legislature to curb expenditures by restricting the power to levy taxes, it is believed it must be given a strict construction.

In the case of State ex rel vs. Zangerle, 95 O. S., page 1, it was held in the first branch of the syllabus:

> "In view of the legislative policy declared by the enactment of the so-called Smith one per cent. law (Sections 5649-2 to 5649-5b, General Code), the manifest purpose of which is to restrict the power of levying taxes and thus limit expenditure by administrative officers, statutes purporting to permit departures from that general policy and authorizing exemption therefrom will be strictly construed."

Considering all related sections of the statute and the case of State ex rel vs. Zangerle, supra, it is my opinion that in the event the county commissioners issue bonds under section 1223, and afterward submit the question of exempting all levies for interest and sinking fund purposes to the voters with favorable results, the levy under section 1222 is not wholly outside of all limitations.

Respectfully,
C. C. CRABBE,
Attorney-General.

1802.

APPROVAL, BONDS OF VILLAGE OF MINSTER, AUGLAIZE COUNTY, $30,000.00, TO EXTEND, ENLARGE AND IMPROVE THE ELECTRIC LIGHT PLANT.

COLUMBUS, OHIO, September 27, 1924.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

1803.

COUNSEL APPOINTED FOR INDIGENT PRISONER—SECTIONS 13617 AND 13618 G. C. CONSTRUED.

SYLLABUS:

1. *Under the provisions of sections* 13617 *and* 13618 *G. C., when a number of indictments for felonies other than murder in first and second degree and manslaughter have been found against the same defendant and he is tried upon one indictment, and the others nollied, the counsel may receive, subject to the approval of the court and the allowance by the commissioners, the maximum fee of fifty dollars on each indictment.*

2. *When two defendants are jointly indicted for a felony other than murder*

in first and second degree and manslaughter and tried together and one attorney is appointed to defend both, he may receive, subject to the approval of the court and the allowance by the commissioners, the maximum fee of fifty dollars for each defendant.

3. *Where two attorneys are appointed to defend one defendant in a felony other than murder in first and second degree and manslaughter, section* 13618 *G. C. limits the amount that may be paid to both attorneys to fifty dollars.*

COLUMBUS, OHIO, September 29, 1924.

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

Gentlemen:—

Acknowledgment is hereby made of your recent communication, which reads:

"Under the provisions of sections 13617 and 13618 G. C., authorizing the appointment of attorneys to defend indigent prisoners and to pay certain compensation to such attorneys out of the county treasury, we desire to submit the following question with reference to the allowance of fees to such attorneys in felonies other than murder in the first and second degree and manslaughter.

Question 1. In such cases, when a number of indictments have been found against the same defendant and he is tried upon one indictment and the others nollied, may such attorney receive a maximum fee of fifty dollars on each indictment?

Question 2. When two defendants are jointly indicted and tried together and one attorney is appointed to defend both, may he receive the maximum fee of fifty dollars for each defendant, or only fifty dollars for both?

Question 3. Where two attorneys are appointed to defend one defendant, may each attorney receive the maximum fee of fifty dollars, or does section 13618 limit the amount that may be paid to both attorneys to fifty dollars?"

The assignment of counsel for indigent prisoners and the payment of compensation of said counsel has been the subject of frequent legislation in this state. At all times since the passage of the act of March 7, 1831, directing the mode of trial in criminal cases, (S. & C. 1181), the courts of this state have had authority and were required to assign counsel for persons indicted in such court, if the accused persons had not the ability to procure counsel. This provision is contained in section 14 of the act named; but the act does not in any of its sections provide for or authorize compensation for services rendered under such appointment.

It was the practice, under the above statute, or one of like import, in force for many years, to allow a compensation to the counsel so assigned to defend indigent prisoners. The claims for compensation were presented to the county auditor, who without further authority, drew orders for their payment out of the county treasury.

A statute was then passed, March 4, 1844, providing that it should be unlawful for the county auditor to issue his warrant for such counsel fees until they had been examined and allowed by the county commissioners. (1 S. & C. 94).

The acts of March 7, 1831, and March 4, 1844, remained in force until March 14, 1862, when the act of that date, to amend section 14 of the act of March 7, 1831, was passed (59 Ohio Laws, 26). By this act section 14 of the act of 1831 was amended by adding to the original section the following:

"Provided such counsel shall receive no compensation to be paid out of either the county or state treasury."

Section 3 of the act repealed section 14 of the original act, and the proviso contained in section 14 as amended, being in direct conflict with the provisions of the act of March 4, 1844, in accordance with the well settled rules of construction, repealed that act also.

The act of February 1, 1866 (S. & C. 612), to amend section 14 of the act of March 7, 1831, as amended by the act of March 24, 1862, amends that section by adding thereto the following:

"And it shall not be lawful for the county auditor of any county in this state to audit or allow any account, bill, or claim hereafter presented by an attorney or counsellor at law for services performed under the provisions of this section, until said account, bill, or claim, shall have been examined and allowed by the county commissioners of the proper county, and the amount so allowed for such services certified by said commissioners; provided that no such account, bill or claim shall, in any case, exceed one hundred dollars."

Section 2 of this act repeals section 14 of the act of March 7, 1831, as amended by the act of March 24, 1862.

Section 104 of the code of criminal procedure, 66 Ohio Laws 303, re-enacts, substantially, section 14 of the act of March 7, 1831, and by the 4th clause of section 225 repeals that act; and by the 37th clause of the same section repeals the first clause of section 14, in section 1 of the act to amend section 14 of the act of March 7, 1831, passed February 1, 1866, so that when the code of criminal procedure took effect, to-wit, August 1, 1869, the courts of this state were authorized and required by section 104 of the code to assign counsel to defend indigent persons indicted in such courts; and under the clause of the act of February 1, 1866, not repealed by the 37th clause of section 225, of the code, the claims of attorneys for defending such prisoners not exceeding in any case one hundred dollars, were authorized to be paid out of the county treasury on the allowance of the commissioners and their certificate of the amount of the claim so allowed.

On the 5th of January, 1871, 68 Ohio Laws, 3, section 104 of the code of criminal precedure was so amended, as to make an "opportunity had for receiving" a copy of an indictment by a defendant equivalent to service of a copy of the indictment upon him, and the original section repealed; and on the 3rd of March, 1875, 72 Ohio Laws, 46, the act of April 18, 1870, was repealed and a substitute therefor enacted which authorized courts to assign counsel for indigent persons indicted for capital offenses or offenses punishable by imprisonment in the penitentiary for life, and prohibited the county auditor from auditing or allowing any claim of any attorney at law for services rendered under the act until such claim had been examined and allowed by the county commissioners and the amount certified by them. And it also provided that no such account, bill or claim should in any case of homicide exceed one hundred dollars; and provided further, no such account, bill or claim should in any other case exceed fifty dollars.

Section 7245, Revised Statutes, enacted in 1880, amended the act of 1875 and provided as follows:

Section 7245. (Court may assign counsel to indigent prisoner). "After a copy of the indictment has been served, or opportunity had for receiving the same, as provided in the preceding section, the accused shall be brought

into court, and if he is without counsel, and unable to employ any, the court shall assign him counsel, not exceeding two, who shall have access to the accused at all reasonable hours; but such counsel shall not be a partner of the attorney having charge of the prosecution, in the practice of law, and no partner of the attorney having charge of the prosecution shall be employed by or conduct the defense of any person prosecuted as aforesaid."

