

Section 5020, General Code, provides as follows:

“When the approval of a question, other than a constitutional amendment, is to be submitted to a vote, such question shall be printed on a separate ballot and deposited in a separate ballot box, to be presided over by the same judges and clerks of election.”

Specifically answering your question, therefore, it is my opinion that the special election provided for in Section 3515-1, General Code, may be held on the same day that the August primary is held if that date should come within the statutory limitations therein mentioned. It is also my opinion that such question should be printed on a separate ballot and the votes thereon deposited in a separate ballot box, and that said election should be presided over by the same judges and clerks of election that conduct the regular primary election.

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

2172.

**TOWNSHIP TRUSTEES—LIABILITY FOR DAMAGES RECEIVED THROUGH BOARD'S NEGLIGENCE IN DISCHARGE OF ITS OFFICIAL DUTIES, DISCUSSED—NO AUTHORITY TO SPEND MONEY TO INSURE AGAINST INJURY BY TOWNSHIP OWNED MOTOR VEHICLES.**

**SYLLABUS:**

1. *By the terms of Section 3298-17, General Code, a board of township trustees is liable, in its official capacity, for damages received by any person by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties. If an action be brought against a board of township trustees for such damages it must, to succeed, be for a wrong committed or an obligation incurred by such trustees while in the discharge of their official duties.*

2. *Statutes, such as Section 3298-17, General Code, being in derogation of the common law, should not be extended beyond the plain meaning of their terms.*

3. *A board of township trustees is without authority to enter into a contract and expend public moneys for the payment of premiums on "public property" or "property damage" insurance covering damages to property and injuries to persons caused by the negligent operation of township owned motor vehicles and road building machinery.*

COLUMBUS, OHIO, May 29, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge your letter of May 22, 1928, which reads:

“You are respectfully requested to furnish this department your written opinion upon the following. Section 3298-17, of the General Code, provides that 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 said board of trustees in the discharge of its official duties.

Question 1: Would this section of law, or any other section, make the trustees liable in case of the negligent operation of trucks or other road building machinery owned by the township and operated by employees of the township?

Question 2: If the answer to the first question is in the affirmative, may the trustees of a township legally take out liability insurance to cover damages occasioned by such operation?"

Section 3298-17, General Code, was enacted May 17, 1915 (106 v. 574), being Section 237 of an act entitled:

"An Act—To provide a system of highway laws for the State of Ohio  
\* \* \*"

and provides 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 said board of trustees in the discharge of its official duties."

It is stated in Rockel's Complete Guide for Ohio Township Offices, 21st Ed., Section 1731, that:

"\* \* \* if action is sought against it, (the township) it must, to succeed, be for a wrong or an obligation incurred by the township in the exercise or the failure to exercise the powers given to it by the Legislature."

The following language appears in Section 1732 of the same authority:

"It is well settled that township trustees are a quasi corporation and their powers must be strictly construed. They cannot be enlarged by judicial construction to hold them for negligence upon improvements not erected by them nor place (placed) under their control by direct enactment.

\* \* \*

It (Section 3298-17, General Code), places no liability on the individual member; the liability is one of the township, and it must be a negligence of the board of trustees, in a negligent or careless discharge of a duty placed upon it by statute. The question is, have they failed to discharge a duty, using the same degree of care and prudence that an ordinarily careful and prudent person would have done under like circumstances? It is not the duty of the township trustee to maintain bridges and culverts, therefore they would not be liable for an injury resulting from a defective one. While it is their duty to maintain township roads, it is not easy to determine the liability incurred by them, arising from an injury on a road in a defective condition. It would be no greater than that of the county commissioners \* \* \*"

By the terms of Section 3370, General Code:

"The township trustees shall have control of the township roads of their township and shall keep the same in good repair. \* \* \* In the maintenance and repair of roads the township trustees may proceed in any one of the following methods as they may deem for the best interest of the public, to-wit:

1. They may designate one of their number to have charge of the maintenance and repair of roads within the township, or

2. They may divide the township into three road districts, in which event each trustee shall have charge of the maintenance and repair of roads within one of such districts, or

3. They may appoint some competent person, not a member of the board of trustees, to have charge of the maintenance and repair of roads within the township which person shall be known as township highway superintendent, and shall serve at the pleasure of the township trustees. The method to be followed in each township shall be determined by the township trustees by resolution duly entered on their records."

As provided by Section 3298-1, General Code,

"The board of trustees of any township shall have power, as hereinafter provided, to construct, reconstruct, resurface or improve any public road or roads, or part thereof, under their jurisdiction. \* \* \*"

By the terms of Section 3374-1, General Code,

"It shall be the duty of the township trustees to cause all the highways within the township, including the state, county and township roads, to be kept free from obstruction by snow. \* \* \*"

Section 3374-2, General Code, imposes a duty upon township trustees in their respective townships to cut briars, brush, weeds, etc., growing along the public highway, and to employ the necessary labor to carry out the provisions of said section.

