

language of Section 6602-32, I am inclined to think that the board of county commissioners would be justified in taking the position that the terms and conditions upon which the State may connect with this water supply, shall be the payment of \$2,000.00 in cash, regardless of the fact that the county may owe the State a greater sum. I take this view especially on account of the fact that the property owners within the district are, under the law, entitled to have this money appropriated to their district fund. It follows, therefore, that this is not a case for an application of the principle of set-off.

It is, accordingly, my opinion that when the State desires to contract with a board of county commissioners for water supply from water supply lines serving a county sewer and water district, for a State institution lying outside of such district, the board of county commissioners may require that moneys received for such service be paid in cash notwithstanding the fact that the county may owe the State a greater amount.

Regarding your second question, I am advised that no objection is being raised by the village of Brecksville, to the State connecting with the mains within the village in the event the assessment is paid by the State. In view of my opinion upon your first question, it is, therefore, unnecessary to further comment upon your second question.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3406.

LEGAL COUNSEL—EMPLOYED UNDER SECTION 2412, GENERAL CODE, TO REPRESENT COUNTY TREASURER IN ACTION TO ENJOIN COLLECTION OF TAXES—NO PORTION OF SUCH COUNSEL'S COMPENSATION CHARGEABLE TO STATE OR POLITICAL SUBDIVISIONS OF COUNTY.

SYLLABUS:

No part of the compensation allowed by the county commissioners and paid out of the county treasury to legal counsel employed under the provisions of Section 2412, General Code, to defend the county treasurer in an action to enjoin the collection of taxes, may be charged back to the state or to any political subdivision or subdivisions of the county.

COLUMBUS, OHIO, July 6, 1931.

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

GENTLEMEN: This is to acknowledge receipt of your recent communication which reads as follows:

"You are respectfully requested to furnish this department your written opinion upon the following:

When under the provisions of section 2412, General Code, an attorney is employed to defend the county treasurer in an action to enjoin the collection of certain taxes, may the amount of the compensation of such attorney be apportioned ratably by the county auditor among all of the

parties entitled to share in the revenue collected as the result of such action and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties the state itself as well as the county, townships, cities, villages, school districts and organizations entitled thereto, in accordance with the provisions of section 5700 of the General Code."

Section 5700, General Code, which is referred to in your communication, provides:

"When an action has been commenced against the county treasurer, county auditor, or other county officer, for performing or attempting to perform, a duty authorized or directed by statute for the collection of the public revenue, such treasurer, auditor, or other officer, shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending the action. The amount of damages and costs adjudged against him, with the fees, expenses, damages, and costs shall be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected, and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties, the state itself, as well as the counties, townships, cities, villages, school districts, and organizations entitled thereto."

At the time the provisions of section 5700 General Code, were enacted in substantially their present form as a part of the act of April 5, 1859, providing for the assessment and taxation of property in this state (56 O. L. 175, 200), and for many years thereafter, there were no statutory provisions requiring the prosecuting attorney or other legal officer of the county to represent the county auditor, the county treasurer or other county officer in actions against such officers involving the assessment and collection of taxes. Nevertheless, by reason of statutory provisions which were later carried into section 5848, Revised Statutes (secs. 12075, et seq., General Code), if not otherwise, such county officers were liable to be sued in actions of this kind. The fact that such county officers were liable to suit gave them implied authority when sued to employ counsel to conduct their defense in actions against them. The manifest purpose of the statutory provisions now found in section 5700, General Code, was to provide for the reimbursement out of the county treasury of the reasonable counsel fees and other expenses incurred by any such county officer in an action brought against him for performing or attempting to perform a duty imposed upon him by law relating to the collection of the public revenue, and to charge back against the state as well as against the county and other political subdivisions therein, their respective ratable shares of such costs and expense

The duties of the prosecuting attorney of the county, as defined by section 1274, Revised Stat., in his relation to other county officers, were formerly of an advisory nature only. On March 31, 1906, 98 O. L. 160, an act was passed by the legislature providing in effect that the prosecuting attorney, in addition to his duties as the legal adviser of the county commissioners and all other county officers, should prosecute and defend all suits and actions in which such county commissioners or other county officers might be parties, and that no county officer should have authority to employ any other counsel or attorney at law. As thus amended, section 1274, Revised Statutes, was carried into the General Code as section 2917 thereof. This section of the General Code now reads 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. He 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."

It seems clear from the provisions of section 2917, General Code, above quoted, that it is no longer possible for the county auditor, county treasurer or other county officer to employ counsel other than the prosecuting attorney or an attorney especially appointed under the provisions of section 2412, General Code, to represent him in an action filed against him involving the collection of taxes so as to require the reimbursement to such officer of counsel fees under the authority and in the manner provided by the provisions of section 5700, General Code, above quoted. See *State ex rel. Hunt vs. Board of County Commissioners*, 8 N. P. (N. S.) 281, 284.

However, your question is one which calls more particularly for a consideration of the provisions of section 2412, General Code. This section was carried into the General Code from section 845 of the Revised Statutes which provided generally for the powers, duties and liabilities of the commissioners of a county. This section of the Revised Statutes provided that the commissioners were authorized and empowered in all suits brought by or against them in their official capacity and relating to any of the duties required by law to be performed by them, to employ counsel, not exceeding two, to prosecute or defend in any such case or cases, and to allow and pay such counsel, out of the county treasury, reasonable fees for such services performed by them not exceeding the sum of two hundred and fifty dollars in any one case. By an act passed by the legislature under date of April 22, 1904, 97 O. L. 304, section 845, Revised Statutes, was amended so as to provide, among other things, that whenever the board of county commissioners of any county deemed it advisable, it might employ a legal counsel and necessary assistants, upon such terms as it might deem for the best interest of the county; that such counsel should be the legal adviser of the board of county commissioners and the board of control, where there was such board, and of all other county officers and boards; and that any of such officers or boards might require of such legal counsel written opinions or instructions in any matters connected with their official duties. Said section of the General Code, as amended in the act above referred to, further provided that the legal counsel so employed by the board of county commissioners should prosecute and defend all suits and actions in which any county officers or boards might be a party. By said section of the Revised Statutes as so amended, it was further provided that the board of county commissioners should fix the compensation of all the persons appointed or employed under the provisions of said section, which compensation, together with their reasonable expenses, should be paid out of the county treasury upon the allowance of the board of county commissioners.

The provisions of section 845, Revised Statutes, were later amended in some particulars by an act of the legislature under date of May 9, 1908 (99 O. L. 338), and, as amended, said provisions were held to be unconstitutional as in contraven-

tion of section 2, article X of the constitution of this state, which provides that all county officers shall be elected by the electors thereof. *State of Ohio ex rel. vs. Cannon*, 12 C. C. (N. S.) 103; 80 O. S. 756.

As above noted, some of the provisions of section 845, Revised Statutes, were carried into the General Code as section 2412. This section of the General Code now reads as follows:

"If it deems it for the best interests of the county, the common pleas court, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board of county commissioners to employ legal counsel temporarily to assist the prosecuting attorney, the board of county commissioners or any other county board or officer, in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such county board or officer is a party or has an interest, in its official capacity.

Section 2413, General Code, provides, among other things, that the board of county commissioners shall fix the compensation of all persons appointed or employed under the provisions of section 2412, General Code, which compensation, with their reasonable expenses, shall be paid from the county treasury upon the allowance of the board of county commissioners.

Looking to the provisions of sections 2412 and 2413, General Code, it appears that the compensation of legal counsel employed under section 2412, General Code, to assist the prosecuting attorney, the board of county commissioners or any other county board or officer in the prosecution or defense of any action or proceeding in which such county board or officer is a party, is to be paid out of the county treasury upon the allowance of the board of county commissioners, and that no provision is made in said sections for charging back to the state or to any political subdivision in the county any part of the compensation of legal counsel so paid. And, in this connection, it should be observed that the county would not be authorized to charge back to the state or to political subdivisions of the county any part of the compensation of legal counsel so allowed and paid under the provisions of said sections, without express statutory authority therefor. See *State, ex rel. v. Cappeller*, 39 O. S. 207.

Inasmuch as the conditions upon which the provisions of section 5700, General Code, above quoted, formerly operated, namely the authorized employment of legal counsel by the county treasurer, county auditor or other county officer in actions involving the collection of the public revenue, no longer exist and since there is no provision in sections 2412 and 2413 or elsewhere in the General Code authorizing the county to charge back to the state or to any political subdivision in the county any part of the compensation paid to legal counsel employed under the authority of section 2412, General Code, I am of the opinion, by way of specific answer to the question presented in your communication, that said question should be answered in the negative.

Respectfully,
GILBERT BETTMAN,
Attorney General.