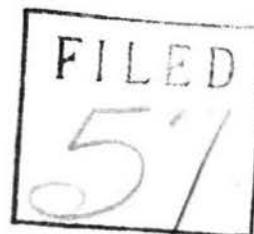


PROSECUTING ATTORNEY: Can bring civil suit for county or state
without order from county court.

April 2, 1938 4/4



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

Dear Sir:

This will acknowledge yours of March 29, 1938,
which reads as follows:

"There are several officers of this county who are in default on their official bonds, for the reason they have collected certain fees by virtue of their office and failed to turn these fees over to Morgan County. Who should order suit on these official bonds, or is any order necessary?

"I am well aware of the duties imposed upon the prosecuting attorney by the statutes. But a prosecuting attorney usually has a party to represent and act for in court. He does not act for himself, and he is usually not the moving party to institute suit on his own discretion. It seems to me that in order to get cooperation, and to act for a moving party, that in the case of a suit on an official bond against a county officer to collect money coming to Morgan County, the County Court should make the necessary order for a suit upon such an official bond. The County Court audits and approves the monthly settlements of the county officers. The County court has been given the power to compromise and settle claims due the county. Sec. 12162

gives these powers. The statute provides among other things '.....to enforce the collection of money due the county; to order suit to be brought on the bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same.....'

"It appears to me that under this part of the statute, if I, as prosecuting attorney, brought suit on an official bond of a county officer, the civil suit could be demurred out of court because there was no order made by the county court in order to bring the suit on the bond."

Section 12162, R. S. Mo. 1929 provides, among other things, as follows:

"The county court shall have power ** to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; *** "

The foregoing section appears under Article 8, Chapter 85, which is entitled "County Treasurers, Funds and Warrants, and the title to the section is, "Power of county court -- auditing and settling claims."

Said article deals primarily with the fiscal affairs of the county. By this section, the Legislature granted to the county court the power to audit, adjust and settle all accounts to which the county is a party, and if on such audit, adjustment and settlement it is found that there is anything due the county or any delinquency, then the county court can order suit brought on the bond of the delinquent and require the prosecuting attorney to commence and prosecute the same.

However, we find other provisions in the law relating to suits in which the county is interested. Section 11316 reads in part as follows:

"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; *** "

Section 11318, R. S. Mo. 1929 provides in part as follows:

"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. **** "

All of these statutes have been on the books for many years. It is a familiar rule of construction that where two statutes are susceptible of a construction that will give force to both, they must be so construed. State ex rel. vs. Clayton, 226 Mo. 292. In view of this rule and of the fact that these statutes are of long standing, we think it incumbent upon us to construe them so as to give

force and effect to all of them unless they are in hopeless conflict.

Section 11316 says the Prosecuting Attorney "shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned." What does "commence" mean? Webster's New International Dictionary defines it as follows:

"To enter upon; to begin; to perform the first act of; as commence a lawsuit."

The same authority says that "begin" and "commence" are identical in meaning."

In the case of School District vs. Brand, 81 Pac. 473, the Supreme Court of Kansas, in discussing a provision of the law which authorized the director to cause a suit to be commenced, said this:

"To commence is to institute, and to institute is to commence."

In the case of Maud vs. Terrell, 200 S. W. 375, (Tex.) the court was discussing the meaning of a statute which said, "the collector shall commence an action to recover the amount of such tax." In discussing this expression, the court said: (l.c. 377)

"Upon its face this language would authorize the collector to file the suit, but it cannot be assumed that the Legislature so intended. It plainly means that he should cause the suit to be filed by the official charged by law with that specific duty. There is not much difference, as was suggested in the argument, between declaring it a duty 'to commence an action for taxes' and 'to sue for taxes.' If the former expression in the connection in which it is used is susceptible of the meaning, as it clearly is, that the

person to whom the duty is confided shall merely cause the suit to be brought, the latter, used in a similar connection and found in the same chapter, is equally open to the same construction."

The foregoing case decided that while the language itself would authorize the collector to file the suit, yet the context wherein such expression was used in that particular statute indicated that the language meant to authorize the suit or cause the suit to be brought. Whether the meaning of the word "commence" in our statute is to actually bring the suit or to cause it to be brought is the same thing for the purpose of our discussion, since the officer, the prosecuting attorney, to whom this duty is entrusted, is an attorney and can actually bring the suit.

We think from the foregoing definitions and constructions of the word "commence", Section 11316 might well read, "The prosecuting attorney shall institute and prosecute all suits ***". There is nothing in this section which indicates that the prosecuting attorney must wait until the county court tells him to commence a suit. He is plainly charged with the duty of beginning and prosecuting actions in which the county or state may be concerned.

Section 31318, supra, requires the prosecuting attorney to represent generally the county in all matters of law. He therefore represents the county rather than the county court. He is charged with certain duties to be performed for the welfare of the inhabitants of the county and likewise the county court is charged with certain duties. An interesting discussion of the relation of the prosecuting attorney and the county court will be found in the case of State ex rel. vs. Wurdeman, 183 Mo. App. 28, wherein the court said (l.c. 32) :

"It is to be said, first, that under the statutes both the judges of the county court and the prosecuting attorney are elected by the people of the county and with a view of serving its inhabitants

in the discharge of the duties annexed by law to the respective offices of county court and prosecuting attorney. The office of the county court and of the prosecuting attorney are, of course, separate and independent and neither is necessarily subservient to the other. The county court consists of three judges, elected by the people, but its members are not required to be learned in the law, while one of the qualifications prescribed for the prosecuting attorney is that he shall be so learned. By statute, certain judicial duties and certain other ministerial and administrative duties are committed to the county court, while other statutes commit certain duties which appertain to the profession of a lawyer to the prosecuting attorney as the law officer of the county."

