

clear that one of the ways in which a public road may be improved by the county commissioners, as referred to in Section 6906 of the General Code, is in the manner provided in Section 6911, *supra*, i. e., by resolution passed by the unanimous vote of the board of county commissioners without a petition.

The fact that Sections 6907, 6908 and 6909 of the General Code, were not amended in House Bill No. 67, and that said act amended certain other sections, as Section 6911, General Code, pertaining to road improvements under the jurisdiction of the county commissioners, has no bearing upon the question which you present, since it is quite clear that inasmuch as the Legislature did not amend or repeal Sections 6907, 6908 and 6909 of the General Code, it was intended that the county commissioners might proceed by a petition as provided in said sections, as well as by resolution adopted by unanimous consent, as provided in Section 6911, of the General Code.

From the foregoing discussion, and answering your question specifically, it is my opinion that a board of county commissioners may, under the provisions of Section 6911 of the General Code, as amended by the 87th General Assembly (112 v. 488), proceed by resolution adopted by unanimous vote without the filing of a petition, as authorized by Sections 6907, 6908 and 6909 of the General Code, to grade, drain, pave, straighten or widen any road under their jurisdiction, and to construct or reconstruct any bridges and culverts necessary for such an improvement.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2297.

TRANSCRIPT—TESTIMONY IN CRIMINAL CASE OF ONE JOINT DEFENDANT—MUST BE PAID FOR BY OTHER WHEN TRIED SEPARATELY AT LATER DATE.

SYLLABUS:

A joint defendant in a criminal case dismissed therefrom on a plea in abatement and subsequently separately indicted for the same offense is not entitled to receive a transcript of the testimony taken in the trial of the other defendant or defendants, the costs thereof to be taxed as costs in the case of such other defendants and collected as other costs.

COLUMBUS, OHIO, June 30, 1928.

HON. HERMAN F. KRICKENBERGER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date reading as follows:

“A controversy has arisen here in connection with a criminal case in which the defendant’s attorney and I cannot agree on the construction to be placed on a certain statute. The facts in the case are these:

A and B were jointly indicted for an offense; A moved for a separate trial, was tried separately and convicted, and the indictment as to B was dismissed on a plea in abatement. B was re-indicted by the next Grand Jury, and is now to be tried on this new indictment for the same offense. Counsel for B has ordered a transcript of the testimony in the trial of A, and contends that, under Sections 1552 and 1553 of the General Code, the

cost of this transcript is a proper charge against the county. It is my contention that the cost of this transcript under this state of facts, especially in the light of Section 13752 of the General Code, is not a proper charge against the county.

The case referred to herein will be for trial soon, and, in view thereof, I will greatly appreciate your giving me an opinion on the subject at as early a date as possible."

B's plea for abatement having resulted in a dismissal from the case in which he was jointly indicted with A, the question finally turns on whether or not B was thereafter a party to the suit wherein A was tried and convicted. Provision is made in the statutes, to which you refer, for a party to a suit, or his attorney, to have a transcript made of all or any portion of the shorthand notes taken in a case. Likewise, provision is made for the payment therefor and for the taxing of the amount so paid as costs in the case.

Pertinent provisions of Sections 1551, 1552, 1553 and 13752, General Code, read as follows:

Sec. 1551. "When shorthand notes have been taken in a case as herein provided, if the court, either party to the suit, or his attorney, requests transcripts of all or any portion of such notes in longhand, the shorthand reporter reporting the case shall cause full and accurate transcripts thereof to be made for the use of such court or party. * * * "

Sec. 1552. "* * * Such compensation shall be paid forthwith by the party for whose benefit a transcript is made. The compensation for transcripts made in criminal cases, by request of the prosecuting attorney or the defendant, and transcripts ordered by the court in either civil or criminal cases, and copies of decisions and charges furnished by direction of the court shall be paid from the county treasury, and taxed and collected as other costs. The clerk of the proper court shall certify the amount of such transcripts or copies, which certificate shall be a sufficient voucher to the auditor of the county, who shall forthwith draw his warrants upon the county treasurer in favor of such shorthand reporters."

Sec. 1553. "When ordered by the prosecuting attorney of (or) defendant in a criminal case, * * * in either civil or criminal cases, the costs of such transcripts shall be taxed as costs in the case, collected as other costs, and paid by the clerk of the proper court, quarterly, into the treasury of such county, and credited to the general fund. * * * "

Sec. 13752. "On application, by or on behalf of the accused, to an officer required to make a record or docket entries in such case, and upon tender of the proper fee, such officer shall make and deliver to such accused or his counsel a complete certified transcript of the record, omitting, if so requested, a bill of exceptions therefrom. * * * "

From an analysis of the foregoing sections, it is manifest that the defendant in a criminal case, or his attorney, is entitled on demand, to receive a transcript of all or any portion of the shorthand notes, the cost of which shall be taxed and collected as other costs.

In criminal cases it is provided by statute that the judge or magistrate imposing sentence shall include the costs in the case and render a judgment against the defendant for the same, which costs, under the provisions of Section 1553, supra, "shall

be taxed as costs in the case, collected as other costs and paid by the clerk of the proper court quarterly into the treasury of such county and credited to the general fund."

Since B ceased to be a party before A was tried and convicted, it seems to me logically to follow that he is not, under the provisions of the statute, entitled to receive a transcript of the testimony in the trial of A. If he be entitled to receive the transcript of the testimony in that trial and tax the costs thereof against the county, it would follow that the ultimate cost of the transcript so received by him would be taxed against A as costs.

While you state in your letter B has been re-indicted by the grand jury and is to be tried on a new indictment for the same offense, such fact does not make him a party to the suit wherein A was convicted and entitle him to receive a copy of the testimony for use in his trial on the new indictment.

It appears from the provisions of the statute, supra, with reference to the right of a defendant to have a transcript of the testimony, that the statute does not contemplate that a defendant in a case other than the one on which B is being brought to trial shall bear the expense of obtaining a transcript to be used in connection with the other cause, notwithstanding the fact that the same might be very desirable and enlightening to the attorney representing B.

Answering your question specifically, I am of the opinion that a joint defendant in a criminal case dismissed therefrom on a plea in abatement and subsequently separately indicted for the same offense is not entitled to receive a transcript of the testimony taken in the trial of the other defendant or defendants, the costs thereof to be taxed as costs in the case of such other defendants and collected as other costs.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2298.

TAX AND TAXATION—ROADS—SPECIAL LEVIES VOTED BY TOWNSHIP ELECTORS FOR CERTAIN HIGHWAY—UNEXPENDED BALANCE NOT TRANSFERABLE.

SYLLABUS:

An unexpended balance of certain funds raised by taxation against all the taxable property of a certain township, which fund was derived from taxes authorized by a vote of the people under the provisions of Sections 5649-2 and 5649-3, General Code, as those sections existed at the time of the submission of the question of levying said tax to the people, for the purpose of paying the township's share of the cost and expense of improving a certain inter-county highway located within such township, cannot be transferred to another fund for the purpose of improving, maintaining and repairing other roads within such township, because of the restrictions existing under the provisions of Section 5625-13, General Code, relating to the transfer of special funds. The unexpended balance remaining in such fund must remain intact for the purpose of constructing the particular road for the improvement of which the electors authorized the levying of taxes, and the same cannot be used for any other purpose.