

COLLECTOR--EX OFFICIO TREASURER--Required to give a new bond after  
January 1, 1937.

February 2, 1937

Hon. John B. Smoot  
Prosecuting Attorney  
Scotland County  
Memphis, Missouri



Dear Sir:

We have your letter of January 13, 1937, requesting  
an opinion of this office as follows:

"I would like to have the opinion of your  
department with regard to the sufficiency  
of the enclosed bond of the Collector of  
Revenues of Scotland County. Will this  
bond protect the funds of Scotland County  
in the hands of the ex officio County  
Treasurer in the event said County Collector  
should default in his ex officio capacity?

The bond executed by the Collector of  
Scotland County was executed in 1935 and  
at that time he was collector of revenue  
only. Now he is also ex officio County  
Treasurer. Unless the words 'and ex  
officio County Treasurer' are contained in  
the condition of said bond could not his  
bondsmen say in defense to an action to  
recover on the present bond for a default  
made by the principal as ex officio County  
Treasurer, that by the very terms of the  
bond they are obligated only in case of  
default by the principal as Collector and  
not as County Treasurer."

The 1933 Legislature provided that the county collector in all counties of less than forty thousand population and not under township organization should be ex officio county treasurer. No effort was made to abolish the office of county treasurer in such counties. The two offices, County Treasurer and County Collector, are still separate and distinct offices, but with one public official performing the duties of each. The county treasurer is required to take an oath, 12135 R. S. Missouri 1929. He shall keep his office and records in such rooms and vault as the county court provides; shall receive all county moneys and disburse same on warrant of the county court, 12136; is required to keep a warrant book, 12139; to write "paid" in ink across the face of cancelled warrants, 12123 R. S. Missouri 1929, file the same and make a register of the number and date of such warrant, 12144. Whenever a county warrant is paid by the treasurer it is his duty to cancel the same by punching round holes through the signature on the paper on which the warrant is written, 12145. For all moneys paid into the treasury he is required to issue duplicate receipts in favor of the person paying such money and to keep the books, papers and moneys pertaining to his office at all times in readiness for inspection by the county, 12149. He is required to settle with the county court semi-annually, at its first and third regular terms of each year, 12152. The county clerk is required to keep a regular account between the county and the county treasurer, 12161. Further examination of the statutes will reveal other and additional specific duties imposed by law upon the county treasurer.

An examination of some of the duties imposed upon the county collector shows that he is required to collect the revenue, give notices of when and where he will meet taxpayers in various townships for the purpose of collecting taxes, Section 9908 R. S. Missouri 1929; to furnish non-resident taxpayers with a statement of taxes, 9912 R. S. Mo. 1929; to enter all payments of taxes on his records, and to mark "paid" on the tax bill against each tract or lot of land at the time he collects the taxes thereon, 9913. The collector is empowered to seize and sell property of delinquent taxpayers for the purpose of paying such taxes, 9915. At the March term of the county court annually the collector is required to return the delinquent lists of taxes under oath to the county court, 9918. Monthly statements and payments are required from the

county collector, 9927. He is required to pay state taxes monthly to the State Treasurer, 9929. Further and additional duties relative to delinquent and back taxes are imposed upon the collector by Article IX of Chapter 59 R. S. Missouri 1929 relating to taxation and revenue.

Thus, from an examination of the statutes it is apparent that the offices of county collector and county treasurer even in counties where the elective official performs the duties of both are still separate and distinct offices--as much so as though they were filled by separate individuals.

Section 12132a, Laws of Missouri 1933, page 338, among other things provides:

"Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector."

The meaning of the above statute was to relieve the collector who went into office in 1935 from giving an additional bond as ex officio county treasurer upon assuming the duties of county treasurer in January 1937. These additional duties are imposed by law upon the county collector in the middle of his term, and approximately two years after he executed a bond solely as county collector.

The questions therefore treated in this opinion are:

- (1) The power of the legislature to alter the terms of a surety bond so as to make it cover two offices instead of one.
- (2) The liabilities of an officer and his bondsmen for the performance ex officio of the duties of another office.
- (3) The bond of the county collector after January 1, 1937.

## I.

The power of the legislature to  
alter the terms of a surety bond  
so as to make it cover two offices  
instead of one.

