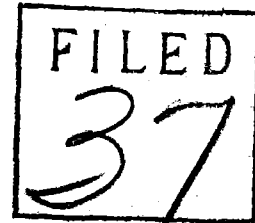


CLERK OF COUNTY COURTS: Bondsmen of county clerks are not
COMPENSATION AS AGENTS, liable for acts of their principal
LIABILITY OF BONDSMEN : done while acting as an agent for
FOR : the county court.

May 13, 1941.

Honorable Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri



Dear Mr. Harned:

In reply to yours of recent date wherein you submit the following question:

"I would appreciate your opinion on the following: On December 20, 1935, the County Court of Pettis County, Missouri, made an order appointing the Clerk of the County Court as agent, under section 9256 and section 12107 Revised Statutes of Missouri 1929, to take charge of the School Loans and handle the properties under said School Loans, and directed him to take out eighty dollars per month from the fees collected by him as County Clerk as compensation for the services to be rendered. Also the County Court for the years 1936, 1937, 1938, and 1939, by another order allowed the County Clerk fees in excess of the amount provided by statute for making and filing financial report of the County. Of course the Clerk has a bond and the question I would like your opinion on is, 'Under the Facts above stated is the Bonding Company liable for these over payments and the deduction of eighty dollars a month from his fees?'"

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The last part of your request, which pertains to a charge alleged to have been made by the county clerk for preparing a financial statement, you state that the amount allowed by the court was in excess of the amount permitted by statute. Your request does not indicate whether or not the county court ordered the clerk to prepare this statement or whether he prepared it without an order of court. Under the statute this might make a difference.

On this question I find that this department, on April 26, 1939, by an opinion to Honorable G. Logan Marr, Prosecuting Attorney of Morgan County, Missouri, and written by Mr. Drake Watson, held that the county clerk receives these funds officially and his bondsmen are liable if he receives an amount not permitted by statute. I note in this opinion, however, that the writer of the opinion relies on the case of Putnam County vs. Johnson, 259 Mo. 73, as authority. Under some circumstances it might be authority on this question, however I am particularly calling your attention to the statement of the court made on page 85, in reference to the facts in that case wherein the court said:

"We suspect plaintiff may have trouble in proving a case under counts 3 and 4 of the petition, but that remains to be seen."

Referring to the opinion in the Putnam County case, you will note that counts 3 and 4 of the petition charged that the clerk was acting as agent when he collected the monies for which the cause of action was brought. So, that case might not be a good authority on this question if the clerk is acting as agent.

Section 13285, R. S. Mo. 1939, requires the clerk to furnish a bond conditioned "that he will faithfully perform the duties of his office, and pay over all monies which may come to his hands by virtue of his office".

In Howard et al. vs. United States et al., 37 Fed. (2d) 243, at 246, the court, in speaking of the liability of the sureties on such a bond, and the construction which will be

placed on an official bond, said:

"A surety on such a bond undertakes that the officer will faithfully perform the duties stated and defined by law as pertaining to his office. He does not consent to become liable for any act in which the officer may become engaged in the pursuit of his office. Otherwise stated, an officer may so act as to render himself personally liable as a matter of general law, but it does not follow necessarily that his official bondsmen are liable. The liability of sureties is limited to that for breach of official duties of the principal, and does not include an undertaking against every act that the official may perform or every failure to act of which he may be guilty. (cases cited) Thus in *City of Wilkes Barre v. Rockefeller*, 171 Pa. 177, 33 A. 269, 270, the court said: 'The terms must receive a reasonable construction, and, if there has been no violation of official duty, there has been no breach of the condition for which the sureties can be required to account. It follows, necessarily, that for an extraofficial act or undertaking of the principal the sureties cannot be held responsible. 2 Am. & Eng. Enc. Law, 467b. And if the ordinary course of official action is departed from, for the benefit and at the instance of the party to whom the bond is given, and loss results, the sureties are not, in law or morals, responsible for such loss, unless they assented to the departure from the ordinary course of official action which made the loss possible.'

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"Contracts of sureties on official bonds are strictissimi juris. The instrument is required by a statute which defines its terms, and the law of the office is a part of the contract. The surety guarantees the faithful discharge of all duties properly pertaining to the office, and the extent of such liability can be determined only from the bond and from the statutes creating the office and defining the terms of the bond. * * *"

Applying this rule, the extent of the liability on the clerk's bond can only be determined from the bond and from the statutes creating the office and defining the terms of the bond.

In the first part of your request you state that the county court had made an order appointing the county clerk, as agent, to take charge of school loans and handle the properties under these loans, and has allowed the clerk \$80.00 a month for this service. Then you ask the question, that if this allowance is illegal and the clerk has collected it, are his bondsmen liable under the bond for the re-payment of this. If the bondsmen are liable it is on account of the provision of the bond which requires him to faithfully perform the duties of his office and to pay over all monies which may come to him by virtue of his office so, if the foregoing are not duties of the office and the monies which he received, as compensation therefor, are not received by virtue of his office then, under the authorities hereinafter set out, the bondsmen would not be liable.

Under Section 10389, R. S. Mo. 1939, county courts manage the school funds and properties which it may become possessed of in connection with such management. This section authorizes the county court to appoint an agent to perform its duties in managing these properties. It was for this purpose that the county clerk was appointed and paid the compensation which you mention in your letter. It will be noted from this section that there is no provision whereby it is the duty of the county court to appoint the county clerk as its agent, for the foregoing duties,

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nor do we find any statute which makes it the duty of the county clerk to act as such.

You also state that the duties to be performed, by this agent, were those which are authorized under Section 13766, R. S. Mo. 1939, which 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."

From this section you will note that there is no duty imposed on the county court to appoint a county clerk, as agent, nor do we find any statute which makes it the duty of the county clerk to act as such agent.

In the case of Knox County vs. Goggin, 105 Mo. 182, it was held that the county clerk had no authority to collect money due upon a bond given for a loan of school monies, nor to enter satisfaction of the mortgage.

In the case of State ex rel. vs. Moeller, 48 Mo. 331, the court held that it was not the duty of the clerk of a county court to collect the proceeds arising from the sale of swamp lands, and sureties on his official bond would not be held liable for monies so collected and not paid over as required by law.

In Vol. 46, C. J., page 1068, Section 399, the rule with reference to the liability of bondsmen, for acts outside of the official duty of the principal, is stated as follows:

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"Liability upon an official bond arises as a rule only with reference to acts of the officer which pertain to some function or duty which the law imposes upon his office. Thus sureties are not liable for a purely personal act of an officer not done as a part of, or in connection with, his official duties; * * *"

Referring to the school laws and particularly Article 2 of Chapter 72, R. S. Mo. 1939, it is quite apparent that the lawmakers have made the county courts trustees of the school funds and the managers of certain school properties, and in no instance have they imposed any of these duties on the county clerk.

CONCLUSION

From the foregoing, it is the opinion of this department that the sureties on the official bond of the county clerk are not liable for alleged over-payments made by the county court to the county clerk for services performed as agent of the county court in handling school properties as is authorized under Section 10389, R. S. Mo. 1939, and for acting as agent of the county court, under Section 13766, R. S. Mo. 1939, to make contracts on behalf of the county for erecting county buildings or any other purpose authorized by law.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

VANE C. THURLO
(Acting) Attorney General

TWB:LB