2321.

COUNTY COMMISSIONERS—AUTHORITY TO ESTABLISH COUNTY ROAD WITHIN LIMIT OF MUNICIPALITY—MAINTENANCE OF BRIDGES IN CITY.

SYLLABUS:

1. *County commissioners are authorized to establish a county road wholly within the limits of a municipality, where such road is established upon a street which is a connecting link between two state highways and will be of general utility to the through traffic operating over such highways.*

2. *Where a county road is properly established upon a street within the limits of a city, the county commissioners have the authority and duty to construct and maintain necessary bridges thereon.*

3. *Opinion No.* 1147, *dated October* 14, 1927, *approved and followed.*

COLUMBUS, OHIO, July 6, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication, as follows:

> "We are enclosing herewith a blue print, showing the location of Cedar Street in Youngstown, Ohio, in connection with inter-county highways. The bridge across the Mahoning River on this street was built by the county commissioners of Mahoning County under a special act of the Legislature, 87 O. L. 557. Referring to your Opinion No. 1147, of October 14, 1927, we respectfully request your opinion as to the authority of the county commissioners to lay out and establish a county road on Cedar Street and construct a bridge across the Mahonong River to take the place of the old bridge."

The blue print enclosed with your letter indicates that Cedar Street constitutes a connecting link between East Federal Street and Poland Avenue and that both of these thoroughfares are inter-county highways. The bridge in question extends over the Mahoning River and, at its northern terminus, joins with East Federal Street. Cedar Street apparently extends southwesterly beyond Poland Avenue, but I am advised that it is a street of little or no importance from the standpoint of through travel.

From the nature of your inquiry I find it necessary to go beyond the facts which appear in your communication. Upon inquiry I am further advised that the Cedar Street viaduct has been in the past of very general use. Poland Avenue is the main highway between Youngstown and Pittsburgh and, as such, is subject to heavy through traffic. East Federal Street constitutes the main business section of Youngstown, and Cedar Street is an important connecting link for through travel between two state roads. I am further advised that the Mahoning River roughly parallels Federal Street and its continuation, Wilson Avenue, and Poland Avenue. Cedar Street is the first important connecting link within the city limits between the two state roads. West of Cedar Street there are one or two other streets with viaducts crossing the Mahoning River and leading into the heart of the business section, but I am informed that their use necessitates a circuitous route for those traveling upon Poland Avenue, the Youngstown and Pittsburgh state road, and seeking to reach important sections of the business section of Youngstown located on East Federal Street. I am further informed that the present Cedar Avenue viaduct is in an unsafe condition and that vehicular traffic is not permitted thereon. A street car line occupies the viaduct and

is now being operated thereon, but the situation is dangerous and some repair or reconstruction is inevitable if Cedar Street and the viaduct are to be utilized.

As you point out in your communication, the original viaduct was constructed under authority of a special act of the Legislature, passed April 6, 1890 (87 O. L. p. 557), as follows:

> "BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That the commissioners of Mahoning County, be and they are hereby authorized and empowered to build a bridge across the Mahoning River, in the city of Youngstown, at or near the east end of east Federal Street in said city, to the opposite bank of said river and to procure and construct the necessary approaches thereto. And for the purpose of building said bridge and procuring and constructing said approaches, said commissioners are hereby authorized and empowered to issue the bonds of said county, not to exceed sixty thousand dollars ($60,000), in sums of not less than one hundred nor more than five hundred dollars each, and payable at such times as they may deem most advantageous, not exceeding seven years from the date of their issue, and to negotiate and sell the same, but the interest upon such bonds shall not exceed five per cent per annum, nor shall they be sold for less than their par value."

The act does not purport to extend to the county commissioners any authority nor to impose any duty to repair and maintain the bridge therein authorized to be constructed. On the other hand, it is to be observed that the act constitutes mere authority and is not obligatory upon the commissioners. That is to say, the county commissioners were not required to build the bridge and it is a reasonable deduction that, in proceeding, the commissioners felt that the expenditure was justified from a county standpoint.

