

CRIMINAL, LAW: FUNDS, FOURTH
CLASS CITY: DISBURSEMENT:
PROSECUTION FOR: WHEN:

Treasurer of 4th class city dis-
bursing funds after failure of city
to publish semi-annual financial
statement required by Sec. 79.160,
RSMo 1949; and before effective date
of Sec. 79.165, Laws of 1951, making
payment by treasurer under such cir-
cumstances a crime, could not be
prosecuted, since the act was not a
crime when committed. But after
effective date, if treasurer dis-
burses city funds and semi-annual
statement has not been published
prior to disbursement, he may be
prosecuted for violation
of Sec. 79.165.

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January 29, 1952

Mr. Charles E. Murrell, Jr.
Prosecuting Attorney
Edina, Missouri

1-30-52

Dear Sir:

This is to acknowledge receipt of your request
for a legal opinion of this department which reads
as follows:

"I would like to have an opinion
of your office, as soon as possible
in connection with Section 79.160
and 79.165, RSMo 1949, the latter
being the Laws of 1951, House Bill
Number 192.

"On what date does Section 79.165
become effective and does it apply
to the failure of a city to publish
a financial statement as required,
in July of 1951."

We are also in receipt of your later letter in
which the opinion request is explained in more detail.
Said letter reads in part as follows:

"I am again requesting your office
to render the opinion asked for in
my recent letter since I am sure that
this office is going to receive
several complaints of violation of

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79.165 in connection with the failure of the city of Edina, Missouri to publish a financial statement last July."

Since receiving the letters quoted above you have further informed us that no semi-annual statements of the City of Edina, Missouri, have been published during the five years immediately preceding the date of the opinion request, and that the financial statement required to have been published in July, 1951, has not been published either before or after the effective date of Section 79.165, supra. It is in regard to this particular financial statement that your inquiry deals, and consequently our opinion herein will be limited to a discussion of the proposition as to whether or not if the treasurer of Edina, Missouri, pays out city funds, upon warrants or orders of the board of aldermen after the end of July, 1951, and no semi-annual financial statement of the city has been published prior to such payment, said treasurer may not be prosecuted for a violation of Section 79.165, supra, when the alleged payments were made before the effective date of said Section, but the treasurer may be prosecuted for a violation of said section after the effective date, when the semi-annual statement required to have been published in July, 1951, had not been published prior to such payment by him.

Sections 79.160, RSMo 1949, and 79.165, Laws of 1951, are referred to in your letter, and such reference calls for an interpretation and an application of them to facts given in the opinion request.

Section 79.160, RSMo 1949, provides that the board of aldermen of a fourth class city shall publish a statement of the financial affairs of the city semi-annually and reads as follows:

"The board of aldermen shall semi-annually in January and July of each year make out and spread upon their records a full and detailed account and statement of the receipts and

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expenditures and indebtedness of the city for the half year ending December thirty-first and June thirtieth, preceding the date of such report, which account and statement shall be published in some newspaper in the city."

Section 79.165, Laws of 1951, prohibits the disbursing of funds from the treasury of a fourth class city until after the financial statement provided for by the preceding section has been made. A penalty is provided for a violation of this section by a treasurer of such a fourth class city. Said section reads as follows:

"In the event the financial statement of any fourth class city is not published as required by Section 79.160, RSMo 1949, the treasurer of such city shall not pay out any money of the city on any warrant or order of the board of aldermen after the end of the month in which such financial statement is required to be published until such time as said financial statement is published. Any treasurer violating the provisions of this section shall be deemed guilty of a misdemeanor and punished according to law."

The inquiry is made as to when Section 79.165 became effective as a law. Upon investigation it appears that Section 79.165, Laws of 1951, became effective on October 9, 1951.

Under the provisions of Section 79.160, supra, a financial statement of the City of Edina, Missouri, for the period beginning January 1, 1951, and ending June 30, 1951, was required to be published in July, 1951, but it appears that such statement was not published during that month and that it has not been published at any time after July, 1951. Under such circumstances, if the treasurer pays out city funds after the end of July, 1951, and before

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the effective date of Section 79.165, supra, on October 9, 1951, when the financial statement had not been published prior to the payment, can he be prosecuted for a violation of said section? In this connection the further question immediately arises as to whether or not the section is an ex post facto law and as to the enforceability of same. Both the state and federal constitutions prohibit the enactment of laws of this nature, and if the law is ex post facto, it is unenforceable.

In the case of *Cummings v. Missouri*, U. S. 4 Wal. 277, L. E. 356, an ex post facto law was defined as one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.

From a careful reading of Section 79.165, supra, it is noted that a new offense is defined and that this section does not make the offense criminal when committed, prior to its enactment, and it seems that it was not the intention of the legislature to create an ex post facto law. If the law is not ex post facto, to hold that it applies to offenses committed prior to its effective date, which were not criminal offenses when committed, and are now punishable as such after the effective date, would in effect be giving the law an ex post facto construction, and such a construction is as pernicious as creating an ex post facto law. This principle was held to be the law in the case of *St. Louis Bridge Terminal Ry. Co. v. United States*, 188 Fed. 191, in which the court said at l. c. 193:

"A penal statute which creates and denounces a new offense, and the act under consideration is such a statute, should be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified as punishable by such a law. The definition of offenses and the classification of offenders are legislative and not judicial functions, and where, as in the case at bar, a penal statute is plain and

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unambiguous, the courts may not lawfully extend it to a class of persons who are excluded from its effect by its terms, nor by interpolation or construction after their commission make acts offenses which were not clearly such by the expressed will of the legislative department. The creation of an offense by ex post facto construction is as pernicious as its creation by an ex post facto law. * * *

It is therefore our thought that if the city treasurer of Edina, Missouri, disburses funds on warrants or orders of the board of aldermen after the end of July, 1951, and after the failure of the board of aldermen to publish the semi-annual financial statement of the city required by Section 79.160, supra, and the disbursement was made before the effective date of Section 79.165, supra, the treasurer cannot be prosecuted for the criminal offense defined by said section, since such disbursement was not a criminal offense at the time of the commission of the act. Said section is not an ex post facto law, and to hold that the treasurer is guilty of a violation of same and might be prosecuted for such offense, would be giving it an ex post facto construction which is as objectionable as the creation of an ex post facto law in the first instance.

In view of the fact that Section 79.165, supra, is not an ex post facto law, but one which operates prospectively, the treasurer cannot be prosecuted for the crime defined herein until after the effective date of the section. But if after said effective date the treasurer pays out city funds when the semi-annual financial statement has not been published prior to the payment, it is our further thought that he may be prosecuted for a violation of said section.

CONCLUSION

It is the opinion of this department that a treasurer of a fourth class city who pays out city funds on warrants or orders of the board of aldermen after the end of July, 1951, and before the effective date of Section 79.165,

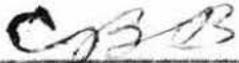
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Laws of 1951, when the semi-annual financial statement of the city has not been published in accordance with Section 79.160, RSMo 1949, cannot be prosecuted for a crime of disbursing city funds in violation of Section 79.165, supra. The offense was not a crime at the time of its commission and said section not being ex post facto, it cannot be given an ex post facto construction, thereby authorizing a prosecution for its violation prior to October 9, 1951, the effective date. But after the effective date of Section 79.165, supra, if the treasurer of such a city pays out city funds on said warrants or orders of the board of aldermen when the semi-annual financial statement has not been published prior to the payment, as required by Section 79.160, supra, he may be prosecuted for violating the provisions of Section 79.165, supra.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

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