

compensation as employes of the sinking fund commission, where it is physically possible for such employes to discharge the duties involved by such employments, as determined by the sinking fund commission.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1182.

ROADS AND HIGHWAYS—WHEN PROCEEDS OF TAX LEVY AUTHORIZED BY SECTION 6929 G. C. MAY BE EXPENDED BY COUNTY COMMISSIONERS—MAY NOT BE EXPENDED IN IMPROVEMENT OF VILLAGE STREET LYING ON LINE OF INTER-COUNTY HIGHWAY.

1. *The proceeds of the tax levy authorized by section 6926 G. C. may be expended by county commissioners in the improvement of such sections of an inter-county highway within the county as have not become subject to maintenance by the state as provided by sections 1224, 7464 and 7465 G. C.*

2. *The proceeds of the levy authorized by said section 6926 G. C. may not be expended by county commissioners in the improvement of a village street lying on the line of an inter-county highway.*

(Second conclusion in this opinion revised. See Opinion No. 1531 dated August 30, 1920.)

COLUMBUS, OHIO, April 27, 1920.

HON. BARCLAY W. MOORE, *Prosecuting Attorney, Cadiz, Ohio.*

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

“Money raised under the law which authorizes a special levy for road purposes, by vote of the people, under section 6926-1 G. C., says that such money shall be used for the purpose of paying the county’s proportion of the compensation, damages, costs and expenses of constructing, reconstructing, maintaining and repairing county roads.”

Does this prohibit the expenditure of money from this fund on any road which has been laid out as an inter-county highway?

Would a portion of a village street, which is on the line of an inter-county highway, be considered an inter-county highway?

Does an interpretation of ‘county road’ make any difference between a road which has been designated and laid out as an inter-county highway, but not improved, and a road which has been constructed and is maintained by the state?

In other words, the commissioners desire instructions specifically as to where they can and where they can not spend this money.”

Said section 6926-1 to which you refer, appears in 108 O. L., 500, and with its two accompanying sections, provides for a vote of the electors of the county upon the question of exempting from all tax limitations the levy of two mills provided by section 6926 G. C. Therefore, the language quoted in your letter from section 6926-1 must be taken as constituting a reference to section 6926, rather than as describing or authorizing a levy. However, your quoted language fairly rep-

resents the purpose of the levy authorized by section 6926; for in that section appear the words

“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, re-constructing, improving, maintaining and repairing roads under the *provisions of this chapter*,”

and when we turn to the so-called Cass law (106 O. L. 574), wherein said section 6926 made its appearance, we learn that it is part of the chapter relating to “road construction and improvement by county commissioners”; and, again, when we consult the form of ballot provided by section 6926-2 we find this language:

“For an additional levy of taxes for the purpose of constructing, re-constructing, maintaining and repairing *county roads*.”

Hence, it may be stated that the general purpose of the levy under section 6926 is for use in connection with the improvement of county roads; and in the absence of authority elsewhere in the statutes, it would probably be true that the proceeds of the levy could be used only in the improvement of county roads as such roads are defined by statute (section 7464.)

The effect of an affirmative vote under authority of said sections 6926-1 et seq. was somewhat fully discussed in an opinion of this department (No. 959) of date January 23, 1920, directed to Hon. Walter W. Beck; prosecuting attorney. That opinion dealt with the question whether proceeds of levies under section 6926 were available for use in connection with state aid improvements; and of course if so used such proceeds would be expended under the supervision and upon the order of the state highway commissioner. Your inquiry on the other hand goes to the point whether the county commissioners may themselves directly expend such proceeds in the improvement of inter-county highways. Nevertheless, the discussion in the opinion referred to is in certain of its aspects applicable to your inquiries and a copy of the opinion is therefore enclosed.

Said section 6926 reads as follows:

“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.”

A related section, namely, section 6921, appearing in 106 O. L. 601, reads:

“The county commissioners, or joint board thereof, upon a unanimous vote, may without a petition therefor, order that all the compensation and damages, costs and expenses of constructing any improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county, or out of any road improvement fund available there-

for, or the county commissioners or joint board thereof, may enter into an agreement with the trustees of the township or townships in which said improvement is in whole or part situated, whereby said county and township, or one or more of them may pay such proportion or amount of the damages, costs and expenses as may be agreed upon between them."

In view of what was said in the discussion in opinion No. 959, it is quite plain that your inquiry really concerns section 6926 rather than sections 6926-1 et seq. These latter sections and the elections held under authority of them do not in any wise change the essential character of the levy authorized by section 6926.

Your first question, which is, in effect, whether the county commissioners may expend on inter-county highways money arising from levies under section 6926, involves a reference to sections 1203 (107 O. L. 125) and 7465 (106 O. L. 649). The first of these sections reads:

"Sec. 1203. Nothing in this chapter shall be construed as prohibiting the county commissioners or township trustees from constructing, improving, maintaining or repairing any part of the inter-county highways within such county or township; provided however, that the plans and specifications for the proposed improvement shall first be submitted to the state highway commissioner and shall receive his approval."

While the language of this section is negative in form, yet, taken in connection with the language of sections 6926 and 6921 and the powers in general conferred upon county commissioners in the matter of road improvement by sections 6906 to 6956-3, there remains no question as to the legislative intent that commissioners should have power to make improvements upon inter-county highways, provided the plans and specifications for the improvement first receive the approval of the state highway commissioner.

