

shall be issued to pay the corporation's share of an improvement "and if such determination be included in the resolution, then the issuance or authorization of issuance of both the assessment bonds and the bonds for the corporation's portion may be included in a single ordinance and such ordinance need not be published." This section clearly refers to bond ordinances, which include both special assessment bonds and bonds to cover the corporation's cost of said improvements. There is no authority in Section 3815, General Code, for the proposition that where bonds are issued to cover the corporation's cost of the improvements separately, and not in conjunction with the ordinance to issue special assessment bonds, publication may be dispensed with.

For the foregoing reasons, I am compelled to advise you not to purchase the above issue of bonds.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

1174.

#### BOARDS OF EDUCATION—EMPLOYMENT OF ATTORNEY, DISCUSSED.

##### SYLLABUS:

1. *A board of education of a county school district, a rural school district or a village school district may employ an attorney only in cases in which the prosecuting attorney refuses to act, or is not required to act as provided in Section 4761 of the General Code, or in which there is litigation between the board of education of such school district and the county or a county officer.*

2. *A board of education of a city school district may employ an attorney only in cases in which there is a conflict of interests between the city and the city school district, or in cases where the city solicitor refuses to act.*

COLUMBUS, OHIO, October 19, 1927.

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

GENTLEMEN:—Permit me to acknowledge receipt of your request for my opinion as follows:

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

Section 4761 of the General Code makes the prosecuting attorney of the county the legal adviser and attorney for boards of education other than in city districts. Section 2917, G. C., provides that the prosecuting attorney shall be the legal adviser of county commissioners and boards of trustees of townships and Section 2917-1, G. C., makes him the legal adviser of boards of elections. Section 2918, G. C., provides that nothing in the preceding two sections shall prevent a school board from employing counsel to represent it and that said counsel when so employed shall be paid by such board from the school funds.

Question 1: May a board of education of a village or rural school district employ attorneys to represent it?

Question 2: May a county board of education employ attorneys to represent it?"

Also your supplemental request, which reads as follows:

"In our letter of October 6th, addressed to you, we requested your opinion as to the authority of a board of education of a village or rural school district and of a county board of education to employ attorneys. Will you kindly add to this letter the additional question as to whether the board of education of a city school district may legally employ attorneys other than the city solicitor?"

Section 4761 of the General Code reads as follows:

"Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. In city school districts, the city solicitor shall be the legal adviser and attorney for the board of education thereof, and shall perform the same services for such board as herein required of the prosecuting attorney for other boards of education of the county."

This section was formerly Section 3977 of the Revised Statutes, and was last amended in 97 Ohio Laws. This section requires the prosecuting attorney to be the legal adviser of all boards of education "of the county in which he is serving", except the boards of education of city school districts. It also requires him to be "the legal counsel of such boards \* \* \* in all civil actions brought by or against them" and provides that he "shall conduct such actions in his official capacity." It further provides that he shall be relieved from the latter requirement when there are civil actions "between two or more boards of education in the same county."

The latter part of the section places all of the above duties, as they relate to city boards of education, upon the city solicitor.

Consideration must also be given to the provisions of Section 2918 of the General Code, the pertinent part of which reads as follows:

"Nothing in the preceding two sections shall prevent a school board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund, \* \* \*"

This provision was originally a part of Section 1274 of the Revised Statutes, which section also included the provisions of present Section 2917 of the General Code. Section 1274, Revised Statutes, was originally enacted on March 31, 1906 (98 v. 160), and reads as follows:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and any and all of them may require of him written opinions or instructions in any matters connected with their official duties; he shall also perform all duties and services as are required to be performed by legal counsel under Section 845 and he shall further be the legal ad-

viser for all township officers, and no county or township officer shall have authority to employ any other counsel or attorney at law; at the expense of the county, except on the order of the county commissioners or township trustees according as the services engaged are to be rendered for a county or township board or officer, duly entered upon its journal, in which order the compensation to be paid for legal services shall be fixed; *but this section shall not be construed to affect the provisions of Sections 1271 and 7196 nor to prevent any board of township trustees or any school board from employing counsel to represent them; and such counsel, if employed by the township trustees, shall be paid from the township fund, and if employed by the school board, shall be paid from the school fund.*"

(Italics the writer's.)

The Codifying Commission of 1910 divided this section, numbering the Sections 2917 and 2918, giving to Section 1273 Revised Statutes, General Code section number 2916. Section 2917-1, General Code, was not enacted until May 27, 1915 (106 v. 452), and it is, therefore, obvious that the language "the preceding two sections" as used in Section 2918, supra, refers to Sections 2916 and 2917, and not to sections 2917 and 2917-1.

It is unnecessary to quote herein Section 2916. Section 2917, General Code, 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."

The question presented is as to whether or not that provision of Section 2918, General Code, is in conflict with the provisions of Section 4761, General Code, and repugnant thereto, or whether the provisions of said sections can be harmonized. If the provision of Section 2918 is irreconcilable and can not be harmonized with the provisions of Section 4761 of the General Code, then the provisions of Section 4761 are amended thereby, for the reason that Section 2918 is a later act of the General Assembly.

It is a well recognized principle of law, however, that repeals by implication are not favored and not to be countenanced unless the sections are so repugnant and irreconcilable that they can not be harmonized.

I am of the opinion that said provisions can be harmonized. As recognized by the legislature in Section 4761, supra, there may be cases in which the prosecuting attorney or city solicitor can not or is not required to represent the boards of education of which he is made the legal adviser and counsel; and in any such case if the board of education is involved in litigation it would be necessary for it to have an attorney to represent it.

Section 1274 of the Revised Statutes previous to its amendment in 98 Ohio Laws, supra, read as follows:

"The prosecuting attorney shall be the legal adviser of the county commissioners and other county officers, and any of them may require of him written opinions or instructions in any matters connected with their official duties; and for these services the county commissioners shall, annually, at their December session, make him such allowance as they think proper; but this section shall not apply to any county having a county solicitor."

While boards of education are not mentioned in said section, it is probable that there had been some contention that this section would prevent boards of education from employing attorneys even in cases where the prosecuting attorney would not or could not act for said board, and therefore the legislature amended said section by stating that nothing in Sections 1271 or 7196, Revised Statutes, relating to the appointment of assistant prosecuting attorneys and counsel to assist the prosecuting attorney, or in that section should be construed to prevent a board of education from employing counsel.

Section 4761, General Code, makes it the duty of the prosecuting attorney and the city solicitor to be the counsel for the boards of education except in certain instances. In such cases where those officers are required to act, there is no necessity for any board of education employing an attorney. If, however, the county prosecutor or the city solicitor, as the case may be, is not required to act, as set forth in said Section 4761, or he refuses to act, then it would become necessary for the board of education to employ counsel; and Section 2918, supra, provides that nothing in Section 2917 or Section 2916 shall be construed to prevent them from employing an attorney in such case.

This interpretation gives full force and effect to all the provisions of both Section 2918 and Section 4761. It is my opinion that it is the proper construction to be placed upon these sections, and that such was the intention of the legislature when the provision of Section 2918 was enacted.

An examination of the opinions of this department upon this subject discloses that this question has not heretofore been specifically passed upon. All questions heretofore answered were in cases in which the prosecuting attorney or city solicitor could not act for the board of education, and in all such cases the opinions of this department held that the board of education could employ legal counsel. Whether or not they could do so under an other circumstances has not heretofore been considered.

In the case of *State ex rel. vs. Commissioners*, 8 O. N. P. (N. S.) 281, the court held:

"In the absence of any statutory provision either express or implied, other persons can not be legally employed and paid out of the public treasury to perform the duties of an officer provided by law, unless such officer refuses to act or becomes adversely interested."

The opinion in this case was rendered by Judge Hunt, of the Court of Common Pleas of Hamilton county, and another opinion rendered by him on a similar question is found in the case of *Caldwell vs. Marvin*, 8 O. N. P. (N. S.) 387, in which he held that when the city solicitor refused to represent the board of education "there was an implied right to employ counsel". In the opinion at page 390, he said as follows:

"It is claimed in this case that no valid contract could have been made by any board of education for services of attorneys in a *quo warranto* proceeding. The city solicitor, under Section 3977, was the legally constituted attorney or legal counsel of the board, and until he refused or failed to act,

no additional legal counsel could be employed. When, however, he elected to act for the *de facto* board, and not for the board *de jure*, other counsel was necessary. The ordinary and necessary method of conducting a legal proceeding is with the assistance of legal counsel. If the right of a board of education to exercise some single power was challenged in a *quo warranto* proceeding there would be no question of the implied right to employ counsel in the absence of legally constituted counsel, or upon the failure or refusal of such counsel to act."

The case of *Bettman vs. Board of Education*, 17 O. N. P. (N. S.) 439, is also in point. The syllabus in said case reads as follows:

"When the legally constituted counsel of a public board refuses to resist an action in which the board is vitally interested and special counsel are employed to make the necessary defense, the board, rather than its members in their individual capacity, will be held liable for the fees of such counsel, particularly where no bad faith is shown and the members of the board serve without compensation."

From this discussion it would seem clear that a board of education of a village or rural school district may not employ an attorney to represent it unless the prosecuting attorney is not required by law so to do or he is disqualified by some special interest to represent it, or unless he refuses to act. The prosecutor's first duty is to the county. If the litigation is between a board of education of the county or two boards of education, he is not required to represent the board of education. Likewise the city solicitor's first duty is to the city.

This then leads us to a consideration of the duty of the prosecuting attorney to the county board of education. It is well recognized that the members of a county board of education are not county officers, but the provisions of Section 4761, General Code, are broad. It provides that the prosecuting attorney shall be the legal adviser of "all boards of education of the county in which he is serving" and that he shall be the legal counsel of "such boards" in all civil actions brought by or against them. The county board of education is a "board of education of the county." Former opinions of this department hold that the prosecuting attorney by virtue of this section is the legal adviser of the boards of education of the rural and village school districts. The only exception made in the statute is that he shall not be the legal adviser or counsel of a city school district. Therefore, Section 4761 places a mandatory duty upon the prosecuting attorney to be the legal adviser of and to represent the county board of education.

Section 2917, *supra*, is also broad enough to include the county board of education. The language of that section is that nothing in the sections of the statute mentioned therein shall prevent "a school board from employing counsel."

Whether or not this section would authorize a county board of education to employ counsel was considered by this department in an opinion reported in the Opinions of the Attorney General, 1915, Volume I, p. 664, in which opinion it was held that a board of education of a county school district had no authority to employ counsel other than the prosecuting attorney. This conclusion was reached because of the requirement of Section 2918, General Code, that when an attorney other than the prosecuting attorney was employed by the school board the services should be paid for "from the school fund," and the county board of education had no such fund from which to pay for said services. The next to the last paragraph of said opinion reads as follows:

"The authority of the local board, in the case above referred to, to employ counsel other than the prosecuting attorney to represent it, provided it has sufficient funds in its treasury available for such purpose, is clear, but the county school district has no school fund within the meaning of Section 2918, G. C., out of which counsel, other than the prosecuting attorney, might be paid by the county board of education for services rendered to said board, and there is no authority in law to create such fund."

At that time Section 4744-2 of the General Code read as follows:

"On or before the first day of August of each year the county board of education shall certify to the county auditor the number of teachers to be employed for the ensuing year in the various rural and village school districts within the county school district, and also the number of district superintendents employed and their compensation and the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county and district superintendents."

It will be noted that said section as then enacted provided only for funds with which to pay the salaries of the county and district superintendents.

Since the above mentioned opinion was rendered said section was amended (109 v. 243) to read as follows:

Sec. 4744-2. "On or before the first day of August of each year the county board of education shall certify to the county auditor the number of teachers to be employed for the ensuing year in the various rural and village school districts within the county school district, and also the number of assistant county superintendents employed and their compensation and the compensation of the county superintendent for the time appointed; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county superintendent and assistant county superintendents and of the local expense of the normal school in each county, and the contingent expenses of the county board of education."

It will be seen that "contingent expenses" was added to the provisions of said section.

Section 4744-3, General Code, requires the auditor to retain such amounts. It provides as follows:

"The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and assistant county superintendents *and for contingent expenses*, as may be certified by the county board. Such amount shall be placed in a separate fund to be known as the 'county board of education fund.' The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the salaries of the county and assistant county superintendents of such county school district for the next six months. Upon receipt by the state auditor of such certificate, he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, which shall be placed by the county auditor in the county board of education fund."

This makes it possible for the board of education of the county school district to make provisions for the contingency of employing legal counsel in proper cases.

Therefore, the reasoning of the former opinion of this department is no longer applicable because provision has been made for funds from which such expenses might be paid. See Opinions of Attorney General, 1917, Volume I, p. 270.

It is therefore my opinion that

(1) A board of education of a county school district, a rural school district or a village school district may employ an attorney only in cases in which the prosecuting attorney refuses to act, or is not required to act as provided in Section 4761 of the General Code, or in which there is litigation between the board of education of such school district and the county or a county officer.

(2) A board of education of a city school district may employ an attorney only in cases in which there is a conflict of interests between the city and the city school district, or in cases where the city solicitor refuses to act.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

1175.

TAXATION—EXEMPTION OF INSTITUTIONS “USED EXCLUSIVELY FOR CHARITABLE PURPOSES”, DISCUSSED—SECTION 2, ARTICLE XII, OHIO CONSTITUTION AND SECTION 5328, GENERAL CODE, DISCUSSED.

SYLLABUS:

1. *The provision in Section 2, Article XII of the Constitution that institutions “used exclusively for charitable purposes \* \* \* may, by general laws be exempted from taxation,” does not authorize the General Assembly to exempt from taxation the property of benevolent organizations not used exclusively for charitable purposes.*

2. *Section 5328, General Code, passed pursuant to the requirement of Section 2, Article XII of the Constitution, requires that, “all real or personal property in this state \* \* \* shall be subject to taxation, except only such property as may be expressly exempted therefrom.” The exemption must be clearly and expressly stated in the statute and must be such only as the above section of the Constitution authorizes to be exempted.*

COLUMBUS, OHIO, October 20, 1927.

HON. W. P. TUCKER, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

“Lodge No. 43, F. & A. M. of West Union, Ohio, owns its own Lodge Home, the same of course being real estate.

The Lodge has permitted the tax on same to run, forfeited, under the belief that such property is not subject to taxation.

I have a certificate from the Auditor of State, to foreclose the tax lien on said property.

The Members of said Lodge say that they will rely on your opinion of the matter.

Hence I am submitting the matter to you.”