PROSECUTING A ORNEYS: Prosecuting Att ney, and ex. the County Court, controls county litigation.

COUNTY COURTS:

March 18, 1938

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Honorable F. C. Bollow,
Prosecuting Attorney,
Shelby County,
Shelbyville, Missouri.

Dear Sir:

We acknowledge receipt of your request for an opinion, which is as follows:

> "You no doubt have a vivid recollection of the County Bond Suit. This suit was instituted by me in response to a Court order made by the County Court. Both Mr. Henderson and myself have advised the County Court that we believe the case could be reversed on appeal. And I have also advised them that you were of the same opinion. In spite of all this the County Court has made an order directing me to proceed no further with the cause if the ruling of the motion for a new trial be adverse.
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> "What I want to know is whether or not I have the right or authority to appeal this case in the face of this Court order. And if I have such authority, consider this a formal request for an opinion from the Attorney General's Office on the point, and send me out such an opinion at your very earliest convenience, so that I may be able to proceed with the opinion itself to rely upon. Furthermore if you should determine that I have such authority, and I should order the Bill of Exceptions from the official Court Reporter could the County

> Court refuse to pay for the same, and if they did so refuse what could be done about it."

Replying thereto, Sections 11316 and 11318, R. S. Mo. 1929, prescribe the duties of the prosecuting attorney. Section 11316 states:

> "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; * * * *"

Section 11318 provides:

> "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 justices of the peace, when the state is made a party thereto; * * * *."

This section has a proviso that county courts owning swamp or overflowed lands may employ special counsel or attorneys to represent the county in prosecuting or defending suits for the recovery or preservation of swamp or overflowed lands, and quieting title thereto, and to pay such special counsel compensation out of the general revenue fund of the county.

In the case of State ex rel. v. Lamb, 237 Mo. 437, the Supreme Court of Missouri en banc, in 1911, discussed the authority of the prosecuting attorney to file in the name of the State proceedings to enjoin a public nuisance, and held that he had such authority, and that a bond was not required because the action was prosecuted officially for the State. At page 451 the court says:

> "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. Usually a discretion that is within the power granted to an officer cannot be controlled by other officers. * * * A prosecuting attorney has discretionary power to institute or discontinue prosecutions. * * * He may file informations without leave of court (State v. Kyle, 166 Mo. 1. c. 306) * * *. In Texas, the Supreme Court decided that a judge had no power to enter a nolle prosequi, or dismissal of a case pending, against the objection of the district attorney. * * * So in New Hampshire the Supreme Court, speaking of the right of the prosecuting officer in this regard, says: 'The law has lodged that duty with the officer selected for that special purpose, and who are responsible for the manner in which they perform their duties.' * * * In State ex rel. v. Rose, 84 Mo. 198, we held that a prosecuting attorney may file an information in the nature of quo warranto, ex officio, without leave of court, * * * *. This upon the principle that when he acts ex officio, he is exercising the discretion which the State has delegated to him, and, through him, the State may act without leave of court. * * *
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> "It is clear that if the prosecuting attorney acts at all ex officio, he must act for and in behalf of the State. If he has power to act for the State, and institute proceedings at his discretion,

> as we think he has, then it follows that proceedings instituted by him of the character in question are in behalf of the State."

At page 455 the court says:

> "Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance, * * *."

In Meador v. Texas County, 167 Mo. 201, the question arose as to whether the County should compensate the prosecuting attorney for services performed by him in appearing and orally arguing a criminal case in the appellate court. He contended that he should determine when it was necessary for him so to do, and the county court contended that it should determine when it was necessary for him so to do. At page 204 the court states:

> "This statute makes it the duty of the prosecuting attorney to represent the State in all criminal cases in the Court of Appeals from his county, and it specifies that in the performance of that duty he shall make and cause to be printed, at the expense of the county all necessary abstracts of record and briefs. Those duties are required of him unconditionally. In addition to those absolute duties, the statute further declares that 'if necessary' he shall appear in court in person."

