COLLECTORS: Collector who voluntarily pays part of his compensation to the county and makes final settlement, cannot thereafter recover the same.

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April 24, 1947

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Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"The County Court of Morgan County, Mo., requests an opinion on the question of whether the court can make a refund of $160.00, to Mr. O. C. Roark, the former collector of Morgan County, Mo., who overpaid the county that much money. The facts disclose that Mr. Roark as county collector in Morgan County, in March 1947, filed and submitted to the county court his final financial collector's settlement, and the same was duly approved, and Mr. Roark was given his quietus on the approval of the same. Some time afterwards in the last few days, an assistant state auditor in checking over the same, discovered that Mr. Roark had overpaid the county of Morgan $160.00. This money was paid over to the treasurer of Morgan County, Mo., and by Mr. Roark, and the treasurer apportioned some out to the school funds, the road funds, and other funds, and some of the money of course has been spent by these different political subdivisions, and probably cannot be reclaimed.

> "Mr. Roark suggested that the county court approve his request for a refund because it was his money that was paid over. The County Court has no desire to be contentious about the matter, but requested of me an opinion as to whether the same was legal to make such a refund out of the general revenues of the county."

You do not state any facts in your letter from which we may conclude that the collector paid this money over a mistake of fact. We gather from what you do state that the collector paid what he thought was due the county and retained what he thought was due him for commissions for compensation under the statute, and that later when the collector's office was audited by the State Auditor's fieldman, and after the final settlement of the collector was made and approved, the collector then, and after said audit, concluded that he had overpaid the county to the extent of $160.00.

Replying to your inquiry, we have looked up the law and find that a similar state of facts was ruled by the Supreme Court of this state in 1906 in Hethcock v. Crawford County, 200 Mo. 170. The Court, in that case, ruled against recovery by the collector from the county of excess money he had paid over to the county, and denied his recovery thereof. At pages 176, 177 and 178 the Court said:

> "The question, then, comes to this? Having without duress, misrepresentation, or any form of imposition or fraud on the part of defendant's agent, the county court, voluntarily paid this money into the county treasury on the theory it was tax money and belonged to the county treasury - that he had but rendered unto Caesar the things that were Caesar's - can he recover it back, or must he abide the event? Courts have been extremely lenient in seeing a mistake of fact, as distinguished from a mistake of law, but plaintiff has produced no case on all-fours with this one. To the contrary,

there is a live line of controlling decisions holding that under such a record, the mistake is not of fact but of law, and that money so paid voluntarily cannot be recovered back. (Claflin v. McDonough, 33 Mo. 412, and cases cited; Mathews v. Kansas City, 80 Mo. 231, and cases cited; Needles v. Burk, 81 Mo. 569; Price v. Estill, 87 Mo. 378; Norton v. Highleyman, 88 Mo. 623; State ex rel. Scotland County v. Ewing, 116 Mo. 129, and cases cited; State ex rel. Shipman, 125 Mo. 436; Corbin v. Adair County, 171 Mo. 385; Campbell v. Clark, 44 Mo. App. 249; State ex rel. v. Stonestreet, 92 Mo. App. 214.)

"If we look to the natural justice of the thing, the same conclusion should be reached. For instance, the money paid by plaintiff into the county treasury, pertaining to the road fund, presumably, has long since been spent for such purposes; the money he paid into the county treasury, belonging to the county revenue, presumably, has long since been used for the purposes prescribed by the law - that is, this tax money has been paid out and put into circulation and thus gone about doing good. There is no pretense the funds or any part of them are intact in the county treasury, and no presumption of law to that effect. The Constitution and statutes of Missouri contemplate that counties should be run on a cash basis, that the tax levies should be made with an eye to the condition of the county treasury and current demands of the county's business, and plaintiff may not disturb the county treasury of Crawford county unless he is warranted in so doing by the strict law.

"The conclusion we have reached is based on the concession to plaintiff that this suit, in its nature, is for money had and received, and, hence, must be governed by both legal

> and equitable principles. But we find no case in assumpsit for money had and received that entitles plaintiff to recover under the conditions existing here. * * * Here plaintiff had the money. He (misjudging the law) voluntarily parted with it without solicitation, misrepresentation, duress, fraud or undue influence, and, as he made his bed, so he must lie."

The above case has been cited many times. In Donovan v. Kansas City, 352 Mo. 430 (1943), our Supreme Court, en banc, cited this case as holding that the equitable principle of recovery for goods sold and used does not apply so as to justify recovery "when counter to paramount principles of law."

In State ex rel. Buchanan County v. Fulks, 296 Mo. 614, l.c. 624, the Court, in following the Hethcock case, held that if an officer misconstrued the statute it was a mistake of law and not of fact, and he was not entitled to recover the payment from the county. The Court said:

> " * * * * Under our scheme of taxation each year's levy is made to meet 'the conditions of the county treasury and current demands of the county's business and plaintiff may not disturb the county treasury of Crawford County unless he is warranted in so doing by the strict law.' (Hethcock v. Crawford County, 200 Mo. 170, 177; Dameron v. Hamilton, 264 Mo. 103, 121.) * * * *"

In State ex rel. Thompson v. Sanderson, 336 Mo. 114 (1934), our Supreme Court, in speaking of a similar question, said, l.c. 118:

> "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 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.)"

Conclusion.

Under the facts here above set forth, it is our opinion that the collector of Morgan County having voluntarily paid to the county at his annual and final settlement as collector an excess above the amount he was required to pay, and having received his quietus and there being no fraud worked on him in so doing, is not entitled to recover such excess from the county.

Yours truly,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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