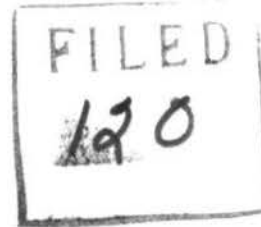


March 12, 1971

Opinion Letter No. 120

Answer by Letter (Klaaffenbach)

Mr. J. M. Wilson  
Assistant Prosecuting Attorney  
Scott County  
217 South Kingshighway  
Sikeston, Missouri 63801



Dear Mr. Wilson:

This letter is in answer to your opinion request in which your question is stated as follows:

"I would like to request an opinion from your office concerning what constitutes use of criminal process to collect a private debt as such would subject the officers of the Court to liability.

When our office is approached by small loan and furniture companies advising that someone has carried mortgaged property out of the state and refused to pay, our procedure is to write a letter informing the mortgagor that the acts he has committed may subject him to criminal liability. Since most people are unaware that criminal charges can be brought against them it is our feeling that they should have an opportunity with full knowledge, to dispel the intent to defraud. My attention has been called to an article in the American Law Review Third, 27 ALR 3rd 1202. If after receiving the above notice an agreement is made with the mortgagee or payment is made we do not process complaint.

In your opinion does this constitute use of criminal process to collect a debt."

It is our understanding that the section of the Missouri Statutes to which you refer concerning the disposition of mortgaged chattels is Section 561.570 RSMo. 1969 which states:

"Every debtor in any security agreement or trust deed of personal property who shall sell, convey or dispose of the property mentioned in the security agreement or trust deed or any part thereof, without the written consent

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of the secured party or beneficiary and without informing the person to whom the same is sold or conveyed that the property is subject to the security interest or who shall injure or destroy the property or any part thereof or aid or abet the same, for the purpose of defrauding the secured party or beneficiary or his heirs or assigns or shall remove or conceal or aid or abet in removing or concealing the property or any part thereof, with intent to hinder, delay or defraud the secured party or beneficiary, his heirs or assigns, shall, if the property is of the value of fifty dollars or more, upon conviction thereof, be punished by imprisonment by the department of corrections not exceeding five years, or by imprisonment in the county jail not exceeding six months, or by a fine of not less than one hundred dollars, or by both the fine and imprisonment in the county jail; and if the property is of less a value than fifty dollars he shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail not exceeding six months or by a fine not exceeding one hundred dollars or by both the fine and imprisonment."

It is also our understanding from additional correspondence from you that the cases involve instances where the person not only removes the property from the State of Missouri but also refuses to give a forwarding address, does not make any attempt to continue payments on the property and in effect substantially attempts to hide himself and the mortgaged property from his creditors.

27 ALR 3rd 1202 which is cited in your question concerns the use of criminal process to collect debts. In our view the letters you state that you write by themselves do not come within the theory of abuse of process.

Although this would appear to answer your question we believe that you want us to explore the situation further.

That is, malicious prosecution is another theory of action which is distinguishable from an action for malicious arrest or from malicious abuse of process or malicious use of process and other actions of a similar nature. 54 C.J.S. Malicious Prosecution, #2. However in this instance no prosecution has been commenced therefore there does not appear to be a theory which could be founded upon "malicious prosecution".

We also note that Section 559.450 RSMo. 1969 with respect to threatening letters states:

"Every person who shall knowingly send or deliver any letter,

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writing, printing, circular or card, with or without a name subscribed thereto, or signed with a fictitious name, or any letter, mark or device, threatening to accuse any person of a crime, or to kill, maim or wound any person, or to do any injury to the person, property, credit or reputation of another, though no money or property be demanded or extorted thereby, shall, on conviction, be adjudged guilty of a misdemeanor."

There is little Missouri authority on the interpretation of this section. However its application should be considered in this instance.

Another section of possible application which is self-explanatory is Section 560.130 RSMo. 1969 concerning robbery in the third degree which states:

"If any person shall, either verbally or by a written or printed communication, accuse or threaten to accuse another of a felony, or shall threaten to do any injury to the person or property whatever of anyone, with a view or intent to extort or gain any money or property of any description belonging to another, and shall, by intimidating him with said accusation or threat, extort or gain from him any money or property, every such offender shall be deemed guilty of robbery in the third degree."

In addition obviously any time a public officer abuses his position he will have to consider whether or not he is in violation of Section 558.110 RSMo. 1969, with respect to oppression in office, which states:

"Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor."

Finally with respect to the general subject of threats, we refer you to 86 C.J.S., Threats and Unlawful Communications, §3.

It is obvious of course that the particular facts in each case must be individually considered and for that reason we do not attempt to speculatively determine at what point an official exceeds the bounds of propriety and enters the area of criminal and civil liability.

In our view it is not proper for the prosecuting attorney to base his decision as to whether to prosecute upon whether

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an account or alleged debt is paid. We find no advisory opinion from the Missouri Bar Advisory Committee on this precise subject and are informed that there is none.

We conclude that it is the duty of the prosecutor to determine whether or not he should prosecute and he should clearly not involve himself in any commercial dealings between the complainant and the other party.

Very truly yours,

JOHN C. DANFORTH  
Attorney General