JUSTICE OF PEACE—ENTITLED TO ADVICE FROM PROSECUTING ATTORNEY ON MINISTERIAL MATTERS BUT NOT PROCEDURAL OR SUBSTANTIVE LAW.

## SYLLABUS:

- 1. Since justices of the peace are township officers by virtue of section 1711-1 of the General Code, the county prosecuting attorney is required by section 2917 to advise such officers upon matters pertaining to their ministerial functions.
- 2. Section 2917 of the General Code does not require the prosecuting attorney to advise justices of the peace upon questions of procedure and substantive law involved in cases before such justices, these matters being among the judicial functions of magistrates.

Columbus, Ohio, March 13, 1933.

HON. C. G. L. YEARICK, Prosecuting Attorney, Newark, Ohio.

DEAR SIR:—I have your letter of recent date which reads as follows:

"Is the prosecuting attorney required by law, as a part of his official duties, to advise justices of the peace as to matters of substantive law or procedure involved in cases tried, or to be tried, before such justices?

Sec. 2917 of the General Code provides, in substance, that the prosecuting attorney shall be the legal adviser for all township officers. The case of *State* vs. *Stafford*, 8 O. N. F. 470, contains, as one of the branches of its syllabus, the following quotation:

'Cases do not come within the line of duty of the prosecuting attorney unless the interest of the state is involved, or unless some statute specifically makes it his duty to act.'

The benefit of your opinion upon the foregoing question is earnestly requested."

Section 2917 of the General Code, in so far as it is material, provides:

"\* \* \* He (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 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." (Words in parenthesis the writer's.)

By its terms, section 2917 makes the prosecuting attorney "the legal adviser for all township officers." In order to ascertain who are "all township officers," it is necessary to consider other statutory provisions.

"All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively and construed together as though they constituted one act."

2 Lewis' Sutherland Statutory Construction, 2nd Ed., p. 844.

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Section 1711-1 provides:

"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 jurisdiction, powers and duties of said office, and the number of justices of the peace in each such township shall be the same as was provided by the laws in force on September 3rd, 1912. All laws and parts of laws in force on said date, in any manner regulating such powers and duties, fixing such jurisdiction or pertaining to such office or the incumbants thereof are hereby declared to be and remain in force until specifically amended or repealed, the same as if herein fully re-enacted."

This section contains the words "office of justice of the peace." In the case of *In re Hesse*, 93 O. S. 230, the court said at page 231:

"The office of justice of the peace on January 1, 1913, ceased to be a constitutional office. Acting under the authority conferred upon it by Section 1, Article IV of the Constitution, as amended in 1912, the general assembly, by an act filed in the office of the secretary of State April 30, 1913 (103 O. L., 214), established the office of justice of the peace in each of the several townships in the different counties of the state, excepting townships in which a court other than a mayor's court then existed or might thereafter be created having jurisdiction of all cases of which justices of the peace had or might have jurisdiction. The jurisdiction, powers and duties of the office under that act are the same as were provided by the laws in force on September 3, 1912 \* \* \*." (Italics the writer's.)

This language clearly shows that the court considered a justice of the peace to hold a township office. Likewise, in *State ex rel.* vs. *Redding*, 87 O. S. 388, both the syllabus and the opinion contain references to "the office of justice of the peace"; and in *State ex rel.* vs. *Morse*, 94 O. S. 435, justices are termed "officers." Similar language appears in an opinion of this office reported in Opinions of the Attorney General, 1925, page 755. Thus it is clear that a justice of the peace is a township officer.

In addition to his judicial duties, a justice of the peace performs ministerial functions. 35 C. J. 467. It is stated in 35 C. J. 475 that all acts of a justice which are of a clerical nature or similar to the official acts of a clerk of a court of record are ministerial. Since section 2917 makes no distinction between officers who perform only ministerial functions and judicial officers who perform certain ministerial functions in addition to their judicial duties, it is clear that prosecuting attorneys are required to advise justices of the peace upon acts which are purely ministerial.

The answer to your inquiry does not require an enumeration of ministerial duties, as distinguished from judicial duties, since questions of procedure and substantive law arising in cases pending before magistrates are clearly of a judicial nature: Must the prosecuting attorney advise justices as to their judicial duties? It is an incident to our system of trying lawsuits that the attorneys representing the respective litigants should present to the court the law applicable to the facts involved. The law applicable to questions of procedure as well as questions of

substantive law may arise in a case. There is no question but that a justice of the peace is precluded from delegating to other persons those judicial duties imposed upon him by statute. If he could require the prosecuting attorney to advise him upon questions of procedure and substantive law, I fear that in practical effect a situation dangerously close to delegation of judicial duties would be presented. Such a practice would seem to violate the spirit of the traditional mode of trial. All of the township officers for whom the prosecuting attorney is the legal adviser, except justices of the peace, perform only administrative functions. In addition to their judicial, justices of the peace perform ministerial functions. The evident purpose of the legislature in the enactment of section 2917 was that public officers should be advised as to the legality of their acts performed in a ministerial capacity. The duty of conducting the trial of cases is imposed upon magistrates and judges. The law prescribes rules and principles which of necessity they must apply, aided by oral arguments and briefs presented by counsel conducting the case. The existence of a legal adviser for a judge to give advice upon questions of law and procedure involved in cases would be an anomaly in our judicial system, and I am of the opinion that section 2917 does not impose such duty upon the prosecuting attorney.

In certain criminal cases, the prosecuting attorney appears before the justice of the peace as counsel. It could hardly be argued that the prosecuting attorney should give information to the justice, in his capacity of adviser, upon questions involved in a case in which he was representing the State as counsel. Such a situation would impose conflicting duties upon a prosecuting attorney and might easily result in gross unfairness to the defendant whose counsel, under the ethics of the profession, could discuss the case with the justice only in the presence of the prosecuting attorney.

Section 13422-3 gives justices jurisdiction within their respective counties over seventeen classes of criminal cases. One of these is the violation of any law in relation to the practice of medicine. Section 12694 makes the practice of medicine without a certificate a misdemeanor. Section 1295 provides that the prosecuting attorney shall prosecute violations of the laws relating to the practice of medicine. This is but one example where the prosecuting attorney might be called upon to advise a justice of the peace on questions of procedure and substantive law involved in a case wherein he was acting as prosecutor.

In view of the foregoing, I am of the opinion that:

- 1. Since justices of the peace are township officers by virtue of section 1711-1 of the General Code, the county prosecuting attorney is required by section 2917 to advise such officers upon matters pertaining to their ministerial functions.
- 2. Section 2917 of the General Code does not require the prosecuting attorney to advise justices of the peace upon questions of procedure and substantive law involved in cases before such justices, these matters being among the judicial functions of magistrates.

Respectfully,

JOHN W. BRICKER,

Attorney General.