As provided by Section 3375, General Code,

"The township trustees shall cause the graveled and unimproved public roads of the township to be dragged in the manner hereinafter provided. \* \* \*"

By the provisions of Section 3376, General Code,

"The township trustees shall from time to time designate the roads to be dragged and shall furnish suitable road drags, hones, scrapers, or other tools, which shall be paid for out of the township road fund. \* \* \* Such trustee or trustees or township highway superintendent shall employ the necessary labor and teams at a price to be fixed by the board of township trustees. \* \* \*"

As provided by Section 3373, General Code,

"\* \* \* Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township. The township trustees shall provide suitable places for housing and storing machinery and tools owned by the township. They shall have the power to purchase such material and to employ such labor and teams as may be necessary for carrying into effect the provisions of this section, or they may authorize the purchase or employment of the same by one of their number or by the township highway superintendent at a price to be fixed by the township trustees. \* \* \* All force account work shall be done under the direction of a mem-

ber of the board of township trustees or of the township highway superintendent."

The foregoing sections of the General Code, together with others which need not be quoted for the purposes of this opinion, may be said to impose certain official duties on boards of township trustees with regard to the construction, maintenance and repair of roads under their jurisdiction. In other words, these and related sections of the General Code impose certain duties on boards of township trustees which may be said to be "official" duties as that word is used in Section 3298-17, supra. If any person, firm or corporation is damaged by reason of the negligence or carelessness of a board of trustees in the discharge of any such official duties, such person, firm or corporation by the terms of Section 3298-17, supra, may recover damages therefor from such board of township trustees.

In the case of *Board of Commissioners vs. Michaels*, 7 O. S. 110, the following question was presented:

"\* \* \* Is a county, or, in other words, the people of a county, liable in an action sounding in tort, for the personal misconduct or negligence of the county commissioners while in the performance of their official functions? If a county be thus liable, that liability must be derived either expressly or by necessary implication from the provisions of some statute, or must rest on the principles of the common law."

The Court held:

"The board of commissioners of a county are not liable, in their quasi corporate capacity, either by statute or at common law, to an action for damages for injury resulting to a private party by their negligence in the discharge of their official functions."

Your attention is directed to the case of *Board of County Commissioners vs. Marietta Transfer and Storage Co.*, 75 O. S. 244, the syllabus of which reads:

"Consistently with the rule that statutes in derogation of the common law should not be extended beyond the plain meaning of their terms, the amendment of Section 845, Revised Statutes, providing that county commissioners shall be liable for negligence 'in keeping any such road or bridge in proper repair' can not be interpreted as creating a liability for negligence in the operation of a free ferry."

See also the case of *Ebert vs. Commissioners of Pickaway County*, 75 O. S. 474, the syllabus of which reads as follows:

"Consistently with the rule that statutes in derogation of the common law should not be extended beyond the natural meaning of their terms, the amendment of April 13, 1894, of Section 845 of the Revised Statutes that 'any such board of county commissioners shall be liable in its official capacity for any damages received by reason of its negligence or carelessness in keeping any such road or bridge in proper repair' can not be interpreted as creating a liability for injuries sustained by one whose horse takes fright at stones which the commissioners had collected by the road-side for the purpose of repairing a road or bridge, there being no defect in either road or bridge contributing to the injury."

Although these references apply to boards of county commissioners, the same rules of law and the same conclusions are applicable to boards of township trustees.

As stated in the opinion of the case of *Johnson vs. Grunkenmeyer*, 8 O. N. P. 274:

“County commissioners and township trustees are quasi corporations and their powers must be strictly construed. The latter, certainly, cannot be enlarged by judicial construction, in order to hold them liable for negligence upon improvements not erected by them nor placed under their control by direct enactment.”

You will note that the liability created by Section 3298-17, *supra*, with reference to boards of township trustees is not as limited as the liability imposed on boards of county commissioners by Section 2408, General Code, which provides:

“\* \* \* The board shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair, \* \* \*”

As stated in the opinion in the case of *Ebert vs. Commissioners*, *supra*, at page 479:

“It is conceded that the judgments below are right unless the facts alleged in the petition bring the case within the amendment of Section 845 of the Revised Statutes, passed April 13, 1894, (91 O. L., page 142), creating and defining a liability of the county commissioners for negligence. Prior to that date it was recognized as established by repeated decisions that there was no such liability on the commissioners or the county for any negligence of the commissioners. A limited liability was then imposed by the amendment of the statute defining the duties and powers of the commissioners, the pertinent portion of the amendment being: ‘Any such board of county commissioners shall be liable in its official capacity for any damages received by reason of its negligence or carelessness in keeping any such road or bridge in proper repair.’ The scope of this amendment was under consideration in *The Board of County Commissioners of Morgan County vs. The Marietta Transfer & Storage Company*, ante, 244, where it was held, for obvious reasons, that the amendment is within the rule that statutes in derogation of the common law should not be extended beyond the plain meaning of their terms. Without repeating what was there said in support of that view it may be taken as the correct view of the scope of this amendment. The liability which the Legislature has created is for negligence or carelessness in keeping a road or bridge in proper repair. No broader effect can be given to the amendment without disregarding the rule stated.”

