

found in all cases, the determination of maturities, rate of interest, etc., is an essential part of the function of borrowing money and cannot be separated from it, so that the borrowing authority must determine this matter, and cannot delegate it to the purely executive officers who may be called upon to sign and deliver the bonds.

The second question submitted by the Commission is therefore answered in the negative, for the reason that the ordinance if properly drawn and legal, will show on its face the facts needed by the auditor in order to enable him to discharge his duty under section 5649-1b of the General Code.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3046.

TAXES AND TAXATION—DELINQUENT PERSONAL TAXES—AUTHORITY OF COUNTY TREASURER WITH RESPECT TO LEVYING UPON PERSONAL PROPERTY FOR PAYMENT OF SAID TAXES—PROCEDURE—WHEN PROSECUTING ATTORNEY MUST REPRESENT COUNTY TREASURER.

The county treasurer is without authority to require or direct the sheriff to levy upon goods for the payment of delinquent personal taxes.

The county treasurer by himself or deputy is authorized by section 2658 to seize personal property for the satisfaction of delinquent taxes charged on his duplicate, but may not delegate this power or impose this duty upon any other county officer.

In case he is unable to collect such taxes by distress, the county treasurer is authorized by section 2660 to obtain a rule to show cause, which upon becoming absolute, has the force and effect of a judgment upon which execution may be issued to the sheriff and levied as in other cases of judgments.

Or, the treasurer, without showing that he is unable to collect by distress, may bring a civil action in his own name under section 5697 G. C., and obtain a judgment upon which execution may be issued to the sheriff. In such event no exemptions are available to the judgment debtor.

COLUMBUS, OHIO, May 1, 1922.

HON. J. KENNETH WILLIAMSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Receipt is acknowledged of your recent letter requesting advice of this department as follows:

“The treasurer of this county has turned over certain delinquent tax statements to the sheriff of the county requesting that he levy upon goods for the payment of delinquent personal tax.

I know of no authority whereby the treasurer can do this. The only way I know that the treasurer can collect delinquent tax is in accordance with General Code, Section 2658, by distress, and in accordance with Section 5697, by civil action. Is there any authority whatsoever whereby the treasurer can delegate this to the sheriff of the county and is the prosecuting attorney required to bring this civil action for the treasurer in case the treasurer decides to proceed in accordance with G. C. 5697? If the treasurer decides to proceed according to G. C. 2658, who actually distrains the goods and chattels charged with such taxes? In other words, can the treasurer delegate this to any other officer?”

Section 2658 of the General Code, to which you refer, provides as follows:

"When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken the time and place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall not be less than ten days after the taking of the property, the treasurer shall sell it at public vendue or so much thereof as will pay such taxes and the costs."

Reference may also be made to section 2659 of the General Code, providing as follows:

"For making distress and sale for the payment of taxes, the treasurer shall be allowed the same fees as are allowed to constables for making levy and sale of property on execution. Traveling fees shall be computed from the seat of justice of the county to the place of making the distress."

Section 2834 relating to the duties of the sheriff, provides as follows:

"The sheriff shall execute every summons, order or other process, make return thereof as required by law and exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law."

No express statutory provision has been found authorizing or requiring the sheriff to collect delinquent taxes without process. His duty under the section just quoted is to execute and return process.

The treasurer is not authorized to issue process to the sheriff. Indeed, it does not appear that he has attempted to do so in the case about which you inquire, he having merely turned over the delinquent tax statements and requested the sheriff to levy. The delinquent tax statements do not even purport to be official process. The seizure authorized by section 2658 is analogous to the levy of execution process, but in this case the process is the tax duplicate in the hands of the treasurer. The delinquent tax statement is merely a memorandum of what appears on the face of that duplicate.

On the other hand, section 2658 authorizes the county treasurer, who is the official custodian of the duplicate and the collecting officer, to make the money involved in the collection by summary seizure. This authority runs to the treasurer and to him only. He can delegate the actual seizure of course to any person officially related to him as agent, such as a deputy, but he is not authorized to call upon the sheriff to act as his agent or deputy in the premises.

Accordingly, it is the opinion of this department that the sheriff is not authorized, much less required, to take any steps whatever by virtue of the action of the treasurer which you describe, and that the actual distress authorized under section 2658 G. C. must be made by the county treasurer or his deputy by virtue of the process which the treasurer officially holds in the shape of his tax duplicate. For making such distress, he is allowed by section 2659 the fees of a constable.

