

COUNTY COURTS:  
THIRD CLASS COUNTIES:  
MAY EMPLOY  
SPECIAL COUNSEL:  
WHEN:

When third class county court was advised by prosecuting attorney against legal action to evict tenant of county poor farm, and prosecuting attorney refuses to do anything further to protect the county's rights, and the court thereafter employed special counsel, who filed an ejectment suit to evict tenant, said special counsel and not the prosecuting attorney shall have exclusive control of ejectment suit. Courts action was authorized by Section 56.250, RSMo 1949, and it may allow reasonable compensation to special counsel and other compensation paid from available county funds.



May 28, 1957

Honorable Alden S. Lance  
Prosecuting Attorney  
Andrew County  
Savannah, Missouri

Dear Mr. Lance:

This department is in receipt of your recent request for a legal opinion based upon the facts presented in detail, and which may be summarized as follows:

By written agreement, the county court of Andrew County leased the county poor farm for a term of one year ending January 1, 1957, to a tenant for the purpose of conducting a nursing home on such property. As a part of the agreement, the tenant was to accept and board all indigent persons of the county who would ordinarily be maintained at public expense on the poor farm. For the board of such persons, the county court agreed to pay the tenant \$150.00 per month.

At the end of January, 1957, the county court has failed to notify the tenant concerning their intention to let the county poor farm for the coming year. At this time the tenant had been paid \$150.00 by the court, although the lease had expired the first day of the month. The court then requested you as prosecuting attorney to bring legal proceedings to oust the tenant from the county poor farm. In a written legal opinion, you advised the court that for reasons given in said opinion, it would be improper to start legal proceedings, to evict the tenant of the poor farm at that time. It appears that you failed to do anything further in this matter, and then the court consulted a law firm for advice on said matter.

Thereafter the law firm which had been employed by the county court filed an ejectment suit against the tenant of the poor farm.

You have asked for an opinion based upon these facts and the four specific questions asked in the request are:

Honorable Alden S. Lance

"The questions of law upon which I desire your office to render an official opinion are as follows:

"1. On the basis of the facts as set out above, do I have a right as prosecuting attorney, to intervene in the pending litigation as attorney for the county?"

"2. Assuming that the answer to question number one is 'yes', would I then, as prosecuting attorney of the county, have the legal right and authority to assume full control of the litigation on behalf of the county?"

"3. Assuming that the answer to questions numbered one and two are 'yes' would I then have the legal right and authority to dismiss this action on behalf of the county, upon the basis of my belief that it is unwise to pursue the matter at this time?"

"4. On the basis of the facts indicated above, would the county court have the authority to pay the law firm which they have retained out of the county funds for work done by this law firm in connection with the ejectment suit?"

All statutory references herein are to RSMo 1949 unless otherwise specified.

Section 56.060, is in regard to the general duties of the prosecuting attorney, among which are those of commencing and prosecuting all civil and criminal cases in his county, in which the state or county may be concerned, and of defending all suits against the county or state. Said section reads 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; 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

Honorable Alden S. Lance

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. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over three hundred thousand inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

Section 56.070 provides that the prosecuting attorney shall prosecute or defend all civil suits in which the county is interested. Said section reads 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 the magistrate court, 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 or 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

Honorable Alden S. Lance

any or all of said swamp or overflowed lands, and quieting the title of the 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."

Section 56.250 authorizes all county courts of the third and fourth classes of this state to employ special counsel to represent the county in prosecuting or defending any suit in behalf of the county. Your County of Andrew is one of class three and this section applies to it. Said section reads as follows:

"The county courts of all counties in this state of the third and fourth classes may, in their discretion, employ special counsel or an attorney to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties, and may pay to such special counsel or attorney reasonable compensation for their services, such compensation to be fixed by the county court of such county, to be paid out of such funds as the county court may direct; and such counsel or attorney shall be a person learned in the law, and at least twenty-five years of age."

Section 56.060, supra, gives the general duties of a prosecuting attorney; it requires him to represent the county or state in all civil or criminal cases in his county, in which the interest of the county or state is concerned. Section 56.070, supra, is somewhat more specific than Section 56.060, in that it requires the prosecuting attorney to represent his county in all civil suits in which the county is interested. No reference is made to criminal cases in this section.

Both of these sections are general statutes and apply to prosecuting attorneys in all classes of counties in the state. While Section 56.250, supra, does not impose any duties on the prosecuting attorney, it indirectly concerns him, as the section empowers the county court of third or fourth class county to employ special counsel to prosecute or defend any suit in which the county is interested.

In the discretion of the county court, when it is deemed advisable by them, they may employ another attorney to represent the county. When this is done, the prosecuting attorney is thereby relieved of a portion of those duties imposed upon him by

Honorable Alden S. Lance

Sections 56.060 and 56.070, supra.

Section 56.250 is a special statute, and is more in detail than the two former ones. However, according to certain rules of statutory construction, to be presently noticed, all three of these sections shall be read and construed together. In that instance, it will be found they are fully in harmony and that all of them can be given effect.

In the case of *State ex rel Buchanan County v. Fulks*, 296 Mo. 614, among other matters, the court had under consideration the construction and harmonization of two statutes and gave some statutory rules of construction for that situation. At l.c. 626 the court said:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' [See *Lazonby v. Smithey*, 151 Mo. App 285, 289 and cases cited in *State ex rel. Lashley v. Becker*, 290 Mo. l.c. 620.]"

