

Opinion No. 384**County Printing — County Commissioners — Public Officers — Contracts**

It is not legal for county officials to order publication of notices in any paper except the official newspaper.

Contract for printing with a newspaper other than the paper with which the county has made a contract is illegal and void and the contract price cannot be collected. Recovery may be had on the basis of quantum meruit only in the event actual benefit to the county has resulted.

October 10, 1933.

You have submitted the following questions: "1. Is it legal for county officials to order publications of notices of a county nature to other papers than the county official paper? 2. If a county officer ordered and had printed notices of a county nature in a newspaper other than the official paper in the county, would the Board of County Commissioners have authority to pay a claim for such services?"

You have cited a number of instances where the board of county commissioners, as well as other officers of the county, had ordered notices printed in some paper other than the paper with which the county has entered into a contract for the county printing. In connection with these publications you have submitted the following facts: "We find that publications of the above character are ordered printed by the officers in other papers than the official paper and also the

same notices in the county paper, and in some instances the notices are not ordered published in the county paper, but only in other newspapers. In some cases it was explained that the notices are printed in other publications than the official paper because they impart the notices to more people interested in the matter, the circulation of the paper being in the immediate vicinity of the persons they desire to reach. In some instances it appears that the publications are given to other newspapers for personal reasons. The publishers other than the county official paper in nearly all cases charged and collected a far greater price, the official paper being bound by a contract price controlled by a statutory provision (Chapter 10, 1929 Laws.)"

It is my opinion that your first question should be answered in the negative. Chapter 10, Laws of 1929, amending Section 4482, R. C. M. 1921, provides that it shall be the duty of the county commissioners to contract with some newspaper to do all the printing for the county. In my opinion such contract covers all the county printing and does not permit the county commissioners or any other officer of the county to make contracts with or authorize other papers to do any of the county printing. (Volume 2 Opinions of the Attorney General, page 41.) It does not permit them to divide the printing or to duplicate it. The commissioners have no power except conferred by statute. The legislature having determined the policy and method of handling county printing, neither the county commissioners nor any of the officers of the county have any power to disregard such policy and method and to determine upon a policy or method of their own contrary to statute. (*Hersey v. Nielson, et al.*, 47 Mont. 132, 131 Pac. 30.)

The only interpretation I can give to the language of the statute is that all the county printing must be given to one newspaper according to a contract previously entered into. A contract for county printing made by the commissioners or other county officials with some other newspaper, is illegal and void. (*Carbon County v. Draper*, 84 Mont. 413, 276 Pac. 667; *Hill County v. Shaw & Borden Co.*, 225

Fed. Rep. 475, 140 C. C. A. 523.) Since such contract is illegal and void no recovery can be had under it; therefore, the board of county commissioners would have no authority to pay such contract price for such printing. It does not follow, however, that the paper which rendered the service cannot recover the reasonable value of such services. The rule is stated by Pollock, in his *Principles of Contract* (264): "When no penalty is imposed, and the intention of the Legislature appears to be simply that the agreement is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose."

The Circuit Court of Appeals in the Hill County case, *supra*, construing this statute in a case where books and other property were furnished by Shaw & Borden Company, (which was not the contracting newspaper) said on page 477: "It is a doctrine of the courts, however, now well established, that sanction will be given a cause of action proceeding as for quantum meruit, or for recovery of property or in trover, where the property has been converted, aside from the contract and independent thereof, where the contract is merely *malum prohibitum*, not *malum in se* nor involving moral turpitude, and does not contravene public policy, and where the statute imposes no penalty for its infraction. This upon the principle that the courts will always try to do justice between the parties where they can do so consistently with adherence to law." The court in that case held that, while the contract with Shaw & Borden was unauthorized as it was not a company with which it could contract under the law, the county having possessed itself of the supplies, and appropriated them, so that it cannot return them in kind, that it was liable in conversion, independent of the contract, for the value of the supplies. In support of this principle see the other cases cited in this case. The same principle was announced in *Morse v. Board of Commissioners*, 19 Mont. 450; 48 Pac. 745, 746.

You will note, however, that the cases cited above are concerned with the sale of property. When property

has been used or consumed by the county, there can be no question as to the actual benefit resulting. In principle, there would be no difference in the case of printing or publication of notices, provided an actual benefit to the county can be shown, but I am inclined to doubt if there is any real substantial benefit in most of the instances you have named. Where the publication is not made in the official paper, as required by law, but in some other paper, there may be a benefit. It is rather difficult, however, to see how a mere duplication of publication can result in an actual benefit. It is impossible for me to determine this question of fact in all the numerous instances you have mentioned, without making an independent investigation in each case. Unless it can be clearly shown that an actual and substantial benefit has resulted to the county, no payment would be authorized. In the event payment is made, the reasonable value of the services, and not the void contract, should determine the amount to be paid. (Carbon County v. Draper, *supra*.)