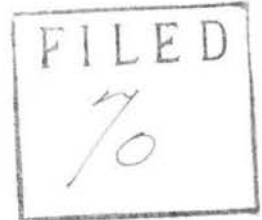


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Bonding Company qualified in Missouri can sign county official's bond --
If County under township organization, County Treasurer must give bond ~~xx~~ as
Treasurer also bond for school district money, and for money received as exofficio
collector - Treasurer failing to give bond and not inducted into office predecessor
holds over until Treasurer either is inducted into office or gives bond and
qualifies or does all three -- Giving bond is a directory and not mandatory
provision and has nothing to do with election and qualifying of Treasurer,
If Treasurer gives bond after being inducted into office and before ouster pro-
ceedings filed, Treasurer cannot be ousted for failure to give bond.

April 14, 1933

Hon. Geo. B. Padget
Prosecuting Attorney
Gallatin, Missouri



Dear Sir:

Your letter reads as follows:

"An unusual condition has developed here regarding the giving bond of Robert Pogue, our Treasurer elect. Heretofore it has been the custom for the bank with whom the money was deposited, to go on the bond, but now owing to their not desiring to increase their liabilities, the bank has indicated that they are not willing to make his bond, though he is in all respects a very worthy gentleman. I notice that sec. 12133 Revised Stat. 1929 provides that his bond shall not be less than twenty thousand dollars, to be fixed by the court, and that the sureties are referred to as 'resident land owners'. Now the first question is, will a bond bought from a bonding or surety company fill the requirements of the law?

Our county court informs me that the present sum fixed as bond amounts to the sum of Two Hundred Thousand Dollars, and to buy a bond in such sum would cost so much that it seems he cannot well afford to buy the bond, even if such bond would be a legal bond. The court further informs me that the greatest sum of money likely to be in his hands at any one time is Sixty Thousand Dollars. I also see by sec. 9266 R.S. 1929 'He shall give a separate bond with sufficient security in double the probable amount of school moneys that shall come into his hands', and sec. 9886 R.S. 1929 provides that 'he shall give bond and security as such exofficio collector ***** in a sum at least equal to the amount of all revenue to be by him collected for any one year'. Now here are three separate and distinct bonds that it seems are required by statutes above set out, and if there is any provision for other, or additional bonds, to be given in such case, I have over-looked it.

Now that our county-court may know just how many bonds, he must give, and the least amount the bonds should be for, and whether a bonding, or surety companies bond will answer, Will you kindly advise me fully as soon as possible. I suppose in case he gives no bond the present incumbent will hold over; is that correct?"

Section 2851 R. S. of Mo. of 1929 provides as follows:

"Any company having a paid-up capital of not less than two hundred thousand dollars, organized and incorporated ***** for the purpose of transacting the business of becoming surety on the bonds or obligations of persons or corporations, or of insuring the fidelity of persons holding places of public or private trust,***** may, on production of evidence of solvency satisfactory to the court, judge, clerk, head of department or other officer, person or persons authorized to approve the same, become and be accepted as surety on the bond, recognition or other writing obligatory of any person or corporation in or concerning any matter in which the giving of a bond or other obligation is authorized, required or permitted by the laws of the state, and if such surety company shall furnish satisfactory evidence of its ability to provide all the security required by law, no additional surety may be exacted, but other surety may, in the discretion of the official authorized to approve such bond or obligation, be required: ***** it being the true intent and meaning of sections 2851 to 2853 to enable corporations created for that purpose to become surety on any bond, recognition or other writing in the nature of a bond, in the same manner that natural persons may, subject to all the rights and liabilities of such persons."

I am not aware of any act repealing this statute nor court decision holding Surety Company cannot become surety on County Treasurer's bond, subject of course to right of county court to require additional surety in discretion of the court as provided in Sec. 2851. It is true Sec. 12133 R. S. Mo. 1929 provides as follows:

"The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

Section 12133 was enacted first in 1855 l.c.p.520, Par. 6.

