

COUNTY COURT: Right to employ assistant counsel.

12-27

December 21, 1934.



Hon. W. W. Crockett,  
Prosecuting-Attorney,  
New London, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion dated November 23, 1934, said request reading as follows:

"The personnel of our county court changes on January 1st, 1935. About thirty days ago the present court entered into a contract and made an order of record to procure the services of an attorney as special counsel to assist the prosecuting attorney to try to obtain a preference for the county as to funds amounting to above \$44,000.00 tied up in the State Bank of New London, now a closed institution and in the hands of the State Finance Department for purpose of liquidation. The agreement was to pay a per cent on the contingent basis to carry the proceedings thru the Circuit Court and thru appellate court, if necessary, and in the event of failure to obtain preference the attorney was to receive a stipulated sum for his expense and trouble. The last day for filing claims is December 12th, 1934, and I take it that if the Finance Department refuses to allow the claim at all then it will be at least sixty days from that date before suit can be brought and in the meantime the present court will have ended their terms and the new court will have been installed. If the Finance department allows the claim as a common claim, then I take it the circuit court would have jurisdiction and could hear the matter at any time thereafter and if the court decided not to allow

preference, then the county could appeal but it would seem that the appeal could hardly be completed before January 1st, and could not be heard in appellate court for a long time thereafter.

The question is, has the present court authority to hire special counsel in a county of this size, viz 10704, according to last census? 2nd. Can the present court hire a party to do something that will not be completed and perhaps not begun during their term of office? 3rd. Would the incoming court be bound to carry out the contract of the present court?"

The county court of a county is in charge of the property and management thereof in its respective county. Section 2078, R. S. Mo. 1929, sets forth this power as follows:

"The court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

The control and management, above referred to, implies certain contractual powers, among them being, I believe, the right to employ additional counsel where the situation justifies the same. I can find no statutory prohibition to this course, or that the county court is in any different position, than a private individual seeking to contract. The county court is in the position of any other contracting individual, other than for what statutory limitations are placed upon said court.

A brief discussion of this proposition is contained in L. R. A. 1917D, page 253, which reads as follows:

"In Missouri the court seems to be in confusion upon the question. It was held in

Thrasher v. Greene County (1885) 87 Mo. 419, and in Thrasher v. Greene County (1891) 105 Mo. 244, 16 S. W. 955, that the county court may by statute employ attorneys to aid the prosecuting attorney in any civil business. In Butler v. Sullivan County (1891) 108 Mo. 630, 18 S. W. 1142, it was held that the county court might not employ special counsel to prosecute suits for taxes on railroad property, this being the duty of the prosecuting attorney, although the collector might appoint an assistant attorney with the approval of the county court, the court stating that the county court was not a general agent and had only statutory power, and that the statute referred to in the Thrasher Cases had been repealed. But in Reynolds v. Clark County (1901) 162 Mo. 680, 63 S. W. 382, the court, not referring to the Butler Case, although it was cited by counsel, held, on the authority of the Thrasher Cases, that the county had the power to employ unofficial counsel in a civil suit."

The Reynolds case (supra) and other cases herein-after cited, removes the doubt, as has been expressed in the above authority. The Reynolds case (supra) was a case in which the county was sued for \$50,000 on some coupons and interest. The county court contracted with Reynolds to defend the matter. Reynolds was successful in what court procedure was undertaken, and the county court, without consultation with Reynolds, compromised and settled the claim, and Reynolds sued for the balance of his attorney fee. The county court defended plaintiff's claim on the ground that the county court had no power to employ plaintiff as attorney in said matter.

The Court mentioned the Thrasher Cases (supra) and said:

"The county court, therefore, had the power to make the contract, which contract, when made, bound the county, and placed it on the same plane of liability and on the same basis as to incidents and consequences flowing from such liability, as other contracting parties are placed. Among such incidents and con-

sequences is this one: That if a party employs an attorney to bring or defend a suit, and such suit is brought or defended; such party cannot, while the suit is pending, dismiss the suit, if he is plaintiff, or compromise it, if defendant, and then refuse to pay his attorney as previously agreed upon. This view is announced by all the courts.

In the language of one of those cases, 'It would be most unjust that the defendant, by a compromise with the adverse party, should snatch from the plaintiff the fruits of his labor, and deprive him of the power of performing his contract.' (Hunt v. Test, 8 Ala. (N.S.) 713).

Furthermore, as the act of defendant prevented performance, it will be assumed that the service would have been performed as agreed upon. (McElhinney v. Kline, 6 Mo. App. 94).

Judgment was reversed and cause remanded with instructions to enter judgment for the amount of plaintiff's demand."

In the Case of State ex rel v. Butler County, the following comment is made by the court, 164 Mo. page 214, l. c. 219:

"There is something in the nature of the services of an attorney at law that renders a contract, calling for the performance of the same, peculiar. When the performance of the services has been entered upon and then cut off by the willful act of the client, and the services continued by another, it is not only often impossible to determine the value of the services up to the time of his dismissal, but also even the effect of the employment itself on the ultimate result of the case. And under such conditions it has been held that the attorney was entitled to recover the full contract price as if he had

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performed all that he agreed to do."

In the case of *Morrow v. Fike County*, 189 Mo. (1905), page 610, the power of the county court was conceded to employ counsel. No attack was made upon any inherent or statutory lack of power of the county court to make a contract employing an assistant attorney.

In view of the case law I have above set forth, we are of the opinion that the county court has authority to hire assistant counsel to assist in the prosecution or defense of any substantial rights of the county; that the present county court has the right to enter into such a contract for attorney services, and that the same would be binding upon any future county court, if the contract is reduced to writing and proper orders are made and entered on the records of the court.

Respectfully submitted,

HARRY G. WALTNER, Jr.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK  
Attorney General.

HGW:MM