

"After each recurring federal census, and within three months after the issuance of the proclamation, by the secretary of state of the population of such city, and when there is annexed thereto any territory containing, by the last federal census, such number of inhabitants as will entitle the city to an additional member of the council, the council shall subdivide the city into wards, equal in number to the members of the council therein to be elected from wards. If the council fails to make such subdivision into wards within the time herein required, on the application of the president of the council, it shall be made by the director of public service. * * * "

I am of the opinion that the present situation is governed by the same principles as were discussed in the prior opinion. It was there held that no provision for the qualification of additional councilmen could be made prior to the next municipal election. The same rule applies in this instance, although the city has actually been redistricted into a larger number of wards.

My conclusion is that the redistricting does not become operative until the next regular election and that therefore no vacancy exists at present. This must obviously be the fact, for, were it to be held otherwise, then all of the present councilmen, the boundaries of whose wards were changed in the redistricting, would no longer be officers of the municipal corporation. The inescapable conclusion is that the present council continues until the next municipal election, at which time councilmen will be elected in accordance with the redistricting already adopted.

My conclusion is confirmed by the decision in the case of *State ex rel vs. Kearns, et al.*, 47 O. S., p. 566, where, in considering an earlier analogous statute, the court held that a special election was not authorized and that the redistricting did not become effective until the next regular election.

You are accordingly advised that the council of the city of Mansfield has no authority to appoint two councilmen to serve in the wards created by redistricting.

Respectfully,
EDWARD C. TURNER.
Attorney General.

118.

DEPUTY TOWNSHIP CLERK—MAY BE PUNISHED CRIMINALLY FOR THE PERFORMANCE OF ACTS, WHICH WHEN DONE BY AN OFFICER DE JURE, WOULD BE CRIMINAL—WHOEVER AIDS IS ALSO CRIMINALLY LIABLE.

SYLLABUS:

1. *A deputy township clerk appointed to sell hunter's and trapper's licenses, as provided in Section 1432, General Code, who fails or neglects to deposit the bond as therein required before issuing such licenses, is a de facto officer and may be punished criminally for the performance of acts, which when done by an officer de jure would be criminal.*

2. *Whoever aids, abets, or procures such a deputy township clerk to commit an offense may be prosecuted and punished as if he were the principal offender.*

COLUMBUS, OHIO, March 1, 1927.

HON. ISAAC E. STUBBS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I am in receipt of your letter dated February 16, 1927, which reads as follows:

“John Doe was arrested on January 3, 1927, for violating the game laws by hunting and trapping without a license. On January 4, 1927, James Doe, the father of John Doe, went to a township clerk’s office, in which he found a young lady acting as deputy, in the absence of the clerk, which deputy was not under bond as required by Section 1432 of the General Code. This deputy issued a license to James Doe in the name of John Doe and at the request of said James Doe, dated said license January 1, 1927.

(John Doe was later found guilty of violating the game laws and fined, and said license was not effective in preventing his conviction.)

Questions:

1. Is the township clerk liable to prosecution for allowing the deputy to issue license without being under bond?

2. Is he liable to prosecution or such deputy liable to prosecution or both, for falsely dating a license prior to the date of issuing under Section 1434?

3. Is James Doe liable to prosecution for requesting said license to be dated prior to the date of issue, and if so for what offense?”

Your questions will be answered in order:

1. In this state, only those acts are criminal, which expressly are made so by statute. No statute provides that a township clerk may be prosecuted and punished for allowing a deputy clerk to issue hunter’s and trapper’s licenses without such deputy clerk being under bond.

Your first question must therefore be answered in the negative.

2. In answer to your second question, Section 1432, General Code, provides:

“ * * * whenever the township clerk deems it advisable he may designate one or more deputies in his township to distribute hunter’s and trapper’s licenses. Before issuing such licenses, the deputy shall be required to deposit with the township clerk, either a personal bond of at least two hundred dollars (\$200.00) with two sureties thereon, approved by the township clerk, or a corporate surety bond of at least the same amount, which security shall be conditioned on the proper performance of his duties. * * * ”

Provision is thus made by statute for a township clerk to designate one or more deputies in his township to distribute hunter’s and trapper’s licenses.

Sections 1432 and 1433 of the General Code, outline the duties of such deputies and the procedure incident to the issuance of such licenses. It is provided in Section 1432, General Code, that such appointed deputies before issuing such licenses shall file a bond conditioned upon the proper performance of their duties.

A deputy clerk who performs the official duties of his office before filing a bond as required by Section 1432, General Code, is a de facto officer. Section 137, Constantineau on the De Facto Doctrine, states the law as follows:

“Irregularities relating to the official bond are regarded in the same

light as irregularities in connection with the official oath, and are no impediment to a person becoming an officer de facto. This principle is applicable where the bond is not given, approved, filed or renewed within the time, or as, prescribed by law, or where the officer who never at any time attempted to qualify by giving bond."

See also 29 Cyc. 1392.

The ordinary rules as to de facto officers apply to deputies. (22 R. C. L. 588.)

In addition to being criminally responsible as ordinary persons, officers may be, and in this state in many cases are, criminally responsible for violation of their official duties. And that the criminal responsibility of officers for violation of official duty extends to *de facto* as well as to *de jure* officers is supported both by reason and authority. See 22 R. C. L. 583; 29 Cyc. 1395; Id. 1449; Constantineau on the De Facto Doctrine, Sections 253 and 257; Meechem Public Offices and Officers, Section 336 and the authorities cited therein

Section 253 Constantineau on the De Facto Doctrine, reads as follows :

"It is said in Hawkins that an officer de facto is punishable the same as an officer de jure, 'for that the crime is in both cases of the very same ill consequences to the public; and there seems to be no reason that a wrongful officer should have greater favor than a rightful officer, and that for no other reason but because he is a wrongful one.' This is also the theory sanctioned by American authority. Thus, in State vs. Goss, (69 Me. 22), the court, after declaring that there is no good reason why an officer de facto should not be punished as an officer de jure adds: 'the moral wrong, the wickedness of the act, must be as great in the one as in the other; and if we punish the latter and allow the former to escape, we make it an object for men to obtain office by illegal rather than legal means; thus encouraging instead of repressing illegalities. Nor are we aware of any authority for such a distinction'."

Section 1433, General Code, provides :

"Clerks and deputies authorized to issue licenses shall issue them in consecutive order of their numbers as stamped on the left upper corner of each license with date and exact time of date of issue plainly written thereon.
* * * " on. * * * "

Section 1434, General Code, provides :

" * * * and it shall be unlawful for any person empowered to issue such license to issue and falsely date a license with a date prior to the day and date of its issue."

Section 1454, General Code, provides :

" * * * whoever violates any of the other provisions of this act shall be fined not less than twenty-five dollars, nor more than two hundred dollars and the cost of prosecution, and upon default of payment of fine and costs assessed for any violation of this act he shall be committed to the jail of the county or to some workhouse and there confined one day for each dollar of the fine imposed and the costs assessed. He shall not be discharged, paroled, or released therefrom by any board or officers, except upon payment of the

fine and costs or that portion of the fine and costs remaining unpaid or except upon the order of the Secretary of Agriculture.”

In answer to your second inquiry it therefore follows that the deputy township clerk, having done an act which if done by a duly qualified deputy clerk would be criminal, cannot shield himself through his de facto character. He may be subjected to the penalty prescribed for violation of his duty, as provided in Section 1454 supra. As regards the township clerk, the general rule of law applies that he himself is not criminally liable for the criminal acts of his deputy where he did not aid, abet, or procure the deputy to violate the law.

3. In answer to your third question your attention is called to Section 12380, General Code, which provides:

“Whoever aids, abets or procures another to commit an offense may be prosecuted and punished as if he were the principal offender.”

“Aid” means to help, assist or strengthen; “abet” means to encourage, counsel, incite, or assist in a criminal act; “procure” means to persuade, to induce, to prevail on, to cause to bring about. See *State vs. Snell*, 2 O. N. P. 55; *Berry vs. State*, 31 O. S. 219.

You state that James Doe requested said license to be dated prior to the date of issue. What he hoped to accomplish by so doing is readily apparent. Ignorance of law does not excuse, and James Doe is presumed to have known that to issue and falsely date such a license with a date prior to the day and date of its issue was unlawful.

It is my opinion that in requesting the deputy township clerk falsely to date a license he aided and abetted and procured another to commit an offense against the law. Therefore, he may be prosecuted and punished as if he were the principal offender for the crime of issuing and falsely dating such a license with a date prior to the day and date of its issue.

Respectfully,
EDWARD C. TURNER,
Attorney General.

119.

COUNTY COMMISSIONERS OR BOARD OF TRUSTEES FOR A COUNTY MEMORIAL BUILDING—MAY NOT ENGAGE IN SHOW BUSINESS—ANYONE OPERATING A SHOW WHEREIN PAID ADMISSIONS ARE CHARGED MUST PAY U. S. TAX.

SYLLABUS:

1. *Neither the county commissioners nor the board of trustees for a county memorial building appointed under Section 3068, General Code, may legally engage in the business of conducting a motion picture or show business.*

2. *When a county memorial building has been constructed and completed as provided in Section 3059, et seq., of the General Code, and title thereto has vested in the county, and a board of permanent trustees therefor has been appointed by the common pleas court as provided in Section 3068, General Code, any one operating a show or attraction, in and upon said premises, wherein paid admissions are charged*