

OFFICERS: Trustee of county hospital subject to ouster,
criminal prosecution, and civil suit for illegal
purchase of supplies.

January 21, 1942

Hon. T. A. Faucett
Prosecuting Attorney
Callaway County
Fulton, Missouri



Dear Sir:

This department is in receipt of your request for an
opinion under date of January 19, 1942, which reads as fol-
lows:

"I am writing your office for an opinion,
on the last clause in Sec. 15195, 1939
Revised Statutes, which reads as follows:

'No Trustee shall have a personal
pecuniary interest, either directly
or indirectly, in the purchase of
any supplies for said Hospital, un-
less the same are purchased by com-
petitive bidding.'

"Of course, this law applies to establish-
ing and maintaining a County Hospital. We
have one here in this County and it seems
that one of the Trustees of the Hospital
has furnished considerable supplies to this
Hospital, without competitive bidding.

"I don't think that there would be any ques-
tion but that the contract would be void to
start with, but if it was performed and the
goods paid for, would there be any liability
on the Trustees part, or would he forfeit
his right to be Trustee, by reason of having
done this?

"I have my own ideas about this situation
but would like to have an opinion from your
office."

That part of Section 15195, R. S. Mo. 1939, which you set out in your request is worded in a plain and unambiguous manner. It may not be construed but must be given effect as written. *St. Louis Amusement Co. v. St. Louis County*, 147 S. W. 667.

The above partial section is mandatory and any contract for the purchase of supplies for a county hospital entered into by the trustees without competitive bidding is absolutely void.

In your request you state that the contracts have been performed and the goods delivered and paid for. You also state that one of the trustees has furnished considerable supplies to the hospital. The general rule is that neither party to an illegal agreement that has been executed on both sides will be aided in recovering what has been parted with under the agreement. This rule is set out in the case of *Idel v. Hamilton-Brown Shoe Co.*, 121 S. W. (2d) 817, par. 3-4, where the court said:

"The general rule is that neither party to an (illegal) agreement that has been executed on both sides will be aided in recovering what has been parted with under the agreement." 12 Am. Jur., Contracts, Sec. 213, p. 724. Numerous cases from the Supreme Court of the United States and from many states are cited supporting the general rule as stated in American Jurisprudence. Among the cases cited is *Ullman et al. v. St. Louis Fair Ass'n*, 167 Mo. 273, 66 S. W. 949, 56 L.R.A. 606. In the *Ullman* Case the court quoted with approval from *Skinner v. Henderson*, 10 Mo. 205, as follows (page 951): 'The rule in respect of money paid on illegal contracts appears in general to be that money so advanced may be recovered in an action for money had and received while the contract remains executory, because a violation of the law is thereby prevented; but, if the contract be executed, it cannot be recovered back.'

"In an executory, illegal and immoral contract the law allows for repentance, and

money paid thereon may be recovered back; but, if the contract upon which the money is paid has been performed, then the law will not aid the party who has expended money thereon to get it back.' Burgess v. Manchester Inv. Co., Mo. App., 186 S. W. 1144, loc. cit. 1145, and cases there cited."

The above opinion is on the general rule between private individuals, but there are exceptions to that general rule where the public is interested. In the case of Witmer v. Nichols, 8 S. W. (2d) 63, par. 2-3, the court said:

"It is to be first noted that the question of enforcing the contract or in any way giving it effect is not involved. The contract has been completely executed on both sides. What the plaintiffs seek is a recovery for the school district of the moneys paid out for the site. In so doing they recognize that under equitable principles the district is bound to restore to the rightful owners the possession of the land which it obtained in consideration for the money. Sparks v. Jasper County, 213 Mo. 218, 112 S. W. 265. The general rule is that where the parties to an illegal contract are in pari delicto, and the contract has been fully executed on both sides, neither will be aided in recovering what has been paid out under the contract. The rule is without application, however, in cases in which the public interest will be better promoted by granting than by denying relief. Winchester Electric Light Co. v. Veal, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353; 6 R. C. L. 829, sec. 220."

Under the above opinion, even though the parties to the illegal contract have fully executed the contract, the courts will aid one of the parties where the public is interested.

According to the above opinion of the court, the county could bring a civil action against the trustee who furnished the supplies to the hospital for money had and received. The question as to the amount of the recovery would depend upon the facts in each and every case.

You also inquire as to the question of the forfeiture of office of the trustee. There is no question but that the trustee could be ousted for violation of his duties as trustee of the hospital in furnishing supplies in direct violation of Section 15195, R. S. Mo. 1939. It was so held in the case of State v. Wymore, 119 S. W. (2d) 941, 1. c. 944, where the court said:

"In other words, under the statute, the offending official 'forfeits by the act forbidden' (State ex inf. v. Ellis, 325 Mo. 154, 161, 28 S. W. 2d 363, 366) and is subject to any remedy available to the people."

The trustee who furnished the supplies to the hospital in violation of the clause set out in your request, and the other trustees, if members of a conspiracy, can be prosecuted criminally. The main section under which a criminal prosecution could be maintained is Section 4482, R. S. Mo. 1939, which reads as follows:

"Any member of the county court, common council or board of trustees, or officer or agent of any county, city, town, village, school township, school district, or other municipal corporation, who shall, in his official capacity, willfully or corruptly vote for, assent to or report in favor of, or allow or certify for allowance, any claim or demand, or any part thereof, against the county, city, town, village, school township, school district or other municipal corporation, of which he is such officer or agent, or against the county court, common council or board of trustees of which he is a member--such claim or demand, or part thereof, being for or on account of any contract or demand

or service not authorized or made as provided or required by law--every such person so offending shall, on conviction, be punished by imprisonment in the penitentiary not more than five years, or by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment in the county jail not less than two nor more than twelve months, or by both such fine and imprisonment."

Other criminal sections under which the trustee who illegally furnished supplies to the hospital could be prosecuted are Sections 4339 and 4340, R. S. Mo. 1939. These two sections are misdemeanors, but Section 4482, supra, is a graded felony.

That the trustee who illegally furnished supplies to the hospital, and the other trustees, if guilty of conspiracy in the illegal transaction, could be removed from office and could be subjected to criminal prosecution was held in the case of *Bakersfield News v. Ozark County*, 92 S. W. (2d) 603, par. 7-9, where the court said:

"If he 'be guilty of any willful or fraudulent violation or neglect of any official duty' (Mo. St. Ann. sec. 11202, p. 6143), he may be removed from office by the method provided in sections 11202-11209, R. S. 1929 (Mo. St. Ann. secs. 11202-11209, pp. 6143-6146). He would be subject to criminal prosecution under sections 3945-3950 and 10187, R. S. 1929 (Mo. St. Ann. secs. 3945-3950, 10187, pp. 2761-2763, 3695)."

The procedure for the ousting of a county officer under the facts stated in your request is set out in Section 12828, R. S. Mo. 1939, which reads as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such

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office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

This section was enacted in accordance with Section 7, Article XIV, of the Constitution of the State of Missouri.

As to who shall bring an ouster proceeding under the facts stated in your request, is set out in Section 12829, R. S. Mo. 1939.

CONCLUSION

Under the above authorities, it is the opinion of this department that a trustee who has furnished considerable supplies to the county hospital of Callaway County, the furnishing of which was not open to competitive bidding, can be ousted from office.

It is further the opinion of this department that a civil suit can be brought against this trustee for money had and received under an illegal contract.

It is further the opinion of this department that the trustee, under the facts set out in your request, can be prosecuted criminally under Sections 4482, 4339 and 4340, R. S. Mo. 1939.

Respectfully submitted

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APPROVED:

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