v. Addyston Pipe, etc., Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; Anderson v. Jett, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390; Arnold v. Jones, 152 Ala. 501, 44 South. 662, 12 L. R. A. (N. S.) 150; Martell v. White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341.

The doctrine or ruling of Reeves v. Decorah Farmers' Co-operative Society, supra, the Iowa case above discussed, was reaffirmed in Ludowese v. Farmers' Mutual Co-operative Co., 164 Iowa, 197, 145 N. W. 475. In the latter case the by-law imposed a penalty upon the stockholder if he sold grain or live stock to a competitor of his company; the penalty as to grain being one cent per bushel, as in the case at bar. The court held that "the by-law was clearly in restraint of competition and therefore illegal." It further announced that it adheres to its decision in the Reeves Case.

The decision in these Iowa cases is criticized by the defendant in error, the plaintiff below, on the ground that the Iowa court "did not consider the proposition as to whether the by-law was a reasonable or unreasonable restraint of trade." True, there is no direct expression upon this point. Nevertheless the doctrine as to reasonableness was in the mind of the court, and regarded as a settled proposition, since the court in one part of the opinion uses this language:

"Again, the doctrine of restraint as applied to the early cases has been broadened, and all contracts in unreasonable restraint of competition are now understood to be in restraint of trade."

In our opinion the decisions in the Iowa cases above cited are sound, and for the reasons above indicated we hold the by-law involved in the instant case void and illegal, as being in undue restraint of competition. The cause is therefore reversed and remanded, with directions to dismiss the case.

Reversed.

(65 Colo. 443)

LECKENBY, State Auditor, et al. v. POST PRINTING & PUBLISHING CO.

(No. 9328.)

(Supreme Court of Colorado. Dec. 2, 1918.)

1. STATES ⟸63 — LIEUTENANT GOVERNOR — INCREASE IN SALARY—CONSTITUTIONALITY.

In view of Const. art. 4, §§ 1, 13, 14, and 19, defining duties of Lieutenant Governor, and article 5, §§ 9, 30, relating to increase in compensation of officers, etc., where act had fixed Lieutenant Governor's salary at $2,000 for biennial period, Legislature could not appropriate $1,000 for official or semiofficial purposes, as, if intended as an increase in salary, it was unconstitutional.

2. STATES ⟸62 — LIEUTENANT GOVERNOR — APPROPRIATION FOR EXPENSES—VALIDITY.

In view of Const. art. 4, §§ 1, 13, 14, and 19, and article 5, §§ 30, 34, where Legislature had fixed Lieutenant Governor's salary at $2,000 for biennial period, an appropriation of $1,000 for official or semiofficial purposes could not be sustained, where he had no books or papers to care for, or any official or semiofficial duties.

3. STATES ⟸63 — LIEUTENANT GOVERNOR — MILEAGE—"COMPENSATION."

An appropriation of $1,000 for official or semiofficial purposes of Lieutenant Governor, where there was no law authorizing him to take mileage, if intended to cover mileage, would be an increase in his compensation, in view of Const. art. 5, § 32, and would violate section 30, forbidding increases in compensation, for mileage or traveling expenses paid him would clearly come within the term "compensation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compensation.]

4. OFFICERS ⟸94—MILEAGE—STATUTE.

Any public official demanding mileage, emoluments, fees, or expenses, must point out some statute authorizing its allowance.

5. STATES ⟸131 — COMPENSATION OF LIEUTENANT GOVERNOR—EXPENSES—VALIDITY.

In view of Const. art. 5, §§ 28, 33, forbidding payment of money out of state treasury, except on appropriation made by law, a general appropriation bill can only provide for charges already created against public funds by legislative act, so that compensation and expenses of Lieutenant Governor must first be prescribed by Legislature before they can be included therein.

6. STATES ⟸130—LIEUTENANT GOVERNOR—EXPENSES—CONSTITUTIONAL PROVISIONS.

In view of Const. art. 5, §§ 28, 33, providing that no money shall be paid out of treasury except upon appropriations made by law, there is no contingency in which Lieutenant Governor may lawfully take additional compensation above that allowed by law, for official or semiofficial purposes, where he has no such duties.

7. STATES ⟸168½ — MISAPPLICATION OF PUBLIC FUNDS—REMEDIES OF TAXPAYER.

A private individual taxpayer may enjoin the misapplication of public funds from state treasury or enjoin payment of a void appropriation upon the ground that appropriation act is unconstitutional.

8. STATES ⟸131 — LIEUTENANT GOVERNOR — COMPENSATION.

That the Lieutenant Governor is underpaid, and that it has always been the custom of Legislature to make an allowance to Lieutenant Governors, is no warrant for a legislative appropriation of $1,000 for his official and semiofficial expenses in violation of Const. art. 5, §§ 9 and 32.

En Banc.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action in equity for injunction by the Post Printing & Publishing Company, a taxpayer of the State of Colorado, on its own behalf and on behalf of all other taxpayers in state similarly situated and interested, against Charles H. Leckenby, as Auditor of State of Colorado, Robert H. Higgins as Treasurer of State, and another. Demurrers to complaint overruled, and defendants bring error. Affirmed.

This is an action in equity, by an individual taxpayer, to restrain the State Auditor and State Treasurer from paying out money from the state treasury to the Lieutenant Governor upon an appropriation made by the Legislature.

At the time of the matters complained of herein, plaintiff in error James A. Pulliam was Lieutenant Governor of Colorado, and Charles H. Leckenby was State Auditor, and Robert H. Higgins was State Treasurer. Pulliam, as ex officio President of the Senate, presided over the Senate of the Twenty-First General Assembly in 1917. The Legislature at this session appropriated for the per diem of its officers, and to pay the members and employés thereof, the total sum of $215,000, and for printing and other miscellaneous expenses, the sum of $38,000, and for the salary of Pulliam as Lieutenant Governor, $2,000 for the biennial period of 1917 and 1918. In addition to these appropriations, there was included in the General-Short appropriation bill the following item:

"Lieutenant Governor's incidental and office expenses, for official or semiofficial purposes to be determined by him, $166.66."

And in the General-Long appropriation bill this item:

"Lieutenant Governor's fund for official or semiofficial purposes to be determined by him for the biennial period, $1,000, less amounts already paid from the Short appropriation."

The present suit was brought by a taxpayer to have this appropriation adjudged void, and the prayer of the complaint is for a temporary writ, to be made permanent on final hearing, enjoining the payment of this $1,000.

Demurrers to the complaint upon the ground that plaintiff has no capacity to maintain the suit, and that the complaint does not state facts sufficient to constitute a cause of action, were overruled, and defendants elected to stand thereon.

Thereupon, judgment was entered for plaintiff in accordance with the prayer of the complaint, and the state officers were restrained from issuing or paying any warrant to Pulliam under and pursuant to that clause in the appropriation bill which reads:

"Lieutenant Governor's fund for official or semiofficial purposes to be determined by him for the biennial period, $1,000."

The Constitution provides that:

Article 4, § 1: The Lieutenant Governor shall hold his office for the term of two years, and shall perform such duties as are prescribed by the Constitution, or by law.

Article 4, § 14: The Lieutenant Governor shall be President of the Senate, and shall vote only when the Senate is equally divided.

Article 4, § 13: In case of the death or disability of the Governor, the powers, duties, and emoluments of the office of Governor shall devolve upon the Lieutenant Governor.

Article 4, § 19: The Lieutenant Governor shall receive for his services a salary to be established by law, which shall not be increased or diminished during his official term.

Article 5, § 27: The General Assembly shall prescribe by law the compensation of the officers and employés of each House.

Article 5, § 28: No bill shall be passed providing for the payment of any claim against the state without previous authority by law, or giving extra compensation to any public officer after services shall have been rendered.

Article 5, § 30: Except as otherwise provided by the Constitution, no law shall increase or diminish the salary or emoluments of any public officer after his election or appointment.

Article 5, § 9: No member of either House shall receive any increase of salary or mileage under any law passed during the term for which he may have been elected.

