

2634.

QUESTIONS RELATING TO THE AUTHORITY OF COUNTY COMMISSIONERS AND MUNICIPAL AUTHORITIES TO CONSTRUCT AND MAINTAIN BRIDGES, ANSWERED.

SYLLABUS:

1. *It is the duty of county commissioners to construct necessary bridges in cities on state and county roads over streams and public canals.*
2. *It is the duty of county commissioners to maintain and repair bridges in cities on state and county roads over streams and public canals.*
3. *County commissioners have no authority over, nor duty to perform in connection with either the construction or maintenance and repair of bridges on streets established by the city for the use and convenience of the city and not a part of a state or county road.*
4. *It is the duty of a city to construct and repair necessary bridges on streets established by the city for the use and convenience of the city and not a part of a state or county road.*
5. *It is the duty of a city to exercise care, supervision and control over bridges in the city and keep them open, in repair and free from nuisance, including both bridges over streams and public canals on state and county roads and bridges on streets established by the city for the use and convenience of the city and not a part of a state or county road.*
6. *Although under no legal duty to do so, a city is authorized to construct bridges over streams and public canals on state and county roads and within the limits of a city.*
7. *A city is authorized to make minor and extensive repairs on bridges over streams and public canals on state and county roads within the limits of the city, notwithstanding it is the duty of the county commissioners to keep such bridges in repair.*
8. *A city may expend funds which are the proceeds of bonds sold and issued for the purpose of constructing specific bridges, in the construction only of such bridges for the construction of which the bonds were issued.*
9. *A city is not authorized to expend funds, which are the proceeds of bonds sold and issued for the purpose of constructing specific bridges over streams and public canals on state and county roads within the limits of the city, in the construction and repair of bridges on streets established by the city for the use and convenience of the city and not a part of a state or county road.*

COLUMBUS, OHIO, July 1, 1925.

HON. ALBERT H. SCHARRER, *Prosecuting Attorney, Dayton, Ohio.*

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

“The city of Dayton, for some unexplainable reason, has been receiving for some time past, part of the county bridge fund with which it has been constructing and maintaining bridges on extensions of county and state roads within the corporate limits of the city of Dayton.

“At the general election held last November, the electors of the city of Dayton voted favorably upon the question of issuing bonds in the sum of approximately two million (\$2,000,000.00) dollars, for the purpose of constructing additional bridges within the corporate limits of the city of

Dayton, some of which bridges are located on main thoroughfares of the city, and being part of state and county highways. Other bridges to be constructed with this fund are located on streets which connect up with county highways.

"This office and the office of the state examiner called the attention of the county commissioners and the city commissioners to the fact that under section 2421 of the General Code of Ohio, all bridges over streams and public canals on state and county roads must be constructed by the county commissioners.

"Certain bridges are in immediate need of repair and are now permanently closed to public traffic, but the county commissioners have no available funds to construct or repair bridges in their bridge fund. And under section 5638 of the Ohio General Code they cannot expend for such purpose more than eighteen thousand (\$18,000.00) dollars, without submitting the question of such expenditures to the electors of the county, unless they do so pursuant to the provisions of 103 Ohio laws, pages 141 and 760. Both the city engineer and the county surveyor stated that certain of these bridges have been weakened by reason of the flood which occurred in 1913.

"The members of the commission of the city of Dayton and the board of commissioners of Montgomery county, Ohio, have requested us to write you for an opinion upon the question as to what bridges the city may expend money to *construct* and *repair* when the electors of the city voted favorably upon the bond issue to construct certain specific bridges over streets in Dayton, which are a part of state and county roads, and whether they may expend money on bridges which cross rivers and canals connecting streets which are not a part of the state and county highway system. The county commissioners are of the opinion that if the question were presented to the electors of the county to build bridges within the corporate limits of the city of Dayton, the question might fail to carry and they would be unable to build the bridges, unless same were built under the Flood emergency act. In the meantime, the city is urging an immediate construction of such bridges by reason of their dangerous condition, and the further fact that both the city and county may be liable for damages in the event of any injury to person or property by reason of the dangerous condition.

"Although this office was willing to render an opinion upon the question, and have called the attention of the city commissioners and the county commissioners to Vol. II, opinions of the attorney general for 1920, page 1075, and also Vol. II, opinions of the attorney general for the year 1919, page 1622, they wished to submit same to your office for an opinion and request that a reply be made at as early a date as is convenient, in order that they may know how to proceed in the matter."

It is noted that in your communication you call attention to an opinion of my predecessor, found in the opinions of the attorney general for the year 1919, Vol. II, page 1622. This opinion relates to the duties of county commissioners and municipal corporations in the keeping in repair of bridges.

It is believed that it will be of interest and pertinent to your questions to review the law relative to the duties of county commissioners and municipal authorities in connection with the construction and repair of bridges and the authority of municipal authorities in relation thereto.

Section 2421 of the General Code reads:

"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."

Section 7557 of the General Code reads:

"The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank-roads, which are of general and public utility, running into or through such village or city."

Section 3629 of the General Code reads:

"To lay off, establish, plat, grade, open, widen, narrow, straighten, extend, improve, keep in order and repair, light, clean and sprinkle, streets, alleys, public grounds, places and buildings, wharves, landings, docks, bridges, viaducts, and market places, within the corporation, including any portion of any turnpike or plank road therein, surrendered to or condemned by the corporation."

Section 3714 of the General Code reads.

"Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

As a first proposition, it may be stated that it is the duty of county commissioners to construct and keep in repair necessary bridges over streams and public canals on state and county roads and within the limits of a city. This proposition is sustained by a long line of well considered cases and opinions. The first paragraph of the syllabus of the case of *Interurban Railway & Terminal Co. vs. City of Cincinnati*, 94 Ohio St. 269, reads:

"It is the duty of county commissioners to construct and keep in repair necessary bridges in cities and villages on state or county roads of general public utility running into or through such cities or villages."

On page 275 of the opinion, Matthias, J., says:

"The provisions of section 2421, General Code, impose upon the county commissioners the obligation to 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,' and the provisions of section 7557, General Code, specifically require the county commissioners to construct and keep in repair 'all necessary bridges * * * on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through such villages or city.'

"Both of the above sections make exception of bridges within cities and villages having the right to demand, and which do demand and receive, a portion of the bridge fund levied upon property within such corporation. Such exception, however, is no longer of any force or effect for the reason that there is now no statute authorizing any city or village to demand or receive any portion of the bridge fund created by county levy. Provision is made by section 5635, General Code, for making a levy on the taxable property within the county for road and bridge purposes, and the county commissioners are required to set aside such portion as they deem proper to be applied for the building and repair of bridges, which is called a 'bridge fund.' "

As a second proposition, it may be stated that county commissioners have no authority over nor duty to perform in connection with the construction or repair of bridges on streets established by a city for the use and convenience of the city and not a part of a state or county road. This proposition is supported by authorities. The syllabus in the case of *City of Piqua vs. Geist*, 59 Ohio St., 163, reads:

"Under the amendment made February 8, 1894, of section 860, revised statutes (91 laws, 19), county commissioners are not required to construct and keep in repair bridges over natural streams and public canals, on streets established by a city or village for the use and convenience of the municipality, and not a part of a state or county road, though the city or village receive no part of the bridge fund levied on the property within the same. It is the duty of the city or village to construct and keep in repair such bridges, and is liable in damages to one injured by its neglect to do so."

Also to the same effect is the case of the *City of Newark vs. Jones*, 16 C. C., 563, the syllabus of which reads:

"In villages and cities not having the right to demand and receive any portion of the bridge fund levied upon property within such corporation, the county commissioners have the authority and duty to construct and maintain all necessary bridges in state and county roads, free turnpikes and plank roads, which are of general and public utility, running into and through any such village or city, but they have no authority to construct bridges in the streets, as such, of such villages and cities."

As a third proposition, it is the duty of the city to construct and repair necessary bridges on streets established by a city for the use and convenience of the city and not a part of a state or county road.

In the opinion in the case of *Interurban Railway and Terminal Co. vs. City of Cincinnati*, supra, on page 278, commenting on the case of *City of Piqua vs. Geist*, supra, it is said:

"As there pointed out, it is the exclusive duty of the municipal authori-

ties to construct and keep in repair any bridge which forms a part of a street established by a city which is not a part of a state or county road, and the county commissioners have no duty or responsibility whatever in respect to the construction and the care and maintenance of any such bridge."

As a fourth proposition, a city has a duty in connection with bridges on a state or county road within a city, namely, the duty to exercise care, supervision and control over such bridges, and the duty to cause them to be kept open, in repair and free from nuisance.

On page 279 of the opinion in the Cincinnati case, supra, it was said:

"It undoubtedly would be the duty of the city authorities to take necessary steps to protect and safeguard the public, by placing barriers or otherwise, or possibly by making temporary repairs and giving notice of the defective condition."

In numerous cases cities have been held liable for failure in performing their duties in these respects.

Mooney vs. village of St. Marys, 15 C. C. 446;

Newark vs. McDowell, 16 C. C. 556;

Newark vs. Jones, 18 C. C. 563.

Your questions then, as I read your communication, are:

(1) Although under no legal duty to do so, is the city authorized to construct or repair bridges over streams and public canals on state and county roads within the limits of the city?

(2) May a city expend funds which are the proceeds of bonds issued and sold for the purpose of constructing bridges over streams and public canals on state and county roads within the city limits, for the construction or repair of bridges on streets established by the city for the use and convenience of the city and not on a county and state road?

It will be noted that the language used in sections 3629 and 3714 is general and applies to all bridges within the limits of the city and without regard to whether such bridges are on a state or county road or on a street established by the city for the use and convenience of the city, and not a part of a state or county road. Those sections, without doubt, authorize a city to construct, improve and repair bridges within the limits of a city, whether such bridges be on state and county roads or on streets established by the city for the use and convenience of the city and not a part of a state or county road.

The language of said section 3629 was formerly contained in subdivision 18 of section 1536-100 of the revised statutes, and the language of said section 3714 was formerly contained in section 1536-131 of the revised statutes. In the case of *State, ex rel vs. Wright, Auditor, et al.*, 9 N. P. (N. S.), 321, on page 326 of the opinion, Keeler, J., said:

"The power to build and repair bridges is plainly conferred upon all municipalities in the state of Ohio by section 1536-100-18 of the revised statutes, and the duty so to do; and the implied corporate power to perform the duty is plainly contained in section 1536-131, a section which replaced former section 2640, revised statutes."

That this power extends to bridges on state and county roads within the limits of a city is supported by the cases of *City of Newark vs. McDowell*, 16 C. C. 556, 60 Ohio St. 599; *The City of Newark vs. Jones*, 16 C. C. 563, *Piqua vs. Geist*, 59 Ohio St. 163.

The first paragraph of section 3939, General Code, reads:

"When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes:"

Subdivision 27 under this section reads:

"For constructing or repairing viaducts, bridges and culverts and for purchasing or condemning the necessary land therefor."

Section 3918 of the General Code, which is a part of chapter 6, division 3, title 12, which chapter is entitled "Borrowing Money," reads:

"Bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued and under what ordinance."

Under the provisions of these statutes, bonds issued for the purpose of providing a fund for the construction of specific bridges may not be diverted from that purpose and used for the purpose of constructing other bridges.

It would follow, and you are advised, that it is the duty of county commissioners to construct and keep in repair necessary bridges over streams and public canals on state and county roads in cities; that county commissioners are without authority to construct and repair bridges on streets established by the city for the use and convenience of the city and not a part of a state or county road; that it is the duty of the city to construct and repair such bridges; that there is imposed upon a city the duty to exercise care, supervision and control over bridges in the city and keep them open, in repair and free from nuisance, including bridges over streams and public canals on state and county roads, and bridges on streets established by the city for the use and convenience of the city and not a part of a state or county road; that a city is under no legal duty to construct bridges over streams and public canals on state and county roads and within the limits of the city; but a city is authorized to construct such bridges and may expend funds therefor which are the proceeds of bonds issued and sold for the construction of specific bridges so located, but is unauthorized to expend such proceeds in the construction or repair of bridges other than those specified in connection with such bond issue.

Respectfully,

C. C. CRABBE,
Attorney General.