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PROSECUTING ATTORNEY, ASSISTANT—APPOINTED BY PROSECUTING ATTORNEY—MAY WHEN AUTHORIZED OR DIRECTED BY PROSECUTING ATTORNEY, ACT FOR AND IN HIS PLACE IN ALL CIVIL AND PROCEDURAL MATTERS, INCLUDING SERVICES BEFORE GRAND JURY AND PROSECUTION OF CRIMINAL CASES—SUCH POWER DOES NOT EXTEND TO VERIFICATION AND FILING OF INFORMATIONS UNDER SECTION 13437-34 G. C.

## SYLLABUS:

An assistant appointed by the prosecuting attorney may, whenever authorized or directed by him, act for and in the place of such prosecuting attorney in all civil and procedural matters, including services before the grand jury and prosecution of criminal cases; but such power does not extend to the verification and filing of informations under Section 13437-34, General Code.

Columbus, Ohio, March 23, 1945

Hon. C. J. Borkowski, Prosecuting Attorney  
Steubenville, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“On taking office on the first Monday of January, 1945, I appointed two members of the Bar of Jefferson County, Ohio, as

Assistant Prosecuting Attorneys of Jefferson County, Ohio, pursuant to Section 2915 of the General Code of Ohio. Their compensation has been fixed by me by reason of an allowance made to cover the same by the Common Pleas Judges of Jefferson County, Ohio, pursuant to Section 2914 of the General Code of Ohio.

The question that I am concerned with pertains to, first, what powers these assistants of mine have in acting for me and in my stead as Prosecuting Attorney of Jefferson County, Ohio. May such Assistant Prosecuting Attorney, by reason of such appointment, perform any and all the duties devolved upon the Prosecuting Attorney of this county, and the statutes be so construed to empower such assistant to act in the same capacity wherein the word 'prosecuting attorney' is used in the General Code of Ohio. Second, has an Assistant Prosecuting Attorney appointed according to the provision of Section 2915 of the General Code the power to verify an information filed in the Common Pleas Court of any county as provided for in Section 13437-34 of the General Code of Ohio, or must this information be verified by the Prosecuting Attorney himself?"

Section 2915, General Code, provides :

"The prosecuting attorney may appoint such assistants, clerks, and stenographers as he deems necessary for the proper performance of the duties of his office, and fix their compensation, not to exceed in the aggregate the amount fixed by the judge or judges of the court of common pleas. Such compensation after being so fixed shall be paid to such assistants, clerks and stenographers monthly from the general fund of the county treasury upon the warrant of the county auditor."

It will be noted that that section does not in any way define or limit the duties of assistants to the prosecuting attorney. It is obvious that in a county where a number of assistants are required, a great many of the duties devolving upon the prosecuting attorney under the law must be performed by his assistants. It can not, however, be said that an assistant prosecuting attorney is a deputy under the provisions of Section 9 of the General Code, which provides :

"A deputy when duly qualified may perform all and singular the duties of his principal."

There are specific provisions in the statutes authorizing several of the county officers to appoint deputies, but no such authority is given to

the prosecuting attorney. In several opinions which have been rendered by my predecessors the question was presented as to the right of deputy auditors and deputy treasurers to sit as members of the county budget commission in place of their principals. In an opinion found in 1925 Opinions Attorney General, page 406, it was held that they could not sit as members of that commission since the duties of the commission involved the exercise of judgment and discretion on the part of the officers who were designated by law as members thereof and that that judgment and discretion could not be delegated to a deputy. Later, the same question was under consideration by this department and in an opinion found in 1931 Opinions Attorney General, page 1417, and also in a later opinion found in 1934 Opinions Attorney General, page 1721, the 1925 opinion was overruled and it was held that the deputies of the county treasurer and auditor could, when authorized by their respective chiefs, represent them on the budget commission.

In an opinion rendered by my immediate predecessor June 29, 1943 (1943 Opinions Attorney General, page 363) it was held:

“An assistant prosecuting attorney appointed by a prosecuting attorney who is serving in the armed forces of the United States may, when authorized so to do by the prosecuting attorney, sit as a member of the county budget commission and perform the functions enjoined upon the prosecuting attorney by Section 5718-3, General Code.”

Section 5718-3, General Code, referred to in that opinion relates to the power and duty of the prosecuting attorney in the matter of foreclosure of delinquent tax liens, in which procedure there is vested in him by law a discretion to determine whether or not lands mentioned in the delinquent land tax certification will or will not bring upon sale a sufficient amount to pay the tax and other charges, and to decline to bring such foreclosure proceedings, resulting in the lands being forfeited to the state. In the opinion last referred to it was said:

“Although assistant prosecuting attorneys are not deputies, the legislature, when it authorized the appointment of assistant prosecuting attorneys, must have contemplated and intended that such assistants would perform such part of the official duties of the prosecuting attorney as he might assign to them, and in practice that is how Section 2915, General Code, has been construed since its enactment. Assistant prosecuting attorneys have sat

on the budget commission and have exercised the authority granted to the prosecuting attorney by that portion of Section 5718-3, General Code, hereinabove quoted, and so far as I know their authority so to do has never been seriously questioned.

The construction placed upon a statute by those whose duty it is to apply and execute same is entitled to great weight, and this is especially true where such construction has been long continued. See 37 O. Jur., 698, 699."

The opinion just referred to grew out of a situation where the prosecuting attorney had gone into the armed forces of the United States and therefore was of necessity absent from the county. The then attorney general referred to his former opinion found in 1942 Opinions Attorney General, page 637, wherein it had been held that a prosecuting attorney who was in the armed services nevertheless carries the responsibility of his office during his absence in such service, and then said:

"It would present an anomalous situation if the prosecuting attorney were responsible for his office during his absence while in the armed forces, if he could not appoint an assistant to perform his duties during such absence."

I do not, however, consider that the fact that the prosecuting attorney was in the military service had any controlling bearing on the conclusion reached. Many other circumstances could render it equally important that his assistants carry on whether he is present or absent.

The question which you raise, in so far as the duties of your assistants relate to civil duties and to ordinary procedural matters, should receive the same answer as that given in the opinion to which I have last referred, and it is my opinion that your assistants have in general the power to act for you and in your stead in all such civil and procedural matters, when and to the extent authorized and directed by you.

Coming to a consideration of the verification and filing of an information under Section 13437-34, General Code, I believe a different rule must apply. We are here dealing with the rights of one who is or may be charged with a penal offense, and in such matters the rights of citizens are very closely guarded both by the constitution and the law. Article I, Section 10 of the Constitution provides in part as follows:

"Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war

or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; \* \* \*

There is thus left to the legislature the right to provide a procedure other than indictment, for offenses less than felonies. Section 13437-34, General Code, provides an alternative to an indictment by the grand jury in prosecutions for misdemeanor. It reads as follows:

"In prosecutions for misdemeanor in the court of common pleas, indictment by the grand jury shall not be necessary, but such prosecution may be upon information *filed and verified by the prosecuting attorney* of the county, or by affidavit when such method is by statute especially provided. The provisions of law as to form and sufficiency, amendments, objections and exceptions to indictments and as to the service thereof shall apply to such informations."

(Emphasis added.)

It will be noted that this section permits a prosecution to be founded upon an information "filed and verified by the prosecuting attorney." If the statute merely provided that such information should be *filed* by the prosecuting attorney I would have no hesitancy in holding that he could authorize his assistant to file the same. But the statute says it must be filed *and verified* by the prosecuting attorney. I know of no authority whereby an officer who is specifically required to verify an instrument can authorize someone else to do that in his stead.

In the case of State of Ohio vs. Cannon, 70 Oh. App., page 262, this section was under consideration, and the court after quoting Section 13437-34 said:

"Apparently Section 13437-34, General Code, was enacted for the purpose of obviating the necessity of presenting misdemeanor cases to the lower court by indictment, and expediting and simplifying the trials of those charged therewith, and saving the county the expense attendant upon presentation thereof to the grand jury. *Accordingly by the provisions thereof informations are accorded equal dignity with indictments in misdemeanors.*

That section of the Code dispensed with the necessity of indicting defendant and authorized the prosecuting attorney *in his discretion to present the instant case to the lower court by indictment or information, \* \* \**

(Emphasis added.)

In that statement it appears that the court intended to emphasize the seriousness of the proceeding by way of information, and to recognize the responsibility that rests upon the prosecuting attorney.

The rule of strict construction of criminal statutes, particularly those involving the imposition of punishment of a penalty is certainly a very familiar one. It is recognized in the statutes of the state. Section 10214, General Code, being part of the remedial portion of the Code provides:

*“The provisions of part third and all proceedings under it, shall be liberally construed, in order to promote its object, and assist the parties in obtaining justice. The rule of the common law, that statutes in derogation thereof must be strictly construed has no application to such part; but this section shall not be so construed as to require a liberal construction of provisions affecting personal liberty, relating to amercement, or of a penal nature.”*

(Emphasis added.)

In 12 Oh. Juris., page 531, it is said:

*“It is a well established rule that penal statutes must be strictly construed, and the rule is jealously guarded.”*

To like effect see 37 Oh. Juris., page 744 and numerous cases cited.

Section 2912, General Code, I believe strengthens my conclusion that there is a limit to the power which a prosecuting attorney can confer on his assistants. It provides:

*“If a vacancy occurs in the office of prosecuting attorney, the court of common pleas shall appoint a prosecuting attorney. In case of sickness or other disability of the prosecuting attorney, preventing him from discharging his duties, the court shall appoint an assistant prosecuting attorney to perform the duties of the office until the disability is removed or a prosecuting attorney is elected or appointed and qualified. A person appointed prosecuting attorney or assistant prosecuting attorney, shall give bond and take the oath of office prescribed for the prosecuting attorney, and the assistant prosecuting attorney shall receive such compensation as the court fixes and the county commissioners allow.”*

An assistant thus appointed by the court, upon his taking the oath and giving bond as required by the statute, unquestionably becomes endowed with the powers and charged with the duties of the regular

prosecuting attorney during the disability of the latter. This statute would lose much of its purpose if the prosecutor could by his own appointment endow his assistant with every power possessed by himself, and there is a strong inference that the legislature, in enacting it, intended to supply the authority that would otherwise be lacking.

It is significant that the legislature has seen fit to enact a law permitting assistants to the prosecuting attorney to have access to the grand jury in the presentment of charges looking to indictments. This is found in Section 13436-7, General Code. The absence of any such provision as to the alternative procedure of criminal information, lends support to my conclusion in regard to the right of such assistants in the verification and filing of such information.

In specific answer to your inquiries it is my opinion :

An assistant appointed by the prosecuting attorney may, whenever authorized or directed by him, act for and in the place of such prosecuting attorney in all civil and procedural matters, including services before the grand jury and prosecution of criminal cases; but such power does not extend to the verification and filing of informations under Section 13437-34, General Code.

Respectfully,

HUGH S. JENKINS

Attorney General