

**Note from the Attorney General's Office:**

1928 Op. Att'y Gen. No. 28-2155 was overruled in part by 2012 Op. Att'y Gen. No. 2012-009.

household furniture, real estate, produce, horses, sheep, hogs and meat cattle, without a license as herein provided. \* \* \*

the following language was used:

"You will observe that by the specific language of this section it is unnecessary to secure an auctioneer's license to sell real estate. Manifestly, therefore, the licensing section has no application to sales of real estate at auction and the fact that, by reason of other activities of the auctioneer, he may be amenable to the auctioneer's license law and so must secure a license, does not extend the licensing provision to his activities in connection with the sale of real estate.

The real estate broker's license law is of general application and the terms of Section 6373-25 of the General Code are clearly applicable to sales by auctioneers. The definitions of real estate broker and real estate salesman are manifestly broad enough to cover auctioneers and their employes. Those definitions, as found in Section 6373-25, are as follows:

"'Real estate broker' means a person, firm or corporation who, for a commission, compensation or valuable consideration, sells, or offers for sale, buys, or offers to buy, negotiates the purchase or sale or exchange of real estate, or leases, or offers to lease, rents, or offers for rent, any real estate, interest therein or improvement thereon, for others.

'Real estate salesman' means a person, who for a commission, compensation or valuable consideration, is employed by a licensed broker, to sell, or offer for sale, or to buy, or to offer to buy, or to lease, or to offer to lease, rent, or offer for rent, any real estate, interest therein or improvement thereon.'

None of the exceptions contained in the later language of the above section, which I have not quoted, is applicable and I am therefore of the opinion that any auctioneer who offers for sale real estate at auction is required by the provisions of Section 6373-25, et seq., of the General Code to secure a license as a real estate broker, irrespective of the fact that such auctioneer is already licensed as an auctioneer under the provisions of law applicable thereto."

For the reasons stated in Opinion No. 960, above quoted, it is my opinion that any auctioneer who offers for sale real estate at auction is required by the provisions of Sections 6373-25, et seq., General Code, to secure a license as a real estate broker, irrespective of the fact that such auctioneer is already licensed as an auctioneer under the provisions of law applicable thereto.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

2155.

COUNTY COMMISSIONERS—LIABILITY UPON FAILURE TO ERECT  
GUARD RAILS—NORTON-EDWARDS ACT, DISCUSSED.

*SYLLABUS*

*It is the duty of county commissioners to erect guard rails at all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with*

*the public highway, or are adjacent thereto, in an unprotected condition, and such duty extends to roads in the state highway system. Upon failure to so do county commissioners may be subjected to a suit in damages, in case injuries are sustained which directly grow out of such failure to erect guard rails as required by law.*

COLUMBUS, OHIO, May 24, 1928.

HON. W. W. BADGER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of recent date reading as follows:

“Please give your opinion on the following:

Are the County Commissioners liable for damages or injuries sustained on a state road where there are no guard rails on a perpendicular wash bank more than 8 feet in height, where such bank has an immediate connection with the state highway or is adjacent thereto in an unprotected condition?

I find G. C. 7464 classifies the various roads such as state, county and township. G. C. 7563 provides that the Commissioners shall construct guard rails. G. C. 2408 provides that the Commissioners can be sued and House Bill No. 67 called the Norton-Edwards Act makes a separate classification of the state highway, limiting the authority of the Commissioners with reference to their powers and duties on said state highways.

Our question is, if the County Commissioners are held liable for the failure and neglect to construct guard rails on state highways according to G. C. 7563?”

I take it from your letter that you desire my opinion as to whether or not Section 7563, General Code, making it the duty of county commissioners to protect, by suitable guard rails, all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with the public highway, or are adjacent thereto, in an unprotected condition, applies to state roads, and if, in case county commissioners do not construct guard rails to protect wash banks on state roads they are liable in damages for injuries occasioned by such failure.

Section 7563, General Code, reads as follows:

“The board of county commissioners shall erect or cause to be erected and maintained where not already done, one or more guard rails on each end of a county bridge, viaduct or culvert more than five feet high. They shall also erect or cause to be erected, where not already done one or more guard rails on each side of every approach to a county bridge, viaduct or culvert if the approach or embankment is more than six feet high. They shall also protect, by suitable guard rails, all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, or are adjacent thereto, in an unprotected condition, but in such cities and villages as by law receive part of the bridge fund levied therein, such guard rails shall be erected by the municipality.”

Section 7565, General Code, provides as follows:

“Failure to comply with the provisions of the next two preceding sections shall render the county liable for all accidents or damages as a result of such failure.”

You will observe that, by the terms of Section 7563, General Code, hereinbefore quoted, it is the duty of county commissioners to erect, or cause to be erected and maintained, guard rails "at all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with the public highway or are adjacent thereto, in an unprotected condition."

From the facts stated in your communication, it is apparent that the wash bank in question is more than eight feet in height, has an immediate connection with a state highway and is adjacent thereto in an unprotected condition.

You state that Section 7464, General Code, was amended by the last Legislature (112 v. 496), and, as amended, classifies the public highways of the state into three classes; viz., state roads, county roads and township roads. However, prior to its amendment, Section 7464 likewise classified the various highways of the state into state roads, county roads and township roads, so that the fact that the Legislature saw fit to amend Section 7464, General Code, in keeping with the general provisions of the Norton-Edwards Act (House Bill No. 67, 112 v. 430), does not affect the question presented by you.

This department, on May 27, 1927, in Opinion No. 461, addressed to Hon. George F. Schlesinger, Director of Highways and Public Works, passed upon the question of whether it was the duty of the county commissioners to erect guard rails on fills, dangerous curves or other points of danger on inter-county highways. On pages 3, 4 and 5 of that opinion appears the following discussion:

"The Supreme Court of Ohio has not passed upon the question as to whether or not the creating of a Department of Highways and Public Works and the sections of law defining the duties of such department and conferring thereon the supervision and control of all inter-county highways and main market roads, has entirely taken away the duty of county commissioners as provided in Section 7563 of the General Code. However, this question was presented in the case of *Harrigan, Administrator, vs. Board of County Commissioners*, 31 O. C. A., 469, decided June 25, 1919, by the Court of Appeals for Lawrence County, in which case the court held:

"The principal purpose of requiring guard rails to be erected at the ends of certain county bridges and on each side of the approaches thereto, as required by Section 7563, is to warn drivers of the location of danger.

The duty enjoined on county commissioners by the provisions of such sections was not relieved by the passage of the State Highway law (105-106 O. L., p. 623-666) or any later amendment thereof.'

In that case the facts, as stated in the opinion, were as follows:

'April 16, 1917, plaintiff's decedent lost her life by the falling of an automobile, in which she was riding, from a county bridge over Lick Creek, about five miles above Ironton, near the Ohio River. The negligence complained of was the failure of the county commissioners to erect guard rails along the approach to and at the end of the bridge.

There were no guard rails erected on the approach to the bridge where the accident happened. \* \* \* There was evidence tending to show that state aid was used in the improvement of the road from the floor of the bridge for a distance toward Ironton, and that it was at the date of the accident a state road and under state control, being an inter-county highway and main market road.'

The trial court directed a verdict in favor of the defendant at the close of all the evidence.

One of the defenses of the county commissioners was that 'as the State Highway Department has control and the duty to repair and maintain the road the defendant, the board of county commissioners,' was not liable.

In its opinion by Judge Middleton, the court quoted the provisions of Section 7563, supra, and 7564, General Code, and referred to Section 7563, above quoted.

The court then said as follows:

'It is contended that since the road has come under the control of the State Highway Department the county commissioners were relieved of their duty to comply with Sections 7563 and 7564. However, these sections have not been expressly repealed and if they are now superseded by the State Highway law it is because they are inconsistent with such law. The following is the last section of the act of June 5, 1915 (105-106 O. L., p. 666):

"This act shall supersede all acts and parts of acts not herein expressly repealed, which are inconsistent herewith \* \* \*."

