

2063.

COUNTY COMMISSIONERS— DUTY TO CONSTRUCT AND MAINTAIN A BRIDGE OVER A DITCH ALONG A TOWNSHIP ROAD CONSIDERED AND DISCUSSED.

SYLLABUS:

Duty of board of county commissioners to construct and maintain a bridge over a ditch, constructed by township trustees along a township road, in order to afford means of ingress and egress to and from private farm considered and discussed.

COLUMBUS, OHIO, May 5, 1928.

HON. OTTO J. BOESEL, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—This will acknowledge your letter which reads as follows:

“The county commissioners of Auglaize County have requested me to secure your opinion as to the law in relation to the following facts:

We have in the eastern part of our county, a county road running east and west. Along the south side of said county road, and within the right of way of said road, is located an open ditch of considerable depth, which ditch serves as a drainage for the county road. Immediately south of the south line of said road there is located a farm, and the farmer occupying said premises drives from his premises to said road over a bridge constructed across said ditch. This bridge has heretofore been constructed and maintained by the farmer, the bridge affording egress and ingress to said farm. He now contends that it is the duty of the county commissioners to construct and maintain this bridge.

Will you advise me at your earliest convenience whether, in your opinion, there is any legal obligation on the part of the board of county commissioners of Auglaize County, to construct and maintain this bridge, which, as heretofore noted, affords egress and ingress to the farmer or to anyone desiring to enter or leave said farm.”

In response to my request for additional facts, you inform me that:

“The road in question and along which said ditch is located, was built on petition by the trustees of Duchouquet Township, and I further find that the road at the present time is still a township road, rather than a county road, as first advised. Hence you may consider the proposition from the standpoint of a township road, and the ditch in question is located along said roadway, and within the right of way of the road.

The record of Duchouquet Township discloses the following facts:

On September 18, 1897, a petition was signed by residents of said township, petitioning for the construction of the road in question. The records further disclose that a notice that the petition would be presented was given by posting in three public places in Duchouquet Township, by the petitioners. The petition was presented to the trustees of Duchouquet Township on October 20, 1897. Proper bond was filed by the petitioners.

On October 29, 1897, the trustees of Duchouquet Township, Auglaize County, Ohio, appointed three parties and the county surveyor to view the road, and set the date of said view for November 9, 1897. On November 15,

1897, the records disclose that the viewers filed their report and notified the trustees of the filing. The records further disclose that on November 29, 1897, the viewers' report was considered at a regular meeting of the township trustees, the trustees determined to establish the road. The record further discloses a plat of said road and in the viewers' report is allowed compensation for land taken certain sums of money to certain respective land owners, and said report further sets forth a detailed statement of damages that were assessed and allowed to persons whose premises were rendered less valuable by the opening and construction of said road, which said sums were paid.

The foregoing, in substance, sets forth the manner in which the township road in question was created. The records further disclose that in April, 1898, the trustees of Duchouquet Township purchased additional land along said road for ditch purposes. You will note that all the foregoing proceedings were under the jurisdiction of the trustees of Duchouquet Township. The records of the board of county commissioners of Auglaize County, disclose that on May 1, 1908, on a petition duly filed in said court by Otto Buchanan and others, the particular ditch in question, and which parallels the road and within the right of way of the road, was cleaned out through proceedings before the board of county commissioners of Auglaize County, and based on the petition of Mr. Buchanan, and the proceedings, so far as the clean out is concerned, are legal.

I have further made an investigation to determine at this time the character of the road in question and I find that the road in question is not a part of the State Highway System, nor is it a part of the County Road System, and hence, for the purpose of determining the questions involved, you may consider the road in question and along which this ditch is located, is a township road, and always has been.

I regret very much my inability to furnish this information prior to this time, but, as heretofore stated, it was due solely to the fact that I was unable to locate the records of Duchouquet Township, bearing on the construction of this road."

It is fundamental that a board of county commissioners, being a creature of statute, can exercise only such powers as are expressly given by statute or necessarily implied from the powers so expressly given. See *State ex rel. vs. Commissioners*, 8 O. N. P. (N. S.) 281; *State ex rel. vs. Yeatman*, 22 O. S. 546; *Ireton vs. State ex rel.* 12 O. C. C. (N. S.) 202, (affirmed without opinion, *Ireton vs. State*, 81 O. S. 562).

As stated by the Supreme Court in the opinion in the case of *Elder vs. Smith, Auditor, et al.*; 105 O. S. 369, 370:

"It has long been settled in this state that the board of county commissioners has such powers and jurisdiction, and only such as are conferred by statute."

It is equally well settled that the powers granted to the board of county commissioners must be construed strictly. *State ex rel. vs. Commissioners*, 11 O. S. 183; *Commissioners vs. Andrews*, 18 O. S. 48.

These rules are especially applicable with reference to the county's financial affairs. Such board represents the county, in respect to its financial affairs, only so far as authority is given to it by statute. Public moneys and public property, whether in the custody of public officers or otherwise, constitute a public trust fund which can

only be disbursed by clear authority of law. To this effect see *State ex rel. Smith vs. Maharry*, 97 O. S. 272.

In the opinion of the Supreme Court in the case of *Peter vs. Parkinson, Treas.*, 83 O. S. 36, 49, it was said as follows:

“While in a sense the board of commissioners is the representative and financial agent of the county, *its authority is limited to the exercise of such powers only as are conferred upon it by law.* As said by this court in the first paragraph of the syllabus in *Jones, Auditor, vs. Commissioners of Lucas County*, 57 O. S. 189: “The board of county commissioners represents the county in respect to its financial affairs, only so far as authority is given to it by statute.” (Italics the writer’s.)

The Constitution of Ohio, Article X, Section 5, provides:

“No money shall be drawn from any county or township treasury except by authority of law.”

And as stated in the third paragraph of the syllabus in the case of *State ex rel vs. Pierce*, 96 O. S. 44:

“In case of doubt as to right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power.”

I have examined the several sections of the General Code, relating to the question that you present, and I find no section which would authorize a board of county commissioners to make such an expenditure.

The right of ingress and egress to the farm in question was, of course, a valuable property right which could not be legally taken or destroyed by the county commissioners or township trustees without compensating the owner of the land. It appears, however, that when the township trustees laid out the road here involved, land owners whose land was taken were compensated therefor. I assume from your statement that compensation was also paid for any additional property or property rights taken or destroyed when the ditch was constructed by the township trustees. You do not state whether or not the owner of this particular farm was compensated for such property and property rights as was taken from him; but, if he were, the damages paid to him undoubtedly covered the destruction of his right of ingress and egress. If this be true, having been compensated for this property right, which was damaged or destroyed when the road and ditch were built, the burden of rebuilding and maintaining the bridge necessary to provide a way to go to and from the farm is on the owner.

In order to determine the respective rights of the land owner and the township, however, it would be obviously necessary to ascertain just what the facts were; and if the land owner was never compensated he probably has a valid claim for the destruction and continuing damage to his land.

It is therefore my opinion that under the facts, as submitted, the board of county commissioners is without authority to construct and maintain a bridge over and across the ditch or drain, which runs parallel with the township road and within the right of way of said road, in order that abutting private property may have a means of ingress and egress to said township road.

Respectfully,
EDWARD C. TURNER,
Attorney General.