

judgment in this case, including the taxpayer's costs and his attorney fees, should be paid from the general fund of the city of Cincinnati.

Respectfully,
GILBERT BETTMAN,
Attorney General.

476.

BRIDGES—TOWNSHIP—COUNTY COMMISSIONERS MAINTAIN PRIMARILY—TRUSTEES DESIGNATE IMPROVEMENTS FINANCED FROM THEIR SHARE OF GASOLINE TAX—EXCEPTION NOTED.

SYLLABUS:

1. *It is the mandatory duty of county commissioners to maintain and keep in repair bridges and culverts on township roads. However, township trustees are authorized to expend moneys for such maintenance and repair or to co-operate with county commissioners in such undertakings if they so desire.*

2. *The discretion to determine the nature of the improvement and the part of the county system to be improved from funds which are the proceeds of the township's share of the proceeds of the two cents gasoline tax, as provided in House Bill No. 335 (Sullivan-Bostwick Act), is in the township trustees, unless such trustees see fit to relinquish this privilege to the county commissioners.*

COLUMBUS, OHIO, June 4, 1929.

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

DEAR SIR:—Acknowledgment is made of your recent communication which reads:

“A number of township trustees of this county have called upon me recently, complaining of what they feel to be an arbitrary and erroneous position taken by our county commissioners in that the county commissioners are requiring the trustees to construct all bridges in their respective townships, the original cost of which does not exceed fifty dollars. The commissioners paying the cost of constructing those bridges which cost in excess of fifty dollars. The trustees have taken the position that the commissioners should build all bridges, irrespective of cost. I have examined a number of sections of the General Code, as well as some two or three opinions rendered by your predecessors in office. I do not have an opinion of the Attorney General rendered in 1925 which, from a notation at hand, might solve my difficulty. However, I trust your office will put me right in the premises.

Certain of our township trustees are of the impression that they will shortly receive a substantial sum of money derived possibly from the gasoline tax imposed by the Sullivan Bostwick law, as well as from the state under the provisions of the Green law. This money, they understand, is to be expended on the county system of roads within their respective townships. Several questions have arisen—chief among them being:

Do the commissioners of the county or the trustees of the township determine the nature of the improvement and the part of the county system to be improved?

Should the commissioners and trustees not agree, is there any way by which the trustees can finally determine the nature and location of such improvement?

Should the commissioners and trustees not agree, and there is now no unimproved portion of the county system in any given township, who then determines upon what road or roads the money so derived from the above suggested sources shall be spent?"

In connection with your first inquiry relative to whether the township trustees should construct bridges on township roads or whether this duty is imposed upon the county commissioners, your attention is directed to an opinion of the Attorney General, being No. 1674, and issued to Hon. John H. Houston, Prosecuting Attorney, Georgetown, Ohio, under date of February 4, 1928, which contains a comprehensive consideration of the duties of county commissioners with reference to state, county and township roads. Said opinion considers the provisions, among others, of Section 2421 of the General Code, which provides :

"The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

Said opinion also discusses Section 7557 of the General Code and points out that, insofar as said sections require the county commissioners to construct bridges on state roads outside of municipalities, they are inconsistent with the so-called Norton-Edwards Act as enacted by the 87th General Assembly, and that the sections above mentioned were repealed by implication to such extent. However, the opinion further points out that said sections are in full force and effect insofar as they apply to roads other than state roads outside municipalities.

The opinion above mentioned also refers to an opinion of the Attorney General, reported in Opinions of the Attorney General, 1917, Vol. II, p. 1813. Also an opinion reported in the Opinions of the Attorney General for the year 1925, p. 389, which in some respects modified the opinion above mentioned for the year 1917. The Attorney General, in said opinion above mentioned for the year 1928, quotes from Section 831, Rockel's Complete Guide for Ohio Township Officers, in which it is pointed out that under the old law, when the cost of either a bridge or culvert was not over \$50.00, the trustees were bound to construct and maintain the same, but that such law is now repealed. Said section further indicates that under Section 2421, supra, county commissioners are required to construct bridges and culverts upon "all roads established by the county as distinguished from roads laid out to a plantation or dwelling house." Without an extended discussion of the various authorities considered in said opinion of the Attorney General for the year 1928, it is believed sufficient to state that the then Attorney General reached, among other things, the following conclusion :

"It is also the duty of county commissioners to maintain and keep in repair bridges on township roads, although township trustees are authorized

to appropriate and use township road funds in the maintenance and repair of bridges within their jurisdiction.”

After due consideration, I concur in the conclusion above reached by my predecessor. It seems clear that the primary duty rests upon county commissioners to maintain and keep in repair bridges on township roads. However, it should be pointed out that there is nothing to prevent township trustees from exercising such powers. It is believed that the foregoing will dispose of your first inquiry.

Coming to your inquiries which relate to the relative jurisdiction of trustees and county commissioners, to determine the nature and part of the county system to be improved with funds derived from the receipts of the two cent gasoline tax, as provided in House Bill No. 335, to which you refer as the Sullivan-Bostwick Law and receipts under the so-called Green Law, it is to be observed that there has been no appropriation made by the Legislature to meet the requirements of the said Green Law, and, therefore, this feature of your inquiry may be disregarded. However, it appears to have been the evident intent of the Legislature to substitute the township's share of the gasoline tax, as provided in House Bill No. 335, in lieu of the appropriations heretofore made under the Green Law.

Section 5541-8, General Code, as enacted by the 88th General Assembly in the so-called Sullivan-Bostwick Law, among other things, provides:

“Ten per cent of said highway construction fund shall be appropriated for and divided in equal proportions among the several townships within the state, and shall be paid on vouchers and warrants drawn by the auditor of state to the county treasurer of each county for the total amount payable to the townships within each of the several counties. Upon receipt of said vouchers and warrants each county treasurer shall pay to each township within the county its equal proportional share of said funds which shall be expended by each township for the sole purpose of constructing, widening and reconstructing the public roads and highways within such township. Provided, however, that such funds shall be used by the township trustees for the purpose of constructing, widening and reconstructing unimproved dirt roads of the secondary or county system of highways within the township, unless there be no unimproved dirt roads of the secondary or county system of highways within such township, in which event such funds may be used for constructing, widening and reconstructing such township roads as the township trustees shall designate. Provided, however, that no part of said funds shall be used for any purpose except to pay in whole or part the contract price of any such work done by contract or to pay the cost of labor in constructing, widening and reconstructing such roads and highways and the cost of materials forming a part of said improvement; and provided further that all such improvement of roads shall be under the supervision and direction of the county surveyor as provided in Section 3298-15k of the General Code; and provided further than no obligation against such funds shall be incurred unless and until plans and specifications for such improvement, approved by the county surveyor, shall be on file in the office of the township clerk; and provided further that all disbursements of such funds shall be upon vouchers of the township trustees approved by the county surveyor. The trustees of any township are hereby authorized at their discretion to pass a resolution permitting the county commissioners to expend such township's share of said funds, or any portion thereof, for the improvement of such roads within said township as may be designated in said resolution.”

The part of the section above quoted, seems to clearly place in the hands of the

township trustees the authority to make such expenditures for the purposes therein mentioned. In the exercising of such power, said trustees are under the supervision and direction of the county surveyor. However, the section expressly authorized such trustees, in their discretion, to pass a resolution permitting the county commissioners to expend said township's share of said funds for roads which they designate in their township. It follows that unless and until the township trustees relinquish their right to the county commissioners, the expenditure of said fund is a matter which is under the control of such trustees, so long as they expend it in accordance with the provisions of the act and for the purposes specified therein.

Based upon the foregoing and in specific answer to your inquiries, it is my opinion that:

First, it is the primary duty of the county commissioners to construct bridges and culverts in the improvement of township roads. However, the township trustees may undertake the construction of such bridges if they so desire.

Second, the discretion to determine the nature of the improvement and the part of the county system to be improved from funds which are the proceeds of the township's share of the two cent gasoline tax, as provided in House Bill No. 335 (Sullivan-Bostwick Act), is in the township trustees, unless such trustees see fit to relinquish this privilege to the county commissioners.

It is believed the foregoing makes it unnecessary to specifically answer the second and third branches of your second inquiry.

Respectfully,
GILBERT BETTMAN,
Attorney General.

477.

SURETIES—GUARANTEEING DEPOSITS OF TOWNSHIP TRUSTEES
AND SCHOOL BOARD—CANNOT BE RELEASED UPON BANK'S
FAILURE—SECTIONS 2303, ET SEQ., GENERAL CODE, INAP-
PLICABLE.

SYLLABUS:

The authority to release a treasurer of a county, city, village, township or school district for a loss of public funds entrusted to him and resulting from fire, robbery, burglary or inability of a bank to refund public money of the subdivision lawfully in its possession, and which loss is not occasioned by the fault or negligence of the said treasurer, by virtue of Section 2303, et seq., of the General Code, does not extend to the releasing of sureties on depositary contracts.

COLUMBUS, OHIO, June 4, 1929.

HON. MARCUS C. DOWNING, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—By your recent communication my opinion is requested with reference to the following statement of facts:

“The board of education of Washington Township centralized school district and the trustees of Washington Township have deposited public funds in the Arcadia Bank and Savings Company which has been closed for some time and is now in the hands of a liquidating officer.