

pointed by the comptroller of the currency, and is in process of liquidation, the superintendent of banks in Ohio may not compel the transfer of the assets of the trust department of such bank to a special deputy appointed by him for the separate liquidation of such trust department.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

251.

PROSECUTING ATTORNEYS—EMPLOYMENT AND COMPENSATION OF  
SECRET SERVICE OFFICERS—EMPLOYMENT AND COMPENSATION  
OF ATTORNEYS—ALLOWANCE TO SHERIFF FOR USE OF PRIVATE  
AUTOMOBILE.

SYLLABUS

1. Sections 2914 and 2915, General Code, providing for the appointment of "assistants, clerks and stenographers" of the prosecuting attorney's office and the fixing of their compensation do not authorize the appointment of secret service officers to assist the prosecuting attorney in the discovery and collection of evidence to be used in the trial of criminal cases and matters of a criminal nature.

2. By Section 2915-1, General Code, the prosecuting attorney is authorized to appoint a secret service officer to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. Such section further provides that the compensation of such secret service officer shall be fixed by the judge of the court of common pleas of the county in which the appointment is made. A prosecuting attorney may also employ a secret service officer at an annual salary and pay such secret service officer out of the allowance provided by Sections 3004 and 3004-1 of the General Code, notwithstanding the fact that a secret service officer has been appointed under the provisions of Section 2915-1, General Code.

3. County commissioners are authorized to make allowances to a sheriff for necessary expenses incurred in the use of his private automobile, based on the mileage covered while such automobile is being used by the sheriff in the performance of his official duties.

4. Prosecuting attorneys may employ attorneys for the purpose of appearing in courts lower than the common pleas court either for the conducting of preliminary hearings in state cases or for the prosecution of offenses in contravention of state laws and such attorneys may be paid from allowances made to the prosecutor by virtue of Sections 3004 and 3004-1, General Code, or the prosecutor may direct his assistants who have been appointed under and by virtue of Sections 2914 and 2915 of the General Code to conduct such preliminary hearings or prosecutions when in his opinion it is reasonably necessary for the protection of society and in the furtherance of justice.

COLUMBUS, OHIO, March 29, 1927.

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

GENTLEMEN:—I am in receipt of your communication, in which you request my opinion in answer to three questions as follows:

"May the prosecuting attorney appoint and pay a secret service officer out of the allowance made to him under the provisions of Section 2914 of the General Code, in view of the fact that special provision is made for the employment of such an officer under the provisions of Section 2915-1 of the General Code?

May the county commissioners make an allowance to the sheriff under the provisions of Section 2997 G. C. for the use of his privately owned automobile, basing such an allowance upon a stipulated amount per mile? In connection with this question we call your attention to two opinions of the attorney general. First, one found in his 1921 report at page 1191 referring to allowances upon a mileage basis to officers and employes of the board of education for the use of their personally owned automobiles, and to an opinion rendered to this department under date of June 26, 1926 as to the allowance to probation officers for the use of their own automobiles.

May the prosecuting attorney employ attorneys to prosecute criminals in the municipal court of the city of Newark or before a justice of the peace or mayor."

I will consider your questions in their order.

1. The answer to your first question involves a consideration of the provisions of Sections 2914, 2915 and 2915-1 of the General Code which read as follows:

"Sec. 2914. On or before the first Monday in January of each year in each county, the judge of the court of common pleas, or if there be more than one judge, the judges of such court in joint session, may fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office."

"Sec. 2915. 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."

"Sec. 2915-1. The prosecuting attorney may appoint a secret service officer whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. Such appointment shall be made for such term as the prosecuting attorney may deem advisable, and subject to termination at any time by such prosecuting attorney. The compensation of said officer shall be fixed by the judge of the court of common pleas of the county in which the appointment is made, or if there be more than one judge, by the judges of such court in such county in joint session, and shall not be less than one hundred and twenty-five dollars per month for the time actually occupied in such service nor more than one-half of the official salary of the prosecuting attorney for a year, payable monthly, out of the county fund, upon the warrant of the county auditor."

The legislative history of the above statutes is instructive as showing the evolution of the legislative intent in providing for the appointment of assistant prosecuting attorneys and secret service officers to aid the prosecutor in the collection and discovery of evidence to be used in the trial of criminal cases.

