COUNTY COURTS: 1. An order of the county court exonerating county officials under an audit, from charges of fraud and embezzlement and stating the officers are not liable for any shortage is not an estoppal or res adjudicata which prevents actions if it is found such officers actually are indebted to the county court.

2. Sec.11816 must be followed in the event the county officers owe moneus to the county.

3. Sec.12165, Laws Mo.1933, p.356 contains amount allowed county clerk or other person designated to prepare financial statement.

February 3, 1937

7-9

FILED 22

Honorable Jack H. Denny
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Sir:

This Department is in receipt of your recent letter wherein you present three questions for an opinion.

I

The substance of your first question is, as follows:

> "The report of the State Auditors on the records of Howard County, Missouri, from January 1, 1934, to December 31, 1935, shows several of the county officers to owe sums of money to the County. The largest amount owing the County is in the sum of $4,108.86, due from J.H. Gallemore, County Clerk. The records show that the County Clerk filed quarterly abstracts of fees collected; they were filed and approved by the Court; but instead of retaining the amount prescribed by law as salary for himself and deputy and turning the balance over to the County Treasurer, the full amount of fees collected was allowed the officer and his deputy as salary in disregard of the Statute fixing the salary of the County Clerk and his deputy.
>
> (see Laws of 1933, Page 369.)

"At the November Term of the County Court, 1936, the following order was passed by the Court:

'IN THE MATTER OF THE COUNTY AUDIT. Now on this 15th day of December the court takes up the report as recently submitted by the State Auditor's Office; and after carefully examining the same and after having talked to each of the officers concerning the alleged deficits in their accounts, the court is fully satisfied that there is no evidence of any fraud or embezzlement on the part of any county officer.

BE IT THEREFORE ordered that said report be accepted, made a part of the public records of this court and that each county officer be discharged from any financial liability to the County existant prior to January 1, 1936.

Approved this 15th day of December, 1936.

C. B. Biswell Yes. W. W. Walker Yes. and Chas. Eaton No. '

"Since this order was made, the personnel of the Court has changed, and a new Board is now constituted.

"The question for decision is whether this order has an effect of releasing the County officer from his liability to the County for the amount of the deficit."

The main point involved in this question is whether or not the record of the court exonerating the various county officers of fraud or embezzlement, and that each county officer be discharged of liability

to the county prior to January 1, 1936, is an order or judgment of such a nature that you are precluded from any action against such officer.

It is stated in the decision of Bayless v. Gibbs 251 Mo. 492, that

> "County courts are not the general agents of the counties of the state but are courts with only limited jurisdiction, and their acts outside of their statutory authority are null and void."

The first portion of Section 12162,Revised Statutes Missouri 1929, refers to the ordinary accounts which are filed with the county court. The last proviso is as follows:

> "Provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officerx."

Assuming that the county court considered the audits and it was the finding of the court such audits did not reflect any shortage or embezzlement or fraud on the part of such officers, is the county estopped by the action of its court if such finding be determined as untrue and a mistake, and is the matter res adjudicata. We think not. The powers of the county court are strictly summed up in the case of State v. Diemer 255 Mo. l. c. 351, as follows:

> "In the allowance of claims against a county or in settling with county officers, county courts do not act so strictly as a court, or in the performance of a judicial function, that their allowance or disallowance of a claim is res adjudicata. Something of substance might be said in favor of the contrary theory, but at an early day this court considered

> our statutes and announced the doctrine, on the reason of the thing and because of a good public policy, that county courts in the allowance of claims, as in settling with officers, acted as a mere public board of audit, as ministerial, administrative or fiscal agents for the county and not strictly as a court, hence we have uniformly refused to apply the doctrine of res adjudicata to their orders allowing or disallowing claims against the county, or to their settlements with county officers. That doctrine has always been adhered to and must be accepted as settled. (County of Marion v. Phillips, 45 Mo. 75 (in connection with which case the reasoning of In re Saline County Subscription, 45 Mo.52, is pertinent); Phelps County v. Bishop, 46 Mo. 68; Reppy v. Jefferson County, 47 Mo. 66; Owens v. Andrew County Court, 49 Mo. l. c. 376 et seq; State to use v. Roberts 62 Mo. 388; State to use v. Roberts 60 Mo. l. c. 404; Cole County v. Dallmeyer, 101 Mo. l.c. 63; State ex rel. v. Gideon, 158 Mo. l. c. 338 et seq.,and cases cited; Givens v. Daviess County, 107 Mo. l. c. 607 et seq.; Scott County v. Leftwich, 145 Mo. l. c. 32.)"

