

there is statutory provision, hereinbefore referred to, under the conditions hereinbefore set out, for the appointment of a clerk for a board of county commissioners, there is no statutory provision for the appointment of a clerk for a joint board of county commissioners in connection with joint county ditch matters.

It would follow, and you are advised, that the county auditor of the county in which a petition for a joint county ditch is filed is, by virtue of his office, under the statute, the clerk of the joint county board of commissioners in connection with joint county ditches.

Respectfully,
C. C. CRABBE,
Attorney General.

1706.

PROSECUTING ATTORNEY—"FURTHERANCE OF JUSTICE FUND"—
COUNTY AUDITOR MAY NOT REFUSE TO PAY OVER TO PROSE-
CUTING ATTORNEY AMOUNT PROVIDED IN SECTION 3004 G. C. BE-
CAUSE OF FAILURE TO FILE AN ITEMIZED ANNUAL STATEMENT.

SYLLABUS:

The county auditor has no authority to refuse the payment of the annual amount allowed the prosecuting attorney under Section 3004, General Code, because of failure to file an itemized annual statement.

Mandamus lies to require the prosecuting attorney to file said annual itemized statement of the expenditures made from said fund.

COLUMBUS, OHIO, September 3, 1924.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

Gentlemen:—

Your letter of recent date, asking for an opinion of this department, reads as follows:

"Section 3003 G. C. authorizes an allowance, annually, to the prosecuting attorney to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice not otherwise provided for. The section provides that upon an order of the prosecuting attorney, the county auditor shall draw his warrant from the county treasury, payable to the prosecuting attorney for such amount as the order requires, not exceeding the amount provided for herein and to be paid out of the general fund of the county. The third paragraph of the same section provides that the prosecuting attorney shall annually, before the first Monday in January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which such fund has been expended during the current year, and shall, if any part of such fund remains in his hands not expended, pay the same into the county treasury.

"Question: If the prosecuting attorney fails to file the itemized account as required, would the county auditor be warranted in refusing to pay over to the prosecuting attorney the amount due under the section for the full year? The case we have for decision is in a county where a prosecuting attorney has failed for two or three years to file the itemized account, and the county auditor inquires whether he might legally refuse to pay further amounts to the prosecuting attorney until such itemized accounts are filed."

Section 3004 of the General Code of Ohio reads as follows:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer, payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.

Providing that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.

The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which such fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury. Provided, that as to the year 1911, such fund shall be proportioned to the part of the year remaining after this act shall have become a law."

The headnote of an opinion of this department, found in Opinions of the Attorney General for 1916, Vol. 1, page 55, reads:

"The county's security for any money drawn, as well as for any money expended by the prosecuting attorney, is the bond specially required by Section 3004, G. C. Security for deposit of any of this fund when drawn out of the treasury and placed in a bank is a matter personal to the prosecuting attorney alone."

This opinion further observes that if interest is paid by the bank in which the prosecuting attorney has deposited this fund, such interest belongs to the fund.

The fund allowed annually to the prosecuting attorney, equal in amount to one-half his salary, and in addition to the fund provided for in Section 2914, General Code, for clerk hire, is one for the current year—an annual fund. In the matter to which your question applies, the statute quite logically requires that the prose-

cuting attorney account for this fund in an itemized statement, annually made, with a proper verification by him. This part of the section is mandatory, in that it requires "that the prosecuting attorney shall annually, before the first Monday in January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which the fund has been expended during the current year, * * * ."

It is also provided that he shall pay any unexpended portion of such fund forthwith into the county treasury. Filing of the itemized statement and payment of the unexpended balance, if any, are concurrent duties to close the year's business with respect to this fund.

It is the evident legislative intent that this fund shall be strictly an annual one, confined in the aggregate to one-half the salary of the prosecuting attorney for each year, the itemized statement showing that the application of the money of the fund is for "the performance of his official duty and in the furtherance of justice."

Several opinions by former Attorneys General have held that the prosecuting attorney may draw this sum as a whole from the treasury or may pay it out by drawing upon the treasurer for such sums as may be expended by him from time to time.

The section provides no penalty for non-compliance with any of its provisions; but a bond is required to be given to protect the county against any improper or illegal use of said fund.

The legislature, by use of appropriate language, if it had intended the auditor or other county officer to have supervision of the paying over of this fund, could have required the filing of the itemized statement in any year before making the fund available to the prosecuting attorney for the ensuing year.

This, it seems to me, has not been done and the failure of the prosecuting attorney to perform an express statutory duty with respect to this fund must be enforced, if at all, in some other way, otherwise provided for.

Should the itemized annual statement not be filed as required, mandamus will lie to enforce such duty.

This appears to me to be the only method by which relief may be had where the requirement of the statute is not complied with. After the filing of such itemized statement, if any illegal expenditure appears to have been made, such expenditure may become the subject of a finding by the Bureau.

You are therefore advised, and it is my opinion, that the county auditor may not refuse to pay over to the prosecuting attorney the annual amount provided in this section; but an action in mandamus may be begun to require him to file the annual itemized statement and to pay over to the county treasurer an unexpended balance, if any, where such filing and payment has not been done.

Respectfully,
C. C. CRABBE,
Attorney General.