This act is but one of a number of similar acts passed during that period, an examination of the volume of the Ohio Laws disclosing any number of special acts purporting to authorize the construction of bridges within municipalities by county commissioners. This practice was discontinued, however, following the decision of the Supreme Court in the case of *State ex rel.* vs. *Davis et al.*, 55 O. S. 15. It is interesting to observe that that case involved the constitutionality of an act of exactly the same character as that involved here and authorizing the commissioners of Mahoning County to construct a bridge over the Mahonong River on Mahoning Avenue, in the City of Youngstown. Without quoting from the decision, it may be said that the act was there held unconstitutional on the ground that it was not of uniform operation throughout the state. This was so because the general statute prescribed that bridges costing in excess of ten thousand dollars could not be constructed without a vote of the people, whereas the special act purported to authorize the commissioners, without a vote, to expend thirty thousand dollars on the bridge in question. In the light of this decision, it can scarcely be contended that the act authorizing the construction of the Cedar Street bridge was constitutional. However, the bridge was constructed and I deem the unconstitutionality of the original act of little importance in the present consideration.

As suggested above, it may well be argued that the action of the county commissioners, in constructing the bridge under this special authority, was a recognition of its necessity from a county standpoint as distinguished from a mere municipal convenience. While there is some force in this contention, I believe the language of the Supreme Court in the case of *Commissioners* vs. *Railway Company*, 45 O. S. p. 401, is dispositive of such an argument. In that case the court had under consideration a bridge constructed under similar authority crossing the Mahoning River on Market Street in the City of Youngstown. The railway had damaged one of the

abutments to the bridge and the commissioners brought suit therefor. The decision hinged upon the duty of the county commissioners to keep in repair the bridge in question and recourse was had to the language of Sections 860 and 4938, Revised Statutes, with relation to the authority and obligation of county commissioners with respect to the construction of bridges, together with Section 863, Revised Statutes, authorizing the commissioners to recover damages for injuries to bridges on state and county roads. Sections 860 and 4938 of the Revised Statutes were the predecessors of Sections 2421 and 7557 of the General Code. Those sections are as follows:

> Section 2421. "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."
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> Section 7557. "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 corporation, 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."

The exception with respect to municipal corporations having the right to participate in the bridge fund is inapplicable here and may be disregarded. These sections are in practically the same language as their predecessors, Sections 860 and 4938, Revised Statutes. The court in the case of *Commissioners* vs. *Railway Company*, supra, states the following on pp. 404 and 405:

> "It will be noted that the petition does not, in terms, describe a bridge upon any one of the roads enumerated in either of these sections, nor can the court, *sua sponte* say that any one of these roads or turnpikes enumerated in the foregoing sections is the equivalent of a street in a city. So that, unless the fact that the bridge was built under authority of the act of April 8, 1880, makes it a county bridge, and brings it within the category of bridges upon county roads, it is manifest that the sections quoted can give no authorityto the commissioners to keep this bridge in repair, or recover for damages to it. The act simply authorizes the commissioners to construct this bridge. There is no provision giving authority to repair, nor is there any authority to maintain an action for injury to it. Had those subjects been in the legislative mind at the time of the enactment of the statute, and had it been the purpose of the assembly to confer that authority, it seems reasonable to assume that clear language to that effect would have been used.
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> But if we were able to say that Market Street may be treated as an improved road, or a turnpike, or a county road, still the exceptions contained in both Sections 860 and 4938, confining their application to bridges in 'cities and villages not having the right to demand and receive any portion of the bridge fund levied upon property within such corporations,' would be fatal to a recovery in this case. We have, by statute, but two classes of cities both

of which under Section 2824 have the right to demand a portion of the bridge fund, and it follows that when this bridge is described as within the city of Youngstown, it is the equivalent of saying that it is within a city which may demand and receive a portion of the bridge fund, thus bringing it within the exceptions of the sections of the Revised Statutes referred to."

The court apparently reached the conclusion that the special authority to construct the bridge originally did not in and of itself constitute it a bridge upon a county road or any of the roads enumerated in Sections 860 and 4938, Revised Statutes, although the language of the last paragraph of the quotation above indicated that there may be some force in this argument. Accordingly we must proceed upon the theory that the mere act of the county commissioners in constructing the bridge in the first instance is not sufficient to give it continuing jurisdiction thereover so as to authorize it to expend money for its replacement or repair.

The question remains, however, whether any affirmative action on the part of the county commissioners may now be taken which will justify the reconstruction of the bridge by the expenditure of county funds. In other words, as you state, may the county commissioners lay out and establish a county road on Cedar Street and thereafter construct a bridge across the Mahoning River to take the place of the old bridge?

From the statement of facts at the start of this opinion, it is quite evident that Cedar Street, while at present no part of a county or state road, or any of the other kinds of roads specified in Sections 2421 and 7557, General Code, is, nevertheless, an important link between two state roads. It is, however, located wholly within the city of Youngstown.

A somewhat similar question was involved in the recent case of *State ex rel.* vs. *Commissioners*, 107 O. S. 465. There the board of county commissioners of Cuyahoga County had passed a resolution declaring that it was necessary to build the high-level bridge over the Cuyahoga River in the City of Cleveland from Lorain Avenue to a point in Ontario Street in the proximity of Huron Road, and had declared its intention to issue bonds in the sum of five million dollars for the purpose. In accordance with the vote had the bond issue carried and thereafter various steps were taken which it is unnecessary to recite. The court in the statement of the case uses the following language on page 466:

"Lorain Avenue forms the northerly portion of a state road, laid out under authority of a special act of the Legislature passed February 22, 1833, commencing on the west bank of the Cuyahoga River and proceeding westerly to Elyria, in Lorain County. The road as opened, however, did not reach the Cuyahoga River, nor within about 2500 feet thereof, but terminated on the high ground near the southwesterly side of the valley through which the Cuyahoga River flows. The easterly end of the proposed bridge rests a few hundred feet from the state road from Akron to Cleveland, now known at this point as Ontario Avenue, which runs approximately at right angles to the road above described, Lorain Avenue, and terminates at the south end of the northeast line of old Ontario Street in the village of Cleveland, as laid out in the original village plats. This state road passes about 500 feet from the Cuyahoga River, on the northeasterly side thereof."

It will be observed that the proposed viaduct would constitute a link between two state highways. The proposed link was wholly within the city of Cleveland and hence the situation was very similar to that involved in your question. There was no existing road, either county or state, between the two state roads proposed to be joined. In the action it was sought to enjoin the county commissioners.

So much of the opinion in that case is pertinent to our consideration that I feel at liberty in quoting therefrom extensively. Commencing on page 470 is found the following:

> "This cause will be here decided upon the power of the board of county commissioners to build bridges under the provisions of Sections 2421 and 7557, General Code. The source and extent of the power of the board of county commissioners is statutory. The power to build bridges within municipalities is conferred by Section 2421, General Code:
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> '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. * * *'
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> And by Section 7557, General Code:
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> 'The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities * * * 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.'
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> It is conceded by counsel for the board of county commissioners that these sections do not authorize the board to build bridges other than 'over streams and public canals on state and county roads, free turnpikes, improved roads,' and over 'transferred and abandoned turnpikes and plank roads, which are of general and public utility,' whether within or without a municipality; but it is the contention of the defendant in error that the site of the proposed Huron-Lorain bridge is substantially upon two state roads, in that the western terminus of the bridge will rest upon such a road and the eastern terminus will rest near another such road, and much reliance is placed upon the decision of the circuit court of Cuyahoga County in the case of *State, ex rel. Howell*, vs. *Eirick et al., Commrs.*, reported in 14 Ohio Cir. Ct. R. (N. S.), 577, and 17 Ohio Cir. Ct. R. (N. S.), 331, affirmed by this court without opinion in 84 Ohio St., 503, 95 N. E., 1156. That case, however, is readily distinguishable from the instant case, in that the bridge in question there was built as nearly as practicable on a state or county road; it being necessary from a practical engineering standpoint to make the bridge straight rather than to follow the sinuosities of the theretofore existing state or county road. Nor does it follow, because the decision of the circuit court was affirmed in that case by this court without opinion, that, in the absence of a specific declaration to that effect, this court adopted the reasoning of the court below; such affirmance being effective only to sustain the judgment and to make the enunciation by the court below the law of the case.
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> In the instant case the Brooklyn-Carlisle road, upon which it is proposed to rest the southwestern terminus of the bridge, was laid out in 1833 as beginning at the southwesterly bank of the Cuyahoga River and running in a general southwesterly direction to the township of Carlisle, in Lorain County. That part, however, of the Brooklyn-Carlisle road which was actually opened up and subsequently included within the municipal limits of the City of Cleveland, and known as Lorain Street, was never opened beyond the brow of the hill, about 2,500 feet distant from the southwesterly bank of the Cuyahoga River, and no road has ever existed beyond that

