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TOWNSHIP TRUSTEES—ROAD; BOUNDARY-LINE ROAD—MANDATORY DUTY TO APPORTION COSTS OF MAINTENANCE UNDER SECTION 5579.03 RC—MANDATORY INJUNCTION MIGHT POSSIBLY ISSUE TO COMPEL ADOPTION OF EQUITABLE PLAN OF APPORTIONMENT.

SYLLABUS:

1. The provision in Section 5579.03, Revised Code, requiring the boards of township trustees of adjoining townships to meet and apportion a boundary line road between such townships as justice and equity require, and thereafter to cause such road to be opened, improved, worked, and kept in proper repair, is mandatory.

2. If boards of township trustees fail to perform their mandatory duty of making an equitable apportionment as required in Section 5579.03, Revised Code, a court of equity might, in the exercise of its discretion and depending on the facts involved in the particular case, issue a mandatory injunction to compel the adoption of a specified equitable plan of apportionment.

Columbus, Ohio, May 21, 1957

Hon. John F. DeMuth, Prosecuting Attorney
Paulding County, Paulding, Ohio

Dear Sir:

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

"There is a strip of township road between Benton Township and Harrison Township in this county which, as I understand it, is in need of improvement. Sec. 5579.03 of the Revised Code provides that if a road is established as part of the line or boundary of a township the Board of Township Trustees of such adjoining townships 'shall meet at a convenient place as soon after the first Monday of March as convenient, and apportion such road between the townships . . . as justice and equity may require.' This section further provides that the boards of the respective townships 'shall cause the road to be opened and improved accordingly, and shall thereafter cause their respective portions to be worked and kept in proper repair.'

"I have been informed that the boards of trustees of these two townships have had a preliminary informal meeting but that such boards were unable to agree on an apportionment. The wording of the above quoted section appears to be mandatory in that it states that such boards *shall* apportion, etc.

"Could you please give me your opinion on the following questions?

"1. Are the provisions of Sec. 5579.03, R. C., mandatory?

"2. What procedure is to be followed if there is a joint meeting of the boards of trustees as provided for under R. C. 5579.03 and such boards fail to agree on an apportionment?"

Section 5579.03, Revised Code, provides in its entirety:

"If a road is established as a part of the line or boundary of a township or municipal corporation, the board of township trustees of such adjoining townships and legislative authority of such municipal corporation, *shall* meet at a convenient place as soon after the first Monday of March as convenient, and apportion such road between the townships, or township and municipal corporation, as justice and equity require. The board of the respective townships and legislative authority of the municipal corporation *shall* cause the road to be opened and improved accordingly, and *shall* thereafter cause their respective portions to be worked and kept in proper repair." (Emphasis added.)

It is stated in Sutherland, Statutory Construction, 3rd Edition, Volume 3, Section 5808, p. 86, that :

“Where statutes provide for the doing of acts or the exercise of power or authority by public officers, and private rights or the public interest require the doing of such acts or the exercise of such power or authority, they are mandatory, * * *”

Section 5579.03, *supra*, does provide for the doing of certain acts by the board of township trustees of adjoining townships, which trustees are clearly public officers. The public interest requires these statutory duties be executed by designated public officials, and it logically follows they are mandatory duties to be performed.

The repeated and consistent use of the word “shall” in the above statute is strong indication of such mandatory intent. This interpretation is consistent with the case of State, *ex rel. Rogers, et al.*, Appellees, v. Taylor, *et al.*, Trustees, Appellants, 152 Ohio St., 241, wherein the duties of township trustees under certain other statutes were considered. The Court said in pertinent part therein :

“Are these statutory provisions fixing the duties of township trustees mandatory or merely directory? The repeated and consistent use of the word ‘shall’ leaves nothing to conjecture. Section 3370, *supra*, provides that the township trustees *shall* keep the township roads in good repair. Section 3374-2 provides that brush, briars and weeds *shall* be cut. Section 3375 provides that the township trustees *shall* cause the graveled and unimproved public roads of the township to be dragged; and the trustees *shall*, before making any other appropriations from the road fund, appropriate and set aside out of said fund a sum sufficient to meet the expense of dragging the roads; and that such sum *shall* not be used for any other purpose. That the General Assembly intended this plain, unambiguous language to be mandatory is indicated further by the additional provisions of Section 13421-5, General Code, which reads as follows:

“‘If any * * * township trustee or township highway superintendent, wilfully neglects, fails or refuses to perform the duties of his office, he shall be fined not more than one hundred dollars, nor less than ten dollars, and said conviction shall operate as a removal from office.’”