Section 12132a, supra, provides that on and after December 31, 1936, the county collector in certain counties shall be ex officio treasurer. The county collector is elected in the off year elections, to-wit, 1934, etc., Section 9983 R. S. Missouri 1929; his term of office is for four years. The above statute therefore went into effect in the middle of the county collector's term of office. The sureties on the collector's bond may have been willing to sign said bond to cover the principal's duties as collector but may have been unwilling to sign such bond to cover the duties of county treasurer. The legislature had the right to postpone the effective date of the 1933 act, Section 12132a supra, until after December 31, 1936. An act passed by the legislature does not become a law until its effective date. The 1933 act is to be treated as though it was passed and became effective January 1, 1937. Ordinarily the liability on a bond cannot be effected by a law passed subsequent to its execution. 9 Corpus Juris, Section 5, page 56.

The rule as to the construction of surety contracts is stated in Schuster vs. Weiss, 114 Mo. 158, l. c. 166, as follows:

"The contract of the surety is voluntary, without the expectation of profit or gain, and the law demands that he be dealt with in the utmost fairness and good faith. Brandt on Suretyship, sec. 330. The rule was stated by Judge Lumpkin in Bethune vs. Dozier, 10 Ga. 235: 'No principle of law is better settled at this day than that the undertaking of the surety, being one stricti juris, he cannot, either at law or in equity, be bound further or otherwise, than he is by the very terms of his contract; and that if the parties to the original contract think proper to change the terms of it without consent of the surety (which it is not disputed they have a right to), the surety is discharged.\*\*\*\*\*'"

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The sureties are in an entirely different position from the principal. The principal's obligation to perform the duties of county collector and ex officio county treasurer are direct obligations while those of the sureties partake of a collateral undertaking. It may be said that the sureties enter into the agreement to be bound on certain conditions, *Schuster vs. Weiss*, supra, 1. c. 173:

"Over their contract was the protection of the constitution. That contract was made with reference to the law as it then stood. In the light of that law it must be read. After it was made it was secure from any act of the legislature or amendment to the constitution impairing its obligations."

Placing a strict construction upon the bond, the sureties are only liable when made so by the express terms of the bond. There is nothing in this bond which could be construed to cover the duties of the collector as ex officio county treasurer. In *State vs. Holman*, 96 Mo. App. 193, the public administrator executed a statutory bond to cover the duties of his office. He was elected in November 1894 and gave a bond which was approved in March 1895 covering his duties as public administrator. The legislature by an act of April 11, 1895, amended the law relating to public administrators by adding thereto the office of ex officio public guardian. Thereafter a suit was instituted on the bond of Holman as public administrator to recover certain moneys which he failed to turn over as ex officio public guardian. The Supreme Court in denying liability on the bond for Holman's account as ex officio public guardian, 1. c. 202 said:

"\*\*\*\*In *State to use, etc., vs. Roberts*, it was held that 'the State can not by a legislative act, materially modify a contract between herself and a citizen, any more than she can impair the obligation of a contract between citizens.'\*\*\*\*\*"

The Court further quoted with approval the following, 1. c. 202:



"\*\*\*\*\*Every contract (which does not expressly provide to the contrary) must be considered as made with reference to the existing state of the law; and, if by the intervention of the Legislature a change is made in the law which in any degree affects the contract, such contract, made without some clear and distinct reference to the prospect or possibility of a change, does not hold with reference to the state of things as altered by the new law.'

The condition in the bond in suit is, in terms, that the 'said William A. Holman shall faithfully discharge all the duties of his office.' It was not a part of the duties of his office at that time to have charge of the estates and persons of the insane under any circumstances; and there is nothing in the bond to indicate that it was made with reference to any prospective change of the existing law.\*\*\*\*\*

In *Mix vs. Vail* (1877) 86 Ill. 40, it was held that an injunction bond must be construed with reference to the statute in force at the time of its execution, and that the liability thereon could not be changed by the passage of a statute which takes effect after the execution of the bond.

#### CONCLUSION.

It is therefore the opinion of this office that the 1933 Act of the Legislature, Laws 1933, page 338, did not and could not impose any liability upon the sureties of the county collector under the bond given by the county collector in 1935 so as to make the bondsmen liable for any defalcations made by a county collector in his capacity as ex officio county treasurer after January 1, 1937.

