

471

1. BRIDGES SITUATED ON STATE HIGHWAY WITHIN MUNICIPAL CORPORATION—NO OBLIGATION OR MANDATORY DUTY ATTACHES TO DIRECTOR OF HIGHWAYS TO REPAIR SUCH BRIDGES.
2. BRIDGES OVER STREAMS AND PUBLIC CANALS—CONNECTING STATE AND COUNTY ROADS WITHIN LIMITS OF MUNICIPAL CORPORATIONS—COUNTY PRIMARILY OBLIGATED TO KEEP IN REPAIR SUCH NECESSARY BRIDGES.

SYLLABUS:

1. No obligation or mandatory duty attaches to or rests upon the director of highways to repair bridges situated on a state highway within a municipal corporation.
2. A county primarily is obligated to keep in repair necessary bridges over streams and public canals on or connecting state and county roads within the limits of municipal corporations.

Columbus, Ohio, July 5, 1951

Hon. Thomas F. Dewey, Prosecuting Attorney,
Sandusky County, Fremont, Ohio

Dear Sir:

You have requested my opinion upon the following inquiry:

“Does the State of Ohio have the obligation of repairing the bridges across the Sandusky River in the City of Fremont, Ohio, or is it the obligations of the Sandusky County Commissioners and the City of Fremont?”

From the full text of your letter, I understand your inquiry to be two-fold, involving the following two questions:

(1) Does the State of Ohio have the obligation of repairing the bridge across the Sandusky River in the City of Fremont?

(2) If not, is the duty of repairing said bridge the joint obligation of Sandusky County and the City of Fremont?

As to your first question relating to the obligation, if any, of the State of Ohio, to repair a bridge situated on a state highway within a municipi-

pality, I invite your attention to the laws pertaining to the highway department, State of Ohio, which were recodified and revised in 1945 by Amended Senate Bill No. 204, 121 Ohio Laws, 455. Included in such recodification act is Section 1178-20, General Code, which reads in part as follows:

"No duty of constructing, reconstructing, maintaining and repairing such state highways within municipal corporations shall attach to or rest upon the director of highways; but such director shall be authorized to enter upon state highways within any municipal corporation and construct, reconstruct, widen, improve, maintain and repair the same, in such manner as may be provided by law, provided the municipal corporation first consents thereto by resolution of its council or other legislative body."

(Emphasis added.)

Also included in such act are Sections 1178-42, 1178-2 and 1178, General Code. Section 1178-42, relating to improvement of state highways within a municipality, reads in part as follows:

*"The director * * * at his discretion may establish, construct, reconstruct, improve or widen, maintain or repair any section of state highway within the limits of a city, including the elimination of railway grade crossings, and pay the entire or any part of the cost and expenses thereof from state funds; but in all cases he shall first obtain the consent of the council or other legislative authority of such municipal corporation."* (Emphasis added.)

The last paragraph of Section 1178-2, General Code, makes specific reference to Section 1178-42, as follows:

*"Except in the case of maintaining, repairing, or center line painting of state highways within villages, which shall be mandatory as required by Section 1178-42 of the General Code, no duty of constructing, reconstructing, widening, resurfacing, maintaining or repairing state highways within municipal corporations, or bridges and culverts thereon, shall attach to or rest upon the director * * *"* (Emphasis added.)

The last sentence of Section 1178, General Code, which defines the word "road" or "highway" when used in the act to include bridges, is cited as follows:

"The word 'road' or 'highway' when used in this act shall be deemed to include bridges, viaducts, grade separations, appurtenances and approaches on or to such road or highway."

(Emphasis added.)

Further inquiry indicates that the bridges in question spanning the Sandusky River is situated in the City of Fremont on a street which has been declared to be a state highway and a part of the state highway system pursuant to certain enabling provisions of Section 1178-20, General Code.

The foregoing sections as cited, and particularly the specific exclusion contained in Section 1178-2, supra, evince that no obligation or mandatory duty devolves upon the state or the director of highways to maintain or repair bridges erected on a state highway within a municipality. While the director may cooperate in the maintenance and repair of such bridges, the initiation of such work is within his sole discretion and is subject to the consent of the council or other legislative authority of the municipality in which such bridge is located.

In view of the plain and unambiguous provisions of the foregoing sections and specifically answering your first question, it is my opinion that no obligation or mandatory duty attaches to or rests upon the director of highways to repair bridges situated on a state highway within a municipal corporation.

With reference to your second question as to whether or not the county and municipality have a joint obligation to repair such bridges erected on part of a state highway in the City of Fremont, the statutory authority of county commissioners over bridges is found in Sections 2421, 2421-1 and 7557, General Code.

Section 2421, General Code, reads in part as follows :

"The commissioners shall construct and keep in repair necessary bridges over streams and public canals for and connecting state and county roads, free 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 the property therein."

(Emphasis added.)

With respect to the exception set forth in Section 2421, supra, the provisions of Section 2421-1, General Code, are cited, to-wit :

"When the council of any city having a population not exceeding fifteen thousand or of a village shall cause to be filed in the office of the county auditor of the county in which such corporation is situated in whole or in part a certified copy of a resolution of such council demanding some portion of the county bridge fund levied upon property within such corporation, the

county commissioners of such county may, by resolution, authorize the county auditor to draw his warrant upon the county treasurer in favor of such corporation for not to exceed sixty per cent of the county bridge fund then levied or collected, or in process of collection, upon the property in such corporation. Such fund so received by such corporation shall be used by it for the construction, repair and maintenance of any bridges and viaducts within such corporation."

Section 7557, General Code, which pertains to the duty of County Commissioners regarding the construction and repair of bridges in villages and cities not having the right to demand and receive a portion of the bridge fund, reads as follows:

"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 on the property within such corporation, on all state and county roads, which are of general and public utility, running into or through such village or city."

(Emphasis added.)

These sections make exception of bridges within villages and cities 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 and must be disregarded inasmuch as the statute authorizing counties to levy for such bridge fund has been repealed and investigation fails to disclose the enactment of any substitute legislation or the existence at this time of any such fund. Furthermore, should such bridge fund exist at the present time, it is unlikely that the City of Fremont would have the right to demand any portion thereof under Sections 2421 and 2421-1, supra, because the unofficial census for 1950 shows Fremont to be a city in excess of 15,000 population.

These facts, however, do not limit or affect the obligation of the county commissioners to repair necessary bridges located in municipalities on state or county highways. It is manifest from a consideration of these several sections of the General Code that a statutory duty is imposed upon county commissioners to repair such bridges of like character and situation to the one in question.

The general statutory authority of municipal corporations over bridges is set forth in Sections 3629 and 3714, General Code.

Section 3629, which sets forth the authority of municipalities over bridges, provides as follows:

“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.”
(Emphasis added.)

Section 3714, General Code, reads as follows:

“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.”
(Emphasis added.)

Section 3629, supra, authorizes a municipal corporation to repair bridges within its corporate limits and Section 3714, supra, assigns to the council of a municipality the duty of care, supervision and control of bridges within the corporation as well as the obligation to keep them “in repair, and free from nuisance.”

The question presents itself, therefore, as to whether or not it is within the intendment of Sections 3629 and 3714, supra, to limit the duty of a county to repair bridges as imposed by Sections 2421 and 7557, supra, thereby requiring the joint participation of counties and municipalities in the fulfillment of this duty to keep in repair such bridges within the corporate limits.

The distinction between the obligations of county commissioners and municipalities with reference to the supervision and repair of bridges has long been recognized by the Supreme Court and is sustained by a long line of well considered opinions.

In the case of *The City of Piqua v. Geist*, 59 Ohio St., 163, an antecedent statute of Section 2421, supra, containing substantially the same language, was the subject of interpretation. The court held therein that it was the exclusive duty of the municipal authorities to construct and keep in repair any bridge which forms a part of a street established by a city and is not a part of a state or county road, and that no duty whatsoever

attached to county commissioners with respect to the construction or repair of any such bridge. On the other hand the court construed the provisions of said statute to impose upon the county commissioners the duty of constructing and keeping in repair necessary bridges in the cities and villages on state or county roads of general public utility running into or through such municipalities.

The Geist case, *supra*, is cited with approval in the later case of *The Interurban Railway and Terminal Company v. The City of Cincinnati*, 94 Ohio St., 269. On page 278 of the opinion, Matthias, J., says :

“As there pointed out it is the exclusive duty of the municipal authorities 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, care and maintenance of any such bridge. On the other hand, the provisions of the statute above cited, in clear and unmistakable language, place upon the county commissioners the duty of constructing and keeping 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.”

In the case of *Youngstown v. Sturgess*, 102 Ohio St., 480, paragraph 2 of the syllabus reads in part as follows :

“The county primarily is obligated to construct and repair bridges upon state or county roads and the approaches thereto over streams within the limits of municipalities, * * *”.

It appears to me from the foregoing authorities that it is the primary duty of county commissioners to keep in repair bridges situated within a municipal corporation and connecting streets which are part of the state or county highway systems. Conversely, 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. Such authority and duty devolves solely upon municipal authorities.

Also to the same effect are *State ex rel. Bushnell v. The Board of County Commissioners of Cuyahoga County*, 107 Ohio St., 465; *Newark v. Jones*, 16 C. C., 565; Opinion No. 1334, Opinions of the Attorney General for 1927, page 2417, Vol. II; Opinion No. 1147, Opinions of the Attorney General for 1927, page 2016, Vol. III; Opinion No. 2634,

Opinions of the Attorney General for 1925, page 471; Opinion No. 900, Opinions of the Attorney General for 1919, page 1622, Vol. II.

While a county primarily is responsible for the repair of bridges upon state or county roads within the limits of municipalities, it does not follow that municipal corporations are thereby relieved from their duties to exercise care, supervision and control over such bridges, and to cause them to be kept open, in repair, and free from nuisance.

It was held further in *Youngstown v. Sturgess*, supra, that "municipalities are not thereby relieved from their obligation to keep bridges and approaches thereto 'open, in repair and free from nuisance'; neither are such municipalities relieved from the duty to safeguard travelers upon such structures within the limits of municipalities against dangerous defects amounting to a nuisance."

On page 279 of the case of *Interurban Railway and Terminal Co. v. Cincinnati*, supra, it was said in citing with approval the decision in *Mooney, Admr., v. The Village of St. Marys*, 15 C. C., 446:

"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. They may make extensive repairs, but are not required by statute to do so."

One of my predecessors in Opinion No. 4078, Opinions of the Attorney General for 1935, page 322, Vol. I, has ruled likewise, the syllabus reading as follows:

"Where a state or county road becomes a city street by reason of annexation of territory to a city, such street continues to exist as a state or county road within the intendment of sections 2421 and 7557, General Code, and *it is the primary duty of the county commissioners to construct and keep in repair necessary bridges on such street over streams and public canals, but municipalities are not thereby relieved from their obligation to keep such bridges open, in repair and free from nuisance.*"
(Emphasis added.)

The same conclusion was reached in Opinion No. 2633, cited above, rendered in 1925 by the Attorney General.

I am aware that another of my predecessors in the more recent Opinion No. 243, Opinions of the Attorney General for 1945, page 230,

has held that the repair of bridges is a joint obligation of the county and municipality, paragraph 2 of the syllabus thereof stating as follows :

“The maintenance and repair of bridges erected on state and county highways within municipal corporations is a joint obligation of the county and the municipality.”

