

959.

ROADS AND HIGHWAYS—WHEN LEVIES UNDER SECTION 6926 G. C. MAY BE USED IN STATE AID IMPROVEMENTS—HOW QUALIFIED.

Subject to the prior granting of an order of transfer by the common pleas court in accordance with section 2296 et seq. G. C., county commissioners may devote to state aid improvement projects funds not otherwise appropriated, derived and to be derived from levies under section 6929 G. C. insofar and only insofar as the proceeds of such levies are either in the county treasury or are to accrue to the treasury from levies which have been placed on the duplicate and are in process of collection; provided that the use stated may not be made of any part of such funds as may have been (a) anticipated by bond issues; (b) directed by popular vote under section 6926-1 G. C. to be put in certain uses; or (c) found necessary for the maintenance and repair fund purposes mentioned in section 6956-1 G. C.

COLUMBUS, OHIO, January 23, 1920.

HON. WALTER W. BECK, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—Your communication of recent date to this department reads as follows:

“At the November election the county commissioners submitted to the electors of Columbiana county the question of an additional levy of taxes to the extent of two mills. Under sections 6926-1 and 6926-2 this additional levy was supported for a period of ten years. The question now presented is whether or not any moneys derived from this levy of two mills as provided by section 6926-1 can be used in conjunction with the state under what is known as the state aid plan? This is an important question in this county for the reason that little or no levy has been made under section 1222, which provides for a tax levy not exceeding one mill under the state aid plan.

The second question: Section 1212 of the General Code provides that the county's proportion of the fund for state roads shall be paid from any fund in the county treasury available for the construction, improvement and maintenance or repair of roads, bridges and culverts within the county and not otherwise specifically appropriated. May the funds raised from a two mill levy under section 6926-1 amended, be utilized in accordance with the above section?”

Certain of the statutes on the subject of highway improvement have been amended by the present general assembly, as will appear by reference to 108 O. L. 478, et seq. so that what is said herein will have reference to the statutes as so amended.

Discussion of your question properly embraces preliminary mention of certain general features of the state highway and county highway improvement statutes in order that the bare statement of the comparatively brief and simple consideration directly involved in your inquiry may not prove misleading.

In the first place, it should be kept clearly in mind that the affirmative popular vote of which you speak as having been given under authority of sections 6926-1 et seq. *did not of itself make a levy of taxes* during the whole or any part of the ten year period. The sole effect of such favorable vote was to *remove the restrictions* theretofore existing by reason of *general tax limitations* upon the authority granted by section 6929 for a two mill levy for county road improvement purposes, and to authorize the commissioners to make the two mill levy without restraint on account of general tax limitations. The inherent authority granted by section 6926 was in no wise changed or enlarged by the favorable vote in question; for the commissioners were fully au-

thorized before the election in question to make the two mill levy, provided the general tax limitations did not prevent their doing so. Furthermore, the proceedings of the commissioners in making their levy under section 6926 from year to year during the ten year period you mention will be exactly the same as though no election had been held, with the exception as noted that the commissioners will not be compelled to give heed to any tax limitations in levying up to the two mills. Again, it should be noted that bonds for county highway improvements undertaken by virtue of the series of sections of which section 6926 is a part, are authorized only as to specific improvements—that is to say, there is no power in the county commissioners to procure money from levies under section 6926, except on the one hand, by awaiting from year to year the accuals from the levy they make under said section; or on the other hand, by issuing bonds in anticipation of such levies to the extent only of the estimated cost of given definite improvement projects.

The two matters just mentioned, namely, the intent of sections 6926-1 et seq. and the matter of issuing bonds in anticipation of taxes levied under section 6926 are dealt with in two opinions of this department, one (No. 759) dated November 7, 1919, directed to the tax commission of Ohio, and the other (No. 887) dated December 24, 1919, and directed to Hon. P. A. Saylor, prosecuting attorney, Eaton, Ohio, copies of which opinions are enclosed.

You say in the course of your letter that little or no levy has been made in your county under section 1222. This fact does not *of itself* prevent the issuing of bonds under authority of section 1223 in anticipation of levies under section 1222; for owing to the similarity existing between section 1223 relating to bonds for state aid improvements and section 6929 relating to bonds for county highway improvements, the same general principles as underlie the conclusion in Opinion No. 887 referred to above are applicable to section 1223.