Said section 7465 reads:

"In all cases where a county or township has constructed or improved any main market or inter-county road, the state highway commissioner, upon request, shall, within sixty days indicate what changes, or improvements, will be required in said road in order to bring the same up to the approved standard of construction of such roads, or in any case where such road is about to be constructed, reconstructed, or improved, the state highway commissioner shall, upon application, indicate within sixty days what changes will be required in the plans and specifications therefor, to bring said road up to the standard required by the state for the construction of inter-county highways and main market roads. Whenever the changes so specified by the state highway commissioner have been made, or when such roads have been constructed according to the plans and specifications so approved by the state highway commissioner, such roads shall at once become state roads."

Thus we have recognition of the power in the county commissioners to expend funds upon inter-county highways, as well as a conferring of authority to make the changes or improvements necessary to bring a section of inter-county highway up to the state standard.

So far as a search of the statutes has disclosed, the only source of funds for use by the commissioners on inter-county highways is the levy authorized by said section 6926. True, another county road levy is provided for by section 6956-1

(108 O. L. 503); but the purpose of that levy, as will be seen by section 6956-1a, is primarily *maintenance and repair of improved county highways*.

Authority in county commissioners to use the proceeds in question, in the improvement of inter-county highways does not mean, however, that they may use them on all parts of inter-county highways. The opening provisions of section 7464 (106 O. L. 648) read:

"The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads.

(a) State roads shall include such part or parts of the inter-county highways and main market roads as have been or may hereafter be constructed by the state, or which have been or may hereafter be taken over by the state as provided in this act, and such roads shall be maintained by the state highway department. * * *

The procedural steps involved in the duty thus cast upon the highway department are provided for by section 1224.

In the light of said sections 7464 and 1224, the conclusion becomes plain that the authority of county commissioners to make direct expenditure of funds upon inter-county highways is limited to those sections of such highways as have not been improved by the state under the state aid laws, or taken over by the state under sections 7465 and 1224.

Your next question is whether a portion of a village street which is on the line of an inter-county highway is to be considered an inter-county highway.

Speaking generally, the answer to this question is in the negative, for the reason that under the law the matter of supervision and control over streets within a municipality, and the improvement of such streets, is vested in the municipality. (See sections 3629 and 3714, G. C.). The tenor of your communication indicates, however, that what you have in mind is whether county commissioners may expend in the improvement of such portion of a village street funds arising from levies under section 6926; so that we are led to consider the effect of certain statutes authorizing state aid road improvement and county road improvement within villages.

Sections 1193-1 and 1193-2 provide in substance that when the improvement of an inter-county highway or main market road is being carried on by the state highway department with the co-operation of county or township, such improvement may with the consent of the village be carried into, within or through the village. Somewhat similar provision is found in section 1231-3, though this section seems to relate to cases where the state highway commissioner is proceeding without the aid of county or township. Again, by section 6949 et seq. a county road improvement undertaken by county commissioners may be extended by them into, within or through a municipality, whether village or city, if the consent of the municipality be first obtained. It is to be noted that in all of the several plans relating to the carrying of road improvement into a municipality, the only action on its part when it is not to bear a part of the cost of the improvement is the giving of its consent to the improvement.

Your question, then, comes down to the point whether the authority which, as we have seen, is vested in county commissioners to expend the proceeds of levy under section 6926 on certain sections of inter-county highways, extends to expenditure upon a village street lying upon the line of an inter-county highway. The question is a close one. It may well be urged that since for the improvement purposes contemplated by sections 1193-1 and 1193-2, a village street on the line of an inter-county highway is to be considered part of such highway, the inference or implication fairly follows that the county commissioners have the

same power with reference to such street as with reference to other parts of an inter-county highway, especially when it is borne in mind that by sections 6949 et seq. express authority is given commissioners to carry a *county* highway improvement into, within or through a village.

However, it would seem that the negative answer first above given to your question as stated forecloses the drawing of the inference suggested. To begin with, it is only by virtue of the express power conferred by such sections as 1193-1 that village streets may be improved by public authority other than the village itself. The authority given by section 1193-1 for entry upon the streets of a village for improvement purposes may be exercised, so far as the express terms of the statute are concerned, by the state highway commissioner alone. How, then, is there ground for inference or implication that the same authority may be exercised by county commissioners, when in fact the section of village street is not essentially a part of an inter-county highway, but is treated by section 1193-1 as being part of such highway for a limited purpose only? Upon the whole, since the proposition involves the expenditure of public funds, and since, primarily, the burden of caring for village streets is by statute placed upon the village, there would seem to be no justification for going beyond the letter of the statute, with the result that it must be concluded that county commissioners are without authority to improve a village street lying on the line of an inter-county highway through the medium of expending the accruals of levies under section 6926 G. C.

Your third question, it is believed has been answered by what has been said in connection with your first inquiry.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1183.

PHYSICIANS AND SURGEONS—PERSON EMPLOYED TO DISTRIBUTE
ADVERTISING CIRCULARS—SUCH EMPLOYMENT NOT A “CAP-
PER, SOLICITOR OR DRUMMER” WITHIN PURVIEW OF SECTION
1275 G. C.

The employment of a person to distribute advertising circulars prepared by a physician, such circulars to be distributed from house to house and to men working in the shops in industrial plants, does not of itself alone constitute the employment of a “capper, solicitor or drummer,” within the purview of section 1275 G. C.

COLUMBUS, OHIO, April 27, 1920.

The State Medical Board, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

“An interpretation is requested from your department of the meaning of Section 1275, Paragraph “First,” General Code, which reads as follows:

‘First: The employing of any capper, solicitor or drummer for the purpose of securing patients, or subsidizing any hotel or boarding house with like purpose, or the obtaining of any fee on the assurance that an incurable disease can be cured.’