Article 5, § 34: No appropriation shall be made for charitable or beneficial purposes to any person.

Article 5, § 33: No money shall be paid out of the treasury, except upon appropriations made by law.

Article 5, § 32: The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the state, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

The statutes provide that:

S. L. 1883, § 1, p. 191: The Lieutenant Governor shall receive an annual salary of $1,000.

R. S. 1908, § 6153: Whenever the powers and duties of the office of Governor shall devolve upon the Lieutenant Governor, the salary of the Governor shall cease, and the same shall be received by the Lieutenant Governor as a full compensation for his services.

S. L. 1909, p. 314: Each member of the General Assembly shall receive $1,000 as compensation for his services for each biennial period, and all actual and necessary traveling expenses, and the members of the General Assembly shall receive no other compensation, perquisite, or allowance whatever.

T. J. O'Donnell and Canton O'Donnell, both of Denver, for plaintiffs in error.

John A. Rush and Foster Cline, both of Denver, for defendant in error.

GARRIGUES, J. (after stating the facts as above). [1] 1. The only public duty of the Lieutenant Governor, when the Legislature is in session, is to preside over the Senate, for which services he is entitled to a salary of $1,000 per annum, or $2,000 for the biennial period. He has no public duty to perform during the intermission between sessions. The extra $1,000 allowed in this appropriation could not have been for his compensation, because that was already provided for in the bill, and, if it was intended as an increase in salary, it was unconstitutional.

[2] 2. The claim is made that it was for his expenses. But what expenses? He has no office, books, records, or papers to keep or care for. In his official capacity as Lieutenant Governor, he has no acts to perform for the public except to go to the Capitol, preside over the Senate, and return home, and, when it adjourns sine die, his duties with the public service cease. He has no expenses which are made a charge against the state. While the Legislature is in session, an office

is furnished him free at the Capitol, and the appropriation of $38,000 to pay for printing, stationery, stamps, supplies, and miscellaneous expenses, include him while presiding over the Senate, with the officers and members of the Legislature; and when acting as Governor he is entitled to the pay and emoluments of the Governor. As Lieutenant Governor, he has no official or semiofficial duties to perform other than to preside over the Senate.

[3, 4] 3. But it is said the appropriation may have been intended for mileage, and that the court cannot question the intent of the Legislature. There is no law authorizing him to take mileage. Mileage of the Lieutenant Governor is not made a charge against the state. He is allowed no mileage. If he could take mileage, then all the state officials could as well take mileage. He is required to come to the Capitol and return home at his own expense, and, if the state pays his traveling expenses, it is an increase in his compensation. No state officials except members of the Legislature, and no county officials except county commissioners, are entitled to take mileage.

Any public officer demanding mileage, emoluments, fees, costs, or expenses, must point out some statute authorizing its allowance. Denver v. Meyer, 54 Colo. 96, 129 Pac. 197; McGovern v. Denver, 54 Colo. 411, 131 Pac. 273; Board of County Commissioners v. Lee, 3 Colo. App. 177, 32 Pac. 841; Fremont Co. v. Wilson, 3 Colo. App. 492, 34 Pac. 265; Stevens v. Sedgwick Co., 5 Colo. App. 116, 37 Pac. 948; Troup v. Morgan Co., 109 Ala. 162, 19 South. 503; Yeager v. Com., 95 Ind. 427; Wood v. Com., 125 Ind. 270, 25 N. E. 188; Legler v. Paine, 147 Ind. 181, 45 N. E. 604; Board of County Commissioners v. Buchanan, 21 Ind. App. 178, 51 N. E. 939; State v. Wofford, 116 Mo. 220, 22 S. W. 486; State v. Brown, 146 Mo. 401, 47 S. W. 504; Bates v. City, 153 Mo. 18, 54 S. W. 439, 77 Am. St. Rep. 701; State v. Adams, 172 Mo. 1, 72 S. W. 655; State v. Silver, 9 Neb. 85, 2 N. W. 215; Bayha v. Webster Co., 18 Neb. 131, 24 N. W. 457; Red Willow Co. v. Smith, 67 Neb. 213, 93 N. W. 151; Hall v. Hamilton, 74 Ill. 437; Fergus v. Russel, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120; State v. Cheetham, 21 Wash. 437, 58 Pac. 771; Torbert v. Hale Co., 131 Ala. 143, 30 South. 453; Jefferson Co. v. Waters, 114 Ky. 48, 70 S. W. 40; State v. Raine, 49 Ohio St. 580, 31 N. E. 741.

Mileage or traveling expenses paid to the Lieutenant Governor would clearly come within the term "compensation," because, unless the state paid it, he would have to pay it himself. Therefore, if intended to cover mileage, it would be an increase in his compensation, and unconstitutional.

[5] 4. The general appropriation bill can only provide for meeting charges already created against the public funds by affirmative acts of the Legislature. The compensation of the Lieutenant Governor should first be prescribed by affirmative legislation before it can be included in the general appropriation bill, and there must be a law permitting expenses to be incurred before they can lawfully be paid out from the state treasury. A law must be enacted providing for its allowance before the compensation or expenses of state officials can be included in the general appropriation bill. People ex rel. v. Spruance, 8 Colo. 307, 6 Pac. 831; In re Appropriations, 13 Colo. 316, 22 Pac. 464; Lithographing Co. v. Henderson, 18 Colo. 259, 32 Pac. 417; In re House Bill, 21 Colo. 46, 39 Pac. 1096; Parks v. S. & S. Home, 22 Colo. 86, 43 Pac. 542; In re Senate Bill, 23 Colo. 508, 48 Pac. 540.

[6] 5. We know of no contingency by which the Lieutenant Governor can lawfully take additional compensation above the $2,000 salary allowed by law. There are no official or semiofficial purposes for which he may lawfully use any part of this appropriation. It is additional compensation, and is in violation of the Constitution and statutes. The Constitution provides that no money shall be paid out of the state treasury except upon appropriations made by law. No matter about the terms employed in the bill; that is immaterial; the appropriation was not made by law. The effect of it is to increase the allowance, salary, or compensation of the Lieutenant Governor in violation of law, and the appropriation is void.

6. The claim is made that the district court could not, at the suit of an individual taxpayer, interfere by injunction to restrain the State Auditor from drawing, and the State Treasurer from paying, warrants upon the appropriation. No doubt some courts have so held, but the weight of authority is to the contrary. Moreover, we are committed to a contrary doctrine in regard to municipal and county officials, and we see no legitimate distinction in state officials. State officials cannot be interfered with by the courts in the exercise of their discretion in matters of a political or executive character, but drawing and paying warrants upon an appropriation made by the Legislature is of a ministerial, business, or financial character, without the exercise of discretionary powers, and is not of a political or executive character.

[7] 7. A private individual taxpayer may resort to a court of equity to restrain by injunction the misapplication of public funds from the state treasury, or enjoin the payment of a void appropriation upon the ground that the act making the appropriation is unconstitutional. Packard v. Board of County Com'rs, 2 Colo. 338; Nelson v. Garfield Co., 6 Colo. App. 279–283, 40 Pac. 474; Littler v. Jayne, 124 Ill. 123, 16 N. E. 374; Burke v. Snively, 208 Ill. 328, 70 N. E. 327; Fergus v. Russel, 270 Ill. 304, 110 N. E. 130, Ann.

Cas. 1916B, 1120; Terrell v. Middleton (Tex.) 187 S. W. 367; Ellingham v. Dye, 178 Ind. 338, 99 N. E. 1, Ann. Cas. 1915C, 200; Christmas v. Warfield, 105 Md. 531, 66 Atl. 491; State v. Pennoyer, 26 Or. 205, 37 Pac. 906, 41 Pac. 1104, 25 L. R. A. 862; McKinney v. Watson, 74 Or. 220, 145 Pac. 266; Snyder v Foster, 77 Iowa, 638, 42 N. W. 506; Goetzman v. Whitaker, 81 Iowa, 527, 46 N. W. 1058; Crawford v. Gilchrist, 64 Fla. 41, 59 South. 963, Ann. Cas. 1914B, 916; Martin v. Ingham, 38 Kan. 641, 17 Pac. 162; Hailey v. Huston, 25 Idaho, 165, 136 Pac. 212; Mott v. Penn. R. R. Co., 30 Pa. 9, 72 Am. Dec. 664; State v. Raine, 49 Ohio St. 580, 31 N. E. 741.

