

I am therefore of the opinion that library trustees, appointed under authority of Section 4004 of the General Code, may not expend money in excess of five hundred dollars, other than for the compensation of employes, without advertising, competitive bidding and the making of a written contract with the lowest and best bidder.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*

39.

ENFORCEMENT LAWS FOR PROTECTION, PRESERVATION AND PROPAGATION OF BIRDS, FISH AND GAME—UNDER SECTION 1444, G. C., DUTY OF PROSECUTING ATTORNEY TO PROSECUTE—FAILURE DOES NOT DEPRIVE COURT OF JURISDICTION OR ENTITLE CASE TO BE DISMISSED.

*SYLLABUS:*

*In a prosecution instituted under provisions of Section 1444 of the General Code, relating to the enforcement of the laws for the protection, preservation and propagation of birds, fish and game, by the terms of such section it is the duty of the prosecuting attorney of the county in which the offense was committed, to prosecute such action, but the failure or neglect of such prosecuting attorney to prosecute such action does not deprive the court of jurisdiction to hear and determine the same, or entitle the defendant to have such case dismissed.*

COLUMBUS, OHIO, February 1, 1927.

*Department of Agriculture, Division of Fish and Game, Columbus, Ohio.*

GENTLEMEN:—Under date of January 12, 1927, you submitted to this office a letter from one of the deputies in your department, requesting an opinion upon the following question propounded therein:

Does the failure or neglect of the prosecuting attorney to prosecute a case in which the defendant is charged with a violation of the laws for the protection, preservation and propagation of birds, fish and game, as required by Section 1444 of the General Code, deprive the court, before whom an affidavit charging such violation has been properly and legally filed, of jurisdiction to hear and determine such case and entitle the defendant to have such proceeding dismissed?

Section 1444 of the General Code provides:

“Sheriffs, deputy sheriffs, constables, marshals, chiefs of police and other police officers shall enforce the laws for the protection, preservation and propagation of birds, fish and game and for this purpose they shall have the power conferred upon wardens. 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, and said prosecuting attorney shall prosecute such action.”

It was the purpose of the legislature in enacting this statute to prevent promiscuous

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: