

1827.

COUNTY COMMISSIONERS—AUTHORITY TO EMPLOY ATTORNEYS  
WHEN PROSECUTING ATTORNEY REFUSES TO ACT—UNAUTHORIZED SETTLEMENT OF ROAD APPEAL CASE BY PROSECUTING ATTORNEY.

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.*

COLUMBUS, OHIO, March 8, 1928.

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

GENTLEMEN :—This is to acknowledge receipt of your recent communication, as follows :

“In Belmont County in a proceeding for the establishment of a road, an appeal was taken to the Probate Court on the question of damages. The Prosecuting Attorney representing the County Commissioners and without the authority of the Commissioners, in fact against their specific protest, asked the court to enter a consent judgment for some four hundred dollars more than had been allowed by the commissioners. The County Commissioners now desire to bring an action to set aside this judgment. The Prosecuting Attorney refuses to bring this action at the request of the commissioners. He also refuses to join with the county commissioners in making an application to the Common Pleas Court for permission to employ another attorney to bring the action.

Under these circumstances, may the county commissioners legally employ an attorney for the purpose of bringing an action to set aside this judgment, which they feel is wrong?”

In Opinion No. 1313 of this department, addressed to you under date of November 29, 1927, it was held that the prosecuting attorney of the county has no power or authority to settle a road appeal case without authority given to him by the board of county commissioners of such county so to do, if such settlement involves the rights of the county or of the board of county commissioners in such case and does not merely have reference to some matter of practice or procedure in presenting the rights of the parties in the case to a court or jury for determination. On the facts stated in your communication, it appears that the unauthorized settlement made by the prosecuting attorney has been consummated by a judgment of the court in the road appeal case on the unauthorized consent of the prosecuting attorney. The question presented by your communication is whether, on the facts therein stated, the board of county commissioners is authorized to employ some attorney other than the prosecuting attorney

to institute and prosecute proper action and proceed to vacate or set aside the judgment of the probate court so entered.

It will not be necessary in this opinion to note at any length the statutory provisions relating to appeals in the matter of laying out and establishing roads. It is sufficient to note that any person aggrieved by final order or judgment of the board of county commissioners with respect to the matter of compensation for land of such person appropriated, or damages claimed to property affected by the improvement, may appeal from such final order or judgment of the board of county commissioners to the probate court; and that on such appeal to the probate court the appellant shall be designated as plaintiff in the cause and the board of county commissioners shall be designated as defendant. (Secs. 6891, 6894, General Code.)

Touching the question here presented, it may be stated as a general rule that, in the absence of statutory provisions affecting the question, the power and authority of a board of county commissioners to sue and be sued confers upon such board the implied power and authority to employ counsel to represent it in any action in which such board is a party.

In the case of *State ex rel vs. Board of County Commissioners of Hamilton County, Ohio*, 8 N. P. (n. s.) 281, the court in its opinion says:

“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.”

Section 2917, General Code, so far as pertinent to the consideration of the question at hand, provides:

“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 other county officer may employ other counsel or attorney at the expense of the county except as provided in Section twenty-four hundred and twelve.”

Section 2412, General Code, referred to in the provisions of Section 2917, General Code, above quoted, at the time said Section 2917 was enacted in and as a part of the General Code, provided that if the board of county commissioners deemed it for the best interest of the county, such board might, upon the written request of the

prosecuting attorney, employ legal counsel to assist the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or any county officers or boards in their official capacity. Said Section 2412, General Code, now 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."

The case of *State ex rel. vs. Board of County Commissioners of Hamilton County*, supra, was one involving the question of the right of the board of county commissioners of Hamilton County to employ and pay therefor out of public funds certain attorneys, other than the prosecuting attorney of the county, to represent said board of county commissioners in a certain action brought against such board by a road contractor on a contract entered into by and between such road contractor and the board, for the improvement of a road in said county. The court in this case, upon a consideration of the then provisions of Sections 1274 and 845, Revised Statutes, later carried into the General Code as Sections 2917 and 2412, respectively, held that the board of county commissioners had no authority to employ attorneys other than the prosecuting attorney to represent it in said action. Said Section 1274, Revised Statutes, so far as the same was pertinent to the consideration of the question before the court in the case above referred to, read 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 the 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 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."

The provisions of Section 845, Revised Statutes, other than those authorizing the board of county commissioners of a county to sue and be sued, which are now a part of Section 2408, General Code, provided as follows:

"Whenever upon the written request of the prosecuting attorney, the board of county commissioners of any county deems it advisable, it may employ legal counsel and the necessary assistants upon such terms as it may deem for the best interests of the county, for the performance of the duties herein enumerated. Such counsel shall be the legal adviser of the board of county commissioners and of all other county officers, of the annual county board of equalization, the decennial county board of equalization, the decennial county board of revision, and the board of review; and any of said boards and of-

ficers may require of him written opinions or instructions in any matters connected with their official duties. He shall prosecute and defend all suits and actions, which any of the board above named may direct, or to which it or any of said officers may be a party, and shall also perform such duties and services as are now required to be performed by prosecuting attorneys under Sections 799, 1277, 1278a and 3977 of the Revised Statutes, and as may at any time be required by said board of county commissioners."

Although, as above noted, the court in the case of *State ex rel. vs. Board of County Commissioners of Hamilton County*, supra, held that said board of county commissioners was not authorized to employ, and out of public funds pay for the services of, attorneys other than the prosecuting attorney in a particular action there under consideration, the court in this case quite clearly expressed the view that if in said action against the county the prosecuting attorney had refused to act on behalf of the board of county commissioners, such board would have been authorized to employ attorneys other than the prosecuting attorney to defend it. Said case of *State ex rel. vs. Board of County Commissioners of Hamilton County*, supra, was affirmed by the Circuit Court of Hamilton County in the case of *Ireton et al vs. State of Ohio ex rel Hunt*, 12 O. C. C. (n. s.) 202. The court in its opinion in this case expresses the same view in the following language :

"We are further of the opinion that Section 1274 authorizes the commissioners to employ counsel in cases where from any cause the prosecuting attorney cannot or will not act as counsel for the commissioners."

Possibly some light may be thrown upon the question here presented by consideration of the decision of the courts upon the question of the rights of boards of education to employ counsel other than such as is provided by law. In the case of *Board of Education, by Alfred Bettman, City Solicitor, et al., vs. Board of Education et al.*, 17 O. N. P. (n. s.) 439, it was held that where the legally constituted counsel of the board of education refused to represent such board in an action in which such board was interested as a party defendant, the employment of such special counsel was lawful and the fees of such counsel should be paid by the board of education in its official capacity and not by the members thereof individually. The court in its opinion in this case said :

"The same question as to the right of public officers to employ other attorneys than the legally constituted counsel of such officers, has been before the courts of this state before. And it has *been* uniformly been held that where the legally constituted counsel refuses or is adversely interested, such employment is legal and proper.

In *State ex rel, vs. Commissioners*, 8 N. P. (n. s.) 281, Judge Hunt 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.'

In a case very similar to the one at bar, *Caldwell vs. Marvin et al.*, 8 N. P. (n. s.) 390, Judge Hunt held again :

'It is claimed in this case that no valid contract could have been made by the 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. Why should the rule be different where the right to exercise any power, whatever, is questioned and proper to be established? The public is interested in having its legally elected officers perform their duties, even though less interested than in having such duties performed.' "

The decision and judgment of the court in this case was affirmed by the court of appeals in the case of *Board of Education of the School District of the City of Cincinnati vs. Board of Education*, et al., 22 O. C. C. (n. s.) 439. The court of appeals in its opinion in this case says:

"The question here is whether these attorneys employed by the large school board should be paid from the school fund. No question is raised as to the amount of compensation or the fact that the service was rendered, the only question being as to the power of the board to incur such expense in proceedings brought or resisted contrary to the official opinion of the city solicitor, their legal adviser. The further point is made that the quo warranto case in which the real service was rendered was an action against members of the large board of education as individuals and should have been resisted by them as individuals, and that any expense incurred should not be paid for out of public funds.

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There is no question but that the action of the large board in employing counsel was taken in good faith for the purpose of procuring the judgment of the proper court as to their official duties, and that the attorneys so employed by the large board acted in good faith in all of the litigation in which they were concerned in securing a decision on the question of the validity of this law, and that they rendered a public service. Nor is there any question but that such action was necessary, as the city solicitor had properly taken the other side and the court finally sustained his official opinion.

Such unusual employment of counsel has been sustained in *Klobb, Auditor, vs. Commissioners*, 4 C. C. (n. s.) 565, and in *State ex rel Matthews vs. Boyden*, 18 C. C. 282."

In the consideration of the question here presented, it will be noted that the provisions of Section 1274, Revised Statutes, were changed when they were carried into the General Code as Section 2917 and that said Section 2917, General Code, in terms 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." Though this change in the provisions of Section 1274, Revised Statutes, was effected by revision rather than by amendment by the Legislature, we are required to give effect to the rules of construction recognized by the Supreme Court in the case of *Marqua vs. Martin*, 109 O. S. 56, where it was held:

"Although there is a presumption, where a statute has undergone revision and consolidation by codification, that the construction thereof will be the same as prior thereto, yet where the language of the revised statute is plain

and unambiguous, it must be given the meaning and effect required by the plain and ordinary signification of the words used, whatever may have been the language of the prior statute."

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.

On the facts stated in your communication, I am of the opinion that the board of county commissioners therein referred to has authority to employ counsel other than the prosecuting attorney to represent said board in any proper action or proceeding it may see fit to institute, to set aside or vacate the judgment by which the unauthorized settlement made by the prosecuting attorney in the appeal case was consummated. It appears that in this case the question at issue between the prosecuting attorney and the board of county commissioners, which the prosecuting attorney took upon himself to determine, was purely one of fact to be determined by the board of county commissioners rather than by the prosecuting attorney so far as any proposed settlement of the road appeal case was concerned. The prosecuting attorney having made such unauthorized settlement of the road appeal case, it is not believed that, by his refusal to represent the board of county commissioners in this matter or to cooperate with it in securing other counsel for the purpose, he now can prevent said board from taking proper steps to set aside or vacate the judgment entered in pursuance of such unauthorized settlement; and, as an incident to the right of the board of county commissioners to institute some proper action or proceeding against said judgment, it is believed that said board has the right to employ counsel for this purpose.

In conclusion it may be stated that this opinion is not to be construed as expressing any opinion with respect to the merits of any actions or proceedings which the county commissioners may institute for the purpose of vacating or setting aside said judgment.

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

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1828.

ROADS—WHERE APPLICATION FOR STATE AID WAS FILED UNDER FORMER SECTION 1191, GENERAL CODE,—IS PENDING PROCEEDING WITHIN PURVIEW OF SECTION 26, GENERAL CODE.

**SYLLABUS:**

*Where an application for state aid was filed under the provisions of former Section 1191 of the General Code, and the State agreed to co-operate in the construction of a new road to the extent of a certain specified sum of money, such procedure constitutes a proceeding that is "pending" within the meaning of Section*