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1. ROADS, TOWNSHIP—STATUTES CONFER POWER AND IMPOSE DUTIES ON TOWNSHIP TRUSTEES TO KEEP IN REPAIR ALL TOWNSHIP ROADS WITHIN TOWNSHIPS, INCLUDING BRIDGES.
2. DUTY OF COUNTY COMMISSIONERS TO KEEP IN REPAIR ALL NECESSARY BRIDGES OVER STREAMS AND PUBLIC CANALS WITHIN COUNTY ON ALL PUBLIC HIGHWAYS, INCLUDING TOWNSHIP ROADS—SECTION 2421 G. C.

SYLLABUS:

While the statutes confer power and impose duties on Township Trustees to keep in repair all township roads within their respective townships, including bridges thereon, it is also made the duty of the County Commissioners of each county under the provisions of Section 2421, General Code, to keep in repair all necessary bridges over streams and public canals within such county, on all public highways, including township roads.

Columbus, Ohio, February 28, 1947

Hon. Earl Henry, Prosecuting Attorney
Guernsey County, Cambridge, Ohio

Dear Sir:

I have before me your request for my opinion relative to the duty of the County Commissioners to repair bridges on certain roads in your county. Your letter describes five classes of roads, all outside of any municipality, which present certain differences as to their establishment or present status, and on each of which there are bridges in need of repair. These several situations will be discussed in the order in which you present them. You inquire as to each of these classes, whether they are public roads, whether they are township roads, and whether it is the duty of the County Commissioners to repair the bridges thereon.

First. It appears that certain highways are located outside of the village of Byesville and form extensions of streets in that village. These streets were shown on a plat of an addition which was filed and recorded in the office of the County Recorder on March 19, 1903. It is stated that there never was a formal acceptance of this plat by the County Commissioners as required by Section 3583, General Code. That section reads in part as follows:

“After the plat or map is completed, it shall be certified by the surveyor, and acknowledged by the owner or owners before an officer authorized to take the acknowledgment of deeds, who shall certify his official act on the plat or map. If any owner is a non-resident of the state, his agent, authorized by writing, may make the acknowledgment. Such plat or map, and if the execution is by agent, his written authority, shall thereupon be recorded in the office of the County Recorder. Provided, however, that no plat or map certifying lands outside of a municipal corporation, wherein the proprietor shall dedicate public highways, shall be entitled to be recorded without the approval thereon of the County Commissioners of the county wherein such lands are situated, * * *”

However, the streets have been in existence and in use by the public during all of those years and there are several houses on each of them which have been there for about forty years.

In Volume 20 Oh. Jur., p. 639, it is pointed out that public highways may be established by any one of several methods: (1) by formal proceed-

ings instituted and carried on by the public authorities, (2) by dedication and acceptance, (3) by prescription, or (4) by virtue of a license and an estoppel against the owner of the land. The author uses this language in referring to the above methods of establishing a road:

“Thus, where the owner of land waives strict compliance with statutory requirements in the matter of the location of a highway thereon, he will be estopped, to the extent of the matters so waived, from denying the legal establishment and existence of the highway. A highway may also be established by a grant of land to the public authorities, and the opening and use thereof, for such purpose, or by such opening and use following defective statutory proceedings.”

The same author states at page 640:

“A conveyance of land to the County Commissioners for a county road, the acceptance of the grant by the commissioners, the opening of the road by their order and its subsequent use as such by the public, and by the proper authorities, constitute a legal public highway, notwithstanding the want of statutory proceedings for its establishment. * * * Also, defective proceedings for the establishment of a highway may be cured by the opening thereof, and the use thereof by the public for a long period of time.”

It would appear from the above statements of law that the roads in question are without doubt public highways. Apparently, there was an offer of dedication, evidenced by the filing of the plat, and while there was no formal approval by the County Commissioners as contemplated by the statute, there certainly was acceptance by the public. The above author cites and quotes from *Anderson v. Hamilton County*, 12 O. S., 635, as to the basis of the rule whereby defective proceedings for the establishment of a highway are cured by the opening thereof and use by the public for a long period of time.

The fact to which you refer, that these streets are dead-end streets, does not appear to me to have any bearing on their character as public highways. Nor, as I shall later point out, does it affect the question of the obligation to build and maintain bridges.

Second. Your second proposition relates to a road which you say was constructed by the owner of the land through which it passes and which “was accepted from the landowner by the Board of County Commissioners

under General Code 6886, about nine years ago, and has been kept open to the public," and has been kept in repair by the Township Trustees. Section 6886, General Code, in so far as pertinent, reads as follows:

"Any person or persons may, with the approval of the County Commissioners, dedicate lands for road purposes. A definite description of the lands to be dedicated with a plat of the same thereto attached and signed by the party dedicating the same, with the approval and acceptance of the commissioners endorsed thereon, shall be placed upon the proper road records of the county in which such road is situated. * * *"

Upon your statement I can not see that there is any question but that this road is a public highway. You inquire whether this and the roads mentioned in your first list are public roads and township roads. It appears to me quite evident that unless they have been formally included either in the state highway system or in the county highway system under the procedure outlined in Section 7464 et seq., General Code, they are to be regarded as township roads. However, as I view it, it is immaterial for the purpose of determining the duty of the County Commissioners, whether they are state, county or township roads.

Third. Your third paragraph relates to some dead end roads which have the same characteristics as the second except that they were constructed by the Board of County Commissioners. The answer to the question whether they are public roads or township roads would be precisely the same as that given as to the second class.

Fourth. You here refer to other dead end roads that pass from a public road through the lands of one or more private landowners and pass by their dwelling houses and end at a dwelling house at the extreme end of the road. You do not indicate that there was ever any attempt at a dedication. You say that these roads were not at any time accepted by the County Commissioners as prescribed by Sections 3583 or 6886, *supra*, and were not constructed by the public authorities but have been kept open, and have been kept in repair by the Township Trustees; further that they have been used by that part of the public who desired to use them for more than twenty-one years. You also state that these roads have never been placed on the county or state highway systems. I do not think that you have given enough facts to enable me to determine whether these roads have become

public highways by prescription. I refer you to the case of Railroad Company v. Roseville, 76 O. S., 108, particularly to the fourth paragraph of the syllabus, which reads as follows:

“Title by prescription to a public street can be shown only by *adverse user* by the public, *under a claim of right*, and uninterrupted for twenty-one years.” (Emphasis added.)

In that case the court found that where the use of a driveway through the lands of a railroad company to reach its station was merely with the permission and acquiescence of the owner and that the road was not used by the public under a claim of right adverse to the right of the owner, it would not result in the establishment of a highway by prescription although the public had used it for more than fifty years.

The question, therefore, whether these roads mentioned in your fourth proposition have been established as public highways by prescription, is one that can only be determined on the basis of proof which may be adduced as to the conduct of the owner of the land and the adverse character of the use by the public.

Fifth. You refer to a public road, a part of which “has been vacated by statutory proceedings leaving a dead-end road connecting with a public road.” In my opinion the vacation of a portion of a public highway would have no effect whatever on the remainder thereof and it would retain its status as a public highway, particularly where it is connected as you state, with a public road.

Coming then to the question of the obligation of the County Commissioners to build and repair bridges on the several roads to which you refer, I call your attention to the provisions of Section 2421, General Code, which in so far as pertinent, reads as follows:

“The commissioners shall construct and keep in repair necessary bridges over streams and public canals on or connecting *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.” (Emphasis added.)

The scope of this statute you will observe is quite broad. It requires the County Commissioners to construct and keep in repair necessary bridges

on state and county roads and also on "free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use", excepting under some circumstances, those located wholly within a city or village. The inclusion of all the roads mentioned, even of abandoned turnpikes and plank roads in common public use, would seem to leave no doubt but that the roads referred to in your letter come within the scope of the statute, because on your statement those roads are not abandoned but are apparently a part of the township highway system and in continued use by the public.

The fact that Township Trustees appear to be authorized to repair bridges does not in my opinion modify the duty which appears to be placed upon the County Commissioners. I find in Section 3295, General Code, the following provision:

"The trustees of any township in addition to other powers conferred by law shall *have power to* purchase, appropriate, construct, enlarge, improve, rebuild, *repair*, furnish and equip a township hall, a township park, *bridges* and viaducts over streets, streams, railroads or other places where an overhead roadway or footway is necessary, and sites for any of the same."

(Emphasis added.)

Section 7214, General Code, provides in part as follows:

"The County Commissioners or Township Trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county, and also appropriate additional land necessary for cuts and fills together with a right of way to or from the same for the removal of material. * * *"

Attention might also be called to the provision of Section 7464, General Code, which divides all highways of the state into state roads, county roads and township roads. The final paragraph of this section reads as follows:

"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.”

I note also Section 3370, General Code, which provides in part as follows:

“The Township Trustees shall have control of the township roads of their township and shall keep the same in good repair. The Township Trustees may, with the approval of the County Commissioners or State Highway Commissioner, as the case may be, maintain or repair a county road or intercounty highway or main market road within the limits of their township.”

Plainly, the General Assembly in conferring powers and duties on both county and township officers, intended that there should be active cooperation between them as to road repair and that they were not to be confined strictly to roads of a particular class.

Construing Section 3370 *supra*, it was held in 1923 Opinions of the Attorney General p. 636, that Township Trustees are authorized to construct or repair culverts. In 1925 Opinions of the Attorney General, p. 389, it was held that Township Trustees may use township road funds in the construction and repair of bridges and culverts on township roads. In this opinion it was said that the provisions of the statutes as to the maintenance and repair of “roads” carried with them the power and duty to maintain and repair culverts and bridges on the road as a part thereof.

In an early opinion found in 1916 Opinions of the Attorney General, p. 298, it was held that either County Commissioners or Township Trustees may maintain the bridges on township roads.

Effect must be given to the word “necessary” used in Section 2421 *supra*. The duty imposed on the County Commissioners is to keep in repair all “necessary bridges.” In construing an earlier statute containing practically the same language it was held in *State ex rel. v. Commissioners*, 49 O. S., 301:

“The expediency of the construction or repair of a bridge, under section 4938, Revised Statutes, rests in the administrative discretion of the County Commissioners, and such discretion cannot be controlled by *Mandamus*.”

The court, in its opinion, said that the question of the necessity for the construction or repair of a certain bridge and the time when the work should be done were matters committed to the sound discretion of the commissioners.

Accordingly, it is my opinion that while the statutes confer power and impose duties on Township Trustees to keep in repair all township roads within their respective townships, including bridges thereon, it is also made the duty of the County Commissioners of each county, under the provisions of Section 2421, General Code, to keep in repair all necessary bridges over streams and public canals within such county, on all public highways including township roads.

Respectfully,

HUGH S. JENKINS,
Attorney General.