At page 205 the court says:

> "The statute does not make either the prosecuting attorney or the county court the sole arbiter of that matter. The statute says he should go if necessary, and shall be paid a reasonable fee for his services. But the question of the necessity and that of the quantum meruit are open questions of fact to be tried on the evidence

> by the court which is to pass judgment on the claim when presented, * * *. Was it necessary in this case for the prosecuting attorney to attend on the Court of Appeals in person? That must be decided by the triers of the fact, like any other question of fact in the case. "

In State ex rel. v. Wurdeman, 185 Mo. App. 28, the question arose as to whether the prosecuting attorney had authority of his own accord, and contrary to the wishes of the county judges, to defend the county judges who were sued in mandamus to require the county court to consider a dram-shop license. Upon the return made of the judges of the county court, the prosecuting attorney appeared and moved the circuit court to permit him to assume control of the defense on the ground that it was a case in which the county was interested, and therefore the statute made it incumbent upon him to do so. The circuit court denied this motion, as though it were competent for the county judges to exclude the prosecuting attorney with respect to the matter of the defense of that case and employ other counsel to control and manage it. The circuit judge declined to permit the prosecuting attorney to defend the case. Thereupon this mandamus suit was instituted to test the ruling of the circuit court.

The St. Louis Court of Appeals quotes approvingly from Kansas decisions and at page 34 states that the Supreme Court of Kansas, construing the question of the right of the county commissioners or the prosecuting attorney to control the case in court, approvingly quotes from the case of Clough & Wheat v. Hart, 8 Kan. 487, 494:

> "'The county attorney is elected by the people of the county and for the county. He is the counsel for the county, and cannot be superseded or ignored by the county commissioners. His retainer and employment is from higher authority than the county commissioners. The employment of a general attorney for the county is not by the law put into the hands of the county commissioners, but is put into the hands of the people themselves. The

> county attorney derives his authority from as high a source as the county commissioners do theirs, and it would be about as reasonable to say that the county attorney could employ another board of commissioners to transact the ordinary business of the county as it is to say that the county commissioners can employ another attorney to transact the ordinary legal business of the county. Both would be absurd. It is the duty of the county attorney to give legal advice to the county commissioners, and not theirs to furnish legal advice to or for him.'"
>
> "The doctrine of that case was affirmed in Waters v. Trovillo, 47 Kan. 197, 27 Pac. Rep. 822, and has never been questioned, so far as we have been able to ascertain. Other courts either quote and approve it, or proceed in the same view on fundamental reasons."

At page 38 the court says:

> "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."

At page 41 the court says:

> "Obviously, if it be the official duty of the prosecuting attorney under the statute to thus appear, and one which he is sworn to perform, then its performance on his part cannot depend upon the consent of the respondent county officer in the mandamus,

> and such county officer should not be permitted to defeat the prosecuting attorney in the performance of his official duty by withholding consent to put the interests of the county forward in his return."

At page 45 is this:

> "Therefore, it appearing that it is the clear legal right of the prosecuting attorney to appear in and to control, manage, and defend the mandamus suit pending * * * against the judges of the county court as such, the alternative writ of mandamus will be * * * made peremptory."

That case was certified to the Supreme Court because of a dissenting opinion filed by Judge Reynolds, but the records of the Supreme Court show no further opinion written on it, but it was dismissed in the Supreme Court, perhaps because time had made the further prosecution of the suit unnecessary, so it would seem that the decision in this case is the law with reference to the rights and authority of the prosecuting attorney of Shelby County as to who controls the litigation.

In the Murdeman case, the court at page 32 said:

> "Under the statutes both the judges of the county court and the prosecuting attorney are elected by the people of the county and with a view of serving its inhabitants in the discharge of the duties annexed by law to the respective offices of county court and prosecuting attorney. The office of the county court and of the prosecuting attorney are, of course, separate and independent and neither is necessarily subservient to the other. The county court consists of three judges, elected by the people, but its members are not required to be learned in the law, while one of the qualifications prescribed for the prosecuting attorney

> is that he shall be so learned. By statute, certain judicial duties and certain other ministerial and administrative duties are committed to the county court, while other statutes commit certain duties which appertain to the profession of a lawyer to the prosecuting attorney as the law officer of the county."

It will be noted that not only do the decisions of the courts hold that the prosecuting attorney is the person to determine the course of litigation, but other significant facts, than those referred to as stated above in the decided cases, appear from the statutes conferring authority upon the county court and upon the prosecuting attorney.

Section 11318 puts the duty upon the prosecuting attorney to represent the county, except where the proviso empowers the county court, in matters having to do with swamp or overflowed lands, to employ other attorneys than the prosecuting attorney in handling the last mentioned litigation. The fact that the Legislature saw fit to specifically mention and give authority to the county court in this last matter is significant as indicating that the county court is confined to the limits of the statute as to the duties to be performed by the prosecuting attorney.

Section 11316 is the source of authority of the prosecuting attorney to act as such prosecuting officer in criminal cases.

We have never heard of a county court attempting to assume the authority to control the procedure to be followed in the prosecution of a criminal case. The same statute that authorizes the prosecuting attorney to so institute and control the conduct of criminal actions gives him the same authority with reference to the conduct of civil actions. It says (Sec. 11316), "The prosecuting attorneys shall commence and prosecute all civil and criminal actions * * * in which the county or state may be concerned." The statute makes no distinction in the authority of the prosecuting attorney, depending on whether it be a civil or a criminal action. The statute does not merely say he shall file the suit. It says he shall "prosecute or defend, as the case may require," both

civil and criminal actions. His authority to prosecute an action includes his authority to exercise his judgment as a lawyer as to the course that shall be pursued.

The object to be sought in the prosecution of a criminal action is the conviction of the defendant, in order that the defendant may be made to realize that he has transgressed the rules of society as laid down either by the common law or by statute, to the end that he and others may be more careful against such transgressions in the future, and that he be punished for such violation. The object sought in the prosecution of the usual civil lawsuit is the recovery of property. Neither of these objectives can be accomplished except by procedure along well recognized lines that are known, not by laymen, but by lawyers who have devoted their time and efforts to the acquisition of knowledge of the law, and who have especially equipped themselves to apply given facts to given rules of law and determine from a scientific and a professional viewpoint the ultimate result of the litigation through the courts. That result cannot be accurately or scientifically measured by laymen.

It seems to the writer that there would be just as much reason to say that the county court, consisting of laymen, unskilled in the law, should have the right to determine the method of putting on evidence in the conduct of the lawsuit in the trial court, or what witnesses shall be subpoenaed, or what argument shall be made to the jury, or what shall be embodied in the motion for new trial, as for the county court, composed of laymen, to determine that the suit instituted and tried by the prosecuting attorney in the trial court should not be appealed.

By the same construction and line of reasoning which leads to the result that this statute authorizes the prosecuting attorney to control the conduct of the criminal litigation, he is authorized to control the conduct of the civil litigation.

In the Lamb case, supra, it is held that the prosecuting attorney had the power to act for the State and institute a lawsuit. In that case he exercised his own judgment as a lawyer as to whether such action should be prosecuted. He did not go to any other official to get instructions as to such litigation. The highest court of this state, en banc, held that he had that authority because the statute conferred upon him that duty to act for the State.

In the Meador case the statute was again followed. The statute there said that "if necessary" the prosecuting attorney should appear in the Court of Appeals in person. The Supreme Court of this state held in that case that the county court did not have authority to determine that he should not attend the Court of Appeals, but that if it was necessary, all of the facts and conditions surrounding the case considered, that he appear in said court, then he should do so regardless of whether the county court wanted him to, or instructed him to, or instructed him not to.

In the Wurdeman case the statute again was followed and the law in the appellate court was declared to be that the prosecuting attorney receives his mandate and instructions, not from the county court, but from the statute, and that the statute making it his duty to defend the litigation gave him the authority to appear in the circuit court and conduct that defense, and that the circuit court had no authority to deny him that right. In that case both the county court and the circuit court attempted to deny the prosecuting attorney the right to so appear and defend the litigation, but the appellate court held they were wrong and that he had the right to appear and defend the litigation notwithstanding their attempted denial thereof.

That there may be no misunderstanding as to the relevancy to this opinion of the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, we mention that case, which discusses the authority of the county court to employ private counsel to institute civil litigation on the part of the county where the prosecuting attorney has declined to act on matters vitally affecting the county welfare. There the county would have lost substantial revenues by the running of the statute of limitations if suit had not been filed on the day it was filed. The county court had directed the prosecuting attorney to file such suit and he had declined to act. Thereupon they employed other counsel who did institute the lawsuit and did recover for the county a substantial sum of money. It was contended on appeal that the judgment should be reversed and the county denied the money that was justly due it because the lawyers who prosecuted the suit for and on behalf of the county were not lawfully employed by the county. The Supreme Court held that where the county had a just claim that was about to be barred by the statute of limitations, and the county court had instructed the prosecuting attorney to file the lawsuit and he had declined, and thereupon the county employed private

counsel, who successfully prosecuted the litigation and recovered in the trial court the money for the county, that the judgment in favor of the county would not be reversed, but that the county had the authority to employ such other counsel in the emergency in order to save the county's property rights which would have been lost if such action had not been taken. In that case, however, there was no effort on the part of the county court to control the litigation. Their action was merely in instituting the litigation. The court on appeal, as we read that opinion, merely held that the prosecuting attorney could not ignore the rights of his client, the county, and thereby deprive the county of the recovery of its just deserts.

It appears that the county is entitled to the double protection, that is, the prosecuting attorney, being the legal adviser of the county and invested with the statutory duty of prosecuting and defending both civil and criminal litigation on behalf of the county or state, has authority to institute such litigation. It also appears by the Fulks case that the county has the additional power, when the prosecuting attorney declines to act, to employ other counsel to prosecute litigation for the county, where such other counsel, exercising their judgment as lawyers, believe the county has a meritorious case and successfully try it and recover judgment for the county for the money. If, however, this private counsel had been unsuccessful in recovering for the county, perhaps a different conclusion might have been reached by the appellate court.

The facts in the instant case are essentially different from the facts in the Fulks case, and we do not regard the Fulks case as militating against the views herein expressed.

The county court, not being learned in the law, would not be acting in a becoming way if they would assume to determine and evaluate the worth or merit of a lawsuit that has been prosecuted in the circuit court. If the county court could do that, then on the same line of reasoning the county court would have authority to determine the course of conduct of that trial in the circuit court. Who would contend that the county court should write the motion for new trial or make objections and assign the reasons therefor to the introduction of evidence, or determine what facts should be proven, or what witnesses should be subpoenaed? And yet if the county court has authority to

control the course of the litigation in one respect, it must have authority to determine and control the litigation in its other respects. In such a case there would be no place for a lawyer. In such a case the Legislature would not have enacted the statute saying the county court should be invested with certain other duties and the statute defining the duties of the prosecuting attorney to be to prosecute and defend criminal and civil litigation for the county.

The statutes do not contemplate that the county court shall be learned in the law, nor that they know the vital things affecting the merits of litigation. The statute places that duty on the prosecuting attorney. He must be a lawyer. The reason why he must be a lawyer is that the evaluation of a lawsuit, in order that the object of it be attained, can be better reckoned with, summed up and determined by a lawyer than by a layman. As was said in the Wurdeman case,

> "Obviously, if it be the official duty of the prosecuting attorney under the statute to thus appear, and one which he is sworn to perform, then its performance on his part cannot depend upon the consent of the respondent county officer in the mandamus, and such county officer should not be permitted to defeat the prosecuting attorney in the performance of his official duty by withholding consent to put the interests of the county forward * * *."

So it would appear in the instant case that the county court "should not be permitted to defeat the prosecuting attorney in the performance of his official duty by withholding consent to put the interests of the county forward." It is the duty of the county court, of course, to faithfully represent the public. Their first and only allegiance is to the public. That duty comprehends that every reasonable effort shall be made in order to recover for the county all moneys that are due the county. In so doing the county court should not be deterred by any thought of private gain by private individuals, nor favors, nor political advantage or disadvantage. If it is necessary to institute litigation for the recovery thereof, the prosecuting attorney, elected by the people to represent the county in a legal way and to prosecute its civil as well as criminal litigation, is the proper person to determine what steps are reasonably

necessary to be taken in order that the rights of the county may be preserved. The people elect both, and the prosecuting attorney receives his mandate and authority direct from the people and not from the county court.

CONCLUSION.

It is our opinion that the prosecuting attorney, having instituted a lawsuit for and on behalf of the county, has authority to control the further disposition of that lawsuit, at least to the extent of determining whether the case should be appealed, and has authority to contract the debts on behalf of the county reasonably necessary in such further disposition of the lawsuit, and that if in his opinion the case should be appealed, he has authority to order the transcript of the evidence from the official court reporter, and that the county court is obligated to pay for the same and may not lawfully refuse to pay for the same, and if they do refuse that they may be required by mandamus proceedings to pay said bill.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

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