

It has been suggested for consideration in this connection that the effect of the subsequent legislation abolishing the state board of health, was to create two vacancies in the state board of embalming examiners, and by reason thereof the governor would be justified in filling the vacancies so created by appointment. I am unable to accept this suggestion for the reason that, in my judgment, the repeal of the laws creating the old state board of health had the effect of creating a state board of embalming examiners of three members, rather than that of creating a vacancy in the board as originally constituted; and even if the subsequent legislation had the effect suggested, there is no law which confers upon the governor the power of filling the vacancy so created,—the power of the governor with respect to filling vacancies, so far as the embalming examiners act is concerned, being confined to vacancies caused by death, resignation or removal from office for causes specified in section 1337 G. C., and there being no general statute on the subject of vacancies which is applicable to the present situation.

You are therefore advised that, in my opinion, the opinion of the former Attorney-General hereinabove referred to correctly interprets the statutory laws of this state governing the state board of embalming examiners.

Respectfully,

JOHN G. PRICE,
Attorney-General.

2096.

TAXES AND TAXATION—COUNTY TREASURERS HAVE AUTHORITY TO COLLECT DELINQUENT PERSONAL TAXES—DUTY OF PROSECUTING ATTORNEY TO ADVISE TREASURER—NO AUTHORITY FOR EMPLOYMENT OF PERSONS TO BRING SUIT FOR COLLECTION OF SAID TAXES—WHEN COLLECTORS MAY BE EMPLOYED BY TREASURERS TO ASSIST IN COLLECTION OF DELINQUENT PERSONAL TAXES.

1. *Ample authority of law is conferred upon county treasurers for the collection of delinquent personal taxes, by the provisions of sections 5694, 5695, 2658, 5697 and 5698 of the General Code, and in the prosecution of suits for the collection of said taxes, it is the duty of the prosecuting attorney to render legal advice to such treasurer, when so requested.*

2. *There is no authority of law for the employment of persons to bring suit for the collection of delinquent personal taxes, and the authority of the county treasurer in this regard may not be delegated to others.*

3. *Under the provisions of section 5696 G. C. collectors whose services are not required in a legal capacity may be employed by county treasurers to assist in the collection of delinquent personal taxes.*

COLUMBUS, OHIO, May 24, 1921.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter reading as follows:

“The treasurer of Defiance county, Ohio, and myself would like to have an opinion from your office in regard to the following:

There is a large amount of delinquent personal tax on the duplicate

of Defiance county and we would like to have some party designated to bring suit to collect these taxes. There seem to be so many opinions regarding the collection of the same that we do not seem to be able to determine who should collect these taxes,—whether we can pay some party designated by the treasurer or county auditor or board of commissioners to collect these taxes.

We do not believe it the duty of the prosecuting attorney to collect these taxes and would like to know whether or not we can appoint a man and what amount we can pay him for services.”

The following sections of the General Code are cited as pertinent to the questions contained in your inquiry:

“Section 5694. Immediately after each semi-annual settlement in August, the county auditor shall make a tax-list, and duplicate thereof, of all the taxes on personal property remaining unpaid, as shown by the treasurer’s books, and the delinquent record as returned by him to the auditor. Such tax list and duplicate shall contain the name, valuation, and amount of personal property taxes, with ten per cent penalty thereon, due and unpaid. He shall deliver the duplicate to the treasurer on the fifteenth day of September, annually.”

“Section 5695. The county treasurer shall forthwith collect the taxes and penalty on the duplicate by any of the means provided by law, and the funds so collected shall be distributed in proper proportions to the appropriate funds.”

By the provisions of the foregoing two sections, it may be observed that the county treasurer is authorized to collect by any of the means provided by law, the delinquent personal taxes as shall be upon the duplicate delivered to him by the county auditor.

Section 2658 G. C. relates to the collection of delinquent personal taxes by distress by the county treasurer, and provides as follows:

“Section 2658. When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken the time and the place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of the property, the treasurer shall sell it at public vendue or so much thereof as will pay such taxes and the costs.”

If the county treasurer is unable to collect by distress the taxes assessed to a person or corporation, or an executor, administrator, guardian, receiver, accounting officer, agent or factor, he shall by the provisions of section 2660 G. C. apply to the court of common pleas in his county at any time after the semi-annual settlement, and the clerk shall cause notice to be served upon such corporation, executor, administrator, guardian, receiver, accounting officer, agent or factor, requiring him forthwith to show cause why he should not pay such taxes. If he fails to show sufficient cause, the court at the term to which such notice is returnable shall enter a rule against him for such payment and the costs of the proceedings, which rule

shall have the same force and effect as a judgment at law, and shall be enforced by attachment or execution or such process as the court directs.

By the provisions of sections 2662, 2663, and 2664 of the General Code, the county treasurer is authorized to collect the delinquent personal taxes of persons who have removed from the county and who are liable for such taxes.

Section 2665 G. C. provides :

"If a person charged with a tax has not sufficient property which the treasurer can find to distrain to pay such tax, but has moneys, or credits due, or coming due him from any person within the state, known to the treasurer, or if such taxpayer has removed from the state or county, and has property, moneys, or credits due, or coming due him in the state, known to the treasurer, in every such case, the treasurer shall collect such tax and penalty by distress, attachment, or other process of law. He may make affidavit that the residence of such taxpayer is to him unknown, or that he is not a resident of the county where such property is found or where such debtor resides, or that such taxpayer has not property in the county sufficient to distrain to pay such tax. Thereupon an attachment, with garnishee process, shall be issued and such proceedings had, and such judgment rendered for taxes, penalty, and costs, as are lawful in other cases of attachments. If the treasurer serves upon any person indebted to such taxpayer a written notice, stating the amount of delinquent tax and penalty due, such debtor may, after the service of such notice, pay such tax and penalty to the treasurer, whose receipt therefor shall be a full discharge of so much of the indebtedness, as equals the tax and penalty so paid."

Section 5697 G. C. provides :

"When personal taxes stand charged against a person, and are not paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of such unpaid taxes. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his bill of particulars or petition that the taxes stand charged upon the duplicate of the county against such person, that they are due and unpaid, and that such person is indebted in the amount appearing to be due on the duplicate, and the treasurer need not set forth any other or further special matter relating thereto. The tax duplicate shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes appearing due and unpaid, thereon, and of the non-payment thereof, without setting forth in his petition any order or further special matter relating thereto."

Section 5698 G. C. provides :

"On the trial of the action provided in the next preceding section, if it is found that such person is indebted, judgment shall be rendered in favor of the treasurer prosecuting the action as in other cases. The judgment debtor shall not be entitled to the benefit of the laws for stay of execution or exemption of homestead, or other property, from levy or sale on execution in the enforcement of such judgment."

It is apparent by the provisions of the foregoing statutes that the county

treasurer is the only person authorized by law to collect the delinquent personal taxes remaining unpaid upon the tax duplicate. It would also seem to be clearly indicated that in event it should be necessary to bring suit against such delinquent persons for the collection of said taxes, the county treasurer is the only person in whose name such action may be brought.

Manifestly, therefore, it would appear that there is no authority of law permitting the county treasurer to delegate to other persons his authority to bring suit in such cases. Section 2917 G. C. also prohibits the employing of legal counsel other than the prosecuting attorney by county officials. Thus it may be fairly concluded that there is no authorization of law for the appointment of persons to bring suit for the collection of delinquent personal taxes as indicated in the first part of your inquiry.

Proceeding to the second part of your communication in which the question is stated as follows,—“whether we can pay some party designated by the treasurer, or county auditor or board of commissioners to collect these taxes,” section 5696 G. C. is quoted for your consideration :

“The county commissioners, at each September session, shall cause the list of persons delinquent in the payment on personal property to be publicly read. If they deem it necessary, they may authorize the treasurer to employ collectors to collect such taxes or part thereof, prescribing the compensation of such collectors which shall be paid out of the county treasury. All such allowances shall be apportioned ratably by the county auditor among all the funds entitled to share in the distribution of such taxes.”

It may be observed by the clearly stated provisions of the section quoted, that the county commissioners if they deem it necessary, may authorize the treasurer to employ collectors to collect delinquent personal taxes, prescribing at the same time the compensation such collectors are to receive, and which shall be paid out of the county treasury. Construing the same section as the one under consideration, a former opinion of this department, the same being Opinion No. 945, found at page 2030, Vol. III, Opinions of Attorney-General, 1915, while not specifically mentioning section 5696 G. C., holds that the county treasurer cannot employ a person to collect delinquent personal taxes. This opinion is also adhered to in Opinion No. 1641, page 1588, Opinions of Attorney-General, Vol. II, 1918, and comments upon the former opinion as follows :

“It is my opinion that section 5696 G. C. is broad enough to cover the employment of such collector, and the payment thereof out of the county treasury, but my attention has been called to Opinion No. 945 found at page 2026, Vol. III, of the Opinions of the Attorney-General for 1915, which seems to hold to the contrary although section 5696 G. C. is not expressly mentioned in said Opinion No. 945.”

While it is conceded that attorneys may not be employed to bring suit for the collection of delinquent personal taxes or employed in a legal capacity to collect the same by the express provisions of section 2917 G. C. yet it does not seem conclusively established that “collectors” may not be employed who are not required to perform legal services in such collections. On the contrary, it would seem to definitely appear by the provisions of the section under consideration that such “collectors” may be so employed. Since section 5696 G. C. has never been repealed and stands in full force and effect, and by its express provisions authorizes the employment by the county treasurer of collectors to assist in the collec-

tion of delinquent personal taxes, it is difficult to understand the reasoning which prompted the conclusion drawn in the former opinions herein mentioned, in which it is held that such collectors may not be appointed.

For the reasons assigned, therefore, it is felt that this department cannot concur in the conclusion stated in said opinions in so far as it is held that collectors may not be employed by the provisions of section 5696 G. C. by the county treasurer for the purpose of collecting delinquent personal taxes. On the contrary, the view of this department is that such collectors may be employed by the county treasurer to assist in the collection of delinquent personal taxes when such collectors are not employed in a legal capacity, and it is believed that the opinions mentioned should be so modified as to give force and effect to the provisions of section 5696 G. C.

In connection with your inquiry as to the duties of the prosecuting attorney in cases relative to the collection of delinquent personal taxes by the county treasurer, section 2917 G. C. provides 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 duties of the prosecuting attorney are clearly stated and defined by the provisions of this section. It is plainly his duty to furnish legal advice and assistance to the various county officers, when requested by them in their official capacity to do so. It is obviously his duty to prosecute and defend all suits and actions which such officers may direct officially and which pertain to the interest of the county.

It would seem conclusive, therefore, that in suits or actions instituted by the county treasurer for the collection of delinquent personal taxes, the prosecuting attorney, if necessity requires it, would be obliged to furnish legal advice and assistance in the prosecution of such cases.

In specific answer therefore, to the questions contained in your communication, it is the opinion of this department:

(1) That there is no authority of law for the employment or appointment of persons to bring suit for the collection of delinquent personal taxes, and that the treasurer's authority in such cases to bring suit cannot be delegated to others.

(2) That collectors, whose services are not required in a legal capacity, may be employed by the county treasurer to assist in the collection of delinquent personal taxes under the provisions of section 5696 G. C.

(3) That it is the duty of the prosecuting attorney, when so requested by the county treasurer, to render legal advice and assistance in the prosecution of suits by said treasurer for the collection of delinquent personal taxes.

Respectfully,

JOHN G. PRICE,

Attorney-General.