2707.

NEGLIGENCE—DUTIES OF AN EMPLOYE OF COUNTY SURVEYOR—COUNTY NOT LIABLE IN TORT FOR NEGLIGENT DISCHARGE OF OFFICIAL DUTIES OF SUCH EMPLOYE WHEN.

SYLLABUS:

A county is not liable in tort for the negligent discharge of official duties by an employe of the county working under the jurisdiction of the county surveyor.

COLUMBUS, OHIO, December 23, 1930.

HON. HOWARD M. NAZOR, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "Will you kindly advise me whether the county can be charged with the negligence of the driver of a truck which is being operated in any of the county departments. In other words, is this a governmental function under which there is no liability on the part of the county?
>
> The particular case in question arose out of an accident between the car of a non-resident of the county coming into collision with a truck operated by one of the employees of the county surveyor's department, and the injured party is now claiming damages."

The Supreme Court of Ohio is committed to the doctrine that there is no liability on the part of political subdivisions in actions for tort, if the function exercised by the political subdivision at the time of the alleged injury was a governmental function. The non-liability for governmental functions is placed on the ground that the State is sovereign, that the sovereign can not be sued without its consent, and that the political subdivision is the mere agent of the State, therefore can not be sued unless the State gives its consent by legislation. *Wooster* vs. *Arbenz,* 116 O. S., 281.

The court is equally committed to the doctrine that if the function being exercised is proprietary and in pursuance of private and corporate duties for the particular benefit of the corporation and its inhabitants, as distinguished from those things in which the whole State has an interest, the political subdivision is liable.

These questions have engaged the attention of the Supreme Court numerous times in recent years, and except for the case of *Fowler, Admrx.* vs. *The City of Cleveland,* 100 O. S., 158, later overruled by *Aldrich* vs. *City of Youngstown,* 106 O. S., 342, the court has consistently adhered to the distinction between governmental and proprietary functions.

While you do not state in your letter just what the circumstances were at the time of the collision in question with respect to what duties the employes of the county surveyor's department were performing in the operation of the truck or vehicle which was involved in the collision, I can conceive of no circumstances whereby employes of a county surveyor's office, in the performance of their duties, would be engaged in the performance of other than a governmental duty. I know of no cases in Ohio directly in point. However, there are a number of cases which deal with the liability of county commissioners in the performance of their duties, and I believe the reasoning and conclusions reached in those cases, with reference to county commissioners, are equally applicable to a county surveyor and the employes of the county under his jurisdiction.

As to the liability of county commissioners in actions sounding in tort the law in Ohio is well settled. As stated by Judge Jones at page 33 of the opinion in the case of *Riley* vs. *McNicol,* 109 O. S., 29:

> "This court has on various occasions announced the principle that these county boards are not liable in their official capacity for negligent discharge of official duties, unless such liability is created by statute, and that 'such liability shall not be extended beyond the clear import of the terms of the statutes.' *Weiher* vs. *Phillips,* 103 Ohio St., 249, 133 N. E., 67."

The first syllabus in the case of *Weiher* vs. *Phillips, et al.,* 103 O. S. 249, cited by Judge Jones in the excerpt above quoted from the opinion in the McNicol case, reads as follows:

> "A board of county commissioners is not liable in its official capacity for damages for negligent discharge of its official duties except in so far as such liability is created by statute and such liability shall not be extended beyond the clear import of the terms of the statutes."

In the opinion at page 251 Chief Justice Marshall gives a resume of the cases decided by the Supreme Court bearing upon this question in the following language:

> "In 1826, in the case of *Commissioners of Brown County* vs. *Butt. etc.,* 2 Ohio, 348, it was held that the county commissioners were liable for not supplying a jail for safe custody of prisoners, whereby a prisoner confined for debt was permitted to escape. This conclusion was reached by a divided court and remained the law of Ohio until the year 1857, at which time this court decided the case of *Board of Commissioners of Hamilton County* vs. *Mighels,* 7 Ohio St., 110, the former decision being overruled and it being determined that the county commissioners 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 duties.
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> There being no liability against the county commissioners at common law, and all liability against them having been created by statute, and the courts not having any right to enlarge upon the liability thus created, by judicial construction, and the language of the Section 2408 being clear and free from ambiguity, it would seem that there should not be much difficulty in reaching a conclusion in this case.
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> The limitations upon the application of this section have been very clearly laid down by Chief Justice Shauck in *Board of County Commissioners of Morgan County* vs. *Marietta Transfer & Storage Co.,* 75 Ohio St., 244, and in *Ebert* vs. *Commissioners of Pickaway County,* Id., 474 * * * ."

See also *Joint District Board of County Commissioners* vs. *Crawford,* 90 O. S. 433, reversing without opinion the decision of the Court of Appeals in the same case, reported in 1 Ohio App. 54.

Section 2408, General Code, provides that the board of county commissioners "shall be liable in their official capacity for damages received by reason of its neglect or carelessness" in not keeping certain roads and bridges in proper repair. Sections 6278 to 6289, inclusive, contained in Ch. 20, Title 2, Part Second, entitled "mobs"

relate to injuries inflicted to a person by a mob as defined in Section 6278, and Sections 6279, 6281 and 6282 authorize recovery of damages from the county for such an injury. By the terms of Section 7565, General Code, failure to comply with the provisions of Sections 7563 and 7564 relating to the erection and maintenance of guard rails in certain places on county roads rendered "the county liable for all actions or damages for the result of such failure."

I find no statute, however, which permits recovery of damages from a county for an injury to persons or property caused by the negligence of an agent or servant of the county in the operation of a county owned motor vehicle.

An interesting and instructive case with reference to the liability of a municipal corporation on account of the negligence of its agents and servants while in the act of making repairs and improvements to streets and highways is the case of *City of Wooster* vs. *Arbenz,* 116 O. S., 281.

While this case is a case respecting the liability of a municipality, the principles there discussed and the doctrine of the case could well be applied in determining the liability of a county while in the exercise of its powers with respect to the construction, repair and improvement of highways. In the course of the opinion in this case, written by Chief Justice Marshall, it is said:

> "By the weight of authority, as well as upon principle, we have reached the conclusion that streets and highways are public and governmental institutions, that in the absence of statutes there would be no liability for failure to maintain them, that it is only by reason of statutes that municipalities have been held responsible in damages for injuries caused by defects in streets, and that this statutory liability by its terms extends only to damages caused by defects in the streets themselves, and does not extend to the negligence of the agents and servants of the city while in the act of making repairs and improvements."

I am of the view that the principles set forth by Chief Justice Marshall in his opinion in the above case are equally applicable in determining the liability of a county on account of the alleged negligence of its servants and agents while engaged in the construction, repair and improvement of highways as they are to the liability of a municipality.

I am of the opinion, therefore, in specific answer to your question, that a county is not liable in tort for the negligent discharge of official duties by the employes of the county working under the jurisdiction of the county surveyor.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2708.

APPROVAL, ABSTRACT OF TITLE TO LAND OF HENRIETTE J. CORRODI IN THE CITY OF COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 23, 1930.

State Office Building Commission, Columbus, Ohio.

GENTLEMEN:—There has been submitted for my examination and approval an abstract of title, warranty deed and Encumbrance Estimate No. 700, relating to a parcel of land owned of record by one Henriette J. Corrodi, which property is more particularly described as follows: