

PROSECUTING ATTORNEYS: Duties imposed on other administrative officials to direct prosecutions do not relieve prosecuting attorneys of their duties in regard to same.

November 30, 1939

Honorable Louis H. Schult, Judge  
38th Judicial Circuit  
Caruthersville, Missouri



Dear Judge Schult:

We are in receipt of your request for an opinion dated November 17, 1939, which is as follows:

"I would like an opinion from your office on Sections 13210 and 13212, relating to the employment of females in laundries, etc., and the hours of employment.

The Prosecuting Attorney of this county has filed an information charging the operator of a local laundry with having employed a certain female to do physical and manual labor in said laundry more than nine hours in one day and more than fifty-four hours during one week.

The attorney representing the defendant contends that Section 13213 controls and that it is the duty of the Commissioner of Labor to file complaints, since under this section the Commissioner is charged with the enforcement of Sections 13210 and 13212 and the prosecutions of all violations, and further that the Prosecuting Attorney would not have the right to file a complaint or institute prosecution - that is, that the Commissioner would have to file the complaint before the Prosecuting Attorney would be authorized to act."

Section 13213, R. S. Mo. 1929, referred to by you, follows those sections setting out the hours which females may work during any one week in certain establishments, and is as follows:

"The commissioner of labor and industrial inspection shall be charged with the enforcement of the provisions of sections 13210 and 13212 and the prosecution of all violations thereof. It shall be the duty of the commissioner of labor and industrial inspection, his assistants, or deputies, to make at least two inspections each year of all shops, establishments and places described in said section 13210, and he shall be entitled to demand and receive for each such inspection the schedule of fees provided in section 13219, R. S. 1929, and amendments thereto."

The statute setting out the duties of prosecuting attorneys is Section 11316, R. S. Mo. 1929, which 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, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county;  
\* \* \* \* \*"

A search of the decided cases in this state fails to reveal any direct decision on the question raised by you, but an indication of the decision of the courts in case such question should be presented, is found in the following paragraph in State of Missouri ex inf. Roy McKittrick v. Carl Wymore, not yet reported.

"The people of this state are not idiots. They know that a prosecuting attorney cannot, under his oath of office, hide behind Sec. 3505, R. S. 1929, which authorizes private persons to file complaints with the clerk of the circuit court or with the prosecuting attorney. If he could do so, the law-abiding citizens of the state

would be helpless and at the mercy of the "underworld". 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."

18 C. J., p. 1312, Section 38, sets out the general rule, as follows:

"But his (referring to district and prosecuting attorneys) duty to institute proceedings on behalf of the state is not dependent upon authority from any public officer required to report violations of the law and direct prosecution in certain cases."

Several authorities are cited thereunder.

In *Bartley v. State*, 53 Neb. 310, 73 N. W. 744, the exact question presented here was decided by the court in the following language, l. c. 748:

"Section 4, art. 3, c. 83, Comp. St., declares that 'it shall be the duty of the auditor: \* \* \* Seventh. To direct prosecutions in the name of the state for all official delinquencies, in relation to the assessment, collection, and payment of the revenue, against all persons who by any means become possessed of public money or property, due or belonging to the state, and fail to pay over or deliver the same, and against all debtors of the state.' The proposition is advanced that this information is bad because it does not allege that the prosecution was instituted under the direction of the auditor of public accounts. To this we cannot agree. The statute makes it the duty of a

county attorney to prosecute all criminal actions in his county, as well as to file in the district court all informations for crimes; and he may institute criminal proceedings against a public officer who is guilty of some official delinquency relating to payment of the revenues, whether directed by the auditor to do so or not. It will not do to say that the county attorney cannot institute such a prosecution until he has been directed by the auditor. The most that can be claimed for the provision of the statutes already quoted is that it is the duty of the county attorney to institute and prosecute a criminal action against a public officer who has made default in the assessment, collection, or payment of the public revenues, and not that the county attorney is powerless to take any steps towards instituting criminal prosecution against a defaulting state treasurer until after the auditor has given him instructions to act. The state was not required to prove that this prosecution was brought by direction of the auditor; hence it was wholly unnecessary for the information to aver such fact."

This position is sustained by other authorities. *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935, confines the rule to criminal cases and refused to permit the prosecuting attorney to institute suits where other officials were required by statute to commence and direct proceedings as to civil matters.

From the foregoing authorities, it appears that a statutory duty imposed upon an administrative official to direct prosecutions in certain cases is concurrent with or supplemental to the powers of the prosecuting attorney to institute all criminal proceedings in the name of the state.

Respectfully submitted,

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APPROVED:

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