County Attorneys—Power—Detectives, Employment Of —Intoxicating Liquor Laws.

By virtue of Section 3052, Revised Codes of 1907, a county attorney is authorized to employ detectives for the purposes of obtaining evidence upon which to prosecute and of apprehending persons violating the liquor laws.

June 27, 1919.

Hon. H. G. Bennett,
County Attorney,
Great Falls, Mont.

Dear Sir:

Referring to your inquiry as to your authority, powers and duties in regard to hiring detectives for the purpose of securing evidence in cases where you have reason to believe that the prohibitory liquor laws have been violated.

The laws of this State provide that: "The County Attorney is the public prosecutor and must:

(1) Attend the district court and conduct on behalf of the state all prosecutions for public offenses, and represent the state in all matters and proceedings to which it is a party, or in which it may be beneficially interested, at al times and in all places, within the limits of his county.'

Sec. 3052, Rev. Codes of 1907.

The general law relating to charges against counties provides that: "The following are county charges * * *:

(2) One-half of the salary of the county attorney, and *all expenses necessary incurred by him in criminal cases arising within his county.*"

Rev. Codes, Section 3199.

It is my opinion that this authorizes the county attorney to employ detectives at the expense of the county, when necessary to enable him to ascertain the persons guilty of crimes, or to obtain evidence to prove the commission thereof and effectively prosecute the same.

The statutes charge upon a county the expenses, and those only, which are legitimately incurred for purposes within the powers or duties of those who have some official or representative relation. The County Attorney is a county officer and has been such ever since Montana became a state. The responsibilities are upon the county attorney to conduct all prosecutions for crimes triable in his county, and it is his duty to conduct prosecutions for crimes committed in his county, and expenses necessarily incurred by him in criminal cases arising in his county are county charges.

This particular question was involved in and decided in the case of People ex rel. Gardiner vs. Board of Supervisors 31 N. E. 322, (N. Y.) The New York statute, having reference to the expense incurred by county officers, contained the following provisions:

> "The following shall be deemed county charges: * * * (2) All expenses necessarily incurred by the district attorney in criminal cases arising within the county."

The court held that the District Attorney was authorized to bind the county for "expenses necessarily incurred," and for moneys necessarily expended by such District Attorney in executing the duties of his office. In the course of the opinion of the court, at page 325, it was said:

> "A criminal case arises when the offense is committed, and duties of the District Attorney prior to indictment are not limited to issuing subpoenas for witnesses and attending upon the grand jury. The whole subject of inquiry into the commission of crimes in his county is properly within the official duty with which he is charged; and, when he is advised that a criminal offense has been committed there, the duty to prosecute the offender is with him, and it is within his power to use such means as are legitimate and necessary for the purpose. The power is well recognized of district attorneys to incur the expense of special compensation necessary to employ the service of experts to prepare themselves by investigation, in cases requiring it, to testify as witnesses upon the trials of persons charged with crimes. This is in aid of the prosecution of the alleged offender; and so is the expense incurred for the purpose of having him brought within the jurisdiction of the court which can take cognizance of the offense."

In the case of People vs. Graut, 77 N. Y. Sup. 321, where the District Attorney had employed private detectives and authorized a charge against the county for the purpose of procuring legal evidence to establish violation of the liquor tax law of the State of New York, and in which the comptroller declined to audit or allow the payment of the bill, the Court in deciding that such charge is a legal charge against the county, said in the course of its opinion:

> "It must be conceded that the duty and responsibility rest upon the district attorney to conduct all prosecutions for crimes triable in his county. It is clear that it is within the power of the district

attorney to do that which is essential to the prosecution of offenders, and that 'that is a matter necessarily, to a great extent, dependent upon his judgment. This is so as to all county officers in respect to the subject to which their duties relate. They take as incidental to them such powers as may be deemed necessary to the proper performance of their official duties.' People ex rel. Gardinier v. Board of Sup'rs. of Columbus Co., 134 N. Y. 5, 31 N. E. 322, and cases there cited." * * * "It should also be borne in mind that the district attorney, as the legal prosecutor in criminal matters, must, if he is expected to properly present for indictment and trial the criminal cases which it is his duty to prosecute, be permitted to exercise his judgment, is requisite to a successful prosecution. He must necessarily be intrusted with a large measure of discretion in the management and preparation of cases that he is expected to prosecute. In such matters it would seem to be a most dangerous and serious precedent to permit another official, to-wit, the comptroller, to override the judgment of the district attorney with respect to matters peculiarly within the liberal discretion and judgment of the latter. The administration of criminal prosecutions might be most seriously hampered if the comptroller were vested with such a power of censorship over the expenditures of the district attorney as to permit the former to overrule him as to the kind, extent, and character of the testimony which, in a given case, he considers proper." * * * "In my opinion it is not the province of the comptroller to act as an appellate tribunal, and sit in review upon the judgment of the district attorney with reference to the sufficiency of evidence in a given case, under the authority given to him to pass upon the reasonableness of the expenditures. It is for the district attorney to determine if his case requires proof of the sale of one or two drinks. I take it that the charter was designed to confer upon the comptroller the power to say if the expenditures of an official are directly related to the management of the office of the official incurring the expenditures, and come within the exercise of the fair discretion of that official. The reasonableness contemplated by the statute would seem to refer rather to the moderateness of the charges, than to their necessity, providing it appears that the expenditures clearly relate to a matter connected with the administration of the office incurring the charge."

The Gardenier and Grout cases and the principles therein involved have been approved and followed in recent New York cases. People ex rel. Watts, et al. vs. Board of Sup'rs. of Magard Co., 156 N. Y. supra, 148, (1915), and cases therein cited.

You are therefore advised that the County Attorney has the power and authority under the general provision of our statute herein cited to incur expenses in connection with the prosecution of offenders and may engage

the services of private detectives to secure evidence concerning violations of our prohibitory liquor laws, and other criminal laws, and make such service a county charge.

Respectfully,

S. C. FORD,

Attorney General.