Opinion No. 126.

Counties—Officers' Salaries—Salaries, repayment of overpayment.

Held: Officers must refund salary increases which were paid under law thereafter declared unconstitutional.

September 21, 1943.

Mr. Fred C. Gabriel
County Attorney
Phillips County
Malta, Montana

Dear Mr. Gabriel:

The question presented concerns the ten per cent increase in salary for county officers, as provided by Chapter 169, Laws of 1943.

In the case of Will Whalen v. Board of County Commissioners of Lewis and Clark County, 138 Pac. (2nd) 969, 970 and 971 (Advanced Sheets) decided June 16, 1943, (and not yet reported in Montana Reports), the Supreme Court held Chapter 169, Laws of 1943, unconstitutional insofar as the legislature intended to make it effective as to the terms of officers elected or appointed prior to the effective date as in excess of legislative power, but valid as to such officers elected or appointed after the effective date of the act, holding as follows:

"There can be no possible doubt that the decision with reference to Chapter 169 is correct, and that the legislative intent to make it effective as to the terms of persons elected or appointed prior to its effective date is unconstitutional as in excess of the legislative power. The people could hardly have made clearer or more definite the provision of Section 31 of Article V forbidding the legislature either to increase or to diminish the salary or emolument of any officer after his election or appointment. On the other hand, it is apparent that the constitutional provision does not forbid the application of Chapter 169 to an officer whose election or appointment occurs after the effective date of the Act, and that as to him Chapter 169 is valid. State ex rel. Johnson v. Porter, 57 Mont. 343, 188 p. 375. The judgment appealed from in the Whalen case, No. 8434, is therefore affirmed."

The effective date of Chapter 169 was March 4, 1943. On the effective date some counties, in compliance with that chapter, commenced to pay to the various county officers the ten per cent increase in salary which the act provided for. In other cases, boards of county commissioners, acting under advice of county attorneys, refused to pay the increase.

The two direct questions are: (1) Were the boards of county commissioners correct in withholding payment of the increase, and (2) in counties where the ten per cent increase was paid to the county officers, do those officers have to refund the increase to the county, because of the fact Chapter 169, Laws of 1943, was declared unconstitutional as to such officers elected or appointed prior to the effective date of the act.

The question whether the increase in salary should have been withheld by the county commissioners was one purely for the discretion of the county commissioners. That the county officers in those counties cannot now collect the ten per cent increase is a certainty. The general rule, without exception, is that an unconstitutional statute confers no rights. No citation of authority is required, but see 11 Am. Jur. p. 828, 6 R. C. L. p. 117, 12 C. J. p. 801, and authorities there cited.

A review of the authorities reveals no case wherein the action is against a county officer for return of salary paid under a statute later held unconstitutional. The annotations in 118 A. L. R. 787 bear out the general assumption made against holding public officers liable for paying out public money upon reliance of an unconstitutional statute. It may be deduced from A. L. R. 1417 that no cases have been decided on the question whether a public officer is entitled to compensation under an unconstitutional statute, where the constitution provides no change in salary shall be made after the election or appointment of the officer.

In such case, the familiar principles of constitutional law, recognized by the authorities must be applied. In Norton v. Shelby County, 118 U. S. 425, 6 S. Ct. 1121, 30 L. Ed. 178, the Supreme Court of the United States enunciated a rule which has been followed to the present time:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

It is also recognized a decision by a court that a statute is unconstitutional has the effect of rendering the statute absolutely null and void from the date of its enactment, and not just from the date on which it is judicially declared unconstitutional. (Gilkerson v. Missouri Pac. R. Co., 222 Mo. 173, 121 S. W. 138. Finders v. Bodle, 58 Neb. 57, 78 N. W. 480.)

In Board of Highway Commissioners, Bloomington TP., v. City of Bloomington, 253 Ill. 164, 97 N. E. 280, the Supreme Court of Illinois considered the question of taxes levied and collected by a townshhip and paid to the treasurer of the city within the township, under an unconstitutional statute. The Court said:

> "The facts in the case at bar are that appellant received from the collectors of taxes the money here sought to be recovered. At the time this money was paid over by the collectors and received by appellant, there was in the statute a provision which, had it been valid, would have settled the right of appellant to this money. The statute, however, under which this money was received by appellant has been declared unconstitutional. To be sure, the decision of this court declaring said statute unconstitutional was rendered after the money had been paid over to appellant, but this circumstance does not affect the legal status of the parties in the least. The rule is universal that an unconstitutional law confers no right, imposes no duty, and affords no protection. It is in legal contemplation as though no such law had ever been passed. Norton v. Shelby, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178. There being no question of wrongful intention on the part of any one in connection with this transaction, the unconstitutional statute must be eliminated from all consideration. With this statute out of view, the situation is simplified. We merely have the case of the collectors of taxes voluntarily paying to the appellant, and the appellant voluntarily receiving, public funds which, under the law, belong to Bloomington township. The money in question must be conclusively presumed to have been levied and paid by the taxpayers for the benefit of the only municipality that had a legal right to receive it. The equitable right to this fund follows the legal right thereto. Applying the foregoing principles to these facts, we have no hesitation in coming to the conclusion that an action of assumpist for money had and received to the use of appellee is maintainable to recover the money in question, and that it is not necessary that there should be any privity whatever between the parties other than such privity as is implied by law, to warrant a recovery."

It is to be noted the Court in the above case eliminated the unconstitutional statute from all consideration. The question of the right to the money collected then revolved around the legal right to receive it.

The facts in the instant case, although involving the question of salary received, instead of taxes received, are similar. County officers voluntarily paid, and county officers voluntarily received the ten per cent increase in salary. The statute providing

for such increase was later held unconstitutional. Under the principles of the above case, the question of the legal right to the money is then the deciding factor. True, the county officers had a legal right to accept the increase, for the presumption of constitutionality prevailed. When the statute was declared unconstitutional, however, it was as though the act had never been enacted. That is exactly what our Supreme Court has said in the above case. The legal right to the money used to pay the increased salary rested in the county. The county officers receiving the increase in salary, then, must make refund of it to the county.

Sincerely yours.
R. V. BOTTOMLY
Attorney General.