[8] 8. Because the Lieutenant Governor is underpaid, and it has always been the custom to make such an allowance to the preceding Lieutenant Governors of this state, is no warrant for the present act. A wrong cannot be transformed into a virtue or sanctioned by age and acquiescence. A power may be long exercised in violation of the Constitution, but this does not authorize its infraction.

Judgment affirmed.

(65 Colo. 385)

HENRYLYN IRR. DIST. v. PATTERSON, County Treasurer. (No. 9112.)

(Supreme Court of Colorado. Oct. 7, 1918.)

1. TAXATION ⟸733—TAX SALES—TITLE.

Every tax sale, regular in all respects, is the beginning of a new title, which is paramount to titles originating in former sales.

2. TAXATION ⟸679(1)—TAX SALES—WANT OF BIDS—IRRIGATION DISTRICTS.

Laws 1915, p. 315, providing that the county treasurer shall strike off to an irrigation district lands therein offered for sale and for which no bids are received, give an irrigation district no right to have struck off to it lands on which the county holds certificates issued on sales prior to 1915.

Error to District Court, Weld County; Neil F. Graham, Judge.

Mandamus by the Henrylyn Irrigation District against W. R. Patterson, County Treasurer of Weld County. Judgment for defendant, and plaintiff brings error. Affirmed.

John R. Smith and H. B. Woods, both of Denver, for plaintiff in error.

Walter E. Bliss, of Greeley, for defendant in error.

TELLER, J. The plaintiff in error sought by mandamus to compel the defendant in error, as county treasurer, to strike off to it lands alleged to be subject to sale for delinquent taxes where no bids were made for the same, relying on the provisions of chapter 109 of Laws of 1915 to support its demand. That statute makes it the duty of the county treasurer, at a tax sale, to strike off to an irrigation district lands in the district offered, and for which no bids are received. The writ recites that the defendant in error excuses his noncompliance with such statute by the fact that the lands which he did not strike off to the district had, at former sales, been struck off to the county, and that it still held certificates thereon.

The only question presented is as to the duty of the county treasurer, in the circumstances stated, under section 5713, R. S. 1908, which provides generally for the sale of lands on which taxes are delinquent, and closes with the following:

"No taxes assessed against any lands purchased by the county under the provisions of this section shall be payable until the same shall have been derived by the county from the sale or redemption of such lands."

The statute of 1915 above cited contains a similar provision making taxes assessed on lands struck off to the district payable only from funds derived from a sale or redemption of such lands.

The defendant in error cites the case of *Emerson v. Valdez*, 24 Colo. App. 462, 135 Pac. 137, as decisive of this question. It was there held that, when there was an outstanding tax sale certificate in the hands of a county, no taxes on the land covered by the certificate could be due and payable at the time of a subsequent tax sale.

It is therefore contended that, as to the lands in the district on which the county held tax certificates, the statute of 1915 does not apply, since such lands were not subject to tax sale.

[1, 2] Every tax sale, regular in all respects, is the beginning of a new title, which is paramount to titles originating in former sales. Morris v. Grauberger, 59 Colo. 164, 147 Pac. 674. If, then, the land, on which the county holds certificates, be again sold for taxes, and be bought in, the county loses all interest in the property, and the taxes for which it received the certificate need never be paid. We think the construction given to the statute by the Court of Appeals is correct. It follows that the district has no right to have struck off to it lands on which the county holds certificates issued on sales prior to 1915.

The judgment is therefore affirmed.

Judgment affirmed.

HILL, C. J., and BAILEY, J., concur.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes