

following co-operative contracts covering the proposed improvement of Section A, S. H. No. 56, Lucas County :

- Proposal No. 1—Type B.
- Proposal No. 1—Type C.
- Proposal No. 2—Type B.
- Proposal No. 2—Type C.
- Proposal No. 3—Type B.
- Proposal No. 3—Type C.

Said contracts are also accompanied by the final resolution of the commissioners of Lucas County and the certificate of the county auditor, to the effect that there are funds available for said purpose.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

1404.

ELECTION—BOND ISSUE APPROVED BY ONE VOTE—AMOUNT AUTHORIZED INSUFFICIENT BECAUSE BASED ON AUDITOR'S MISCALCULATION—COLLECTION OF TAXES UNAUTHORIZED

SYLLABUS:

When the question of issuing bonds is submitted to the electors of a subdivision pursuant to the provisions of the Uniform Bond Act and the question carries by one vote, authorizing the issue and a tax levy outside of the fifteen mill limitation to pay the interest and principal of such bonds, in the event such levy has been miscalculated and is in fact approximately twenty-six per cent greater than authorized by the electors, such election is invalid and the people of such subdivision may not be taxed pursuant thereto.

COLUMBUS, OHIO, January 14, 1930.

HON. ISAAC E. STUBBS, *Prosecuting Attorney, Cambridge, Ohio.*

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

“A rural school district board of education of this county duly passed the proper resolutions for a bond issue of \$30,000 for the building of a school building, to be voted on by the electors at the last November election, publication of notice for which being duly made.

The county auditor certified that the estimated average additional tax rate, outside of the fifteen mill limitation, was 2.18 mills and it was not published in the notice.

The bond issue carried by a margin of just one vote above the 55% required by law.

It is now discovered that the true tax rate that will be required above the fifteen mill limitation, is about 2.76 mills; and that the calculation made by the county auditor was incorrect; and that the 2.18 mills is insufficient to produce the amount required by said bond issue.

Assuming that everything is regular in this issue except the incorrectness of the rate as certified by the county auditor, I would like your opinion as to whether or not a bond issue of \$30,000 would be legal and binding obligations

upon said school district, for which the board of education can certify and have assessed against the taxpayers taxes at an average rate of 2.76 mills above the regular limitations.

You can have in mind the published notice to the taxpayers was 2.18 mills, and the closeness of the vote."

I am advised that the form of ballot submitted to the voters was in accordance with the form provided in Section 2293-23, General Code, and presented the question of a levy of taxes outside of the fifteen mill limitation, estimated by the county auditor to average 2.18 mills to pay the principal and interest of the issue.

Sections 2293-19 and 2293-21, General Code, provide as follows:

Sec. 2293-19.

"The taxing authority of any subdivision may submit to the electors of such subdivision the question of issuing any bonds which such subdivision has power to issue. When it desires or is required by law to submit any bond issue to the electors, it shall pass a resolution, declaring the necessity of such bond issue and fixing the amount, purpose and approximate date, interest rate and maturity, and also the necessity of the levy of a tax outside of the fifteen mill limitation to pay the interest on and to retire the said bonds. It shall certify such resolution to the county auditor at least sixty days prior to the election at which it is desired to submit such questions. Thereupon and more than fifty days prior to such election the county auditor shall calculate and certify to the taxing authority the average annual levy throughout the life of the bonds which will be required to pay the interest on, and retire, such bonds, assuming that they are all issued in one series and that the amount of the tax list of such subdivision remains throughout the life of said bonds the same as the amount of the tax list for the current year, and if this is not determined, the estimated amount submitted by the auditor to the county budget commission. Thereupon the said taxing authority, if it desires to proceed with the issue of such bonds, shall, more than forty days prior to such election, certify its resolution, together with the amount of the average tax levy estimated by the county auditor, and the maximum number of years required to retire the bonds, to the deputy state supervisors of elections of the county who shall prepare the ballots and make other necessary arrangements for the submission of the question to the voters of the subdivision."

Sec. 2293-21.

