

matters required, that its statements are true, that the name proposed is appropriate, that the limits of the proposed corporation are accurately described and are not unreasonably large or small, that the map or plat is accurate, that the persons whose names are subscribed to the petition are electors residing on the territory, that notice has been given as required, that there is the requisite population for the proposed corporation, and "if it seems to the commissioners right that the prayer of the petition be granted, they shall cause an order to be entered on their journal to the effect that the corporation may be organized."

It will be observed from the foregoing, that the commissioners, in proceedings of this kind, are granted considerable discretion in that they are to grant the prayer of the petition only if it seems to them to be right that it should be granted, and the same rule would apply to proceedings for annexation instituted by force of Section 3548, General Code, as Section 3549 specifically says that the duties of the county commissioners in the one case shall be the same as in the other.

In the case of *Bring, et al. v. Hollis, et al.*, 4 O. A. 45, it was held by the Court of Appeals with reference to proceedings had under and by force of Sections 3516 et seq., General Code, for the incorporation of a village, that:

"An order of a board of commissioners in such proceedings, dismissing the petition is not, therefore, subject to review upon petition in error."
See also *Shipbaugh v. Kimble*, 7 N. P. (N. S.) 514.

It clearly follows, from the foregoing, that the county commissioners are vested with a certain discretion in granting the prayer of the petition filed for the annexation of territory to a city under and by force of Section 3548, General Code.

In specific answer to your questions, I am of the opinion:

1. Where a petition has been filed for the annexation of territory to a city, under and by force of Section 3548, General Code, signers thereto may withdraw their names at any time before official action is taken on said petition.

2. It is not mandatory upon a board of county commissioners to grant the prayer of a petition filed by favor of Section 3548, General Code, for the annexation of territory to a municipality. The commissioners, in such case, are vested with the discretion to determine whether or not the granting of the prayer of said petition seems right. Section 3549 and 3522, General Code.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3837.

DISTRICT BOARD OF HEALTH—AUTHORITY TO EMPLOY ATTORNEY
WHERE PROSECUTING ATTORNEY REFUSES TO ACT IN LITIGATION
BETWEEN BOARD AND COUNTY COMMISSIONERS—COUNSEL
PAID FROM GENERAL HEALTH DISTRICT FUND.

SYLLABUS:

1. *In the event of litigation between a district board of health of a general health district and a board of county commissioners of the county constituting all or a major part of such district, and the prosecuting attorney of such county elects*

to represent the board of county commissioners, such district board of health has implied power to employ legal counsel for such litigation.

2. Such counsel may be paid from any unappropriated funds in the general health district fund as are other expenses of the district board of health, in accordance with the provisions of Section 1261-38, General Code.

COLUMBUS, OHIO, December 10, 1931.

HON. H. G. SOUTHARD, M. D., *Director of Health, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“I have been requested by the health commissioner of one of our general health districts to obtain an opinion from your department on the following matter.

It has become necessary for a general district board of health to bring a civil action against the board of county commissioners because of refusal of said commissioners to make certain sanitary improvements in the plumbing at the County Home. The prosecuting attorney, as the legal representative of both the district board of health and of the county commissioners, has elected to represent the county commissioners in this action.

The board of health is interested in knowing what authority it has under the law to employ an attorney to file and prosecute such action against the county commissioners, and, if there is such authority, how and from what funds shall the attorney be paid.

I shall be very glad to have an opinion from you replying to these questions.”

The establishment of general health districts and the appointment of district boards of health to administer such districts are provided for in Sections 1261-16 and 1261-17, General Code. Section 1261-37, General Code, provides that the prosecuting attorney of a county constituting all or the major part of a health district shall act as the legal adviser of such district board of health, in the following language:

“In general health districts the prosecuting attorney of the county constituting all or a major part of such district shall act as the legal adviser (adviser) of the district board of health. In a proceeding in which the board of health of any general health district is a party the prosecuting attorney of the county in which such proceeding is instituted shall act as the legal representative of the district board of health.”

Sections 2917 and 2412 are next pertinent to consider in connection with your inquiry. These sections provide as follows:

Sec. 2917.

“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."

Sec. 2412.

"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."

An opinion of my predecessor appearing in Opinions of the Attorney General for 1928, Vol. I, p. 633, held as set forth in the syllabus:

"Where the prosecuting attorney of a county, acting as attorney for the board of county commissioners in a road appeal case, makes an unauthorized settlement of such case, which is carried into judgment, and where the prosecuting attorney refuses to represent the board of county commissioners in an action or proceeding which said board desires to institute for the purpose of setting aside or vacating such judgment, and refuses to cooperate with said board in securing authority to employ other counsel under the provisions of Section 2412, General Code, such board of county commissioners has implied power and authority to employ counsel other than the prosecuting attorney for the purpose of instituting and maintaining a proper action or proceeding to vacate or set aside said judgment."