However, it may be that your county authorities have some reason which does not appear from your letter for not issuing bonds under section 1223 in anticipation of levies authorized by section 1222, and are therefore interested in the question whether the proceeds of levies under section 6926 may be used for the same purpose as that mentioned in section 1222.

The observations already made clearly lead to the conclusion that if there is any authority at all for using the proceeds of levies under section 6926 for the same purpose as that mentioned in section 1222, such authority is limited to the use of the proceeds of levies under section 6926 only after such levies have been actually made and the proceeds are either in the treasury or in process of collection. In other words, there is no general scheme whereby such levies may be anticipated by bond issues and the proceeds of the bond issues used in lieu of proceeds from bonds under section 1223.

In this connection, see an opinion of this department of date January 6, 1919, found in Opinions of Attorney-General for 1918, Vol. II, p. 1653, the headnote of which reads:

“When bonds are sold under the provisions of section 6929 G. C. by the county commissioners, the proceeds of such sale cannot be used to take care of the county's proportion of the cost and expense of said improvement, if the same be constructed under the jurisdiction of the state highway commissioner. The proceeds of said bonds issued not used for the purposes for which the bonds were sold would pass into the sinking fund, or debt fund, of the county.”

Furthermore, it goes without saying that whatever proportion of the two mill levy has been hypothecated or sequestered, so to speak, by the issuance of bonds under section 6929 for county highway improvements, will not be available for use in any

respect, whatever, save for sinking fund levy purposes, in order to procure funds for the taking care of such bonds and the interest thereon.

However, assuming that the commissioners from year to year will make a levy in whole or in part of the two mills provided by section 6926 and that the whole or part of said two mills so levied has not been wholly hypothecated or sequestered by the issuance of bonds, the question remains whether the proceeds of that part of the levy not so hypothecated or sequestered may be used from year to year by the commissioners in connection with state highway improvements.

It must be said at this point that under the terms of section 6926-1 itself a condition might arise which would prevent the use of any part of levies under section 6926 on state aid improvements. Said section 6926-1 contains the following sentence:

"The petition and resolution, or the resolution where the commissioners act without a petition being presented, may also state the part of such levy so to be exempted to be used for constructing and improving county roads and the part of such levy so to be exempted to be used for maintaining and repairing county roads, in which event the proceeds of any such levy exempted by vote of the electors of such county *shall be expended* in accordance with such division."

Of course, its clear that if the question as presented to the voters of your county contained a provision in accordance with the sentence just quoted, the proceeds of the levy that may be made under section 6926 from year to year during the ten year period, will have to be used in accordance with such provision.

But if advantage was not taken of the authority given by the sentence just quoted, and the popular vote was an unrestricted one for the exemption of the two mill levy from tax limitations; or if advantage was taken of such authority to the extent of only part and not all of the two mills (for the sentence quoted is susceptible of the interpretation that the division therein referred to may be applied to a part only of the levy to be exempted), then the question arises whether any other restrictions are to be found upon the use of the proceeds of levies under section 6926 on state aid improvements.

At least one other restriction is possible under the provisions of sections 6956- and 6956-1a when taken together. Those sections read (108 O. L. 503):

"Sec. 6956-1. After the annual estimate for the county has been filed with the county commissioners by the county surveyor, and the county commissioners have made changes and modifications in said estimate as they deem proper, they shall then make their levy for the purposes set forth in said estimate, upon all the taxable property of the county not exceeding in the aggregate two mills upon each dollar of the taxable property of said county. Such levy shall be in addition to all other levies authorized by law for said purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force. The provisions of this section shall not, however prevent the commissioners from using any surplus in the general funds of the county for the purposes set forth in said estimate.

Sec. 6956-1a. The board of county commissioners of each county shall provide annually by taxation an adequate fund for the maintenance and repair of improved county highways. Such fund shall be provided by levies made under sections 6926, 6927 and 6956-1 of the General Code and the several sections amendatory thereof or supplementary thereto. The maintenance and repair fund so provided shall not be less than one hundred dollars for each mile of improved county highway within the county. Such levy or levies for maintenance and repair purposes shall be separately set forth

in the annual budget of the county commissioners presented to the budget commission, and the maintenance and repair levies so made by the county commissioners pursuant to the provisions of this section shall be preferred levies as against any other levies made by the commissioners for county road purposes. Should the budget commission of any county be unable, by reason of the limitations of law, to allow all of the road levies made by county commissioners, such reductions as are necessary therein shall be first made in levies other than those for maintenance and repair purposes made under the provisions of this section. The fund produced by such levy or levies for maintenance and repair purposes shall not be subject to transfer by order of court or otherwise and shall be used solely for the maintenance and repair of the improved county roads within the county. The provisions of this section shall not prevent the county commissioners from using any other available funds for the maintenance and repair of improved county roads."

We thus see that the creation of a maintenance and repair fund for annual expenditure in a sum equal to at least one hundred dollars for each mile of improved county highway within the county is made mandatory, and that if the commissioners see fit to call for such fund in an amount greater than such one hundred dollars per mile, they may do so. In either event, the requisite levies are preferred levies. It follows that if the two mill levy mentioned in section 6956-1, or such part of said two mills as may be levied within tax limitations, will not produce when augmented by transfers (if transfers are available and made from general funds of the county), the maintenance and repair fund of one hundred dollars per mile, or a maintenance and repair fund of larger proportions if so fixed by the county commissioner, then, and in that event, the deficiency must, as directed by section 6956-1a, be provided for by levies under authority of sections 6926 and 6927. Whatever part of the proceeds of levy under section 6926 is necessary for the purpose last named will of course not be available for use in conjunction with state aid improvements.

Taken in connection with the several possible restrictions noted your question for the purpose of further discussion may be re-stated as follows:

Are the county commissioners at liberty to devote to state aid improvement projects such part of the two mill levy named in section 6926 not otherwise appropriated as may not have been anticipated by bond issues, and as may not have been segregated to a certain use by popular vote under the provisions of section 6926-1, and as may not be necessary under the provisions of section 6956-1a to bring the maintenance and repair fund up to the amount fixed by the commissioners, which amount in any case must be not less than one hundred dollars for each mile of improved county highway within the county?

Section 1222 in its form as amended 108 O. L. 478, after setting forth authority in the county commissioners to levy upon the taxable property of the county a tax for the purpose of providing a fund for the payment of the county's share, etc., and upon the taxable property of an interested township a tax for the purpose of providing the township's share of such improvement, concludes with this sentence:

"A county or township may use any moneys lawfully transferred from any fund in place of the taxes provided for under the provisions of this section."

Section 1212, relating to the payment of the cost of a state aid improvement, has this to say relative to the payment of warrants issued upon the requisition of the state highway commissioner against the county for the share of the county, township and property owners:

"Such warrant shall be paid from any funds in the county treasury available for the construction, improvement, maintenance or repair of roads, bridges, and culverts within the county and not otherwise specifically appropriated."

So far as has been found, the two quotations just made furnish the only indication set forth in the highway laws proper as to the use of funds derived from levy under section 6926 on state aid improvements. The latter section reads as follows:

"Sec. 6926. The proportion of the compensation, damages, costs and expenses of such improvement to be paid by the county shall be paid out of any road improvement fund available therefor. For the purpose of providing by taxation a fund for the payment of the county's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, improving, maintaining and repairing roads under the provisions of this chapter, the county commissioners are hereby authorized to levy annually a tax not exceeding two mills upon each dollar of the taxable property of said county. Said levy shall be in addition to all other levies authorized by law for county purposes, and subject only to the limitation on the combined maximum rate for all taxes now in force."

However, there are general statutes which also are to be considered, namely, sections 2296 to 2302 dealing with the subject of transfer of funds upon order of common pleas court. Said section 2296 as amended 103 O. L. 521, reads as follows:

"The county commissioners, township trustees, the board of education of a school district, or the council, or other board having the legislative power of a municipality, may transfer public funds, except the proceeds or balances of special levies, loans or bond issues, under their supervision, from one fund to another, or to a new fund created under their respective supervision, in the manner hereafter provided, which shall be in addition to all other procedure now provided by law."

Accompanying sections provide for filing of petition for authority to make the transfer, notice of filing, hearing, finding, appeal, etc.

The authority given in these general statutes for transfer of funds is quite broad in character; and if we are to give full effect to such authority, it is ample enough in connection with the provisions of the highway laws above quoted to permit of the transfer of fund derived from levy under section 6926 into a fund for use in connection with state aid improvements. As supporting this view, the provision in section 6956-1a that levies for county maintenance and repair purposes shall not be subject to transfer by order of court or otherwise, seems to imply quite plainly that other funds may be subject to transfer.

Again, the provision in section 1222 that "the proceeds of such levy shall be used solely for the purpose of paying the county's proportion of the cost and expense of constructing, improving, maintaining and repairing inter-county highways and main market roads or parts thereof in co-operation with the state highway department or the federal government or both, and the funds provided by such levy shall not be subject to transfer to any other fund either by order of court or otherwise, does not have a counterpart in the provisions of section 6926; that is to say, there is no express prohibition in the latter section against the use of funds for or transfer to state aid improvement purposes. Finally, it may not be said that the purpose of the levy defined in section 6926 is such as to bring it within the class of special levies as mentioned in section 2296. "Special levy" as mentioned in said last named section would seem to be referable to section 5654, which was amended 108 O. L. 521, as part of the same act in which section 2296 was amended; and "special tax" as those words are used

in section 5654 would seem to be a tax for a specific improvement, because section 5654 directs that the surplus of the proceeds of such special tax not used or needed for the purpose for which the tax was levied shall go into the sinking fund. In this view, the levy provided by section 6926 is a general levy rather than a special levy.

It should be said, however, that the power of transfer relates only to funds which are either in the treasury or on the duplicate and in process of collection as the result of a levy under section 6926. In order that the proceeds of a direct tax levy may be used by the county in conjunction with state aid improvements, the auditor's certificate provided by section 5660 must first have been made (see section 1218 [as amended 108 O. L. 478]); and under the provisions of section 5660 such certificate cannot be made until the tax funds are either in the treasury or have been levied and put on the duplicate and in process of collection. Therefore, as a prerequisite to the making of such certificate, not only must the funds be in the treasury or on the duplicate and in process of collection, but the order of transfer from the county road improvement fund to a fund for state aid improvements must have been made by the court of common pleas as directed by section 2296 et seq.

In conformity with the foregoing observations, answer to your question is given as follows:

Subject to the prior granting of an order of transfer by the common pleas court in accordance with sections 2296 et seq. G. C., county commissioners may devote to state aid improvement projects funds not otherwise appropriated, derived and to be derived from levies under section 6926 G. C. insofar and only insofar as the proceeds of such levies are either in the county treasury or are to accrue to the treasury from levies which have been placed on the duplicate and are in process of collection; provided that the use stated may not be made of any part of such funds as may have been (a) anticipated by bond issues; (b) directed by popular vote under section 6926-b 1 G. C. to be put to certain uses; or (c) found necessary for the maintenance and repair fund purposes mentioned in section 6956-1 G. C.

Respectfully,

JOHN G. PRICE,

Attorney-General.

960.

CONSTITUTION OF OHIO—COST OF PUBLISHING PROPOSED AMENDMENTS GOVERNED BY SECTION 6251 G. C.

1. *Section 4 of the act passed April 28, 1913 (103 O. L. 724), and designated as section 5123-4 of the General Code, applied only to charges for publishing amendments to the state constitution which were proposed by the 80th general assembly and submitted to the electors at the November, 1913, election, and not to proposed amendments generally.*

2. *The costs of publishing proposed amendments to the state constitution, other than those proposed by the 80th general assembly, should be paid by the secretary of state at the rates prescribed by section 6251 G. C.*

COLUMBUS, OHIO, January 23, 1920.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date making inquiry concerning the payment of bills incurred in publishing or advertising proposed amendments to the state constitution, was duly received, and, omitting formal parts, reads as follows:

“Constitutional amendments proposed by the general assembly of Ohio are required, under the provisions of section 1, article XVI of the constitution