

was heard on appeal by the Court of Appeals of Summit County, which court refused the injunction, finding for the defendants, the Board of Education. The copy of the journal entry of the Court of Appeals which you have submitted reads as follows:

“This day this cause came on to be heard upon the pleadings, evidence and argument of counsel, and was submitted to the court;

Upon consideration whereof, the court finds, on the issues joined, in favor of defendants.

It is therefore ordered, adjudged and decreed that the petition of the plaintiff be dismissed, at its costs.

To all of which the plaintiff excepts.”

There is no question but that the action of the Court of Appeals constitutes a reversal of the decision of the Common Pleas Court. This case then is surely no authority for a conclusion to the effect that such a transfer may not be made. Paragraph e of Section 5625-13, supra, authorizes such a transfer in clear and unambiguous language. It is therefore my opinion that the transfer about which you inquire was legal. Having reached this conclusion, it is unnecessary to answer your second question.

Respectfully,

JOHN W. BRICKER,
Attorney General.

761.

COUNTY HIGHWAYS — BRIDGES — MONEY EXISTING IN SPECIAL FUND THEREFOR MAY NOT BE TRANSFERRED TO BOND RETIREMENT FUND WHEN—COUNTY COMMISSIONERS CANNOT SET ASIDE SPECIAL ASSESSMENT WHEN.

SYLLABUS:

1. *Where there exists a special fund, created pursuant to the provisions of section 5625-9, General Code, for the purposes of general construction, reconstruction, resurfacing and repair of county highways and bridges, any funds remaining therein may not be transferred to the bond retirement fund of such subdivision so long as there remain highways or bridges in such county which may be in need of such repair.*

2. *In the absence of illegality in the levy of a special assessment, in anticipation of the receipt of which bonds have been issued, the board of county commissioners has no authority to cancel or set aside such assessments.*

COLUMBUS, OHIO, May 3, 1933.

HON. L. ASHLEY PELTON, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—This acknowledges receipt of your letter of recent date which reads as follows:

“I hereby request your official opinion upon the question which is involved in this letter. The question is as follows:

The County Commissioners of Medina County have built certain secondary roads over a period of approximately six years. The cost of said roads has been divided between the county and the abutting property holder. The county's portion has been provided for from monies raised by a levy upon all the taxable property of the county under authority of Section 5625-15, Sub-section 7, of the General Code. The balance of the cost was provided for by assessments against abutting property, said assessments being authorized by Section 6919-4. These assessments, after being determined by the Engineer and approved by the Board of County Commissioners, were provided for by an issuance of special assessment bonds, which were in turn payable over a five year period.

Whereas, the assessments have been placed upon the duplicate for the purpose of retiring bonds, and whereas the assessments are going delinquent to the extent that it is apparent money will not be available to meet the sinking fund requirements for the year 1933, will it be possible for the Board of County Commissioners, under authority of Section 6919-4, which reads in part as follows: 'All or any part thereof shall be assessed against real estate abutting upon said improvement * * * according to the benefits accruing to such real estate', to now change the assessments previously established, on the grounds that said assessments exceed the benefits accruing to such real estate, and pay a portion of the bonds with the money previously mentioned, raised by a levy under Section 5625-15?

If such money can be used, how can it be applied against the maturing bonds, in view of the limitation placed on transfers of money by Section 5625-13?"

Your inquiry is somewhat ambiguous; however, since you state that the county's portion of the cost of the improvement of certain highways is, or was, paid by funds derived from a tax levied by virtue of the authority contained in section 5625-15, General Code, paragraph 7, I assume your inquiry to be whether the tax funds so raised may be used to pay the bonds referred to in your inquiry.

Paragraph 7 of section 5625-15, provides that the taxing authority may levy outside the fifteen mill limitation "for the general construction, reconstruction, resurfacing and repair of roads and bridges in counties."

I am informed that there is an unexpended and unappropriated balance in the fund thus raised in your county, and construe your request to be as to whether such fund may be used for the payment of bonds issued in order to obtain funds to pay that portion of the construction cost of the improvement of the highway which was assessed against the abutting property owners.

It must be remembered that the bonds issued by a county are general obligations of the county and the full faith and credit of the county is pledged for their payment. (Sec. 2293-24 G. C.) Such section, in so far as material to your inquiry, reads:

"* * * Bonds or notes issued in anticipation of the levy of special assessments or the collection thereof shall be full general obligations of the issuing subdivision, and for the payment of the principal and interest of same the full faith, credit and revenues of such subdivision shall be pledged."

There is a definite obligation on the county to pay such bonds. See *State ex rel. Bowman vs. Commissioners*, 124 O. S. 174.

There is a general rule that when taxes are levied for a special purpose the funds derived therefrom can be used only for the purpose for which the tax was levied. Section 5625-9, General Code, provides for the establishment of certain funds, among which is "(d) A special fund for each special levy." The proceeds of the special levy authorized by section 2293-24 would therefore by virtue of the provisions of paragraph (d) of section 5625-9, supra, be placed in a special fund for the special levy. The special levy for highway construction and maintenance would, therefore, be placed in such type of fund.

Section 5625-13, General Code, provides the method by which the proceeds of certain funds may be transferred to certain other funds. Such section in so far as material to your inquiry reads:

"No transfers shall be made from one fund of a subdivision to any other fund, by order of the court or otherwise, except as hereinafter provided:

* * * *

b. The unexpended balance in any specific permanent improvement fund other than a bond fund, after the payment of all obligations incurred in the acquisition of such improvement, shall be transferred to the sinking fund or bond retirement fund of the subdivision; provided that if such money is not required to meet the obligations payable from such funds, it may be transferred to a special fund for the acquisition of a permanent improvement or improvements or, with the approval of the court of common pleas of the county wherein such subdivision is located, to the general fund of the subdivision.

* * *

d. Unless otherwise provided by law, the unexpended balance in any special fund, other than an improvement fund, existing in accordance with section 5625-9 paragraph (d), (f), or (g) or section 5625-11 of the General Code, may be transferred to the general fund or to the sinking fund or bond retirement fund after the termination of the activity, service or other undertaking for which such special fund existed, but only after the payment of all obligations incurred and payable from such special fund.

e. Moneys may be transferred from the general fund to the sinking fund or the bond retirement fund to meet a deficiency in either of the latter funds.

f. Moneys appropriated therefor may be transferred from the general fund of a subdivision to a fund authorized by sections 5625-11 or 5625-12 of the General Code or to the proper fund of a district authority.

Except in the case of transfers in accordance with paragraphs (c) and (f) of this section, transfers herein authorized shall only be made by resolution of the taxing authority passed with the affirmative vote of two-thirds of the members thereof."

It is evident from paragraph (b) supra, that if the funds in a specific improvement fund are not needed; that is, if all the costs of the improvement for which such tax funds were collected, are paid and a surplus remains, such sur-

plus may be transferred to a bond retirement fund of the subdivision. Therefore, if it be considered that the fund in question, in which I am informed there is a surplus after the improvement or repair of all highways in need of repair, is of the nature referred to in paragraph (b) of section 5625-13, such excess may be transferred to the bond retirement fund in question, in the manner prescribed in such paragraph.

If, however, such fund be not considered as a specific improvement fund, the provisions of paragraph (d) of such section would authorize its transfer, after the termination of the activity for which such fund existed, to the bond retirement fund.

However, since the provisions of paragraph 7 of section 5625-15, General Code, is that the tax levied pursuant thereto shall be for "the general construction" of highways, it is difficult to perceive how the activity for which such tax was voted outside the limitation could be considered as terminated until all of the roads and bridges of the county were in such condition that there will be no need for either the construction, reconstruction, resurfacing or repair of such highways or bridges. Until such state of facts is found to exist, I am of the opinion that the board of county commissioners would not be justified in finding that the activity for which such tax was levied had terminated.

The other question contained in your inquiry presents a more difficult problem. That is, whether in the event it should now be found that the special taxes assessed against abutting property owners may now be reduced or abated in part.

Under date of February 1, 1930 (Opinions, Attorney General, 1930, p. 194) my predecessor in office held, as stated in the syllabus, that:

"After a board of county commissioners has levied assessments against abutting property to pay a part of the cost of a state highway and has issued bonds in anticipation of the collection of such assessments, such board of county commissioners has no authority to cancel and set aside such assessments."

Such opinion is based upon the reasoning, first, that there is no statute authorizing the county commissioners to cancel or set aside a special assessment which has previously been levied, and, second, that section 2293-13, General Code, provides that bonds issued in anticipation of special assessments shall not be considered in calculating the net indebtedness of the subdivision. I am in accord not only with the conclusion but also with the reasoning of my predecessor in office.

It must also be borne in mind that if the taxpayer had been aggrieved at the amount of the assessment against the abutting property owners, or felt that it exceeded the benefits, he had his statutory remedy. Not having availed himself thereof, several courts have held that thereafter he cannot be heard to complain in a court of equity or law. *Helmrs vs. McCarthy, et al.*, 6 O. App. 423; *Malbin Bros. vs. McBride, Treas.*, 28 O. L. R. 18; and *Hammond vs. Winder*, 112 O. S. 158.

It therefore appears that the county commissioners have no legal authority to abate the assessments made against abutting property owners, unless such assessments were illegal at their inception, in which case an injunction would lie to prevent their collection. *Conn. vs. Ringer*, 32 Fed. 2d, 638; *Fuel and Supply Co. vs. Paxton*, 1 Fed. 2d, 662; *Gas Co. vs. Imes*, 11 Fed. 2d, 191; and *Paxton*

vs. *Fuel & Supply Co.* 11 Fed. 2d, 740. Since you present no facts concerning the legality or illegality of the assessments, I express no opinion thereon.

Specifically answering your inquiry, I am of the opinion that:

1. Where there exists a special fund, created pursuant to the provisions of section 5625-9, General Code, for the purposes of general construction, reconstruction, resurfacing and repair of county highways and bridges, any funds remaining therein may not be transferred to the bond retirement fund of such subdivision so long as there remain highways or bridges in such county which may be in need of such repair.

2. In the absence of illegality in the levy of a special assessment, in anticipation of the receipt of which bonds have been issued, the board of county commissioners has no authority to cancel or set aside such assessments.

Respectfully,

JOHN W. BRICKER,
Attorney General.

762.

LIQUIDATION OF BANK—SECTION 710-89a, G. C. AS AMENDED BY HUNTER ACT APPLICABLE TO BANKS IN PROCESS OF LIQUIDATION ON EFFECTIVE DATE OF ACT—RESUMPTION OF BUSINESS.

SYLLABUS:

Section 710-89a of the General Code, as amended by the Hunter Act (H. B. No. 358, 90th G. A.), is applicable to banks in the process of liquidation on the effective date of that act.

COLUMBUS, OHIO, May 3, 1933.

HON. I. J. FULTON, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date which reads as follows:

“You have in your files plan with various amendments thereto approved by your predecessor in connection with the proposed reopening of The O. Savings Bank and Trust Company, T., Ohio. I have been informed that a Reorganization Committee proposes after other requirements are met, to take advantage of the provisions of Section 710-89 (a), known as the Hunter Bill, at the time application is presented to the Court of Common Pleas of L. County, Ohio, for authority to re-open this institution.

The O. Savings Bank and Trust Company was closed on the 17th day of August, 1931, and has since said time been in my possession for the purpose of liquidation, and while the Hunter Bill provides that the same shall be applicable to banks in liquidation on the effective date of said act, I would appreciate your opinion as to whether or not the provisions of this act may be applied in the particular case or should I, irregardless of the enactment, make the same requirement relative to its cash position as regards non-assenters as I have in the past in all