denied redress where he had been paid a less commission than permitted by law. (Hethcock v. Crawford County, 200 Mo. 170, 98 S. W. 582.)

The ruling was subsequently affirmed in State ex rel, v. Thompson, 337 Mo. 328, 335 by the court en banc, where, quoting from another case, the court stated:

> "It is settled law that settlements made between a county collector and the county court do not have the force and effect of a judgment and are not res adjudicata. In making such settlements the county court acts as a public accountant or financial agent of the county, and settlements so made amount to no more than an accounting between the principal and agent, or a settlement between individuals, and may be inquired into and corrected or set aside on the ground of fraud or mistake of fact. (State ex rel, Scotland County v. Ewing, 116 Mo. 129, 136, 22 S. W. 476; State ex rel, Lawrence County v. Shipman, 125 Mo. 436, 28 S. W. 842."

The group of cases above cited refuse the right to recover excess fee on the ground that a mistake of law cannot be corrected or set aside, and that this can only be done for fraud or mistake of fact. In other words, the county courts mistake of law cannot be corrected.

On the other hand, there is the case of Lamar Township v. City of Lamar, 261 Mo. 171, 183 (Div. 2). In this case the township collector paid over certain taxes collected by him to the city treasurer, when the city had no right thereto, and such payment was a mistake of law. On this question the court said:

> "The payments having been so made, can the plaintiff recover the money by action at law? The authorities are not uniform on this question, and in the judgment of the court it is the most doubtful question involved in the case. As between individuals, payments under a mistake of law cannot be recovered. The court has examined the authorities cited in briefs of counsel, and has reached the conclusion that, in Missouri and in the best reasoned cases elsewhere,

municipalities constitute an exception to the general rule. The case of Morrow v. Surber, 97 Mo. 1. c. 161, clearly recognizes the exception to the general rule and is much in point. The case of Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264, cited by defendant's counsel, supports the contention that payments under mistake of law cannot be recovered back. The facts in this case, without the application of this rule, clearly warrants the decision on the recognized rule that a municipality cannot accept the benefits of a void contract and retain them and recover back the consideration paid. This principle was recognized in the case of Aurora Water Co. v. Aurora 129, Mo. 1. c. 574, in a very able opinion by Judge Sherwood. In other words, municipalities will not be permitted to ignore every principle of common honesty, even though their officers do exceed their authority under the law in dealing with the public. In the Schell City case the officers of the city bought machinery from the defendant and paid part of the purchase price. The contract of purchase was held void, being unauthorized by law. Thereupon the city while retaining the fruits of the contract, brought suit to recover back the money paid on the contract, and the Court of Appeals denied the right to recover back the money paid on the contract and based their opinion on the general rule that money paid under a mistake of law cannot be recovered back. But reading that case in connection with Sparks v. Jasper County, 213 Mo. 237, it will be seen that the case is only treated as authority for the proposition that municipal corporations cannot retain property bought on a valid contract and recover back the consideration paid for it. The language of the court in Ada County v. Gess, 4

> Idaho, 611, appeals to this court as a correct statement of the law. That court, among other things, says: Some authorities go so far as to hold that payments of public moneys under mistake of law cannot be recovered back. The doctrine is so repugnant to every principle of justice and common honesty that the latter cases do not, by their reasoning, commend themselves to this court. We cannot consent to carry the doctrine beyond settlements between individuals.
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> "A settlement made by an individual and a corporation binds the individual and these cases have caused some misunderstandings as to the law. The court holds that the public money of municipal corporations paid out by its officers under a mistake of law can be recovered back at the suit of such corporation."

further at l. c. 186, the court had this to say:

> "The serious question and the one as to which appellant most earnestly and strenuously contends, is whether the rule that money paid without protest or duress, under a mistake of law, cannot be recovered, applies as between officers of municipal corporations dealing with the money and the property of the public. That individuals may not recover money so paid, absent fraud, protest or duress, is too well settled for argument. (Needles v. Burk, 81 Mo. 569; Savings Institution v. Enslin, 46 Mo. 200; Campbell v. Clark 44 Mo. Appl 249). Likewise in other jurisdictions this rule so far as it applies to individuals, sui juris, dealing with their own property, is well nigh without exception. (30 Cyc. 1313, and cases cited). The reason for the

rule as between individuals (which while sometimes provocative of great miscarriages of justice, and while largely predicated upon expediency) is yet bottomed upon some considerations which are logical and well settled. Among these (but when wrong is being done, clearly not chief among these), is the maxim ignorantia legis neminem excusat. Likewise the rule touches nearly upon the doctrines of accord and satisfaction, and of estoppel; as also upon the rule forbidding the unsettling of things settled and thereby disturbing repose by clamorous litigation. Other maxims, e. g. volenti non fit injuria, have likewise been invoked; but confessedly even among individuals, unless the peculiar facts of the case also warrants the application of the rule ex aequo et bono, there is little logic and less of honesty in putting it upon such an excuse. The best that may be said of the rule even as applied to individuals, is that it is a handy ruly to apply in those rare cases where the application of it prevents gross injustice. (See, argumndo, Schell City v. Rumsey Mfg. Co., 59 Mo. App. 264.)

