Section 4188 relates to Union cemeteries and is not applicable to the sections under discussion here, which relates to township cemeteries.

Consideration of the terms employed in section 5660, which include "the trustees of a township," inclines this department to the belief that that section is applicable to such a contract made by the trustees for the purchase of additional land, as it is to one "involving the expenditure of money," as defined in section 5660.

Respectfully,
JOHN G. PRICE,
Attorney-General.

950.

BOARD OF AGRICULTURE—FISH AND GAME—PROSECUTION BY GAME PROTECTOR CANNOT BE LEGALLY INSTITUTED WHEN SAID OFFENSE IS NOT COMMITTED IN PRESENCE OF SUCH OFFICER WITHOUT APPROVAL OF PROSECUTING ATTORNEY OR ATTORNEY GENERAL—SUCH OFFICER NOT LIABLE TO PROSECUTION UNDER PENALTIES IMPOSED IN SECTION 1454 G. C. (108 O. L. 577).

1. *A prosecution cannot be legally instituted by a game protector or other public officer for a violation of the fish and game laws of Ohio, when said offense is not committed in the presence of such officer, without the approval of the prosecuting attorney or attorney general.*

2. *A game protector or other public officer is not liable to a prosecution under the penalties imposed in section* 1454 *G. C.* (108 *O. L.* 577) *by reason of having instituted a prosecution without the approval provided for in section* 1444 *G. C.* (108 *O. L.* 577).

COLUMBUS, OHIO, January 19, 1920.

HON. SUMNER E. WALTERS. *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department on the following:

> "Calling your attention to reamended senate bill No. 45, an act to codify fish and game laws of Ohio, enacted into a law by the present general assembly, and found in O. L. Vol. 108, part 1, at page 577. Section 54 thereof contains the following provision:
>
> 'Prosecutions by the protector or other public officer for offense 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, or upon the approval of the attorney-general.'
>
> Section 64 thereof after fixing punishment for violation of section 47, 26 and 52 contains the following provision:
>
> 'Whoever violates any of the other provisions of this act shall be fined not less than $25.00 nor more than $200.00, and the costs of the prosecution, etc.'
>
> I desire your reasoning and conclusion on the following hypothesis:
>
> If a game protector or other public officer commences and completes prosecution for an offense not committed in his presence, without the approval of the prosecuting attorney or attorney-general is the protector or officer subject to the punishment imposed in section 64 for violating a provision of the act?"

An analysis of the entire act to which you refer discloses that numerous sections are prohibitory in their provisions while others are administrative in their effect. That is to say, certain sections of this law define acts which are prohibited, the object of which is to protect and conserve the fish and game of the state, and other sections direct the manner in which the law shall be administered It is conceded that section 64 of said act applies to acts prohibited under the sections preceding it. However, criminal statutes are strictly construed and said penal section can operate only against persons who violate provisions of the act that are clearly forbidden and specifically enjoined.

Section 54, part of which you quote, undoubtedly requires the approval of the prosecuting attorney of the county or the attorney-general before an affidavit may legally be filed in the prosecution of an offense not committed in the presence of the officer. However, it is believed that this provision in its application can not be construed as prohibitory in the sense that it may be considered as a crime punishable under section 64. Undoubtedly the intendment of this provision is to prevent the promiscuous prosecution of cases wherein the evidence in the opinion of the prosecuting attorney or attorney-general is insufficient to obtain a conviction. While this provision should be and must be followed before a proper conviction can be had, if it is not, then the failure to comply with said provision is a question of jurisdiction rather than a criminal act. There are certain provisions in this act which define the authority, powers and duties of the secretary of the state board of agriculture and chief of the division of fish and game relative to the administration of the law. Suppose that for any reason said secretary or chief should not comply with the provisions of the act; it certainly will not be argued that they are criminally liable under the provisions of section 64. Their duties are prescribed and powers defined, and in the event they should ignore the provisions of this law such acts would be illegal and subject to the remedies of law. It is believed that the acts of an officer in instituting a prosecution, ignoring the provisions relative to the approval mentioned, would be upon a similar basis.

In the case of Smith vs. The State, 12 O. S. 469, the court held:

> "No act or omission * * * is punishable as a crime in Ohio, unless such act or omission is specifically enjoined or prohibited by the statute laws of the state."

Also in the case of State vs. Bovee, et al., 6 N. P. (n. s.) 342, it was held:

> "In Ohio an act is not criminal unless made so by statute and the statute should describe the act which is forbidden with reasonable certainty * *."

The supreme court, in the case of The State vs. Meyers, 56 O. S. 350, in its opinion referring to the construction of a criminal statute, in part said:

> "Persons can not be made subject to such statute by implication. Only those transactions are included in them which are within both their spirit and letter; and all doubts in the interpretation of such statutes are to be resolved in favor of the accused."

In the case of Brinkman vs. Drolesbaugh, 97 O. S. 171, Brinkman, who had filed an affidavit as game warden and made the arrest, was sued by the defendant for false imprisonment. While this case does not bear directly upon your question, it is believed that by analogy it is applicable to the question under consideration. The court in part said: (pp. 174-180.)

"No system of jurisprudence has yet been invented that will be infallible when administered by fallible man. Mistake and injustice will occur to the individual under any judicial system, in the application of either civil or criminal jurisprudence.

* * * * * * * * * * * * *

Suppose the affidavit did not state an offense, and therefore, was actually demurrable, or subject to motion, would the game warden then have been liable for false imprisonment?

This is a matter so vital to the state at large and all its political subdivisions, so vital to all of the police officers of township, city, county and state, that it deserves special consideration in this case.

Must the officer, when he receives a process from a court of competent jurisdiction, said process to be served and returned agreeable to the orders thereof, go back of the process and inquire, at his own peril, as to whether or not there was sufficient affidavit, or sufficient legal steps taken, preliminary to the issuing of the process; and if he judges wrong in that respect, or fails to make the inquiry, shall he be penalized by an action at law for damages for false imprisonment? If that be sound law, then it is time that the people of Ohio, and every police officer of the state, should know the fact; and yet that is the holding of the courts below. That such a holding would absolutely paralyze the police administration of the state in the enforcement of its law is so obvious as to leave no arguments.

* * * * * * * * * * * * *

If the acts complained of be made an offense under the law, and the court have jurisdiction of such offense, and the process be regular upon its face, it becomes the officer's sworn duty to serve the same and make a return thereon; and, though some one may be wronged thereby, the law has uniformly protected the magistrate in the issuing of the process against an action for false imprisonment. If the magistrate shall be protected, who is responsible for the issuing of the process, how can it be consistently claimed that his subordinate, the process-server of his court, shall be held liable for false imprisonment when he has done nothing more nor less than discharge his simple duty under the law?

There is no 'unlawful detention' where the law specially warrants the proceedings taken, though they may be irregular."

If officers are subject to criminal prosecution in cases such as your letter presents, it would tend to make them hesitate to perform their duties, which would be against public policy. It would seem that no such result was contemplated by the legislature and that the mandatory provision requiring the approval of the prosecuting attorney or the attorney-general is not and was not intended to be a criminal provision.

Therefore it is the opinion of this department, upon the hypothesis which you submit, that a game protector or other public officer would not be liable to a prosecution under the penalties imposed in section 1454 G. C., 108 O. L. 577, by reason of having instituted a prosecution without the approval provided for in section 1444 G. C., 108 O. L. 577.

Respectfully,
JOHN G. PRICE,
Attorney-General.