The liability for damages created upon boards of township trustees in their official capacity, by the terms of Section 3298-17, *supra*, has only to do with the negligence or carelessness of such boards in the discharge of their *official* duties.

As stated by Judge Read in the case of *Conwell vs. Voorhees*, 13 Ohio 523, at page 543:

“But public agents, although in one sense treated as principals, are not responsible for the omissions, negligence, or misfeasances of those employed under them, if they employed trustworthy persons of suitable skill and ability, and have not cooperated in the wrong.”

It is stated in Story's Commentaries on the Law of Agency, at page 394:

"The rule, which we have been considering that where persons are acting as public agents, they are responsible only for their own misfeasances and negligence, and not for the misfeasances and negligences of those who are employed under them, if they have employed persons of suitable skill and ability, and have not cooperated in or authorized the wrong, is not confined to public officers, or agents of the government, properly so called, in a strict legal sense; but it equally applies to other public officers or agents, engaged in the service, or acting for public objects, whether their appointments emanate from the particular public bodies, or are derived from general laws, and whether those objects are of a local or of a general nature. For, if the doctrine of *respondet superior* were applied to such agencies, it would operate as a serious discouragement to persons who perform public functions, many of which are rendered gratuitously, and all of which are highly important to the public interest."

As stated in 38 Cyc., at page 442:

"In determining liability for a tortious injury, the law regards the proximate and not the remote cause. \* \* \* Each case must be decided largely upon the special facts belonging to it, and often upon the very nicest discriminations."

From the foregoing discussion you will readily see that it is impossible to give a categorical answer to the question you present in view of the meager facts contained therein. In the interest of clarity the following summary is given in view of the general question presented by your first inquiry.

1. By the terms of Section 3298-17, General Code, a board of township trustees is liable, in its official capacity, for damages received by any person by reason of the negligence or carelessness of said board of trustees in the discharge of its *official* duties.

2. The official duties of such a board are enumerated in the several sections of the General Code.

3. The powers of township trustees must be strictly construed and they cannot be enlarged by judicial construction so as to hold them responsible for negligence upon improvements not erected by them nor placed under their control by direct enactment.

4. If an action be brought against a board of township trustees, it must, to succeed, be for a wrong or an obligation incurred by such trustees while in the discharge of their *official* duties.

5. Statutes, such as Section 3298-17, General Code, being in derogation of the common law, should not be extended beyond the plain meaning of their terms. In other words, such statutes must be strictly construed.

6. To constitute a tort, the wrong must have amounted to a breach of a legal duty owing by the wrong-doer to the injured party, which duty must be created by statute.

7. In determining liability for a tortious injury, the law regards the proximate and not the remote cause.

8. Public agents, although in one sense treated as principals, are not responsible for the omissions, negligence, or misfeasances of those employed under them, if they have employed trustworthy persons of suitable skill and ability, and have not cooperated in the wrong.

In considering your second inquiry your attention is directed to Opinion No. 494, dated May 16, 1927, the syllabus of which reads:

“A board of county commissioners cannot legally enter into a contract and expend public moneys for the payment of premiums on ‘public liability’ or ‘property damage’ insurance covering damages to property and injury to persons caused by the negligent operation of county owned motor vehicles; there being no liability to be insured against, the payment of premiums would amount to a donation of public moneys to the insurance company.”

Although the discussion in said opinion is confined to boards of county commissioners the reasoning therein contained is applicable equally to boards of township trustees. I am enclosing herewith a copy of this opinion.

The rule that statutory boards, being creatures of statute, can exercise only such powers as are expressly granted by statute and such as are necessarily implied to carry the powers expressly granted into effect, is especially applicable with reference to the township’s financial affairs. A board of township trustees represents the township in respect to its financial affairs only so far as authority is given to them by statute. Public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, which can only be disbursed by clear authority of law. To this effect see *State, ex rel. Smith vs. Maharry*, 97 O. S. 272. As stated in the third paragraph of the syllabus in the case of *State, ex rel. vs. Pierce*, 96 O. S. 44:

“In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power.”

No section of the General Code confers authority upon a board of township trustees to expend public moneys for the payment of premiums for liability insurance covering damages to property or injury to persons caused by the negligent operation of township owned motor vehicles or road building machinery. Nor does authority exist for such a board to expend public moneys for the payment of premiums for liability insurance covering damages to property or injury to persons caused by reason of the negligence or carelessness of such a board in the discharge of its official duties. Your second question must therefore be answered in the negative.

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

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2173.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF JACOB Y. DYKE  
AND E. B. HATFIELD, IN FRANKLIN TOWNSHIP, ROSS COUNTY.

COLUMBUS, OHIO, May 29, 1928.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—There were submitted for my opinion under recent date two abstracts of title covering two separate tracts of land in Franklin Township, Ross County, Ohio, which said tracts are more particularly described as follows: