

PROSECUTING ATTORNEYS:  
DUTIES: NOT REQUIRED TO  
REPRESENT SCHOOL DISTRICTS;  
LIMITATION OF ACTIONS AGAINST  
COUNTY TREASURER:

Prosecuting attorney is not required to represent a school district in an action to recover moneys from county treasurer. Action against a county treasurer for money alleged to have been wrongfully paid out should be brought within three years.

January 24, 1939

Mr. Frank Huffhines  
Prosecuting Attorney  
Stone County  
Galena, Missouri

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Dear Sir:

This department is in receipt of your request for an official opinion which is as follows:

"In Re: Opinion rendered December 21st, 1938-By Tyre W. Burton-To N. Elmer Butler, Pros. Atty. Stone Co.

"In the above opinion, and in regard to the same subject, I would like to be informed as to whether or not it is the duty of a Prosecuting Attorney to represent a common school district in an action to recover money illegally paid out by the County Treasurer on warrants issued for a prior school year?

"Is there any limitation on the time for recovering from a County Treasurer for money illegally paid out on such warrants?"

The duties of the prosecuting attorney in reference to representing the state and counties are set out in Section 11316, R. S. Missouri, 1929, which provides 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 con-

cerned, 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.  
 \* \* \* \* \*

By this section prosecuting attorneys are required to represent the state or county in all matters in which the interests of the state or county are involved.

Your request indicates that a school district is planning to institute an action against your county treasurer for the purpose of recovering moneys which the district claims the treasurer has wrongfully paid out.

The school district could maintain this action by virtue of the provisions of Section 9271, R. S. Missouri, 1929, which provides in part as follows:

"\* \* \* \* \* Such districts shall be bodies corporate under the numbers and designation thus given them by the county courts, and shall by such numbers and designation be capable of suing and being sued; \* \* \* \* \*

By this section a common school district may institute an action when the interests of the district are involved. In the case of School District v. Correll, 220 Mo. App. 322, 327, the school district had sued the county treasurer for moneys wrongfully paid and one of the defenses set up was that the school district had no authority to bring the action. The court, in passing on the defense, said at l.c. 327:

"Under Section 11197, Revised Statutes

1919, plaintiff district is constituted a body corporate and is capable of suing and being sued. This cause of action, as we view it, being wholly independent of the statute requiring warrants to be first drawn, we are unable to discover any legal impediment to the maintenance of this action by the school district in so far as the statutes are concerned. (State ex rel. v. Chick, 146 Mo. 1.c. 654, 48 S. W. 829; State ex rel. v. Henderson, 142 Mo. 1.c. 605, 44 S. W. 737.)

"It is further contended that this action could be brought only by the county clerk or some freeholder. This contention is based on certain provisions found in section 11188, supra, as follows: 'On the forfeiture of such bond (of the treasurer) it shall be the duty of the county clerk to collect the same for the use of the schools in the various districts. If such county clerk shall neglect or refuse to prosecute, then any freeholder may cause prosecution to be instituted.' We construe this section to apply only to actions on the bond of the treasurer. There is not a word in the statute authorizing the clerk or freeholder to institute a suit except to collect the amount due on the bond. Since there was no bond no such action could be maintained. There is good reason for limiting the power of the clerk or freeholder to the bond itself. The bond required is given for the benefit of all the districts in the county. It is, therefore, proper that one person or official should have authority to bring the suit on the bond in order to avoid multiplicity of suits. But where there is no bond and the suit affects only one district, the reason for vesting the exclusive power in the clerk or freeholder vanishes.  
\* \* \* \* \*

Following the ruling in the above case your school district, as a body corporate, may maintain the suit. Since the district, as a body corporate, is authorized to contract, we think the lawmakers have intended that a school district may employ an attorney to represent it either when it is sued or being sued. In *School District v. Correll, supra*, the district employed a firm to represent it and the question of prosecuting attorney being the necessary attorney and it being his duty to represent the district, was not even raised.

As Section 11316, *supra*, requires the prosecuting attorney to only represent the county and state in matters pertaining to them, and since the officer must look to the statute for his powers and duties, by applying the rule "The expression of one excludes all others", we think that if the lawmakers had intended for the prosecuting attorney to represent other subdivisions of the state, such as road districts, city school districts, etc., they would have so stated.