point. By virtue of a statute thereafter enacted (Section 4636, Revised Statutes (51 O. L., p. 303), to the effect that 'any state road or part of such road which has heretofore been authorized, which remains unopened for public use for the space of ten years, shall be vacated and the authority for opening revoked for non-user,' the authority for opening that portion of the Brooklyn-Carlisle road from the brow of the hill to the river was revoked for non-user. There was not, therefore, in 1914, nor has there since been, any county or state road upon the line, or approximately upon the line, established in 1833 as the Brooklyn-Carlisle road for a distance of approximately 2,500 feet from the southwestern bank of the Cuyahoga River.

In 1832 the Cleveland-Akron road was surveyed, the northwestern terminus of which was at a post at the now south end of the northeast line of Ontario Street, at an intersection with Huron Road, a distance of approximately 500 feet from the northeastern bank of the Cuyahoga River. The river is about 239 feet wide, making the gap between the two state or county roads about 3,239 feet, over which no state or county road, or road of any kind, ever existed, and at which point no crossing of the river by bridge, ferry, ford, or other means ever existed. The proposal is to build a bridge spanning this space of 3,239 feet, including the Cuyahoga River, and to thereby connect the Brooklyn-Carlisle road, which runs substantially northeast and southwest, with the Cleveland-Akron road, which runs substantially northwest and southeast.

That the Legislature had the power to authorize the board of county commissioners to so connect two distinct state or county roads, and to do so without the formality of first creating a state or county road, making such connection with proper provision for compensation and damages for property taken or depreciated, must be conceded; but the Legislature does not appear to have done so, for it has provided that the commissioners shall construct and keep in repair necessary bridges over streams and public canals *on state and county roads* and that 'the county commissioners shall cause to be constructed and kept in repair * * * bridges in villages and cities * * * *on all state and county roads.*' Beyond that it has not gone.

This contemplated bridge cannot, by any stretch of the imagination, be held to be *on* either a county road or *on* two county roads; but the most that can be said for it is that it is to be between two county roads, where no connecting road theretofore existed. It does not follow, however, that the board of county commissioners may not, by proper proceedings, acquire the power to build a bridge upon the site indicated by their resolution of 1914, for the Legislature has provided by Section 6949, General Code, that:

'The board of county commissioners may construct a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has been first obtained.'

The conceded facts being that no state or county road exists between the termini of the proposed bridge, it therefore follows that until such time as the board of county commissioners has laid out and acquired a road according to law between such termini it is without power to construct the bridge upon such site.

The judgment of the Court of Appeals will be reversed. The defendant in error will be enjoined from expending the sum authorized by the election of November 3, 1914, or any portion thereof, until such time as a state or county road is laid out and acquired according to law between the termini of the proposed bridge; and the court, accepting as a disclaimer the answer of the defendant filed herein, that it has no intention to expend any portion

> of the sum authorized by the election of November 3, 1914, in the acquiring of a site or the erection of a bridge which cannot be completed for the aggregate sum authorized in such election, makes no order in that respect."

The language used in the last sentence of the opinion is extremely significant. The court states that the injunction will issue *"until such time as a state or county road is laid out according to law between the termini of the proposed bridge."* This is clearly indicative of the right of either the state or the county to lay out a road between the termini and this was said by the court having in mind the fact that the whole improvement was located within the limits of the City of Cleveland. Accordingly there was at least a strong inference that the county commissioners in that instance would have the authority to establish a county road between the two termini. The decision was rendered in 1923 and expresses the view of the court that the commissioners, under the law then in force, had the authority to lay out a county road within the limits of a municipality. There is, however, nothing startling in such a conclusion. The recognition of the right of the county commissioners in this respect is of ancient origin.

