QUO WARRANTO: Whether Attorney General or prosecuting attorney should file action, and when, and under what conditions.

8-22

August 19, 1935.

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Hon. C. Arthur Anderson,
Prosecuting Attorney,
Clayton, Missouri.

Dear Sir:

We are in receipt of your letter of August 9, 1935, which is as follows:

> "There has been some dispute as to who can file ouster proceedings against some twenty two different Justices of the Peace appointed by the County Court of St. Louis County.
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> "I know that it is set out very clearly in the Statutes that the Attorney General or Prosecuting Attorney has the right to file quo warranto proceedings, but as long as the County Court made these appointments, and the County Court is represented by a County Counsellor, I am of the opinion that it is the County Counsellor's duty to file the above named proceedings, and the same must be filed in my name or the Attorney General.
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> "Kindly give me an opinion on the above as soon as possible.

Section 1618, R. S. Mo. 1929, in part reads as follows:

> "In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney-general of the state, or any circuit or prosecuting

> attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney."

In the case of State ex inf. v. Taylor, 208 Mo. 442, l. c. 451, the Supreme Court of Missouri, speaking with reference to questions raised by your inquiry, said:

> "Now, observe, our statute (R. S. 1899, sec. 4457) charges the Attorney-General of the State and the prosecuting attorneys of the respective counties with the duty of speaking in the name of this sovereign commonwealth, 'in case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise.' In such case, in matters of initiative, they wield the bolt forged by the law, no other hand may; they stand charged with the duty of exhibiting to the court an information in the nature of quo warranto, at the relation of any person desiring to prosecute the same. When such information has been once filed and proceedings commenced in a circuit court at the relation of such person, such prosecuting attorney or Attorney-General steps down from the exclusive stool of duty and responsibility, and, seating himself on a lower and more humble bench of power shared jointly with relator, he may not thereafter dismiss or discontinue such proceeding without his

consent. (Sec. 4457, supra). So much appears from that statute, and the case may proceed with the assumption that the power and duty of the prosecuting attorney to alone use the name of the State in quo warranto come down unimpaired, in full flower, until such time as the information is exhibited, filed and the proceeding commenced; and, with that point once reached, the relator thenceforward (but not before) shares with him the control and disposition of the litigation.

"The statute uses the phrase 'shall exhibit.' It was argued in this court in State ex inf. v. Talty, 166 Mo. 529, that the phrase 'shall exhibit' as therein used 'means that the act itself must be done;' and that the prosecuting attorney had no discretion with respect to the matter, but was bound, as of course, to exhibit the information when requested to do so by a given relator. In disposing of that argument, this court (p. 559, et seq.) said: 'That the word "shall," as generally used, is mandatory may be conceded, but it is a cardinal rule that "the intention of an act will prevail over the literal sense of its terms" (Sutherland on Statutory Construction, sec. 219), otherwise it might lead to absurd consequences, which could but be the result in this case if the statute be construed according to its strict letter. If the statute is to be interpreted in accordance with defendant's contention, the proceeding would be at the mere will or caprice of any person in position to prosecute it, and the Attorney-General, circuit or prosecuting attorney, as the case might be, a figurehead, a mere nonentity, and we are unable to believe

> that any such state of affairs was ever contemplated by the Legislature. The power of determining whether or not the action shall be commenced must exist somewhere, and from the very nature of the writ, its character and purpose, it should rest with the officer who represents the people of the State with respect to such matters."

