

COUNTY COURTS: County court must pay publication of county financial report when compiled according to law.

September 19, 1938. 9/24

Honorable J. P. Campbell
Representative, Ripley County
Doniphan, Missouri



Dear Sir:

This is to acknowledge receipt of your request for an opinion dated September 10, 1938, which is as follows:

"Where the county court, under section 12166, Laws 1937, page 420, authorizes the county clerk to prepare the financial statement and to publish same, can the court legally refuse to pay the printing bill on the theory that there was too much of the statement and the cost of the printing or publication is too much?

"I would be very glad to have your opinion as to the interpretation of this section, together with the other sections relative to financial statements of counties and their publication."

Section 12166 as amended, Session Laws of 1937, page 420, reads as follows:

"The statement shall be set in the standard column width measure that will take the least space and the publisher shall file two proofs of publication with the county court and the court shall forward one proof to the state auditor and shall file the other in the office of the court. The county court shall not pay

the publisher until said proof of publication is filed with the court and shall not pay the person designated to prepare the statement for the preparation of the copy for said statement until the state auditor shall have notified the court that said proof of publication has been received and that it complies with the requirements of this Section. The statement shall be spread on the record of the court and for this purpose the publisher shall be required to furnish the court with at least two copies of said statement that the same may be pasted on the record. (For the preparation of the copy for the statement the court may allow a sum not less than ten cents and not to exceed thirty cents for every hundred words and figures, which sum, if allowed to the clerk of the court, shall be in addition to the salary or fees allowed him by law), and no pay shall be allowed for pasting a printed copy in the record. In submitting bill to the county court the person preparing the statement and the publisher shall itemize the amount as properly chargeable to the several funds and the county court shall pay out of each fund in the proportion that each item bears to the total cost of preparing and publishing said statement and shall issue warrants therefor. Provided, any part not properly chargeable to any specific fund shall be paid from the fund from which officers salaries are paid. The state auditor shall notify the county treasurer immediately of the receipt of the proof of publication of the statement in this act required. After the first of April of each year after the effective date of this act the county treasurer shall not pay or enter for protest any warrant for the pay of any judge of any county court until notice is received from the state auditor that the proof of publication herein

provided for has been filed. Any county treasurer paying or entering for protest any warrant for any judge of the county court prior to the receipt of such notice from the state auditor shall be liable on his official bond therefor. Within twelve months after the effective date of this act the state auditor shall prepare sample forms for financial statements and shall mail the same to the county clerks of the several counties in this state, but failure of the auditor to supply such form shall not in anywise excuse any person from the performance of any duty imposed by this act. If the county court shall employ any person other than a bonded county officer to prepare the financial statement herein required the county court shall require such person to give bond with good and sufficient sureties in the penal sum of one thousand dollars for the faithful performance of his duty. If any county officer or other person employed to prepare financial statement herein provided for shall fail, neglect, or refuse to, in any manner comply with the provisions of this act he shall, in addition to other penalties herein provided, be liable on his official bond for dereliction of duty."

This section amends Section 12166 as set out in the Session Laws of 1933, page 356, the only difference being that that part of the section parenthesized in the 1937 Session Laws changes the method and mode of payment for the preparation of the financial statement.

Section 12165 as set out in the Session Laws of 1933, page 353, is a section which amended Sections 12165 and 12166, R. S. Mo. 1929. This section as set out in the Session Laws of 1933 is too lengthy to set out in this opinion, but part of this section reads as follows:

"On or before the first Monday in March of each year after the taking effect of this act the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not by notices posted in at least ten places in such county, a detailed financial statement of the county for the year ending December 31, preceding. * * *"

Section 12165, as partially set out above, was not amended by the Session Laws of 1937. This section sets out specifically the contents of the financial statement either prepared by the county clerk or by some other person designated by the county court to prepare such statement for the purpose of publication. Under this section you will also notice that it is mandatory that the county court prepare and publish in some newspaper of general circulation published in such county, a detailed financial statement. It is mandatory for the reason that until this publication is made and said publication has been filed in the state auditor's office and in the office of the clerk of the county court, the county court or county treasurer would be liable on their official bond for the payment or the issuing of any warrants whatsoever. The financial report should contain that which is set out in Section 12165 as amended by the Session Laws of 1933, and no more.

