

1264.

ROADS AND HIGHWAYS—COUNTIES ARE AUTHORIZED TO CO-OPERATE WITH STATE IN MAINTENANCE AND REPAIR WORK UPON "STATE ROADS" AS DEFINED IN SECTIONS 1224 AND 7464 G. C.—APPLICABLE TO INTER-COUNTY HIGHWAYS OR MAIN MARKET ROADS CONSTRUCTED OR TAKEN OVER BY STATE FOR MAINTENANCE—LEVY UNDER SECTIONS 6956-1 AND 6956-1a G. C. NOT AUTHORIZED FOR SAID PURPOSE.

1. *Counties are authorized to co-operate with the state in maintenance and repair work, under the supervision of the state highway commissioner, upon "state roads" as defined in sections 1224 and 7464 G. C., namely, those sections of inter-county highways or main market roads which were originally constructed by the state or taken over by the state for maintenance. (Certain language in Opinion No. 1480, Opinions Attorney-General 1918, Vol. II, p. 1233, disapproved).*

2. *Counties are not authorized, when so co-operating, to use funds arising from levy under section 6956-1 G. C., as appearing 106 O. L. 647, or as amended and supplemented by section 6956-1a in 108 O. L. Pt. I 503.*

COLUMBUS, OHIO, May 20, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your letter of May 7, 1920, was duly received, enclosing, among others, the following final resolutions:

Portsmouth-Columbus road, I. C. H. No. 5, sections "st" and "u,"
Pickaway county.

Circleville-Adelphi road, I. C. H. No. 362, section "A," Pickaway county.

I note that these three projects are all maintenance and repair work and that the appropriation for the state's share of the estimated cost is from maintenance and repair funds, i. e., funds arising from the registration of automobiles. I also note that the county auditor's certificate shows that the money for the share of cost other than that assumed by the state is to be taken from the road repair fund of the county.

I learn upon inquiry of the county auditor that the fund which he designates as "road repair fund" is that which arises from levy made under section 6956-1 G. C. Furthermore, personal conference at your department with Mr. Perry, of the maintenance and repair bureau, has disclosed that the sections of highways in question are sections which several years ago were improved with state aid up to the state standard, and taken over by the state for maintenance; that Pickaway county now proposes voluntarily to contribute the several amounts shown in the final resolutions as having been appropriated by the county commissioners; and that the proposed maintenance work does not involve the use of materials different from those of which the sections of highway in question were originally constructed.

Under the situation stated, there is, of course, no question that the state might do the maintenance work without the county's co-operation (sections 1224 and 7464 G. C.) But, do the statutes permit of the doing of the work by the state highway commissioner on the plan of co-operation between state and county? An affirmative answer to this question would seem to be required by that provision of section 1224 G. C. which reads:

" * * * Nothing in this chapter shall be construed so as to prohibit a county, township or municipality or the federal government or any individual or corporation from contributing a portion of the cost of the construction, maintenance and repair of said state highways. * * *"

Furthermore, section 1191 G. C. (107 O. L. 121) reads in part as follows:

"The commissioners of any county may make application to the state highway commissioner for aid from any appropriation by the state from any fund available for the construction, improvement, maintenance or repair of inter-county highways. Such application shall be filed prior to March first of the calendar year in which such appropriation may be made or become available. * * *"

This section further provides:

"The board of county commissioners of any county or the board of township trustees of any township thereof shall, however, be authorized to make said application for aid from any appropriation by the state from any fund available for the construction, improvement, maintenance or repair of inter-county highways at any time after the first day of May of the calendar year in which such appropriation may be made or become available provided that at the time such application is made the state highway commissioner has not entered into any contract or incurred any obligations on behalf of the state involving the expenditure of the funds for which application is made. * * *"

Notwithstanding these provisions of statute, my predecessor in the course of an opinion (No. 1480) directed to your predecessor under date September 26, 1918, and now appearing in Opinions of Attorney-General, 1918, Vol. II, p. 1233, stated (p. 1237):

"Of course under these provisions the application for state aid would not be made in reference to those parts of the inter-county highways which come within the classification of state roads, because these the state highway commissioner must repair and maintain upon his own motion, as provided in sections 7464 and 1224 G. C.

The application for state aid in the maintenance and repair of inter-county highways would apply to other parts of inter-county highways than those which could be included under the class 'state roads.' This gives the provision set out in section 1221 G. C. its full force and effect. It provides:

* * * * *

3. The funds derived from the registration of automobiles shall be used for the maintenance and repair of the inter-county highways and main market roads of the state. * * *'

The two branches above discussed give this its full force and effect; that is, the state highway commissioner upon his own motion can use these funds only for the repair and maintenance of those inter-county highways and main market roads which can be brought within the classification of

state roads; while upon the application of county commissioners or township trustees, under section 1191 G. C. he can grant state aid in the maintenance and repair of inter-county highways and main market roads other than state roads and supply the state aid from the funds derived from the registration of automobiles."

The headnotes of the opinion just quoted from, read as follows:

1. The jurisdiction of the state highway commissioner in the maintenance and repair of inter-county highways, upon his own motion, is limited to those parts of the inter-county highways which come within the classification of 'state roads' as defined in section 7464 G. C.
2. Upon the application of county commissioners or township trustees for state aid, in the maintenance and repair of inter-county highways, the state highway commissioner has authority to use the funds derived from the registration of motor vehicles to pay the state's proportion of the cost and expense of such maintenance and repair.
3. The state highway commissioner has no authority in law to use the funds derived from the registration of motor vehicles, either upon his own motion or upon the application of the county commissioners or township trustees, to repair and maintain inter-county highways which have not been improved."

A reading of these headnotes in connection with what has been quoted from the opinion, indicates that it was the view of my predecessor that the only case in which the state might co-operate with the county in maintenance and repair of inter-county highways and main market roads, as distinguished from original construction or improvement, was as to those sections which, while not yet taken over as "state highways," had been improved by county or township, thus leaving to the state alone, without county or township co-operation, the maintenance of those sections which had become state roads because of their improvement or taking over by the state as mentioned in sections 1224 and 7464 G. C.

It is believed that this view of my predecessor fails to take into account the full force and effect of the sentence above quoted from section 1224. It is to be noted that this last named section relates particularly to the maintenance of those sections of highway which are strictly "state highways" as defined both in the section itself and in section 7464 G. C., namely, sections improved by the state or taken over by the state for maintenance. It is in section 1224 that the duty of maintaining state roads is cast upon the state highway commissioner; and it is likewise in section 1224 that the procedural steps in maintaining such roads are laid down for the guidance of the commissioner. Since we find in this very section provision to the effect that the county is not prohibited from contributing to the maintenance of "said state highways," the conclusion follows that the county is not barred from contributing to the maintenance of a section of highway which was originally improved by the state, or which has been taken over by the state for maintenance. In other words, while the opinion of my predecessor gives force and effect to the two propositions, first, that the state highway commissioner may without local co-operation maintain and repair "state roads" as defined in sections 1224 and 7464; and second, the state highway commissioner may with local co-operation (section 1191) maintain and repair improved sections of inter-county highway and main market roads which have not become "state roads" as defined in sections 1224 and 7464, said opinion

fails to give effect to the further proposition which, as above stated, seems clearly to follow from the provision quoted from section 1224. Such provision, as herein construed, is certainly not inconsistent with the terms of section 1191 or of paragraph 3 of section 1221.

What has been said in this opinion goes only to the extent of disapproving certain language in the opinion of my predecessor, and does not take exception to any of the three propositions stated in the headnotes to said former opinion. Especially is no exception here taken to the first of the headnotes, which really embraces a complete answer to the inquiry giving rise to the former opinion. In connection with said first headnote, however, it should be added that in the year 1919 the general assembly amended section 1224 G. C. so as to include the following language which did not appear in the statute when said former opinion was rendered (see 108 O. L. Part I, p. 495) :

“The state highway commissioner shall also be authorized to maintain, repair, resurface or reconstruct any inter-county highway or main market road not originally constructed by the state by the aid of state money or taken over by the state after being constructed. Any such inter-county highway or main market road so maintained, repaired, resurfaced or reconstructed shall not by reason of such operation become a state road unless the work done thereon is of such a character as in the judgment of the state highway commissioner produces an improvement which fully meets the standard prescribed by the state for state roads.”

Attention has also been given the question whether the county commissioners may devote to a state aid improvement project funds arising from levy under section 6956-1 G. C. That section as appearing 106 O. L. 647, was amended 108 O. L. Part I, p. 503, effective August 27, 1919, and at the same time supplemented by section 6956-1a. The amended and supplemental forms of these statutes were quoted and certain of their features passed on in an opinion (No. 959) of this department dated January 23, 1920, directed to Hon. Walter W. Beck, prosecuting attorney, Lisbon, Ohio, copy of which is enclosed.

Evidently the annual estimate of the county surveyor referred to in the opening lines of section 6956-1 is as described in the first paragraph of section 7187 :

“The county surveyor shall report to the county commissioners on or before the first day of April in each year the condition of the county roads, bridges and culverts in the county, and estimate the probable amount of funds required to maintain and repair the county roads, bridges and culverts, or to construct any new county roads, bridges or culverts required within the county.”

Section 6956-1a discloses very emphatic language on the part of the general assembly that the maintenance and repair fund which may accrue in part from the two mill levy authorized by section 6956-1 is to be used only for the maintenance and repair of *improved county roads*. The portion of such two mills as is not needed for levy to make up the maintenance and repair fund of one hundred dollars per mile, is also to be used only for county purposes as will be seen by reference to the quotation from section 7187 above. Again, section 1222 G. C. authorizes a county tax for the specific purpose of

“Providing a fund for the payment of the county's proportion of the cost and expense of the construction, improvement, *maintenance and repair* of highways under the provisions of this chapter”

and said section 1222 is in the chapter relating to state aid improvement. Finally, as was shown in the opinion, copy of which is enclosed, funds arising from levy under section 6926 G. C. may, subject to the conditions and restrictions outlined in that opinion, be used by the county for contribution to a state aid project.

As it is thus found that on the one hand counties may contribute to the maintenance and repair of state roads as defined in sections 1224 and 7464 and have been given authority to levy for funds applicable to that specific purpose, and on the other hand, sections 6956-1 and 6956-1a specifically say that funds arising from levy authorized by the first of these sections are to be used only for the maintenance and repair of *improved county roads*, and since it appears (section 7464) that there is a well-recognized and clearly defined class of "improved county roads" as distinguished from "state roads," the conclusion clearly follows that funds arising from levy under said section 6956-1 are not to be used by the county in co-operation with the state for the maintenance and repair of state roads.

It may be that the particular road repair fund covered by the county auditor's certificate accompanying the final resolutions now being discussed arose from a levy made before section 6956-1 was amended and supplemented as above set forth. However, the earlier form of said section, while not so clear as is the present form when read in connection with section 6956-1a, is nevertheless believed to be of the same purport as is the present form so far as concerns the point now under consideration.

Hence, while the fact that you are proposing to do the maintenance and repair work in question upon the plan of co-operation between state and county does not furnish ground for my withholding approval of the final resolutions first above mentioned, yet on the other hand, the fact that the county proposes to furnish its share of the cost from funds arising from levy under section 6956-1 is objectionable, and for this latter reason alone I am returning the resolutions without my approval as to their form and legality.

I am sending to Hon. C. A. Weldon, prosecuting attorney of Pickaway county, a copy of this opinion and of said opinion No. 959, for his information.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1265.

COUNTY TUBERCULOSIS HOSPITAL—WHERE COUNTY DISPOSES OF ITS INTEREST IN DISTRICT HOSPITAL—WHEN PROCEEDS DERIVED FROM SUCH SALE CAN BE USED TO ERECT AND MAINTAIN COUNTY TUBERCULOSIS HOSPITAL—SECTIONS 3141-1, 3141-2 AND 3148 G. C. CONSTRUED.

Under section 3141-1 G. C. (108 O. L., p. 230, Part 1) construed with section 3141-2 (Amended Senate Bill 195, 108 O. L., Part 2) and 3148 (108 O. L. Part 1, p. 252), where a county has joined in the erection of a district tuberculosis hospital and in which such hospital there is not suitable accommodations afforded, and where the trustees of such hospital have failed and refused to provide additional accommodations and because of such conditions such county, under sections 3148 et seq. has withdrawn from such district tuberculosis hospital and sold its interest therein, such