“Manifestly the Court of Appeals was not in error in holding that the statutory provisions fixing the duties of township trustees are mandatory.” (Emphasis added)

Likewise, the repeated and consistent use of the word "shall" in our present statute leaves nothing to conjecture. It is obvious the General Assembly intended this plain, unambiguous language to be mandatory. This is further supported by Sections 5589.03 and 5589.99 (C), Revised Code, which together provide substantially the same punitive action against a township trustee who wilfully neglects, fails or refuses to perform the duties of his office, as was provided in former Section 13421-5, General Code. Section 5589.14, Revised Code, provides a prosecuting attorney with specific authority to prosecute such an offender.

In Opinion No. 6547, Opinions of the Attorney General for 1956, my predecessor in office answered your first question in part. In commenting about Section 5579.03, *supra*, he said :

"Here it will be seen that when such apportionment has been made each township, as to that length of road which is thus apportioned to it, is not only authorized to keep it in proper repair, *but is under a duty to do so. * * **" (Emphasis added.)

I concur in this recognition by my predecessor that a duty exists to keep such apportioned road in proper repair, after apportionment has already been made. I am further impelled to conclude there is a similar mandatory duty imposed upon the board of township trustees of such adjoining townships to meet and apportion such road between the townships, as justice and equity require, and to cause such road to be opened and improved accordingly. In specific answer to your first question, I conclude the provisions of Section 5579.03, Revised Code, are mandatory.

Coming to your second question, you have asked what procedure is to be followed if such boards fail to agree on an apportionment. It is noted the boards of trustees of these two townships have already had a preliminary informal meeting. I assume they will comply with the provisions of this statute when it is recognized their duties are mandatory, rather than merely directory. However, even though Section 5579.03, *supra*, does not specifically provide the procedure to be followed to enforce it, it would seem that if the two boards fail to agree they might in the discretion of the court of common pleas in their county be compelled to act by mandatory injunction. It is the duty of the two boards to make such an apportionment "as justice and equity require." Section 5579.03, *supra*. Failure to do so is, as noted, a failure to perform a mandatory duty. In this situation, it seems to me that a court of equity

might, after hearing evidence, determine that the position of one board is just and equitable and that the position of the other is not, or that there is only one equitable course, and in such case a court in the exercise of its discretion might issue a mandatory injunction requiring the adoption of a given plan. Although the courts are careful to avoid "government by injunction," failure to act in accordance with a mandatory statute might be deemed by a court to constitute such disregard of duty as would justify a mandatory injunction. Of course, it is not the function of this office to attempt to anticipate what decision a court might reach upon any given set of facts.

It is obvious, of course, that mandamus is not a proper remedy in this situation for courts are without power to compel agreement where honest differences of opinion are entertained.

Accordingly, in specific answer to your inquiry, it is my opinion that :

1. The provisions in Section 5579.03, Revised Code, requiring the boards of township trustees of adjoining townships to meet and apportion a boundary line road between such townships as justice and equity require, and thereafter to cause such road to be opened, improved, worked, and kept in proper repair, is mandatory.

2. If boards of township trustees fail to perform their mandatory duty of making an equitable apportionment as required in Section 5579.03, Revised Code, a court of equity might, in the exercise of its discretion and depending on the facts involved in the particular case, issue a mandatory injunction to compel the adoption of a specified equitable plan of apportionment.

Respectfully,
WILLIAM SAXBE
Attorney General