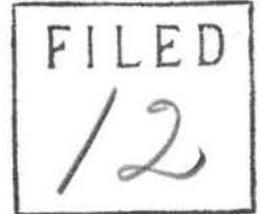


TOWNSHIP COLLECTORS: Township collectors liable on official bonds for failure to comply with Sections 14,009, 14,010 and 14,011; R. S. Mo. 1939.

November 26, 1943

Mr. Loyd Bryan
Clerk of the County Court
Princeton, Missouri



Dear Mr. Bryan:

This is to acknowledge your opinion request of November 16, 1943, reading as follows:

"The County Court of Mercer County Missouri, would appreciate an opinion from you in regard to settlement with Township Collectors.

"If the Collectors fail to comply with Sec. 14009-14010-14011 R.S. of 1939, may the Court refuse to make a settlement with them?

"Is it compulsory for the Collectors to comply with the above sections? If so, who is responsible for seeing that this is done?"

For the purpose of this opinion we shall consider your second question first; your third question second, and your first question last.

The first question is: Is it compulsory for collectors to comply with Sections 14009, 14010 and 14011? These sections read as follows:

"Sec. 14009. Manner of collecting taxes.
-- Every ex officio township collector, upon receiving the tax book and warrant from the county clerk, shall proceed in the following manner to collect the same; and he shall call at least once upon the person taxed at his or her place of residence, if in the township for which such

collector has been chosen, and shall demand payment of the taxes charged to him or her, on his or her property; for which, when paid, such receipt shall be given as is provided by law.

"Sec. 14010. Levy and sale of goods and chattels in case of refusal to pay tax.--In case any person shall refuse or neglect to pay the tax imposed, the collector shall levy the same by distraint and sale of the goods and chattels of the person who ought to pay the same.

"Sec. 14011. Proceedings incident to sale.-- The collector shall give public notice of the time and place of sale, and of the property to be sold, at least fifteen days previous to the sale, by advertisement to be posted up in at least three public places in the township where such sale is to be made. The sale shall be by public action."

We first call your attention to Section 13956, R. S. Mo. 1939:

"Every person elected or appointed to the office of township trustee and ex officio treasurer, before he enters on the duties of his office, and within ten days after his election or appointment, shall execute and deliver to the township clerk a bond* * *"

"The conditions of such bond shall be that he, the said collector, will faithfully and punctually collect and pay over all state, county, township and other revenue, including school taxes, that may become due and collectible during the period for which such collector shall be elected or appointed; and that he will in all things faithfully perform all the duties of the office of township collector according to law* * *" (Underscoring ours.)

From the above quotation you will particularly notice the phrases "faithfully and punctually collect" and "faithfully perform* * * according to law." We shall consider these

phrases and words in light of adjudicated cases and standard definitions of the same.

In this connection your attention is directed to the case of Perry v. Thompson, 16 N. J. (Law) 72, 73, wherein the court, in speaking of the word "faithfully", said:

"The word 'faithfully', as it respects temporal affairs, means diligent, without unnecessary delay: as a faithful officer, a faithful servant, in applying to their duties."

In the case of Archer v. Noble, 3 Me. 418, 420, the court had before it for consideration the construction of a bond that had been given by a constable in office wherein the bond was conditioned by the faithful performance of the duties of that office, and in construing the bond the court said:

"Now, as Noble, constable, and his sureties, were bound for his faithful performance of the duties of his office, the condition of the bond must be construed to embrace all those instances of malfeasance, misfeasance, and nonfeasance, in the execution of his office, which would subject a principal to responsibility for similar wrongful actions of his deputy; and we have seen how far this responsibility extends."

A diligent search has not disclosed wherein a judicial interpretation has been placed upon the word "punctually," and we have relied upon the definition ascribed to the word by Webster's New International Dictionary. It is defined as follows:

"* * * promptly * * * * *"

The word "punctual", an adjective, is defined by the afore mentioned dictionary as follows:

"Punctilious in regard to appointed time; of action; manifesting attentiveness to exact time determined by

an engagement or schedule."

In the case of Shanahan v. State, reported in 142 Md. 616, 630, 631, 635, the court considered the liability of one William J. Shanahan, on his bond executed in the favor of the State of Maryland. The conditions of the bond were substantially the same as the conditions imposed by Section 13956, supra. The court in speaking of the duties imposed upon the collectors of public moneys said:

"There are many cases, both in this state and elsewhere, which prescribe with more or less clearness the duties of such an official as a county treasurer, but nowhere is it more clearly defined than in the case of United States v. Thomas, 15 Wall, 337, which opinion was written by Justice Bradley, and in it he lays down the rule that 'a collector of public moneys is a bailee and only bound to due diligence and only liable for negligence or dishonesty. * * * The measure of his accountability is to be found in the official bond.' This decision is in accord with Colerain v. Bell, 9 Metc. (Mass.) 499. In Olean v. King, 116 N. Y. 355, the collector and his bond were held liable because of the fact that he rendered no account whatever of uncollected taxes, and the case of Supervisors v. Otis, 62 N. Y. 88, follows the same rule as did Justice Bradley in United States v. Thomas, supra.

"* * * a collector may be liable for taxes which he never collects, where the failure to collect was due to some omission or act of negligence upon his part."

The evidence in the above case tended to show that the defendant was derelict in his duty for failing to make a return of defunct corporations, chattels no longer in existence, property in custodia legis; and, further, that in the case of property in custodia legis, the collector made no application to the court under the jurisdiction of which the property was for an order for leave to sell, which would have given him a

priority for taxes.