In the case of *Wells* vs. *McLaughlin et al.*, 17 Ohio 99, the action of the county commissioners of Columbiana County, in establishing a road from the landing place at Wellsville to an intersection with the state road to Cleveland, was attacked. Both of the termini of the improvement were within the town of Wellsville. The court in its opinion states the following:

> "But it is said that the county commissioners could not establish the road in question, because it is not a county road; and that it cannot be a county road because it lies wholly within the corporate limits of the town of Wellsville; that the county authorities can only establish roads for the county; township authorities for townships, and town authorities for towns. Now it is not pretended that the county authorities can establish township roads or streets for an incorporated town. But this does not prove that the county authorities may not establish a county road through or within the limits of a township or incorporated town. Whether a road be a county road or not, does not depend upon its length; but whether the county commissioners establish it as a county road; and whether they should establish it or not depends upon considerations of public utility, of which the law has made them the judges, subject only to such control as is provided by law on appeal to the courts. There could not be a better illustration of the remarks just made than the road under consideration; it is a road connecting the public landing-place on the Ohio River, at Wellsville, with the state road leading to Cleveland.
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> That this road occupies a part of one of the streets of Wellsville is a matter of no concern to this plaintiff."

To the same effect is the succeeding case of *Butman et al.* vs. *Fowler, et al.*, reported in 17 Ohio, p. 101.

These cases are clear authority for the right of the county commissioners to establish county roads within municipal limits and it remains to be seen whether or not there has been any change of law which will defeat that right in view of its inferential reaffirmance in the Bushnell case, supra.

In this connection it is interesting to note that the court in the Wells case, supra, holds that it is unimportant that the road in question happened to occupy one of the streets of the village.

General authority with respect to public roads is now conferred by Section 6906 of the General Code, which, as amended by the last Legislature, is as follows:

"The board of county commissioners of any county shall have power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, widening, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventatives, or by otherwise improving the same. The board of county commissioners shall also have authority to purchase, erect and maintain automatic traffic signals at such intersections of public highways outside of municipalities, as they deem necessary for the protection of the public traveling upon such highways; provided, however, such power and authority shall not extend to intersections of public highways on the state highway system unless the board of county commissioners first obtain the consent and approval of the director. The county commissioners shall have power to alter, widen, straighten, vacate or change the direction of any part of such road in connection with the proceedings for such improvement. Provided, the provisions of this section shall have no application to roads or highways on the state highway system, except such portions of the state highway system which the board of county commissioners may construct under plans and specification approved by the director of highways and under his supervision and inspection as provided by law."

The amendment of that section has in no way changed the authority in so far as the question here involved is concerned. The section purports to give the board of county commissioners general power to lay out and build a new public road, without limitation as to the location thereof, except, of course, that it be within the limits of the county and with the further exception that roads or highways in the state highway system are not included unless the director of highways approves the plans and specifications for the proposed construction.

This section must, however, be read in the light of the succeeding sections of the Code, which place further limitations upon the authority therein conferred. Thus there is found, commencing at Section 6949, the procedure incident to the construction of roads by county commissioners into, within or through a municipality. Section 6949 is as follows:

"The board of county commissioners may construct a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council. If no part of the cost and expense of the proposed improvement is assumed by the municipality, no action on the part of the municipality, other than the giving of the consent above referred to, shall be necessary; and in such event all other proceedings in connection with said improvement shall be conducted in the same manner as though the improvement were situated wholly without a municipality."

This section makes the consent of council a condition precedent to action by the county commissioners in the construction of a road improvement within a municipality. While there is some doubt in my mind as to the application of this section and the succeeding section to the mere *establishment* of a county road within a municipality, as distinguished from the construction or other improvement thereof, I am inclined to believe that the safer course to pursue would be to secure the consent

of council, even though no actual improvement were contemplated at the time of the establishment of a city street as a county road. I assume that no difficulty would be encountered in this respect in the present instance. It is further to be noted that the language of the section is specific in authorizing the construction of road improvements "into, within or through a municipality". The correlative use of these terms clearly indicates that there is no intention to depart from the general rule first announced in the Wells case, supra, to the effect that county commissioners are authorized to establish county roads wholly within municipalities. The added condition of the consent of council is the only novel feature of the proceedings, except, of course, the subsequent provisions with relation to cooperation as to the cost, right of assessment, etc.

I accordingly am of the opinion that, under authority of Section 6906 et seq. and Section 6949 et seq., General Code, county commissioners may establish a county road within the limits of a municipality, unless other provisions of law negative that right. In this connection an examination of the provisions of the Green Law, comprehended within Sections 6965 to 6972 of the General Code, is pertinent.

