

1123.

APPROVAL, BONDS OF THE CITY OF KENMORE, SUMMIT COUNTY,
OHIO—\$6,615.00.

COLUMBUS, OHIO, October 8, 1927.

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

1124.

APPROVAL, 4 GAME REFUGE LEASES.

COLUMBUS, OHIO, October 8, 1927.

Department of Agriculture, Division of Fish and Game, Columbus, Ohio.

GENTLEMEN:—I have your letter of recent date in which you enclose the following Game Refuge Leases, in duplicate, for my approval:

<i>No.</i>	<i>Name</i>	<i>County</i>	<i>Township</i>	<i>Acres</i>
994	Adam Bach, et al.....	Monroe	Summit	80
1014	The Whitsit Realty Co.....	Franklin	Perry	8.59
1047	Luther B. Yapple.....	Ross	Scioto	423
1053	Howard Miller.....	Coshocton	Tuscarawas	325

I have examined said Leases, find them correct as to form, and I am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1125.

COUNTY TREASURER—LEGAL COUNSEL IS PROSECUTING ATTORNEY.

SYLLABUS:

By virtue of the provisions of Section 2917, General Code, the prosecuting attorney is the legal adviser of the county treasurer, and it is the duty of the prosecuting attorney to represent the county treasurer and to prosecute all suits and actions which the county treasurer may direct or to which he is a party.

By virtue of the provisions of Section 3003, General Code, the prosecuting attorney may not be employed by a county officer and receive extra compensation for services required to be performed by him as such prosecuting attorney.

COLUMBUS, OHIO, October 10, 1927.

HON. MERVIN DAY, *Prosecuting Attorney, Paulding, Ohio.*

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

“A certain Life Insurance Company holding various farm mortgages in Paulding County has brought several mortgage foreclosure proceedings, seeking to foreclose their respective mortgages on farm lands located in Paulding County. There are delinquent taxes on these lands and I think in all cases the taxes have been certified delinquent, but have not been delinquent for a period of four years, at least the County Treasurer has not yet been ordered to foreclose for delinquent taxes.

The plaintiff Life Insurance Company has chosen to make our County Treasurer a party defendant with the usual averment that he set up his claim or be barred.

We have filed or are filing answers and cross-petitions on behalf of the County Treasurer at his request.

Section 5700 of the General Code of Ohio seems to be authority for authorizing the County Treasurer to employ counsel where he has been sued and there is a decision in the case of *State vs. Stafford*, 8 N. P. 470, 11 D., 720, holding that the Prosecuting Attorney may be employed.

We wish to have your opinion as to whether you think it would be legal for the County Treasurer of Paulding County to pay the Prosecuting Attorney of Paulding County a reasonable compensation as and for attorney fees in these cases.

It might not have any bearing on the legality of this, but bear in mind that the monthly salary of the Prosecuting Attorney of Paulding County is \$87.50 and the duties are various and burdensome here.

I would thank you for an opinion on this and if your opinion should be adverse to the payment of an attorney fee in these cases we shall probably forego trying to collect them.”

Section 5700 of the General Code of Ohio reads as follows:

“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.”

This section was formerly Section 2862, Revised Statutes, which was the same in so far as the matter under consideration is concerned, as Section 5700, General Code.

It will be observed that this is a reimbursement statute, and does not authorize the commissioners to employ counsel nor require their approval of an employment made by a treasurer or auditor.

In an opinion found in Opinions of the Attorney General, 1913, Vol. II, at page 1710, in construing Section 5700, it is stated that:

“Of course, quite an argument might be made as to the effect of Section 2862 R. S., now 5700, being in force during all of said time, and whether it was or was not repealed by implication to a very large extent, at least by the amendment of Section 1274, supra, but it is not thought to be necessary, as the provisions of that amendment and the intention of the legislature in making them are believed to be too plain to call for explanation.”

Section 1274, Revised Statutes, as amended March 31 1906, and found in 98 Ohio Laws, page 160, was carried into the General Code as Section 2917 and 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 2412. 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.”

In an opinion found in Opinions of the Attorney General, 1914, Vol. II, page 1264, it is stated that:

“From a reading of Section 2917 which was passed after Section 5700, it is clear that it is primarily the duty of the prosecuting attorney of your county to defend the county auditor and county treasurer in the suits referred to, but if he deems it for the best interest of the county, he may request the county commissioners to appoint counsel to assist him in these cases, and the commissioners may employ such counsel by virtue of Section 2412. The prosecuting attorney himself may not receive any additional compensation for such services.”

You call attention to the case of *State ex rel. vs. Stafford*, found in 8 N. P. 470. 11 Dec., page 720, holding that the prosecuting attorney may be employed by the county commissioners. This was a case involving the question of the right of the board of county commissioners, county auditor and county treasurer to employ the prosecuting attorney in his individual capacity, to defend them in suits brought against them in any action which affected the public interest, and in suits brought against public officials in their official capacity, for attempting to perform such duties enjoined upon them by virtue of their office, and also the right of the prosecuting attorney of the county to be paid ten per cent of the amount collected on forfeited recognizances, where the sum did not exceed one hundred dollars in any one case. This case was decided in the common pleas court of Clark County in 1901, and involved

the construction of Sections 1274, 845 and 2862, Revised Statutes of Ohio. The court held there was nothing in the statutes at that time to prohibit the prosecuting attorney being so employed and receiving compensation therefor.

As before stated herein, Section 2862, Revised Statutes, was carried into the General Code as Section 5700. Section 1274, Revised Statutes, was amended March 31, 1906, 98 Ohio Laws, 160, and was carried into the General Code as Section 2917 and as was stated in an opinion, Opinions of the Attorney General for 1913, Vol. II, page 1710, Section 2862, Revised Statutes, was to a very large extent repealed by the amendment of Section 1274 in 1906.

Mower, judge, in the opinion in *State ex rel. vs. Stafford*, supra, stated:

“The prosecuting attorney is allowed by the laws of the state from the public funds for the services he is required to perform:

- (1) By way of salary.
- (2) By the way of percentage.
- (3) By way of allowance.

* * * Public duties for which he is to be recompensed are to be found in the foregoing sections and following ones, and the court is unable to find anywhere in the statutes any law that makes it the duty of the prosecuting attorney to prosecute in the county any civil action for or against the board of county commissioners or county officers, such as are set forth in the several causes of action in the petition.

It seems, therefore, to resolve itself finally to this question,—whether the statute makes it the duty of the prosecuting attorney to be the legal adviser of the county commissioners and the other county officers, and to give them written opinions, and whether it also becomes his duty to prosecute all the suits and causes of action in which they become entangled?”

Section 1274, Revised Statutes, as amended, 98 Ohio Laws, page 160, 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 adviser for all township officers, and no county or township officer shall have authority to employ any other counsel or attorney at law.
* * *”

Section 1297, Revised Statutes, as amended 98 Ohio Laws, page 160, reads as follows:

“The prosecuting attorney shall receive an annual salary, not exceeding the sum hereinafter mentioned in each county of the state; * * *. such salary shall be in full and in lieu of all compensation consisting of salaries and fees heretofore paid to prosecuting attorneys for their services as such, and in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether the same relates to either criminal or civil matters.”

These sections were amended in 1906, five years after the decision in the case of *State ex rel. vs. Stafford*, supra. As before stated, Section 1274, Revised Statutes, was carried into the General Code as Section 2917 and Section 1297, Revised Statutes,

was carried into the General Code as Section 3003. Said Section 3003, General Code, fixes the salary of the prosecuting attorney and provides that:

“Such salary shall be paid in equal monthly installments from the general fund and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters.”

Section 2917 of the General Code provides that the prosecuting attorney 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 2412.

Section 2412, General Code, 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.”

As the former sections of the statute under which the court in the case of *State ex rel. vs. Stafford*, held that the prosecuting attorney could be employed and compensated by county officials have been expressly or by implication repealed and there being no statute authorizing such employment by county officers of the prosecuting attorney, it seems evident that there is no authority for so employing and compensating said prosecuting attorney. On the other hand, Section 2917, General Code, expressly makes it the duty of the prosecuting attorney to prosecute and defend all suits and actions in which any county officer or board is a party, and Section 3003, General Code, expressly provides that the salary named therein shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters.

I am therefore of the opinion as expressed by my predecessor, Opinions of the Attorney General, 1914, Vol. II, page 1264, that the prosecuting attorney may not be employed by a county officer and receive extra compensation for services required to be performed by him as such prosecuting attorney.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1126.

OHIO BOARD OF CLEMENCY—AUTHORITY TO TERMINATE “FIRST SENTENCE” AFTER SERVICE OF MINIMUM TERM AND PERMIT PRISONER TO BEGIN “SECOND SENTENCE”—“RUBENSTEIN LAW” DISCUSSED.

SYLLABUS:

1. Sections 2174 and 2175, General Code, do not apply to that class of prisoners in the Ohio Penitentiary, who, prior to July 21, 1925, the effective date of the so-called