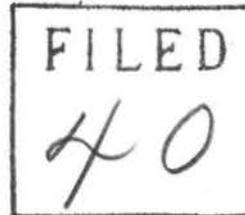


COUNTY COURT: Old county court may employ janitors whose terms extend into term of new county court; two members of the county court may make an order to transact business without the presence of the other member of the county court.

January 14, 1943

Honorable Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri



Dear Sir:

Your request of January 6, 1943, for an opinion on two matters pertaining to the action of the county court of Ray County, has been received.

This request consists mainly of two question, the first question reading as follows:

I

"The County Court of this County is composed of three members - a Judge from the Western District, a Judge from the Eastern District, and a Presiding Judge, who is elected from the County at large. All three members were sworn into office the 2nd day of January, 1943. The old Court made certain appointments and orders of record relative to hiring janitors for the Court House, and fixing their salaries, and then finally adjourned their November term upon December 31st.

"The question now arises as to whether or not the New Court may set aside the orders and break contracts made by the Old Court and substitute new and different agreements in their place?"

Section 36, Article VI of the Constitution of the State of Missouri, reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

By reason of this section of the Constitution, the legislature enacted Section 2480 R. S. Missouri, 1939, which reads as follows:

"The said 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."

In the first question of your request, you stated that the old county court appointed janitors for the courthouse, fixing their salaries and then adjourned their November Term upon December 31st. I am presuming that the old county court entered into some contract, with the janitors, which would extend over into the term of the new county court which was sworn in on January 2, 1943:

In a recent case handed down by the Supreme Court of this State, it was held that the county court could appoint janitors, and set their salary, for a term that might hold over under the next new county court.

It was so held in the case of *Aslin v. Stoddard County*, 106 S. W. (2d) 472, 1. c. 475, where the court said:

"By section 2078, R. S. 1929, Mo. St. Ann. Sec. 2078, p. 2658, it is provided that the county court 'shall have control and management of the property, real and personal, belonging to the county.' This express authority and duty carries with it the necessarily implied authority to employ such labor and service as may reasonably be requisite in order to effectuate the express power granted. Of such character is the work of a janitor, such as plaintiff herein. By the order of court and the contract pursuant thereto employing him he did not become an officer of the county, but only an employee, to whom no attempt was made to delegate governmental or other such functions of the court which from time to time might involve matters of discretion to be exercised by that body. See, on this question, *Manley v. Scott*, 108 Minn. 142, 121 N. W. 628, 630, 29 L. R. A. (N. S.) 652, and notes in latter volume.

"No case from this state is cited nor have we found any directly adjudicating the precise question

now under consideration, viz., whether the county court may lawfully make a contract, binding upon the county (assuming good faith in the making thereof and reasonableness as to time of performance), the performance of which will extend beyond the terms of office of part or all of the members of the court as then constituted. * * *

The court further said, on page 477 of the same case:

"In our opinion, a county court has power to make a contract such as that here in question, for a reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold.

"We take next the contention that the contract was for an unreasonable time and was made in bad faith and collusively. As to the time factor we think it clear that one year cannot be considered an unreasonable term of employment, the circumstances considered. The county court needed the services of a competent janitor (a continuing need), and, being agent of the county and trustee of its funds (Kansas City Disinfecting & Mfg. Co. v. Bates County, 273 Mo. 300, 201 S. W. 92), owed the county the duty to conserve its funds and to procure necessary labor and service at the best available price. It may well be that, in the judgment of the court, a competent janitor, who

might, perhaps, have found employment elsewhere, could be hired at the time in question for the definite term of one year, to the advantage of the county. The result in the instant case emphasizes that thought. There is no contention that plaintiff was not competent and suitable for the work for which he was employed. Prior to his employment Parks had been receiving \$60 per month for doing the same work which plaintiff contracted and was willing to do for one year at \$50 per month. The 'new' county court (so called in appellant's brief) continued to pay Parks \$60 per month. The contract with plaintiff, if carried out, would have saved the county \$10 a month for a year -- a substantial saving on an item of the size involved.

