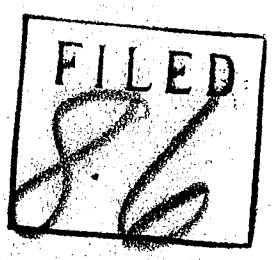
COUNTY COLLECTORS: Limitation on amount of commission of ex officio collectors in township organization counties in Section 52.270, RSMo 1949, not unconstitutional.



September 8, 1955

Honorable Christian F. Stipp
Member, House of Representatives
Carrollton, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request, condensed somewhat for purposes of brevity, reads as follows:

> "I respectfully request your opinion concerning the liability of a County Treasurer and Ex-Officio Collector, under the following circumstances, for alleged excess commissions retained by him for the collection of taxes.
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> "In 1954 and 1955, the County Treasurer and Ex-Officio Collector in a county operating under the township organization form of government made his final settlement with the county court and fully reported all the taxes chargeable against and collected by him for the year 1953 and 1954, respectively. This settlement shows that he retained fees and commissions in excess of the amount set out in Section 52.270, R.S. Mo. 1949. He also made settlement with the State of Missouri for the year 1953. He submitted his accounts and vouchers for the year 1954 to the State of Missouri and settlement has not been made with the state.
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> "The State of Missouri now seeks recovery from said County Treasurer and Ex-Officio Collector for its share of such alleged excess commissions

> "There is no basis for a charge of fraud, collusion or mistake of fact in the settlements.
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> "Question No. 1. Can the County Treasurer and Ex-Officio Collector now be required to pay to the county a sum equal to the county's share of the amount of commissions and fees retained by him in excess of the amount set out in Section 52.270, R.S. Mo. 1949?
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> "Question No. 2. Can the County Treasurer and Ex-Officio Collector now be required to pay to the State of Missouri a sum equal to the State's share of the amount of commissions and fees retained by him in excess of the amount set out in Section 52.270, R.S. Mo. 1949?"

Inasmuch as this matter concerns accounts between the county treasurer and ex officio collector and the state collector of revenue, we have taken the liberty of discussing with Mr. Croy of the County Department of the Office of Collector of Revenue the circumstances surrounding the allowance of the excess commissions to the treasurer involved. We are advised that prior to the increase in compensation of the county treasurer and ex officio collector in township organization counties made by an amendment of Section 54.320, Laws of Missouri, 1951, page 377, which became effective for the term of such officials beginning March 1, 1953, there had been no question of the commissions of the ex officio collectors in counties under township organization exceeding the limitation fixed by Section 52.270, RSMo 1949. With the increase in commissions and the increased public utility taxes collected by such officials, the commissions claimed by the ex officio collectors in five counties for taxes collected during the year 1953 exceeded the maximum allowed under Section 52.270. In examining the settlements of these ex officio collectors, the state collector of revenue overlooked the fact that the limits of Section 52.270 were applicable. On June 28, 1954, Mr. Croy wrote the collector of the county with which you are concerned as follows:

> "A check of your annual settlement on state taxes and licenses for the year ending February 28, 1954, has been made and it is found to conform to the reports and records

> filed in this department, with all amounts due the state, as ascertained on said settlement, being paid into the state treasury."

Sometime later, the attention of the Department of Revenue was called to the fact that Section 52.270 by its terms limited the amount of commission which the county treasurer and ex officio collector in township counties was entitled to retain. On February 11, 1955, the Director of Revenue requested an opinion of this office on the question of whether or not the limitations contained in that section were applicable to such officials. This office, on March 2, 1955, rendered an opinion holding that such limitations were applicable. Shortly thereafter, on March 29, 1955, Mr. Croy called at the office of the county treasurer and ex officio collector of the county with which you are concerned. The treasurer was absent at the time, but Mr. Croy did advise the deputy in the office of the fact that the treasurer's commissions were subject to the limitations contained in Section 52.270. Apparently this information was conveyed to the treasurer, inasmuch as you subsequently called Mr. Croy in his behalf, inquiring regarding the matter. All of the foregoing transpired before the collector's settlement for the year 1954 had been filed with and approved by the county court on May 9, 1955.

Despite the advice of the representative of the office of collector of revenue to the treasurer that the limitations of Section 52.270 were applicable, that official took credit on his 1954 settlement for all commissions received by him without limitation. His theory in doing so is not known. He did indicate to Mr. Croy that he had been advised that Section 52.270 was unconstitutional as applied to him because in its enactment the bill related to more than one subject. However, whether the collector acted on that basis is not known to us. Furthermore, we have no knowledge of what transpired between the treasurer and the county court when the settlement was presented to them. We do not know whether or not the treasurer advised the county court of the fact that he had been informed that his commissions were subject to the limitations contained in Section 52.270, and, if so, what reason, if any, the county court assigned for ignoring provisions of that section.

A copy of the settlement was submitted to the collector of revenue on May 11, 1955, and he refused to approve it, demanding that the treasurer remit to the state the excess commissions retained by him. To date, the treasurer has refused to remit such excess commissions charged by him against the state. We might note that the ex officio collectors of two other counties similarly situated remitted the excess commissions to the state for both 1953 and 1954 upon request of the collector of revenue.

The Supreme Court of this state has had occasion to consider the effect of the approval of a collector's settlement by the county court on the right of the county and state to regain excess fees retained by the collector and shown on the face of his settlement. In the case of State ex rel. Scotland Co. v. Ewing, 116 Mo. 129, l.c. 137, the court said:

> "County courts are, by statute, given full power and authority to make the final settlement with the collectors of their respective counties, which includes the allowance of their commissions, and, after the amount found due on such settlement has been paid to the treasurer, the clerk of such court is empowered to give a discharge and 'full quietus' under the seal of the court. Now while these settlements do not have the conclusiveness of judgments, no reason can be seen why they should not be given the force of settlements between private persons. The 'full quietus' to which the collector is entitled implies that some verity should be given to the settlements. * * *
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> "In the case at bar the facts were all before the court and as to them no question seems to have been raised. The error was in the decision of the court as to the amount of the collector's commission. The settlement was approved, the excessive commission allowed, and a full quietus given. No attempt was made on the trial to show fraud or mistake of fact in making or approving the settlement. Indeed defendants offered to take the burden of proving that the amount of commission was fully discussed and that the amount agreed upon was believed to be what was due under the statute.
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> "No fraud, collusion, or mistake of fact, having been shown, we think the circuit court correctly held the settlement binding on the county and its judgment is affirmed. * * *"

This holding was followed in the case of State ex rel. Lawrence County v. Shipman, 125 Mo. 436, 28 S.W. 842. The most

recent exposition of this rule which we find was in the case of State ex rel.Thompson v. Sanderson, 336 Mo. 114, 77 S. W. (2d) 94, decided by the Supreme Court in 1934.

However, this doctrine has not been wholly unquestioned. In the case of Lamar Township v. City of Lamar, 261 Mo. 171, the court discussed the question of the effect of payment by a public official of public funds under mistake of law. In that case the court stated, 261 Mo. l. c. 186:

> "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. * * *
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> "Certainly in a case like this of dealings 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, <u>especially when made to another officer</u>, may be recovered back.' * * *"

The court further stated, 261 Mo. l. c. 189:

> "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."

In that case the court discussed the above-cited cases, stating, 261 Mo. l. c. 190:

> "The other cases of Scott Co. v. Leftwich, 145 Mo. l. c. 34; State ex rel. v. Shipman, 125 Mo. 436; State ex rel. v. Ewing, 116 Mo. 129; and State ex rel. v. Hawkins, 169 Mo. 615, were all cases of settlements made by the county with county officers, i.e., circuit clerks, and county collectors. Formal settlements intervened, which settlements were set down upon the solemn records of a court of record. The shadowy reason behind the holdings in these cases smacked of the doctrine of res adjudicata, and accord and satisfaction. * * *"

We feel that the court in the Lamar case pointed out the essential basis of the decisions in the Shipman and Ewing cases, i.e., res judicata. The settlements there involved had been approved by a court of record and spread upon the record by such court. However, county courts are no longer courts of record; they were deprived of that status by the 1945 Constitution. They no longer exercise judicial functions and are now mere agents for conducting the county's affairs in accordance with law. Consequently, it appears that the primary basis of the decisions in the Shipman and Ewing cases no longer exists.

Even if these cases are still to be followed, we feel that we are in no position to pass upon the question of whether or not

the county is entitled to recover the excess commissions retained for the years 1953 and 1954. We do not know, as above pointed out, all of the facts and circumstances surrounding the approval of the settlement by the county court for such years. Insofar as 1953 is concerned, we have no knowledge whatsoever of the surrounding circumstances. Perhaps both the collector and county court were ignorant of the fact that the limitations of Section 56.270 were applicable. In that event, the doctrine of the Shipman and Ewing cases might well prevent a recovery by the county of such excess fees.

Insofar as the year 1954 is concerned, circumstances indicate that the collector was aware of the application to him of the limitation contained in Section 52.270 at the time of the settlement, yet he saw fit to ignore it. The status of the court's knowledge is an unknown factor with us. However, it appears to us that since the collector was aware of the limitation and chose to ignore it, he would be in a position of overreaching if he failed to call the matter to the court's attention and should not be entitled to retain the benefits of such action. If, on the other hand, the limitation was called to the court's attention and the court chose to ignore it, such would not, in our opinion, constitute a mistake of law. As the court pointed out in the Lamar case, public officers "are trustees as to the public money which comes to their hands." The funds here involved were public funds and in dealing with them the county court occupied the position of trustee and could not ignore the limitations imposed by law in their dealing with such funds. As for the problem of constitutionality, the county court obviously would have no right to pass upon the constitutional question if it had been presented to them. State ex rel. Board of Mediation v. Pigg, 244 S. W. (2d) 75, 78.

Insofar as the right of the state to obtain repayment is concerned, we are of the opinion that there has been no formal settlement by the state with the collector for 1953 taxes, such as was involved in the Ewing and Shipman cases. The letter from the county supervisor merely advised the collector that the amounts shown on his settlement as having been paid to the state had been in fact deposited in the state treasury. This does not, in our opinion, constitute a formal settlement of the account such as to preclude the state's claim to the excess commissions retained.

Insofar as 1954 is concerned, there has been no approval in any respect of the settlement submitted and demand has been made for the payment of the excess commissions. The only basis suggested by you for holding that the collector is entitled as

a matter of law to retain all of the commissions received by him without limitation is that Section 52.270, insofar as it applies to county treasurers and ex officio collectors in counties under township organization, is in violation of Section 23 of Article III of the Constitution of Missouri, which provides, in part: "No bill shall contain more than one subject which shall be clearly expressed in its title, * * *." A similar provision was found in Section 28 of Article IV of the 1875 Constitution.

The provisions of Section 52.270 limiting the amount of commissions which the treasurer and ex officio collector in township organizations might retain was first inserted in an act found in Laws of Missouri, 1933, page 454. Prior to that time the corresponding section of the Revised Statutes of 1929, Section 9935, contained a provision "that this section shall not apply to any county adopting township organization." The title of the 1933 act read as follows:

> "AN ACT to repeal section 9935 of Article 8, Chapter 59, Revised Statutes of Missouri, 1929, entitled 'Collectors and the Collection of Taxes,' and to enact a new section to be known as Section 9935 pertaining to the same subject: Providing for the rate of per cent which county collectors may charge for the collection of taxes; for the classification of counties for the purpose of fixing such rate of per cent, and limiting the total amount of compensation of such collectors and also of county treasurers and ex-officio collectors in counties under township organization." (Emphasis supplied.)

That act contained the following provision presently found in Section 52.270:

> "* * * provided, however, that this section shall not apply to any county adopting township organization, so far as concerns the rate of per cent to be charged for collecting taxes, but shall apply to counties under township organization so far as to limit the total amount of fees and commissions which may be retained annually by the county treasurer and ex-officio collector for collecting taxes in such counties; * * *"

There can be no question that the title to the 1933 bill clearly revealed that it imposed a limitation upon the amount of commissions which might be retained by the county treasurer and ex officio collector in township organization counties. It could hardly have been more clearly stated than was done in the title. Whether or not the enacting clause made similar reference would be immaterial inasmuch as there is no requirement that the enacting clause set out in full the subject matter of the act. Therefore, the only question is whether or not the 1933 amendment engrafted upon Section 9935, R.S.Mo. 1929, a provision not germane to the original purpose of the section.

You have pointed out that Section 9935, R.S.Mo. 1929, was found in Article VIII, entitled, "Collectors and the Collection of Taxes," of Chapter 59, entitled, "Taxation and Revenue," of the Revised Statutes of 1929. No provision was found in that article relating to the compensation of county treasurers and ex officio collectors in counties under township organization. This was found in Section 12316 of Article 11, entitled,"County Treasurers as ex officio Collectors," of Chapter 86, entitled, "Township Organization," of the Revised Statutes of 1929. You state that "there was * * * absolutely no connection between Article 8 of Chapter 59 and Article 11 of Chapter 86, R.S.Mo. 1929." With this we must respectfully disagree. Section 12312 of Article 11, Chapter 86, R.S.Mo. 1929, expressly provided that the county treasurer and ex officio collector in counties under township organization should have the same power in the collection of certain taxes as vested in the county collector under the general laws of the state. Thus, obviously Article 11 of Chapter 86 required reference to Article 8 of Chapter 59 to ascertain the extent of the authority of the treasurer and ex officio collector in township organization counties. Article 11 of Chapter 86 did not purport to set up a complete scheme for the performance of the duties of the ex officio collector.

However, the problem essentially is whether or not the inclusion in Section 9935, R.S.Mo.1929, of a provision limiting the commission which the treasurer and ex officio collector in township organization counties might retain was germane to the remainder of the section which dealt with the maximum commissions which might be retained by collectors in other than township organization counties. In our opinion, the matters are germane to the same general subject of compensation for services for the collection of taxes. Such was the over-all object of the section. To include county treasurers and ex officio collectors in township organization counties in the same section with county collectors generally certainly would not appear to be so foreign

to the over-all subject as to require its enactment in a separate act of the Legislature.

In 1948 the Legislature enacted a bill imposing a tax upon the use of the highways by motor vehicles. Laws of Missouri, 1947, Volume II, page 431. The bill was enacted as an amendment to the sales tax act. In the case of State ex rel. v. Bates, 359 Mo. 1002, 224 S. W. (2d) 996, the validity of the act was attacked on the grounds that it violated Section 23 of Article III because it contained unrelated and incongruous subjects, to wit, the sales tax and a use tax. The court denied this contention, stating, 224 S. W. (2d) l. c. 998:

> "Are sales taxes and use taxes on motor vehicles so incongruous and unrelated as to subject matter that, included in a single statute the prohibition of Section 23 of Article III is here violated?
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> "We have uniformly given a broad and reasonable construction to Section 23 of Article III of the Constitution which declares that no bill shall contain more than one subject which shall be clearly expressed in the title. State ex inf. McKittrick v. Murphy, 347 Mo. 484, 148 S.W.2d 527, Thomas v. Buchanan County, 330 Mo. 627, 51 S.W. 2d 95. And while that section of the Constitution is mandatory and subjects having no legitimate connection or natural relation cannot be joined in one bill, yet if the subjects covered by an Act are naturally and reasonably related, and have a natural connection with each other then the subject is single. Thomas v. Buchanan County, supra; Edwards v. Business Men's Assurance Co., 350 Mo. 666, 168 S.W.2d 82. It is not required that every separate tax or every separate legislative thought be in a different bill, but it is sufficient if the matters in an Act are germane to the general subject therein. * * *
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> "* * * We hold that under the instant circumstances the use tax on motor vehicles

> is legitimately connected and naturally related to the subject of sales taxes. Each tax is a related portion of a comprehensive tax system. A complementary use tax on motor vehicles enacted as an amendment of a same purpose Sales Tax Act did not violate the constitutional provision. Each is clearly germane to the other." (Emphasis supplied.)

There is a natural and reasonable relation between a limitation upon the compensation of county collectors generally and that of county treasurers and ex officio collectors in counties under township organization. Both relate to the same general subject of the amount of compensation which may be retained by officials charged with the responsibility for collecting taxes. In our opinion, the amendment of 1933 was germane to the original act and did not violate the constitutional prohibition against the inclusion of more than one subject in the same bill.

CONCLUSION

Therefore, it is the opinion of this office that a county treasurer and ex officio collector in a county under township organization who has retained commissions on taxes collected on behalf of the state in excess of the limitations contained in Section 52.270, RSMo 1949, is liable to the state for the return of such excess commissions. Insofar as liability to return such excess commissions to the county is concerned, it must be determined on the basis of all facts and circumstances surrounding approval by the county court of the collector's settlement. Where, however, the collector has been advised of the fact that his commission is subject to limitation and ignores such limitation, and the county court also ignores such limitation, the collector is liable for the return of such excess commissions.

We are further of the opinion that the inclusion in Section 52.270, RSMo 1949, of a limitation upon the amount of commissions which may be retained by the county treasurer and ex officio collector in township organization counties does not violate the provisions of Section 23 of Article III, Constitution of Missouri, 1945.

Honorable Christian F. Stipp

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

John M. Dalton
Attorney General

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