Liquor License, Recovery of Moneys Paid for. County Commissioners, Power to Refund Moneys for Unused Liquor License.

Moneys voluntarily paid for liquor licenses which were beyond the authority of the county commissioners to issue, cannot be refunded.

March 12, 1915.

Hon. Stanley E. Felt,
County Attorney,
Glendive, Montana.

Dear Sir:

I am in receipt of your communication under date the 4th instant, asking for my opinion upon the following state of facts:

> A demands a license as a wholesale liquor dealer, tenders the money to the county treasurer and the license is issued to him. After he had been in business for sometime, the Supreme Court of this State in another case decided that there was in law no authority for the issuance of such a license as that issued to A. After this decision, criminal action was brought against A for selling liquor without a license and his place closed. Thereafter, he made demand upon the county for a refund of a portion of the license money represented by the ratio of the time which the license yet had to run to the whole period to which it was issued. It further appears that previous to the issuance of this license, the treasurer had refused to issue such a license, and had been compelled to do so in a similar case by a writ of mandate issuing out of the District Court.

The question now arises:

Is this a legal claim against the county? The general rule applicable in such cases, was stated in an early case as follows:

> "It is an established rule of law that if a party with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money as paid by compulsion unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust. And the case is not altered by the fact that the party so paying protests that he is not answerable, and gives notice that he shall bring an action to recover the money back. He has an opportunity, in the first instance, to contest the claim at law. He has or may have a day in court. He may plead and make proof that the claim on him is such that he is not bound to pay."

In defining what are voluntary payments, the courts hold:

> "All payments are presumed to be voluntary until the contrary appears."
>
> Cooley Taxation, 811,

and that the mere threat of civil or criminal proceedings for a failure to pay, are not compulsory. It is usually held that there must be some

actual or immediate threat or duress, such as a seizure of goods, or holding of them by the person collecting the money, if in his possession, or restraint of the person by one in authority, to make a case of compulsion. This doctrine is announced and upheld in

Benson vs. Monroe, 7 Cushing, 125;
Brumagin vs. Tillinghast, 18 Cal. 265;
Garrison vs. Tillinghast, 18 Cal. 404;
Maxwell vs. San Luis Obispo Co., 18 Cal. 484;
Stephen vs. State, 103 N. W., 44;
C. J. Michael Brewing Co. v. State, 103 N. W. 40;
Baker vs. City of Fairburg, 50 N. W. 950;
People vs. Wilmerding, 136 N. Y. 363;
Older vs. City of Galena, 19 Ill. App. 409;

These cases go further and hold that one paying money voluntarily, without taking any action to restrain the enforcement of the license, or the distribution of the money, cannot afterwards have a recovery in a court of law. The rule above stated is undoubtedly the general one, and supported by a preponderance of authority. Another reason for holding that the county cannot be held for this refund, is that there is no statutory authority for such a payment; without authority of law, the commissioners cannot allow such a claim.

See 25 Cyc, 631;

It is true there are a few cases to be found which might be urged in support of the claim, towit:

Martell vs. City of East St. Louis, 94 Ill. 67;
State vs. Cornwell, 11 N. W. 729;
Lydick vs. Korner, 20 N. W. 26;
Pearson vs. Seattle, 14 Wash. 438; 44 Pac. 884.

An examination of these cases, shows that they arose either upon an attempt to enforce a penalty for operating a business after a license had been issued and money taken in which case it was held that an estoppel in pais arose against the municipality, or upon an attempt by a licensee to have money applied to a new license, where a former one was technically defective, or as in the Washington case, where a city had issued a license and collected the money, and afterwards passed an ordinance making the business for which the license was issued, unlawful. All cases, it will be seen, differ from the one in hand, and in this connection, it is to be noticed that at least two of these states, Illinois and Nebraska, in cases similar to the one under discussion, have held to the general rule announced in Benson vs. Monroe, supra;

Baker vs. City of Fairberg, 33 Neb. 674; 50 N. W. 950;
Older vs. City of Galena, 19 Ill. App. 409;

I am, therefore, of the opinion from the facts stated above, that moneys voluntarily paid for a license, for which there was no authority in law, cannot be refunded. This is in accordance with the conclusion reached by you.

Yours very truly,
D. M. KELLY,
Attorney General.