"Neither do we think the agreed facts would justify us in holding, as matter of law, that the court acted fraudulently or in bad faith in employing plaintiff. Fraud is not presumed. Contra, right rather than wrong action is presumed, if presumption may be indulged. So far as concerns the employment of plaintiff alone, that contract certainly cannot be said to indicate bad faith or wrongful purpose on the part of the court. As we have pointed out, it was calculated to conserve the county's funds -- to save money for the county, and would have so resulted had it been adhered to. But it is said that, at the same time, when two members of the court

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were about to bid farewell to their official positions, the court made three other 'appointments,' each for a term of one year, when the statute did not fix any definite term for such appointments or employments. One of those 'appointments,' that of Mcooney, seems to have been considered by the so-called 'new court' as all right, since he was retained (though for an indefinite term). As to none of them is there any showing concerning salaries, or the reasons why the county court made the alleged 'appointments' on December 31, 1932. We have but the bare fact that the appointments were made. From this it is argued that said appointments were made collusively and in bad faith, for the purpose of forestalling the court, after the two newly elected members took office, from appointing other persons to such positions, and that, inferentially, it must follow that plaintiff's employment was actuated by the same purpose. We cannot say, as matter of law, that it conclusively so appears. The trial court found the issues for the plaintiff. We would not be justified in setting aside that finding."

Under the holding in the above case, the old county court could employ janitors for a term that may not be terminated until some time during the term of the new county court, providing the term and salary are reasonable.

CONCLUSION

It is therefore the opinion of this department that the members of the county court of Ray County, whose terms expired December 31st, 1942, could have employed janitors for the courthouse and fixed their salaries, even though the term of employment was carried over into the term of the new county court, if such employment, salary and term were reasonable.

The second question contained in your letter, reads as follows:

II

"Can a County Court during the regular term, when it has recessed for a period of five days, be reconvened sooner than that by action of only two of the members without giving notice to the Presiding Judge?"

"If the Presiding Judge does not think it necessary for the Court to meet oftener than once a week, can the other two judges transact and make business without his consent and presence?"

Section 2485 R. S. Missouri, 1939, partially reads as follows:

"Four terms of the county court shall be held in each county annually, at the place of holding courts therein, commencing on the first Mondays in February, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient: * * * * *"

The above term is what is called the "regular" or "stated" term, and can only be changed by giving a notice as to different dates, in such a manner as to them shall seem expedient.

Section 2487 R. S. Missouri, 1939, reads as follows:

"The president or any two judges of the county court may order a special term whenever the business and interest of the county may require it."

This is known as a special term and notice must be given as set out in Section 2488 R. S. Missouri, 1939, which reads as follows:

"Notice of such special term shall be given to the judges who were absent when the same was ordered, and by advertisement placed up in five public places in the county at least five days before the commencement of such term."

The next term set out by the legislature is one that is known as an "adjourned" term, as set out in Section 2489 R. S. Missouri, 1939, which reads as follows:

"Each county court may hold adjourned terms whenever it may become necessary for the transaction of its business."

In other words, there is a regular stated term, as set out in Section 2485, supra, a special term, as set out in Section 2487, supra, and an adjourned term as set out under Section 2489, supra. It has been held that a special term may be held during the time of the regular term, or adjourned term. It was so held in the case of State v. Thompson, 285 S. W. 972, l. c. 975, where the court said:

"Section 2581 provides for special terms, and section 2583 provides for adjourned terms. The notice which the court ordered served on the property owners affected required them to appear --

"'at the courthouse in the city of Perryville, Mo., on Monday, the 6th day of April, 1925, it being the first day of the next regular term of said court, and show cause why their lands should not be incorporated into said levee district.'

"The record of the county court copied in relator's petition shows that the county court of that county at the May term, 1917, made and entered an order finding:

"That on account of the increase of the volume of business to be transacted by the county court there is not sufficient time to transact all of said business at the regular terms thereof. * * * It is therefore ordered by the court that the county court convene on the first Monday in each month to transact such business as may properly come before it."

"The petition filed here also states that after making that order the county court 'has been convening in regular session' on the first Monday in each month. Respondent argues that this shows an attempt to establish 12 terms a year, and since Perry county contains fewer than 75,000 inhabitants, this could not be done under section 2579. Therefore there was no regular April term, and the order of extension under section 4699 was a nullity.

"Before respondent is in position to attack the order and notice on that ground, it must affirmatively appear that such was not the time of holding the regular term of the county court in that county. The presumption of regularity and legality in the proceedings of that court obtains. *Overton v. Johnson*, 17 Mo. 442; *State ex rel. v. Ellison*, 285 Mo. loc. cit. 312, 226 S. W. 559, 12 A. L. R. 1157.

