

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.

COLUMBUS, OHIO, June 30, 1928.

HON. FRANK F. COPE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date, which reads as follows:

“On August 28th, 1915, the trustees of Loudon Township, Carroll County, Ohio, met in special session and passed the following resolution:

RESOLUTION

Whereas the amount of taxes that may be raised by the levy of taxes at the maximum rate authorized by Section 5649-2 and 5649-3 of the General Code of Ohio, will be insufficient to raise sufficient fund to pay the indebtedness of said Loudon Township for its share of cost and expenses, for the maintenance, repair and improvement of inter-county highway to be constructed in said Loudon Township, Carroll County, Ohio, it is necessary and expedient to levy taxes at the rate of two mills in excess of the maximum rate of taxation provided by Section 5649-2 and 5649-3 of the General Code of Ohio, such increase rate not to be levied exceeding five years beginning the fiscal year 1916; and be it further resolved that a copy of this resolution be certified to the Deputy Supervisors of Election, as provided by law, by the clerk of said Loudon Township, Carroll County, Ohio, and that legal notice be given of the passage of this resolution.

Dated August 28, 1915.’

Pursuant to said resolution, the proposition was submitted to the electors of said township at the regular election, November 3, 1915, who voted a special levy to improve a certain road known as I. C. H. No. 371, Sections A and B, said assessment being on the entire taxable property of said township. The amount collected from said assessments was approximately \$12,000.00. The township's share for said improvement was \$6,631.46, leaving a balance unexpended in the hands of said trustees of approximately \$5,300.00.

There is other road work to be done in the township, for which money will have to be raised. Is it possible to transfer this surplus to another fund, or use it for another road, or how should it be disposed of by the Laws of Ohio?”

You request my opinion as to whether or not an unexpended balance of certain funds raised by taxation against all of the taxable property of a certain township, which funds were derived from a tax levy authorized by a vote of the people, under the provisions of Sections 5649-2 and 5649-3, General Code of Ohio, for the purpose of paying the township's share of the cost and expenses of the improvement, of a certain designated inter-county highway, may be transferred from this special fund to another fund and used for the purpose of improving another road. You desire further that I render my opinion as to how this unexpended balance may be disposed of according to law, if such transfer may not be made.

At the outset, it should be noted that the resolution of the township trustees, as copied in your letter, is much broader in its terms than your statement as to the nature of the proposition submitted to and voted upon by the electors. The resolution reads, “to pay the indebtedness of said Loudon Township for its share of cost and expenses, *for the maintenance, repair and improvement of inter-county highway to be*

constructed in * * * Loudon Township;" while, according to your statement, the proposition submitted to and voted upon by the electors was whether or not a special levy should be authorized to *improve* a certain road known as "I. C. H. No. 371, Sections A and B." In this opinion I shall assume that you have correctly stated the contents of the ballot, though I think it manifest that, if the legal notice and the question submitted were as broad in their terms as the resolution, the funds in question may be expended according to law for the maintenance and repair or to improve any inter-county highway in the township.

Section 2296, General Code, which was repealed in House Bill No. 80 (112 v. 391), read 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 public 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."

It is noted that prior to the effective date of House Bill No. 80, the various local subdivisions had the right, by virtue of the provisions of Section 2296 above quoted, with the approval of the Common Pleas Court, to transfer moneys from one fund to another, except the proceeds or balances of special levies, loans or bond issues. From your statement there can be no question but that the fund in question is one derived from a special levy, authorized by a vote of the electors of the township, for the purpose set forth in your letter. Although the question of permitting a levy of taxes at the rate of two mills in excess of the maximum rate of taxation provided by Sections 5649-2 and 5649-3, General Code, for a period of five years, beginning with the fiscal year 1916, was contained in the resolution of the board of county commissioners, a copy of which was certified to the deputy state supervisors of elections, the electors apparently only authorized a special levy for the improvement of certain sections of a particular inter-county highway. In so stating, I am assuming that the ballot made reference to the specific highway, the improvement of which was then contemplated.

Former Section 2297 of the General Code was likewise repealed in House Bill No. 80 (112 v. 391). This section provided that upon the passage of a resolution by the proper officers or board of a local subdivision a petition could be filed in the Common Pleas Court praying for permission to transfer certain moneys from one fund to another.

In passing upon the question as to whether, under the provisions of Sections 2296 et seq., General Code, a board of county commissioners could apply to the Court of Common Pleas for authority to transfer the proceeds of a road fund, which had been raised by virtue of authority of the people, to the general fund, this department, in Opinion No. 1278, addressed to Hon. R. D. Williams, Prosecuting Attorney, Athens, Ohio, on November 18, 1927, held:

"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 pro-

ceeds or balance of a special levy within the meaning of Section 2296 of the General Code."

The last Legislature, as a part of House Bill No. 80 (112 v. 391, 409), enacted Section 5625-13, General Code, which provides as follows:

"No transfers shall be made from one fund of a subdivision to any other fund, by order of court or otherwise, except that transfers may be made from the general to special funds established for purposes within the general purposes of the general fund, and from such special funds to the general fund; but no transfers shall be made from any such special fund to the general fund, except of moneys theretofore transferred from the general fund. Such transfers shall only be made by authority of an appropriation in the annual or supplemental appropriation measure, or by resolution of the taxing authority adopted by a three-fourths vote. Before any transfer shall be made, the fiscal officer of the subdivision shall certify in writing that the amount so to be transferred is not encumbered by any obligation or appropriation, and is in the treasury or in process of collection. At the end of a fiscal year any balance in a special fund to which a transfer has been made shall revert to the general fund but not in excess of the amount that was originally transferred during such fiscal year. In determining the balance in the general fund at the close of such fiscal year, balances which have so reverted shall be included."

It is noted from the provisions of the foregoing statute that transfers may not now be made from one fund of the subdivision to any other fund, by order of court or otherwise, except that transfers may be made "from the general to special funds established for purposes within the general purposes of the general fund, and from such special funds to the general fund; but no transfers shall be made from any such special fund to the general fund, except of moneys theretofore transferred from the general fund."

Inasmuch as the fund in question is a special fund, which was raised by taxation against all the taxable property of the township, by virtue of a vote of the electors authorizing the levying of such taxes, it is quite clear that the special fund in question cannot be transferred to another special fund for the purpose of improving, maintaining and repairing other roads within such township. The electors might not have voted favorably upon the question of authorizing an additional levy of taxes had they not had in mind the improvement of the particular road which was referred to in the ballot.

Paragraph ('c') of Section 7464, General Code, which was amended in House Bill No. 67 (112 O. L. 497), provides as follows:

"Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, *but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act.*" (Italics the writer's.)

In this connection your attention is invited to Sections 1203 and 1224, of the General Code.

It cannot be questioned that the basic underlying principle of the Norton-Edwards Act (House Bill No. 67), and the controlling factor in the enactment of said measure, was to preclude, especially in the smaller counties, cooperation between the state, the counties and townships in the matter of the building of state highways, thereby relieving the smaller counties from a heavy burden of taxation which had resulted from their co-operating with the state in constructing a great state highway system. However, as heretofore pointed out, limited co-operation still exists under the provisions of Section 1191, General Code, which was enacted as a part of House Bill No. 67.

Your attention is further invited to the fact that under the provisions of Section 1203, General Code, the county commissioners, at the sole expense of the county, or in cooperation with the township trustees, may construct any part of the state highway system or the bridges and culverts thereon located within such county or township, provided the plans and specifications covering any such proposed construction by the county commissioners or the township trustees shall be first submitted to the director and shall first receive his approval; and provided further that the construction of said portion of said inter-county highway located within such county or township, or both, be accomplished under the supervision and inspection of the director.

As heretofore pointed out, the electors of the township authorized the levy of an additional burden of taxes for the construction of a particular inter-county highway located within such township, and it may come to pass that said inter-county highway may become worn out by travel to the point that a reconstruction of the same, or an entirely new construction, will be necessary. In that event the township trustees can clearly, under the provisions of Section 1203, General Code, (112 v. 444), expend the balance of the money remaining in the special fund for the construction of that portion of the inter-county highway for which the original levy of taxes was authorized, and concerning which a balance is remaining unexpended.

At all events, in view of the provisions of Section 5625-13, General Code, hereinbefore referred to and quoted in this opinion, the township trustees are unauthorized to transfer the unexpended balance in question to another fund for the purpose of improving, maintaining or repairing other roads within the township.

From the foregoing discussion, and answering your question specifically, it is my opinion that, inasmuch as the fund in question was provided by the levy of taxes authorized by a vote of the electors, as provided in Sections 5649-2 and 5649-3 of the General Code, as those sections existed at the time of the submission of the question of levying said tax to the people, and the electors authorized such a levy for the purpose of improving a certain inter-county highway located within such township, the unexpended balance remaining in such special fund 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. Further, it is my opinion that the unexpended balance remaining in said fund must remain in said fund 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.

Respectfully,

EDWARD C. TURNER,

Attorney General.