

was carried into the General Code as Section 3003. Said Section 3003, General Code, fixes the salary of the prosecuting attorney and provides that:

“Such salary shall be paid in equal monthly installments from the general fund and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters.”

Section 2917 of the General Code provides that the prosecuting attorney shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in Section 2412.

Section 2412, General Code, reads as follows:

“If it deems it for the best interests of the county, the common pleas court, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board of county commissioners to employ legal counsel temporarily to assist the prosecuting attorney, the board of county commissioners or any other county board or officer, in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such county board or officer is a party or has an interest, in its official capacity.”

As the former sections of the statute under which the court in the case of *State ex rel. vs. Stafford*, held that the prosecuting attorney could be employed and compensated by county officials have been expressly or by implication repealed and there being no statute authorizing such employment by county officers of the prosecuting attorney, it seems evident that there is no authority for so employing and compensating said prosecuting attorney. On the other hand, Section 2917, General Code, expressly makes it the duty of the prosecuting attorney to prosecute and defend all suits and actions in which any county officer or board is a party, and Section 3003, General Code, expressly provides that the salary named therein shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters.

I am therefore of the opinion as expressed by my predecessor, Opinions of the Attorney General, 1914, Vol. II, page 1264, that the prosecuting attorney may not be employed by a county officer and receive extra compensation for services required to be performed by him as such prosecuting attorney.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1126.

OHIO BOARD OF CLEMENCY—AUTHORITY TO TERMINATE “FIRST SENTENCE” AFTER SERVICE OF MINIMUM TERM AND PERMIT PRISONER TO BEGIN “SECOND SENTENCE”—“RUBENSTEIN LAW” DISCUSSED.

SYLLABUS:

1. Sections 2174 and 2175, General Code, do not apply to that class of prisoners in the Ohio Penitentiary, who, prior to July 21, 1925, the effective date of the so-called

"Rubenstein Law" (111 O. L. 423) after being placed upon probation by the trial court, have had their probation terminated as provided by Section 2213, General Code, and imprisoned in the Ohio Penitentiary with a second sentence to follow.

2. *The Ohio Board of Clemency has authority to terminate service under such "first sentence" on and after such a prisoner has served thereunder the minimum term provided by law and permit such prisoner to begin service under such "second sentence."*

COLUMBUS, OHIO, October 10, 1927.

Ohio Board of Clemency, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your letter of recent date which reads as follows:

"Before the passage of the Rubenstein Law prisoners were put on probation by the County Courts, and a violator of the probation was usually brought to the Ohio Penitentiary.

In some cases such violators were brought in with a sentence for a second felony.

Question:—After the Ohio Board of Clemency has terminated the probation of a prisoner, and after he has served his legal minimum under the old sentence, has the Ohio Board of Clemency power to release him from further service under the first sentence to begin serving on the second sentence?"

The so-called "Rubenstein Law" to which you refer was passed by the legislature on March 24, 1925, (111 O. L. 423), and was entitled:

"An Act—To provide for probation under suspension of the imposition of sentence, and to provide a system of local administration of probation, parole and conditional pardon; and for such purposes enacting supplementary sections 1554-1, 1554-2, 1554-3, 1554-4, 1554-5, 1554-6, 1663-1, 1871-1 and 1871-2 of the General Code, amending sections 13696, 13706, 13709, 13710, 13711, 13712 and 13714 of the General Code, and repealing sections 2210, 2211, 2213, 2214, and 13715 of the General Code."

This act became effective July 31, 1925.

In order to answer the question that you present consideration must be given to the statutes relating to probation which were in effect prior to July 31, 1925. On May 9, 1908, (99 O. L. 339), the legislature passed an act entitled:

"An Act—To provide for probation for persons convicted of felonies and misdemeanors."

Section 1 thereof became Section 13706, General Code, and read as follows:

"In all prosecutions for crime except as hereinafter provided, where the defendant has pleaded or been found guilty, and where the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the Ohio state reformatory, any jail, workhouse, or a correctional institution and it appears that the defendant had never before been imprisoned for crime, either in this state or elsewhere, (but detention in an institution for juvenile delinquents shall not be considered as imprisonment) and where it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case

are such that he is not likely again to engage in an offensive course of conduct, and where it may appear that the public good does not demand or require that the defendant shall suffer the penalty imposed by law, said court may suspend the execution of the sentence and place the defendant on probation in the manner hereinafter provided. Nothing in this act contained shall in any manner affect the laws providing the method of dealing with juvenile delinquents."

Section 3 thereof became Section 2210, General Code, and provided:

"Whenever a sentence to the penitentiary or to the Ohio state reformatory has been imposed, but the execution thereof has been suspended and the defendant placed on probation, the effect of such order of probation shall be to place said defendant under the control and management of the board of managers of the institution to which he would have been committed, and he shall be subject to the same rules and regulations as apply to persons paroled from said institutions after a period of imprisonment therein."

Section 7 of such act became Section 2213, General Code, and reads as follows:

"Whenever a person placed upon probation as aforesaid, does not conduct himself in accordance with the rules and regulations of the institution in whose charge he has been placed, a field officer thereof may, without warrant or other process, arrest said person and convey him to said institution, and the board of managers may, after a full investigation and a personal hearing, because of such conduct, forthwith terminate the probation and cause said person to suffer the penalty of the sentence previously suspended. Any person under probation who has violated the conditions of his probation shall, upon order of the board of managers, be subject to arrest in the same manner as in the case of an escaped convict. In all cases of such termination of probation, the original sentence shall be considered as beginning upon the first day of imprisonment in the institution."

On March 28, 1919, (108 O. L. Pt. 1, 144) the legislature passed an act entitled:

"An Act—To amend Section 13706 of the General Code, relating to probation of persons convicted of crime."

which act amended Section 13706 to read as follows:

"In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, a jail, workhouse or correctional institution, and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence, at any time before such sentence is carried into execution, and place the defendant on probation in the manner provided by law."

Sections 2210 and 2213 were left unchanged.

Section 13706, *supra*, authorized the trial court, in all prosecutions for crime except as therein provided, upon compliance with the provisions thereof to suspend the execution of sentence and place a defendant upon probation in the manner provided by law.

By the terms of Section 2210, *supra*, the legal effect of such order of probation was to place such defendant under the control and management of the board of managers of the institution to which he would have been committed, subject to the same rules and regulations as apply to persons paroled from said institution after a period of imprisonment therein.

The rules and regulations therein referred to regarding a probationer of the Ohio Penitentiary are such as were promulgated by the Ohio Board of Administration (now Ohio Board of Clemency) under the provisions of Sections 2169 and 2170, General Code.

Whenever a person upon probation did not conduct himself in accordance with the rules and regulations of the institution in whose charge he had been placed, a field officer thereof, as provided in Section 2213, *supra*, could arrest such probationer and convey him to such institution. The board of managers thereof, after a full investigation and personal hearing was empowered to terminate the probation and cause such probationer to suffer the penalty of the sentence previously suspended. In all cases of such termination of probation the original sentence shall be considered as beginning upon the first day of imprisonment in the institution in whose charge such probationer had been placed.

I have examined the several sections of the General Code pertinent to your inquiry and I find no prohibition or limitation upon the authority of the Ohio Board of Clemency to terminate service under such so-called "first sentence" on and after such prisoner has served the minimum term of such sentence as provided by law, and thus permit such prisoner to begin service under such "second sentence."

Sections 2174 and 2175, General Code, which were construed in two recent opinions addressed to your board, being Opinions No. 727, dated July 11, 1927, and No. 849, dated August 19, 1927, Opinions, Attorney General for 1927, have no application to the question that you now present. These sections relate solely to prisoners of the Ohio Penitentiary who have been placed upon *parole* or *conditional release* by the Board of Clemency and have no application to prisoners placed upon *probation* by the trial court.

Answering your question specifically it is my opinion that Sections 2174 and 2175, General Code, relate solely to a "prisoner violating the conditions of his parole or conditional release" and have no application whatever to a prisoner committed to the Ohio Penitentiary for a violation of the conditions of his probation as provided by Section 2213, General Code, with a second sentence to follow. The Ohio Board of Clemency has authority to terminate service under such "first sentence" on and after such a prisoner has served thereunder the minimum term provided by law and permit such prisoner to begin service under such "second sentence."

Respectfully,
EDWARD C. TURNER,
Attorney General.