

SCHOOLS: Prosecuting attorney may exercise discretionary powers in instituting civil actions in which county is concerned.

PROSECUTING ATTORNEYS: (The opinion to Sunderwirth, March 21, 1946 (87) sent in answer to question No. 2 was withdrawn because of Opinion No. 96 - 1953.)

F I L E D

22

June 9, 1950

Honorable Robert A. Dempster  
Prosecuting Attorney  
Scott County  
Sikeston, Missouri



Dear Sir:

Your letter at hand submitting certain questions to this department, which reads as follows:

"Enclosed you will find certain instruments, the originals of which were handed to me by Mr. J. Grant Frye, an attorney in Cape Girardeau. I desire to submit to you the following questions in connection with this matter:

"(1) Is it mandatory upon the Prosecuting Attorney to file a suit to recover money which is alleged to have been spent in Petition I, attached? My investigation reveals that the facts in this petition are not true; hence I decline to entertain it. Do I have any discretionary powers if I feel that I cannot make a case?

"(2) In this question the facts are these: There is no high school in the Commerce Consolidated School District of Scott County. This district has an agreement with the Benton School District which is adjacent to it for its high school students to attend the high school in the Benton District. The Commerce school bus transports its students to the school district line where the Benton School bus picks them up and takes them to the Benton High School. They are returned in the same manner. There are several Catholic students

Honorable Robert A. Dempster

in the Commerce area. They desire to ride this bus and do so in the same manner as the students attending the public school. The school board charges them no extra fare, and they ride free the same as the children going to the public school. There is sufficient room in the bus, they are not crowded and the only points involved are, first, are they permitted to ride at all in the bus, and, second, if permitted to ride at all, can the school board authorize them to ride free. May the school board permit them to ride if a fair and just transportation charge is made? The petition that has been prepared for my signature by Mr. Frye is Number II. I might point out that the families of the Catholic students contend that if the school board is agreeable to them riding free that no one else can complain for the Catholic families pay school taxes the same as non-Catholic families.

"(3) The next question that concerns me is whether any taxpaying citizen in the school district has authority under the law to bring suits similar to the ones marked Number One and Number Two, or do they have to be brought in the name of the Prosecuting Attorney?"

In answer to your first question we might first consider the applicable statutes relating to the duties of the prosecuting attorney.

Section 12942, R.S. Mo. 1939, in part, provides:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. \* \* \*"

Honorable Robert A. Dempster

Section 12944, R.S. Mo 1939, in part, provides:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: \* \* \*"

The above two sections have been construed to be in *pari materia* and are to be read together in determining the duties and rights of the prosecuting attorney. *State ex rel. Lashly v. Wurdemann*, 166 S.W. 348, 183 Mo. App. 28.

We might further state that it is a cardinal principle of interpretation that statutes in *pari materia* are to be treated as embodied in one section and considered together in order to elucidate the legislative intent. *State ex rel. Brokaw v. Board of Education of the City of St. Louis*, 171 S.W. (2d) 75. Consequently, in ascertaining the statutory duties of the prosecuting attorney relative to the commencement of both civil and criminal proceedings we look to the two sections above cited.

In reading the above sections we do not observe that the prosecuting attorney is given any particular discretionary powers in one type of proceeding and not in another, and it is our thought that whether in a civil proceeding or a criminal proceeding the prosecuting attorney, if he has any discretionary power relative to instituting a proceeding, could exercise it in the same manner in both types of cases.

Regarding the exercise of any discretionary power relative to institution of a legal proceeding, the Supreme Court, *en Banc*, in the case of *State on inf. McKittrick v. Wallach*, 182 S.W. (2d) 313, 353 Mo. 312, said at S.W. 1.c. 318, 319:

"The duty of a prosecuting officer necessarily requires that he investigate, i.e., inquire into the matter with care and accuracy, that in each case he examine the available evidence, the law and the facts, and the applicability

Honorable Robert A. Dempster

of each to the other; that his duties further require that he intelligently weight the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which he might initiate. Such duties of necessity involve a good faith exercise of the sound discretion of the prosecution attorney. 'Discretion' in that sense means power or right conferred by law upon the prosecuting officer of acting officially in such circumstances, and upon each separate case, according to the dictates of his own judgment and conscience uncontrolled by the judgment and conscience of any other person. Such discretion must be exercised in accordance with established principles of law, fairly, wisely, and with skill and reason. It includes the right to choose a course of action or non-action, chosen not willfully or in bad faith, but chosen with regard to what is right under the circumstances. Discretion denotes the absence of a hard and fast rule or a mandatory procedure regardless of varying circumstances. \* \* \*

While the court, in the above case, was considering the discretionary power of the prosecuting attorney relative to the institution of criminal proceedings, we are of the opinion that the logic and reasoning of that decision would be applicable to the powers and duties of the prosecuting attorney in instituting a civil proceeding, particularly of the type contained in the petitions marked No. 1, which you have enclosed.

Therefore, in answer to your first question we believe that the prosecuting attorney in the performance of his statutory duties may exercise a sound discretion in determining whether or not a civil action should be instituted.

Your second question contains several parts which generally relate to legality of a school district providing transportation for school children attending parochial schools.

We are enclosing a copy of an opinion submitted to Honorable W. W. Sunderwirth, a Member of the Missouri State Senate, under date of March 21, 1946, in which it was concluded that legislation relating to the free transportation of pupils attending parochial schools does not violate any provision of the Constitution of Missouri. It is our thought that this opinion would answer the questions which you have submitted under paragraph (2).

Withdrawn -- see opinion 96-1953

Honorable Robert A. Dempster

We observe in the petition marked No. 2, which seeks to enjoin the transportation of parochial school children, and which seeks to recover back money for the school district which was expended for such transportation, that the County Superintendent of Schools of Scott County is made a party defendant. Such being the case, we are also enclosing a copy of an opinion submitted to Honorable Hubert Wheeler, Commissioner of Education, under date of November 29, 1949, in which it was concluded that the prosecuting attorneys are required to represent and defend county superintendents of schools in civil suits filed against such officials involving their official acts.

In view of the conclusion reached in the above opinion rendered to Honorable Hubert Wheeler, it is our thought that you, as Prosecuting Attorney, might be placed in an antithetical position of bringing a civil proceeding against an official of the county which, under the law, you may be in fact required to represent.

CONCLUSION

It is, therefore, the opinion of this department that the prosecuting attorney in the performance of his statutory duties relative to instituting civil proceedings may exercise a sound discretion in determining whether or not he should commence a civil action.

Respectfully submitted,

RICHARD F. THOMPSON  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

RFT: ml  
ENCS