The Green Law provides for a system of county highways and Section 6965 requires township trustees to report to the county commissioners the relative value of each road in the township as a used highway, together with other things with respect thereto. From the information furnished therein, the commissioners must establish a county highway system in accordance with the terms of Section 6966, which is as follows:

> "It shall be the duty of the board of county commissioners of each county to determine from the statistics and information furnished by the several board of township trustees within such county the relative importance and value for traffic of the various public highways of the entire county. They shall begin work as soon as the necessary information is furnished by the several boards of township trustees within the county, and after a careful review and consideration of the information furnished by such trustees shall select and designate a connected system of county highways of such mileage as they may deem proper and expedient, connecting with the inter-county highways and main market roads of such county all of the villages, hamlets and centers of rural population within the county. Such system of highways when selected and designated by the county commissioners in the manner herein prescribed shall be known as the system of county highways of said county, and all of the roads composing said system shall thereafter be known and designated as county roads. The county commissioners may call to their assistance the county surveyor in performing the duties devolving upon them under this section and may require him to report as to the relative importance of the highways of any township with respect to which the trustees thereof fail to report within a reasonable time, and upon the completion of their investigation and the designation of a system of county highways the commissioners shall require the surveyor to make a map thereof. A copy of this map with the mileage of the selected roads indicated thereon together with a brief statement by the county commissioners of their reasons for the selection made, shall thereupon be transmitted to the director of highways and public works of the state of Ohio.
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> If the director finds that said system has been designated in substantial compliance with the terms of this act (G. C. Sections 6965 to 6972), and that all portions of the system of county highways connect with either a main market road or an inter-county highway, or another county road, the director shall within sixty days approve such system and certify his approval to the board of county commissioners, who shall thereupon cause a copy of said

map duly approved by them to be made a part of their records and shall cause a copy thereof to be filed in the office of the county surveyor and in the office of the clerk of each township within the county. The system of roads designated upon said map shall thereupon become the system of county roads of said county. Each road constituting a part of said system shall be given a number by the board of county commissioners who may also divide said roads into convenient sections and assign appropriate designations to each section. No main market road or inter-county highway or part thereof shall be included in the system of county highways hereinbefore provided for. The board of county commissioners of any county may from time to time make changes in the county system or addition thereto in the manner hereinbefore provided with respect to the creation of the same. All expenses incurred in carrying out the provisions of this and the preceding section shall be paid from the general county road fund."

A reading of this section apparently negatives the obligation on the part of the county commissioners to make any provision in the county highway system for connecting state roads or county roads within municipalities. The county system is made for the purpose of connecting with the inter-county highways and main market roads of such county all of the villages, hamlets and centers of rural population within the county. It is difficult to conceive how the improvement of Cedar Street in this instance could be within the purpose of the county system, as prescribed in Section 6966, supra. I accordingly feel that the provisions of the county highway system are not pertinent and there is no necessity for the establishment of Cedar Street as a part of the county highway system in order to authorize its improvement by the county commissioners.

In so holding I am not unmindful of the provisions of Section 7464 of the General Code, which are as follows:

"The public highways of the state shall be divided into three classes, namely; state roads, county roads and township roads.

(a) State roads shall include the roads and highways on the state highway system.

(b) County roads shall include all roads which have been or may be established as a part of the county system of roads as provided for under Sections 6965, 6966, 6967 and 6968 of the General Code, which shall be known as the county highway system and all such roads shall be maintained by the county commissioners.

(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

This section is in my opinion limited to the classifications of roads outside of municipalities and has no bearing whatsoever upon the duty of the respective subdivisions with respect to the improvement or maintenance of streets within municipalities which may be either state or county roads. That is to say, by its terms it is limited to provision for maintenance of the various types of roads and, if it had any

pertinency to municipal streets, the provisions of Section (c) would clearly be inconsistent with the duty of municipalities with relation to their streets. Township roads are there defined to include all public highways of the state other than state or county roads. A street is certainly a public highway and, if the section is held to be applicable at all to streets, the obligation would be imposed upon townships to keep in repair all municipal streets within their respective limits. Such conclusion is, of course, absurd and I am accordingly of the opinion that Section 7464, supra, does not in any way purport to apply to streets of a municipality nor does it negative the statutory authority otherwise existing in the state and county with respect to the establishment of roads within municipal boundaries.