In this opinion my predecessor relies upon the case of *Lengyel, v. Brandmiller, et al*, 139 Ohio St., 478, paragraph 1 of the syllabus of which reads as follows :

“1. A statutory duty rests on both the county and the municipality to see that a bridge erected and maintained by a county and comprising a part of the street system in a municipal corporation is kept in repair, and one who is injured by the collapse of such bridge, due to a defective condition of which the county had actual notice and the city constructive notice, may maintain an action for damages against both the county and the municipality.”

It is to be noted that this case pertained to the respective statutory liabilities of a county and a municipal corporation where the holding was that one injured through the neglect to perform the common duty of repair of bridges, imposed on both the county and city, would have a cause of action against both.

The liability of a county or municipality in the exercise of its governmental functions is imposed by statute, and the courts have uniformly recognized the doctrine that such statutory provisions are in derogation of the common law, and therefore are strictly construed. As indicated previously, Sections 2421 and 7557, *supra*, set forth the duties of counties with respect to bridges erected and repaired by them in cities and villages. By Section 2408, General Code, the board of county commissioners is answerable in its official capacity for damages sustained by reason of its negligence or carelessness in not keeping such bridges in proper repair.

The liability of a municipality for failure to repair bridges is fixed by Section 3714, *supra*.

The court in the *Lengyel* case, *supra*, simply reiterated the acknowledged statutory liability devolving upon both the county and municipality concerned, under the facts presented therein. I fail to find that the court considered or determined which of these governmental units has the primary obligation for the construction or repair of such bridges ; nor did

it refer to or overrule *Youngstown v. Sturgess*, supra, or other prior cases of the Supreme Court.

It may be said that paragraph 2 of the syllabus of Opinion No. 243 overrules by implication prior opinions of the Attorney General. This is not necessarily true inasmuch as the body of said opinion does not discuss or refer directly to the question of the primary obligation of a county to repair such bridges. I am of the opinion, however, that the statement of law therein contained does not carry to proper conclusion the proposition that notwithstanding the acknowledged and respective duties of both counties and municipalities to repair such bridges, the primary obligation attaches upon a county in accordance with the sections of the General Code and decisions of the Supreme Court cited above.

A similar conclusion was reached with respect to said opinion by the Court of Common Pleas of Washington County in a well reasoned decision, *T. H. Porter, et al, Commissioners v. Joe C. Hartline, et al., City of Marietta*, Case No. 21981, Docket No. 49, page 57, dated May 18, 1950.

Therefore, for purposes of clarification, I reaffirm herewith the prior opinions of this office and distinguish paragraph 2 of the syllabus of Opinion No. 243 to the extent that although the repair of bridges erected on state and county highways within municipal corporations is a joint obligation of the county and the municipality, particularly where one seeks to impose upon either or both liability for neglect to keep in repair such bridges, existing statutes affix the primary obligation to repair such bridges upon the counties.

The contention has been advanced that the state has never formally transferred the bridge in question to the jurisdiction of either Sandusky County or the City of Fremont, thereby obviating, presumably, any imposition upon either the county or city the duty to repair said bridge. Review of past legislative enactments indicates that House Bill No. 391, passed April 6, 1888, 85 Ohio Laws, 165, authorized the transfer in trust to Sandusky County of that part of the road on which this bridge is apparently situated. House Bill No. 739, passed May 9, 1894, 91 Ohio Laws, 723, which amended the prior act, reaffirmed this transfer of said road to the county, including this Sandusky bridge. However, regardless of such enabling legislation, I fail to see the basis for this contention. It is acknowledged that said bridge spans the Sandusky river, that it is

situated within the corporate limits of Fremont and is connecting streets of general utility running through that city which streets have been designated as part of the state highway system, according to law. Therefore, it appears to me that said bridge would come within the purview of Sections 2421 and 7557, supra, and would be subject to repair by the county commissioners of Sandusky County.

In the face of the foregoing authorities and specifically answering your second question, it is my opinion that a county primarily is obligated to keep in repair necessary bridges over streams and public canals on or connecting state and county roads within the limits of municipal corporations.

Respectfully,

C. WILLIAM O'NEILL
Attorney General