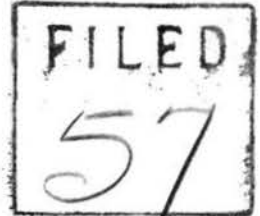


SHERIFFS AND OFFICIAL BONDS: Sureties on Sheriff's bonds are not liable for excess bills presented to the County Court by the Sheriff and paid to him.

June 5th, 1939.

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Honorable G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry,
which is as follows:

"By your copy of the opinion sent to me concerning mileage to sheriffs for criminal investigations, you held that the sheriff could not charge the county for mileage in making criminal investigations.

"By the audit of the office of the sheriff for 1938 by the state auditors office, there was set up against the sheriff \$200.00 for mileage in making criminal investigations. This amount was held due to be returned to Morgan County, Mo. Apparently these are illegal fees charged by the sheriff in his monthly bills presented to the county court. As usual, this officer is insolvent. The county could gain nothing by a suit against the office individually for the return of these illegal fees.

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"The question has been raised would the bondsmen be liable on their bond for the return of this mileage paid the sheriff when he had no right to collect the same, as there was no statutory authority for collecting the same or allowing the same. By what rule of law would the bondsmen be liable for these illegal fees?"

Replying thereto, Section 11507, R. S. Mo., 1929, prescribing the terms of the bond that is required to be executed by the sheriff, says in part that

"* * * * conditioned for the faithful discharge of his duties * * * *;"

Section 9754 R. S. Mo., 1929, prescribes the condition of the bond of the Assessor as follows:

"* * * * conditioned for the faithful performance of the duties of his office* * * *"

In State v. Gomer, 340 Mo. 107, the Supreme Court of Missouri, in 1936, considered the law with respect to the liabilities of the sureties on the Assessor's bond, and held that the sureties on the Assessor's bond are not liable on the bond for excessive bills presented by the Assessor to the County Court, and by that body paid to the Assessor. The court, at page 124, said:

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"When the assessor completes his work he does not decide the question of amount of compensation for himself, but must present a bill for his services, and it is the duty of the county court to investigate and audit his account before entering an order approving it for payment. (As to powers and duties of county court see Jackson County v. Paymen, 329 Mo. 423, 44 S. W. (2d) 849.) If both the assessor and the county court, in good faith, compute this compensation upon the basis they honestly believe the law requires, then surely this is no breach of the bond, which casts liability upon the assessor's sureties.

"It is pointed out in 46 Corpus Juris, 1070, section 402, that 'a bond conditioned on the faithful performance of the duties of the office' has been held not to be breached by an officer claiming and receiving, from the public treasury, compensation in excess of that allowed him by law. (Furlong v. State, 58 Miss. 717; McCrory v. Woods County (Okla.), 150 Pac. 683; Hughes v. Oklahoma County (Okla.), 150 Pac. 1029; Shelton v. State (Oklahoma), 162 Pac. 224; Butte v. Bennetts (Mont.), 149 Pac. 92, Ann. Cas. 1918C, 1019). Some of these cases even go so far as to cover claims based upon false statements. The theory of these cases is that such a bond is not security for an excessive claim for compensation by a public officer, who is not the legal custodian of money out of which he can pay himself and who is, therefore, bound to pay over and account in full therefor except as to the amount he is entitled to retain as his own compensation."

As we view that opinion of the court, it holds that the sureties on a bond such as we are here considering, are not liable for the payment unlawfully by the County Court to an Assessor of a greater amount of money as compensation for his official labors than the law provides for. In other words, the bond is not breached by the Assessor billing the county for a greater amount of money than the assessor is entitled to receive. That does not mean that the payment to the assessor is legal. It does not mean that the assessor may lawfully retain the excess.

In the Gomer case, at page 125, the Court said:

"Nevertheless, we do not mean to hold that an assessor or any other officer is entitled to keep more than he is allowed to collect by law for his services even if overpayment is due to an honest mistake of law; * * * *"

The condition of the Assessor's bond is the same as the condition of the Sheriff's bond, and the same law governing the liability of the surety on the assessor's bond applies to the liability of the surety on the sheriff's bond.

By your question, it appears that the Sheriff does not collect this money and then fails to turn over the full amount to the county officer entitled to receive it, but his wrong consists of billing the county for a greater amount of money than the services he has performed justifies. Under that set of facts, it is our opinion that the sureties on the sheriff's bond would not be liable for the excess payment under the direction of the county court to the sheriff. It

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is the duty of the county court to carefully audit the bills. They are the guardians of the county funds, and the fact that the sureties on the sheriff's bond are not liable for the payment in excess of the lawful amount that could be paid the sheriff is additional reason why the county court should carefully examine and audit the bills and, if necessary, hear evidence on the same and be advised by the Prosecuting Attorney, whom they are authorized to call upon for legal advice to the end that the county officials are paid properly and are not paid a greater amount than under the law they are entitled to.

Yours truly,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW/RV