In the case of State ex rel. v. Hyde, 2 S. W. (2d) 212, l. c. 214, the Supreme Court of Missouri said:

> "It has been held by our Supreme Court that a proceeding of this character is a statutory civil proceeding and that the statutes relative to amending pleadings applies to this character of case. State ex inf. v. Beechner, 160 Mo. 78, 86, 60 S. W. 1110. Also, that after the information is filed at the relation of a private citizen the relator is the real party in interest and the Attorney General or prosecuting attorney becomes a mere instrumentality. State ex rel. v. Long, 275 Mo. 169, 180, 204 S. W. 914.
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> "The statute itself, section 2066, Stat. 1919, provides that when an information in the nature of a writ of quo warranto to test the right of a person alleged to have usurped an office or franchise has been filed and the proceedings commenced by the Attorney General or prosecuting attorney at the relation of a private citizen, 'the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney.' In State ex inf. v. Heffernan, 243 Mo. 442, at page 450, 148 S. W. 90, 92, it is said, after quoting the above statute:

> "'If the relator is successful, he recovers his costs against the defendant; if he is unsuccessful the defendant recovers his costs against him. From the time of the filing and exhibition of the information, it is a fight between the relator and defendant, in which the state and its officers are disinterested spectators.'
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> "While the Attorney General or the prosecuting attorney can exercise a discretion when application is made to him by a private individual asking that an information of this character be filed and may refuse to file it, yet, when he has acceded to the request of the party and has filed the information and named the party therein as relator, the statute seems to place further prosecution of the case largely, if not entirely, in the hands of the relator and the officer becomes, as said, 'a disinterested spectator.'"

In the case of State ex rel. v. Long, 275 Mo. 169, l. c. 180, the Supreme Court said:

> "This proceeding was brought under Section 2631, Revised Statutes 1909. The prosecuting attorney, under this section, is clothed with the power to determine the propriety of bringing an action of this character, but after he has exercised his discretion and the suit has been brought, he is not permitted to dismiss or discontinue it without the consent of the individual at whose request it was brought. In short, where the action was instituted not ex officio but upon request, the individual is the real party in interest and the prosecuting attorney

> (State ex inf. v. Taylor, 208 Mo. l. c. 452) an instrumentality. The statute, otherwise construed, would present the anomaly of authorizing the assertion in the courts of a right, and while forbidding the official in whose name it was required to be brought to dismiss or discontinue same, upon his failure or refusal to prosecute it to a final determination, to preclude the real party in interest from so doing. Such a ruling would nullify the statute and limit its effective application to such cases only as are brought by an officer on his own initiative. A reasonable construction of the statute, and one which accords with justice and right, is that where a prosecuting attorney institutes an action of this character upon request, and the court in its discretion permits the same to be brought (State ex inf. v. McClain, 187 Mo. l. c. 412; State ex rel. v. Rose, 84 Mo. l. c. 202), regardless of the attitude thereafter of the prosecuting attorney, the real party in interest may prosecute it to a final determination. This is in accord with that well established rule, consistent with reason, that a statute should be so construed as to render it operative."

It will be noted that Section 1618, supra, provides that when the prohibited acts have occurred which have given rise to the existence of the right to oust, that the duty is placed on the officials to take court action, but such duty to act is by the statute cast on said officials "at the relation of any person desiring to prosecute the same." This implies that someone desires to prosecute such action. When they do so desire, it is the duty of said officials to use their discretion as to permitting the use of their names in the institution of quo warranto suits. If they decide that a particular set of facts justifies such a suit, they are authorized to lend their names to the suit that is instituted at the instance

of an interested party. However, when once instituted, such suit is under the control of the party at whose instance it was instituted.

The county counsellor, as such, does not have authority to file a quo warranto suit, but either he or some other appropriate person "desiring to prosecute the same" may request you, as prosecuting attorney, to institute such suit, and if and when you reasonably deem the suit to be appropriate, such suit may be instituted by you at that person's instance, and thereupon the suit proceeds under the control of such person.

The statute does not make it mandatory on the prosecuting official to file quo warranto proceedings. It makes it his duty to file suit if he is convinced that the facts justify it, and the suit may be either filed at his own relation or at the relation of "any interested person desiring to prosecute the same."

This does not mean that the prosecuting official has the right to arbitrarily refuse to file such suit. If the violation is adequately brought to his attention, it is his duty to act; otherwise, such official would have the right to thwart the enforcement of justice, and this would be a solecism in the law.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

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