

propagation of birds, fish, game and fur-bearing animals." The offense of which you inquire is included within that class of offenses, wherein, as provided by Section 1448, supra, a justice of the peace has final jurisdiction.

In this connection your attention is directed to Opinion No. 204, dated March 18, 1927, addressed to the Department of Agriculture, Division of Fish and Game, the syllabus of which reads:

"The decision of the Supreme Court of the United States in the case of *Tumey vs. State of Ohio*, decided March 7, 1927, does not affect the jurisdiction of a justice of the peace in prosecutions for violations of any provision of the laws relating to the protection, preservation or propagation of birds, fish, game and fur-bearing animals, so far as pecuniary interest is concerned. However, it must be borne in mind at all times that the defendant is entitled to a fair and impartial trial and pecuniary interest is not the only interest which will disqualify a magistrate."

I agree with the conclusion reached by you in this regard and it is my opinion that, by the terms of Section 1448, General Code, a justice of the peace has final jurisdiction to hear and determine a prosecution charging a violation of Section 1442, General Code.

I am enclosing herewith a copy of Opinion No. 204 referred to.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1626.

TOWNSHIP TRUSTEES—EMPLOYMENT OF LEGAL COUNSEL OTHER THAN PROSECUTING ATTORNEY—MAY DO SO BY RESOLUTION—EMPLOYMENT FOR PARTICULAR CASE—COMPENSATION FIXED.

SYLLABUS:

1. *Under the provisions of Section 2917, General Code, the township trustees of a township may, by resolution duly adopted and entered on their minutes, employ an attorney other than the prosecuting attorney of the county to represent them in a particular case in which they are parties in their official capacity. In such case the resolution providing for the employment of such attorney should fix the compensation to be paid to him for his services in the case.*

2. *The township trustees of a township are not authorized to employ an attorney permanently on an annual or monthly salary to act as the legal adviser of such trustees and other township officers and to represent such trustees and other township officers in all cases in which such officers may become parties in their official capacity.*

COLUMBUS, OHIO, January 26, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your recent communication, in which you ask my opinion on certain questions therein stated. Your communication is as follows:

"Section 2917, G. C., provides that the prosecuting attorney shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly en-

tered upon their journal, in which the compensation to be paid for such legal services shall be fixed.

Question 1. May a board of township trustees employ an attorney other than the prosecuting attorney to represent it in a particular case in which such board is a party?

Question 2. May a board of township trustees employ an attorney permanently as its legal adviser to represent it and other township officers in all cases to which such officers are a party and compensate such attorney by an annual or monthly salary?"

Section 2917, General Code, referred to in your communication, reads as follows:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in Section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

Under the provisions of this section of the General Code it is clear that although the prosecuting attorney of the county is made the legal adviser of the township trustees and other township officers, such township officers are not required to call upon the prosecuting attorney to act as their attorney in any particular litigation in which such township officers, in their official capacity, may be parties; but said township trustees, by resolution duly adopted and entered on their minutes, may employ another attorney to represent the township officers in such case. The resolution providing for the employment of such attorney should fix the compensation to be paid to him for his services in the case. Your first question is answered in the affirmative.

Your second question is one of more difficulty. Under the provisions of Section 2917, General Code, the prosecuting attorney is not only required to advise township officers in regard to all legal questions and matters pertaining to their official duties, but if called upon, he is authorized, if not required, to represent and act for the township and its officers in all litigation in which said township trustees or other township officers are parties, and to perform all legal services required of him with respect to township affairs. Your question is, in effect, whether the board of township trustees may provide for the permanent employment of some other attorney to perform for the township trustees and other township officers all of the services that the prosecuting attorney might be called upon to perform, and to pay such attorney a regular annual or monthly salary. Under the provisions of Section 3244, General Code, each civil township is declared to be a body politic and corporate capable of suing and being sued, pleading and being impleaded. As an incident to its power and capacity of suing and being sued the township, represented by its board of township trustees, independent of statutory provision, would be authorized to employ an attorney to represent it in litigation in which said township and its officers are parties. This implied power, however, would not, in my opinion, extend to the permanent employment of an attorney for the township or its officers, irrespective of particular litigation in which said township or its officers may be parties, or irrespective of some other particular legal

business to be done and performed. Touching this question, it was held in the case of *Vincent vs. Nassau County*, 96 N. Y. Supp. 446, that while a county had implied authority to retain counsel whenever it had litigation, the board of supervisors of the county had no implied authority, irrespective of litigation, to appoint a person as counsel at an annual salary. The court in its opinion in this case said:

"It is not claimed that there is any authority for creating the office of counsel to the board, and we are unable to find any warrant in law for a general retainer, such as is here attempted. There is no doubt that the county of Nassau, as a municipal corporation, having the capacity to sue and be sued, has the incidental right to retain counsel whenever it has any litigation (*People ex rel. vs. Supervisors*, 134 N. Y. 1, 5, and authorities there cited), but it is quite another matter to involve the county in an indebtedness by a general retainer, when there may be absolutely no business for a lawyer to transact."

The authority of the township trustees to provide for the permanent employment of an attorney for said township and its officers, on a regular annual or monthly salary, must be found, if at all, in the provisions of Section 2917, General Code. The provisions of said section to the effect that the township trustees may employ other counsel or attorney by an order of such township trustees duly entered upon their journal is to be read in connection with the provisions that the prosecuting attorney "shall be the legal adviser for all township officers," and, as thus read, the provisions of this section are not, in my opinion, to be construed as authorizing the township trustees to employ an attorney to act as the legal adviser of the township trustees and other township officers, and to transact all of the legal business of said township and its officers. The legislature, if it at any time had seen fit to do so, could have created the office of township attorney and provided for his compensation, subject only to constitutional provision requiring him to be elected in the manner provided for other township officers. (Ohio Constitution, Article X, Section 4; Article XVII, Section 2.)

In the case of *State ex rel. vs. Cannon*, 12 O. C. C. (n. s.) 103, the court had under consideration Section 845 of the Revised Statutes of Ohio, which authorized the board of county commissioners of any county, upon written request of the prosecuting attorney, to employ legal counsel to act as the legal adviser of the board of county commissioners, and of all other county officers and boards, to prosecute and defend all suits and actions which any of said boards might direct, or to which any of said county officers might be a party, and also to perform, generally, such civil duties and services as the prosecuting attorney of the county was authorized and required to perform. The court upon consideration of the provisions of this section held that the same was unconstitutional, for the reason that the same, in effect, provided for the appointment of a county officer and thereby contravened the provisions of the constitution requiring all county officers to be elected. The decision of the Circuit Court in this case was affirmed by the Supreme Court without report. (*Cannon et al. vs. State ex rel.*, 80 O. S. 756.)

However, independent of any possible constitutional question involved in the construction of the above quoted provisions of Section 2917, General Code, I am of the opinion that no construction of the provisions in this section can be adopted which will have the effect of permanently abrogating the duty and authority of the prosecuting attorney to act as the legal adviser of township officers. I am, therefore, of the opinion that your second question should be answered in the negative.

Respectfully,

EDWARD C. TURNER.

Attorney General.