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RURAL HIGHWAY — PORTION MAY NOT BE CLOSED TO REGULAR TRAFFIC — PURPOSE — TO PERMIT HOLDING OF AUTOMOBILE TIME TRIALS—IN ABSENCE OF DELEGATION OF AUTHORITY BY LEGISLATURE.

SYLLABUS:

In the absence of a delegation of authority by the legislature the county commissioners may not legally close a portion of rural highway to regular traffic for the purposes of permitting it to be used for the holding of automobile time trials.

Columbus, Ohio, August 5, 1955

Hon. Sumner J. Walters, Prosecuting Attorney
Van Wert County, Van Wert, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The young people of this county have organized a Hot Rod Club and have asked the commissioners of this county to let them use a section of rural highway a mile long for the period of from 1:00 to 5:00 each Sunday afternoon. It is contemplated that during this time the highway will be blocked off to ordinary traffic. The boys have made arrangements with the local police and sheriff's department for time testing equipment and expect to use the highway to speed-check their automobiles. It is also contemplated that there will always be a member of either or both of the city police department or sheriff's department present to supervise these time trials.

"Their Club rules provide that should a member be convicted of a traffic violation, they will be dropped or lose their membership in the Club, and therefore will not be permitted to participate in the time trial activities, and it is therefore hoped that this will encourage greater traffic safety among the young people on the highways generally.

"It is also provided that before any member of the Club shall be permitted to use this particular section of highway and participate in the time trials, he shall sign a waiver of liability on the part of the commissioners or any other persons present.

"Therefore, would you please be so kind as to render your Opinion for me as to—

"1. Whether or not the county commissioners may legally close this portion of highway to regular traffic during the hours of 1:00 P. M. to 5:00 P. M. each Sunday afternoon and permit it to be used by the Hot Rod Club for the purpose of holding time trials.

"2. Whether or not there would be any liability on the part of the county commissioners toward members of this Club or other persons present who might be injured as a result of these activities.

"It should also be noted that this particular section of highway which they contemplate using has no residences on it."

In respect to your first query, it is to be noted that Article I, Section 19 of the Ohio Constitution declares that "roads shall be open to the public." A temporary closing of roads to public use in certain instances has, however, been permitted. In Clark v. Fry, 8 Ohio St., 358, 373, 374, it is stated:

"The right of the public in the use of a highway, is the right of transit to every person who has occasion so to use it. This right is, however, subject to such incidental and temporary or partial obstructions as manifest necessity may require. * * *

"These incidental and temporary encroachments on the highway, however, must be *necessary* and *reasonable*. * * *"

A company of persons stopping and standing on the pavement of a street or persons stopping and standing with their wagons or carriages, for mere temporary purposes of business were considered by the court in the Fry case as impediments to the free and uninterrupted transit upon a public highway. On the other hand, the delivery of freight and goods to businesses and houses; the repair and improvement of streets with the

deposit of materials for the same; the improvement, or building, or repair of houses and the construction of sewers and cellar drains on adjacent lots, were not considered invasions but rather qualifications of the right of transit. Even such permissive obstructions were said to be subject to the limitation upon them that they must not be unnecessarily and unreasonably interposed or prolonged.

The seemingly strict view taken by the court in the Fry case, supra, is further emphasized in Railway Co. v. Telegraph Association, 48 Ohio St., 390, 426, in which it was said by Dickman, J.:

> "* * * As a general rule, an occupation of the streets otherwise than for travel and transportation, is presumptively inferior and subservient to the dominant easement of the public for highway purposes, for if not so, the primary object of their dedication or appropriation might be largely defeated. * * *"

The fact that county roads are owned by the abutting owners, rather than by the county, would tend to give added support to the general proposition that the use of roads are to be restricted to the use of public travel. In Ohio Bell Telephone Co. v. Watson Co., 112 Ohio St., 385, it was held in the first paragraph of the syllabus:

> "In this state the fee to the country highway is in the abutting owner, and the public has only the right of improvement thereof and uninterrupted travel thereover."

Even if we disregard the limitation in Article I, Section 19 of the Ohio Constitution, it does not appear that the legislature has attempted to confer any power on authorities to permit the highways to be used for the purpose in question. The principle is very clearly established that public officers have only such powers as are expressly delegated them by statute, and such as are necessarily implied from those so delegated. See 32 Ohio Jurisprudence, Section 77, page 933.

In this connection it was observed in Opinion No. 5990, Opinions of the Attorney General for 1942, page 449, that:

> "* * * the board of county commissioners is a quasi-public body created by law, and that by reason of that fact it has such powers as have been expressly conferred upon it by statute, or as are necessarily implied from such statutes."

A perusal of the pertinent statutes fails to reveal any express or implied grant of authority from the legislature to permit the holding of time trials on the highways. Section 5553.02, Revised Code, provides:

> "The board of county commissioners may locate, establish, alter, widen, straighten, vacate, or change the direction of roads as provided in sections 5553.03 to 5553.17, inclusive, of the Revised Code. * * *"

It will be observed that in construing statutes of this kind the rule as stated in 14 Ohio Jurisprudence (2d) Section 83, page 260, is to be considered:

> "Statutes which confer authority upon county commissioners are delegations of power by the state, which reserves to itself all power not thus delegated, and are, therefore, to be strictly construed in favor of the state and against the board. * * *"

Thus, the above rule would tend to restrict Section 5553.02, Revised Code, to the powers expressly set forth therein.

It is to be noted that even where it is necessary to make improvements on the highway, the county engineer has a duty to avoid closing the highway during construction. Section 5543.17, Revised Code, provides:

> "* * * The engineer shall, whenever practicable, so prepare the plans and specifications for an improvement as to avoid closing to traffic at any one time the entire width of the highway or bridge being improved. *No person shall close a county or township highway, bridge, or culvert, unless such action has first been determined to be necessary by the engineer.* * * *"
>
> (Emphasis added.)

The care exercised by the legislature in delegating power to local authorities regarding highways is further evidenced by the fact that even with the special powers conferred upon municipal corporations under Setcion 723.01, Revised Code, as to the care, supervision and control of streets, there is also the express provision that the municipal corporation, "shall cause them [streets] to be kept open, in repair, and free from nuisance." In this same connection the view was stated in Gerspacher v. City of Cleveland, et al., 21 Ohio Opinions, 537:

> "* * * whilst by the provisions of Section 3714, General Code, [Section 723.01, Revised Code], the legislature delegates to municipalities the control and regulation of the streets within their confines, it has in clear terms enjoined upon them the obligation of keeping said streets 'open, in repair and free from nuisance.' * * *"

It may also be noted that although very limited authority is conferred in Section 5547.04, Revised Code, to allow obstructions in the highway,

the statute does not contemplate the closing of a road to public use. Section 5547.04, Revised Code, reads in part:

> "By first obtaining the consent and approval of the board of county commissioners, obstructions erected prior to July 16, 1925 in highways other than roads and highways on the state highway system or bridges or culverts thereon, may be permitted to remain, upon such conditions as the officials may impose, *provided such obstructions do not interfere with traffic or with the construction or repair of such highways.*" (Emphasis added.)

Similar restrictions are to be found in Section 5515.01, Revised Code, where authority is delegated the director of highways to grant permits to use or occupy a portion of road or highway. This provision provides in part:

> "The director of highways may upon formal application being made to him, grant a permit to any individual, firm, or corporation to use or occupy such portion of a road or highway on the state highway system *as will not incommode the traveling public.* * * *" (Emphasis added.)

The statute goes on to state the conditions under which the permits are to be granted, and it will be noted that none of the said conditions would seem to include a temporary closing for the use in question.

Besides the lack of an express delegation of power for local authorities to permit the holding of time trials, and the various statutes already referred to, through which it may be inferred that such authority is not to be implied, there is another statute which would rather clearly indicate the lack of authority in the county to permit such a use of the highways. Section 4511.21, Revised Code, provides in effect that it shall be prima facie lawful for the operator of a motor vehicle to operate at a speed not exceeding fifty miles per hour on highways outside of municipal corporations, and that the local authorities shall not authorize by ordinance a speed in excess of fifty miles per hour.

It is also noteworthy that some jurisdictions have held the racing of vehicles, such as automobiles, in a highway to be an unlawful use and obstruction of the highway and to constitute a nuisance per se, in the absence of a valid legislative grant of authority for such purpose. Authority conferred on a municipality to regulate the use of its streets and the speed of vehicles thereon, does not in itself give it the right to grant permission for racing on its streets. See 25 A. L. R., 788, Section 506.

Thus, it is manifest that the local authorities may not authorize a speed in excess of that set out by Section 4511.21, Revised Code. Accordingly, a purported grant of permission by such authorities to individuals to race vehicles on the highway, where each operator attempts to operate his vehicle to its fullest capacity would ultimately appear to be contrary to Section 4511.21, Revised Code.

It is my opinion, therefore, in view of the absence of a delegation of express or implied authority by the legislature to the county, and by virtue of the several statutory provisions heretofore discussed, that the county commissioners may not legally close a portion of rural highway to regular traffic for the purpose of permitting it to be used for the holding of time trials.

Having reached the above conclusion, I do not consider it necessary for the purposes of this opinion to determine the question of liability on the part of the county commissioners toward members of the Club, or other persons present who might be injured as a result of the activities mentioned in your request.

Respectfully,
C. WILLIAM O'NEILL
Attorney General