COUNTY CLERK:
DUTY OF DRAWING WARRANTS ON ILLEGAL DEMANDS:
COUNTY COURTS NUNC PRO TUNC ENTRIES:

County clerk should not draw warrant on claim illegally allowed by county court, providing he has knowledge of such illegal allowance.
County court not authorized to make nunc pro tunc entries unless there is some record upon which to base such order.

May 26, 1938

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Mr. Melvin Englehart,
Prosecuting Attorney,
Madison County,
Fredericktown, Missouri.

Dear Sir:

This is in reply to yours of May 23, 1938 for an official opinion from this department based upon the following letter:

> "In the year of 1935 the sheriff of Madison County, Missouri collected $186.00 in fees for attending the County Court and in 1936 he collected $171.00 for the same service. According to the court records the court was not in session a sufficient number of days to make the earning of this amount of fees possible. The record shows that he should have received only $108 in 1936 and $102.00 in 1935. When the audit of the county records was completed in March, 1937, this matter was called to the attention of the sheriff and he repaid the county $147.00, March 25, 1937. The audit also shows that the members of county court received pay for the days that they were not in actual session as shown by their record, the same number of days that the sheriff has repaid the county. The county court has refused to turn

back to the county the amount of excess fees that they received and in the May Term, 1938, of said court, the sheriff requested the county court to return the sum of $147.00, which he had returned to the county as above stated. The court ordered the warrant written but the clerk is doubtful of his authority to write the warrant and has requested me to secure an opinion from you on that question. Does the county clerk of Madison County, Mo., have authority to write or draw a warrant on the county for the above purpose?

Is it possible for the County Court of Madison County, Missouri, to correct it's record now, so as to show the action of the court the business transacted during the years of 1935-36 on the days that they have no record to show that they were in session?

If necessary, I shall bring the auditor's report to Jefferson City, Mo., and discuss the case with the assistant to whom the case is assigned."

I.

From your letter it is evident that the county court has attempted to pay to the sheriff the sum of one hundred forty seven dollars ($147.00) which the audit has revealed that he was not entitled to. It appears that the sheriff of your county after the auditors had filed their report showing that he had collected one hundred forty seven dollars ($147.00) too much on account of claims for attendance of county court when the court was not in session; that pursuant to such report the sheriff paid into the county treasury the said sum of one hundred forty seven

dollars ($147.00) thereby balancing his account with the court, and that thereafter the court attempted to refund this amount to the sheriff. Section 11789, R.S. Mo. 1929 sets out the fees to which the sheriffs are entitled and an officer is only entitled to such fees as are prescribed by statute. Under this section the sheriff is entitled to three dollars ($3.00) per day for his attendance upon the county court when it is in session. In the case of State ex rel. v. Brown, 146 Mo. 401, l.c. 406, the court said:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed."* * * * * * *

Section 1826, R.S. Mo. 1929 provides as follows:

> "The supreme court of the state of Missouri, the courts of appeals, the circuit courts, the county courts and the probate courts in this state shall be courts of record, and shall keep just and faithful records of their proceedings."

In the case of Henry County v. Salmon et al., 201 Mo. 136, l.c. 151, the court said:

> "In the first place, a county court is a court of record. (R. S. 1899, sec. 1580.) Therefore, it must speak through its record. (Morrow v. Pike County, 189 Mo. l.c. 620.) The inherent power of a court of record to supply entries nunc pro tunc which have been omitted through the mispriśon of its clerk, where sufficient data exist in the clerk's office, ought not to be gainsaid. This power does not depend on statute,

> but is a necessary incident to the jurisdiction of every court of record--inasmuch as, by a presumption of law, the record imports verity, therefore, it is essential to the administration of justice that records should speak the very truth they are held to import. (Jillet v. Bank, 56 Mo. l.c. 306; Turner v. Christy, 50 Mo. 145; Loring v. Groomer, 110 Mo. l.c. 639; State ex rel. v. Bird, 108 Mo. App. l.c. 168.)
>
> The confusion and distress that would arise from the denial of this sensible power to a county court whereby the business affairs of the county would be left at the mercy of the caprice, wiles, slips, lapses or other inadvertences of a clerk, are apparent. In this case there was a memorandum of the filing of the bond on May 7th, 1903, and on the back of the bond was a memorandum under date of June 1st, 1903, of its approval, certified to by the presiding judge. The presiding judge, while the court was in session, had power to keep minutes ex officio--an act of the clerk in that behalf not being indispensable. (State ex rel. v. Sheppard, 192 Mo. l.c. 514.) His narration on the back of this bond may, therefore, be laid hold of as a minute of the court's action, in the absence of better evidence."* * * * * * * * * * *

Therefore, if there is no court record or other memoranda in the court files or clerk's office showing that the county court was in session on the dates the sheriff claimed fees for such service, then the audit is correct in charging the sheriff with the amount for which he had made claims for attending the court when it was not in session.

