

SALES TAXES: Constable may not refuse to serve execution until he is paid for such service. A refusal to serve the same when it is delivered to him would render him and his bondsmen liable.

February 13, 1940.

Mr. W. G. Marbury
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Dear Mr. Marbury:

We desire to acknowledge your letter of February 8, 1940, addressed to Mr. Joseph A. Lennon, which reads as follows:

"In attempting to administer the Sales Tax Act, we are confronted in some instances with the question which I feel should be called to your attention. It is necessary to relate the matter rather hypothetically to give you the full import of the situation.

"One of the inspectors or auditors working out of the local Sales Tax Office in St. Louis will call upon a merchant and arrive at an additional assessment of sales tax, or a delinquency where the merchant has failed to pay any tax. After arriving at a delinquency the inspector or auditor attempts to effect a collection at that time. In some cases the taxpayer tells the inspector that he will prefer that the assessment be run and the matter certified to the Attorney-General's office and judgment secured thereon for he knows of his own knowledge that in the great majority of cases no execution is ever run on delinquent Sales Tax judgments.

"This is the problem which I think needs to be called to your attention. It both complicates the administration of the Act in this

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office and reflects upon the efficient operation of your good office, which I feel is not responsible for the condition.

"I have, myself, personally called upon Mr. Bockius in your office to run certain executions and have been informed by Mr. Bockius that in some cases he has great difficulty in getting the Constable to act unless costs are posted for the services rendered in running an execution. I am of the opinion that inasmuch as the State of Missouri is the holder of the judgment and that inasmuch as the Constable is performing a duty for and in behalf of the State, it is not imperative that costs of the execution be posted or guaranteed, and I know of no funds, either in the Attorney-General's office or in the State Auditor's office, which can be used for that purpose.

"As a result of this complication and misunderstanding on the part of many, I feel that it would be timely on your part to render or secure an opinion from the Attorney-General's Office in regard to the obligation of the Constable and I would appreciate it personally if you would cause Attorney-General McKittrick, whom I am sure we can depend upon for the utmost cooperation, to issue an instruction under his signature to the various constables of the City of St. Louis that executions on Sales Tax judgments here in the City should receive prompt attention by the various Constables.

"Assuring you of my constant cooperation and thanking you for your help and splendid attitude in the past, I remain,"

The rule as to compensation of a public officer, in a case wherein a County Collector sought fees not provided by statute, is stated in *King v. Riverland Levee District*, 279 S. W. 195, 196, as follows:

"It is no longer open to question but that compensation to a public officer is a matter of

statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. State ex rel. Evans v. Gordon, 245 Mo. 12 Loc. Cit. 27, 149 S. W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504. Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans v. Gordon, supra."

The same rule was restated in Nodaway County v. Kidder, 129 S. W. (2nd) 857, 860, wherein the court quoted a part of the above citation and added:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

In said decision the court, at l. c. 861, further said:

"The rule is stated in 15 C. J. 509, Sec. 176, as follows: 'Money paid to a county officer to which he is not entitled by law may be recovered back, without previous demand, in an action for money had and received instituted by the county.'

"The rule is also stated as follows: 'As a general rule any compensation paid to a public official by the state or other governmental body not authorized by law, or in excess of the compensation authorized by law, may be recovered by the proper governmental body * * *.' 46 C. J. 1030, Sec. 285."

The rule is further stated in the case of State ex rel. Bradshaw v. Hackmann, 276 Mo. 600, 607, wherein the court says:

"We approach the examination of the question whether the State is liable to pay the relator's account for traveling expenses incurred by him in going to and returning from Washington, D. C., with the axiom, several times ruled by us to be fundamental, 'that no officer in this State can pay out the money of the State, except pursuant to statutory authority authorizing and warranting such payment.' (State ex rel. Bybee v. Hackmann, 276 Mo. 110; Lamar Twp. v. Lamar, 261 Mo. 171.) The only exception to this rule (and it is not in fact an exception) is 'that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties effectual, is conferred by implication.' (State ex rel. Bybee v.

Hackmann, supra.) Under this rule we perforce must look to the statutes which created the office of Warehouse Commissioner and which prescribe his duties for authority to make our writ peremptory. It we find no such authority, either express, or which arises from such necessary implication as is above defined, it is manifest that we are without power to compel respondent to audit relator's expense account, for expenses incurred by him in going to and returning from Washington. * * * "

The Sales Tax Laws of 1935-7-9 provide a complete scheme of assessment, levy and collection of delinquent sales taxes. Do either of such laws contain a statute that may be pointed out by a constable, as authorizing, expressly or impliedly, payment or compensation from public funds for the official duties of such officers exercised in the collection of such delinquent taxes? We are unable to find such provision.

In event such laws do not provide for the payment of such fees and such officers were to obtain fees for such services - under the above rule - restoration of the fees illegally obtained could be compelled by suit for money had and received instituted by the county for,

" * * * When a public official wrongfully receives public funds, although paid to him under an honest mistake of law, he must restore such funds, Lamar Township v. City of Lamar, 261 Mo. 171, 187, 169 S. W. 12; State ex rel. Barker v. Scott, 270 Mo. 146, 153 192 S. W. 90; State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 536; State ex rel. Jarvis v. Dearing, Mo. App., 274 S. W. 477; Atchison County v. DeArmond, 60 Mo. 19."

Section 1220 R. S. Mo. 1929, is as follows:

"If any officer to whom any execution shall be delivered shall refuse or neglect to execute or levy the same according to law, or shall take in execution any property, or any property be delivered to him by any person against whom an execution is issued, and he shall neglect or refuse to make sale of the property so taken or delivered, according to law, or shall make a false return of such writ, then, in any of the cases aforesaid, such officer shall be liable and bound to pay the whole amount of money in such writ specified, or thereon indorsed and directed to be levied; and if such officer shall not on the return of such writ, or at the time the same ought to be returned, have the money which he shall become liable to pay as aforesaid before the court, and pay the same according to the exigency of the writ, any person aggrieved thereby may have his action against such officer and his sureties upon his official bond, or may have his remedy by civil action against such officer in default."

Section 1221 R. S. Mo. 1929, is as follows:

"If any officer to whom any execution shall be delivered shall not return the same according to law and the command of the writ, such officer and his sureties shall be liable to pay the damages sustained by such default, to be recovered by the party aggrieved, by action upon the official bond of the officer, or by civil action against such officer."

In the case of *The People v. Johnson*, 14 Ill. 342, the court, in construing the right of the state to collect

a judgment under general statutory provisions, in following a rule stated in Corpus Juris, said:

"The statute authorizes process of garnishment to issue whenever an execution is returned no property found, and an affidavit is made that the defendant has no property in possession liable to execution, and there is just reason to believe that another person is indebted to him, or has in his hands effects belonging to him. R. S. ch. 57, Sec. 38. This provision is general, and applies to all judgments. It clearly embraces a judgment in favor of the State. The State has the same rights, and is entitled to the same remedies, as any other judgment creditor. * * * "

Section 31 of the Laws of Mo. 1939, at page 868, provides:

" * * * and in every such suit the process, pleadings and practice shall be except as in this Act otherwise specifically provided, according to the provisions of the Code of Civil Procedure."
(Underscoring ours)

Section 33 of the Laws of Mo. 1939, is as follows:

"It is expressly provided that the foregoing remedies of the State shall be cumulative, and that no action taken by the Auditor or the Attorney-General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this Act."

Mr. W. G. Marbury

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CONCLUSION

Therefore, it is the opinion of this department that a constable may not collect costs from the state for his official services with reference to sales tax cases and may not refuse to perform such official statutory services until such costs are paid by the state. It is further our opinion that the state has the same right, and is entitled to the same remedies, as any other judgment creditor and that when an execution is delivered to the constable, for the collection of sales tax, and he refuses to perform his official duty, he and his sureties become liable to pay the damages sustained by such default.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

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