

APPOINTMENT OF ATTORNEY:
FOR COUNTY COURT DRAINAGE:
DISTRICT:

Duties of prosecuting attorney and of attorney for county court drainage district incompatible. Authority of county court to supervise and control county court drainage district is broad enough to permit it to terminate employment of attorney for drainage district appointed by preceding county court.

August 7, 1951

FILED
37

Honorable Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri



Dear Mr. Henson:

We have your letter in which you request an opinion of this department. Your letter is as follows:

"I would like to have an opinion on the following two questions:

"(1) Can the Prosecuting Attorney act as an attorney for a drainage district in the County in which he holds office, as provided in Section 12400 of the Revised Statutes of Missouri, 1939?

"(2) May the County Court in a Third Class County remove the attorneys for a drainage district appointed under the provisions of Section 12400 of the Revised Statutes of Missouri, 1939, when said attorneys were appointed and acted under the preceding County Court?"

Section 12400, R.S. Mo. 1939, which is the same as Section 243.040, RSMo. 1949, is as follows:

"At the first term of the court after the filing of the petition the court shall appoint one or more attorneys, satisfactory to the owners of a majority of the acreage represented by those signing the petition to assist in the establishment of the district and advise with its officers, agents and employees, prepare reports and other necessary documents. The court shall allow

Hon. Rex A. Henson

such attorney or attorneys just compensation to be taxed as costs in the case."

Your first question is whether or not the prosecuting attorney of a county may act as attorney for a drainage district which exists in his county. In considering this question we first refer to the fact that there seems to be no statutory provision prohibiting the prosecuting attorney from engaging in the general practice of law. However, the statutes do impose upon him certain definite duties and we are of the opinion that he is precluded from accepting any employment which might be inconsistent with the performance of those duties.

Section 56.060, RSMo. 1949, is, in part, as follows:

"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, * * *"

The question occurs as to whether the duties of an attorney appointed by the county court under the provisions of section 243.040, supra, are such as would conflict with the duties of a prosecuting attorney of a county. The portions of said section 243.040, pertaining to the duties of an attorney for a drainage district appointed thereunder, set forth those duties as follows:

1. Assisting in the establishment of the district and advising with its agents and employees.
2. Preparing reports and other necessary documents.

Subsequent sections outline the procedure to be followed in the process of organization of the district and provide for a report to be compiled by the engineer for the district and persons appointed by the court and designated as viewers, which said report shall include a finding by the viewers as to the extent to which each property in the district is benefited by the proposed improvement. Section 243.100, RSMo. 1949, provides certain limitations as to the assessment of benefits against public highways etc. Said section is, in part, as follows:

"1. In assessing the benefits to lands, public highways, railroad and other right of ways, railroad roadways and other property not traversed by the improvements, the viewers shall not consider what benefits will be derived by such property after other ditches or improvements shall have

Hon. Rex A. Henson

been constructed, but they shall assess only such benefits as will be derived from the construction of the improvements to be constructed by this district, or as the same may afford an outlet for drainage or protection from overflow of or damage to such property.

"2. The viewers shall give due consideration and credit to any other drains, ditch or ditches, levee or levees which may have already been constructed and which afford partial or complete protection to any tract or parcel of land in the new district.

"3. The public highways, railroad and other right of ways, roadways, railroad and other property shall be assessed according to the increased physical efficiency and decreased maintenance cost of roadways by reason of the protection to be derived from the proposed improvements.

* * * * *

Section 243.120, RSMo. 1949, provides, in part, as follows:

"1. The attorney for the drainage district or any owner of land or other property in said district, may file exceptions to said report within ten days after the last day of publication of the notice provided for in section 243.110. All exceptions shall be heard by the court and determined in a summary manner so as to carry out liberally the purposes and needs of the district, and if it appears to the satisfaction of the court, after having heard and determined all of said exceptions, that the estimated cost of constructing the proposed improvement is less than the benefits assessed against the land and other property in said district, then the court shall approve and confirm said viewers' report as so modified and amended."

It is obvious from section 243.100, supra, that benefits may be assessed against roadways belonging to the county and it is also obvious from section 243.120 that it may become the duty of the

Hon. Rex A. Henson

attorney for the drainage district to file and prosecute exceptions on behalf of the drainage district or to defend the district against exceptions filed by the county. We are of the opinion, therefore, that since it is the duty of the prosecuting attorney to institute and prosecute all suits brought by the county and to defend the county in all suits instituted against it and since it may be the duty of the attorney for the drainage district to represent the district in a controversy with the county over the assessments or benefits, the two positions are incompatible and the prosecuting attorney is precluded from acting as attorney for a drainage district located in the county in which he holds office.

Your second question is whether or not the county court in a third class county may remove attorneys for a drainage district appointed under section 243.040, supra, when said attorneys were appointed and acting under the preceding county court. Section 243.240, RSMo. 1949, and specifically paragraph 1 thereof, is as follows:

"It shall be the duty of the several county courts of this state to maintain the efficiency of the drainage districts now or hereafter organized and existing under and by virtue of the provisions of this chapter and such courts are vested with the continuous management and control of said districts with the duty and power of maintaining, preserving, restoring, repairing, strengthening and replacing the drains, ditches and levees thereof."
(Underscoring ours.)

We are of the opinion that the very broad power of management and control conferred upon the county court by the above quoted section is comprehensive enough to vest in the court the power to remove an attorney for a county court drainage district who was appointed by a preceding county court.

CONCLUSION

We are accordingly of the opinion that by reason of the conflict between the duties of the attorney for a drainage district, set forth in Section 243.040, RSMo. 1949, and the duties of a prosecuting attorney to represent the county and the state in the prosecution of their respective claims and to defend the county or the state in proceedings against either of them, the prosecuting attorney is precluded from accepting an appointment by the county court as attorney for a county court drainage district. And we are further of the opinion that by reason of the broad powers of


Hon. Rex A. Henson

management and control of the affairs of a county court drainage district by the county court set forth in Section 243.240, RSMo 1949, said county court has the right and discretion to remove an attorney appointed by a preceding county court.

Respectfully submitted,

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Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

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