

Sec. 12387. "In cases where a fine may be imposed in whole or part in punishment of an offense, or for a violation of an ordinance of a municipality, and such court or magistrate could order that such person stand committed to the jail of the county or municipality until the fine and the cost of prosecution are paid, the court or magistrate may order that such person stand committed to such work house until such fine and costs are paid, or until he is discharged therefrom by allowing a credit of one dollar and a half per day on the fine and costs for each day of confinement in the work house, or until he is otherwise legally discharged."

Sec. 13717. "When a fine is the whole or a part of a sentence, the court or magistrate may order that the person sentenced remain imprisoned in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs at the rate of one dollar and a half per day for each day's imprisonment."

Your attention is directed to Section 12387, supra, which in my opinion, was the section by which the defendant was committed to the work house rather than Section 13717, supra, to which you refer.

Answering your question specifically, it is my opinion that under either Section 12387 or Section 13717, General Code, a defendant committed to a work house until his fine and costs are paid is entitled to be discharged at any time by paying the balance of his fine and costs after receiving a credit of one dollar and a half for each day of confinement served. (See *Hamilton vs. State*, 78 O. S. 76.)

Respectfully,

EDWARD C. TURNER,
Attorney General.

1306.

JUSTICE OF THE PEACE—EXPIRATION OF OFFICE WHEN MUNICIPAL COURT IS ESTABLISHED—MANSFIELD MUNICIPAL COURT—ELECTION OR APPOINTMENT OF CONSTABLE.

SYLLABUS:

1. *Under the provisions of the act providing for the establishment of a municipal court for the city of Mansfield and Madison Township, Richland County, Ohio, (112 O. L., 323), a justice of the peace in said township, whose term of office has not expired when the municipal judge elected under said act qualifies and commences his term of office on January 1, 1928, will continue in office with jurisdiction in civil and criminal cases until the expiration of the term of such justice of the peace on December 31, 1929.*

2. *It appearing that no constable was elected in said township at the election held November 8, 1927, the board of trustees of the township is authorized to appoint a constable.*

COLUMBUS, OHIO, November 28, 1927.

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

GENTLEMEN:—This is to acknowledge receipt of your communication under date of November 16, 1927, in which you call my attention to certain provisions of an act passed at the recent session of the General Assembly establishing a municipal court in and for the City of Mansfield and Madison Township, Richland County, Ohio, (112 O. L. 323), and submitting for my opinion certain questions as follows:

Question 1. Will a justice of the peace whose term does not expire until January, 1930, continue to serve and have jurisdiction in civil and criminal cases?

Question 2. If the first question is answered in the affirmative, can a constable in Madison Township, Richland County, whose term expires January 1, 1928, continue to act as constable after the expiration of his term? If not, how may the justice proceed to get the services of a constable, no constable being elected at the November, 1927, election?"

On January 1, 1913, when the constitutional amendments adopted in September, 1912, went into effect, the office of justice of the peace ceased to be a constitutional office. Authority in the legislature to establish such office was, however, granted by the provisions of Section 1 of Article IV of the Constitution, which reads:

"The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law."

Pursuant to the authority of this constitutional provision, the legislature, on April 18, 1913, enacted what is now Section 1711-1 of the General Code, which, so far as pertinent to the consideration of the question submitted by you, provides in part as follows:

"That there be and is hereby established in each of the several townships in the several counties of the State of Ohio, except townships in which a court other than a mayor's court now exists or may hereafter be created having jurisdiction of all cases of which justices of the peace have or may have jurisdiction, the office of justice of the peace."

The act providing for the establishment of a municipal court in and for the City of Mansfield and Township of Madison, Richland County, Ohio, has been carried into the General Code as Sections 1579-978 to 1579-1030, inclusive. Section 1579-978 provides as follows:

"That there shall be, and hereby is, established in and for the city of Mansfield and Township of Madison, Richland County, Ohio, a municipal court, which shall be a court of record and shall be styled 'The municipal court of Mansfield Ohio,' hereinafter designated and referred to as the 'Municipal Court.'"

Section 1579-979, General Code, provides in part:

"Said municipal court shall be presided over by one judge, to be designated herein as the 'municipal judge,' whose office is hereby created and whose term of office shall be for a period of four (4) years."

Section 1579-982, General Code, provides that:

"The first election of the municipal judge shall be held at the time of the regular city and township elections of 1927 and the term of office of such municipal judge shall commence on the first day of January next after his election and he shall hold office until his successor is elected and qualified."

With respect to the civil jurisdiction of said court, Section 1579-983, so far as material to the consideration of the question at hand, provides:

"The municipal court shall have original civil jurisdiction within the limits of the City of Mansfield and Madison Township, in the following cases:

1. All actions and proceedings of which justices of the peace now have or may hereafter be given jurisdiction.

* * * * *

With respect to criminal jurisdiction, Section 1579-989, General Code, provides:

"The municipal court shall have jurisdiction of all misdemeanors committed within the Township of Madison, and all violations of city ordinances within the City of Mansfield, of which police courts in municipalities or justices of the peace now have, or may hereafter be given jurisdiction. In felonies the municipal court shall have the powers which police courts in municipalities and justices of the peace now have, or may hereafter be given."

Likewise, touching the jurisdiction and proceedings of said municipal court in criminal cases, Section 1579-993, General Code, provides:

"In all criminal cases and proceedings the practice and procedure and mode of bringing and conducting the prosecution for offenses, and the powers of the court in relation thereto, shall be the same as those which are now or may hereafter be possessed by police courts in municipalities or justices of the peace."

By the provisions of Section 1711-1, General Code, above quoted, the office of justice of the peace is established in each of the several townships in the several counties of the state, "except townships in which a court other than a mayor's court now exists or may hereafter be created having jurisdiction of all cases of which justices of the peace have or may have jurisdiction."