"The election shall be held at the regular places for voting in such subdivision and shall be conducted, canvassed and certified in the same manner as regular elections in such subdivision for the election of county officers. Notice of the election shall be published in one or more newspapers of general circulation in the subdivision once a week for four consecutive weeks prior thereto, stating the amount of the proposed bond issue, the purpose for which such bonds are to be issued, the maximum number of years during which such bonds shall run and the estimated average additional tax rate, outside of the fifteen mill limitation, as certified by the county auditor."

Section 2293-23, General Code, after providing the form of ballot which shall be used at such election, is as follows:

"If fifty-five per cent of those voting upon the proposition vote in favor thereof, the taxing authority of such subdivision shall have authority to

proceed under Sections 2293-25 to 2293-29, inclusive, with the issue of such bonds and the levy of a tax outside of the fifteen mill limitation, sufficient in amount to pay the interest on and retire such bonds at maturity."

An examination of the sections of the Uniform Bond Act relative to this matter of a levy outside of the fifteen mill limitation, with a view of determining the accuracy with which it must be computed is, at first blush, somewhat confusing. Section 2293-19, *supra*, provides that the county auditor shall "calculate" this average annual levy upon the assumption that the bonds are all issued in one series and that the tax duplicate throughout the life of the bonds shall remain the same as for the current year. There is no reference in this section to an estimated levy except, in the event the tax list for the current year is not determined, the amount submitted by the county auditor to the county budget commission may be estimated. Manifestly this estimate would in any event result in an exceedingly slight variation in the average levy required for a bond issue. Section 2293-21, in providing for the publication of notice of election, however, refers to this levy as an "estimated average additional tax rate." The form of ballot provided in Section 2293-23 refers to the levy as "estimated by the county auditor to average ----- mills." The last paragraph of Section 2293-23, *supra*, would appear to authorize whatever levy may be necessary, outside of the fifteen mill limitation, to pay the interest on and retire at maturity bonds authorized by fifty-five per cent of those voting upon the proposition. The question arises whether or not this language, in view of the provisions of Section 2293-19 that the auditor shall "calculate" the average levy, is sufficient to authorize whatever levy may be necessary irrespective of the extent such levy may exceed the levy authorized by the voters. I am of the view that such a construction of the language of Section 2293-23 would be untenable, as will be hereinafter shown.

Section 2293-12 provides that all bonds hereafter issued, with certain exceptions, "shall be serial bonds maturing in substantially equal semi-annual or annual installments." By virtue of this provision, it is manifest that the interest requirements of a bond issue are based upon a constantly decreasing principal throughout the life of the issue and that the amount necessary for interest is calculated upon a decreasing scale. It is not required that bonds mature in exactly equal installments throughout the life of an issue. The requirement that they shall mature in "substantially" equal installments is obviously to preclude the necessity of issuing bonds in denominations of odd dollars and cents when the total amount of the issue is in an odd amount. Therefore, the decreasing scale upon which interest requirements are computed is not necessarily a scale which decreases uniformly or in the same amount each year. The result of this situation is that the levy necessary to pay the interest and principal of an issue must necessarily not only be an average levy but must, in the event the issue does not mature in exactly equal annual or semi-annual installments, be, to a certain extent, an estimated average levy. Such average levy must also be estimated because of the fact that the tax duplicate throughout the life of the issue may not remain the same. I am of the view that, because of these necessary contingencies and conditions, the Legislature has referred to the levy to pay the interest and principal of a bond issue as an estimated average levy. Obviously, it was contemplated that actual variations from the estimated average levy would be comparatively slight.

Upon the facts presented in your letter, the levy estimated by the county auditor does not show a slight error due to a miscalculation in the amount of the tax duplicate or due to the issue not maturing in exactly equal installments. The levy in this case necessary to meet the interest and principal requirements of the issue is approximately twenty-six per cent greater than authorized by the voters, caused presumably by a miscalculation. I am aware of the principle that an error made by an official in good faith, in the absence of a showing of fraud, will not necessarily invalidate an election,

particularly where there has been no resultant material infringement upon the rights of the voters and where it appears that there has been a free expression of the public will. The application of this broad principle to the situation here is, however, somewhat difficult.

In the first place, there is the question of levying a tax, over and above the general limitations of taxation provided by law, approximately twenty-six per cent in excess of the amount authorized by the voters. It is well recognized that sections conferring authority to impose taxes should be strictly construed in favor of the taxpayer. Sutherland on "Statutory Construction", Vol. II, p. 1000. If the provision of Section 2293-19, supra, that the county auditor shall calculate the average levy, must be strictly construed, the provision is mandatory and the negligence or mistake of the officer would terminate the authority to proceed. The discussion upon this point contained in Cooley on "Taxation", 3d Ed., Vol. I, pp. 476-480, is worthy of consideration:

"Much use is made in the law of taxation of the words *directory* and *mandatory*, as words of classification of the various provisions of tax-laws, as regards the imperative nature of the obligation they impose on the revenue officers to obey them strictly. All the provisions of a statute not on their face merely permissive or discretionary are intended to be obeyed, or they would not be enacted at all; and therefore they come to the several officers who are to act under them, as commands. But the negligence of officers, their mistakes of fact or of law, and many other causes, will sometimes prevent a strict obedience, and when the provisions which have been disregarded constitute parts of an important and perhaps complicated system, it becomes of the highest importance to ascertain the effect the failure to obey them shall have on the other proceedings with which they are associated in the law. The form the question most commonly assumes is this: Some official act which the law provides for and which constitutes one step to be followed by others in reaching a specified result, having failed to be taken, does the authority to proceed toward the intended result terminate when that particular step has been neglected, or may the proceeding go on to a conclusion, treating the neglect as immaterial? If the proceeding fails at that point, the requirement of the official act which has been neglected is said to be mandatory, but if it may still proceed, the requirement is directory only; that is to say, the law directs that particular act to be performed, but does not imperatively command it as a condition precedent to anything further.

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Many eminent judges have endeavored to lay down a general rule on this subject, by which the difficulties in tax cases may in general be solved. In one of the most recent cases in which this has been attempted, the general doctrine is stated as follows: "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words, importing that the act required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed, or the acts done will be invalid."

This same principle was followed in the case of *Pratt vs. Pope*, 78 Fla. 270, 82 So. 805, wherein it was held that:

“Diligence in the discharge of their duties is required of public officers, particularly when the rights of one’s property may be jeopardized by their neglect, and their obligations to the public are not discharged by a mere perfunctory performance of official acts.”

I do not believe, in view of the language of the Uniform Bond Act, that it should be held as a matter of law that a slight error in the calculation of an estimated average levy necessary to pay the interest and principal of a bond issue invalidates the election. On a given statement of facts, I believe it proper to consider the degree of the error, the closeness of the vote, or any other elements which may be pertinent. In the case here before me, the issue carried by one vote over and above the required percentage. There is absolutely no indication that the issue would have carried had the voters been apprised of the fact that the additional levy outside of the fifteen mill limitation was to be 2.76 mills instead of 2.18 mills.

In view of the foregoing, I am of the opinion that when the question of issuing bonds is submitted to the electors of a subdivision pursuant to the provisions of the Uniform Bond Act and the question carries by one vote, authorizing the issue and a tax levy outside of the fifteen mill limitation to pay the interest and principal of such bonds, in the event such levy has been miscalculated and is in fact approximately twenty-six per cent greater than authorized by the electors, such election is invalid and the people of such subdivision may not be taxed pursuant thereto.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1405.

APPROVAL, ABSTRACT OF TITLE TO LAND OF THE CITY OF ALLIANCE, STARK COUNTY, IN SAID CITY, TO BE CONVEYED TO THE STATE OF OHIO FOR ARMORY PURPOSES.

COLUMBUS, OHIO, January 14, 1930.

HON. A. W. REYNOLDS, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—In my opinion No. 1316, issued to you under date of December 20, 1929, there were pointed out certain liens with reference to lot No. 341 in the city of Alliance, which lot the said city of Alliance proposes to deed to the state for armory purposes.

You have submitted certain documents which have been forwarded to you by the Director of Public Safety of the city of Alliance for the purpose of complying with the objections heretofore made.

Among the enclosures is a receipt from the clerk of courts for the sum of \$7.21, which disposes of objection No. 1.

You further enclose a receipt from the treasurer of Stark County for \$126.68 for delinquent taxes and \$248.45 for taxes for the first half of the year 1929. The Director of Public Safety states in his communication that the Treasurer of Stark County absolutely refuses to accept payment for the taxes for the last half of the year 1929 at this time. The Director further states that he will personally assume re-