

NEWTON COUNTY *v.* PHILLIPS.

Opinion delivered March 3, 1930.

TAXATION—CLERK'S SETTLEMENT—"IN KIND."—Though a county clerk is required to receive depreciated county warrants in full satisfaction of county privilege taxes, if tendered, yet where he received money in payment of such taxes, he is required to make settlement "in kind," and cannot make settlement thereof in such warrants, under Crawford & Moses' Dig., § 10,046, requiring collectors and "other officers" to pay into the State and county treasury "in kind" all money collected by them.

Appeal from Newton Circuit Court; *J. F. Koone*, Judge; reversed.

STATEMENT OF FACTS.

This appeal challenges the right of a county clerk and recorder to pay the county tax in fees collected for recording deeds, etc., other than "in kind" of funds collected.

Appellee, in his settlement, as county clerk of Newton County, as was the custom in that county where the scrip is worth only 50 cents on the dollar, allowed the depreciation to the persons required to pay the county tax for recording deeds and mortgages and procuring marriage licenses, and made his settlement with the county by paying the amount of tax in depreciated warrants of the value of 50 cents on the dollar. He stated that he just considered in the collections of the fee for the tax in accordance with the custom of the county clerk for the last twelve or fifteen years in charging \$1.25 for recording a deed, when he was entitled to \$1.50, and that he allowed the person paying the fees the benefit of the discount or depreciated value of the scrip. That he considered in collecting \$1.25 cash that he was paid the one dollar in cash for his services and 25 cents for 50 cents worth of scrip, the amount of the county tax, that he was selling his scrip to the taxpayer and allowing him the full benefit of its depreciation. He did not claim to have received scrip from any of the persons for recording deeds and mortgages for issuing marriage licenses, nor

to have kept an account of the fees of the office showing the kind of funds or moneys received.

In his settlement with the county court for January, 1929, after checking the record of deeds, mortgages and marriage licenses, he charged himself with the tax due, amounting to \$229. In payment of this he presented the county treasurer's receipt for \$211.28, having paid into the treasury scrip issued to him in payment for moneys paid out by him for merchandise, goods bought for the county and paid for in cash and advertising in the newspaper, and \$17.72 in cash. The county court disapproved the settlement, and on appeal the circuit court held that the county clerk came within the provisions of the statute, § 10046, C. & M. Digest. That he had paid in his settlement, county scrip worth only 50 cents on the dollar, taking the treasurer's receipt therefor, dollar for dollar, and anticipating that he could make settlement with the county with the scrip he did not collect the full amount of tax for recording deeds and mortgages, and for marriage licenses issued. The court held that he was required to account for the amount of money that he actually received and, in addition to the amount paid to the county as shown by the settlement, found that he be required to pay the value of the difference between the amount of cash received for the county and the actual value of the scrip paid over to the county, found it to be the sum of \$21.20, for which judgment was rendered, from which both parties have appealed.

Jack Holt and *Shouse & Rowland*, for appellant.

W. P. Spears and *J. M. Shinn*, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not rendering judgment against the clerk for \$105.64, one-half of the amount of scrip \$211.28, which he offered with \$17.72 in cash in payment of the county tax collected and charged against himself, \$229.

The county clerk was charged with the duty of collecting the county privilege tax for recording deeds and

mortgages and issuing marriage licenses, and, the majority is of opinion, comes within the designation "or other officer" under the statute, § 10046, C. & M. Digest, requiring the collector of revenue to pay the revenues collected "in kind" in settlement, and making himself subject to a fine for violation of the act "and liable on his official bond for the difference in value between the funds received and those paid." Although it is true the clerk would have been required to receive in payment of the county privilege tax, if it had been tendered, the county scrip for that amount, and could have paid this scrip so received in full settlement of the tax to the county, he did not in fact do so, but allowed the debtor the discount of the depreciated value of the scrip, collecting of him 25 cents in money only for the 50-cent tax for which he attempted to make settlement of the tax due the county with county scrip. This could not be done. Although he claimed he only collected in cash one-half of the amount of the privilege tax required by law to be paid the county, it is undisputed, conceded in fact, that he collected in each instance, in money, his own fees and one-half of the amount of the county tax, an amount in excess of the amount due for county tax. Since this was collected in money, he was bound to pay "in kind" into the treasury, in settlement with the county court, the whole of the tax collected, which the court correctly held had not in fact been done by the payment into the county treasury of the \$211.64 in county scrip of the value in cash of 50 cents on the dollar. He could not take, regardless of the custom, in payment of the amount of privilege tax required by law to be collected a less amount than fixed by law and was bound to pay "in kind" in settlement of the tax collected. Having in fact collected in cash more than the amount of the tax required to be collected and being bound to pay "in kind" the funds received, the whole amount of the tax, the court erred in not rendering judgment for the balance of the tax, which should have been collected by him and paid "in kind"

into the treasury. He was bound to collect the tax, collected only one-half of it in cash, and, not being permitted himself to substitute depreciated scrip, not paid to him, in settlement of the tax, he could not discharge his obligation to the county to pay the whole amount of privilege tax "in kind" into the treasury, which he attempted to do, by using depreciated scrip worth only 50 cents on the dollar.

The judgment must accordingly be reversed, and the cause remanded with directions to enter a judgment for one-half the cash value of the scrip attempted to be paid in settlement or \$105.64. It is so ordered.