It did follow that the sheriff was right in refund-

this amount to the county and the order of the county court attempting to repay this amount to the sheriff would be unauthorized and illegal.

Then the question is, should the county clerk issue the warrant for this refund upon the order of the county court.

Section 12169, R.S. Mo. 1929 provides as follows:

> "When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, and unless otherwise provided by law, in the following form:
>
> Treasurer of the county of ____: Pay to _____ _____ dollars, out of any money in the treasury appropriated for ordinary county expenditures (or express the particular fund, as the case may require).
>
> Given at the courthouse, this _____ day of _____, 19___, by order of the county court.
>
> Attest: C D, clerk. A B, president."

Section 12170, R.S. Mo. 1929 provides in part as follows:

> "Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman letters, without ornament. It shall be signed

> by the president of the court whilst the court is in session, attested by the clerk, and warrants shall be numbered progressively throughout each year:"* * * * * * * * * * * *

The county clerk is a ministerial officer and he acts ministerially in the performance of his duties of issuing warrants which had been ordered by the county court, and if the order of the county court is a legal order such officer may be compelled by mandamus to perform the duty of issuing such warrants. In the case of State of Missouri ex rel. Thomas et al. v. The Treasurer of Callaway County, 43 Mo. 228, l.c. 230, the court said:

> "* * * * But where the allowance by the court has been regularly had upon a claim they are required to pass upon, and the warrant has been drawn and presented, and the court adjourned for the term, the treasurer has but one duty; and no subsequent court, not of superior jurisdiction, can excuse him from the performance of that duty. There is no doubt of the jurisdiction of this court by mandamus against county treasurers who refuse to pay claims properly audited. They are ministerial officers, and can be compelled to perform their plain duties."* * *

However, such officer cannot be compelled to do that which is expressly forbidden by statute. In the said Thomas v. Treasurer of Callaway County case, supra, the court further said:

> "But in entertaining the application we will look into the claim allowed by the court. It does not follow that, because it is the duty of the treasurer to pay, we will necessarily, in this form of action, order him to do so. If it should appear that the

> County Court has, by mistake or otherwise, audited an illegal claim--one which should have been rejected--we will leave the parties to such remedies as they may have by ordinary proceedings."* * * * * *

In the case of State ex rel. Younkin, 108 Kansas 634, 637, the county board attempted to issue bonds for the payment of road machinery. The issuance of the bonds was unlawful and the clerk of the board refused to sign and register the bonds. The court said at l.c. 367:

> "The county clerk balks at this large bond issue against 'Project D' and refuses to sign and register the bonds and coupons. The state highway engineer who must sanction the outlay, also declines to give his official approval that all this vast sum be charged against 'Project D'. Hence the lawsuit. So far as the county clerk is concerned he has neither responsibility or discretion in the matter. His functions in the matter of this bond issue are only clerical; and yet it has been held that a public officer ought not be required by mandamus to perform an act which in itself is merely incidental and ministerial to that which other officials are unlawfully seeking to accomplish. Thus in National Bank v. Heflebower, 58 Kansas, 792, the Board of School Fund Commissioners who were charged with the unlawful investment of state school funds, purchased some county bonds at a price somewhat but not greatly in excess of their market value, and drew orders on the state treasurer for the payment of the agreed price. The treasurer declined to register the warrants and pay them. The court declined to compel the treasurer to perform these mere ministerial duties."

Volume 38 Corpus Juris, section 108, page 621, the rule is stated as follows:

> "Where the duties of a clerk of court

> are ministerial, as they usually are, in conformity to general rules, resort is very generally had to the writ of mandamus to compel the clerk to perform a function which he has refused to perform; but mandamus will not lie where there is another adequate and appropriate remedy, such as an application to the court for an order directing the clerk to act; or where there is an adequate remedy by appeal; or where there is a specific remedy provided by statute; or where the right thereto is not clear; or where the performance of the act sought to be compelled would be necessary to give effect to an unlawful act undertaken by a board of county commissioners,"* * * * * * * * *

From the facts which you have submitted it appears that the county clerk is familiar with all the facts surrounding this allowance to the sheriff. As stated above, if the court was not in session on the dates for which it is attempting to pay the sheriff for attendance, then it is not authorized to order the warrant issued for a payment of such service.