Section 7246, Revised Statutes, as amended 91 O. L., page 62, provided as follows:

Section 7246. (Payment of counsel assigned in cases of felony). "Counsel so assigned in any case of felony shall be paid for their services by the county, and may receive therefore, in any case of murder in the first or second degree such compensation as the court approves, in any case of manslaughter not exceeding one hundred dollars, and in any other case of felony not exceeding fifty dollars; but the auditor shall not draw an order on the treasurer for the payment of any such counsel until his account for such services has been presented to and allowed by the commissioners.'

Sections 7245 and 7246 were carried without change into the General Code, as sections 13617 and 13618 respectively.

The original enactment for the assignment of counsel for indigent prisoners, made no provision for compensation; later enactments expressly prohibited the payment of compensation in such cases. Subsequent statutes removed this prohibition, but confined the compensation to certain classes of felony, and required the claim for compensation to be first examined and allowed by the county commissioners.

It is evident that the entire trend of this legislation was to control and limit the compensation paid as fees for defending indigent prisoners.

In the case of Commissioners of Geauga County vs. Ranney et al. 13 O. S., 388, the court used this language:

"Now we think, we have a right to take notice of this existing state of things, of that which the legislature may have regarded as an abuse. There had a practice prevailed for courts to allow and certify, and county auditors to pay, as a part of the ordinary expenses attending the administration of justice, fees to the attorneys assigned to indigent prisoners. This practice explains the title of the act 'to regulate the fees of attorneys and counsellors,' and shows that the object was to restrain the courts in the allowance of fees to the counsel assigned to defend prisoners, or to transfer the allowance of said fees from the courts to the county commissioners upon the supposition, undoubtedly, that its exercise by the latter would prove less burdensome to the county."

The constitutional inhibition is:

"No money shall be drawn from any county or township treasury, except by authority of law."

Ohio Constitution, Art. X, Sec. 5.

Sections 13617 and 13618 G. C. read in part as follows:

Sec. 13617. " * * * the court shall assign him counsel, not exceeding two, * * *."

Sec. 13618. "Counsel so assigned in any case of felony shall be paid for their services by the county, and may receive therefore, in any case of murder in the first or secend degree such compensation as the court approves, in any case of manslaughter not exceeding one hundred dollars, and in any other case of felony not exceeding fifty dollars; * * *."

Your questions will be considered in reverse order. The third question is as to whether two counsel so appointed to defend one defendant, may each receive the maximum fee of fifty dollars, or whether both are limited to said amount.

Counsel is defined by Funk and Wagnall's Dictionary as:

"A lawyer engaged to give advice or act as an advocate; used as singular or plural."

Webster's Dictionary defines counsel as:

"One professionally engaged in the trial or management of a cause in court; also collectively, the legal advocates united in the management of a case."

It is evident that the term counsel may refer to one, or two or more. How did the legislature use the term?

That part of section 13618 G. C. directly involved in the question is:

"Counsel so assigned in any case of felony shall be paid for their services by the county, * * * , in any other case of felony not exceeding fifty dollars, * * *."

or, further eliminating, it reads:

"Counsel so assigned, * * *, shall be paid for their services, * * * not exceeding fifty dollars, * * *."

As before stated the term counsel may apply to one or more, and it seems, in this section, an express limitation is placed upon the compensation of the two assigned counsel, "for their services."

This construction is strengthened by the consideration of the constitutional inhibition herein mentioned, and by the fact that the entire trend of the previous legislation pertaining hereto is toward the strict limitation and control of said compensation.

In your second question you ask:

"When two defendants are jointly indicted and tried together and one attorney is appointed to defend both, may he receive the maximum fee of fifty dollars for each defendant, or only fifty dollars for both?"

While two defendants may be jointly indicted and tried together; yet, there are really two separate cases, and the assignment of counsel is to each defendant.

There are two defendants; two arraignments, though simultaneous, and there may be two separate and distinct dispositions of the indictment as to the two defendants.

The New York statute is similar to ours, except as to maximum compensation.

