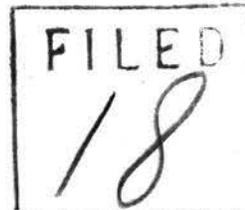


PROSECUTING ATTORNEYS: Required to represent county officers in proceedings in which the county is the interested party.

September 1, 1939

Mr. J. Carrol Combs
Prosecuting Attorney
Barton County
Lamar, Missouri



Dear Sir:

We are in receipt of your request for an opinion in regard to the duty of the prosecuting attorney to represent the collector, the assessor and the county clerk in a proceeding in which it is sought to enjoin each of the foregoing officials from collecting a personal tax.

The general duties of the prosecuting attorney in regard to civil matters are set out in Section 11318, R. S. Mo. 1929, which is 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. 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: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel of attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and

quieting the title of said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

In the case of State ex rel. Lashly v. Wurdeman, 183 Mo. App. 28, a mandamus proceeding was brought against the judges of the county court of St. Louis County in which the plaintiff sought to compel said judges to hear an application for a dramshop license. The prosecuting attorney sought to intervene on behalf of the county under Section 1008, R. S. Mo. 1909, which is the present statute above quoted. We find the following in the opinion of the court, which bears directly on the question at hand:

"In an early case in this court, the prosecuting attorney of the same county declined to permit the use of his name in a certiorari proceeding against the county court to remove and review the record of a dramshop proceeding, for that he deemed it his duty, under the statute, to represent the interest of the county, through appearing for the county court in the matter, and this court affirmed such to be the correct view of the duty of the prosecuting attorney. (State ex rel. v. Heege, 37 Mo. App. 338, 345.) Obviously such is the sound law of the question, for, though the judges of the county court themselves are respondents in the mandamus suit pending in the circuit court, it is clear the county is interested therein. The statutes (sections 1007 and 1008) are to be read together for they are in pari materia and pertain alike to the duties of the prosecuting attorney, which they annex to his office, and the officer is required by virtue of his oath to perform them. While section 1007, in so far as its consideration here is essential, applies more particularly to cases in which the county is concerned and suits against it, section 1008 imposes a duty on the prosecuting attorney in respect of all civil suits in which the county is 'interested.'

"It is clear that the county is interested in a civil suit in mandamus directed against the judges of the county court by which it is sought to compel them, through utilizing the franchises of their office, to issue a dramshop license in favor of any citizen, authorizing him to sell intoxicating liquors in the county. In respect of this matter, it is to be said the judges of the county court as individuals, apart from their office and the franchises which inhere in it could confer no privilege under the law, and it is only because of their office as county judges that they may be compelled to act thereon at all, and this is true though the writ runs against them as judges of the county court, rather than against the office of the county court eo nomine. The idea is to compel the judges, as individuals in whose hands the franchises pertaining to the office are accumulated, to exercise the powers of the office in acting upon the application for a dramshop license and thus proceed in the performance of a public duty affixed by statute. To say that St. Louis County is not even interested in such a proceeding involves but a partial view of the subject matter. Under our statutes the county is pecuniarily interested in the matter of dramshop licenses, for a portion of the revenue received therefor goes into its treasury."

One judge dissented in the opinion and it was ordered certified to the Supreme Court, however, the citator fails to reveal that this case ever reached our Supreme Court. The above case was apparently decided on the theory that the court was also interested in the matter of dramshop licenses for the reason that a part of their revenue was derived therefrom. In the matter at hand, the county would benefit by the receipt of the taxes which are sought to be avoided by the petitioners in the injunction suit, therefore, they are pecuniarily interested, and the prosecuting attorney should appear for the officers you mention to represent the interest of the county.

Mr. J. Carrol Combs

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September 1, 1939

It is our conclusion, therefore, that it is the duty of the prosecuting attorney to defend various county officers in proceedings in which the county has an interest and where such officers are made parties only by reason of their official positions.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RLH:VC