Section 2851 was passed and put on the Statute Books in 1885, see Mo. Session Laws 1885, p. 41. Both Statutes deal with the same subject - giving of bond by county Treasurer. The act of 1885 now Section 2851, is an additional method of furnishing bond by the county Treasurer and is a later act and modifies Sec. 12133 to the extent that Treasurer can furnish legally qualified Surety Company as bondsmen and if Surety Company furnishes, satisfactory evidence it can furnish the requisite security required by law, the county court should accept same, but as above stated in addition county court may require under Section 12133 additional security.

In county under township organization county Treasurer should in my opinion furnish a county Treasurer's Bond under Sec. 12133 R. S. Mo. 1929 and a school money bond under Section 9266 R. S. Mo. 1929 and also give bond as exofficio County Collector in the amount of all revenue to be collected by him in any one year. I know of no additional bonds the county Treasurer *is required to give* under the Missouri decision as I read same there is no vacancy in the office in your county. A county Treasurer was duly elected in legal time and manner. He merely has not given bond. Our court held as follows in State ex rel Attorney General v. Churchill 41 Mo. p. 41, that the statute requiring giving of a bond in ten days after Treasurer's election was merely directory and in the course of the opinion said l.c. p.p. 43:

"The matter of time was not essential to the validity of the bond nor a condition precedent to the party's title to the office. Time not being of the essence of the thing required to be done here it was not material."

And in 46 C. J. p.p. 962-963 par. 95 it is stated:

"In the absence of a statute so providing, it is generally held that a failure to qualify, although it affords cause for forfeiture of the office, does not create a vacancy; and even though it is irregular and improper to induct one into office, without giving the required bond, such a one is legally in office and so remains until removed by judicial process, and if the oath is taken or the bond filed at any time before proceedings are taken to declare a vacancy, it is sufficient."

This doctrine is quoted approvingly in Cantley, Com'r v. Village of Mt. Moriah, 49 S.W.2nd, in which case l.c.277 the Kansas City Court of Appeals said:

"Some statutes provide that the failure to give bond shall work a vacancy or a forfeiture of the office, but it is usually held that, under these statutes, the officer continues to be a de jure officer until a vacancy or forfeiture is declared. See State ex rel. v. Ely, 43 Ala. 568; State ex rel. v. Callow, 73 Mont. 308, 254 P.187; People ex rel. v. Benfield, 80 N. ch. 265, 45 N. W. 135; People ex rel. Brooks v. Watts, 73 Hun, 404, 26 N. Y. S. 280. In the case last cited the court quoted

approvingly (page 282 of 26 N. Y. S., 73 Run, 404)
from Dill. Mun. Corp. (4th Ed.) as follows:

'Statutes requiring an oath of office and bond
are usually directory in their nature; and unless the
failure to take the oath or give the bond by the
time prescribed is expressly declared, ipso facto,
to vacate the office, the oath may be taken or the
bond given afterwards, if no vacancy has been de-
clared.'

The elected County Treasurer is a de jure officer until a forfeiture of
his office or vacancy is declared. But as the elected County Treasurer
has not been inducted into office the old Treasurer will hold over until
a successor is both elected and qualified. In this case the Statute
Sec. 12130, expressly provides the county Treasurer shall hold "For a
term of four years and until his successor is elected and qualified
unless sooner removed from office". A successor was elected to the
present incumbent but he has not qualified nor been inducted into office.

But if the statute above quoted did not provide for the Treasurer holding
until successor is elected and qualified he would so hold under Sec. 5 of
Article 14 of Missouri Constitution which provides, "In the absence of any
contrary provision, all officers now or hereafter elected or appointed
shall hold office during their official term, and until their successor
shall be duly elected or appointed and qualified."

State ex inf. Crow Atty. Gen. v. Smith 152 Mo.1.c.517.

Very Respectfully,

Edward C. Crow.
Assistant Attorney General.

APPROVED:

Attorney General.

ECC:SW