PROSECUTING ATTORNEY: (1) May make and swear to complaint for a felony under Section 3467, R. S. 1929.
(2) No civil liability on prosecuting attorney in event of failure of prosecution by acquittal, dismissal or otherwise.

September 4, 1937.

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Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of August 27th, in which you request the opinion of this Department as follows:

> "I would like to have your opinion on the following:
>
> "Can the Prosecuting Attorney make an affidavit charging a person with a felony before a Justice of the Peace?
>
> "If he does so, and there is no conviction, is he subject to be sued and is he liable for damages as would be a private person?"

I.

Can the Prosecuting Attorney make an affidavit charging a person with a felony before a Justice of the Peace?

In your first question you, of course, refer to the complaint mentioned in Section 3467, R. S. Mo. 1929, 4 Ann. Statutes, p. 3119 which section provides as follows:

> "Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed,

> and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

And Section 3503, R. S. Mo. 1929, provides that,

> "No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. * * * * *"

The filing of the complaint is the initial step in the prosecution of those charged with the commission of felonies.

Prior to the adoption of Section 12, Article II of the Missouri Constitution, which was adopted November 6, 1900, an information by a prosecuting attorney could not be filed for a felony but all felonies were prosecuted by indictment of a grand jury. In answering your question it might be well to trace the history of the word "complaint" as used in Section 3467, supra, and as it has been used in connection with the prosecution of felonies.

By the General Statutes of 1865, Chapters 208-209, on "Arrest, Examination, Commitment and Trial," Sections 2 and 3, page 832, it was provided:

> Section 2:
>
> "Whenever <u>complaint</u> shall be made to any such magistrate that a criminal offense has been committed, it shall be his duty to examine the complainant and any witnesses who may be produced by him on oath."

Section 3:

> "If it appear on such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant reciting an accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

It will be noted that the complaint mentioned therein was not necessarily in writing and sworn to before an officer, but the complainant and the witnesses who were produced were examined on oath, and Section 3 provided that if it appear on such examination that any criminal offense has been committed the magistrate was authorized to issue proper warrant and brought before such magistrate to be dealt with according to law. If it was found that a felony had been committed and there was probable cause to be guilty he was bound over to await the action of the Grand Jury.

By the Revised Statutes of 1879, Article 13, on "Arrest and Preliminary Examination," Section 1726, it is provided:

> "Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant, reciting the accusation and commanding the officer to whom it shal be directed forthwith to take the accused, and bring him before such magistrate, to be dealt with according to law."

Under the Revision of 1879, the complaint was made in writing and upon oath. We then had the first written complaint to be filed before a magistrate in felony cases. The above section (1726-1879) has been carried through the various revisions and is now Section 3467, supra, and is in exactly the same form as Laws of 1879, Section 1726.

It will be seen that originally the complaint to the magistrate may have been an oral complaint and later in 1879 it became a written complaint under oath.

We now come more directly to your question as to whether a prosecuting attorney may make the complaint mentioned above. This section of the statute, 3467, supra, requires only that the complaint be in writing and upon oath, setting forth that a felony has been committed and the name of the person accused thereof. It does not state that the complainant must have first-hand knowledge of all the constituent elements of the felony alleged to have been committed.

As the principal law enforcement officer of the county we see no reason why a prosecuting attorney, who upon investigation finds that in his opinion a felony has been committed and there is probable cause to believe the defendant guilty, cannot file the complaint called for in Section 3467, supra. We know as a matter of practice that in a great many cases the prosecuting attorney does file the necessary complaint and it is his duty in many cases to do so. However, we can readily see that in many instances the prosecuting attorney may require a complainant to swear to the complaint required under this section, especially is this true where it is a crime committed against a person, and more or less of a personal nature.

In the case of State v. Layton, 58 S. W. (2d) 454, l. c. 457, Judge Ellison, in a case in which an assistant prosecuting attorney had filed the complaint, said:

> "As to the complaint's being based on hearsay evidence, Mr. Chalender admitted he had no first-hand knowledge of the facts attending the assault; and that he obtained the information on which he filed the complaint from parties present thereat. But the complaint is not expressed to be verified on information and belief; it contains a positive recital of the facts, unconditionally sworn to. We know of no reason why this is not entirely sufficient to meet the requirements of section 3467, R. S. Mo. 1929 (Mo. St. Ann. Sec. 3467). See 16 C. J. Sec. 504, p. 292; State v. Carey, 56 Kan. 84, 42 P. 371."

In the case of State v. Tull, 62 S. W. (2d) 389, l. c. 390, in which case the appellant questioned the sufficiency of the oath of the prosecuting attorney to a complaint filed before a justice of the peace, the court set forth briefly a part of the complaint as follows:

> "The complaint introduced in evidence by defendant is regular on its face and sufficiently charges the offense. It recites: 'Before me, M. F. Foster, a justice of the peace within and for the county aforesaid, personally came Elbert L. Ford, prosecuting attorney, who, being duly sworn according to law, deposes and says,' etc. It closed with: 'Sworn to and subscribed before me this the 15th day of April, A. D. 1931. M. F. Foster, J. P.'"

