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OPTOMETRY—PROSECUTION OF PERSONS PRACTICING WITHOUT LICENSE—RECORDS OF STATE BOARD PRIMA FACIE EVIDENCE—TALLY ACT (108 O. L. 40) NOT APPLICABLE TO OHIO STATE BOARD OF OPTOMETRY—OPTOMETRY ACT DOES NOT CONFER UPON ITS BOARD MEMBERS ANY POWERS TO INSTITUTE PROSECUTIONS—NO PROVISION FOR PAYMENT OF EXPENSES INCURRED IN SUCH CONNECTION.

1. *In a case involving the prosecution of one accused of practicing optometry without a license the testimony of a member of the board, after qualifying as such a witness, to the effect that the records of the board do not disclose that such a license was issued should be received as prima facie evidence. However, there is authority to the effect that the burden is not upon the state in such a prosecution to prove the accused was not licensed.*

2. *The provisions of the Tally Act (108 O. L., p. 40) do not apply to the Ohio State Board of Optometry.*

3. *The optometry act does not confer any powers upon the board or its members to institute prosecutions, and there are no provisions for the payment of expenses incurred in such connection.*

COLUMBUS, OHIO, December 31, 1920.

*The Ohio State Board of Optometry, Columbus, Ohio.*

GENTLEMEN:—In your recent communication you request my opinion as follows:—

“We are in receipt of a communication from one of our licensed men inquiring as to the standing in the courts of a statement of the board to the effect that a defendant was not a holder of a license to practice optometry. The question is whether such a statement would be accepted by the court as prima facie evidence, and we request your opinion on this matter.

We would also like to inquire if the Tally Act is included in the Optometry law, in regard to prosecutions—if this board has the privilege of prosecuting violators, and if so, where the expenses for carrying out such prosecutions would be derived.”

In response to your first inquiry, it is believed that consideration should first be given to the question of whether or not, in a case in which the accused is being prosecuted for practicing optometry without a license, the burden is upon the state to prove that the defendant was not licensed.

Undoubtedly a sufficient complaint will contain the allegation that the defendant had not been licensed, and such an allegation must be regarded as material notwithstanding it is of a negative character. While it is a general rule of evidence that the burden is upon the state to prove beyond a reasonable doubt every material allegation of the complaint, in many jurisdictions there is an exception to this rule relative to facts that are peculiarly within the knowledge of the defendant. In fact, it would seem that this exception is quite generally recognized. The following is quoted from *Corpus Juris*, Vol. 16, page 530:

“Where the subject matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him.”

Also Woolen and Thornton's Law of Intoxicating Liquors recognizes this ruling relative to the proving of a license (Vol. II, p. 1638-1645).

In the case of Thuma vs. State, reported in 15 O. N. P. (n. s.) 625, which involved the prosecution of violators for making loans on chattels without the license required by law, Judge Dillon in his opinion said:

"It is pertinent here to observe that the proving of a license is an exception to the rule of evidence requiring putting the burden upon the state. The fact of a person possessing or not possessing a license being peculiarly within the knowledge of the defendant, no evidence on that subject is necessary to be adduced by the state. The burden is upon the defendant to show he has a license."

In view of the foregoing it is believed that the conclusion that the burden is upon the defendant to prove he has a license in a case such as you present is justified. However, in the event that it is thought to be expedient to prove said negative averment in the complaint in such a prosecution, in case it is permitted or required, it may be done by qualifying the witness by showing him to be a member of the board and that as such member he has access to the records required by law to be kept by the board. When a member of the board has properly qualified as a witness it is believed that he may testify that to his knowledge the records do not show the defendant to be licensed, which evidence should be regarded as prima facie. Of course, in those matters in which the board is required to keep a record, a certified copy of the record may be admitted as evidence under the provisions of the optometry law. However, in the case under consideration there will be no record.

Coming to your second question, you are advised that the Tally Act, which was an act entitled: "An act to amend sections 12694 and 13423 of the General Code, relative to the illegal practice of medicine and surgery, or any of its branches, and the enforcement of penalties therefor," found in 108 O. L. 40, has been carefully examined and it is the opinion of this department that it does not cover prosecutions instituted under the optometry laws.

In reply to your third inquiry, you are advised that the optometry law does not make any special provisions relative to prosecutions. The duties of members of the board are defined in the act and there are no powers conferred on the board excepting the right to hold examinations, issue licenses, etc. The courts of this state have frequently enunciated the following doctrine:

"Public officers have no power except such power as expressly given or is to be implied from the powers that are expressly given."

State ex rel. Commissioners, 8 O. N. P. (n. s.) 281.

Also see Ireton v. State, 12 O. C. C. (n. s.) 202,—affirmed without opinion, 81 O. S. 562.

It is believed that the legislature has left the enforcement of this act to the regular law enforcing officers of the state and the activities of the board in this respect cannot be regarded as a part of its duties as prescribed by statute. Therefore, it must be concluded there is no provision whereby such expenses can be paid.

Of course, any interested citizen may institute a prosecution against a violator of the law and a member of your board would have this right. That is to say, a member of the board would have the right to institute prosecution, deriving such power from the general laws rather than because of his being a member of the board. In the event that a member of the board is desired as a witness he may be subpoenaed and recover his mileage and fees as such witness.

Respectfully,

JOHN G. PRICE,  
*Attorney-General.*