Sections 2914 and 2915 of the General Code were formerly Section 1271 of the Revised Statutes and as originally passed in 1878 (75 O. L. 520) read as follows:

"Sec. 1. Be it enacted by the General Assembly of the State of Ohio, That in counties containing a city of the first class, which has been advanced to that grade between decennial periods, the senior judge of the court of common pleas, residing in said county, may appoint an assistant prosecuting

attorney, at a yearly salary not exceeding fifteen hundred dollars, to be fixed by the judge making the appointment; such salary shall be paid out of the treasury of the county, on the warrant of the county auditor. The term of appointment shall be for one year from date of appointment, and whenever there shall be a vacancy, such judge may renew the appointment."

Before this enactment in 1878, no provision was made by law for the appointment of any assistants to the prosecuting attorney in any county only as might be deemed necessary in specific cases.

Section 1271 of the Revised Statutes passed through many revisions during the years following 1878 each time some additional county being added to the ones for which assistants to the prosecutor might be appointed and in each one of the revisions as well as in the original enactment the words "assistant prosecuting attorney" were used (77 O. L. 319, 79 O. L. 79, 86 O. L. 4, 86 O. L. 66, 90 O. L. 73, 92 O. L. 37, 94 O. L. 30 and 95 O. L. 240) until in 1904 (97 O. L. 315) the statute was enacted in substantially the same terms as are now embraced in Sections 2914 and 2915 of the General Code, it having been thus divided into two sections at the time of the codification of 1910.

It will be observed that the word "assistants" is used in the act of 1904 instead of the words "assistant prosecuting attorney" as had formerly been used in the statute. However, I do not consider this fact of any significance in view of the observations hereinafter made with reference to the appointment of secret service officers to aid the prosecutor.

At the same session of the legislature at which the act of 1904 above referred to was passed, and one day before the passage of this act, to wit: on April 22, 1904, the legislature passed an act authorizing judges of common pleas courts throughout the state to make certain appointments among others that of a secret service officer to aid the prosecutor in the collection and discovery of evidence. Prior to this time no provision had been made for the appointment of county secret service officers other than the provisions that were made for a secret service officer for Hamilton county (Revised Statutes 1282-1, 1282-2 and 1282-3). The act of April 22, 1904, specifically repealed 1282-1, 1282-2 and 1282-3 of the Revised Statutes. It was amended by the enactment of Section 2915-1 of the General Code (102 O. L. 77), which reads substantially as it now reads with the exception that it was indefinite in its terms as to who should fix the salary for such officers. For this reason, it was said to be unconstitutional by the common pleas court of Franklin county in the case of State of Ohio ex rel. McGannon vs. Sayre, Auditor, 12 O. N. P. (N. S.) 13. To overcome this, the legislature enacted the statute in its present form (103 O. L. 501).

It is evident from a study of the legislative history of these statutes that there never was any intention on the part of the legislature that the word "assistants" as used in Section 2914 of the General Code should be meant to include secret service officers, special provision having been otherwise made for the appointment of such officers.

However, it has been held by this department in an opinion of the Attorney General for 1916, volume II at page 1453, and again in an opinion of the Attorney General for 1923 at page 250 that the prosecuting attorney may legally employ a secret service officer at an annual salary, payable out of his allowance under Section 3004 of the General Code even though a secret service officer has been employed under Section 2915-1 of the General Code when such employment is reasonably necessary and in the furtherance of justice.

As to your second question:

2. Section 2997 of the General Code reads as follows:

"In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping

and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, homes of refuge, children's homes, sanitariums, convents, orphans' asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad and street car fare and telephone tolls expended in serving civil processes and subpoenaing witnesses in civil and criminal cases and before the grand jury, and may allow his necessary livery hire for the proper administration of the duties of his office.

Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare, telephone tolls and livery hire mentioned in this section before they shall be allowed by the commissioners. Such statement shall show the number of the case and the court in which the service was rendered and the railroad point from which a livery rig was used."

Section 2997 of the General Code prior to 1911 did not authorize the sheriff to expend money for livery hire and only allowed expenses for maintaining horses and vehicles so that if he did not own his own vehicle he was not authorized to hire conveyances. To meet this situation, the legislature amended Section 2997 of the General Code and gave county commissioners authority to make allowances to sheriffs for necessary livery hire for the proper administration of the duties of the office.

It was contended after the amendment that the phrase "livery hire" as used in the statute did not include the hire of automobiles. This question was raised in the common pleas court of Franklin county in the case of State of Ohio ex rel. Sartain, Sheriff, vs. Sayre, Auditor, 12 O. N. P. (N. S.) 61, and since the decision of that case the construction of the statute to the effect that the word "vehicle" as used in the statute included motor driven as well as horse drawn vehicles has been generally accepted and followed. The syllabus of this case is as follows:

"It is within the discretion of the county commissioners to make an allowance to the sheriff for automobile hire incurred in the necessary and proper administration of the duties of his office in the service of writs and processes or in pursuing or transporting persons who are wards of the state or are charged with crime."

This department has a number of times been called upon to determine how, if at all, the sheriff was to be compensated for expenses incident to the use of vehicles in the performance of his duties in the event that he used his own private machine in the performance of such duties.

The question was first presented to Attorney General Hogan who held in an opinion addressed to the Prosecuting Attorney of Hamilton county that if a sheriff was the owner of a buggy or an automobile which he used in the service of the county in connection with the duties of his office, bills for repairs to the automobile or buggy should be allowed. This opinion may be found in the Annual Report of the Attorney General for 1913, Volume II at page 1155. And again in the same report at page 1187 it is held that Section 2997 of the General Code contemplates only recompense to the sheriff for expenditures made by him, and does not comprehend payments to such sheriff for

labor performed by himself in the care of his horse. To the same effect is a later opinion of Attorney General Hogan found in Annual Reports of the Attorney General for 1913, page 1198.

In the Opinions of the Attorney General for 1915, at pages 295 and 1276 are two opinions along the same lines. In the latter opinion the Attorney General held as follows:

“While Section 2997 contains the word “maintaining” and does not contain the word “operating” it would undoubtedly follow that said section authorizes the allowance of all expenses incident to the use of the automobile in public business, and would include oil and gasoline, as well as necessary repairs to tires and parts.

The county commissioners may, therefore, make an allowance to the sheriff for the expenses of maintaining and operating his automobile when used in the proper administration of the duties of his office. \* \* \*

Just what proportion of the expenses may be charged against public funds will depend upon the facts in each particular case and is more a matter of policy than of law.”

In Opinions of the Attorney General for 1917, Volume III, page 2398, the question was raised in another form. The question there was whether or not the county commissioners could hire the sheriff’s car for the use of the sheriff, and it is said with reference thereto that:

“County commissioners have no authority to hire the sheriff’s machine for the use of the sheriff in the performance of his official duties.”

There are many more opinions of this department along similar lines upon consideration of which I think it has been well established and generally recognized that allowances may be made to the sheriff for actual and necessary expenses incurred by him in the use of his own automobile when used in the performance of the duties of his office, due allowance being made for such private use as the sheriff may make of the machine.

I think that the cost per mile for the operation of the various makes of automobiles can now be readily ascertained. Therefore, I am of the opinion that the county commissioners are authorized to make an allowance to the sheriff in reimbursement for his necessary expenses incurred in the use of his private automobile based on a flat rate per mile for the mileage covered while such automobile is being used by the sheriff in the performance of his official duties. This will authorize nothing but reimbursement and good faith must be used in fixing the mileage rate.

Coming now to your third question:

3. The duties of a prosecuting attorney are set out in a general way in Section 2916 of the General Code of Ohio which reads as follows:

“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. In conjunction with the attorney general, he shall also prosecute cases in the supreme court arising in his county. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and faithfully urge the collection until it is effected, or found to be impracticable, and forthwith pay to the county treasurer all moneys belonging

to the state or county, which come into his possession as fines, forfeitures, costs or otherwise."

By the plain provisions of the statute above set out, prosecuting attorneys are directed to prosecute on behalf of the state all complaints, suits and controversies in which the state is a party, and such 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. The statute says nothing whatever about conducting prosecutions in any of the magistrates' courts or in any of the lower courts than those mentioned in the statute. However, there are other provisions of law which do require the prosecuting attorney to prosecute actions before magistrates in certain cases. Section 1444 of the General Code provides in substance that justices of the peace and mayors have final jurisdiction in prosecutions for violation of any of the provisions of law relating to the protection, preservation and propagation of birds, fish, game and fur bearing animals and that the prosecuting attorney shall prosecute actions for the violations of those laws. Section 843-15 of the General Code provides that the prosecuting attorney shall prosecute actions for violations of certain laws upon the complaint and request of the State Fire Marshal. Section 13474 requires the prosecuting attorney to prosecute actions upon complaint of the sheriff to prevent prize fighting. Section 13372 provides that the prosecuting attorney must conduct prosecutions for certain offenses relating to the treatment of domestic animals and there are many other provisions of law directing the prosecuting attorney to conduct prosecutions for violation of food laws, road laws and laws for the prevention of the trade in narcotics, all of which are misdemeanors for which prosecutions may be conducted in courts other than those mentioned in Section 2916 of the General Code, supra.

As early as in 1839 the question arose as to the duties of the prosecuting attorney with reference to the conduct of prosecutions on behalf of the state before justices of the peace, and the Supreme Court of Ohio in the case of *Smith vs. Commissioners of Portage county*, 9 Ohio 26, said that:

"Whatever moral obligation rests upon the prosecuting attorney to prosecute offenses before justices of the peace, the law makes it no part of his duty to do so."

The act under consideration there was found in 31 O. L. page 13, and its provisions were practically the same as are the provisions of Section 2916 of the General Code.

The Portage county case was cited with approval by the Supreme Court of Ohio, in the case of *Railroad Company vs. Lee*, 37 O. S. 48. However, the law makes the prosecuting attorney the chief officer of the county charged with the duty of conducting prosecutions on behalf of the state, for violation of state laws and empowers the prosecutor by the terms of Section 2916, supra, "to inquire into the commission of crimes within the county." I am of the opinion that there is some moral obligation resting upon the prosecutor as is said in the Portage county case to prosecute offenses before magistrates, if in his opinion it be in the furtherance of justice and reasonably necessary for the protection of society. In any case, if he deems it necessary to appear before magistrates and conduct preliminary hearings in state cases, there is ample authority not only in the plain wording of the statute, but by implication as well for him to employ assistants and have them appear in such preliminary hearings before magistrates, and such assistants may be paid from the allowances given to him under the provisions of Sections 3004 and 3004-1 of the General Code or he may direct his regular assistants who have been appointed by virtue of Sections 2914 and 2915 of the General Code to conduct such investigations.

I am also of the opinion that the language of the statute: "To inquire into the commission of crimes within the county" is broad enough to authorize the prosecuting

attorney to employ his own time or that of his assistants in conducting prosecutions in courts lower than the common pleas court when in his opinion it is necessary and in the furtherance of justice.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

252.

MIGRATORY GAME BIRDS—OPEN SEASON MUST NOT BE IN CONFLICT  
WITH FEDERAL MIGRATORY-BIRD TREATY-ACT REGULATIONS.

*SYLLABUS:*

*The provisions of House Bill No. 459 with suggested amendments (to amend Section 1403, General Code,) relative to dividing the State of Ohio into zones and changing the dates of the hunting season for certain game birds, are in conflict with the Federal Migratory-Bird Treaty-Act Regulations and said Bill, if enacted into law, would be ineffective and inoperative. No determination of effect of Article II, Section 26, Ohio Constitution.*

COLUMBUS, OHIO, March 29, 1927.

HON. FERD. J. BING, *Chairman, Fish and Game Committee, Ohio House of Representatives, Columbus, Ohio.*

DEAR SIR:—This acknowledges receipt of your letter of March 23, instant, wherein you request my opinion as to the constitutionality of House Bill No. 459 and the proposed amendments thereto. Your letter reads in part as follows:

“Kindly advise as to the constitutionality of the enclosed bill if same were amended to zoning Ohio.

The National road out of Columbus, north part of the State, open season 16th day of September to the 31st day of December both inclusive and south of National road, 16th day of October to January 31st, both inclusive.”

The purpose of House Bill No. 459 is to amend Section 1403 of the General Code, relative to open season on ducks. Section 1403 of the General Code now provides that ducks and other enumerated game birds may be taken only from the sixteenth day of September to the thirty-first day of December, both inclusive. No provision is made therein for the dividing of the state into zones. House Bill No. 459 seeks to extend this time limit to the thirty-first day of January and the proposed amendments to this bill seek to divide the state into two zones, with a different open season for each zone. As the law now stands the open season on these game birds covers a period of three and one-half months, from September 16th to December 31st. If the proposed bill in question, with the amendments proposed, be enacted into law, the state will be divided into two zones, and the open season in the northern part of the state will be from September 16th to December 31st and in the southern part from October 16th to January 31st.

Since all of the birds enumerated in Section 1403, *supra*, are migratory birds, in order correctly to pass upon the effectiveness of these proposed amendments to Section 1403, it is necessary to consider the federal laws and regulations relating to migratory birds.

On December 8, 1916, a treaty between the United States and Great Britain was