Certainly in a case like this of dealing between public officers with the public's money, no excuse for invoking this rule can be found in logic, nor in our opinion can such excuse be found in the decided cases. The rule in such case is thus stated in 30 Cyc. 1315: "Although there are cases holding the contrary, the better rule seems to be that payments by a public officer by mistake of law, expecially when made to another officer, may be recovered back." (Ada County v. Gess, 4 Idaho, 611; Heath v. Albrook, 123, Iowa, 559; Ellis v. State Auditors, 107 Mich. 528; Allegheny Co. v. Grier, 179 Pa. St. 639; State v. Young, 134 Iowa, 505; McElrath v. United States, 12 Ct. Cl. 201.)"

and at l. c. 189 the court said:

> "Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority.
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> "Neither, so far as counsel have invited our attention or we have been able to find, is this view in conflict with anything which has been ruled by us in this State. The case of Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264, applies a different rule. But there were among the facts there held in judgment a peculiar condition of estoppel existing, which fairly distinguishes that case from this. Besides, that was not a case where one officer of a municipality was dealing with another officer of another municipality; there a muni-

cipality was dealing with a private business corporation. Concededly, however, the broad rule laid down largely by dictum in that case is not in harmony with the views we are now here holding. In Campbell v. Clark, 44 Mo. Appeal 249, the rule here urged was approved.

"The case of Morrow V. Surber, 97 Mo. 155, is in accord with what we here hold, though the court there went beyond the precise point up for ruling, in order to say that upon the facts there a private individual even would have been entitled to recover. Upon the two points touching the rule as it affects a public officer, and as it affects a private person, the court said in that case:

"Such a mistake as is here described furnishes ground for recovery of the money in this action. The plaintiff is the custodian of the county funds and sues here in his official capacity. He is agent of the county for the purposes defined by law, and the public is bound to take notice of the limitations of his agency. He cannot give away county funds or disburse them contrary to law. Any such disbursement is entirely invalid. If this case were between priviate citizens, the undisputed facts would support the judgment given by the circuit court under the settled law of this state. (Columbus Ins. Co. v. Walsh, 18 Mo. 229; Koontz v. Bank, 51 Mo. 275)."

The court in this case (l. c. 190) sharply criticized the holdings in the Ewing, Shipman and Hawkins cases, supra, but distinguished them rather than overruling. The distinguishing point was, so the court said, there was no settlement to contend with in that case (Lamar Township Case).

In State ex rel. v. Scott, 270 Mo. 146, 153 (Div. 1), a case in which the county clerk charged fees for work he had not done, but before the institution of the suit concerning said charge he did perform the work. The plaintiff contended that the work even though done, was not done at the time required, and for that reason plaintiff ought to recover. The court held against this contention, but said:

> "It is suggested by defendant that if the money was honestly paid, and received with a full knowledge on the part of the officers of the State of all the circumstances, it was paid under mistake of law, and cannot, therefore, be recovered back. We do not think this rule is applicable to this transaction. All the participants were officers, each acting solely in his official capacity. When one assumes to represent the State in the disposition of the people's money, he and those dealing with him must look to the law for his authority; and no subsequent act of approval, acquiescence or settlement non-judicial in character, can operate to extend that authority over an unlawful act."

In State ex rel. v. Hackman, 265 S. W. 532 (Mo. Supreme en banc), the court had this to say, l. c. 536:

> "In State ex rel. Barker v. Scott, 270 Mo. 146, 192, S. W. 90, where a clerk of the county court wrongfully certified that he had extended certain taxes, and had been

> paid therefor by the state before such work was done, it was held that the state could recover money so paid out under a mistake of law. But such recovery was not allowed in that case, because the work was subsequently done by the clerk. However, the right tc recover money paid out under mistake of law under such circumstances was clearly recognized.
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> "The same rule had previously been laid down in Lamar Township v. Lamar, 261 Mo. 171, 169 S. W. 12, Ann. Cas. 1916D, 740."

Thus we have two lines of ruling which seem to be hopelessly in conflict with each other. The latter line represented by the Lamar Township case criticizes the principal cases in the other line and establishes that recovery can be had, even though there exists a mistake of law, The latter cases while not overuling the rule laid down in the Ewing, Shipman and Hawkins cases distinguishes them because there the officers had had a settlement with the county court. Yet, in the Thompson case, it was held that these settlements are not conclusive, but the court there went back to the holding that for mistake of law they could not be inquired into.

The latest expression of the court is found in State v. Gomer, 101 S. W. (2d), 57, 69 (Mo. Sup. Div.1). There the question involved was one concerning what compensation a county assessor should receive. The court settled that question, but because the state's evidence was such that the amount due could not be ascertained refused to pass upon the right to recover any excess fees received by the assessor. The court said however:

> "Nevertheless, we do not mean to hold that an assessor or any other officer is entitled to keep more than he is allowed to collect by law for his services even if overpayment is due to an honest mistake of law: that question is not presented by this record because it cannot be determined therefrom what this assessor was paid or was entitled to be paid. See note Ann. Cas. 1915B, 811; State v. Young, 134 Iowa, 505, 110 N. W. 292, 13 Ann. Cas. 345, and cases cited."

The authorities pointed to by the court in the Gomer case throw a very different light on the right of the county to recover excess fees. The Young case in 110 N. W. 292, 13 Ann. Cas. 345 (Iowa) was one in which it was contended that the State Binder (an officer in that State), had received pay for in excess of that to which he was entitled for binding various state publications. The statute required certain publications to be "stitched" and others to be "sewed" and the fees were governed accordingly. The binder stitched some documents which should have been sewed,and charged and received the higher compensation allowed for stitching. The court, in deciding this case, pointed out the statute pertaining to the duties of the Secretary of State in this respect and stated that it did not give the Secretary of the State authority "to fix the compensation or reclassify the reports and other documents to be bound. In so far as he is called upon to audit the accounts of the state binder as presented, he acts in a ministerial capacity, and makes the computation and executes the certificate merely to enable the binder to draw his compensation." The court then commented that the Secretary of State's duties were comparable to that of a County Board of Supervision and stated (l. c. Ann. Cas. 347C:

> "The finding of such bodies is in no sense an adjudication, to be regarded as res adjudicata. The allowance of a claim presented is in the nature of settlement between individuals and is accorded no greater effect. Poweshiek County v. Stanley, 9 Ia. 511. And, in the absence of fraud or mistake, the allowance of a claim by such body can no more be set aside than an adjustment of different items between individuals. Poweshiek County v. Stanley, supra; Commissioner's Ct. v. Moore, 53 Ala. 25. Even to be accorded such effect as will hereafter appear, the items allowed must be such as might have been considered by the board or council, and, if prohibited by law, the municipality will not be bound by the action of its agents."

Further at l. c. 348, the court said:

> "It is conceded that the secretary held the work to have been properly done, and of this no complaint is made. The contention of the state is that, though properly done, the secretary certified that the state binder was entitled to an amount of compensation therefor in excess of the fees fixed by law, and this is conclusively shown by the record before us. Under these circumstances, can the payment of the excess to the state binder be regarded as voluntary? Where the amount to be paid is definitely fixed by law, as a salary, the state is universally held not to be bound by a mistake in amount paid by the officer issuing the warrant. Such officer is regarded as the trustee or agent of the state, and in making any payment other or in excess of that to which the law allows is plainly acting beyond and outside

> the scope of his duty; and this is not only within his knowledge, but that of him with whom he deals, for every one is presumed to know the law. There is a broad distinction between the acts of a public officer in this respect and the agent of an individual or private corporation. In the case of the latter, it is enough that the agent be clothed with apparent authority and that third persons deal with him innocently. Then, even though he violated his private instructions, the principal is bound. Good faith requires this much, for the principal has held him out as competent to act.
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> But it is not so with public officers acting in a ministerial capacity. Their authority is written in the statutes. All men are charged with knowledge of the extent of such authority. Necessarily they must know when their powers are exceeded, and act at their peril."

The court after reviewing a number of cases holding that such amounts can be recovered had this to say, l. c. 348, 349:

> "There are decisions holding that payments of claims in mistake of law by public officers may not be recovered; but these are planted either on the theory that the allowance of a claim is an adjudication, as Heald v. Polk,County, 46 Neb. 28, 64 N. W. 376, and Richland County v. Miller, 16 S. C. 236, a doctrine which, as seen, does not obtain in this state, or that the payment is voluntary. State v. Ewing, 116 Mo. 129, 22 S. W. 476; Painter v. Polk County, 81 Ia. 242, 47 N. W. 65, 25 Am. St. Rep. 489. These last cases rest on

the proposition that voluntary payments by a public officer may not be distinguished from such payments by an individual. See Kraft v. Keokuk, 14 Ia. 86; Ahlers v. Estherville, 130 Ia. 272, 104 N. W. 453. This is not so, as was clearly pointed out in Heath v. Albrook, supra, in overruling Painter v. Polk County, supra; for the individual acts for himself, and no question of exceeding his authority is involved when he makes payment to an officer or other person, Money cannot be taken from the public treasury lawfully, save for the purposes and in amounts as directed by statute, and the officer, in doing so, acts, not for himself, but in behalf of the public; and if he does so in violation of law he necessarily exceeds his authority, and the public is no more bound by his act than is any principal by the unauthorized act of his agent. It is to be noticed that the opinion in the Painter case was based on a decision of the Supreme Court of the United States which expressly recognized this principle, but denied recovery of a salary paid Gen. Badeau on the ground that he was a de facto officer during the period for which he had received it. See Badeau v. U. S., 130 U. S. 439, 9 S. Ct. 579, 32 U. S. (L. ed.) 997. That case, as said, was overruled by Heath v. Albrook, supra, and all the more recent opinions are to the effect that the rule with respect to voluntary payment by individuals has no application, where ministerial officers have made illegal payments of public money to public officers. These proceed upon the ground that such officers are merely the agents of the public, and in acting beyond the scope of their authority do not bind their principals. In other words, the mistake is the mistake of the agent, and not that of his principal.

> The officer may have thought that he had authority of law to make payments or to execute certificates upon which payments should be made; but in this he was mistaken."

And in conclusion the court stated, l. c. 349, 350:

> "Our conclusion rests on the general principle that the public is not bound by the acts of its officers when outside of or beyond the scope of their authority. The public law, of which courts and individuals are bound to take notice, and of which no party can claim ignorance, is the source of the power of the secretary of state, as well as every other official, defining such power with clearness and certainty. It does not clothe him with authority to create any new claim, or to amend statutes, or to increase the compensation of any other officer with whom his duties are connected; and to support the bills he has certified in behalf of the state binder, resort must be had, not to his act in certifying, but to the statutes fixing the compensation to which the latter official is entitled. If payments have been made, owing to his certificates computing compensation at higher rates than those fixed by law, these, to the extent of the excess, cannot be regarded as voluntary. The money, but not the title thereto, has been transferred, and restitution may be enforced in an appropriate action. Any other rule, especially one which would countenance the contention of the appellee that a public officer who has received money from the public treasury from another public officer without warrant

> of law may obviate restoration to the owner, the public, on the pretext that the paying officer misconceived his duty to the public, would encourage official corruption by collusion and be opposed to sound public policy."

This case illustrates, we think, (see quotation from pp 348, 349) the vice of the first group of Missouri holdings. This is that it applies the same rule, on mistakes of law, that exists between individuals. This rule cannot apply because it is firmly established in this state that a principal cannot be bound when his agent acts beyond the scope of his authority, and especially is this so where the authority of the agent is known. Tate v. Evans, 7 Mo. 419; Burnham v. Williams, 198 Mo.App. 18. No citation of authority is needed for the principle that the county court is merely the county's agent and only has such authority that is conferred upon it by statute. The same is also true with respect to every man is presumed to know the law.

Thus, the sheriff presumably knew that he was not entitled to these excess fees and knew that the county court was acting in excess of its authority when they paid the same to him.

The annotator in 13 Ann. Cases, 351, where a number of cases are compiled from all jurisdictions, sums up their holdings with this statement:

> "On grounds of public policy, the rule as to voluntary payments or payments made under a mistake of law is ordinarily, as pointed out in the reported case, held not to apply to fees or compensation paid out of public funds to public officers. In the first place, in as much as public revenues are trust funds and ministerial officers are trustees for the

> administration of those funds, it is not within the scope of their authority to make payments unauthorized by law. Ellis v. State Auditors, 107 Mich. 528, 65 N.W.577; Jones v. Lucas County, 57 Ohio St. 189, 48 N.E. 882,63 Am.St.Rep.710. In the second place, the fidelity which public officers owe to the government in whose services they are makes restitution a duty. Allegheny County v. Grier, 179 Pa.St. 639, 36 Atl.353. Accordingly, it is a general rule that fees or compensation paid illegally or by mistake, out of public funds, by ministerial officers or boards to public officers, or amounts collected by public officers which they have been permitted illegally to retain as fees or compensation, may be recovered back."

