

BANKS & BANKING:

County depositary not relieved of liability
by vacation ex parte circuit court order.

1-22
January 13, 1934.



Hon. C. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This Department is in receipt of your letter of January 2, 1934, with request for an opinion on the facts stated in same; which letter is as follows:

"Will you please let me have an opinion as to whether or not the Court Order under date of December 30th, in connection with a deposit of County Funds in the amount of \$12,500.00, in which the Citizens Bank of Marshfield and the Citizens State Bank of Niangua are the petitioners, copy of which is attached hereto, is sufficient to relieve the Citizens State Bank of Niangua of any liability in connection with this Deposit of County Funds in the amount of \$12,500.00."

In connection with your letter we have before us a copy of the petition of the Citizens Bank of Marshfield and the Citizens State Bank of Niangua, Petitioners, presented to Honorable C. H. Skinker, Judge of the 18th Judicial Circuit of Missouri, together with the court order of Judge Skinker.

First, it will be noted that this is an ex parte proceeding in which the two above banks involved are the petitioners. Secondly the court order was made by Judge Skinker, in Vacation of the Webster County Circuit Court.

The particular point you inquire about is whether or not this court order is sufficient to relieve the Citizens State Bank of Niangua of any liability in connection with this deposit of county funds in the amount of \$12,500. This being an ex parte proceeding, only such parties as were properly in court were bound by this court order if the court had jurisdiction on the subject matter by this ex parte vacation entry, and of course the county court not being a party was not bound by the order. This order being made in vacation, would the court have jurisdiction of the parties, that is, the two banks, the Citizens Bank of Marshfield and the Citizens State Bank of Niangua, and jurisdiction of the subject matter?

The general rule is stated in 14 Corpus Juris, 802:

"It is not within the power of litigants to invest a court with any jurisdiction or power not conferred on it by law, and accordingly it is well established as a general rule that, where the court has not jurisdiction of the cause of action or subject matter involved in a particular case, such jurisdiction cannot be conferred by consent, agreement or waiver."

In the case of *In re Big Tarkio Drainage District vs. Voltmer*, 256 Mo. 152, l. c. 162, the court said:

"The lack of jurisdiction over the person may be waived. The lack of jurisdiction over the subject matter can not be waived. It can not be conferred even by consent. (*State v. Bulling*, 100 Mo. 87; *Brown v. Woody*, 64 Mo. 547; *State ex rel. v. Nixon*, 232 Mo. 496)."

And further, in the case of *Meierhoffer v. Hansel*, 294 Mo. l. c. 205, the same court said:

"It can not be argued that by the introduction of testimony on the motion appellant waived the question of jurisdiction, because it is academic that jurisdiction of the subject matter can not be waived or conferred even by consent. (*In re Drainage District v. Voltmer*, 256 Mo. 152, l. c. 163, 165 S. W. 338; *St. Louis v. Glasgow*, 254 Mo.

262, 162 S. W. 596; Title Guaranty and Surety Company v. Drennon, 208 S. W. 474).

"The general rule is that all judicial business should be transacted by a court in term time, and that such business can be transacted in vacation only where there is some warrant therefor, either in a constitutional or a statutory provision."

15 Corpus Juris, 899.

"An order made in vacation is not an order of the court as there can be no such thing as a constructive session of a circuit court."

Cook v. Penrod, 111 Mo. App., 1. c. 137.

Carter v. Carter, 237, Mo. 634.

"It is a familiar principle of law that, during the interim between periods wherein courts are allowed to sit, such courts have no jurisdiction or power; and that any acts of a judicial nature, except such as may be specifically authorized by statute, done in vacation, are absolutely void."

Hale v. Kinnaird (Ala.) 76 So. 954, 1. c. 957.

In the absence of any statutory authority for a court to make an order of this kind, it is our opinion that it has no inherent right to do so and for that reason it had no jurisdiction of the subject matter. And further, if Webster County has any claim on the Citizens State Bank of Niangua by reason of the deposit of \$12,500 in question, such liability on the Citizens State Bank of Niangua was not relieved by this ex parte proceeding

in vacation in which the county was not made a party. It is, therefore, our opinion that the status of the liability of the Citizens State Bank of Niangua to Webster County was not changed by this order, and was, insofar as the County is concerned, a nullity; and the fact that said order recited that Webster County had approved and agreed to such transfer and release of liability, would not change the situation.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY MCKITTRICK
Attorney-General.

CRH:EG