## II.

The liability of an officer and his bondsmen for the performance ex officio of the duties of another office.

In *People vs. Gardner*, 55 Cal. 304 (1880), a suit was instituted on a bond given by the Surveyor-General to recover certain fees collected and withheld. The surveyor-general was also ex officio register of the State Land Office. In the suit instituted on the bond of the surveyor-general, the Court excluded evidence of misappropriated moneys collected by him as ex officio register of the State Land Office. Commenting upon this phase of the case, the Supreme Court said, l. c. 306:

"We think that the court did not err in excluding the evidence of acts done by the defendant Gardner, as register of the State Land Office. Neither Gardner or his sureties were liable upon the official bond of the surveyor-general, for malfeasance in the office of the register, unless the acts of that office were part of the duties imposed upon the surveyor-general, or were provided for by the bond given by him in his capacity as surveyor-general. If the legislature had imposed these duties on the latter he would have been bound to perform them, and for non-performance he and his sureties would have been liable, for they bound themselves for the faithful performance of all duties which may have been made the appropriate functions of the office, whether made by such laws enacted prior or subsequent to the execution of his official bond; or if the legislature had provided that the bond given by the surveyor-general should include the duties required of the surveyor-general, and of the register of the land office, the sureties upon the bond of the former would be liable. But the legislature made no such provision. When it created the two offices it made them separate and distinct.

Quoting further from the same opinion, l. c. 307:

"The sureties on the bond of the surveyor-general are liable only for the non-performance of such duties as have been imposed by law upon him and come within the scope of his office."

In *People vs. Edwards* (1858) 9 Cal. 286, an action was instituted against the sureties upon the official bond of the sheriff. The bond was executed for the faithful discharge of the duties as sheriff and the breach as assigned consisted in the sheriff's failure to pay over moneys collected by him as taxes in his ex officio capacity of collector. The Court pointed out that, l. c. 292:

"the offices of sheriff and tax collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other.\*\*\*The offices are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace in the absence of the statute the obligations belonging to the other."

The Court held the sheriff liable under his bond for moneys collected as ex officio tax collector because of a statute passed prior to the giving of the sheriff's bond:

"provided that the sheriff shall be liable on his bond for his duties in the collection of taxes."

In *Cooper vs. The People* (1877) 85 Ill. 417, a suit was instituted upon the bond of a sheriff which was given to secure the performance of his duties generally as sheriff. It was contended that the sheriff as ex officio collector had failed to pay into the county treasury commissions retained by him out of the revenue for collecting it, which commissions were in excess of the compensation allowed to him by the county board. In the opinion, l. c. 418, it was held:



"The provisions of the statute under which the bond in suit was executed relate entirely to the duties pertaining to the office of sheriff, and have not the slightest reference to the ex officio duties of collecting and paying over revenue."

It appeared however in this case that the sheriff as ex officio collector was required to give a totally distinct bond for such service.

In State vs. Thomas, the Supreme Court of Tennessee (1890) 12 S. W. 1034, held that the official bond of the State Treasurer did not cover his liability to individuals for his acts as ex officio insurance commissioner.

In Houser vs. State (1915) 110 N.E. 665, an Indiana statute provided that the County Surveyor shall be ex officio drainage commissioner and shall give a bond as such in addition to his ordinary official bond. Thereafter the county surveyor, as ex officio drainage commissioner, executed a bond to secure him in the performance of his duties as drainage commissioner, and thereafter was designated commissioner of construction for drainage work without giving a new bond as such commissioner of construction. He committed a default while acting in the latter capacity. It was held that the drainage commissioner's bond did not cover the default as commissioner of construction, the two offices being distinct and separate.

To the same effect is State vs. Holman, supra.

#### CONCLUSION.

It is therefore the opinion of this office that the county collector's bondsmen now are liable only for the non-performance of his duties as county collector; that the sureties on such bond are not liable for the non-performance of the collector's duties as ex officio county treasurer unless the bond given specifically covers such ex officio duties.

## III.

The bond of the County Collector  
as January 1, 1937.

It has always been the policy of this state to require all collectors of revenue, and all county treasurers to give bonds covering such funds as may come into their official custody. Section 12132a, Laws of Missouri 1933, page 338, among other things provides:

"Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector."

The apparent meaning of this language is that the collector shall not give two bonds, one as county collector and one as ex-officio county treasurer. It means either first, that the county collector shall perform the duties of ex officio county treasurer without bond, or second, that his bond as county collector shall be extended to cover his duties as ex officio county treasurer. To construe the statute in the second alternative is to assume, contrary to the great weight of authority, that the liability of sureties is eternally flexible and at the will of the legislature is capable of being woven about the universe. To so construe the statute would be to allow the ex officio county treasurer to handle such funds without the protection of a bond, a result that has always been opposed to public policy and never intended by the legislature. The legislature intended by this act to extend the collector's bond to his duties as ex officio county treasurer, so that the moneys officially coming into his hands as county treasurer would be protected. We have heretofore pointed out why that cannot be done! While statutes in force become a part of the statutory bond, and such bonds are construed as though such statutes were written therein, *Zellers vs. Surety Company*, 210 Mo. 86, *Fogerty vs. Davis*, 264 Mo. 879, yet the bond cannot be enlarged by implication. The enclosed bond is not sufficient to cover the collector's duties as ex officio county treasurer. We recommend the following form of bond for county collectors who also are ex officio county treasurers:

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## "BOND.

KNOW ALL MEN BY THESE PRESENTS, that we,  
\_\_\_\_\_, as Principal, and  
\_\_\_\_\_, as sureties, are  
held and firmly bound unto the State of Missouri  
in the sum of \_\_\_\_\_ Dollars,  
for the payment of which we hereby bind ourselves,  
our heirs, executors, administrators and assigns,  
jointly and severally and firmly by these presents;

The condition of this bond is such, that  
whereas the said \_\_\_\_\_, was on the  
\_\_\_\_\_ day of November 1934, duly elected to the  
office of collector of revenue within and for the  
county of \_\_\_\_\_, and on January 1, 1937,  
became ex officio county treasurer of said county,  
in the State of Missouri, and has been duly  
commissioned as such county officer;

NOW THEREFORE, if the said \_\_\_\_\_  
shall faithfully and punctually as county collector  
collect and pay over all state, county and other  
revenue for the four years from and after the first  
day of March 1935, and shall faithfully keep,  
account for or faithfully disburse all moneys, bonds  
or securities received by him as ex officio county  
treasurer and in all things faithfully perform all  
the duties of his said office of collector and ex  
officio county treasurer, according to law, then this  
bond shall be void; otherwise to remain in full force  
and effect. This bond is given in lieu of the pre-  
ceding bond heretofore executed and is made subject  
to any and all laws now or hereafter enacted, re-  
lating to the the office of county collector and  
ex officio county treasurer.

WITNESS our hands and seals at the said county  
of \_\_\_\_\_, in the State of Missouri, this  
\_\_\_\_\_ day of \_\_\_\_\_, 1937.

\_\_\_\_\_  
Principal.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Sureties."

Section 9992 R. S. Missouri 1929, provides that the county court shall examine the collector's bond at the end of the first year of his term of office, to-wit, March 1, 1936; that the county court may again examine said bond at any time before the tax books for the second year of his term shall be delivered to him. We judicially notice that the tax book for the second year of the collector's term of office have not as yet been delivered to him. The county court may now examine the collector's bond to ascertain whether or not it is sufficient. Under Section 2848 R. S. Missouri 1929, a general power is vested in all county courts to examine the collector's bond.

In an opinion heretofore written by this office dated January 23, 1934 to Hon. Joseph M. Bone, Jr., Prosecuting Attorney, Audrain County, Missouri, it was held that the county court has ample authority to inquire at any time into the sufficiency of the county collector's bonds and if in the opinion of the county court said bond is insufficient, then the county court may require the collector to give a new bond.

#### CONCLUSION.

It is therefore the opinion of this office that it is now the duty of all county courts to examine the bond of county collectors to ascertain whether or not it is sufficient; that in counties where the county collector is now ex officio county treasurer the bond of the county collector must be broad enough to specifically include all of his duties as ex officio county treasurer; that if the collector's bond is not so worded, then under the law it is insufficient, and the county court should make an order requiring the county collector to execute a new bond as county collector broad enough to cover his duties as ex officio county treasurer.

Respectfully submitted,

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APPROVED:

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