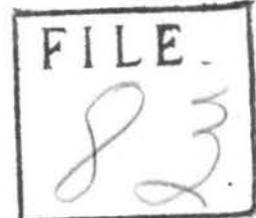


FEEES: TAXATION: - Witnesses and jurors in criminal cases must furnish evidence of no indebtedness to state or county before paid by treasurer.

February 6, 1942

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated January 29, 1942, which reads as follows:

"Our audits have disclosed that a number of counties of the state are paying no attention to Sec. 4249 R. S. MO. 1939 relative to paying witness fees in criminal cases; also to the method of paying jurors. We find that a number of jurors and witnesses are receiving fees when indebted to both the state and county for several years delinquent taxes.

"I would like an opinion as to whether a juror or witness may be paid money from the county treasurer when it is shown on the tax books of that county that they have delinquent state and county taxes charged against them.

"Second, I would like an opinion as to whether the County Treasurer is liable on his bond for the payment of money to jurors or witnesses who are indebted to the state or county for delinquent taxes."

Section 4248 R. S. Missouri, 1939, prescribes the method of certification and payment of criminal cost fee bills.

Section 4249 R. S. Missouri, 1939, reads as follows:

"The county treasurers shall pay out all such fees to the proper owners as the same may be called for: Provided, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he or she, as the case may be, is not at the time indebted to the state or county, on account of delinquent back taxes, or is indebted to the state or county on account of any fine, penalty, forfeitures or forfeited recognizances, or costs for a violation of any criminal statute of this state, or for contempt of any court, no matter if the same shall have been paid by oath of insolvency as provided by law; or is indebted to the state or any county on account of any funds coming to his hands by reason of any public office: Provided further, that after deducting the amount of the indebtedness of the claimant, if any, on account of any or all of the various causes hereinbefore enumerated, the treasurer shall pay him the balance, giving duplicate receipts for the separate amounts paid, one of which shall be filed with the county clerk, who shall charge the treasurer with the same, but if the indebtedness of the claimant equals or exceeds the amount of his fees, the treasurer shall give him credit for the amount of his fees, stating on what account, and shall make duplicate receipts for the same, one of which he shall deliver to the claimant and the other he shall file

with the county clerk, who shall charge the treasurer with all such receipts, and in his regular settlements with the county court the treasurer shall make a full and complete exhibit of all his acts and doings under section 4248 to 4252, inclusive."

Section 4249, supra, refers to Section 4248 which section only prescribes the method of payment of criminal cost fee bills. Section 4249, supra, specifically prescribes that the county treasurer shall pay out all of the fees as described in Section 4248 to the proper owner as the same may be called for. The first provision in Section 4249, supra, specifically states that before any such fees shall be paid to the party to whom the same is due shall furnish certain satisfactory evidence to the treasurer. The evidence required, before the treasurer shall pay the proper owner of such fees, is satisfactory evidence first that the party is not indebted to the state or county on account of delinquent back taxes, or is not indebted to the state or county on account of any fine, penalty, forfeitures or forfeited recognizances or costs for a violation of any criminal statute of this state, or for contempt of any court, even if the same had been satisfied by oath of insolvency; or is indebted to the state or county on account of funds coming to his hands by reason of holding a public office. The above provisions state delinquent back taxes, but this does not apply to real estate taxes, for the reason that the owner of property is not personally liable for delinquent real estate taxes. The taxes referred to are personal taxes, where a judgment may be had against the taxpayer personally, and is not a tax that is a lien against his real estate.

It is very noticeable that the word "shall" is used. "Shall", as a general rule, means that it is mandatory upon the officeholder to comply with that part of the section. It was so held in the case of State v. Wymore, 119 S. W. (2d) 941, Pars. 7-10, 343 Mo. 98, 119 A. L. R. 710, where the court said:

"* * * On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory. * * * "

In Section 4249, supra, although it is mandatory that the county treasurer pay out such criminal cost fees to the proper owner, yet, there are certain methods prescribed before he shall pay out such fees. The methods set out in Section 4249 relate to the essence of that section, and specifically states that the procedure must be followed.

In the case of Morris et al. v. Karr et al, 114 S. W. (2d) 962, 1. c. 964, the court, in holding that a provision was mandatory under such a statement of facts said:

" * * * As said in State ex rel. Ellis v. Brown, 326 Mo. 627, 33 S. W. 2d 104, 107, quoting from 25 R. C. L. par. 14: 'Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' * * * "

Section 4249, supra, specifically excludes the payment of such criminal cost fees to the proper owners unless they comply with certain provisions as described in said section. The method is specifically set out in the section

as to how the criminal cost fees should be paid to the proper owners and that is the only method that can be used by the county treasurer. It was so held in the case of Kroger Grocery & Baking Co. v. City of St. Louis, 106 S. W. (2d) 435, 1. c. 439, 341 Mo. 62, 111 A. L. R. 589, where the court said:

" * * * that when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim expressio unius est exclusio alterius, and 'forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out'); State ex rel. v. Clifford, 228 Mo. 194, 207, 128 S. W. 755, 758, 21 Ann. Cas. 1218."

Section 4250 R. S. Missouri, 1939, reads as follows:

"All fees due witnesses before the grand jury, and all fees due jurors in any criminal case, and all fees accruing in any inquest case where the verdict of the jury is that the deceased came to death by other than unavoidable accident or natural causes, shall be deemed criminal costs, and shall be paid in like manner and shall be subject to all the offsets herein provided for."

This section defines the fees that are considered criminal costs.

It is customary in many counties for the fees described in Section 4248, supra, to be assigned to persons who claimed to be innocent holders and are not aware of

the witness, juror, or other person owing delinquent taxes or other obligations to the county. The Legislature saw fit to define such persons as being not innocent holders for failing to inquire if the original purchaser owed any taxes, by enacting Section 4252 R. S. Missouri, 1939, which reads as follows:

"In order to make said sections 4248 to 4252 effective, it is hereby declared that all fees due by the state or county on account of any criminal case, or due witnesses before the grand jury, or as a juror or witness in an inquest, shall not be negotiable or assignable except subject to all the set-offs herein provided for, and that the state and county holds a prior lien on the same for the purpose of indemnification against loss by reason of the nonpayment of personal back taxes, and for the payment of the fines, penalties, forfeitures and costs hereinbefore mentioned."

The above section specifically sets out: " * * * by reason of the nonpayment of personal back taxes, * * * ." There has been some complaint on the part of county treasurers because, as set out in Sections 4248 and 4249 R. S. Missouri, 1939, before they can pay any other fees to a person who is entitled to same as a witness, juror or other legal party to a criminal cause, it is necessary to obtain satisfactory evidence that the party was not indebted to the state or county as set out in Section 4249, supra. In order to protect himself, the county treasurer should require either an affidavit, from the person who receives the check from the treasurer as to the indebtedness of the original person, or else, he should personally check all of the accounts set out in the first provision of Section 4249, supra.

CONCLUSION

It is, therefore, the conclusion of this department, that Section 4249 R. S. Missouri, 1939, is mandatory and the county treasurer should not pay any juror or witness when it is shown on the tax books of that county that he has delinquent state and county taxes charged against him, or that he is indebted to the state and county under the other section of the first revision of Section 4249 R. S. Missouri, 1939.

Your second question relates to the question of whether or not the county treasurer is liable on his bond for the payment of money to jurors or witnesses who are indebted to the state or county for delinquent taxes and other obligations as set out in the first revision of Section 4249, supra.

Section 13795 R. S. Missouri, 1939, reads as follows:

"The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

Under the above section the treasurer must enter into a bond to the county in a certain amount and with certain sureties, conditioned for the faithful performance of the duties of his office. Since we have held that Section 4249, supra, is mandatory, and it is the duty of the county treasurer to comply with said section before paying out

the fees described in Section 4248, without satisfactory evidence that the person who appeared as a witness or juror in a criminal case which would entitle him to receive fees, then upon failure to comply with that section he is not faithfully performing the duties of his office and would be liable upon his bond for any void payment of such fees without following the procedure as set out in said Section 4249 R. S. Missouri, 1939.

That the treasurer would be liable on his bond for not faithfully performing the duties of his office was held in the case of State v. Blakemore, 205 S. W. 626, l. c. 628, 275 Mo. 695, where the court said:

"It is insisted the bond does not cover drainage district funds. The condition of the bond is that if Blakemore 'shall faithfully discharge the duties of said office of treasurer of said county according to the laws of the state of Missouri in receiving, handling, and disbursements of all funds, except school funds of said county, school township and school district funds, then this obligation to be void, otherwise,' etc. Section 3752, R. S. 1909, requires the county treasurer to give bond 'conditioned for the faithful performance of the duties of his office.' Section 5605, R. S. 1909, requires him to 'enter into a separate bond, for each drainage district organized in the county * * * conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come' into his hands. The bond in suit is not conditioned exactly as prescribed by either of these statutes. Nevertheless, its terms plainly include all county funds except school funds. The obligation to give bond for all these moneys is clear. If not good as a statutory bond, it is good as a common-law bond. It contravenes no public policy,

violates no statute, was voluntarily given, and secures, by its terms, moral and legal obligations of the treasurer. The statute provides no form and does not purport to nullify bonds conditioned otherwise than as prescribed. It is good to the full extent of its conditions.

* * * * *

Also, in the case of State v. Maryland Casualty Co., 66 S. W. (2d) 537, the court, in passing upon the question, where the county collector did not follow the statute, said, at l. c. 539:

"And it is provided in section 9932 that upon payment by the collector to the treasurer of the amount found due on said monthly settlements with the county court, the treasurer shall give the collector duplicate receipts therefor, one of which shall be filed in the office of the clerk of the county court, who shall grant the collector a full quietus.

"Defendant Matkins did not comply with these sections. However, as stated, he made quarterly statements and settlements with the county court as treasurer. We do not think that Matkins should be permitted to profit by his failure to perform his duty as an official. Indeed, we have so ruled. In State ex rei. Dunklin County v. Blakemore, supra, we held that a treasurer under township organization and the surety on his bond are estopped to set up the failure of the treasurer to perform his duty as a defense to an action on the bond given to secure the faithful performance of the official duties of the treasurer."

Hon. Forrest Smith

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February 6, 1942

CONCLUSION

Therefore, it is the conclusion of this department that the county treasurer is liable on his bond for the payment of money to jurors or witnesses in criminal cases who are indebted to the state or county for delinquent taxes, other than real estate taxes, or who are indebted to the state or county on account of any fine, penalty, forfeiture or forfeited recognizances, or costs for a violation of any criminal statute of this state, or for contempt of any court, even if the same shall have been paid by oath of insolvency, or indebted to the state or county on account of any funds coming to his hands by reason of any public office.

Respectfully submitted

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APPROVED:

~~VANE C. THURLO~~
(Acting) Attorney General

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