

COUNTY DEPOSITARY-- Banks in county or adjoining counties entitled thereto - Section 12189 R. S. Mo. 1929 - Preference where no bond given.

February 7, 1933.

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Hon. G. A. Kamp  
Prosecuting Attorney  
Montgomery County  
Montgomery City, Missouri

Dear Mr. Kamp:

Your letter of February 3, 1933, directed to the Attorney General, requested an opinion of the construction of Section 12189 R. S. Mo. 1929, relating to the selection of a county depository by the county court, has been handed the undersigned for attention. In connection with your request you submit the following:

"I am writing you for your opinion of the construction of Section 12189, R. S. 1929, relating to the selection of County Depository by the County Court, when there has been no proposal submitted by any bank or banker in the county to act as such.

Said section provides that in that case the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, etc., IN THE COUNTY OR ADJOINING COUNTIES, in such sums or amounts, \*\*\*\*\* as the court may deem advisable, ..... The question is what is meant by adjoining counties? Does it mean the counties, only, that border on Montgomery County, or could a depository in some other county be selected, in the event no banking corporation in Montgomery County or the counties adjoining thereto, can or will meet the requirements of said section 12189?

In this county we have two banks in which the funds have been kept, the First National Bank and Montgomery County Bank, of Montgomery City, Mo. They

Hon. O. A. Kamp #2

were selected under the provisions of said section 12189, and required to give bond in accordance with section 12187. However, the Montgomery County Bank has given no bond, and the First National Bank, a bond in the sum of \$2500.00 is all that the surety company would write. It seems that surety companies decline such risks almost entirely.

I would like to have your opinion on the above question, for the information of our county court, and will thank you to have it to me by next Wednesday February 15th, 1933, while county court is in session, if possible.

Also would you advise that the \$2500.00 bond given by the First National Bank be held, or should it be rejected, if so what procedure should be taken to have it cancelled? "

Section 12184 R. S. Mo. 1929, provides the manner to be pursued by county courts in advertising for county depositaries .

Section 12187 R. S. Mo. 1929, provides for the execution of the bond of selected depositary; by character of security thereof and the amount of such bond in accordance with the total proportion of the annual revenue as let to said depositary.

Section 12189 R. S. Mo. 1929, provides that if the banks of the county fail or refuse to submit proposals to act as county depositaries as provided for in Section 12184, supra, that the county court shall have power to deposit the funds in banks of adjoining counties, conditioned that the banks in such adjoining counties give bond as required in the first mentioned Section.

In construing a change of venue Statute, Section 911 R. S. Mo. 1929, which reads in part as follows:

"If reasonable notice shall be given to the adverse party or his attorney of record, the court or judge, as the case may be, shall consider the application, and if it be sufficient, a change of venue will be awarded to some county in the same, adjoining or next adjoining circuit, convenient to the parties for the trial of the case and where the causes complained of do not exist \*\*\*\*\*"

Hon. O. A. Kamp #3

The Supreme Court in the case of Irons vs. American Express Company, 300 S. W. L. G. 287 says,

"It may be well to state that we construe the words "next adjoining circuit" to mean a circuit adjoining a circuit adjoining a circuit in which the county in which the suit is filed is situated, and that Mississippi county was properly determined a county in the next adjoining circuit, within the meaning of the statute."

The Section of the Statute to which you refer uses the words "adjoining counties". Omitting then the word "next" and placing upon the words as used the construction of the Supreme Court in the case, supra. They should be taken in their literal sense and mean the counties bordering on and lying immediately adjacent to the county in question.

Such authority as the various county courts have with respect to the bonds required, and the banks which may be selected as county depositories is contained in and provided for, within the provisions of Article 9, Chapter 85, R. S. No. 1929.

The penalty of the bond of a selected depository, as required by Section 12187, supra, is as follows:

\*\*\*\*\* the penalty of each depository's bond to be not less than such proportion of the total annual revenue of said county for the years for which such bond is given as the sum of the part or parts of the funds awarded to such bidder selected respectively bears to the whole number of said parts the amount of the bond to be fixed by the court \*\*\*\*\*

The county court under this section is given no discretionary power with reference to fixing the amount of the bond. The Statute fixes the amount and the county court is without authority to vary therefrom.

If the court should determine that the security as furnished by a depository is insufficient, Section 12197 R. S. No. 1929, provides a way of requiring additional security or selecting another depository.

The following authorities, as we construe them hold that a deposit of public funds without requiring the bond

Hon. O. A. Kamp #4

prescribed by statute is in violation of law and that deposits made by officials with a depository who has failed to execute a bond as the law required, creates and constitutes the monies so deposited a trust fund for which a preference will be allowed.

Consolidated School District vs. Bank, 21 S. W. (2nd);  
Compton Company vs. Trust Company, 279 S. W. 746;  
Fidelity Company vs. Bank, 44 Fed. (2nd) 19.

Section 12198 R. S. No. 1929, provides that,

"The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depository, but nothing in this article shall release said treasurer \*\*\*\*\* from responsibility for the funds of the county, until a depository shall be selected and the funds deposited therein, \*\*\*\*\*"

If the bond accepted by the county court does not fully comply with the statutory regulations, the treasurer is liable on his own bond for the county money.

Bragg City vs. Road District, 20 S. W. (2nd) 22;  
State vs. Thompson 22 S. W. (2nd) 196.

In the above we have undertaken to discuss the statutory provisions relating to your inquiry and apply the law pertaining thereto by the decisions rendered and as hereinabove quoted. From such recitals we believe your inquiry is fully covered.

Yours very truly,

CARL C. ABINGTON  
Assistant Attorney General.

APPROVED: \_\_\_\_\_  
ROY MCKITTRICK  
Attorney General.

CCA:EG