"In the first place, the order on its face does not attempt to create 12 terms a year. It recites that on account of the volume of business there is not sufficient time to transact it all 'at the regular terms' of the court, and therefore it is ordered that they 'convene on the first Monday of each month' to transact such business as may properly come before it. There is nothing to show that those conventions on the first Monday of each month were other than special terms, held after due notice required by section 2582, R. S. 1919."

It was also held that a special term could be held during the regular term, in the case of *State ex rel. v. Mitchell*, 127 Mo. App. 455, l. c. 461, where the court said:

" * * * In *State v. Riddle*, 179 Mo. 287-299, 78 S. W. 606, our Supreme Court considered a question which arose on a state of facts where a special term of the circuit court had been holden during the recess of a regular term of the same court, and before its final adjournment, precisely as in this case, and no mention was made of the question here pressed upon the court. It was there said that such special terms are entirely independent and are in no manner connected with the regular term of such courts. Indeed, it seems that the salutary provisions of these statutes

authorizing special terms would almost entirely fail were the courts to adjudge that no special terms could be held during the interval or recess while the regular terms may not yet be finally adjourned."

The same holding was had in the case of *The State ex rel. Trammel v. The Hannibal & St. J. Ry. Co.*, 101 Mo. 136, l. c. 150, where the court said:

"These taxes against railroad property are to be levied after the assessments are returned 'at a regular term of said court, if in session at the time; if not at a special term of said court called for that purpose.' Sec. 6879. When the county court opens a stated term and adjourns from day to day or for a number of days, such adjournments are but a part of the regular term, and the tax may be levied at any of these adjourned sessions. The special term mentioned in the clause of the statute just quoted evidently means a term called pursuant to sections 1207-8, Revised Statutes, 1879; but when the court adjourns from time to time, the adjourned terms, as they are called, are but parts of the regular term."

In the second question of your request, you stated that the county court, during the regular term recessed for a period of five days, and then reconvened sooner, and by action of only two of the members, without giving notice to the presiding judge.

Section 2493 R. S. Missouri, 1939, reads as follows:

"A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from day to day, and require the attendance of those absent, and when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge at the time being, to be designated by the clerk of such court, shall stand as the judgment of the court."

Under this section a majority of the judges of the county court shall constitute a quorum. It has been held in this State, that even if the county court does adjourn to a certain date, it may convene at a date sooner than the adjourned date and the session would be lawful. It was so held in the case of Smith v. Supreme Lodge K. of P., 83 Mo. App. 509, l. c. 512, where the court said:

"It is stated in the return of the respondent that the said county court adjourned on the sixth day of March, 1900, to the twelfth day of said month, and that on the seventh day of said month it met and made said order.

"The only question raised by the pleadings is whether or not the action of the county court when it met in session on the seventh day of March, 1900, and made the order in question was valid. That the said court was lawfully in session when it made said order seems well established in this and other states. Cole Co. v. Dallmeyer, 101 Mo. 66; State ex rel. v. Railway,

101 Mo. 136; Green v. Morse, 77
N. W. Rep. 925; Bowen v. Stewart,
26 N. E. Rep. 168; Wharton v. Sims,
88 Ga. 617; The Canary, 22 Fed. Rep.
536; Eastman v. Concord, 64 N. H.
263."

In the above case the question of whether or not only two judges are present does not appear, but it can be inferred that all three judges were present when the date of the meeting was changed, or advanced to a sooner date.

Under the facts in the second question of your request, you state that the county court, during the regular term, recessed for a period of five days, but reconvened sooner than that by action of only two members, without giving notice to the presiding judge. The recess of five days is merely adjournment, at which time the adjourned term would begin, and since they convened at an earlier date, with only two members present, it would have been necessary to give the notice to the absent judge, as set out in Section 2488, supra.

The calling of a session of the county court, at a time between the adjourned date, and the date to which the adjournment was made constitutes a special term and any act of the two county judges, although a quorum was present, would be invalid.

CONCLUSION

It is, therefore, the opinion of this department, that a county court, during the regular term, when it has recessed for a period of five days, may be recon-

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vened sooner than that by action of all three members.

It is further the opinion of this department, that when the county court adjourns to a certain date, and then a session is held by only two members, at a date sooner than the date set for the adjourned term, a notice must be given to the absent judge, if one be absent, and by advertisement posted in five public places in the county, at least five days before the commencement of such term.

It is further the opinion of this department, that if the presiding judge does not think it necessary for the court to meet oftener than once a week, the other two judges, who constitute a quorum, can transact business without his consent or presence during any lawful term.

Respectfully submitted

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APPROVED:

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