Again, in the same case one of the issues was that the county court was unauthorized to employ an attorney in a suit in which the interests of the county were involved, since the statutes provided that all such suits should be prosecuted or defended by the prosecuting attorney. In discussing this contention the court said at l.c. 633:

"Another contention is that the court erred in overruling appellant's motion to dismiss this action because it was not brought by the Prosecuting Attorney of Buchanan County, but by private counsel employed by the county court of that county. The prosecuting attorney was repeatedly directed by the county court to bring the suit, but being of the opinion that the collector was entitled to retain the four per cent commissions imposed on delinquent taxpayers by the statute in addition to the \$9000 compensation provided by Subdivision XV supra, he persistently refused to bring suit. In this

Honorable Alden S. Lance

exigency the county court advised with private counsel, and on the last day before the expiration of the three-year period of limitation the court, by an order entered of record, employed Messrs. Strop and Mayer, attorneys, to bring this action, and the petition was filed on February 28, 1915, pursuant to such employment. It was not signed by the prosecuting attorney."

"It is the duty of prosecuting attorneys to commence and prosecute all civil and criminal actions in their respective counties, in which the county or state may be concerned. [Secs. 736 and 738, R.S. 1919.] The county court is the fiscal agent of the county and is charged with the duty and vested with the 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. [Sec. 9560, R.S. 1919.] We are of the opinion that when the prosecuting attorney refused to perform his duty, as in this instance, the county court was not shorn of its power to act in the discharge of its duties in the premises, nor required to supinely abdicate its functions. The servant is not greater than his master. The county court was empowered by the statute to order the suit to be brought and to require the prosecuting attorney for the county to commence and prosecute the action. The refusal of the prosecuting attorney to obey the order of the county court created an emergency. The suit must be brought or the county lose a large amount of its revenue. In this emergency we have no doubt the county court had the implied power to employ other counsel to bring the suit; otherwise it would have failed in the discharge of a duty imposed upon it by the statute. Qui facit per alium, facit per se."

"In Wiley v. Seattle, 7 Wash. 576, mandamus proceedings were brought against the mayor of the city to require him to sign an illegal issue of bonds. Neither the legal officers nor the legislative body of the city would assist him or procure counsel for the purpose: Held, that the city was liable for the services

Honorable Alden S. Lance

of special counsel employed by the mayor, although the employment of such counsel was contrary to the provisions of the charter. Anders and Hoyt, JJ., dissenting."

"In Spence & Dudley v. Clay County, 122 Ark. 157, 161, the court said: 'Section 6393 of Kirby's Digest provides that the prosecuting attorney shall defend all suits brought against the State or any county in his circuit. Notwithstanding this section of the statute, we held in the case of Oglesby v. Fort Smith District of Sebastian County, 119 Ark. 567, 179, S.W. 178, that the county court, under our Constitution and laws, was empowered to employ other counsel when in its judgment the interest of the county were of sufficient importance to demand it, or in cases where the prosecuting attorney neglects or refuses to perform the duties imposed upon him by the statute or where his other duties are of such a character that he does not have time to properly represent the county.'"

It is readily seen that the court was of the opinion the county court was empowered to employ special counsel to represent the county in the case, and it is believed said ruling is fully applicable to the law and facts involved in the first inquiry of the present opinion request.

It is believed that Section 56.250 is an exception to the rule stated in Sections 56.060 and 56.070. Obviously such an exception is necessary to insure proper legal representation of the county at all times in cases where the county's interests are involved, and cannot be taken care of by the prosecuting attorney.

In all these or similar emergencies it appears that Section 56.250 supra, would apply. It is further believed that it was never the legislative intent for this section to operate as an unlimited grant or license for the county court to employ counsel other than the prosecuting attorney without good and sufficient reasons.

On the other hand, the legislative intent, as shown in the enactment of said section appears to be that the county court, would in its discretion be authorized to employ an attorney other than the prosecuting attorney, when it appeared to the court that for any reason the prosecuting attorney failed or refused to take any or all necessary legal action to protect the interests of the county in any case where the interests of the county were involved, and when requested by the county court.

Honorable Alden S. Lance

In the instant case, assuming that the county court has questioned the legal advice you gave them, and in their judgment, necessity required them to be certain, as to what, if any, legal action could be taken with reference to the protection of the county's rights in the poor farm matter, and assuming further they did not abuse the power granted to them by Section 56.250, supra, it is believed that they were authorized to seek the advice of the St. Joseph law firm, and to employ the law firm to bring an ejectment suit to oust the tenant of the county poor farm.

In view of the foregoing, and in answer to the first inquiry, it is our thought that under the circumstances of the case, you have no right to intervene in the pending litigation mentioned above, as prosecuting attorney of the county.

Apparently the second and third inquiries are based upon the assumption that the first inquiry would be answered in the affirmative. Since the first inquiry is answered in the negative, it is believed to be unnecessary to answer said latter inquiries.

In answer to the fourth inquiry, and for reasons given in discussion of the first inquiry, it is our thought that the county court of Andrew County is authorized to pay the law firm retained by them to represent the county in connection with the ejectment suit, from county funds.

#### CONCLUSION

Therefore, it is the opinion of this department that when the county court of a third class county was advised against taking any action to evict a lessor of the county poor farm, by the prosecuting attorney, who refused to do anything further in the matter, and believing it to be for the best interests of the county, the county court employed an attorney, other than the prosecuting attorney, to advise them, and to take any appropriate legal action deemed necessary by him in evicting the poor farm tenant, and said attorney subsequently brought an ejectment suit against the tenant of the county property; the entire control of the ejectment suit shall be in said special counsel, and the prosecuting attorney is unauthorized to intervene in the pending litigation. The action thus taken by the county court was authorized by Section 56.250, RSMo 1949, and the court may fix a reasonable compensation for the services of such special counsel, and may order same paid from any available county funds.

The above foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON  
Attorney General