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THE STATE IS NOT BOUND BY THE TERMS OF A GENERAL STATUTE UNLESS SUCH IS EXPRESSLY PROVIDED, AND THERE IS NO SUCH PROVISION IN CHAPTER 3767., R.C. WHICH WOULD PERMIT THE PROSECUTION OF AN ACTION UNDER SEC. 3767.13, R.C., AGAINST THE STATE OR ITS AGENTS—§3767.13, R.C.

SYLLABUS:

The state is not bound by the terms of a general statute unless such is expressly provided and there is no such provision contained in Chapter 3767., Revised Code, which would permit the prosecution of an action under Section 3767.13, Revised Code, against the state or its agents.

Columbus, Ohio, April 18, 1961

Hon. George Cleveland Smythe, Prosecuting Attorney
Delaware County, Delaware, Ohio

Dear Sir:

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

“In 1959, a contractor doing work on the Freeway in Delaware County entered into agreements with property owners on both sides of Alum Creek immediately south and adjacent to the then existing bridge on State Route 521 for the right to construct a temporary stream crossing in order to get heavy loads across the stream, the existing bridge not being able to carry sufficient weight.

“At the end of the agreement the crossing was to be removed and the dirt disposed of. A copy of one of said agreements is enclosed.

“This temporary crossing was constructed by placing a large amount of fill dirt in the stream at each end of the temporary crossing with a bridge in the center of the stream.

“A picture is enclosed which more adequately describes this construction.

“Thereafter the State decided to replace the old bridge on S. R. 521 (just north of the temporary crossing) and filed appropriation cases against the owners who had made the agreements

above referred to with the contractor. The contractor was also made a party by reason of its interest in said temporary crossing.

“Copies of the plats filed in said appropriation cases are enclosed and the location of said temporary crossing is shown in red on each plat. It will be noted that the take includes a substantial part of said temporary crossing, including both the approaches and the structure in the center of the creek.

“At a hearing today in Court the State argued a motion to amend their take by omitting the structure in the center of the creek but reserving the take on the approaches on each side of said temporary crossing. This motion was overruled so the cases now apparently will proceed on the original plats.

“The new bridge on S. R. 521 has now been completed and no other provision was made by the State for a temporary crossing during construction.

“In the meantime the contractor involved has been declared a bankrupt and the State apparently has no plans for the removal of the approaches and structure at the temporary crossing.

“The problem is that these approaches and structure at the temporary crossing operate to dam the creek and causes flooding of lands to the north and is washing out county roads running north along Alum Creek.

“The County Commissioners are concerned over this damage to its roads which can be corrected only by the removal of the approaches and structure at the temporary crossing.

“If the contractor had not been bankrupt and the State had not appropriated this land perhaps a prosecution could have been filed under Section 3767.13, R.C.

“Even if the contractor were not bankrupt the appropriation cases make it impossible for it to remove the obstructions.

“If the highway officials do not remove the obstructions are they liable to prosecution under Section 3767.13?”

“In other words if the stream bed can be restored to its original condition at this temporary crossing we will not have future concern over the matter.”

Your specific question appears to be contained in the seventh paragraph on page 2 of the letter and reads :

“If the highway officials do not remove the obstructions are they liable to prosecution under Section 3767.13?”

Section 3767.13, Revised Code, provides :

“No person shall erect, continue, use, or maintain a building, structure, or place for the exercise of a trade, employment, or business, or for the keeping or feeding of an animal which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort, or property of individuals or of the public. No person shall cause or allow offal, filth, or noisome substances to be collected or remain in any place to the damage or prejudice of others or of the public. No person shall unlawfully obstruct or impede the passage of a navigable river, harbor, or collection of water, or corrupt or render unwholesome or impure, a watercourse, stream, or water, or *unlawfully divert such watercourse from its natural course or state to the injury or prejudice of others.*” (Emphasis added)

Section 3767.01, Revised Code, provides :

“As used in all sections of the Revised Code relating to nuisances :

“* * *

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“(B) ‘Person’ includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee ;

“* * *

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* * *”

Section 3767.13, Revised Code, is obviously a law that affects the community at large and is of general application throughout the state of Ohio. Therefore, it must be considered to be a “general law” (37 Ohio Jurisprudence, 307, Statutes, Section 16).

The law of Ohio is clearly to the effect that the sovereign, that is the state, is not subject to the provisions of a general statute unless it is expressly provided in the law. This doctrine was specifically set forth by the Supreme Court in *State ex rel. Nixon v. Merrell*, 126 Ohio St., 239, in the first syllabus as follows :

“The state is not bound by the terms of a general statute, unless it be so expressly enacted.”

(Also see *State ex rel. Williams v. Glander*, 148 Ohio St., 188.) The reason for this rule is succinctly set forth in 37 Ohio Jurisprudence, 804, Statutes, Section 479, as follows :

“The doctrine seems to be that a sovereign state, which can make and unmake laws, in prescribing general laws, generally intends thereby to regulate, not its own conduct, but that of its subjects. * * *”

This rule was followed by one of my predecessors in Opinion No. 2768, Opinions of the Attorney General for 1953, page 279, wherein the question presented was whether the state of Ohio and its lessees were subject to the regulation of the local boards of health in the operation of food service establishments at Rocky Fork Lake in Highland County, Ohio. The then Attorney General ruled the state was not subject to such regulations, although the lessee would be, and stated:

“Under this rule, since the statutes relating to the powers and functions of local boards of health do not expressly provide that the state is to be bound thereby, it must be concluded that if the state were to engage in some business, activity or practice which was thought to cause a hazard to the public health, the health regulations of local boards of health could not be enforced against it.”

Thus, a consideration of Section 3767.01 (B), *supra*, clearly indicates that the legislature did not intend to include the state since there is nothing contained therein which, even by implication, would permit the state to be included within the meaning of the word, “person” as defined therein.

Accordingly, it is my opinion and you are advised that the state is not bound by the terms of a general statute unless such is expressly provided, and there is no such provision contained in Chapter 3767., Revised Code, which would permit the prosecution of an action under Section 3767.13, Revised Code, against the state or its agents.

Respectfully,
MARK McELROY
Attorney General