The foregoing opinion to the effect that in case the prosecuting attorney refuses to represent the board of county commissioners, such board has implied power to employ counsel other than the prosecuting attorney to represent it in an action, was predicated upon the case of *State, ex rel. v. Board of County Commissioners of Hamilton County*, 8 N. P. (N. S.) 281, and *Board of Education, by Alfred Bettman, City Solicitor, et al. v. Board of Education, et al.*, 17 N. P. (N. S.) 439, which last mentioned case was affirmed by the Court of Appeals in the case of *Board of Education of the School District of Cincinnati v. Board of Education, et al.*, 22 O. C. C. (N. S.) 439. In the case of *State, ex rel. v. Board of County Commissioners of Hamilton County*, supra, the court in its opinion said:

"Public officials, such as county commissioners, have no power except such as is expressly given or necessarily implied from the powers expressly given. Where they are given the power to sue or to be sued,

or required to sue in their official capacity, inasmuch as in so doing legal counsel is ordinarily if not always necessary, by necessary implication they have the right to be represented by legal counsel and have a right to pay such counsel from any funds not otherwise appropriated, from which they are authorized to pay the general expenses of their administration, in the same manner and subject to the same conditions as such general expenses are paid.

Where, however, an officer is provided by law and charged with specific duties, to-wit, duties of legal counsel for which he is paid from public funds, it is clearly well settled that in the absence of express authority so to do other persons cannot under any implied powers be paid from public funds for performing such duties. The reason for such limitation of the implied power of employment would not exist in cases where the legal counsel so provided by law *refused to act, or became adversely interested*, and such limitation, the reason therefor failing, would not be applicable to such cases."

At the time of the decision of this case, the provisions of Sections 2917 and 2412, *supra*, were substantially contained in Sections 1274 and 845, Revised Statutes. As pointed out in the opinion of my predecessor, *supra*, when Section 1274, Revised Statutes, was carried into the General Code as Section 2917, a change was effected so that Section 2917, General Code, now provides that "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." Commenting upon this express provision of Section 2917, General Code, my predecessor said:

"However, I am unable to see how the express provision now found in the provisions of Section 2917, General Code, with respect to the employment of attorneys other than the prosecuting attorney adds anything to the implied prohibition found by the courts in the provisions of Section 1274, Revised Statutes, read in connection with those of Section 845, Revised Statutes. We have seen that, consistent with the implied prohibition against the employment of such other counsel, gathered from the provisions of Sections 1274 and 845, Revised Statutes, the view has been clearly expressed by said courts considering said provisions of the Revised Statutes that notwithstanding this implied prohibition, the board of county commissioners would be authorized to employ other counsel to represent it in an action in which such board might be a party, where the prosecuting attorney refused to do so."

I concur in these views, and since in principle the opinion is directly applicable to the question you present, it is dispositive of your inquiry.

With respect to the matter of the fund from which the attorney may be paid, Section 1261-38, General Code, referring to the health fund of a general health district, provides that "Expenses of the district board of health of a general health district shall be paid on the warrant of the county auditor issued on vouchers approved by the district board of health and signed by the district health commissioner." Under authority of the case of *State, ex rel. v. Board of County Commissioners of Hamilton County*, *supra*, holding that such counsel may be paid from any funds not otherwise appropriated from which general expenses of administration are paid, it follows that the expenses of employing an attorney

under the circumstances you present should be paid out of the general health district fund as are other expenses of the board, in accordance with Section 1261-38, General Code.

In specific answer to your questions, therefore, it is my opinion that:

1. In the event of litigation between a district board of health of a general health district and a board of county commissioners of the county constituting all or a major part of such district, and the prosecuting attorney of such county elects to represent the board of county commissioners, such district board of health has implied power to employ legal counsel for such litigation.

2. Such counsel may be paid from any unappropriated funds in the general health district fund as are other expenses of the district board of health, in accordance with the provisions of Section 1261-38, General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3838.

APPROVAL, BONDS OF ROSS COUNTY, OHIO—\$20,000.00.

COLUMBUS, OHIO, December 10, 1931.

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

3839.

APPROVAL, LEASE FOR RIGHT TO TAKE WATER FROM OHIO CANAL SOUTH OF THE CITY OF CLEVELAND, OHIO, FOR PURPOSE OF OPERATING MILLS AND PLANT OF COMPANY—THE AMERICAN STEEL AND WIRE COMPANY.

COLUMBUS, OHIO, December 10, 1931.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your communication to me under date of December 5, 1931, in which you submit for my examination and approval a certain lease in triplicate executed by you as superintendent of public works and as director of said department, by which there is leased and demised to The American Steel and Wire Company, a corporation, a portion of the northern division of the Ohio Canal between Station 777 and Station 72+85.6 of G. F. Silliman's survey of the Ohio Canal south of the city of Cleveland, Ohio, together with the right of The American Steel and Wire Company to take from the portion of the canal so leased, such amount of surplus water therein as may be needed by said company for power and other purposes in the operation of the mills and plant of the company which are located on lands contiguous to the canal.

The lease of the canal lands between the points above designated is for a term of fifteen years, commencing on the first day of May, 1932, with an option