

In support of the text above quoted a large number of cases are cited, of which the following cases in point are noted: *Bates and Gould Company vs. Payne*, 194 U. S. 106; *State ex rel. vs. Keefer, et al.* 3 O. A. 426, 431; *U. S. vs. Fletcher, etc., Trust Company*, 197 Ind. 527, 535; *Belknap vs. Benton Township*, 169 Mich., 59, 64.

The principle of law noted by the authorities above cited is clearly applicable in the consideration of the question presented in your communication, and I am of the opinion that in the case here presented the determination of the State Highway Commissioner, as to the number of miles of public roads in the county here in question, is conclusive with respect to the annual salary paid to the county surveyor on such determination by the State Highway Commissioner, and no recovery can be had against such county surveyor for annual salary paid to him upon such determination in excess of that represented by the actual mileage of public roads in the county, unless fraudulent conduct upon the part of the State Highway Commissioner or the county surveyor can be shown. As the first question is stated in your communication, therefore, the same is answered in the negative.

In the consideration of your second question, it is to be observed that the conclusion reached in this opinion with respect to your first question is predicated on the assumption that the computation made by the county surveyor, and the finding made by the State Highway Commissioner as to the miles of public roads in the county here in question, were made in good faith by said officials and in the honest belief that the figures arrived at represented the public road mileage in said county as nearly as the same could be ascertained. A determination of such mileage by the State Highway Commissioner, under the provisions of Section 7181-1, General Code, that was not in accord with the known facts as to the number of miles of public roads in the county, would have been fraudulent and the same would not have afforded any legal basis for the payment of salary to the county surveyor in excess of that payable on the actual mileage of public roads in the county. Inasmuch as it is now known that the computation made by the county surveyor and the finding of fact made by the State Highway Commissioner, with respect to the number of miles of public roads in the county, was incorrect, such determination so made by the State Highway Commissioner should no longer continue in the files of the county auditor as the basis for the salary of the county surveyor. Although the finding made by the State Highway Commissioner, under authority of said section of the General Code, had the effect of legalizing salary payments made to the county surveyor, pursuant to such finding, the same would afford no justification for the payment of salary in excess of that now known to be due and payable on the basis of the actual mileage of public roads in the county. I am of the opinion, therefore, that your second question should be answered in the affirmative.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

144.

PROSECUTING ATTORNEY—DUTY TO CONDUCT ACTION TO QUIET  
TITLE FOR RURAL BOARD OF EDUCATION—WHEN NECESSARY.

*SYLLABUS:*

*It is the duty of a prosecuting attorney, in his official capacity, to institute and conduct actions to quiet title to school property for a rural board of education within his country, when it becomes necessary to do so in order to render said property marketable.*

COLUMBUS, OHIO, March 4, 1929.

HON. J. FRANK POLLOCK, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion as follows:

“A rural board of education in this county has centralized its schools and is now desirous of selling two school sites. They advertised the same for sale and received bids far below the actual value of the property, because of various clouds on the title of the property. They believe that it will be of great advantage to them to have an action brought to quiet title and have requested the prosecutor to bring such an action. I am asking your opinion as to whether Section 4761 of the General Code contemplates service of this nature? If such services are not contemplated by the above section, would it be proper for the prosecuting attorney to bring such an action and charge the board for his service in quieting the title?”

The only authority I have been able to find on this subject is two opinions of the Attorney General, to wit: *Op. Atty. Gen (1923)*, p. 598 and *Op. Atty. Gen. No. 3903, Dec. 22, 1926*.

These opinions refer to abstracts of title, which may have some bearing upon the above question.”

Section 4761, General Code, provides 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.”

The syllabus of the 1923 opinion referred to in your inquiry reads as follows:

“In view of a former opinion of this department in which Sections 4761 and 4762, G. C., are considered, and the conclusion reached that while the city solicitor is the legal adviser and attorney of the city board of education he is not obligated to prepare abstracts of title of property for such board, such city board of education could legally compensate a person holding the office of city solicitor for his services in preparing an abstract of title.”

The 1926 opinion referred to by you simply holds that there is no authority for a city board of education to contribute a part of the city solicitor's salary for services rendered to them by said city solicitor in his official capacity. It refers to the 1923 opinion and says that when the solicitor performs work for the board of education which is no part of his duties in his official capacity, he may be compensated therefor. It is pertinent in this connection to refer to General Code, Section 2918, which provides in part:

"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."