From the foregoing discussion a conclusion may be drawn that county commissioners, acting in good faith and in recognition of the necessities of public travel, may establish a county road within the boundaries of a municipality, although both of the termini of such roads are within the municipal limits. Such road may or may not occupy the limits of a municipal street, the existence of a street being of no significance in connection with the question of the power of the commissioners. In order to authorize the establishment of a county road within municipal limits, there must be some general utility to the proposed road other than to the inhabitants of the municipality. That is to say, the commissioners would not be justified in establishing a county road within a municipality for the sole convenience of its inhabitants.

In the present instance the conditions are such as, in my opinion, clearly justify action on the part of the county commissioners with respect to Cedar Street in case they so decide. It constitutes an important link between two state roads. It is true that by means of certain other connecting links, through travel may ultimately arrive at the business section of the city, but the more expeditious way provided by the use of Cedar Street is, in my opinion, sufficient justification for the establishment of it as a county road. That is to say, if action should be taken by the commissioners, I do not believe that it would constitute an abuse of discretion in view of the facts in this case. It seems to me to be clearly within the rule set forth in the Bushnell case, supra.

It follows that if the commissioners have authority to establish Cedar Street as a county road, they likewise have, after such establishment, under the provisions of Sections 2421 and 7557 of the Code, supra, the authority and also the duty to maintain and repair the bridge or viaduct located thereon. The street would then constitute a county road, and, as such, the duty with respect to bridges is clear

I have not heretofore adverted to my opinion No. 1147, dated October 14, 1927, to which you have referred. The second branch of the syllabus of that opinion is as follows:

> "The county commissioners are without authority to expend county funds in building bridges upon a street within the limits of a municipal corporation, unless such street be a continuation of a state or county road extending into or through such municipal corporation or forms a continuous road improvement."

While in the course of that opinion it was held that no duty or authority with respect to the construction or repair of bridges on streets established by a city for the use and convenience of the city alone exists in the county commissioners, the opinion does not negative the right of the county commissioners to establish a county road within the limits of the municipality under facts such as exist here. The first branch of the syllabus of that opinion is as follows:

> "A board of county commissioners may lay out and establish a county road over a street already established within the limits of a municipal cor-

poration, if such street be a continuation of a state or county road extending into or through such municipal corporation, or forms a continuous road improvement, in which case the consent of the council of said municipal corporation, evidenced by the proper legislation of council, must be first obtained. If a street within the limits of a municipal corporation be not a continuation of a state or county road, or does not form a continuous road improvement, county commissioners are without authority to lay out and establish such street."

Thus it will be seen that the right to establish a county road within the limits of a municipal corporation was recognized to exist in a proper case. In the present instance the road forms a link between two state highways. It thus may properly be said to be a continuation of each of said state roads and is of importance from the standpoint of through traffic and general utility. That is to say, in the present instance I believe it to be within the power of the county commissioners, with the consent of the municipality, to establish Cedar Street as a county road, since it is a continuation of the Youngstown and Pittsburg state road connecting with the Youngstown and Lowellville road which extends over East Federal Street. I accordingly feel that there is nothing in my previous opinion inconsistent with the right of the commissioners to act in the present case.

In view of the foregoing, and answering your question specifically, I am of the opinion that the county commissioners of Mahoning County have the authority, with the consent of council, to lay out and establish a county road on Cedar Street in the City of Youngstown and thereafter to construct a bridge across the Mahoning River on such road to take the place of the bridge now existing thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2322.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF CLAIR H. HAUN, IN NILE TOWNSHIP, SCIOTO COUNTY, OHIO.

COLUMBUS, OHIO, July 6, 1928.

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

DEAR SIR:—This is to acknowledge receipt of your communication of recent date submitting for my examination and opinion an abstract of title and a warranty deed covering two separate tracts of land, one of fifty acres and the other of 354.37 acres in Niles Township, Scioto County, Ohio, of which one Clair H. Haun is the owner of record.

An examination of the abstract of title submitted shows that both of these tracts of land are within the confines of original surveys numbers 15037, 15354 and 15730 in the Virginia Military District, made and entered by one David F. Heaton under date of October 17, 1851. The abstract discloses that no patents were ever issued to said David F. Heaton on these surveys, and there is nothing in said abstract to show that said surveys were ever returned to the land office for patent.

In the case of *Coan* vs. *Flagg*, 123 U. S. 117, it was held that it was essential to the vesting of any interest under an entry and survey within the Virginia Military Land District, made prior to January 1, 1852, that the survey should be returned to