Section 2962, R. S. Mo. 1929, reads as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties

thereto, or their agents authorized by law and duly appointed and authorized in writing."

Section 2963, R. S. Mo. 1929, reads as follows:

"In every case of contract entered into by any county, city, town, village, school township, school district or other municipal corporation, or by any officer or agent on their behalf, duplicate copies of the same shall be executed as above provided, one of which shall be filed in the office of the clerk of the county court of the proper county, or in such office or with such officer of the city, town, village, school township, school district or other municipal corporation as may be charged with the keeping of the contracts thereof, and shall not be taken thence except to be used for the purposes of evidence in some legal matter or cause; and in case of variance between such copies, the one on file shall control in the construction of the contract."

According to *McShane v. District*, 70 Mo. App. 624, *Saleno v. Neosho*, 127 Mo. 627, and *Blades v. Hawkins*, 133 Mo. App. 328, the above section is directory and the duplicate execution of a contract is not a condition precedent to its validity.

Section 13771, R. S. Mo. 1929, reads as follows:

"When any notice or advertisement relating to any cause, matter or thing in any court of record shall be required by law or the order of any court to be published, the same, when duly published, shall be paid for by the party at whose instance it was published, which payment, or so much thereof as shall be deemed reason-

able, may be taxed as other costs, or otherwise allowed by the proper courts, in the course of the proceedings to which such advertisement relates."

Section 13772, R. S. Mo. 1929, reads as follows:

"When any such advertisement shall be made by a public officer, thereunto authorized by law, the reasonable expense thereof shall be allowed and paid out of the county treasury, as other demands and charges of a like nature."

Section 13773, R. S. Mo. 1929, reads in part as follows:

"When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be published in any newspaper for the state, or for any public officer on account of or in the name of the state, or for any county, or for any public officer on account of, or in the name of any county, there shall not be allowed for such publication a higher rate than one dollar per square of two hundred and fifty ems for the first insertion, and fifty cents for each subsequent insertion; and for fractional squares and parts of squares in the same proportion: Provided, that in estimating, measuring and calculating the number of squares or parts of squares, the matter contained in said law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be estimated, measured and calculated as if set 'solid,' or without spacing between the lines, and the total number of ems shall be ascer-

tained by multiplying the number of
ems per line of the type used by the
number of lines printed. * * * *

When any law, proclamation, advertise-
ment, nominations to office, proposed
constitutional amendments, or other
questions to be submitted to the people,
order or notice, shall be required by
law to be published in any newspaper,
the rates herein specified shall prevail,
and all laws or parts of laws in conflict
herewith, except sections 13777, 13778
and 13779, R. S. 1929, are hereby re-
pealed."

Under this section, which provides for the minimum
and maximum amount to be charged the county for publica-
tion, the court in Pendleton v. Asbury, 104 Mo. App. 723,
decided that a contract entered into between two publishers,
whereby they should divide the business among the two
publishers and that each should make a bid of the highest
legal rate as set out in the above section, was immoral
and not enforceable as being against public policy.

Section 12107, R. S. Mo. 1929, reads as follows:

"The county court may, by an order
entered of record, appoint an agent to
make any contract on behalf of such
county for erecting any county buildings,
or for any other purpose authorized by
law; and the contract of such agent,
duly executed on behalf of such county,
shall bind such county if pursuant to
law and such order of court."

Under the above section, the county court may by an
order entered of record appoint the county clerk to enter
into a contract with the publishing company.

Section 12109, R. S. Mo. 1929, reads as follows:

"If a claim against a county be for work and labor done, or material furnished in good faith by the claimant, under contract with the county authorities, or with any agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such work, labor and material, though such authorities or agent may not, in making such contract, have pursued the form of proceedings prescribed by law."