As to whether or not the order of the court constituted a judgment if the accounts of the officers are untrue, false or fraudulent, and the right to disregard the judgment, is discussed in the case of State ex rel. Christian County v. Gideon 158 Mo. l. c. 338, as follows:

> "Nor can the demurrer be sustained on the ground stated in the first

paragraph of the fourth objection, i. e., that 'the various settlements of said M.V.Gideon with the county court are in the nature of judgments,and are binding upon the county,and can not be set aside, modified or altered by the said county court nor by this court.'

"In Scott County v.Leftwich, 145 Mo. loc.cit.32,it was ruled as to these quarterly settlements of the clerk under this statute,that 'the county court in passing upon these statements only acts in its administrative capacity, as it does in making settlements with other county officials,and no more sanctity is given to its decision in examining such statements than is accorded to its settlements with county officers, and it has been held through an unbroken line of decisions by this court that the county courts in making those settlements do not act judicially. (Marion Co.v.Phillips,45 Mo. 75; State to use v.Roberts,60 Mo.402; State to use v.Roberts, 62 Mo.388; Cole v. Dallmeyer, 101 Mo.57; Sears v. Stone Co., 105 Mo.236.) In the last case cited,105 Mo. loc.cit.242,it is said that 'it has been held by this court through an unbroken line of decisions since the case of Marion Co.v.Phillips, 45 Mo.75, that the action of the county court in making settlements with county officials is not judicial,but

that,in such cases the judges act merely as the fiscal or administrative agents of the counties.' The principal laid down in the Marion County case, which has since been uniformly followed, is thus stated in the language of Bliss,J.,after an exhaustive review of the authorities:'We hold,then,that the defendant in the case at bar,in making his settlement with the county court of Marion county, settled and adjusted his claims and liabilities with the public agents of the county; that the entry upon the records of the court was not a judgment at law, but the record of the results of that settlement - a statement of his account,as adjusted between him and the county - and that any mistake in that settlement clearly proved is open to correction, and in the same manner as though it were made with an individual.' (45 Mo. 80).

"And in State to use of Carroll Co., v. Roberts et al.,which was an action against the collector and the sureties on his official bond, the doctrine was thus applied by this court, speaking through Napton, J.: 'Settlements made with the county court in regard to administrators,guardians, etc.,may properly be considered as judicial acts, since they are judgments of a court on proceedings inter partes in which there is notice required, and in which the county and the court are not interested. In settlements with collectors, it is a mere accounting between principal and agent or between a supervising agent

and the subordinate. I refer to the opinion of Judge Bliss,in 45 Mo. 77, where the learned judge has fully discussed this point and established this discrimmination, with the sanction of all the court. It is now insisted, however, that no suit could be instituted against the sureties of the collector, until there had been a suit in equity to set aside the settlement. Undoubtedly, if this settlement could be regarded as a judgment, in a suit or proceeding where the sureties were not parties, it might be a protection to them until set aside. Such has been decided to be the law in regard to settlements of administrators, guardians, etc. But in this case it is not perceived how this settlement operates with more efficacy than an ordinary receipt. If a sheriff should receive, on an execution, double the amount he receipts for, would the plaintiff in the execution have to go into a chancery proceeding to set aside the receipt? The sureties on his bond are responsible for breaches of it,and although the receipt in the case supposed and the settlement in the case now under consideration, are certainlu prima facie evidence in favor of both the sheriff and his sureties, neither can be pleaded as a bar to the action. They may both be explained or set aside as made through fraud or mistake. Why require two suits to settle what can as well be determined in one?'