From the provisions of the act providing for the establishment of said municipal court, it appears that there now exists in said Madison Township, Richland County, Ohio, a court other than a mayor's court having jurisdiction of all cases of which justices of the peace have jurisdiction. So far, therefore, as the provisions of Section 1711-1, General Code, are concerned, the effect of the act providing for the establishment of said municipal court in and for the city of Mansfield, Madison Township, Richland County, Ohio, would be to abolish the offices of justices of the peace in said Madison township, irrespective of when their present terms of office may expire.

In this connection I note that a similar conclusion was reached by this department as to the effect of the provisions of Section 1711-1, General Code, with respect to an act passed in 1917 (107 O. L. p. 660), providing for the creation of a municipal court for the city of Alliance and townships of Lexington and Washington, in Stark County, Ohio. (Opinions of the Attorney General for 1918, Vol. 1, p. 302.)

It will be noted, however, that Sections 1579-1030 and 1579-1028, General Code, provide as follows:

Sec. 1579-1030: "Upon the qualification of the municipal judge, as provided in this act, the jurisdiction of the mayor of the said city of Mansfield and of all justices of the peace in said Madison township, whose term of office has expired, in all civil and criminal matters, shall cease, and no justice of the peace or constable shall thereafter be elected in said Madison township."

Sec. 1579-1028: "All proceedings, judgments, executions, dockets, papers, monies, property and persons subject to the jurisdiction of the mayor's court of the city of Mansfield and the courts of any justice of the peace for Madison township whose term of office has expired on taking effect of this act, shall be turned over to the municipal court herein created; and thereafter the cause shall proceed in the municipal court as if originally instituted therein, the parties making such amendments to their pleadings as required to conform to the rules of said courts."

At the time the act establishing said municipal court in the city of Mansfield and Madison township was passed, there were, as appears from the record in the office of the secretary of state, two duly elected and qualified justices of the peace. The term of office of one of these officers expires December 31, 1927, and that of the other December 31, 1929. The provisions of said Sections 1579-1030 and 1579-1028 were doubtless incorporated in said act and thereby enacted by the legislature in the light of these facts, and in my opinion evinces the intention of the legislature to permit the justice of the peace in said Madison township, whose term has not expired upon the qualification of the municipal judge elected under the act providing for said municipal court, to hold his office until the expiration of his term on December 31, 1929.

In the consideration of this question, I note the further provisions of said municipal court act, found in Section 1579-1027, General Code, which reads as follows:

"No justice of the peace in any township in Richland County or mayor of any village or city in said county shall have jurisdiction in any civil action or proceeding to issue any summons, order of attachment or garnishment, or other process directed against any person a resident of the city or township of Madison, except subpoena for witnesses and in proceedings to collect the judgments of said justices of the peace and mayors."

Though this section in terms refers to a "justice of the peace in any township in Richland County" and though the provisions of this section will be in full force and effect upon the qualification of the municipal judge elected under said municipal court act, nevertheless, reading the provisions of this section in connection with those of Sections 1579-1030 and 1579-1028, above quoted, I am constrained to the view that the provisions of said Section 1579-1027 have reference to justices of the peace in the townships of said county other than Madison township; and that there is nothing in the provisions of said Section 1579-1027 which affects the correctness of my conclusion that the justice of the peace of Madison township, whose term has not expired, upon the qualification of the municipal judge, elected under the act providing for said municipal court, will continue to hold his office until the expiration of his term with jurisdiction in civil and criminal cases.

With respect to your second question, it may be noted that Section 1579-1017 provides for the appointment of a bailiff by the judge of the municipal court established by this act and that said bailiff shall perform for the municipal court services similar to those usually performed by the sheriff of courts of common pleas and by constables of courts of justices of the peace. Obviously, however, the provisions of this section can have no application with respect to the question submitted by you with reference to the method to be adopted in procuring the services of a constable for the court of the justice of the peace who continues in office after the qualification of the municipal judge elected under this act. Section 8 of the General Code provides that a person holding an office of public trust "shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws." However, this statute only vouchsafes to an incumbent the right to remain in office until his successor is elected or appointed and qualified. *State ex rel.*

vs. *Baldwin*, 101 O. S. 65, 67. In this connection Section 3329, General Code, provides that when by death, removal, resignation or non-acceptance of the person elected, a vacancy occurs in the office of constable, or "when there is a failure to elect", the township trustees shall appoint a suitable person to fill such vacancy until the next biennial election for constable, and until a successor is elected and qualified.

By way of specific answer to your second question, therefore, I am of the opinion that such constable should be appointed by the trustees of the township as provided for in said Section 3329, General Code, although, of course, he cannot serve longer than December 31, 1929.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1307.

APPROVAL, BONDS OF THE VILLAGE OF PENINSULA, SUMMIT COUNTY—\$3,500.00.

COLUMBUS, OHIO, November 28, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

1308.

APPROVAL, BONDS OF BOLIVAR VILLAGE SCHOOL DISTRICT, TUSCARAWAS COUNTY, OHIO—\$69,000.00.

COLUMBUS, OHIO, November 28, 1927.

Retirement Board, State Teachers' Retirement System Columbus, Ohio.

1309.

RAPE—SECTIONS 12413, 12414, 12423-1 AND 13023, GENERAL CODE, DISCUSSED—RAPE OF STEP-DAUGHTER BY STEP-FATHER—INCEST—PROSECUTION FOR "SAME OFFENSE", DISCUSSED.

SYLLABUS:

1. A male person of fifty-five years of age who commits rape upon his step-daughter, aged thirteen years, if the act was committed forcibly and against the will of such female.