

3. Unless and until the lessor, The Market Exchange Bank, exercises its option to terminate the lease for nonpayment of rent, the legislature may continue the lease by making appropriations for rental payments.

Respectfully,

JOHN W. BRICKER,
Attorney General.

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DIVISION OF CHARITIES—CHILD PLACING AND ADOPTION—PROSECUTING VIOLATIONS OF STATUTES PERTAINING THERETO—DUTY OF PROSECUTING ATTORNEY NOT ATTORNEY GENERAL TO PROSECUTE—G. C. SECTION 1352-13 APPLICABLE TO CHILD PLACING.

SYLLABUS:

1. *The duty imposed by section 12789-1 of the General Code upon the Division of Charities, Department of Public Welfare, does not preclude others from taking the necessary steps preliminary to prosecuting violations of sections 1352-12, 1352-13 and 1352-14, General Code.*

2. *The prosecuting attorney of the county where the offense occurs, and not the Attorney General, has the duty to prosecute violations under section 12789-1, General Code, in the Common Pleas Court. Solicitors of municipal corporations shall prosecute such violations before mayors and in municipal courts.*

3. *Section 1352-13, General Code, is applicable to child placing in contemplation of adoption.*

COLUMBUS, OHIO, April 15, 1933.

HON. JOHN MCSWEENEY, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date, which reads as follows:

“We are submitting herewith for your opinion questions on the alleged violation of Sections 1352-12, 1352-13, 1352-14, and 12789-1 of the General Code; and on the procedure to be followed in this department through its Division of Charities in enforcing the provisions of these sections.”

With your letter you submitted a brief, together with detailed statements of three cases involving child placement and adoption, in each of which several parties are believed to have violated the statutory provisions in question. Referring to these cases, it is stated in the brief:

“Inasmuch as it would be the duty of the trial court to pass upon the question as to whether in any specific case, such as those above mentioned, there had been a violation of these sections, as part of the case of the State of Ohio, we are not particularly interested in an opinion from the office of the Attorney-General on these points.”

It thus appears that your request does not call for a detailed discussion of these three cases.

The first question presented is whether under section 12789-1, General Code, the Division of Charities, Department of Public Welfare, is given exclusive power to take the necessary steps preliminary to the prosecution of violations of sections 1352-12, 1352-13 and 1352-14, General Code.

The second question is whether prosecutions should be conducted by the Attorney General or by the prosecuting attorney of the county in which the offense occurs.

Since receiving your original request, a letter has been forwarded by your department for my consideration in connection with this opinion, raising the question whether section 1352-13 applies to child placing for adoption as well as to general child placing. I shall consider these three questions in the order stated.

Section 1352-12, provides:

"The parents, parent, guardian or other person or persons having the custody of a child, may enter into an agreement with any public, semi-public or private association or institution of this state established for the purposes of aiding, caring for or placing children in homes, and which has been approved and certified by the division of charities, department of public welfare, placing such child in the temporary custody of such institution or association; or such parent, guardian or other person may make agreement surrendering such child into the permanent custody of such association or institution, to be taken and cared for by such association or institution, or placed in a family home.

Such agreements provided for herein shall be in writing, on forms prescribed and furnished by the division of charities, department of public welfare and may contain any and all proper and legal stipulations for proper care of the child, and may authorize the association or institution when such agreements are for permanent care and custody to appear in any proceeding, for the legal adoption of such child, and consent to its adoption, as provided in section 8025 of the General Code. The adoption order of the judge made upon such consent shall be binding upon the child and its parents, guardian, or other person, as if such persons were personally in court and consented thereto, whether made party to the proceeding or not."

Section 1352-13, reads:

"No child under two years of age shall be given into the temporary or permanent custody of any person, association or institution which is not certified by the division of charities, department of public welfare, as provided in sections 1352-1 and 1352-6 of the General Code, without the written consent of the division of charities or by a commitment of a juvenile court. Provided such child may be placed temporarily without such written consent or court commitment with persons related by blood or marriage, or in a legally licensed boarding home which is not established for the purpose of placing children in free foster homes or for legal adoption. Persons, associations and institutions duly certified and licensed under section 1352-1 and 1352-6 for the purpose of placing children in free foster homes or for legal adoption, shall keep a record of such temporary and permanent surrenders of children under two years of age.

This record shall be available for separate statistics, which shall include a copy of an official birth certificate and all information concerning the social, mental and medical history of such children which will aid in an intelligent disposition of them in case that becomes necessary because the parents or guardians fail or are unable to reassume custody. No child placed on a temporary surrender with an association or institution shall be placed in a free foster home for legal adoption, and all such surrendered children who are placed in foster homes or for adoption must have been permanently surrendered and a copy of such permanent surrender must be a part of the separate record kept by the association or institution."

Section 1352-14, provides:

"It shall be unlawful for any persons, organizations, hospitals or associations which have not been approved and certified by the division of charities, department of public welfare, to advertise that they will adopt children or place them in foster homes, or hold out inducements to parents to part with their offspring, or in any manner knowingly become a party to the separation of a child from its parent, parents or guardians, except through a juvenile court commitment."

Section 12789-1, is as follows:

"Whoever violates any of the provisions of sections 1352-12, 1352-13 or 1352-14 of the General Code, shall be fined not more than three hundred dollars or imprisoned not more than three months, or both fined and imprisoned. Each act of violation shall be considered a separate offense and it shall be the duty of the division of charities, department of public welfare to enforce the provisions of this act (G. C. §§ 1352-12 to 1352-14, 1656 and 12789-1)."

Section 12789-1 provides that "it shall be the duty of the division of charities, department of public welfare to enforce the provisions of this act." To enforce a law is to cause it to take effect. The duty imposed upon the Division of Charities would seem to include the conducting of investigations preliminary to prosecution, making affidavits and inviting the attention of the proper prosecuting attorney to cases believed in violation of the statute. In terms, the statute makes the duty of the Division of Charities mandatory, but does it necessarily follow that they preclude other persons or organizations from instituting prosecution of those who violate this statute? The enforcement of criminal laws generally depends upon the cooperation of private citizens. Any person may sign an affidavit, and under certain circumstances, a private citizen may even make an arrest. Unless this statute clearly places in the Division of Charities the sole power to take the proper steps preliminary to prosecution, other persons and organizations are not precluded from so doing. The brief submitted to you and transmitted to me with your request, cites no authorities in support of the contention there made that only the Division of Charities is authorized to institute these criminal actions.

The question is entirely one of statutory construction. Investigation fails to disclose any decisions or opinions of this office construing the sections in

question. It is state in 59 Corpus Juris at page 984 that where a statute directs performance of certain things by a particular person, it is implied that they shall not be performed by others. This principle was evolved from the maxim of construction *expressio unius est exclusio alterius*. The three cases cited by the text-writer in support of the principle are all cases involving civil statutes. The most enlightening of these cases is *Taylor vs, Michigan Public Utilities Commission*, 217 Mich., 400; 186 N. W. 485. The statute before the court provided:

“* * * In any case where a franchise under which a utility is, or has been, operated, including street railways shall have heretofore expired or shall hereafter expire, the municipality shall have the right to petition the Commission to fix the rates and charges of said utility in accordance with the provisions of this act * * *.”

A third party petitioned the Public Utilities Commission to act. In upholding the proposition that the commission could act only upon the petition of the municipality, the franchise having expired, Wiest, J. said:

“Where a statute creates and regulates and prescribes the mode and names the parties granted right to invoke its provisions, that mode must be followed, and none other, and such parties only may act. Lewis' Sutherland, Statutory Construction, §§491-493. The provisions of this statute cannot be enlarged by implication, as they expressly exclude any such intendment. The maxim 'Expressum facit cessare tacitum' is also of applicability here. This law designates the actors, and when a law designates the actors none others can come upon the stage. The words of the statute are restrictive, and the designation therein of the municipality as the party to give the Commission jurisdiction operates to the exclusion of plaintiff. The matter falls squarely within the provision of the statute granting the exclusive privilege to the municipality to petition the Commission to fix the rates and charges in case the franchise of the company has expired.”

Three other judges joined in this opinion. In an opinion concurring as to result, the chief justice, joined by three other judges, said:

“I do not agree that the Michigan Public Utilities Commission is so limited in power as my Brother Wiest concludes it is.”

This opinion held that the Public Utilities Commission had power to act upon the petition of a plaintiff other than the municipality.

Because of the distinction between criminal and civil statutes and because the opinion in the Michigan case was not the opinion of the majority of the court, that decision does not persuade me to the view that the Division of Charities has the sole power to act. The principle referred to in Corpus Juris and in the opinion of Judge Wiest in that case is based upon the maxim that the express inclusion of one or more persons or things excludes all others by implication. This maxim is merely an aid in ascertaining the legislative intent and should never be applied where it will defeat that intent. As stated by the chief justice in the Michigan case:

"I am not impressed that we should limit ourselves to the use of two legal maxims, however valuable aids they may be in the construction of a statute."

Although a statute on its face confines its operation to a single person or organization, if there is no reason why others should not be enumerated, the application of the principle under consideration may well defeat the legislative intent.

In the case of *Blevins vs. Mullally*, 22 Calif. App., 519, 135 Pac. 307, 311, the court said:

"Where, however, a statute appears upon its face to confine or limit the operation of its provisions to particular persons or things, by enumerating such persons or things, and it is manifest that no reason exists or is apparent why other persons or things not so enumerated should not have been included within the benefits conferred or the burdens imposed by the statute, and it is obvious that, in the construction of such statute according to the maxim above referred to, injustice to a large class of persons will follow, we think that in such cases the just course, and one which cannot offend any canon of construction, is to give the act an interpretation according to its general spirit rather than to its letter, so as to reach a result harmonious with good sense and justice."

If the Division of Charities were in a highly superior position to institute prosecutions by reason of its organization or its ability to investigate and obtain information, there would be some force behind the contention that the legislature intended it to have the exclusive power to institute prosecutions for violations of sections 1352-12, 1352-13 and 1352-14. There are eighty-eight counties in Ohio and these prosecutions must take place in the respective counties where the offenses are committed. Obviously, the Division of Charities must depend to a large extent upon local persons and organizations for information regarding violations. It thus appears that the Division of Charities in relation to these organizations is in an inferior rather than in a superior position to begin prosecutions. It is stated in the brief accompanying your request that the social agencies of Cuyahoga County are anxious to cooperate with the division in reporting violations and otherwise. The same willingness, no doubt, exists in other counties of the state. In my opinion, such agencies and other organizations and persons are not limited to reporting violations, but they, as well as the Division of Charities of the Department of Public Welfare, may directly take the necessary steps preliminary to prosecution.

I assume that the suggestion that the Attorney General rather than the Prosecuting Attorney should prosecute violations of the sections in question, is based upon the assumption that the state department, for whom the Attorney General is the legal adviser, alone can enforce the statute in cases of violations where the action is taken by others than the state department. It is clear that the prosecuting attorney of the county where the offense occurs should conduct the prosecution.

Section 2916, General Code, reads in part:

"The prosecuting attorney shall have power to inquire into the commission of crimes within the county and except when otherwise provided by law shall prosecute on behalf of the state all complaints, suits,

and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county, in the probate court, common pleas court and court of appeals. * * *

Even in cases where the Division of Charities acts pursuant to section 12789-1, it appears that the Prosecuting Attorney and not the Attorney General is the officer to conduct such prosecution if brought in the Common Pleas Court. Like other public officers, the Attorney General has only those powers and duties prescribed by statute. Prosecutions for misdemeanors in the Common Pleas Court must be either upon indictment by a grand jury or upon information. Section 13456-7 reads:

"The prosecuting attorney or assistant prosecuting attorney, except as hereinafter provided, shall be authorized at all times to appear before the grand jury for the purpose of giving information relative to a matter cognizable by it, or advice upon a legal matter when required. Such attorney may interrogate witnesses before such jury when it or he deems it necessary, but no person other than the grand jury shall be permitted to remain in the room with the jury while the jurors are expressing their views or giving their votes on a matter before them. *In all matters or cases which the attorney general is required to investigate or prosecute by the governor or general assembly*, he shall have and exercise any or all rights, privileges and powers conferred by law upon prosecuting attorneys, and any assistant or special counsel designated by him for that purpose, shall have the same authority; and all proceedings in relation to such matters or cases, shall be under the exclusive supervision and control of the attorney general." (Italics the writer's.)

It would seem from this section that the Attorney General is empowered to appear before a grand jury only at the request of the Governor or General Assembly.

Section 13437-34, General Code, which concerns prosecutions upon information, reads:

"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." (Italics the writer's.)

This section does not in terms authorize the Attorney General to file and verify an information. These sections cast a grave doubt upon the power of the Attorney General to prosecute violations of the provisions in question.

Even assuming that this difficulty could be overcome, it does not follow that the Attorney General might prosecute the cases in question.

Section 12789-1, which authorizes the Division of Charities to act, does not mention the Attorney General. It thus differs from certain other criminal statutes which are enforced through state departments.

An act for the protection of agriculture and horticulture, contained in sections 1122 to 1140-6, provides for the inspection of nurseries and nursery stock and makes it a misdemeanor to permit the existence of harmful insect or plant diseases. The duty of enforcing the provisions of this act is placed upon the Director of Agriculture. Section 1140-6, General Code, provides:

“The prosecuting attorney of each county, or the attorney general, shall conduct such prosecutions * * *.”

An act providing for the inspection of feed stuffs is contained in sections 1141 to 1149-1. Section 1149 reads in part:

“* * * It shall be the duty of the director of agriculture or his deputized representative to bring prosecution for all violations under the provisions of this act, or the attorney general when requested to do so by said director.”

It is unnecessary at this time for me to express an opinion as to the duties of the Attorney General in enforcing the two acts just mentioned, and I refrain from so doing. I need only point out that these acts purport to authorize the Attorney General to take some action, whereas the statute concerned in your question fails even to mention the Attorney General.

In view of the foregoing, I am of the opinion that the Prosecuting Attorney and not the Attorney General is the officer having the power and duty to prosecute violations under section 12789-1 in the Common Pleas Court. Upon similar reasoning, if such violations are prosecuted before mayors in municipal courts, the Solicitor of the municipal corporation or the City Attorney is the proper officer to conduct the prosecution.

Your last question is whether section 1352-13 applies to child placing for adoption as well as general child placing. In two of the cases appended to your request, the child was given to third parties for adoption, although no adoption proceedings were then instituted. In the other case, the custody was given to an unlicensed boarding-mother in contemplation of subsequent adoption by a third party. I have pointed out that the section in question appears never to have been construed judicially or in an opinion of this office. It is stated in the brief submitted with your request that the writer knows of no prosecutions for violations of this section, nor have any such cases come to my attention. I know of no statute of any other state similarly worded. My opinion is therefore based solely upon the language of the section.

The first sentence of section 1352-13 reads:

“No child under two years of age shall be given into the temporary or permanent custody of any person, association or institution which is not certified by the division of charities, department of public welfare, as provided in sections 1352-1 and 1352-6 of the General Code, without the written consent of the division of charities or by a commitment of a juvenile court.”

This sentence in terms applies to the temporary or permanent custody of all children under two years of age regardless of the purpose for which such custody is given. The language applied is sufficiently broad to include cases where custody

is surrendered by parents to third persons in contemplation of adoption by the latter, or where temporary custody is given to a boarding home, institution or association in contemplation of adoption by other persons. If the first sentence of the section stood alone, no parent could legally surrender the permanent or temporary custody of a child under two years of age without the written consent of the Division of Charities, or by commitment of a juvenile court, to any person, association or institution not certified by the Division of Charities.

The second sentence of the section is a proviso permitting the temporary placing of children under two years of age, without such written consent or court commitment, in the care of relatives "or in a legally licensed boarding home which is not established for the purpose of placing children in free foster homes or for legal adoption." It is clear from the wording of this proviso that it does not cover cases where parents surrender the custody of infants in contemplation of adoption. A proviso following a general statutory provision must be limited to cases clearly within its terms. *Bruner vs. Briggs*, 39 O. S. 478. See also *State ex rel. vs. Forney*, 108 O. S. 463. Had the legislature intended to include child placing for adoption from the operation of the main provision of section 1352-13, it would have expressly included such cases within the proviso or otherwise have used apt language to effectuate such exception.

The remainder of the section concerns persons, associations and institutions certified under sections 1352-1 and 1352-6 for the purpose of placing children in free foster homes or for legal adoption. They are required to keep certain statistics and information concerning each child. They can place children in foster homes and for adoption only upon permanent surrender in writing by the parent, a copy of which must be preserved.

Under section 1352-1, the Division of Charities shall annually examine every child-caring or child-placing agency and issue a certificate to those deemed fit to carry on this work. Such of these agencies as are certified to place children for legal adoption must have been deemed competent by the legislature to select proper adoptive parents. Therefore, it excepted them from the requirement of section 1352-13 that children under two years of age may not be given into the custody of any person or organization, whether for purposes of adoption or for other reasons, without the written consent of the Division of Charities, or by a commitment by a juvenile court.

In view of the foregoing, I am of the opinion that:

1. The duty imposed by section 12789-1 of the General Code upon the Division of Charities, Department of Public Welfare, does not preclude others from taking the necessary steps preliminary to prosecuting violations of sections 1352-12, 1352-13 and 1352-14.
2. The prosecuting attorney of the county where the offense occurs, and not the Attorney General, has the duty to prosecute violations under section 12789-1, General Code, in the Common Pleas Court. Solicitors of municipal corporations shall prosecute such violations before mayors and in municipal courts.
3. Section 1352-13 is applicable to child placing in contemplation of adoption.

Respectfully,

JOHN W. BRICKER,

Attorney General.