Under the above section, even though the agent, which in this case would be the clerk of the county court, had not pursued the form of proceedings prescribed by law in publishing the financial report, yet the county would be liable under the contract.

The court in the case of Anderson v. County, 181 Mo. 46, held that this section would not be applicable to contracts of great magnitude, that is of building a courthouse.

If there were facts not required to be printed as set out in Section 12165, Session Laws of 1933, page 353, then the court would be justified in refusing to pay that which was not required by law to be published. It was so held in an analogous case, Deubler v. Iron County, 93 S. W. (2d) 899, the facts of which and the holdings of the court are as follows:

"An action to recover the value of personal services and expenses, the former rendered, the latter incurred in the making of an audit of the records of certain county officers of Iron county.

"May 10, 1926, a petition signed by more than 300 taxpaying citizens of Iron county was filed with the state auditor requesting that officer to make an audit of the records of certain county officers of Iron

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county pursuant to the provisions of section 13302, R. S. Mo. 1919 (Mo. St. Ann. sec. 11478, p. 7825). The petition requested that the audit cover the period from 1915 to 1924, inclusive. In compliance with this petition and mandate of the statute (section 13302, supra), the state auditor dispatched plaintiff and two associates, all duly appointed examiners, to Iron county to make the audit. Later another examiner participated in the work. Plaintiff testified that the three examiners arrived at Ironton, the county seat, and began the work on August 26, 1926. The examiner in charge of the audit stated that he, plaintiff, and the third examiner began the work on August 17, 1926. The county court was in session on August 17. On the latter day the county court called upon the prosecuting attorney for an opinion advising what period of time the audit should cover. Based upon the opinion of the prosecuting attorney, the court entered an order of record dated August 17, 1926, stating that it would not pay the expense of making an audit covering any year or years prior to 1921, but that it would pay the per diem salary of the examiners and their expenses at the rate of \$2.50 per day for the making of an audit covering the years 1921 to 1924, inclusive.
* * * *

"A jury was waived and the cause submitted to the court. There was a judgment for defendant, from which plaintiff appealed.

* * * *

"But the fatal weakness in appellant's case lies in the fact that the evidence was amply sufficient to justify the conclusion by the trial court, which occupied the posi-

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tion of a jury in determining the facts, that the audit was made for the period from 1915 to 1924, inclusive, and there was no proof that the audit for that period was necessary or that it was the judgment of the state auditor that it was necessary. The evidence fully justified a finding that the only reason on the state auditor's part for ordering the making of the audit for the period from 1915 to 1924 was his construction of the Attorney General's opinion to the effect that an audit for that period was required. The opinion of the Attorney General was not properly susceptible to that construction. It expressly held that the determination of the extent of the audit was not to be made by the county court or the petitioners, but lay within the exercise of the sound discretion of the state auditor. Since the chief examiner testified on one occasion that the making of the audit from 1915 to 1918, inclusive, took from the middle of October to the 20th of November and the state auditor in his letter to the county court dated October 12th stated that the audit for the five years prior to 1926 was almost completed, the trial court was justified in concluding that the expense of the audit for the five-year period (which it was agreed should be covered) was fully paid when the court paid all of the expenses up to November 1, 1926. Absent proof that it was necessary to make an audit for a longer period than that for which the county agreed to pay, or proof that the state auditor acting in his official capacity as a ministerial officer determined that the more extensive audit was necessary, there could be no recovery therefor from the county. It follows that the judgment should be affirmed. It is so ordered."

Honorable J. P. Campbell

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CONCLUSION

In view of the foregoing, it is the opinion of this department that the county court cannot legally refuse to pay the printing bill for publishing a county financial report as set out in Section 12166, Laws of 1937, page 420, where the publisher and the county clerk have complied with all the requirements as set out in the above authorities.

Respectfully submitted

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APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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