The court, in speaking further of the duties imposed upon the collector, at page 635, said:

"It is perfectly manifest that, after Mr. Shanahan ceased to be the county treasurer, he had no means at his command by which to enforce the payment of taxes due for the years when he had been county treasurer which he had not collected, but this cannot be carried to the point of saying that he and his bond were relieved of all liability for the non-collection of taxes when that was the result of some dereliction upon his part."

From the above considerations you will have noticed: That when a collector of public moneys is charged with the duty of faithfully and punctually effecting the collection of moneys due the sovereign, and fails, it amounts to non-feasance of office, and such dereliction while in office may make the collector and his sureties liable upon his therefore executed bond.

In the case of *ex parte Brown*, 297 S. W., 445, 447, the court in discussing whether a statute was mandatory or directory said:

"When a fair interpretation of a statute which directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, then such statute is mandatory."

In the case of *State ex rel. Stephens v. Wurdeman*, 295 Mo. 566, the court said:

"Usually the word 'shall' indicates a mandate and unless there are other things in the statute it indicates a mandatory statute."

The general proposition of law relating to the condition of an official bond is found in 46 C. J., 1068, paragraph 398. It reads as follows:

"The condition of an official bond providing for the faithful discharge by the principal of his official duties is broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does not involve the exercise of discretion."

In the case of People v. Smith, 55 Pac. 765, l. c. 766, the court said:

"* * * the duty of the assessor to collect the tax is merely ministerial, and gives no room for opinion or discretion, and the neglect to discharge that duty is a breach of the obligation of the bond. In People v. Gardner, 55 Cal. 305, 307, it was said: 'It is the duty of an officer to do what the law requires to be done in his office, for the law is to him a command which he must obey. If it prescribes the course which shall be taken, and the thing which must be done by anyone in office, the officer cannot disregard it. A failure to obey the law, or a disregard of duty, is a nonperformance of duty, and a breach of the official bond of the officer, for which he and the sureties thereon are liable * * * * *'"

It is, therefore, the opinion of this office that it is compulsory for the township collector to comply with Sections 14009, 10 and 11, R. S. Mo. 1939.

Your second question is: If the collector fails to comply with the sections, who is responsible for seeing that it is done?

Section 14000, R. S. Mo. 1939, is as follows:

"The township collector of each township shall, at the term of the county court to be held on the first Monday in March of each year, make a final settlement of his accounts with the county court for state, county, school

and township taxes and produce receipts from the proper officers for all school and township taxes collected by him, less his commission on same, at which time he shall pay over to the county treasurer and ex officio collector all moneys remaining in his hands, collected by him on state and county taxes, and shall at the same time make his return of all delinquent or unpaid taxes, as required by law, and shall make oath before said court that he has exhausted all the remedies required by law for the collection of said taxes. He shall also, on or before the twentieth day of March in each year, make a final settlement with the township board. If any township collector shall fail or refuse to make the settlement required by this section, or shall fail or refuse to pay over the state and county taxes, as provided in this section, the county court shall attach him until he shall make such settlement of his accounts or pay over the money found due from him; and it shall be the duty of said court to cause the clerk thereof to notify the state auditor and the prosecuting attorney of said county at once of the failure of such township collector to settle his accounts, or pay over the money found due from him, and the state auditor and the prosecuting attorney shall proceed against such collector in the manner provided in section 14014 of these statutes, and such collector shall be liable to the penalties in said section imposed." (Underlining ours.)

From the foregoing it is the opinion of this office that in the event the collector does not comply with Sections 14009,

14010 and 14011, the county court shall cause the county clerk to notify the state auditor and prosecuting attorney, whose duty shall be to proceed against such collector.

Your last question is: If the collector fails to comply with sections 14009, 14010 and 14011 may the county court refuse to make his settlement?

Section 14014, R. S. No. 1939, sets out the manner in which the township collector shall make his settlement before the county court. Section 14016 sets out the manner in which the collector shall account for uncollectible taxes. That section is as follows:

"If the township collector shall be unable to collect any taxes charged in the tax list, by reason of the removal or insolvency of the person to whom such tax may be charged, or on account of any error in the tax list, he shall deliver to the county treasurer his tax books, and shall make out and file with said treasurer, at the time of his settlement, a statement in writing, setting forth the name of the person charged with such tax, the value of the property, and the amount of tax so charged and the cause of the delinquency, and shall make oath before the county clerk, or some justice of the peace, that the facts stated in such statement are true and correct, and that the sums mentioned therein remain unpaid, and that he used due diligence to collect the same, which oath or affidavit shall be signed by the township collector; and upon filing said statement, the county treasurer shall allow the township collector credit for the amount of taxes therein stated, and shall apportion and credit the same on the several funds for which such tax was charged; and when he makes settlement with the county court, such statement shall be a sufficient voucher to entitle him to credit for the amount therein stated; but in no case shall any township collector or county treasurer, be entitled to abatement on the resident tax list until the statement and affidavit aforesaid are filed as required by this chapter.

Mr. Loyd Bryan

-9-

November 26, 1943

There is no provision in the aforesaid sections which gives the court the right to refuse the settlement as made by the collector.

In view of the foregoing, it is the opinion of this office that the county court cannot refuse to make settlement with the township collector if he complies with Sections 14014 and 14016, supra, and that the court's remedy would be to follow the procedure outlined in answer to Question 2, supra.

Respectfully submitted,

GAYLORD WILKINS
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APPROVED:

ROY MCKITTRICK
Attorney General

GW:NH