While the county clerk acts ministerially in the issuance of this warrant, yet knowing the facts as he does he would be pursuing the safer course by refusing to issue the warrant and then let the claimant proceedto force him to perform this ministerial duty, at which time the clerk can set up his reasons for such refusal.

In the case of State ex rel. Watkins v. Macon County, 68 Mo. 29, the court held that an officer cannot be compelled to do that which he is expressly forbidden to do, and we are convinced that the clerk is not authorized to issue this warrant under the circumstances. In the said Macon County case, 68 Mo. l.c. 41, the court said:

> "In the case of Supervisors v. United States, 18 Wall. 77, it is

> observed that 'a mandamus will not be awarded to compel county officers of a State to do any act which they are not authorized to do by the laws of the State, from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being."* * * * * * *

CONCLUSION

From the foregoing it is the opinion of this department that when the county court has made its order allowing the claim, the clerk's duties in drawing the warrant are ministerial. However, in this particular case knowing the facts as he does, and by authority of the cases cited above, it is our opinion that the clerk would be justified and would be pursuing the safer course by refusing to issue the warrant, thereby compelling the complainant to resort to mandamus to force him to write it. At that time the clerk could interpose his reasoning for such refusal, which in this case would be sufficient in our opinion to authorize a refusal of an order of court requiring him to issue the warrant.

II.

On the question of whether or not it is now possible for the county court to correct its records so as to show the action of the court the business transacted during the days, of which there is no court record, we find that such an entry would come within the class of nunc pro tunc entries. In the case of Shepard v. Grier et al, 160 Mo. App. 613, l. c. 614, the court said:

> "* * * Nunc pro tunc entries can only be made by the court at a subsequent term when sustained by some entry or memorandum on file in the case, or on the minutes of the clerk or docket of the court, made at the prior term.

> They cannot be made on the recollection of the judge himself or on any testimony aliunde the record."

In the case of State v. Bush, 136 Mo. App. 608, the court had under consideration the question of a county court making a nunc pro tunc entry of the record so as to show that the court had adjourned to the various days of the term which the record showed the court was in session, and in that case the court said at l.c. 614:

> "* * * It is evident, taking into consideration the whole record, that all the different sessions of the court alluded to were adjourned terms of the regular May term for 1906. The recitation in the record at the beginning of each session that the court met pursuant to adjournment of the one last preceding and the final order of adjournment made on the 18th day of July seem to us ought to be construed as showing a continued session of the court from its first regular meeting until the order was made for its final adjournment. Such being the case, it was competent for the court to enter the said nunc pro tunc orders. And, as the court had not finally adjourned when the entries referred to in the first instance were made, that the court met pursuant to adjournment, it had ample evidence of record for the nunc pro tunc orders."

In the case of Ainge v. Corby, 70 Mo. 257, l.c. 260, the court said:

> "* * * The order of court approving the sale recites that the report is fully approved, 'it appearing * * * that the order of this court has

> been fully complied with in all things.' Plaintiffs, for the purpose of showing that the probate court of Buchanan County was not in session on the 18th day of September, 1863, offered in evidence the record of said court, which showed that the court stood adjourned from the 14th day of September, to the 19th day of September 1863. This evidence was received over defendant's objection, and the action of the court in receiving it is assigned for error.
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> The defendant then offered to prove by the judge of said court that it was in session on the 18th day of September, 1863, transacting business, but that by mistake in writing up the records they failed to show the fact. This evidence was rejected, and this action of the court is also assigned as error. The trial court was fully justified in receiving the evidence offered by plaintiffs and rejecting that offered by defendant, by the decision of this court in the case of Mobley v. Nave, 67 Mo. 546, where the precise questions here presented were passed upon."* * * * *

In the case which you have submitted it appears that there is no record entry of the court being in session at any of the dates for which the sheriff has claimed his fees and for which the auditors disallowed such claims in the audit. That being the case and as said in the case of Shepard v. Grier, supra, the record cannot be made up on the recollection of the judge or any testimony aliunde the record.

CONCLUSION

It is, therefore, the opinion of this department that the county court is not authorized to make a record

entry now showing that the court was in session on days in 1935-1936 unless there is some record entry or some memoranda in the court files or clerk's office showing that court was in session on said days.

Respectfully submitted,

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APPROVED:

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