

ELECTION CONTESTS: In absence of statute the county clerk cannot receive any compensation for additional expense in recounting ballots in gubernatorial contest. The county court cannot reimburse him because the claim is not a valid claim and the court is precluded from paying the same by the County Budget Law.

April 17, 1941

Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri



Dear Sir:

You have submitted to this department the question of expense for the recounting of ballots in the contest of the election for governor. Your letter is as follows:

"C. W. Piper, County Clerk of Saline County, has been served with a writ for the recount of ballots to contest the election of Forrest C. Dbnnell, Governor of the State of Missouri, which election was held November 5th, 1940. The contestant and the contestee are both represented by Marshall attorneys. Mr. Piper has fixed April 24th as the day on which the ballots will be opened and a recount made. According to his instructions in the writ served upon him, the contestor and contestee may, by mutual agreement, have present during said recounting, an equal number of tally clerks and stenographers, in addition to the assistants provided by the County Clerk.

The recounting of the ballots will necessitate hiring additional clerks and stenographers, and there will probably be additional expenses that will have to be paid. The Clerk has taken the matter up with the Saline County Court to pay

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for the cost of the recount. They want to know if they have authority, as County Court of Saline County, to pay the expenses of this recount, and have authorized me to write you for your opinion."

In arriving at a conclusion, it will be necessary to determine whether there is any liability for additional costs occasioned by the recount, and if such liability exists who, if anyone, is liable for the additional costs. The legislature has issued the writ for the recount of the ballots under Sections 11654 - 11658, inclusive, R. S. Mo. 1939. The sections provide in substance that after the petition is presented to the General Assembly setting forth the points on which will be contested, together with the facts, the legislature votes by yeas and nays whether the prayer shall be granted. After the granting of the prayer the joint committee is appointed to take the testimony of contestor and contestee. The committee has the power to send for witnesses, to issue warrants under the hand of the chairman and to take the depositions of witnesses. All of the above mentioned statutes are based on the authority given to the legislature by Section 8 of Article VIII wherein contested elections, with the exception of governor and lieutenant-governor, are vested in the courts, and Article V, Section 25, wherein contested elections for governor and lieutenant-governor are to be decided by both houses of the General Assembly in such manner as may be provided by law.

With these preliminary remarks, we proceed to determine the authority for costs of the contest insofar as the recounting of the ballots is concerned by the county clerk. Under Article VIII, Chapter 76, R. S. Mo. 1939 the procedure for election contests to all offices is set forth. Section 11637 R. S. Mo. 1939 is as follows:

"In all contested elections, costs may be adjudged against the unsuccessful party, and the payment thereof enforced

as in civil cases."

We interpret the above section to refer to contests in the different courts of our state and not contests instituted in the legislature. The above section was under construction in the decision of Steele vs. Wear 54 Mo. 531, l.c. 535:

"By they 58th section of the statute concerning Elections, (Wagn. Stat., 574,) it is provided that, 'In all contested elections costs may be adjudged against the unsuccessful party, and the payment thereof enforced as in civil cases.' This section it will be observed from its connection with the other sections of the act, and from the whole subject matter only applies to contests of elections which can be had before the courts where costs can be adjudged and the payment thereof enforced as in civil cases by execution on fee bill or in some other manner provided for in the courts. In the very nature of the case, no costs could be adjudged or enforced by the House of Representatives, where they decide the contest by resolution of the House. No judgment is rendered or could be rendered or adjudged in such cases, and no payment could be enforced as costs are enforced in civil cases. It could not, therefore, have been intended by the legislature that this last quoted section should apply to any contests but those authorized to be contested in the courts of the country. It may be hard in such case for the plaintiff to be put to costs, which he had no means provided by law by which he could recover it back from the unsuccessful party; but the common law gives him no remedy, in such case, and we

do not think he has any by statute."

In the decision of Hoover vs. Pacific Railway Company 115 Mo. 77, the decision of Steele vs. Wear is followed and the general statute relating to civil actions wherein the party prevailing can recover his costs against the other party, except in cases where a different provision is made by law, is discussed and the conclusion reached is that no final costs are recoverable by either party unless by express statute and further that no costs were recoverable at common law. Incidentally, we refer to the case of Lowe vs. Summers 69 Mo. App. 637, which deals with the power of the General Assembly to punish for contempt not only by persons in their presence but by ignoring or treating with contempt the General Assembly's lawful process. The question of contempt is not germane to the questions you present. We merely comment on the fact that the county clerk must follow out the terms of the writ for the recount of the ballots. The rule in the Wear case, likewise in the cases of Veidt vs. M.K.T. Railway Co. 109 Mo. App. 102; Thompson vs. The Union Elevator Co. 77 Mo. 520 and State ex rel Houser vs. Olliver 50 Mo. 217, is to the effect that the right of costs is a statutory right and does not exist independent of the statute and that all statutes relating to costs must be strictly construed.

