

PROSECUTING ATTORNEYS: Prosecuting attorney may sue securities of defaulting county official for monies embezzled by the said official.

September 19, 1949

Mr. Friend B. Greene  
Prosecuting Attorney  
Shannon County Court House  
Eminence, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion upon the set of facts set out in your letter of inquiry, which is as follows:

"Your opinion is requested in the following:

"Under date of April 8th, 1949, the County Court of this county made its order employing the undersigned and C. P. Turley as special counsel and directed that they file and prosecute an action against Wright S. Brawley, his securities and others for the recovery of monies embezzled by the said Wright S. Brawley from the funds in his hands as Treasurer of said county; later, on the 16th day of April, 1949, I was appointed as Prosecuting Attorney for the county of Shannon, and when the audit had been returned of the Treasurers office, by the State Auditor's Office, it was determined that the bond given by Brawley when taking office in 1943 was still in full force and effect and the securities liable for at least a part of the defalcation, it was suggested by me that the securities be made parties to the suit already filed.

"At this the County Court made its order which I have enclosed directing that no action be had against these bondsmen.

"Does this fall within the scope of law laid down in the recent decision of State to the use of Consolidated Dist. No. 42 of Scott County v. Powell et al, reported at page 508 of 221 S.W.(2d),

and am I bound by the order of the County Court in the premises."

From your letter quoted above it appears that on April 8, 1949, you and C. P. Turley were appointed by order of the county court of Shannon County, as special counsel, to recover from Wright S. Brawley and his securities county money embezzled by Brawley; that sometime subsequent to this April 8th appointment you and Turley did file such suit against Brawley but not against his securities; that on April 16 you were appointed prosecuting attorney of Shannon County; that sometime subsequent to your April 8th appointment and subsequent to filing the suit against Brawley you decided that his securities should be made parties to the suit filed against Brawley; that you made this suggestion to the county court; that the county court responded with the order directing that no suits be filed against the securities. You want to know of us whether you have the authority to sue these securities.

It is the opinion of this department that you, in your capacity as prosecuting attorney of Shannon county, may sue the securities aforesaid. In support of this conclusion we direct your attention to the case of State v. Powell, 221 S.W.(2d) 508. The statement of facts in that case is thus stated by the court at l.c. 508:

"Action by the state of Missouri, to the use of Consolidated School District No. 42 of Scott County, by D. W. Gilmore, prosecuting attorney of Scott County, Missouri, who prosecutes in the name of the state of Missouri for and on behalf of the Consolidated School District No. 42, against Arthur Powell, and others, members of the board of directors of the district, and president, treasurer and secretary of the board, to recover district's funds alleged to have been illegally expended.\* \* \*"

The court then states the issue before it in this wise, l.c. 508 and 509:

"The sole question presented on this appeal is the legal right of the prosecuting attorney of Scott county, under the facts stated in the petition and shown by the evidence, to bring and maintain this action in the name of the State and for the use and benefit of Consolidated School District No.

42 of Scott county without the consent  
or authority of such school district.

\* \* \*"

In regard to the foregoing the court further says:

"Appellants argue that the prosecuting attorney has only such powers as are expressly conferred upon him by statute, and that, if a prosecuting attorney is not satisfied with the manner in which the board of directors is administering the affairs of a school district, his remedy is Quo Warranto, Mandamus or Injunction. They insist that he cannot maintain a civil suit, such as this, to obtain a money judgment on an alleged personal liability of the directors to the school district for the misappropriation of funds. Appellants further contend that only the district, by the authority of its board of directors, is a proper party plaintiff to obtain such a money judgment. Respondent has not favored us with a brief.

"(4) Section 12942, R. S. 1939, Mo. R.S.A. expressly provides that '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 \* \* \*.' Section 12944, R. S. 1939, Mo. R. S. A., provides that 'he shall prosecute or defend, as the case may require, all civil suits in which the county is interested \* \* \*.' Neither the word 'concerned' nor the word 'interested' is defined, but one of the definitions given for the word 'concerned' is 'affected, disturbed, troubled, interested; as to be concerned for one's safety.' Webster's New International Dictionary (2nd Edition). There can be no doubt that the state was interested, concerned and affected by the illegal transfer and dissipation of the Teachers' Fund of this school district."

\* \* \* \* \*

"\* \* \*As stated, the right of the state at the

relation of the prosecuting attorney to intervene and enjoin such illegal transfers and expenditures is not questioned. The interest and concern of the state in intervening and stopping such an illegal disposition of public funds is not questioned. We think that the right of the state by the prosecuting attorney of the county to intervene in such case and to recover, on behalf of the state and the school district, the amounts so illegally diverted and spent rests upon sound public policy and upon express authority granted by statute. Under the facts pleaded and proven we hold the prosecuting attorney of Scott county had authority to institute and maintain this action. \* \* \*

It seems to us that if the prosecuting attorney had the power, as the court above held that he did, to file suit against the directors of a school district, representing only part of a county, to recover money illegally spent by them, that a prosecuting attorney would have the power to sue a defaulting county official and his securities for the recovery of money belonging to the entire county, which money had been embezzled by the aforesaid county official.

Who the prosecuting attorney will sue in proceeding with his right and duty to protect the interest of his county is a matter within his discretion. Certainly the county court cannot dictate to a prosecuting attorney as to who he will or will not sue. In an opinion handed down on January 7, 1949, in the case of Rippeto v. Thompson, 216 S.W.(2d) 505, the Supreme Court of Missouri, in discussing the jurisdiction of county courts stated that:

"\* \* \*Article VI of the new Constitution (1945) which concerns local governments, not courts, provides in part in Section 7 that the county court 'shall manage all county business as prescribed by law.  
\* \* \*"

In the above opinion the court stated that county courts are ministerial bodies. As we stated above, by no possible construction of the laws of Missouri could it be found that a county court could determine who a prosecuting attorney would or would not sue. Whereas, on the other hand, from the authorities cited by the court in

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the Powell case, cited above, it is equally clear that a prosecuting attorney, in pursuing his duty of filing criminal and civil suits in all cases in which his county is concerned or interested, has complete discretion in the matter of who he will or will not sue in the discharge of his duty.

#### CONCLUSION

It is the conclusion of this department that the prosecuting attorney of Shannon county, Missouri, in his capacity as prosecuting attorney of said county, may file suit against the securities of Wright S. Brawley for the recovery of monies embezzled by Brawley from funds in his hands as treasurer of Shannon county, Missouri.

Respectfully submitted,

HUGH P. WILLIAMSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General