

PROSECUTING ATTORNEY: Not entitled to fee for examination of abstract from person making application for school fund loan.

SCHOOL LOANS:

April 5, 1943

H-21



Honorable James P. Hawkins  
Prosecuting Attorney  
Dallas County  
Buffalo, Missouri

Dear Sir:

This office is in receipt of your letter of April 1st requesting an opinion upon the following question:

Whether a prosecuting attorney is entitled to charge a person, making application for a school fund loan before the county court of his county, a fee for the examination of an abstract of title.

In view of the fact that this question has been answered by this office on several occasions for various prosecuting attorneys of the state, and due to the interest of the county courts of the various counties, it is felt necessary to go into the matter at some length with the idea in mind of outlining, first, the duty of a county court with respect to school fund mortgage loans, and, second, the duties of a prosecuting attorney concerning the same mortgage loans.

I.

Under the statutes of our state, it is the duty of the several county courts to diligently collect, preserve and securely invest money and other property belonging to the county school fund. This authority is set out in Section 10576, R. S. Missouri, 1939, which reads as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

We find further that Section 10383, R. S. Missouri, 1939, reads as follows:

"Whenever there shall be in the county treasury any money belonging to the capital of the school fund of any township therein, the county court of such county shall loan the same for the highest interest that can be obtained, not exceeding eight nor less than four per cent per annum, upon conditions and subject to the restrictions hereinafter set forth."

As to the exact procedure necessary for the securing of loans from the county or township school funds, your attention

is next invited to Section 10384, R. S. Missouri, 1939, which reads as follows:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; and no loan shall be made to any person other than an inhabitant of the same county, nor shall any person be accepted as security who is not at the time a resident householder therein, who does not own and is not assessed on property in an amount equal to that loaned, in addition to all the debts for which he is liable and property exempt from execution. In all cases of loan, the bond shall be to the county, for the use of the township to which the funds belong, and shall specify the time when the principal is payable, rate of interest and the time when payable; that in default of payment of the interest, annually, or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal. But before any loan shall be effected, the borrower shall file with the county court an abstract of title at the time he files his bond and mortgage to the real estate which is to be mortgaged."

The further intention of the legislature on this question may be found in a portion of Section 10385, R. S. Missouri, 1939, which reads as follows:

" \* \* \* In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

Turning now to the Constitution of the State of Missouri, we note that there is a provision prohibiting the use or payment of the county school fund money for any other purpose whatsoever except for the maintenance of free public schools and the State University. We refer to Article XI, Section 6, of the Constitution of Missouri, which reads as follows:

"The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also, all moneys, stocks, bonds, lands and other property now belonging to any State fund for purposes of education; also, the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, from unclaimed dividends and distributive shares of the estates of deceased persons; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this State (if Congress will consent to such appropriation); also, all other grants, gifts or devises that have been, or hereafter may be, made to this State, and not otherwise appropriated by the State or the terms of the grant, gift or devise, shall be paid into the State treasury, and securely invested and sacredly preserved as a public school fund;

the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

With respect to the members of the county court, we have examined the statutes and find that they must perform the duties imposed upon them, even though no provision is made for the payment of expenses in performing any special duties. It has been held that the members of the county court are not entitled to any fee or fees or expense money incurred in the inspection of any land or lands offered as security for school loans. We find this interpretation in the case of Smith, Judge v. Pettis County, 136 S. W. (2d) 282, l. c. 285, where the court said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182. \* \* \*"

From a further examination of the decisions, we find that officers must perform their duties within the strict limits of their legal authority. We refer particularly to the case of Lamar Township v. City of Lamar, 261 Mo. 171, l. c. 189, where the court said:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are

absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to **their** hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority." (Underscoring ours.)

Also, in the case of Saline County v. Thorp, 88 S. W. (2d) 185, 1. c. 186, the court, in holding that public officers act as special trustees, with very limited authority, in relation to funds held in trust for the public for school purposes, said:

" \* \* \* It must be remembered that this is a case where public officers were acting for a governmental subdivision of the state, a county, in relation to funds held in trust for the public for school purposes. Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that every one dealing with them must take notice of these limitations.

Montgomery County v. Auchley, 103 Mo.  
492, 15 S. W. 626." (Underscoring ours.)

II.

Turning now to the duties of the prosecuting attorney, we find these duties well set out in Section 12944, R. S. Missouri, 1939, which reads 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: \* \* \* \*"

Turning to Section 12939, R. S. Missouri, 1939, we find a provision for the amount of salary to be paid the prosecuting attorney, the amount of salary derived from this office being dependent upon the population of his particular county.

With respect to the duties of the prosecuting attorney concerning the fees that accrue in his office, your attention is invited to Section 12941, R. S. Missouri, 1939, and we quote that portion of this statute bearing on the question at hand:

"It shall be the duty of the prosecuting attorney to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the

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end of each month, pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, \* \* \* \* \*."

It would seem from the above and foregoing that the duties of the prosecuting attorney require him to represent the county in all legal matters, giving his opinion, without fee, regarding the law in all matters in which the county is interested. The requirements imposed upon the county court respecting loans from school funds are quite clear, and it is evident that no loan should ever be made until the abstract of title has been submitted to the county court and the opinion and certification of the prosecuting attorney first had and obtained that the title to the real estate involved in each particular loan is clear and free from all liens and encumbrances, and that the applicant for the loan has a good and marketable title.

Getting to the question involved in your letter, as to whether the applicant for this loan should pay the prosecuting attorney, as such, any fee for the examination of the abstract of title, we wish to point out a rule of the Supreme Court of this state (Rule 55, subdivision 6, of the Supreme Court Rules), the full text of which is as follows:

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a lawyer represents conflicting interests, when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge



his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed."

It would seem that in order for a person to represent an applicant for a loan under the school fund mortgage provisions of our statutes, he must be under no obligation and certainly not under the direction of the county court. The prosecuting attorney is the legal representative of the county court at such times and under such conditions as it may require. His duties under his oath of office require him to act for the county court alone. If this same officer should attempt in the same instance, and at the same time, to represent the applicant for the loan, he is in the position of an officer holding two offices which are incompatible, and which is prohibited under the statute. Should litigation arise regarding the title to the property upon which the loan is made, or should any suit be instituted wherein the county was an interested party, certainly the duties of the office would require the prosecuting attorney to defend the same to the exclusion of all others.

We find then, in the instance the prosecuting attorney attempts to collect a fee from the applicant for the loan, and at the same time to collect a salary from the state as an officer, his position has been quite well defined in the case of State ex rel. McAllister v. Dunn, 277 Mo. 38, l. c. 44, where the court said:

"It is a well settled rule that the Legislature is not to be held to have done a vain and useless thing. It is elementary law that one may not hold two offices the duties of which are incompatible. What greater incompatibility could be conceived than the duty of paying and the duty of receiving and granting acquittance for public money? If one person could be both collector and treasurer, he would pay over the money as collector and receive it as treasurer, and, as treasurer, issue a receipt to himself, as collector. Under

the general law it is settled no man  
could have held these two positions.  
\* \* \* \* \*

Also, bearing on this same question, see the case of  
State ex rel. v. Brown, 146 Mo. 401, l. c. 406, where the court  
said:

"It is well settled that no officer is  
entitled to fees of any kind unless pro-  
vided for by statute, and being solely  
of statutory right, statutes allowing  
the same must be strictly construed."

CONCLUSION

The conclusion at which we have arrived is as follows:

1. There is no provision in our statutes which would  
allow the prosecuting attorney to charge an applicant for a  
school fund mortgage loan a fee for the examination of an ab-  
stract of title.

2. That no interpretation of our statutes by our courts  
would allow such a charge to be made; that such a charge would  
be incompatible with the official duties of the prosecuting at-  
torney, and by no manner or means could it be sustained under  
any expression of any court or the legislature.

We further conclude that any statute defining the duties  
of an officer will be strictly construed against the officer in-  
volved, and any violation, of course, will lead to the penalties  
provided in such situations.

Respectfully submitted

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APPROVED:

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ROY MCKITTRICK  
Attorney General

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