"That it was the duty of Gideon as clerk to make correct return

> quarterly of all fees received by him, and of the salaries by him actually paid to his deputies or assistants, and that in failing to do so, by returning only a part of said fees, and falsely returning the amount paid for salaries to his deputies,as charged in the first two counts of the petition, he committed breaches of his bond, for which the plaintiff has a cause of action, is beyond question. And applying the doctrine of the cases cited, it is quite clear that the plaintiff is not precluded from asserting that cause of action by the approval by the county court of such false statements in ignorance of their falsity."

In the recent case of Sheboygan County v. Frank W. Zimmerman, contained in 103 A. L. R. 1045, the same being a case decided by the Wisconsin Supreme Court, we consider to be in point. The court, in discussing the question, at l. c. 1048, said:

> "The defendants attempt to support the judgment on the ground that a committee of the county board audited Zimmermann's books and found them to be correct and in balance. The members of the committee examined only the entries contained in the books and obviously considered only the receipts, and disbursements, listed therein. The balance shown by the books corresponded with the cash in bank and the cash on hand,and to that extent the books were correct and in perfect balance. The members of the auditing committee made

> no investigation as to moneys collected or received by Zimmermann which he did not enter in his books. Clearly,that audit in no way binds the county. As was said in Town of Cady v. Bailey, 95 Wis. 370,70 N.W. 285, 286: 'The law applicable to settlements between private parties does not apply to settlements between a public corporation and its officers, respecting the handling by the latter of public money. Notwithstanding such settlements, if such officers, by a mistake or otherwise, wrongfully retain public money in their hands, they may be proceeded against therefor at any time thereafter, upon discovery of the facts, within the period of the statute of limitations. Throop, Pub.Off.secs.280-283; Otsego Lake Tp.v.Kirsten,72 Mich. 1, 40 N. W. 26 (16 Am. St.Rep.524); Palo Alto Co. v. Burlingame, 71 Iowa,201, 32 N.W. 259; Boardman Tp. v. Flagg,70 Mich. 372, 38 N. W. 284; Sexton v. Richland County Sup'rs, 27 Wis. 349.' "

The same Volume of A. L. R. reviews all the authorities in Missouri at page 1055 et seq.,including the case of Marion County v. Phillips 45 Mo. 75, in which it was determined that:

> "* the court, observing that the complaint was based not upon fraud but mistake, rested its allowance of recovery upon the nature of the settlement as one partaking of an adjustment

> between principal and agent rather than a judicial proceeding."

In the case of State v. Roberts 62 Mo. 388, it was held:

> "A settlement with a county fiscal court, which consisted of a mere synopsis of statements of accounts found in the books of the county clerk, and did not show whether the balance claimed was on account of cash, notes,or railroad bonds given by a sheriff who had been authorized to sell county swamp lands and take payment in one or all of such forms,was held not conclusive in an action against the sureties, especially since the court members were to be considered fiscal agents of the county, and not judicial officers rendering judgments in the premises."

We are impressed with the decision of the court in the early case of Bates County v.Smith 65 Mo. 469, wherein it was held that,

> "Where a county tax collector, through fraud or mistake,failed to pay over moneys collected, and such items were omitted entirely in a settlement with the county board, such settlement had no more efficacy than an ordinary receipt, and did not prevent an action on the official bond."

In the decision of Callaway County v. Henderson 139 Mo. 510, it was held as follows:

> "Where a county clerk in making up his periodic accounts, required by statute, made only a partial account, and omitted items which should have been charged as fees and for other services rendered, examination and allowance thereof by the county court were held to be no bar to an action by the county to recover that which was received but not included."

In the recent case of United States Fidelity Company v. Huckstep 72 S. W. (2d) 838, it was held that,

> "Failure to consider certain items in an official settlement between the county clerk and the county was held to leave the way clear for consideration of such items in an action for an accounting brought by the surety against the clerk's estate."

CONCLUSION

We are of the opinion that irrespective of the finding of the court to the effect that there was no fraud or embezzlement on the part of county officers in Howard County, and that said officers were discharged from further financial liability to the county; that said order is not a judgment which is res adjudicata or estops the county from taking action against the officers and determining any balance due and owing to the county and collecting the same from the officers.

II

Assuming that the county court has authority to collect the amounts owing, can they, without suit, withhold the future salaries of the officers?

As stated in the memorandum that you have included with your request, the Legislature has set forth the procedure to be followed in the event clerks fail to report and pay the fees as required by law in Section 11816, R. S. Mo. 1929. Section 11814, passed by the Legislature in 1933, page 372, also deals with the collection of fees by the clerks and reports on the payment of fees.

It is the prime duty of the county court to guard zealously the finances of the county. If money and fees are due the county from any officer, it is the duty of the county court to make every effort to have same collected. Therefore, if in the opinion of the court any officer of the county is indebted to the county, and if the county be indebted to any officer, now or in the future, we think that the county can legally withhold the amount it may owe such officer and the same may be treated as a counter claim or setoff. There are no decisions directly in point in the State of Missouri, but it appears to be a well established rule of law as was said in the case of Price v. Lancaster County, 24 Pa. County Court, l. c. 235:

"Conceding, therefore, that the plaintiff did receive from the county the above illegal payments, can they be recovered back into the county treasury, or used by way of set-off? The answer to this proposition is fully contained in County of Allegheny v. Grier, 179 Pa. 639. Suit was brought by the county of Allegheny to recover from the controller of that county $1,290.32, alleged to have been paid to him by mistake in excess of his salary as fixed by law. Among other defenses, it was urged that the payments made to the defendant and sued for were voluntary payments. The court below entered judgment in favor of the

county, and this decision was affirmed by the Supreme Court. The late Chief Justice Sterrett, in delivering the opinion of the court, said: 'The act of 1864 being in force, the amount received by the controller in excess of the salary there fixed was, therefore, illegal. So, on the grounds of public policy, the court was right in holding that the maxim volenti non fit injuria has no application to the illegal payment of public funds to a public officer, more especially, where, as here, it is the peculiar function of that officer to guard the public treasury. Public revenues are but trust funds, and officers but trustees for its administration for the people. It is no answer, to a suit brought by a trustee to recover private trust funds, that he had been a party to the devastavit. There could be no retention by color of right: Abbot v. Reeves, 49 Pa. 494. With much the stronger reason is this doctrine applicable where the interests of the whole people are involved, and the authorities are, accordingly, numerous to this effect: New Orleans v. Finnerty, 27 La. Ann. 681; Com. V. Field, 84 Va. 26; Day Land and Cattle Co. v. State, 68 Texas, 526; Am. Steamship Co. v. Young, 89 Pa. 191; Taylor v. Board of Health, 31 Pa. 73; Smith v. Com., 41 Pa. 335. It is obviously immaterial whether the illegal payment be through design or mistake, for, in either event, the result must be not only misuse of trust funds, but, what is of far more importance, demoralization in the service. The only practical difference lies in this, that one makes a criminal and the other a trustee. So it is immaterial by what officer the funds are had and received. Fidelity to the government which he represents and is sworn to support makes restitution a duty. He can plead neither laches nor estoppel in pais to a suit for malversation. Public office is a public trust

> the sanctity of public property is essential to its due administration, and necessarily implies a remedy for any diversion from legitimate use.'"

III

> Does the law fix the amount which a person may charge for preparing the financial statement for the County as provided for in Section 12165, Laws of 1935?

You are no doubt confused by the fact that in 1935 the Legislature repealed and re-enacted Section 12165, the same being enacted by the Legislature in 1933. The Legislature made no change in Section 12166, page 356, Laws of Missouri 1933, in which it is stated as follows:

> "For the preparation of the copy for the statement the court may allow not to exceed the price per hundred words and figures permitted to the clerk of the court for the writing of the record and no pay shall be allowed for pasting printed copy in the record."

We believe the above properly answers your inquiry under question III.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC