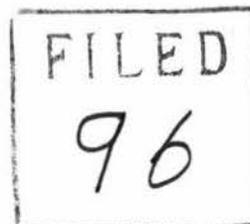


PROSECUTING ATTORNEYS: Prosecuting Attorneys are required to
SCHOOLS: represent and defend County Superintendents
of Schools in civil suits filed against
such officials involving their official
acts.

November 29, 1949

Honorable Hubert Wheeler
Commissioner of Education
State Capitol Building
Jefferson City, Missouri



Dear Sir:

In answer to your recent request for an opinion from this department, we first quote your request excepting the portion thereof making reference to opinions, laws and court decisions as follows:

"Inquiry has come to this Department concerning the laws of this State governing the powers and duties of county officials in relation to the enforcement of laws governing the public schools of this State.

"The case in question involves Audrain County, in which the County Superintendent of Schools denied the assignment of elementary pupils living in a common school district adjacent to the School District of Mexico. The parents of the school children who were denied assignment, employed the County Prosecuting Attorney as counsel to bring a mandamus suit in circuit court to compel the County Superintendent of Schools to make an official assignment as provided in Senate Bill 308, Section 10461, Laws of 1945. The County Superintendent of Schools employed an attorney to defend his action in refusing to make assignment. The employment of such counsel involved an expenditure of money. The circuit court, in this case, denied the petition for mandamus action.

"This problem seems to be one of general interest, since such action may be taken in any county of this State wherever a request is made for the official assignment of public school pupils. County superintendents of schools will need to know how to secure legal counsel when necessary,

for carrying out their official duties in the administration of school laws.

* * * * *

"I shall be glad to have your advice and official opinion in regard to the following questions:

"1. Is the county superintendent of schools entitled to the legal counsel of the prosecuting attorney under the provisions of Section 12942 in the defense of his official actions in administering the school laws under his jurisdiction?

"2. If Section 12942 does not include the defense of the county superintendent of schools by the prosecuting attorney, in the administration of the laws governing public schools, what would be the proper source of legal counsel for such county official and who would be responsible for paying both counsel and court costs?"

In the case of State ex rel. Trash v. Lamb, 237 Mo. 437, decided by the Supreme Court of Missouri in 1911, the court had occasion to review the history of legislation in Missouri concerning the duties and powers of prosecuting attorneys, and such review commences with a discussion of the Missouri territory law as it stood in 1806, which provided for an attorney general for the territory, and traced subsequent enactments touching the offices of attorney general, circuit attorneys and prosecuting attorneys in Missouri up until the date of such decision, at which time the court was construing Section 1007, R. S. Mo. 1909, which section remains unchanged in our present laws at Section 12942, R. S. Mo. 1939.

An excerpt from the opinion just referred to will fully acquaint us with the scope of authority to be exercised by the prosecuting attorneys under our present statute, Section 12942, R. S. Mo. 1939.

The court spoke as follows in 237 Mo. 437, l.c. 450:

"The history of this legislation shows that, since 1825, it has been the policy of this

State, as indicated by the various acts passed by the Legislature, to impose upon the local State's attorney, whether known as the circuit or prosecuting attorney, the duty of instituting proceedings in behalf of the State in matters arising within his local jurisdiction. From 1824 to 1955 the Attorney-General acted as circuit attorney in the circuit within which the seat of government was located. From 1855 to 1868 the Attorney-General had no such power. During that period the right to institute proceedings in behalf of the State was in the circuit attorneys exclusively. Since 1868 the statutes have been substantially as they are now; section 1007, Revised Statutes 1909, authorizing the prosecuting attorney to commence proceedings in matters concerning the State within his county, and section 970, Revised Statutes 1909, imposing duties upon the Attorney-General in substance like those provided in the Act of 1868 above quoted.

"Whatever may be the proper construction of section 970 as to the duties of the Attorney-General, it is clear that during all the time since the early territorial days the local State's attorney has been the proper legal representative of the State to institute proceedings in behalf of the State, and in no respect has that power been curtailed by legislation.

"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. * * "

Section 12942, R. S. Mo. 1939, expressly provides that "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, defend all suits against the state or county, * * * ." Section 12944, R. S. Mo. 1939, provides that the prosecuting attorney "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 in the statutes just referred to, 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).

An answer to the first inquiry made must rest on the determination of whether the county is "interested" or "concerned" in a suit brought against the county superintendent of schools in his official capacity to compel him, by mandamus, to make an assignment of pupils pursuant to authority contained in Section 10461, R. S. Mo. 1939, as repealed and reenacted, Laws of Missouri, 1945, page 1663, Such section reading as follows:

"Whenever any pupil is so located that an adjoining school is more accessible, the county superintendent shall have the power and it shall be his duty to assign such pupil to such adjoining district: Provided, if a school district shall be divided by a county line, or it is deemed advisable to assign pupils to a district in an adjoining county, then the county superintendent of the county wherein the pupil resides shall make the assignment, subject to an appeal to the state board of education by any county superintendent whose county is affected, and the decision of the state board of education shall be final: Provided, the attendance of such assigned pupil shall be credited for the purpose of apportionment of state funds to the district in which the student lives, and the board of directors of the district in which said student lives shall pay the tuition of such pupil or pupils so assigned: Provided, such tuition shall not exceed the pro rata cost of instruction."

In this opinion we do not rule on the right of any person to employ the writ of mandamus to compel compliance with Section 10461, R. S. Mo. 1939. Our concern is solely with the duty of the prosecuting attorney, if any, to represent the county superintendent of schools in the event such litigation is commenced. No citation of authority is necessary for us to conclude that the county superintendent of schools is a public officer to whom some of the sovereign functions of government have been delegated by the state, to be exercised by such official for the benefit of the public. Section 10461, supra, is a clear example of such delegation of a governmental function. When a county superintendent of schools is made a defendant in a legal action to compel him, in his official capacity, to perform, or perform in a certain manner, duties prescribed by statutes applicable to his office, it seems that the "interest" and "concern" of the county is readily apparent.

In the case of State ex rel. v. Wurdeman, 183 Mo. App. 28, 166 S.W. 348, the St. Louis Court of Appeals had occasion to construe Section 1007 and Section 1008, R. S. Mo. 1909 (Section 12942 and Section 12944, R. S. Mo. 1939), which remain unchanged in their language to this date. A quotation from the opinion rendered in the case just cited discloses the nature of such action and its analogy to the question now being considered. At 183 Mo. App., l.c. 36, the court spoke as follows:

" * * * In an early case in this court, the prosecuting attorney * * * 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 interests 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.

" * * * When it is remembered the county is the unit of government with respect of such matters, it appears to be clear enough that it is interested in a civil suit against the judges of the county court, which proceeds with a view of enforcing them, ex officio, to act upon an application for a dramshop license. Therefore, the county

being interested in the subject-matter of the mandamus suit against the judges of the county court, the statute (Sec. 1008) imposed the duty upon the prosecuting attorney to control and defend that case. His right no one can dispute, for the statute pointedly prescribes and affixes it as a duty upon him in all cases in which the county is interested, and this, too, in addition to the duties affixed by the prior section (1007) where the suit is against the county."

In considering the nature and purposes of duties prescribed and to be performed by the county superintendent of schools in compliance with directives contained in Section 10461, R. S. Mo. 1939, in carrying out the public trusts imposed on such official, it would be unreasonable to conclude that the "interest" and "concern" of the county and state in the proper performance of such duties should be restricted to an "interest" and "concern" that might be measured only in terms of pecuniary interest.

In the case of State ex rel. Thrash v. Lamb, cited supra, the Supreme Court of Missouri quoted approvingly from Throop on Public Officers, l.c. 453, as follows:

" * * * 'Acts of public officers acting on behalf of the State, within the limits of the authority conferred on them, and in the performance of their duties, are the acts of the State.'"

In the opinion request there was no suggestion that the county superintendent of schools was not acting, or refusing to act, within the scope of authority contained in Section 10461, R. S. Mo. 1939. His acts were official acts, and from the very character of such acts, the county as well as the state was "interested" and "concerned."

This department has previously ruled in an opinion dated September 4, 1943, and addressed to the Prosecuting Attorney of Boone County, Missouri, that the language of Section 12944, R. S. Mo. 1939, makes it the duty of the prosecuting attorney to advise the county superintendent of schools in matters of law in which the county is interested. It is this same section which makes it the duty of the prosecuting attorney to "defend" all civil suits in which the county is interested. It necessarily follows that the "interest" and "concern" of the county

and state, in the official acts of the county superintendent of schools, as heretofore outlined, makes it the duty of the prosecuting attorney to represent the county superintendent of schools in defending against civil suits in order for the prosecuting attorney to comply fully with the directives contained in Section 12942 and Section 12944, R. S. Mo. 1939. However, this general rule must admit of an exception in those cases where the prosecuting attorney, in his official capacity, and in the interest of the county and state, institutes an action on behalf of the state and county against such public official. The right and duty of the prosecuting attorney to proceed in his official capacity against a public official, when he deems the acts of such official to be in violation of statutory directives and adverse to the interest of the state and county, must be recognized at all times.

Having concluded that language contained in Sections 12942 and 12944, R. S. Mo. 1939, is sufficiently comprehensive to include the defense of the county superintendent of schools in the administration of the laws governing public schools, the second question posed in your inquiry is not a subject for disposition in this opinion.

CONCLUSION

It is the opinion of this department that the county and the state are both "interested" and "concerned," as those terms are used in Sections 12942 and 12944, R. S. Mo. 1939, when the county superintendent of schools is made a defendant in a civil action touching his official acts in administering the school laws within his jurisdiction, and it is the duty of the county prosecuting attorney to defend and represent the county superintendent of schools in such action.

Respectfully submitted,

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APPROVED:

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Attorney General