In the case of *State ex rel. Affolder, 214 Mo. App. 500*, an action by mandamus was brought by a law firm to compel a drainage district to issue a warrant for the fees which were earned in connection with a bond issue. The county court had ordered the district to issue the warrant. The defense of the district was that it was the duty of the prosecuting attorney to represent the district, and, therefore, the attorneys appointed by the county court had no authority to represent them, and that they had no authority to pay them. The district based this defense upon Section 11316, *supra*, and the court at l.c. 505, said:

"Was it the duty of the prosecuting attorney to render the services which plaintiffs rendered? Sections 736 and 738 prescribe generally the duties of the prosecuting attorney. There is nothing in these sections which may be said to place upon the prosecuting attorney the duty of looking after this bond issue. There are other sections prescribing duties in particular

cases, but the sections, supra, cover the field generally. The bond issue of Duck Creek township was not a matter of county wide concern. It was a matter that affected that township only. The Act of 1917 provided that in a township bond issue thereunder the county court shall act for the township. The only recognition of township organization is that the act provides in section 10750 that the proceeds of the bond sale be turned over 'to the treasurer of the district or the county or township as the case may be.' In the reference quoted and in section 10748 it will be seen that not only was township organization taken into account, but also special road districts organized under sections 10800 et seq. and secs 10833 et seq., Revised Statutes 1919. Neither the act of 1917, nor the special road district acts, makes it the duty of the prosecuting attorney to advise or render service. There is nothing in the Township Organization Act, section 13164 et seq. Revised Statutes 1919, which makes it the duty of the prosecuting attorney to render the service rendered here by plaintiffs. The county court in the matters pertaining to the bond issue mentioned in this record was acting for Duck Creek township, and had the same authority in the premises as would the township have had, had the duty here placed upon the county court been placed upon the township board. Section 13169, Revised Statutes 1919, sets out the general powers of townships under township organization, and among them is that it shall have power to make such contracts as may be necessary to the exercise of its corporate or administrative powers. Section 13170 provides that no township shall possess any corporate

powers, except such as are enumerated or granted by statute, or that 'shall be necessary to the exercise of powers so enumerated or granted.' By the act of 1917 Duck Creek township was granted the power to vote the bonds mentioned in this record. The county court in that instance by direction of the statute acted for the township instead of the township board which usually acts for it. It stands conceded that it was necessary that some attorney render the services which plaintiffs rendered. The conclusion, therefore, is that the county court had the power, acting for the township, to employ plaintiffs. Since there is no statute directing generally that the prosecuting attorney shall act for the township in counties under township organization, it is our conclusion that it was not the official duty of the prosecuting attorney to render the services which plaintiffs rendered."

We find that nowhere in the statute is it stated that a prosecuting attorney shall represent a school district.

#### CONCLUSION.

Since the school district is authorized to employ and pay its own counsel, and since there is no statute directing generally that the prosecuting attorney shall represent the school district, it is our conclusion that it is not his official duty to render official services to school districts and represent them in litigation.

As to the limitations on the time for bringing an action against a treasurer for recovering money which is alleged to have been wrongfully paid out by him, we think Sections 860 and 863, R. S. Missouri, 1929, apply. These

sections read as follows (Section 860):

"Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: \* \* \* \* \*

Section 863 provides as follows:

"Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

In the case of Schaeffer v. Bernero, 11 Mo. App. 562, the court held that the cause of action against an officer for failure to pay money wrongfully retained does not accrue so as to set in motion the statute of limitations until there has been a demand of payment or a return or a report of the officer showing such money has been paid.

In the case which you have submitted the date the treasurer made his report showing that he paid the moneys out, which you claim were illegally paid, would be the date on which the statutes begin to run and would be in effect for three years from that period.

CONCLUSION.

It is, therefore, the opinion of this department that an action against a county treasurer for wrongfully paying out school moneys should be brought within three

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years from the date the treasurer makes his report showing that such moneys have been paid out by him.

Respectfully submitted

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Assistant Attorney General

APPROVED:

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COVELL R. HEWITT  
(Acting) Attorney General

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