

The act of the 86th General Assembly, above referred to, clearly expresses the intention of the Legislature that the participation of the state in this improvement, including the acquisition of the Quincy Dam by appropriation proceedings or otherwise, shall be had by the state in connection with the improvement of said Miami River by proper proceedings to be had before the joint board of county commissioners of the counties interested and affected by said improvement. I am of the opinion, therefore, that you are not authorized to appropriate or otherwise acquire and remove said Quincy Dam except as a part of a program for the improvement of said river to be participated in by the counties interested in said improvement. Inasmuch, however, as Section 4 of said act of the 86th General Assembly, above quoted, provides that all expenses in connection with the condemnation proceedings relating to the removal of Quincy Dam shall be paid out of funds provided for the dredging and improving of the Miami River, which funds are, I believe, moneys appropriated by the Legislature for this purpose, I am further of the opinion that you are authorized to acquire and remove said dam by appropriation proceedings or otherwise by payment made directly to the owner of such dam out of moneys released for this purpose by the Controlling Board out of said appropriation; and that you are not required to issue a voucher against this appropriation to the treasurer of any of the counties interested for the payment of the cost of acquiring and removing said dam.

Responsive to the other questions presented in your communication, I am of the opinion that the balance of said appropriation made by the 88th General Assembly over and above the amount necessary to be expended in the acquisition and removal of Quincy Dam, when the same is released from time to time by the Controlling Board and to the extent of the money so released, may be paid over to the treasurer of the proper county for use in connection with moneys secured by assessment made by the joint board of county commissioners for the purposes of said improvement.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

2534.

PROSECUTING ATTORNEY ELECT—CRIMINAL CASES PENDING—NO  
RESPONSIBILITY CHARGED TO—INCUMBENT OF OFFICE MAY EM-  
PLOY PROSECUTOR ELECT IN PREPARATION OF CASES FOR  
TRIAL.

**SYLLABUS:**

*A newly elected prosecuting attorney has no legal responsibility in connection with the preparation of criminal cases now pending, until such time as he assumes the duties of his office.*

*The present prosecuting attorney may properly employ the newly elected prosecuting attorney prior to the time of taking office, in connection with the investigation and discovery of evidence and the preparation of cases which will later be for trial, and pay for said services from the fund arising under Sections 3004 and 3004-1, of the General Code.*

COLUMBUS, OHIO, November 14, 1930.

HON. W. S. PAXSON, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication requesting my opinion upon the following:

"In the criminal cases pending in our local Common Pleas Court against -----, the judge, at the request of the prosecuting attorney under Section 13439-15, General Code, has appointed Hon. -----, to assist the prosecuting attorney in the trials of these cases. Inasmuch as my term of office as prosecuting attorney expires on the first Monday of next January, I feel that the public interest requires that the incoming prosecuting attorney should be fully advised as to what takes place in these cases between now and the time when he assumes office. I also feel that he should not be expected to devote his time to the matters without compensation.

Kindly advise me at your earliest convenience whether or not it would be proper for me to appoint him as special assistant and pay him for his services out of the funds allowed to the prosecuting attorney by Sections 3004 and 3004-1, General Code."

It is well settled that under the provisions of Section 2916, of the General Code of Ohio, it is the duty of the prosecuting attorney to prosecute on behalf of the State all complaints, suits and controversies in which the State is a party, and for such services the prosecutor is to receive his salary, as provided in Section 3003, General Code. It is equally well settled that he may not receive compensation in addition to the salary provided. See Opinions of the Attorney General, 1925, page 49. However, it must be conceded that the newly elected prosecuting attorney of your county has no responsibility with reference to the duties of the office until he is properly qualified, on the first Monday in January. Section 13439-15, General Code, provides for the employment of counsel to assist the prosecuting attorney, in the following language:

"The Court of Common Pleas, or the Court of Appeals, whenever it is of the opinion that the public interest requires it, may appoint an attorney to assist the prosecuting attorney in the trial of a case pending in such court, and the county commissioners shall pay said assistant such compensation for his services as the court approves."

It is evident from your communication that there is no intention of employing the prosecutor-elect for this purpose for the reason that counsel has already been employed to assist in the trial of the case. Furthermore, it is apparent, from the foregoing, that it will be the duty of the prosecuting attorney to prosecute such cases as are pending, after taking office. Your question, of course, is whether the newly elected prosecutor may be appointed as a special assistant prior to his taking office and be paid for his services in accordance with the provisions of Sections 3004 and 3004-1, General Code.

Your attention is invited to Section 2915, General Code, which authorizes the prosecuting attorney to appoint such assistants as are deemed necessary for the proper performance of the duties of his office, and fix their compensation. However, this power must be exercised in accordance with the provisions of Section 2914, General Code, which requires the judge of the Court of Common Pleas to fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers. It will therefore be seen that if a regular assistant is to be appointed under the provisions of Section 2915 and related sections, the moneys arising under the provisions of Section 3004 of the General Code, are not available for the purpose of paying the salary of a regular assistant. Section 3004, to which you refer, provides, in part, 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.

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Section 3004-1, General Code, provides for supplementing the allowance made to the prosecuting attorney by Section 3004, supra, when in the opinion of the prosecuting attorney an emergency exists by reason of the unusual prevalence of crime and if the Court of Common Pleas, upon the application of the prosecuting attorney, sees fit to allow such supplemental allowance. It will be observed that the purpose of the allowance provided for in Section 3004, is broadly and liberally set forth. In other words, this section provides for a fund for the prosecutor, in addition to the allowance by Section 2914, General Code, for the payment of expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice.

In an opinion of the Attorney General, found in Opinions of the Attorney General for 1919, page 1238, it was held as disclosed by the first branch of the syllabus:

"The prosecuting attorney may, subject to the restrictions contained in Section 3004 G. C., employ an attorney to procure necessary evidence to be used in the prosecution of a criminal offender, and pay him for such services out of the fund referred to in that section."

It is a well known fact that in connection with the prosecution of a criminal case, there is much work to be done in advance of the actual trial. In fact, the success of a criminal prosecution may largely depend on the vigilance of the prosecutor in the discovery of his evidence long before the actual day of the trial. It follows, therefore, that the present prosecuting attorney, in order to properly assist the incoming prosecutor, should take such action with reference to the development of any pending criminal cases as is necessary in the furtherance of justice. No doubt, in connection with such preparation, an experienced attorney would be able to render much valuable service. Therefore, it would appear that such an appointment may properly be made. However, as above suggested, such an employment could not be regarded as a regularly appointed assistant, for the reason that such appointments are provided for in other sections of the statute.

Section 3004, supra, has frequently been given liberal interpretation by former attorneys general, to the end that justice might be done.

In an opinion of the Attorney General, found in Opinions of the Attorney General for 1923, page 250, it was held, as disclosed by the syllabus:

"A prosecuting attorney may legally employ a secret service officer at an annual salary, payable out of his allowance under Section 3004 G. C., his employment being continuous throughout the year, when such employment is reasonably necessary and in the furtherance of justice."

In other words, the then Attorney General held that while Section 2915-1, General Code, authorized the prosecuting attorney to appoint a secret service officer to aid him in the discovery and collection of evidence to be used in the trial of criminal

cases, such an employe could be paid under the provisions of Section 3004, General Code. The Attorney General held, in the Opinions for the same year, page 641 as disclosed by the second branch of the syllabus:

"If no secret service officer has been appointed by such prosecuting attorney under the provisions of Section 2915-1 of the General Code, the allowance made to a prosecuting attorney under the provisions of Section 3004 of the General Code may be expended in the employment of a person to enforce the traffic laws."

In an opinion found in Opinions of the Attorney General for 1927, page 438, it was held as disclosed by the second and fourth branches of the syllabus:

"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.

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."

From the foregoing, it is believed to be evident that if, in your opinion, the furtherance of justice requires it, you may properly employ the duly elected prosecuting attorney prior to the time of his taking office, in connection with the investigation and discovery of evidence and the preparation of cases which will later be for trial, and pay for said services from the fund arising under Sections 3004 and 3004-1, of the General Code.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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2535.

APPROVAL, BONDS OF MORROW COUNTY, OHIO—\$9,172.44.

COLUMBUS, OHIO, November 14, 1930.

*Industrial Commission of Ohio, Columbus, Ohio.*