

Opinion No. 91

County Attorney, Duties of—Photography, Authority of Board of Examiners in

Held: Chapter 37, Laws of 1937, being criminal in nature, and it being the duty of the county attorney to prosecute all criminal matters, the county attorney is required to enforce the provisions of said Chapter 37, Laws of 1937.

January 6, 1948

Mr. Melvin E. Magnuson
County Attorney
Lewis and Clark County
Helena, Montana

Dear Mr. Magnuson:

You have requested my opinion on the following question:

(1) Is Chapter 37, Laws of 1937, creating the Board of Examiners in Photography and forbidding the practice of the profession of photography without a license constitutional?

(2) Under the recent decision of the Supreme Court above referred to, is the County Attorney required to enforce the provisions of Chapter 37 of the laws of 1937.

The Supreme Court decision referred to in the second question is the case of *Montana State Board of Examiners in Photography v. Keller*, decided October 17, 1947.

The constitutionality of the Act in question will be presumed. It is not the province of this office, but rather that of the Supreme Court to declare the acts of the legislature to be unconstitutional, and then in accordance with strict rules they have established for their guidance in the matter. The rule is most succinctly stated in *State ex rel. Toomey v. State Board of Examiners*, 74 Mont. 1, 238 Pac. 316:

"... the rule is declared by this Court that 'the constitutionality of a legislative enactment is prima facie presumed and every intentment is in favor of upholding it. ... '(citing Montana cases)."

The answer to the first question is that the constitutionality of the Act will be presumed until decided otherwise by the Supreme Court.

Section 13 of the Act makes violation a misdemeanor and fixes the penalty. Section 13 provides:

"Any person who shall practice, or attempt to practice, photography in the state, without first having complied with the provisions of this act, or who shall violate any provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine for each offense, of not less than fifty (50) nor more than two hundred (200) dollars, or by imprisonment in the county jail not less than thirty (30) days nor more than six (6) months, or by both

such fine and imprisonment. Each sale shall be a separate offense."

Section 10 of the Act limits the power of the board in the matter of enforcement to the revocation of the license of any photographer for stated reasons. It gives the board no power over anyone not a holder of a license from the board, either directly or by implication.

These matters are covered thoroughly in the *Keller* case, supra, wherein the Court said:

"The Act does not give the board of examiners any power concerning the enforcement of the Act other than the right to revoke licenses of photographers under certain circumstances. Subdivision (e) of section 3 of the Act creates the photographers' license fund "to be used only in defraying the expenses of the board and in the prosecution of violations of this Act." This does not confer authority on the board to prosecute violations of the Act. The prosecution of violations of the Act refers to the criminal prosecutions that may be brought under section 13 of the Act. The Act does not give the board of examiners any power over unlicensed photographers. It is given some disciplinary authority over its licensees, to revoke their licenses. Its field is limited to photographers who have licenses and those who are applicants for licenses. The ones who practice without licenses are to be dealt with, if at all, by the criminal law. That is what Chapter 37 provides.

"... The Act declares the violation complained of to be a crime and fixes penalties for the violation. The Act does not declare the violation to be a nuisance. It gives the appellant board no power of enforcement of the Act either in equity or by criminal prosecution as against non-licensed photographers. The only method of enforcement in the Act mentioned is by criminal prosecution. This is an adequate remedy for such violations."

This appears to be a fair and clear interpretation of the Act and the only question remaining is whether the County Attorney is required to en-

force the criminal law. Section 4819, Revised Codes of Montana, 1935, enumerates the duties of the County Attorney. The first three paragraphs of said section provide:

"Duties of county attorney. 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 all times and in all places within the limits of his county;

"2. Institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offense, when he has information that such offenses have been committed, and for that purpose, whenever not otherwise officially engaged, must attend upon the magistrate in case of arrest, and attend before and give advice to the grand jury, whenever cases are presented to them for consideration;

"3. Draw all indictments and informations, defend all suits brought against the state or county, prosecute all recognizances forfeited in the courts of record, and all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or county."

In interpreting this statute, the Court said in *State ex rel. Streit v. Justice Court*, 45 Mont. 375, 380, 123 Pac. 405;

"Criminal cases arising under the state laws must be prosecuted in the name of the state and by the county attorney, under this section and the constitution."

Therefore, it is my opinion, the Act being criminal in nature and it being the duty of the county attorney to prosecute all criminal matters, the county attorney is required to enforce the provisions of Chapter 37, Laws of 1937.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General