COUNTY COURTS: County Court not authorized to employ special counsel, with certain exceptions.

PROSECUTING ATTORNEYS :

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Honorable Chas. B. Butler
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

> "Some time ago I requested and received from your office an opinion as to whether in your opinion a judgment on County warrants was barred by the ten year statute of limitations if no part of the judgment had been paid. You held that the statute applied.
>
> "Since that time the county court of this county employed an attorney to bring suit for a declaratory judgment in the name of the County Treasurer and paid this attorney two hundred dollars for his services.
>
> "If there is anything in the statutes authorizing them to pay out county funds for this purpose I am not aware of it.
>
> "I would like to have your opinion as to the legality of this payment."

Replying to same, will say that we construe your question to be limited to whether your County Court has authority to employ a lawyer who is not the prosecuting attorney and have him represent the county in a lawsuit that he brings to test the validity of a judgment on county warrants, which judgment

appears to be barred by the ten year statute of limitations. Further, we assume that you, as prosecuting attorney of the county, are willing, ready and able to represent the county and prosecute or defend, as the case may be, such civil actions.

The over-all picture must be before us in order to get proper conception of the public policy of the state, with reference to this question, and to do so we recite somewhat at length the case history and pertinent statutes. Beginning with the 1875 Constitution it appears that the Supreme Court of Missouri has ruled both ways on it and the law is so tangled that law writers have said, "In Missouri the court seems to be in confusion on the question." L. R. A., 1917D, page 253. There are the following cases dealing with the power of the County Court to employ outside or unofficial counsel to represent the county in civil litigation:

Thrasher v. Greene County, 87 Mo. 418 (1885);
Thrasher v. Greene County, 105 Mo. 244 (1891);
Butler v. Sullivan County, 108 Mo. 630, 18 S.W. 1142 (1891);
Reynolds v. Clark County, 162 Mo. 680, 63 S.W. 382 (1901);
Morrow v. Pike County, 189 Mo. 610 (1905);
Drainage Dist. No. 1 v. Daudt, 74 Mo. App. 579 (1898);
State ex rel. v. Affolder, 214 Mo. App. 500 (1923);
State ex rel. Becker v. Wehmeyer, 113 S.W. (2d) 1031 (1938).

In addition to the above, the following cases deal with the power of the County Court and they will be discussed hereafter:

Aslin v. Stoddard Co., 106 S.W. (2d) 472, 341 Mo. 138;
Rinehart v. Howell Co., 153 S.W. (2d) 381 (1941);
King v. Maries Co., 297 Mo. 488 (1922);
State ex rel. Buchanan Co. v. Fulks, 296 Mo. 614, 247 S.W. 129 (1922).

In Thrasher v. Greene County, 87 Mo., supra, the court held, under a statute passed March 11, 1873 (Acts of 1873, page 18), that the County Court had authority to employ special counsel to assist the prosecuting attorney in a civil suit

where the county was a party. The contract in that case sued on was entered into between the attorney and the County Court on December 3, 1878. The other case of Thrasher v. Greene County, reported in 105 Mo., supra, although not decided by the Supreme Court of Missouri until 1891, was a suit on a contract between Greene County and attorneys Thrasher and Young, said contract being executed of date December 31, 1878, and a supplemental contract dated July 15, 1880. In that case the Supreme Court approved the finding that there was no fraud in the contract of employment of the attorney, and stated that the other issues were decided against the defendant "when the cause was here before. Thrasher v. Greene Co., 87 Mo. 419."

In Butler v. Sullivan County, supra, the County Court had executed a contract with attorney Butler to sue for certain railroad taxes and agreed to pay him certain specified fees. He so represented the county and then sued for the contract fees. The Supreme Court of Missouri, Division 1, denied relief and held the county was not a general agent, saying at l.c. 638 (108 Mo.):

> " * * * The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court."

In Reynolds v. Clark County, supra, the County Court of Clark County employed plaintiff attorney to defend the county on a $50,000 bond suit. Said attorney represented the county through the State and Federal courts to the United States Supreme Court and won the litigation there, it then being reversed from a judgment theretofore rendered in favor of the bondholders. The case being sent back for another trial, the plaintiff in this case, Reynolds, advised his client, Clark County, that the bond suit had no merit and that he was ready to continue defending the county. Shortly thereafter the County Court compromised the case and settled it for $4,000. The county had paid their attorney, the plaintiff in the in-

stant case, $250 and he sued the county for a balance of $250. The county defended on the ground that it had no authority to employ this attorney. The Supreme Court of Missouri held, through Judge Sherwood, that the plaintiff attorney was entitled to his fees and upheld the contract, citing as authority Thrasher v. Greene County, 87 Mo. 419, and Thrasher v. Greene County, 105 Mo. 244.

The court, in the Reynolds v. Clark County case, made no mention of the case of Butler v. Sullivan County, above mentioned, notwithstanding the Butler case had been tried ten years before, or in 1891, and was cited in the briefs in the Reynolds case. The case of Reynolds v. Clark County would seem to be subject to attack, because that case was ruled on authority of the two Thrasher cases and the statute which was the basis for the holding in the two Thrasher cases had been repealed at the time the Reynolds case arose.

In Butler v. Sullivan County, supra, the court, after holding there is no statute conferring authority upon the County Court to employ outside counsel, said at l.c. 639 (108 Mo.):

> " * * * * As conferring such authority, we are cited to an act, approved March 11, 1873, amending an act approved March 9, 1872, entitled 'An act to abolish the offices of circuit and county attorneys by adding a new section, to be denominated section 5.'
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> "That amendment reads as follows:
>
> "'Sec. 5. The county court of any county in this state may employ on such terms as said court shall deem proper by an order, made of record, one or more attorneys-at-law to aid and assist the prosecuting attorney of such county in any civil business, when, in the judgment of such court, the interest of the county requires such assistance.' The act of 1872, to which this section was amendatory, was revised and amended in 1879 (R. S. 1879, art. 2, ch. 9), and section 5 of that act omitted, and thereby the same was repealed. R. S. 1879, sec. 3160. If, however, it had not

> been repealed, the power thereby granted would have no application to the case in hand.
>
> "The civil business of the county in the transaction of which the county court was thereby empowered to employ the necessary assistance of counsel had no reference to the power of the county court when acting as the agent of the state in the matter of the assessment, levy and collection of the general revenue; but strictly to its business as a municipality, as in Thrasher v. Greene Co., 87 Mo. 419. Besides the revenue law is, in itself, a complete system prescribing service, and providing compensation for such service, and such compensation is necessarily exclusive. Hubbard v. Texas Co., 101 Mo. 210; Harris v. Buffington, 28 Mo. 53."

Again, in the case of Morrow v. Pike County, supra, the County Court had employed an outside lawyer, Mr. Morrow, to represent the county in civil litigation and agreed, by a written contract not placed of record but noted on the county records, to pay him $5,000 attorney fees on his successful conclusion of the litigation. After he had successfully concluded the litigation he sued the county on the contract and recovered, and his recovery was sustained in the Supreme Court. However, in that case it was conceded by both sides that the County Court had authority to enter into contract employing said attorney, so it would not seem that the Morrow case determined the authority of the County Court to employ such an attorney. The court, through Judge Lamm, said at l.c. 620 (139 Mo.):

> " * * * * The power of the court to contract being conceded, we are relieved from the necessity of examining into the right of a Missouri county court to make a contract for an attorney to assist its prosecuting attorney in civil business, and of construing and applying sections 4951 and 5003, Revised Statutes 1899, and of considering those cases construing the legislative

> enactment (Laws 1873, p. 10) approved March 11, 1873, giving all county courts authority to hire lawyers, but which was repealed by not being included in the Revised Statutes of 1879 (Butler v. Sullivan County, 108 Mo. 639), and upon which enactment the decisions in Thrasher v. Greene County, 87 Mo. 419, and Thrasher v. Greene County, 105 Mo. 244, were based, and which cases were cited as authority for the holding in Reynolds v. Clark County, 162 Mo. 680, all of which cases are suits against counties on contracts of employment by attorneys for services."

Indeed, the above remarks might be the basis for the belief that if that power of the County Court had not been conceded, such power would have been ruled against.

In Drainage Dist. No. 1 v. Daudt, supra, the Board of Supervisors of the Drainage District employed Daudt as attorney for the district to collect the drainage taxes. He successfully handled the case, and the attorney for the county collector had tried the case in the Circuit Court and there lost it, whereupon attorney Daudt, under his employment from the County Court and after the attorney for the county collector had failed to appeal, perfected the appeal and won it in the Supreme Court. He then sued for his fees, and the county resisted it, claiming they had no authority to employ him, and the Court of Appeals sustained the county's position. The court there holds that the Board of Supervisors is a limited agent and has only such powers as conferred by statute and that the statute did not authorize them to employ attorney Daudt; that their act was ultra vires and the Board is not estopped under any circumstances. At l.c. 586 (74 Mo. App.) the court said:

> "* * * * Public corporations like the respondent are not bound by the unauthorized acts of their statutory agents, and are not estopped under any circumstances to repudiate their unauthorized and illegal acts -- such acts are not the acts of the principal (the corporation). * * *"

In State ex rel. v. Affolder, supra, nonofficial attorneys were employed by the County Court of Stoddard County to represent Duck Creek Township in an $80,000 bond issue. They did so and then sued the county for $160 for fees and recovered, because the attorney fee was part of the bond issue and was part of the costs thereof, and according to the court's reasoning, the particular statute there considered controls over the general one and no statute placed the duty on the prosecuting attorney to represent the county in that matter. The court said that neither Section 736, nor Section 738, R. S. 1919, prescribing the duty of the county attorney, nor Sections 10748 and 10750, relative to township road bond elections, nor the Township Organization Act, Section 10833, et seq., makes it the duty of the prosecuting attorney to advise the County Court as to bond issues so as to prevent employing of other attorneys as authorized by Sections 13169 and 13170.

In State ex rel. Becker v. Wehmeyer, supra, relator Becker sought to mandamus the County Court of St. Louis County to pay him $2,000 on an alleged unliquidated contract for attorney services. The county pleaded lack of authority to execute the contract and that mandamus was not the proper remedy. The court ruled that mandamus was not the proper remedy and did not rule on the legality or illegality of the contract.

The above are the only cases that come to our mind as dealing directly with the question of the power of the County Court to employ and compensate from public funds outside counsel to represent the county in civil litigation.

Another line of cases holds that the prosecuting attorney is the proper officer to control the county litigation and that the County Court cannot deny him that right.

In State ex rel. v. Lamb, 237 Mo. 437, the Supreme Court held that the prosecuting attorney had authority to file in the name of the state proceedings to enjoin a public nuisance.

In Meador v. Texas County, 167 Mo. 201, our court held that neither the County Court nor the prosecuting attorney had sole power to determine when the prosecuting attorney was entitled to be reimbursed by the county for orally arguing criminal cases in the appellate courts, but it depends on the question of fact as to whether it was reasonably necessary.

In State ex rel. v. Murdeman, 183 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 dramshop 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.

In the Wurdeman 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."

As stated above, the Reynolds v. Clark County case, holding squarely that the county did have authority to so employ outside counsel, seems to have most of its force taken away when it is

recalled that it was apparently ruled on the misunderstanding that the statute was still in existence at the time it had formerly been enacted and repealed. It is also difficult to understand on what reasoning the court, in the Reynolds case, could explain its failure to comment on or overrule the case of Butler v. Sullivan County, supra, decided some ten years prior thereto.

We now refer to a few cases above noted, which, while dealing with the authority or power of the County Court, we believe do not directly affect the question here before us. In the case of Aslin v. Stoddard Co., supra, it was held that the County Court had the implied power to employ a janitor for a year in advance. In Rinehart v. Howell Co., supra, it was held that the county is under obligation to pay the salary of a stenographer for the prosecuting attorney, because in the modern march of things a stenographer is necessary in the well-equipped prosecuting attorney's office and that it was the duty of the county to furnish the prosecuting attorney with the necessary office equipment. Like reasoning seemed to underlie the employment of the janitor, that is, that the County Court was charged with the duty of looking after the county property and that it was necessary for them to employ the janitor to look after it. In State ex rel. Buchanan Co. v. Fulks, supra, it was held that the county had implied power to employ another attorney when the prosecuting attorney refused to act.

The above three cases would seem to be ruled on the implied power conferred by the statute, which will be presently referred to and which placed the duty on the County Court to look after all county property. The statutory grant of power carries with it, by implication, everything necessary to carry out the power to make it effectual and complete. Hudgins v. Mooresville Consol. School Dist., 312 Mo. 1, 276 S.W. 769; State ex rel. Wahl v. Speer, 284 Mo. 45, 223 S.W. 655; In Re Sanford, 236 Mo. 665, 139 S.W. 376. That which is implied in a statute is as much part of it as if expressed. 59 C. J., page 973; State ex rel. v. Blair, 245 Mo. 680, 151 S.W. 148.

The case of King v. Maries Co., supra, holds that the County Court does not have authority to enter into a contract and bind the county to pay an abstracter for furnishing title certificates for tax lands. That case was ruled on the theory that the County Court is a court of limited jurisdiction and has no powers except as are conferred by the statutes. At page 496 (297 Mo.) the court said:

> "It has been held uniformly that county courts are not the general agents of the counties, or of the State. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. (Butler v. Sullivan County, 108 Mo. 630; Sturgeon v. Hampton, 88 Mo. 203; Bayless v. Gibbs, 251 Mo. 492; Steines v. Franklin County, 48 Mo. 167.) This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. (Sheidley v. Lynch, 95 Mo. 487; Walker v. Linn County, 72 Mo. 650; State ex rel. Bybee v. Hackmann, 276 Mo. 110.)"