In the case of People vs. McElvaney, 73 N. Y., Supplement, page 639, the court used the following language:

> "It is contended * * * that this statute must be strictly construed as tending to increase the taxpayers' admittedly onerous burdens, and as 'an innovation upon the common law.' I find on examination that the common practice has been, where more than one defendant has been thus accused * * * in the same indictment, to make a separate allowance to the counsel, whether one or more, for each defendant, even though the aggregate exceed five hundred dollars. Thus in the supreme court, in People vs. Deegan and Gibson, jointly indicted, allowances were made to the one counsel assigned to the defense of the two defendants of five hundred and two hundred and fifty dollars, respectively, and other similar instances might be cited. * * *. The arraignment is several, even if not separate in point of time. * * * The interests and the defense of the two defendants thus jointly indicted are seldom, if ever, identical, and thus double labor is cast upon counsel so assigned, for which, in fairness, he ought to be compensated."

The conclusion, therefore, is that the counsel appointed to defend two defendants jointly indicted, and tried together, may receive the maximum compensation for each defendant, subject, however, to the provision that said claim for compensation must be first approved by the court, and allowed by the county commissioners.

Your third question, (after quoting the substance of sections 13617 and 13618, General Code,) is:

> "In such cases, when a number of indictments have been found against the same defendant and he is tried upon one indictment and the other nollied, may such attorney receive the maximum fee of fifty dollars on each indictment?"

Section 13618 G. C. reads in part as follows:

> "Counsel so assigned * * * shall be paid for their services by the county, and may receive therefor, * * * such compensation as the court approves; * * * , not exceeding fifty dollars."

Said section further provides that said compensation must also be "allowed by the commissioners thereof."

It is evident that while the statute prescribes the maximum, it does not fix the amount of compensation, this being the duty of the court and the commissioners.

It will be noted that the compensation is to be paid counsel for "their services." A considerable amount of service in a case may be performed before an indictment is nollied; in fact many indictments are nollied as the result of the diligent service of counsel.

Although it is possible, under the statute, for counsel to receive the maximum compensation for service performed before the indictment is nollied; yet the compensation is subject to the approval of the court and the allowance of the commissioners, who are presumed to pay counsel what their services in each case are reasonably worth, subject to the maximum limitation.

Summarizing:

1. Under the provisions of sections 13617 and 13618 G. C., when a number of indictments for felonies other than murder in first and second degree and man-

slaughter have been found against the same defendant and he is tried upon one indictment, and the others nollied, the counsel may receive, subject to the approval of the court and the allowance by the commissioners, the maximum fee of fifty dollars on each indictment.

2. When two defendants are jointly indicted for a felony other than murder in first and second degree and manslaughter and tried together and one attorney is appointed to defend both, he may receive, subject to the approval of the court and the allowance by the commissioners, the maximum fee of fifty dollars for each defendant.

3. Where two attorneys are appointed to defend one defendant in a felony other than murder in first and second degree and manslaughter, section 13618 G. C. limits the amount that may be paid to both attorneys to fifty dollars.

Respectfully,
C. C. CRABBE,
Attorney General.

1804.

APPROVAL, BONDS OF VILLAGE OF GARFIELD HEIGHTS, CUYAHOGA COUNTY, $56,476.00, FOR CERTAIN IMPROVEMENTS.

COLUMBUS, OHIO, September 29, 1924.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

1805.

DISAPPROVAL, BONDS OF HARTFORD TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, $2,900.00.

COLUMBUS, OHIO, September 29, 1924.

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

Re: Bonds of Hartford Township Rural School District, Trumbull County, $2,900.00.

Gentlemen:—

I have examined the transcript submitted in connection with the above bond issue and find that I cannot approve the same for the full amount of $2,900.00.

These bonds are issued by the board of education of the school district under the provisions of sections 7629 and 7630 G. C. Section 7629 G. C. as amended in 109 O. L., page 252, provides as follows:

> "The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes, for such purposes, levied or to be levied, from time to time, as occa-