The "two preceding sections", referred to in the above section, means, as I take it, Sections 2916 and 2917 of the General Code. Section 2916, General Code, sets forth the powers and duties of prosecuting attorneys, and Section 2917 provides that the prosecuting attorney shall be the legal adviser of the county and township officers, except that township officers may employ other counsel "on the order of the township trustees fully entered upon their journal." This section was supplemented by Section 2917-1, General Code, which simply provides that the prosecuting attorney shall be the legal adviser of certain election officials. The language of the portion of Section 2918, General Code, above quoted, permits any board of education to employ counsel to represent it, provided such counsel so employed is paid by such board of education from the school fund. By that language an exception is made to the rule laid down, that the prosecuting attorney shall represent all officials. However, it is necessary to look further to determine when and under what circumstances a board of education is authorized to employ an attorney other than the prosecuting attorney.

The several sections of the Code above noted have been under consideration by former attorneys general in a number of opinions. It will be noted that the language with reference to a city solicitor in cities and a prosecuting attorney in counties is very similar. It will also be noted that the language of Section 4761, General Code, with reference to the prosecuting attorney, wherein it says "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" is plain, and to the point, and an examination of the several previous opinions of this department will disclose that under no circumstances is a village or rural board of education authorized to employ any counsel other than the prosecuting attorney, or a city board of education to employ other counsel than the city solicitor, to conduct actions in court unless there is a conflict of interest, and thus a conflict of duty on the part of the prosecutor or the city solicitor, as the case may be, and the prosecutor or solicitor refuses to act as counsel for the board of education but chooses to act for the other party.

This often happens in city school districts where the controversy is between the city and the school district, and in rural and village school districts where the controversy is between two such districts, or between one district and the county as such, or the county school district. In those cases the prosecutor or solicitor is authorized to choose which of the parties he represents and of course the other party may employ other counsel.

In an opinion of the Attorney General, found in the Annual Report of the Attorney General for 1912, at page 487, it is said:

"Section 4761, General Code, beyond dispute, makes the city solicitor the legal adviser of city school districts. Also, by provision of Section 4761, the prosecuting attorney is made the legal adviser of all school boards within the county with the single exception of boards of education which are engaged in civil actions with one another."

Again, in the Annual Report of the Attorney General for 1912, at page 1771, it is said:

"In a controversy between a board of education of a city school district and the city, the solicitor is at liberty to choose which of the two parties he

will represent regardless of a resolution of council ordering him to represent the city."

In Opinions of the Attorney General for 1915, at page 664, it is held:

"The board of education of a county school district has no authority in law to employ counsel other than prosecuting attorney of the county."

And again, in Opinions of the Attorney General for 1915, page 1911, it is held:

"It is the duty of prosecuting attorneys to prepare bond issues and transcripts for boards of education of which they are legal advisers."

The opinion of the Attorney General for 1923 referred to above, with which I concur, is based on the fact that the preparation of an abstract of title to real estate is neither the giving of legal advice nor the conducting of a case in court. The preparation of abstracts of title is a business by itself, aside from strictly legal business. It furnishes the facts and the basis for the preparation of a legal opinion with reference to the title which it purports to abstract and contains the facts from which a legal opinion may be formulated, but does not in and of itself, consist of the doing of the things which Section 4761, General Code, requires prosecuting attorneys or city solicitors as public officials, to do. It is not, in my opinion in any way analogous to the conducting of a civil action brought by or against a board of education, which by the terms of Section 4761, a prosecuting attorney and a city solicitor are specifically enjoined to do.

I am therefore of the opinion that it is the duty of a prosecuting attorney, in his official capacity, to institute and conduct actions to quiet title to school property for a rural board of education within his county, when it becomes necessary to do so, in order to render said property marketable.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

145.

DEPUTY COUNTY SURVEYOR—EMPLOYMENT WHEN NOT PERFORMING PUBLIC DUTIES—CONDITIONS.

SYLLABUS:

*A deputy county surveyor may lawfully accept employment from a city, corporation or person during hours when he is not required to be on duty for the county, provided said services are in nowise inconsistent with the duties of his office.*

COLUMBUS, OHIO, March 4, 1929.

HON. DANIEL P. BINNING, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 14, 1929, which is as follows:

"The deputy county surveyor of this county has an opportunity to do some work for the city of Coshocton, during hours which he is not employed by the city.