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1. WEEDS—DESTRUCTION—ALONG TOWNSHIP HIGHWAY—PART OF MAINTENANCE ENJOINED BY LAW UPON TOWNSHIP TRUSTEES.
2. TOWNSHIP TRUSTEES — WEEDS TREATED WITH POISONOUS CHEMICAL TO DESTROY THEM—SPRAYED WEEDS EATEN BY DOMESTIC ANIMALS GRAZING ON ADJACENT PASTURE—ANIMALS KILLED—NEGLIGENCE—MIXED LAW AND FACT—AUTHORITY OF TRUSTEES TO COMPROMISE OR SETTLE CLAIM FOR DAMAGE—SECTION 5571.10 RC.

SYLLABUS:

1. The destruction of weeds along a township highway is part of the maintenance of such highway enjoined by law upon the township trustees.

2. Where township trustees have caused weeds growing in a highway under their control to be treated with a poisonous chemical for the purpose of destroying them, and such sprayed weeds have been eaten by domestic animals grazing in an adjacent pasture, and such animals have thereby been killed, questions of mixed law and fact are presented as to the possible negligence of the trustees and the possible contributory negligence of the owner of such animals. Where such negligence is found, in the absence of any element of contributory negligence, such trustees would be liable in their official capacity for such damage as provided in Section 5571.10, Revised Code. The township trustees have authority to compromise or settle a claim for such damage.

Columbus, Ohio, October 11, 1955

Hon. Hugh I. Troth, Prosecuting Attorney
Ashland County, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“If the township trustees employ a person to spray the weeds alongside the township road, and animals in the adjoining pasture eat the sprayed weeds and die as a result therefrom, are the township trustees liable for damages? If so, can they make a settlement with the owner of the animals poisoned?”

“My search disclosed Section 5571, Revised Code of Ohio, which says that the township trustees are liable for damages due

to neglect or carelessness. I find that that section is one of those pertaining to the maintenance of roads and that there is an opinion to the effect that this liability pertains only to duties involving roads, so the first question that is presented is whether the spraying of weeds along the road would be covered under this statutory liability.

"Your 1931 Attorney General's Opinion No. 3678 (page 1272), states that no compensation may be paid by the township to the owner of land where crops are damaged from spraying weeds.

"If further information is needed, please contact this office."

Your letter suggests two questions: 1) whether the destruction of weeds along a township road is to be considered as maintenance of the road; and 2) whether the township trustees are liable in damages in case such work is negligently done, resulting in injury to livestock of an abutting owner.

1. Section 5579.04, Revised Code, 7146, G.C., reads in part as follows:

"A board of county commissioners, board of township trustees, * * * having control of and being charged with the duty of repairing macadamized, graveled, or improved roads, * * * between the first and twentieth days of June, the first and twentieth days of August, and, if necessary, between the first and twentieth days of September of each year, shall destroy all brush, briars, burrs, vines, Russian, Canadian, or common thistles, or other noxious weeds, growing within the limits of a county or township road, or improved, graveled, or macadamized road, street, or alley within their jurisdiction."

Section 5579.08, Revised Code, 3374-2 G. C., reads as follows:

"All brush, briars, burrs, vines, and Russian, Canadian, or common thistles, or other noxious weeds growing along the public highway shall be cut between the first and twentieth days of June, the first and twentieth days of August, and, if necessary, between the first and twentieth days of September of each year. This work shall be done by the board of township trustees in its respective township, or by the township highway superintendent, who may employ the necessary labor to carry out this section. All expenses incurred shall, when approved by the board, be paid from the township road fund by the township clerk, upon his warrant."

In Opinion No. 1485, Opinions of the Attorney General for 1952, page 419, I had occasion to consider the responsibility of the township

trustees for the destruction of weeds and brush on a highway, and held as shown by the first syllabus of the opinion:

“Destruction of weeds and brush in a highway under the control of township trustees constitutes maintenance of such highway, and the township trustees are authorized to expend the funds allocated to them under Section 5541-8, General Code, for employing the labor and purchasing the equipment and materials necessary for that purpose.”

In the course of that opinion reference was made to Opinion No. 3886, Opinions of the Attorney General for 1931, page 1544, in which it was held:

“A municipality’s portion of the gasoline excise tax arising under the provisions of Section 5541-1, General Code, and expended for the purposes authorized by Section 5541-8, General Code, may be used for the purchase of machinery for mowing grass and weeds growing in that part of a municipal street or road outside of the traveled portion.”

Attention was also called to the case of State ex rel. Rogers v. Taylor, 152 Ohio St., 241, where it was held:

“1. Under the provisions of Sections 3370, 3374-2 and 3375, General Code, township trustees are charged with the duties to repair and drag township roads and to cut all brush, briars and weeds growing along such public highways.

“2. These provisions are mandatory.”

Section 5571.10, Revised Code, 3298-17 G. C., reads as follows:

“Each board of township trustees shall be liable, in its official capacity, for damages received by any person, firm, or corporation, by reason of the negligence or carelessness of such board in the discharge of its official duties.”

This section was a part of a very comprehensive law passed in 1919, 106 O. L., 574, providing a system of highways for the state, and covering the duties of the state highway department and of county commissioners, township trustees and municipalities relative to the establishment, improvement, repair and maintenance of highways under their respective jurisdictions.

The distribution of duties as to maintenance was set out in Section

244 of that act and is now found in Section 5535.08, Revised Code, reading in part:

“The state, county, and township shall each maintain its roads” * * *

The liability imposed by Section 5571.10 supra, while very general in its language, has been held to impose liability on the township only with respect to the duties created by the act, to wit, the construction, repair and maintenance of highways. See Opinion No. 2498, Opinions of the Attorney General for 1950, page 730; Opinion No. 3010, Opinions of the Attorney General for 1953, page 414.

2. This brings us to the question of liability of a township in a case such as you present, to wit, where the township trustees employ a person to spray weeds along a township road, and animals in an adjoining pasture eat the weeds and die as the result thereof. I assume that the spray used contained a poison which caused the death of the animals.

In an opinion of one of my predecessors, to wit, No. 807, Opinions of the Attorney General for 1933, page 690, the question presented was as to the liability of the township for injuries caused by a spark flying from the stack of a steam traction engine moving along a county road from one township road maintenance job to another, said traction engine being owned by the township trustees and operated by employees of the township. The ruling of the Attorney General was as follows:

“Township trustees are liable in their official capacity for damages resulting from the negligent operation of road repair machinery owned by the township.”

The decision was based on the provisions of Section 3298-17, General Code, 5571.10 R.C., to which I have referred. The opinion emphasized the proposition that the liability imposed by the statute depended upon the presence of “negligence or carelessness” on the part of the trustees, and I am keeping that principle in mind in reaching the conclusion which I will state. The character and general use of the land adjacent to a highway might be such that no danger from the use of the poisonous spray could reasonably be anticipated.

It seems to me that the facts stated in your letter are quite comparable to those set out in the 1933 opinion, and that the township could be held liable for injury to domestic animals pastured in a field adjacent to the road

and which are poisoned by the chemicals used for spraying weeds on the highway adjacent to the pasture.

One must recognize that animals in their search for food, will reach over a fence and eat what they can reach, and the action of the township trustees in placing a poisonous substance within their reach could subject them in their official capacity to liability to the owner of the animals for their death. In my opinion such action on the part of the trustees would constitute negligence, provided they knew or had the means of knowing that the animals were or were likely to be pastured in the field in question.

I would further call attention to the fact that the statute nowhere commands or authorizes the trustees to use poison, but merely requires them to "cut" or "destroy" the weeds. If they choose the dangerous agency of poison, they must certainly assume the risk.

I deem it proper to call attention to Section 3719.30 of the Revised Code, which reads:

"No person shall leave or deposit poison or a substance containing poison in a common, street, alley, lane, or thoroughfare, or a yard or enclosure occupied by another.

"Whoever violates this section shall be liable to the person injured for all damages sustained thereby."

I cite this statute only as indicating the policy of the state in reference to the promiscuous use of poison. But for the immunity from liability for torts which townships enjoy, it would appear possible for the township trustees to be held liable in appropriate judicial proceedings under this statute, as well as under the statute quoted in reference to road maintenance, for injuries to stock caused by the negligent use of poison in the highway.

In reaching this conclusion I express no opinion as to whether there has actually been any negligence in the particular situation you mention. Such question could be resolved only by a consideration of all the facts and circumstances of the case. Being largely a question of fact it is properly one for a jury. Certainly it is well beyond the province of my office to determine the matter. Moreover, the question of negligence on the part of the board having been resolved, the further question of contributory negligence is then presented; and here, too, I should be unable to express an opinion for this question also is largely one of fact.

In connection with your inquiry as to the liability of the township trustees, you also raise the question as to the authority of the trustees to make a settlement with the owner of the animals poisoned. Since township trustees are authorized by Section 503.01, Revised Code, to sue and be sued, it would appear obvious that they could settle a claim if they felt it had merit.

In 11 Ohio Jurisprudence, page 592, the author says :

“The discretionary power given to the board of county commissioners in the matter of maintaining and defending suits seems necessarily to imply authority on the part of such board to compromise and adjust claims and to settle suits.”

The author cites in support of that statement an opinion of the Attorney General rendered January 10, 1901 and found in 45 Ohio Law Bulletin, page 51. That opinion grew out of a claim against the county commissioners resulting from negligence in keeping the county roads in repair, and the Attorney General argued from the fact that the commissioners had been given authority by statute to sue and be sued, they would have by necessary implication the right to compromise and settle claims. That principle would apply with equal force to the right of township trustees to make such compromise or settlement.

In your letter you call attention to Opinion No. 3678, Opinions of the Attorney General for 1931, page 1272, where it was held :

“No compensation may be paid by township trustees to the owner of land for damages which are necessarily done to his crops in the eradication of noxious weeds, pursuant to the duty imposed upon said trustees by statute.”

That opinion grew out of the provisions of Section 7150 et seq., General Code, 5579.05, Revised Code, directed at the eradication of Canadian thistles, etc. Thus the township trustees are required to order landowners to destroy such weeds and on their failure the trustees may enter on their lands, destroy the weeds, and assess the cost against the land involved. The opinion held that the township trustees were not liable for the incidental destruction of crops for the sole reason that the statute had imposed no liability. That opinion is valuable in the present discussion only by way of contrast.

Accordingly, in answer to your questions it is my opinion :

1. The destruction of weeds along a township highway is part of the maintenance of such highway enjoined by law upon the township trustees.

2. Where township trustees have caused weeds growing in a highway under their control to be treated with a poisonous chemical for the purpose of destroying them, and such sprayed weeds have been eaten by domestic animals grazing in an adjacent pasture, and such animals have thereby been killed, questions of mixed law and fact are presented as to the possible negligence of the trustees and the possible contributory negligence of the owner of such animals. Where such negligence is found, in the absence of any element of contributory negligence, such trustees would be liable in their official capacity for such damage as provided in Section 5571.10, Revised Code. The township trustees have authority to compromise or settle a claim for such damage.

Respectfully,

C. WILLIAM O'NEILL

Attorney General