Section 7464 provides that inter-county highways and main market roads constructed by the state, or taken over by it, shall be maintained by the State Highway Department.

Section 7465 provides that under certain conditions county and township roads may become state roads.

Section 1178 provides:

"There shall be a state highway department for the purpose of affording instruction, assistance and co-operation in the construction, improvement, maintenance and repair of the public roads and bridges of the state \* \* \*."

These sections, and others, show that the Legislature intended to create a State Highway Department and give it control over certain highways for the construction, improvement, maintenance and repair of the same. But our attention has not been called to any provision, nor have we found any, which makes it the duty of the State Highway Department to erect guard rails. If by the State Highway law the duty to erect guard rails had been placed on the Highway Department then there would have been an inconsistency between its provisions and the provisions of Sections 7563 and 7564, and the former would supersede the latter. But we can see no inconsistency between a law which confers authority upon the officers of a department to construct, improve, maintain and repair certain roads and a law which directs other officers to erect guard rails on the approaches and ends of bridges. The Legislature may have concluded that since it was the duty of county commissioners to erect guard rails, where required, at all other bridges in the county it might remain their duty to place guard rails, where required, at bridges on roads under state control.

Besides, the Legislature may have considered, in enacting the State Highway law, that to put the duty of erecting guard rails on the State Highway Department would be virtually eliminating a right of action for injuries where one should exist, and left the duty and liability remain.'

In construing the term 'wash bank' as used in Section 7563, supra, the Court of Appeals for Jefferson County held in the case of *Kerr, Admr., vs. Hougher, et al., Board of County Commissioners*, 16 O. A. 434, that:

1. The words "wash bank" in Section 7563, General Code, mean a bank composed of such substance that it is liable to be washed away by the

action of the water thereon, so as to become unsafe to travelers on such highway.

2. The county commissioners are not required under Section 7563, General Code, to protect by guard rails banks immediately connected with or adjacent to a public highway unless they have a perpendicular drop of more than eight feet from the surface of the highway and are composed of such substance that they may be washed away by the action of water thereon so as to be unsafe for travel on such highway.' "

A copy of Opinion No. 461 is herewith enclosed for your information.

It will be noted from the foregoing discussion contained in my former opinion that the Supreme Court of Ohio has not passed upon the question which you raise, and inasmuch as the Court of Appeals in the Harrigan case, *supra*, has directly passed upon the question of the liability of a board of county commissioners to respond in damages for the failure to erect guard rails, as required by the provisions of Section 7563, *supra*, in specific answer to your question, it is my opinion that it is the duty of the county commissioners to erect guard rails at all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with the public highway, or are adjacent thereto, in an unprotected condition, and that such duty extends to roads in the state highway system. Upon failure to so do county commissioners may be subjected to a suit in damages, in case injuries are sustained which directly grow out of such failure.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2156.

MORTGAGE—MAY BE EXECUTED BY CHURCH OR RELIGIOUS SOCIETY INCORPORATED UNDER SECTION 8623-98, ET SEQ., GENERAL CODE—MUST OBTAIN COURT AUTHORITY UNDER SECTION 10051, GENERAL CODE—EXCEPTIONS NOTED.

*SYLLABUS:*

*A church or religious society or association incorporated under the provisions of Sections 8623-98 et seq., General Code, (the new general corporation act) is required to obtain court authority in order to mortgage its property in the manner provided by Section 10051, General Code.*

COLUMBUS, OHIO, May 24, 1928.

HON. J. W. TANNEHILL, *Superintendent of Building and Loan Associations,*  
*Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads as follows:

"Will you please advise whether or not a church or religious society or association incorporated under the provisions of Sections 8623-98 et seq. of the General Code of Ohio is required to obtain authorization of Court in the manner contemplated by Section 10051 of the General Code in connection with the mortgaging of property, the title to which is held in the name of such incorporated body?"