See also the case of Sugg v. Wisconsin Lumber Co., 283 Fed. 290, 299.

The section conferring control of county property on the County Court is Section 2480, R. S. Mo. 1939, the same being as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

The above matters, unless it be the last case above referred to, appear to deal with the law as it might be interpreted if there were no statutes conferring certain statutory duties and liabilities upon the prosecuting attorneys. However, there are many statutory provisions conferring certain rights

and duties upon prosecuting attorneys, and we believe it necessary to keep those statutes in mind in order to have a complete picture of the public policy of the state, with reference to the authority of County Courts to employ outside counsel.

Without detailing many of those sections, we enumerate Sections 12947, 12948, 12949, 12950, 12951, 12962 and 12964 as amended by 1941 Session Acts, page 316; Sections 12966 and 12980, 1941 Session Acts, page 317; Sections 12990 and 12944. There are two of the above sections, to wit, 12942 and 12944, which apparently both deal generally with the prosecuting attorneys and confer upon them certain duties. Section 12942 declares:

> "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 12944 is 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 justices of the peace, 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 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."

In Rinehart v. Howell County, supra, the Supreme Court, speaking of the duties of the prosecuting attorneys, said at l.c. 383 (153 S.W.):

> "* * * * The duties of a prosecuting attorney are many and varied. He, among other things in addition to the prosecution of criminal actions, represents the state and county in all civil cases in his county, represents generally the county in all matters of law, investigates claims against the county, draws contracts relating to the business of the county, gives legal opinions in matters of law in which the county is interested, et cetera. Sections 12942, 12944, 12945, 12947, R. S. 1939, Mo. St. Ann. pp. 600, 602, 603, 604, Secs. 11316, 11318, 11319, 11321. * * * *"

An examination of the above statutory provisions will show that the Legislature has written a rather complete code defining the method by which counties are to be afforded legal advice and legal assistance. Regardless of whether we may think that to be a wise or unwise course, it is not for us to determine the wisdom of such a course, but it is for this office to declare what, in our opinion, is the law as it has been written in former court decisions and in statutory enactments.

Section 12947 requires the prosecuting attorney to give, "without fee," his opinion to any justice of the peace, and to any County Court, or to any judge thereof, "if required," on any question of law in any criminal case, or other case in which the state or county is concerned, pending before such court or officer.

Section 12948 provides that if the prosecuting attorney and his assistant are interested in a case, or related, or of counsel, so they are disqualified from representing the public, then the court may appoint an attorney to prosecute or defend the case.

Section 12949 provides that if the prosecuting attorney is sick or absent, the court may appoint a person to discharge his duties, and Section 12950 provides that said appointee shall have the same power and fees as the prosecuting attorney.

Section 12951 places the prosecuting attorney subject to a fine of $25 if he fails to attend criminal court without a reasonable excuse.

Section 12962 provides that he may have an assistant, and Section 12964 requires him to pay his assistant out of his salary.

Laws 1941, page 316, provide that certain counties having a population between 60,000 and 75,000 may have three assistants at $200 per month salary.

Section 12966 deals with the qualifications and duties of the assistants.

Section 12980 provides that counties having a population of 45,000 to 70,000 have the power, through their County Court exercising its discretion, to "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."

1941 Session Acts, page 317, provides that in counties of a population of 200,000 to 400,000 a county counselor "shall be appointed by the County Court."

Section 12990 provides that counties of a population over 100,000 may appoint a county counselor. Section 12944 provides that such counsel may be employed to represent the county in prosecuting or defending suits for the recovery or preservation of swamp or overflowed lands, and quieting the title thereto, and to pay reasonable compensation therefor.

From the above, it will be observed that the Legislature has provided by statute for legal representation in civil and criminal litigation and that the same shall be by the prosecuting attorney, except in the instances where exceptions thereto are made in the statutes that have been passed. They have even placed a penalty upon the prosecuting attorney for his failure to attend to those duties. Evidently the Legislature has not overlooked the question of employing counsel or legal representation for the counties, because they have provided in some of the instances, as above set forth, that the county attorney may have one and in other instances more than one assistant. They have provided in certain counties, according to population, that the county may employ special counsel and pay the reasonable fees therefor. They have provided that in other counties, according to population, the county may have county counselors and they define their duties. Likewise, they have in express terms provided that the County Courts may employ outside counsel in prosecuting or defending suits, with reference to swamp or overflowed land, and quieting the titles.

However, we understand your inquiry to be not among the exceptions above pointed out, that is, your county does not come within the provisions of Section 12980 which authorizes the County Courts to appoint special counsel in counties of a population of 45,000 to 70,000, nor is your county within the provisions of the above sections referring to authority to appoint a county counselor, nor does the employment you speak of have to do with the recovery of swamp or overflowed lands, etc.

It will be noted that Section 12944, supra, states that "he shall prosecute or defend, as the case may require, all civil suits in which the county is interested." It would be difficult to conceive a broader method of stating the duties of the prosecuting attorney with reference to representing the county than the Legislature has pointed out in the above section.

The statute does not say the prosecuting attorney with the aid of such other counsel as the County Court may employ shall represent the county. It says the prosecuting attorney shall "prosecute or defend * * * all civil suits." The controlling thought as expressed by the statutes is that the prosecuting attorney (not some other and not that he along with another shall prosecute or defend) shall represent the county.

Under the well-recognized doctrine, "expressio unius est exclusio alterius," the above statutes are to be construed as excluding the performance thereof by different or other attorneys. State ex rel. Barlow v. Holtcamp, 14 S.W. (2d) 646, l.c. 650; 50 Am. Jur., par. 244, page 238; 59 C. J., par. 582, page 984; Taylor v. Michigan Public Utilities, 186 N.W. 485, 217 Mich. 400; Taylor v. Taylor, 66 S.W. 690, 66 W. Va. 238, 19 Ann. Cas. 414; State ex rel. Campbell v. Board of Police Com'rs, 14 Mo. App. 297, l.c. 305; State ex inf. Harvey v. Missouri Athletic Club, 261 Mo. 576, 599, 170 S.W. 904, L. R. A. 1915C, 876 Ann. Cas. 1916D, 931.

In State ex rel. Campbell v. Board of Police Com'rs, 14 Mo. App. 297, the statute provided that police officers might be removed "for cause." The court held the officer could not be removed at pleasure, saying at l.c. 305:

> " * * * * It would be superfluous, to say the least, to subject the officer to 'removal by the board for cause,' if the board could remove him at pleasure, whether for cause or no cause. A very familiar maxim of interpretation excludes all idea of such an unmeaning duplication of power: Expressio unius est exclusio alterius."

Likewise the statute, by saying the prosecuting attorney shall represent the county, excludes outside attorneys from such "duplication."

Summarizing the above, it would seem that the cases of Thrasher v. Greene County, reported in Volumes 87 and 105 of the Missouri Supreme Court and above noted, were soundly ruled because they were ruled on a statute which existed from 1872 until 1879, which authorized County Courts to employ outside

counsel; that the case of Butler v. Sullivan County, supra, ruled in 1891 on a state of facts that arose when Missouri did not have any statute authorizing County Courts to employ special outside counsel, was soundly ruled disallowing that right; that the case of Reynolds v. Clark County, supra, decided in 1901, was not soundly ruled because it was based on the authority of the two Greene County cases, and the statute on which they were based had been repealed and did not exist as a basis for the ruling in the Reynolds case; that the case of Morrow v. Pike County, supra, is no authority for the employment of outside counsel because the parties there did not raise, nor did the court pass upon, that question; that the case of Drainage District No. 1 v. Daudt, supra, was soundly ruled on in denying such authority; that the case of State ex rel. v. Affolder, supra, if soundly ruled, which may be questioned, is not authority for believing that the County Court would at this time be construed as having authority to employ outside counsel; that the case of State ex rel. Becker v. Wehmeyer, supra, although having the question in it, rode off on other grounds leaving that question undecided by that court in that case; that, lastly, so far as the writer of this opinion is informed, not a one of the above cases urged as a reason why the County Court did not have such authority the well-recognized rule of "expressio unius est exclusio alterius."

It is believed that if the statute defining the powers and duties of the prosecuting attorney to be to represent the county in all county lawsuits had been properly injected into each of the above cases, kept alive, briefed and presented to the court of dernier resort, it would have been decisive and the court would have ruled the county did not have such authority to employ outside counsel.

Conclusion.

In view of the foregoing, it is our opinion that your County Court did not have the legal authority to employ outside counsel to prosecute, on behalf of your county or county treasurer, a suit for a declaratory judgment determining the

validity of your county warrants in question, provided the prosecuting attorney was ready, able and willing to represent the County Court and the county in all proper legal matters. This is said with the understanding that the matters in controversy do not come within any of the exceptions pointed out here above, in which exceptions the law authorizes the employment of counsel other than the prosecuting attorney.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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