

prosecutions for violation of the laws for the protection, preservation and propagation of birds, fish and game in cases where, in the opinion of the prosecuting attorney of the county in which the offense was committed, the evidence is insufficient to obtain a conviction. The statute clearly makes it the duty of the proper prosecuting attorney to prosecute such actions. And while the provision that "prosecution by any officer for offenses not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed" is jurisdictional and requires the approval of the prosecuting attorney before such an action can be instituted, the following provision of said section to the effect that "said prosecuting attorney shall prosecute such action" does not deprive the court of jurisdiction to hear and determine a prosecution for violating one of the laws for the protection, preservation and propagation of birds, fish and game, or entitle the defendant in such case to have the proceedings dismissed where the prosecuting attorney fails or neglects to perform the duty enjoined by such section, that is, to "prosecute such action."

In the words of Justice Stone of the Supreme Court of the United States in the case of *McGuire vs. United States*, (Case No. 85, October term, 1926):

"A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule."

and while it is clearly the duty of the proper prosecuting attorney to prosecute an action, begun with his approval, for the violation of one of the laws for the protection, preservation and propagation of birds, fish and game, it is my opinion that the failure or neglect of such prosecuting attorney to prosecute such action does not deprive the court, before whom such action was rightly commenced, of jurisdiction to hear and determine such action, nor does such failure or neglect entitle the defendant to have the proceedings dismissed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

40.

VACANCY—OFFICE OF COUNTY COMMISSIONER—WHERE FILLED BY APPOINTMENT—APPOINTEE WILL HOLD OFFICE UNTIL SUCCESSOR ELECTED AND QUALIFIED—PERSON SO ELECTED HOLDS OFFICE FOR UNEXPIRED TERM.

SYLLABUS:

Under the provisions of Sections 2396 and 2397 of the General Code, where a vacancy occurs in the office of the county commissioner, who was elected in November, 1926, and said vacancy is filled by appointment, the appointee will hold his office as county commissioner until his successor is elected and qualified at the November election of 1928, and the person so elected at that time will hold his office for the unexpired term for which his predecessor was elected.

COLUMBUS, OHIO, February 2, 1927.

HON. EARL D. PARKER, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent letter, requesting my opinion as follows:

"In the event of the resignation of a county commissioner, elected in November, 1926, for a period of four years, at what time would it be necessary for his successor to be elected? In other words, would his successor hold for the full term of four years or would it be necessary for him to be elected again in two years, that is, at the next general election?"

Section 2396 of the General Code is as follows :

"When a commissioner is elected to fill a vacancy occasioned by death, resignation or removal, he shall hold his office for the unexpired time for which his predecessor was elected."

The above section provides that when elected to fill a vacancy, the newly elected commissioner shall hold his office for the unexpired time for which his predecessor was elected. However, there can be no election for this office until the November election of 1928.

The section providing for the appointment of a commissioner to fill the vacancy is Section 2397 General Code. Its provisions are as follows :

"If a vacancy in the office of commissioner occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat. If a vacancy occurs more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy be filled before the election, the probate judge, auditor, and recorder of the county, or a majority of them, shall appoint a commissioner, who shall hold his office until his successor is elected and qualified."

By the terms of this section, the appointee will hold his office until his successor is elected and qualified, which, as stated above, cannot be until November, 1928. Under the provisions of the above Section 2396, this election to fill the vacancy caused by the resignation is required to be limited to the unexpired time for which his predecessor was elected.

Specifically answering your question, it is my opinion that where a vacancy occurs in the office of county commissioner, elected in November, 1926, and the same is filled by appointment, the appointee will hold his office until his successor is elected and qualified at the November election of 1928, and that the county commissioner elected at that time will hold his office for the unexpired term for which his predecessor was elected.

Respectfully,

EDWARD C. TURNER,

Attorney General.

41.

APPROVAL, BONDS, VILLAGE OF DEER PARK, HAMILTON COUNTY,
\$8,975.51.

COLUMBUS, OHIO, February 2, 1927.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.