

In answer to your first question, it is my opinion that the judgment or sentence of the trial court is a finality, unless and until the same be set aside or modified by a court of competent jurisdiction, and that the superintendent of the Ohio State Reformatory, the Ohio Board of Clemency and all other administrative officers are bound thereby, in the absence of action thereon by a court having jurisdiction so to act. However, as pointed out in Opinion No. 819 rendered to your board under date of August 2, 1927, by virtue of the provisions of Section 2140, General Code, which reads:

"The Ohio board of administration, with the written consent of the governor, may transfer to the penitentiary a prisoner, who, subsequent to his committal, shall be shown to have been more than thirty years of age at the time of his conviction or to have been previously convicted of crime. The Ohio board of administration may so transfer an apparently incorrigible prisoner whose presence in the reformatory appears to be seriously detrimental to the well-being of the institution."

the Director of Public Welfare, with the written consent of the governor, may transfer a person, shown to have been previously convicted of crime, to the Ohio Penitentiary.

2. The language of Section 2131, General Code, viz., "The superintendent shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory, if they are not known to have been previously sentenced to a state prison" no doubt gives rise to your second inquiry. This section does not authorize the superintendent of such institution to refuse to receive a prisoner whose commitment papers are legal and valid on their face, even though such prisoner is known by the superintendent to have been previously sentenced to a state prison. The commitment papers do not contain on their face any information whether such prisoner has or has not been previously sentenced to a state prison and it is immaterial whether or not such superintendent has personal or hearsay knowledge in that regard. The commitment papers, if valid on their face, control and such superintendent cannot assume judicial authority in determining whether or not a prisoner whose commitment papers issued by a court of competent jurisdiction are valid and legal on their face is eligible to admission in such reformatory. The remedy in such case is provided for by Section 2140, General Code, supra.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1278.

COUNTY COMMISSIONERS—HAVE NO AUTHORITY TO MAKE APPLICATION TO COMMON PLEAS COURT FOR TRANSFER OF FUNDS FROM ROAD FUND TO GENERAL COUNTY FUND—SPECIAL LEVIES DISCUSSED.

SYLLABUS:

Section 2296 of the General Code confers no authority upon the county commissioners to apply to the court of common pleas for authority to transfer the proceeds of the two mill levy, made for the purpose of the construction, reconstruction, improvement,

maintenance and repair of county roads and exempted from the tax limitations by vote of the people, from the road fund to the general county fund. The monies in such road fund constitute the proceeds or balance of a special levy within the meaning of Section 2296 of the General Code.

COLUMBUS, OHIO, November 18, 1927.

HON. R. D. WILLIAMS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion as follows:

“Athens County is now having and has had for several weeks last past considerable internal strife growing out of a labor dispute between the United Mine Workers of America and certain coal operators who are desirous of operating their mines situate in this county under conditions not approved by the mine workers. Our Common Pleas Court of Athens County, Ohio, has heretofore issued two restraining orders against certain of the United Mine Workers of America and sympathizers. It soon became apparent that the sheriff’s office of our county as was then organized, was unable to properly enforce the terms and conditions of these restraining orders. About two weeks ago the sheriff of this county appointed about forty additional deputy sheriffs. These appointments were made under the authority of Sections 2830 et seq., General Code of Ohio. The commissioners of this county fixed the per diem of these deputies at five dollars. The proper authorities of this county are now seeking a means whereby these deputy sheriffs may be paid. I am advised by our county auditor that there is no money in any general fund so-called, which may be transferred to a proper fund from which these deputies can be paid. This county does have, however, a balance in a fund which grew out of and resulted from an additional two mill levy heretofore made resulting from an election had in this county. This levy and election were had under the terms and provisions of Section 6926, et seq., General Code of the State of Ohio.

Query: Is the Common Pleas Court of this county authorized upon proper application being made, to transfer monies so arising from such increased levy to the general or the county fund, so-called?

In the event your answer to the foregoing query should be in the negative, I trust that you will advise whether or not in your judgment there is any procedure, statutory or otherwise, which empowers and authorizes the county commissioners or other officer or officers to issue a certificate of indebtedness or to in any legal manner enable himself or themselves to immediately borrow money sufficient to pay such deputies.

Time is very much the essence of our situation here and it would indeed be greatly appreciated by this office if you would give the above and foregoing your immediate attention.”

The authority to transfer funds as you suggest in your inquiry, exists in Section 2296 of the General Code, which reads as follows:

“The county commissioners, township trustees, the board of education of a school district, or the council, or other board having the legislative power of a municipality, may transfer funds, except the proceeds or balances of special levies, loans or bond issues, under their supervision, from one fund to

another, or to a new fund created under their respective supervision, in the manner hereafter provided, which shall be in addition to all other procedure now provided by law."

You state also that this fund is the result of a tax levy by authority of the vote of the people. I assume that you mean that the question of exempting the levy provided by Section 6926 of the General Code from tax limitations was submitted pursuant to authority contained in Sections 6926-1 to 6926-3, inclusive. The only effect of the vote of the people is to authorize the placing of a levy outside of limitations. The authority to make the levy still resides in the county commissioners and, as stated in Section 6926, supra, the purpose of this levy is specifically to provide for the county's proportion of the compensation, damages, costs and expense of constructing, reconstructing, improving, maintaining and repairing roads. The statutory form of the ballot is prescribed by Section 6926-2 in the following language:

"For an additional levy of taxes for the purpose of constructing, reconstructing, maintaining and repairing county roads not exceeding ----- mills, for not to exceed ----- years. Yes.

For an additional levy of taxes for the purpose of constructing, reconstructing, maintaining and repairing county roads not exceeding ----- mills, for not to exceed ----- years. No."

It is also to be noted that, by the terms of Section 6926-1, the petition or resolution for the levy, or the resolution of the commissioners where they act without petition, may state the part of the levy so to be exempted to be used for constructing and improving county roads and the part of such levy so to be exempted to be used for maintaining and repairing county roads, in which event the proceeds of any such levy exempted by a vote of the electors of the county shall be expended in accordance with such division. Your letter does not disclose whether such an apportionment was made at the time the levy was voted upon in your county. In answering your question, however, I shall assume that no such apportionment was made.

The specific question for determination is whether or not the funds to which you refer are the proceeds of a special levy within the meaning of Section 2296 of the General Code. I have examined the statutes in vain in an attempt to find any statutory definition of the term "special levy." To be sure there are instances wherein the legislature has definitely stated that the proceeds of certain levies should not be subject to transfer by court or otherwise. Quite obviously this type of levy would come within the inhibition of Section 2296 of the Code. Where, however, no such specific language is used, it is difficult to distinguish between a general levy and a special levy. All tax levies must, in a sense, be specific in that they must have definite objects, for it is self evident that a tax levied without any particular object in view could not be sustained. It is to be observed that Section 2296 of the Code speaks of the transfer of funds "from one fund to another." Apparently, therefore, it is contemplated that the proceeds of the various levies shall be paid into different funds and, as is well known, the proceeds of a levy for general county or municipal purposes may, in the ordinary bookkeeping process, be divided into several funds. The transfer of money from one fund to another within the same general purposes is obviously authorized by Section 2296 of the Code. In this instance, however, the two mill levy was made for a definite purpose, viz., the construction, reconstruction, improvement, maintenance and repair of county roads. The voters of the county, by their affirmative vote, have authorized the placing of this levy for this special purpose outside of the limitations provided by law. Surely this authority did not contemplate the expenditure

of the proceeds of the levy for purposes entirely foreign to the improvement of roads. To divert such proceeds would be, in my opinion, entirely unwarranted. If the transfer in the present instance were authorized, in view of the exigency existing, the same principle would be applicable to a transfer to any other county fund. The effect of this would be that, although the voters should authorize the placing of the levy outside of the limitations, for the construction, reconstruction, etc., of roads, yet, upon approval of the court, the county commissioners could transfer the funds derived from such levy for use in general county purposes. In this manner the commissioners could augment the funds for general county purposes and so defeat the tax limitation statutes.

Attention may be invited to the fact that in the enactment of House Bill 80, the last General Assembly, in Sections 5625-6, et seq., of the General Code, specifically recognizes as a special levy a county levy for the construction, reconstruction, resurfacing and repair of roads and bridges other than state roads and bridges thereon. While only persuasive authority, since the provisions of the bill as to funds are not as yet in effect. I feel that this is indicative of the general legislative intent that a levy of this character shall be special. In connection with this discussion, there must also be borne in mind Section 5 of Article XII of the Constitution of Ohio, which is as follows:

“No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied.”

In this instance the object of the two mill levy has certainly been distinctly stated. In my opinion this section of the constitution would be violated in case the proceeds of the tax were applied to objects entirely foreign to those stated in the levy.

I have, therefore, reached the conclusion that Section 2296 of the General Code confers no authority upon the county commissioners to apply to the court of common pleas for authority to transfer the proceeds of the two mill levy, made for the purpose of the construction, reconstruction, improvement, maintenance and repair of county roads and exempted from the tax limitations by vote of the people, from the road fund to the general county fund. The moneys in such road fund constitute the proceeds or balance of a special levy within the meaning of Section 2296 of the General Code.

Since my answer to your first question is in the negative, I am called upon to answer your further question as to whether the county commissioners or other officer or officers have authority to issue certificates of indebtedness or to borrow money to pay for the necessary deputy hire incident to the present emergency. You are doubtless aware of the provisions of Section 2293-4 of the General Code, authorizing the borrowing of money in anticipation of the collection of current revenue in any fiscal year. Because of the limitations contained in said section, I do not feel that its provisions would be of benefit to you in the present situation.

I call your attention, however, to the case of *Youngstown vs. National Bank*, 106 O. S., 563, in which the mayor of the municipality, without any specific authority other than the statutory authority to appoint additional patrolmen in the case of riot or other emergency, had employed special officers and, in order to provide funds therefor, had borrowed money from the bank. This had been done in spite of the fact that there was no fund from which the payment could be made. After pointing out that the mayor, under the statute, is the chief conservator of the peace of a municipality, Judge Wanamaker, in the opinion on page 574, states as follows:

"To those who may desire a precedent to support this proposition, I refer to the statement of this doctrine by that great jurist, Judge Thurman, in an early Ohio case, *Cass vs. Dillon*, 2 Ohio St. 607, at page 622:

'The constitution did not create the municipalities of the state, nor does it recognize them as things already in being, with powers that will continue to exist, so far as they are consistent with the organic law, until modified or repealed. Thus there is no express provision that a county may make a road or contract a debt, yet no one will doubt for a moment that it may do both. Indeed, its power to contract debt is recognized, beyond even the authority conferred by law. It is clearly assumed in Section 5 of Article 8, that it may create debts to repel invasion, suppress insurrection, or defend the state in war, although no such power has ever been conferred by statute, so far as I can discover. If it can thus incur debts, it may, of course, levy taxes to pay them; notwithstanding its only express grant of the taxing power is, by Section 7 of Article 10, for "police purposes." The same thing may be said of townships, cities, towns, and villages.'

When the people of a community organize themselves into a municipality, a public corporation, the artificial political entity created is entitled to protection against violent assault, and just as Judge Thurman says may create debts to suppress insurrection, whether it be called a mob, a riot, or any other name signifying the use of violence, organized or unorganized, which threatens and jeopardizes the very life of the municipality.

Common sense, common justice, the common conscience of our courts, no less than our common people, demand that the full resources of our municipalities and our states shall be employed, yes, if necessary exhausted, that law and order may be maintained; in order that the unalienable rights of men, women and children shall be safe and secure."

In so far as the preservation of the peace is concerned, the office of sheriff is similar to that of mayor. Section 2833 of the General Code, makes it the mandatory duty of the sheriff to preserve the public peace and it is stated:

"In the execution of the duties required of him by law, the sheriff may call to his aid such person or persons or power of the county as may be necessary."

This section is as broad as that conferring authority upon the mayor of a municipality and the analogy between the two offices is plain. If, therefore, as the court states in the case above referred to, the municipality has inherent authority to incur debts to suppress insurrection, that authority would also apparently exist in a county. In this connection, however, it should be observed that this inherent power is only recognized in the case of extreme public exigency and resort to a departure from the ordinary statutory method of incurring indebtedness should not be made until all of the ordinary resources have been exhausted, and then only in the event the protection of persons and property shall imperatively so demand.

Respectfully,
EDWARD C. TURNER,
Attorney General.