It would, however, be somewhat misleading to say that the sheriff cannot be called upon to exercise the power of his office in aid of the collection of taxes. The treasurer is not obliged in all cases to avail himself of the authority found in section 2658 of the General Code which has been considered. If he is unable to collect any personal taxes by this method, he may proceed under section 2660 of the General Code, which provides as follows:

"If the county treasurer is unable to collect by distress taxes assessed upon a person or corporation or an executor, administrator, guardian, receiver, accounting officer, agent or factor, he shall apply to the clerk of the court of common pleas in his county at any time after his semi-annual settlement with the county auditor, and the clerk shall cause notice to be served upon such corporation, executor, administrator, guardian, receiver, accounting officer, agent or factor, requiring him forthwith to show cause why he should not pay such taxes. If he fails to show sufficient cause, the court at the term to which such notice is returnable shall enter a rule against him for such payment and the costs of the proceedings, which rule shall have the same force and effect as a judgment at law and shall be enforced by attachment or execution or such process as the court directs."

The result of this proceeding is to put the county treasurer in respect of a claim for taxes in the situation of a judgment creditor. He may then cause execution to be issued to the sheriff, and may have attachment process in aid of such execution. Such execution may run against lands as well as goods, and indeed it would seem that the judgment for taxes under section 2660 would be a lien on any lands of the debtor situated in the county where it is obtained, or in any other county to which a transcript thereof may have been taken and might be satisfied out of such lands.

You also refer to section 5697 of the General Code which provides as follows:

"When personal taxes stand charged against a person, and are not paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of such unpaid taxes. * * *"

Section 5698 provides as follows:

"On the trial of the action provided in the next preceding section, if it is found, that such person is indebted, judgment shall be rendered in favor of the treasurer prosecuting the action as in other cases. The judgment debtor shall not be entitled to the benefit of the laws for stay of execution or exemption of homestead, or other property, from levy or sale on execution in the enforcement of such judgment."

The difference between this section and the one just considered (Section 2660) is that the treasurer is authorized to bring the action provided for in section 5697 in addition to any other remedy provided by law for the collection of personal taxes. It is not necessary in stating a cause of action under section 5697 to show that the treasurer is not able to collect the taxes by distress, as it is in establishing a rule to show cause under Section 2660. This is apparent from what has been quoted from Section 5697, but is made very clear from sentences which have been omitted from the quotation of that section. Nor for similar reasons would it be a defense to the action, brought under favor of section 5697 to show that the taxes might have been collected by distress.

The result of an action under section 5697 is, however, the same as that under section 2660, as above outlined, with this difference: a judgment debtor is not entitled to any exemptions, so that on execution process (issued in this case as in cases under section 2660 to the sheriff) any and all property of the judgment debtor is subject to be seized and sold. In this respect the sheriff has authority as broad as that of the treasurer when he is proceeding under section 2658 of the General

Code, for there are no exemptions of taxable property at any rate which may be asserted as against the treasurer's power to destrain.

Section 5671 of the General Code provides *inter alia* that

"all personal property subject to taxation shall be liable to be seized and sold for taxes."

These statements answer all the questions in your letter excepting the one respecting the duty of the prosecuting attorney to represent the county treasurer in actions brought under section 5697 of the General Code. When section 5697 was originally passed as section 2859 of the Revised Statutes, the treasurer was under the necessity of employing his own counsel. *State vs. Commissioners*, 26 O. S. 364. Whether he is under such necessity at the present time or not depends upon the interpretation and application to be given to section 2917 of the General Code subsequently enacted. It provides in part 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.

* * * *"

The exception mentioned by reference to section 2412 of the General Code is not applicable to the question which you submit, and it is the opinion of this department that by virtue of the second sentence of section 2917 above quoted, it is the duty of the prosecuting attorney to represent the treasurer in any civil action brought in the name of the treasurer under Section 5697 of the General Code.

Respectfully,

JOHN G. PRICE,
Attorney-General.

3047.

BOARD OF LIBRARY TRUSTEES—WHEN BOARD OF EDUCATION MAY
OR MAY NOT REFUSE TO MAKE LEVY FOR LIBRARY PURPOSES—
LIMITATIONS.

1. *The board of education is not required by section 7639 G. C. to make a tax levy sufficient to realize the amount of money certified to it by the board of library trustees, but it may in a proper case raise that amount by taxation if it can be done by a levy not exceeding one and one-half mills.*

2. *While the board of education may not arbitrarily refuse to levy a tax for library purposes when funds are needed, it has the power of finally deciding (1) the necessity for funds and (2) the amount that should be raised. And in making its decision the board should consider the certificate of the board of library trustees and treat it as making a prima facie case on both points.*

3. *The board of education, in the exercise of a sound discretion, may either increase or decrease the amount named in the certificate of the board of library trus-*