

PROSECUTING ATTORNEYS: : Under Sections-4876 and 4878  
: R. S. Mo. 1939, must investi-  
: gate as well as prosecute  
: violators of liquor control  
: act. A sound discretion must  
: be used to determine extent  
: of investigation.  
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:

November 24, 1944

Honorable Leo J. Harned  
Prosecuting Attorney  
Pettis County  
Sedalia, Missouri

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Dear Mr. Harned:

This will acknowledge your letter of August 23, 1944, which is as follows:

"Will you please inform me, under Section 4876 R. S. Mo., 1939, whether or not it is the duty of the prosecuting attorney to go to the various places where liquors are sold and / or drunk, and gather evidence as to law violations, and then to prosecute the case?"

"As I understand it, the Supreme Court has criticized the prosecuting attorney for prosecuting a case and appearing as a witness in the same case.

"I would appreciate your opinion as to whose duty it is to collect the evidence and present it to the prosecuting attorney, if it is not the duty of the prosecuting attorney.

"I would appreciate this at your earliest convenience."

Section 4876 R. S. Mo., 1939, provides:

"For the purpose of enforcing the provisions of this act and acts amendatory thereto, the prosecuting attorneys of the respective counties and the circuit attorneys, or at the request of the governor, the attorney general shall investigate and prosecute all violations of any provision of this act; and shall represent the supervisor of liquor control in any and

all legal matters arising under this act. When requested by the governor, the attorney general, or his assistants, shall in the enforcement of this act, have the power to sign indictments or informations and conduct prosecutions in any county or city within this state. Whenever any tax, fee or other charge, as authorized by this act, shall be due, suit may be instituted in any court of competent jurisdiction by the prosecuting attorney of the county, or at the request of the supervisor of liquor control, by the attorney general, in the name of the state at the relation of the supervisor of liquor control, to recover such tax, fee or other charge, and in any such suit all persons, associations or corporations interested may be made parties and service may be had on both residents and nonresidents in the same manner as provided by law in civil actions. The fees and expenses of the attorney general in performing the duties as required under this section shall be paid out of the appropriation of the supervisor of liquor control."

It must be noted that the section declares that the prosecuting attorney shall investigate and prosecute all violations of any provisions of this act.

Section 4878 R. S. Mo., 1939, provides:

"The supervisor of liquor control shall, at least once each month, transmit a list of all complaints made to or by him against licensees for alleged violations of the liquor control act to the circuit and prosecuting attorney of the city of St. Louis and to the prosecuting attorney of every county in which said violations are alleged to have occurred, together with a list showing all revocations and suspensions of licenses within such county ordered by said supervisor of liquor control, together with a brief statement of the facts pertaining to each case, and it shall be the duty of the supervisor of liquor control at the time of transmitting each such list and statement to transmit to the attorney general a duplicate thereof for the information of the attorney general in carrying out and enforcing the provisions of the liquor control act. It shall be the duty of the circuit

and prosecuting attorney of the city of St. Louis and the prosecuting attorney of every county to transmit to the supervisor of liquor control, at least once in every three months, a written report of the action, if any, taken by such circuit or prosecuting attorney on each complaint contained on the lists so transmitted to him. "

In State on Inf. McKittrick v. Wymore, 132 S. W. (2d) 979, the court states:

"Under the rule, if it is the statutory duty of a prosecuting attorney to commence and prosecute criminal actions, by necessary implications, he should qualify himself to determine, in the exercise of an honest discretion, if a prosecution should be commenced. The only way he can determine the question is to make an investigation of the facts and applicable law. If he determines there should be a prosecution, and determines, in the exercise of an honest discretion, that he should proceed by information, also by necessary implication it is his duty to do whatever is necessary under the law, to authorize the filing of the information. In making an investigation he qualifies himself to make and swear to the information. \*\*\*\* It is well known that private persons rarely file complaints. They may subject themselves to costs and the hazard of an action for malicious prosecution. If a private person files a complaint, the prosecuting attorney is not compelled for that reason to file an information. However, it is his duty to make a reasonable investigation and then determine if an information should be filed.

In State on Inf. of McKittrick v. Graves, 144 S. W. (2d) 91, l.c. 98 the court states:

"But where the crime is one against the body politic generally and not against a particular individual as in the case with the laws in reference to gambling, intoxicating liquor, elections etc. experience teaches that a

private prosecuting witness will rarely come forward to initiate proceedings. \* \* \* It is not only the right but the duty of the prosecutor in such cases to himself take the initiative. \* \* \* Respondent says that he had no facilities for making investigations in these matters. It is in evidence that in prior years respondent had an investigator attached to his office force, and that while he had no such investigator during 1938 and the early part of 1939, he later obtained one. It is not shown that he made any effort to gain such an assistant during the period here involved. In any event, he had the power to appear before grand juries and he had the power to apply for the issuance of search warrants. It may be that any effort on his part to correct the conditions mentioned would have been hedged around by difficulties. But this could not excuse a failure to make any attempt at investigation. "

In State on inf. McKittrick v. Wallach, 182 S. W. (2d) 313, it is stated:

"The duty of a prosecuting officer necessarily requires that he investigate i.e, inquire into the matter with care and accuracy, that in each case he examine the available evidence, the law and the facts and the applicability of each to the other, that his duties further require that he intelligently weigh the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which he might initiate. Such duties of necessity involve a good faith, exercise of the sound discretion of the prosecuting attorney. \* \* \* Such discretion exercised in good faith authorizes the prosecuting officer to personally determine, in conference and in collaboration with peace officers and liquor enforcement officers that a certain plan of action or a certain policy of enforcement will be best productive of law enforcement and will best result in general law observance."

It is therefore clearly seen that the prosecuting attorney has the duty to make investigations as far as liquor violations are concerned. He also has

the duty to initiate proceedings against offenders. The extent to which the prosecuting attorney should personally take part in these investigations is a matter for the use of his sound discretion under the particular circumstances involved. Under ordinary conditions the peace officers of his county, together with the agents of the liquor department will be able to procure the evidence and do the testifying. His own, as well as their investigations will also probably find private citizens who have evidence and will testify. The extent to which he must personally assume the initiative would seem to depend on the particular situation in his county. If the violations are being discovered by the peace officers and liquor agents he should cooperate with them and file information and diligently attempt to procure convictions of violators. However, if the enforcement officers are lax he should feel a personal responsibility in stirring them to do their duty, and should not hesitate to make personal investigations to discover violations.

It is true that the law frowns on a prosecutor's testifying in a case he is prosecuting, even though it may not constitute reversible error for him to do so. The Springfield Court of Appeals in *State v. Nicholson*, 7 S.W. (2d) 375, stated that the prosecuting attorney should not accompany the sheriff when serving a search warrant in the absence of peculiar circumstances making it necessary. The court held that it was not error for the court to permit the prosecuting attorney to testify, but that it to a certain extent showed a personal interest on his part and also held that if the case was retried the prosecuting attorney should be disqualified and a special prosecutor appointed. However, there were other facts besides the mere testimony of the prosecutor which showed his personal interest in the case. It might well be that under other circumstances the testimony of the prosecutor would not have been prejudiced.

However, in most instances his investigation will discover witnesses who can testify to the violations. The requirement that the prosecutor investigate does not mean that he should take the place of the liquor agents or the peace officers, but it does mean that he should use a sound discretion to enforce the liquor laws in his county and that he cooperate in every way possible with the liquor agents and peace officers and that he should feel a personal responsibility to see that violations are discovered.

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He should carefully study the reports which Sec. 4878 R. S. Mo., 1939, requires the Supervisor of Liquor Control to transmit to him. He should see to it that all complaints so transmitted are investigated and where the reports show a suspension or revocation because of a violation of the liquor laws he should see to it that prosecutions are instituted, where sufficient evidence is available to indicate that a conviction can be obtained.

CONCLUSION.

Under Secs. 4876 and 4878, R. S. Mo., 1939, prosecuting attorneys have a duty to investigate and prosecute all violations of the Liquor Control Act. The extent of their investigation is a matter for the use of their discretion but an arbitrary refusal to investigate or a lack of initiative is not excusable.

Respectfully submitted

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APPROVED:

VANE C. THURLO  
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