In the Wurdeman case, supra, the court quoted with approval the following from a Kansas Case (l.c. 34) :

"The county attorney is elected by the people of the county and for the county. He is the counsel for the county, and cannot be superseded or ignored by the county commissioners. His retainer and employment is from higher authority than the county commissioners. The employment of a general attorney for the county is not by the law put into the hands of the county commissioners, but is put into the hands of the people themselves."

And again at page 41 of said decision the court said:

"Obviously, if it be the official duty of the prosecuting attorney under the statute to thus appear, and one which he is sworn to perform, then its per-

formance on his part cannot depend upon the consent of the respondent county officer in the mandamus, and such county officer should not be permitted to defeat the prosecuting attorney in the performance of his official duty by withholding consent to put the interests of the county forward in his return.

It might be said in passing that this case was certified to the Supreme Court because of a dissent on the part of one of the judges, but an examination of the records in the clerk's office of the Supreme Court shows that the case was later dismissed. Therefore, we think the case is a controlling authority, since it has not been overturned by the Supreme Court.

The office of prosecuting attorney is an important office. An interesting discussion of the history of that office is found in the case of State ex rel. vs. Lamb, 237 Mo. 437. At page 451 of said decision, the court said:

"In a strict historical sense, the prosecuting attorney represents the State and exercises powers analogous to those exercised by the Attorney-General in England. As was said by the Supreme Court of Michigan: 'The prosecuting attorney is a very responsible officer, selected by the people and vested with personal discretion intrusted to him as a minister of justice, and not as a mere local attorney.' (Engle v. Chipman, 51 Mich. 524.)

"The sovereign power of government can only be exercised through its officers. Consequently, to each officer is delegated some of the powers and functions of government. Usually a discretion that is within the power granted to an officer cannot be controlled by other officers. It has been held, for instance, that mandamus will not issue

to control the discretion of the Attorney-General as to whether or not he should institute quo warranto proceedings. (People v. Attorney-General, 41 Mich. 728.) A prosecuting attorney has discretionary power to institute or discontinue prosecutions. (1 Bish. New Crim. Proc., sec. 287.) "

In the case of Meador vs. Texas County, 167 Mo. 201, the question arose as to whether the county should compensate the prosecuting attorney for services performed by him in appearing and orally arguing a criminal case in the appellate court. He contended that he should determine when it was necessary for him so to do, and the county court contended that it should determine when it was necessary for him so to do. At page 204, the court said:

"This statute makes it the duty of the prosecuting attorney to represent the State in all criminal cases in the court of Appeals from his county, and it specifies that in the performance of that duty he shall make and cause to be printed, at the expense of the county all necessary abstracts of record and briefs. Those duties are required of him unconditionally. In addition to those absolute duties, the statute further declares that 'if necessary' he shall appear in court in person."

At page 205 the court said:

"The statute does not make either the prosecuting attorney or the county court the sole arbiter of that matter. The statute says he should go if necessary, and shall be paid a reasonable fee for his services. But the question of the necessity and that of the quantum meruit are open questions of fact to be tried on the evidence by the court which is to pass judgment on the claim when presented, ***. Was it necessary

in this case for the prosecuting attorney to attend on the Court of Appeals in person? That must be decided by the triers of the fact, like any other question of fact in the case."

It should be noted that Section 11316 is the authority under which the prosecuting attorney commences criminal actions also. No one would seriously contend that the prosecuting attorney must wait until the county court orders him to bring a criminal case. The only reason that the question might be raised as to the authority of the county court in civil matters is perhaps the fact that the Constitution (Article VI, Sec. 36) vests in the county court jurisdiction to transact all county business. The courts have repeatedly held that the county court is the fiscal agent of the county and in that respect a prevailing idea has grown up that the county court has a general supervisory power over other officers of the county. However, the Supreme Court of this state, in the case of State ex rel. vs. McElroy, 309 Mo. 595, quoted with approval the following definition of "county business": "All business pertaining to the county as a corporate entity." This has been held to include the power to control county property, county finances, etc.

Neither this constitutional provision nor any statute which we have been able to find vests any control in the county court over the prosecuting attorney. The duties are distinctly set out in the statutes, and he gets his authority from the same source that the county court does. The particular statutes we have been discussing make it the duty of the prosecuting attorney to institute civil and criminal suits in which the state or county may be concerned, and we do not think that the county court can interfere with his performance of that duty, which he took an oath to perform.

It is true that Section 12162 gives the county court the power in certain instances to require the prosecuting attorney to "commence and prosecute" such suits; but said statute does not say that the prosecuting attorney is without authority to bring civil suits on behalf of the county until he has been ordered so to do by the county court. It would seem that the people of the county have

April 2, 1938

the added protection in this case of having the county court vested with authority to compel an action by the prosecuting attorney, so that if the prosecuting attorney should neglect to file such a case, the court could require him to do it, and the Supreme Court of this state, in the case of State ex rel. vs. Fulks, 296 Mo. 614, held that if the prosecuting attorney refused to bring such a suit after being ordered by the county court to do so, the county could employ private counsel to bring such action.

CONCLUSION.

It is, therefore, the opinion of this office that the prosecuting attorney has the authority to file civil suits upon the official bonds of county officers who are in default, without waiting for an order of the county court so to do.

Respectfully submitted

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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