Sometimes the costs in an equity case are left to the discretion of the court. Supreme Council vs. Nidelet 85 Mo. App. 283. The general rule, as expressed in the Wear case and followed by later decisions in Missouri, is also adhered to by foreign states. We quote from 106 A.L.R. 928 as follows:

"It appears to be well settled that, in the absence of express statutory authority the court or other tribunal deciding an election contest may not

render judgment for costs in favor of the prevailing party or order that he be reimbursed for expenses which he has incurred in the contest."

In the decision of *Graham vs. Peters* 248 Ill. 50 it was held that in the absence of any authority in the statute for taxing costs for tellers or others designated to recount ballots, such tellers or others were not entitled to have taxed as costs their services in an election contest.

Without citing further authorities, we are of the opinion that there is no statute by which the county clerk is entitled to any compensation for carrying out his duties under the writ for the recount of ballots issued by the committee of the General Assembly. The legislature has overlooked or intentionally failed to provide for any compensation for the officials who are to recount the ballots. It having been made their duty by the legislature, we think the late decision of *Nodaway County vs. Kidder* 129 S. W. (2nd) 857, 1.c. 860, is applicable insofar as the question of payment for their services is concerned:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. *State ex rel. Evans v. Gordon*, 245 Mo. 12, 28, 149 S. W. 638; *King v. Riverland Levee Dist.*, 218 Mo. App. 490, 493, 279 S. W. 195, 196; *State ex rel.*

Wedeking v. McCracken, 60 Mo. App.
650, 656."

We next proceed to the question of whether or not the county court can pay for the additional costs, assuming that it is willing to do so. The financial structure of a county is governed by the County Budget Act, Article II, Chapter 73, R. S. Mo. 1939, Sections 10910 - 10918, inclusive, in counties of the population of Saline. In Section 10911, the proposed expenditures of a county are classified under six general classes. The act further places the mandatory duty on all officers who are mentioned in the act to classify and sacredly preserve the priority of classes. We know as a matter of fact that the time has elapsed when your county has made its annual estimate and that the budget is now on file in your county and with the state auditor. Hence, there was no provision made and none can be made at the present time for the payment of the additional costs of recounting the ballots out of the first five classes for the reason that they are definite in their purposes. Class 6 is as follows:

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose: Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six: Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

Assuming that your county may have a balance in class 6 and there are no outstanding warrants or obligations of previous years now existing, may the county court expend the balance for any "lawful purpose"? What is a "lawful purpose" as used in the statute? County courts are only agents of the county and can bind the county only when acting strictly within the scope of their statutory authority. *Cape Girardeau County vs. Hatton* 102 Mo. 45, *Sturgeon vs. Hampton* 88 Mo. 203. The county court has certain duties to perform with reference to the holding of an election and the conduct of same. There is no provision in any statute to the effect that the county court has any duties to perform or any authority with reference to the counting of ballots, or any other costs incurred in connection with a gubernatorial contest. The expression "lawful purpose" has been defined by the courts in accordance with the manner in which it was used in the statute and is conceded to be general in character [but must be germane to or connected with the business] and purposes of the corporation or county. In *Re Waterloo Oregon County* 134 Fed. 341. *Guernsey vs. No. Cal. Power Company* 117 Pacific 906.

CONCLUSION

We are of the opinion that in the absence of any statute and in view of the fact that costs in election contests could not be collected even at common law that the county clerk of your county cannot receive remuneration or compensation for additional expenses incurred in making a recount of the ballots on the gubernatorial contest.

We are of the further opinion that the county court cannot use the funds of the county to compensate or to hire additional clerks or pay the additional expense incurred by the recounting of the ballots for the reason that such duties are mandatory on the county clerk and

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the statute having provided no compensation is presumed to carry out the duties gratuitously, and that remuneration by the county court would not constitute a lawful purpose within the meaning of the statutes relating to the County Budget Law. In other words, it is not a valid claim which the county court is authorized to pay.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE THURLO
(Acting) Attorney General

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