

Opinion No. 26-3908

August 16, 1926

BY: ROBERT C. DOW, Assistant Attorney General

TO: Hon. James A. French, State Highway Engineer, Santa Fe, New Mexico. Attention: Mr. E. S. Lewis, Chief Clerk.

This Office is in receipt of your request for an opinion relative to the levying of certain taxes for the years 1925 and 1926 in Valencia County, and other counties similarly situated.

Chapter 37 of the Laws of 1925, in order to provide funds to meet Federal Aid for the construction and improvement of a State Highway in Valencia County, provided for the levy of a tax of two mills on the dollar of assessed valuation of all property subject to taxation in said County for each of the years 1925 and 1931, inclusive. § 2 of said statute provides that the County Commissioners of the County of Valencia are "authorized and directed" to make such levy for said years. You desire to know whether or not a lawful levy may be made in the year 1926 and subsequent years provided for in said statute, and also whether or not the levy which should have been made for the year 1925 can be made in the year 1926.

As I understand it, the County Commissioners failed to make the levy provided for in the year 1925, notwithstanding the fact that under the terms of the statute the Board of County Commissioners of said County was authorized and directed to make such levy for the year 1925.

I am of the opinion that such levy can be made for the year 1926, and all subsequent years provided for in the statute, regardless of whether or not a levy is made for the year 1925, and should a levy be made for such back year with the levy for 1926, even though the levy for the year 1925 be held invalid, it will not invalidate the levy for 1926, provided the portion for the year 1926 is clearly severable from the portion for the year 1925. See Cooley on Taxation, Vol. 3, Fourth Edition, § 1041. A similar case to this was decided in the case of Perrin v. Benson, 49 Iowa Reports, 326. A statute of Iowa required that a levy be made for each of two different years. The Commissioners failed to make the levy the first year and they attempted to make the levy for both years during the last year, and certain tax payers filed suit to enjoin said Commissioners from making the levy for the previous year. The court decided in this case that as it was the duty of the Board of Commissioners to make the levy that mandamus would properly lie to compel the performance of such duty. In a case of this kind if the County Commissioners should refuse to make the levy for a certain year, then mandamus would likely be the only remedy to enforce the performance of such duty. A mandamus suit could not be filed until after the levy had been made for the reason that it would be necessary to allege that the County Commissioners had failed and refused to perform such duty. If such a suit should be filed and decided in the District Court and appealed

to the Supreme Court it might be a year or two years before the final disposition of the case, and if under the circumstances a levy for a preceding year could not be made in a subsequent year, then any Board of County Commissioners in failing or refusing to do their duty could easily defeat the requirements of the law. Under the foregoing statute it was the duty of the County Commissioners to make a levy for the year 1925; they had no discretion in the matter. If they so desired they might fail or refuse to make the proper levies for this year or succeeding years provided for in the statute, and for the foregoing reasons no taxes could be collected and said statute would be a nullity if the taxes for previous years could not be levied during some one of the years provided for in the Statute.

For the foregoing reasons I am of the opinion that the levy which should have been made during the year 1925 can legally be made at the time the levy is made for the year 1926.