Another case where this question is discussed is County Court of Tyler County v. Long, 77 S. E. 28, Ann. Cas. 1915B, 808 (W.Va.). There the court said l. c. Ann. Cas. 811:

> "Lastly, the question is presented whether the county court, having voluntarily paid these items, can recover them from the defendant? If private individuals alone were involved the right would be very doubtful; indeed the genral rule seems to be that voluntary payment, made by mistake or ignorance of law, but with full knowledge of all the facts, and not induced by fraud or improper conduct on the part of the payee, cannot be recovered back. But this rule, it seems, is inapplicable to unauthorized payments of public money by fiscal bodies, such payments being regarded as in fact no payments and not voluntary payments."

The annotator in the case l. c. 811, summing up the cases collected has stated:

> "The rule relative to the recovery of payments made under mistake of law, is generally considered to be inapplicable to fees or compensation paid out of public funds to public officers, and it is accordingly held, as stated in the reported case, that fees or compensation paid illegally or by mistake, out of public funds, by ministerial officers or boards to public officers, or amounts collected by public officers, which they have been permitted illegally to retain as fees or compensation, may be recovered."

It will be noticed that the Missouri authorities heretofore cited for the most part, reached their conclusion by the assumption that the settlements of the county court were in the nature of judgments which could not be inquired into on mistake of law, although they do not come right out and say so in so many words. But in the Thompson case (337 M. l. c. 335) this was held not to be so. There the court held claim merely to be the same as settlements between individuals, but then held mistakes of law could not be corrected.

A more literal and exact description of what this function of the county court is, appears in Howe v. State, 53 Miss. 57. There it is said, concerning Mississippi's Board of Supervisors, comparable to our county courts, when it was claimed the approval and settlement of the county treasurer's account was final, that:

> "The duties of the board are ministerial, and not judicial, in this respect. The board has no power to decide what commissions the county treasurer should have. The law fixed that at a certain rate per centum on receipts and disbursements. It was a mere matter of calculation. That the board considered and decided that (the treasurer) was entitled to greater commissions than allowed by law did not sanctify his wrong in claiming it, did not change the law, and did not make the money in his hands belonging to the county his money."

The holdings heretofore set out that a mistake of law cannot be set aside by the principal (the public), when the mistake occurs between an individual (officer) and an agent (county court) is directly in conflict with the case of Huntsville Trust Co. v. Noel, 12 S. W. (2d) 751 (Mo. Sup.). That is a case where a bank failed to legally qualify as county depository. The bank attempted to qualify, but for some reason, (not quite clear from the opinion), failed to do so. The failure was in some connection with the bond given under a statute which all parties misconstrued. On this the court said l. c. 754:

> "As heretofore stated, all county funds are required by law to be deposited in a county depository. The officers of the county charged with duties relating to the deposit of such funds for safe keeping are agents of limited powers, and as such they have no authority to deposit these public moneys with any other than a county depository. Now a bank or trust company does not become a county depository merely by being designated as such in an order of the county court;

> it must qualify as a depository by giving the security prescribed by section 9585. If, therefore, the trust company had not so qualified on June 27, 1927, the deposit of the county funds with it was unlawful; and it, in receiving such funds under color of being a county depository, wrongfully obtained possession of them. The county moneys so obtained thereupon became, in the hands of the trust company, a trust fund by operation of law. These funds entered into, became commingled with, and to that extent augmented, the trust company's assets as a whole. Such assets may therefore be impressed with the trust to the extent of the funds so wrongfully obtained and commingled with them."

We have pointed out the cases in this state which bear on this subject. They are, as can be seen, not uniform. We have pointed out the inconsistency of the rule, that where the public money is concerned and a mistake of law exists no recovery can be had, with other established rules on principle and agency and in cases involving public funds. We have shown that in other jurisdictions such rule has been repudiated and was repudiated in this state in the Lamar case, but seemly reinstated in the Thompson case. The last expression of the court (Gomer case) and the cases cited therein are indicative that the rule might have been clarified if the question had been presented in the Gomer case.

Before reaching a conclusion in this opinion, there remains the question of limitations to be disposed of. Section 863 R.S.Mo. 1929, covers this situation and is as follows:

> "Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

In Putnam County v. Johnson 259 Mo. 1. c. 85, it is held that fees although illegal and excessive, were within the purview of the above statute and any suit to recover the same would be barred three years after the statute commenced to run, that is, when the illegal fees were received.

CONCLUSION

Our conclusion is that, in the face of decided cased directly in point (Ewing, Shipman and Hawkins cases), we cannot say that recovery of these illegal fees can be had, but we are impelled to the decision that if this matter were presented to the courts, in the light of the cases we have reviewed here, that recovery is entirely feasible.

Respectfully submitted,

APPROVED:

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LLB:RV