In State v. Frazier, 98 S. W. (2d) 707, l. c. 712, the appellant contended that he was not accorded a valid preliminary examination for the reason,

> "* * *that the affidavit filed before the magistrate as a basis therefor was made by a complainant who had no actual knowledge of the commission of the crime charged and was not competent as a witness to prove the same. In support of the allegations of fact in the plea in abatement the appellant adduced evidence at the trial establishing without contradiction that the affidavit was made by W. W. Kemp, sheriff of Madison county; and that he had no knowledge of the homicide except such as he obtained by hearsay from the deceased and others. It appears that he did not testify at the preliminary hearing.
>
> "This assignment is without merit. The affidavit was unconditionally sworn to, not simply verified on information and belief; and this was held to be sufficient

> in State v. Layton, 332 Mo. 216,221, 58 S. W. (2d) 454. The statute, section 3467, R. S. Mo. 1929, Mo. St. Ann. Sec. 3467, p. 3110, merely provides that 'whenever complaint shall be made, in writing and upon oath,' the preliminary hearing shall be held."

The enforcement of the criminal law is primarily the duty of the sworn officers elected or appointed for that purpose, and one who violates the law should not be permitted to escape because some individual citizen does not come forward and voluntarily sign the complaint. As later will be seen in this opinion, the officer has many safeguards thrown around him that the individual citizen does not have.

It is, therefore, our opinion that a prosecuting attorney may make the complaint under oath and file same with the magistrate and thus start the necessary legal machinery of the State in the prosecution of the crime. It is a permissible and legal practice which has received the sanction of the courts of this State from time immemorial. We all know that the complainant, whoever he may be, necessarily, in many cases, does not have knowledge of all the necessary elements of a crime, and the statute does not require such knowledge. If it were true, a great many criminals would escape for want of a complainant who knew all of the facts and elements necessary to make up the crime.

II.

Coming now to the second question in your request:

> If he does so, and there is no conviction, is he subject to be sued and is he liable for damages as would be a private person?

A private p rson is not necessarily liable for damages even though there is no conviction. But it seems unnecessary to go into that question and we will endeavor to answer the specific question asked in your letter.

In examining the law on this question there seem to be a scarcity of cases where a prosecuting attorney has been sued and reaching the appellate courts. This, we think, is because the rule, that a prosecuting attorney is not liable and is immune from civil actions involving his official duties, is so well established.

In support of this statement of the law we quote from authorities which we think substantiate this rule.

In 18 C. J., p. 1318, it is said:

> "A prosecuting attorney, being a judicial officer of the State, is not liable in damages for acts done in the course of his duty, although willful, malicious or libelous."

In Cooley on Torts, 3d. Ed., Vol. 2, page 795, and restated in the same work, 4th Ed. Vol. 2, page 426, the author says:

> "Whenever, therefore, the state confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the state, speaking by the mouth of the common law, says to the judicial officer."

The Supreme Court of California said in Pearson v. Reed, 44 P. (Cal.) (2d), 592, l. c. 596, wherein the prosecutor was sued for malicious prosecution:

> "A prosecutor is called upon to determine, upon evidence submitted to him, whether a criminal offense has been committed by the person accused--exactly the same question that is presented to a court or jury upon trial. His decision is no less judicial in character if it be erroneous or swayed by prejudice or malice. It does not matter whether the evidence before him be much or little or whether he hears all or only some of it. His authority to investigate the facts before acting is unlimited, and the matter rests in his own discretion."

Griffith v. Slinkard, 44 N. E. (Ind.) 1001, l. c. 1002, is a leading case on the subject, in a case where a prosecuting attorney was sued for malicious prosecution. The court said, in referring to the prosecuting attorney:

> "He is the legal adviser of the grand jury. We think he is an "officer intrused with the administration of justice."' The prosecuting attorney, therefore, is a judicial officer, but in the sense of a judge of a court. The rule applicable to such an officer is thus stated by an eminent author: 'Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.' Townsh. Sland. & L. (3d Ed.) Sec. 227, pp.395,396."

We cite the following cases as further supporting this rule:

Rogers v. Marion, 54 Pac. (2d) 760 (Cal.);
Watts v. Keator, 228 Pac. 135 (ore.), 22 R. C. L. 96, 34 A. L. R. 1489;
Smith v. Parman, 101 Kan. 115, L. R. A. 1917E 698, 165 Pac. 663;
Yaselli v. Goff, 12 Fed. (2d) 396, 56 A. L. R. 1239;
Kittler v. Kelsch, 216 N. W. 898, 56 A. L. R. 1217.

We think that the reason for the rule could not have been stated more clearly than as set forth by Judge Cooley in the above text.

It is, therefore, our opinion that a prosecuting attorney who makes and files the complaint as required by Section 3467, supra, as the preliminary step in the enforcement of the criminal laws of the State, is not liable for damages although he may err in his judgment and the case may later be dismissed or the defendant declared to be innocent. This is the only reasonable and sound rule to be followed in the administration and prosecution of the criminal statutes.

As stated by an eminent jurist in the case of Watts v. Gerking, 228 Pac. 135 (Ore), 34 A. L. R. 1489, l. c. 1500, "public policy dictates rather that one citizen should suffer some financial loss than that the district attorneys of the state should be harassed by actions, to defend which might require a large portion of their time, to which the public has a right, and a large portion of the emolument prescribed by law as compensation for their services, and that it is better, on the whole, that redress be afforded by prosecutions for misconduct in office, than that the results above indicated should be made possible."

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG