

with said Miami and Erie Canal, likewise vests in the control and custody of the Director of Highways as such, for the purposes of such act. As to this, it will be noted that under the provisions of Section 14153-5, General Code, the Director of Highways is required to make maps and plats of not only the canal property abandoned by said act but also "all land used in connection with that portion of the Miami and Erie Canal, hereby abandoned, belonging to the State of Ohio adjacent thereto."

Likewise under the provisions of Section 14153-6, General Code, the Director of Highways is required not only to make a plat or plan of so much of the canal property as may be used for highway purposes, but such plat or plan is likewise required to show "all other lands adjacent thereof (thereto) that may be leased for other purposes."

Section 14153-7, General Code, authorizes the Director of Highways to effect temporary leases of that part of said abandoned canal property that is to be later used for highway purposes, and as above noted, Section 14153-8, General Code, authorizes the Director of Highways to lease in the manner and under the terms therein provided for, "all other lands which may be shown on said plat adjacent to said highway and which will not be used for highway purposes."

It is quite certain that the map and plats provided for by Section 14153-5, of the General Code, will show not only the canal property abandoned by said act, but likewise all property of the State of Ohio adjacent thereto, which in former times has been used in connection with the operation of said canal such as tracts of land upon which have been erected residence buildings for the use of lock tenders and other property of like kind.

The provisions of Section 14153-6, General Code, are not so clear with respect to the question under consideration. But reading this section together with the other provisions of said act, I am inclined to the view that the language therein, "all other lands adjacent thereto that may be leased for other purposes," requires the plat or plan therein provided for to show not only the boundaries of highways to be constructed on said canal property, but all other canal property and adjacent lands of the State of Ohio as well.

Arriving at this conclusion with respect to the operation of Sections 14153-5 and 14153-6, General Code, with respect to the lands to be shown in the maps and plats therein provided for, it follows that Section 14153-8, General Code, authorizes the Director of Highways as such to lease not only such of the abandoned canal property as may not be used for highway purposes but also lands of the State of Ohio adjacent thereto, which formerly have been used in connection with that part of the Miami and Erie Canal abandoned by said act.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2118.

ROAD—DEDICATION BY DEED OR AFFIRMATIVE ACTION—ACCEPTANCE BY PUBLIC USE OR LEGISLATIVE ACTION NECESSARY—SECTIONS 18 AND 7464, ET SEQ., GENERAL CODE, DISCUSSED.

SYLLABUS:

Under Section 18 of the General Code, as well as independent of its provisions, the State of Ohio may receive a donation of land as right of way for a public road, whether

said right of way so donated is mere land or is already improved as a road by the donor. Before the proprietary right and title to said land donated can pass to and vest in the State for said purpose, the State must in some manner accept the same. In the absence of statutory provision designating some officer or board with authority to accept said property on behalf of the State for road purposes, the only way such acceptance can be effected is by an act of the Legislature. Unless otherwise provided by law at the time of such acceptance by the State the road thus established will be subject to the classification of public roads provided for by Section 7464, General Code.

Although a road right of way dedicated by the owner for public road purposes does not become established as a public road, so as to charge the public authorities with the duty of maintaining and repairing such road without some action on the part of the proper public authorities expressly or by implication accepting such dedication, yet as against the owner making such dedication and as between him and the general public, the said road way may be established as a public road by an acceptance of such dedication by the general public by general public use of said roadway for purposes of public travel, pursuant to the terms of the dedication.

COLUMBUS, OHIO, May 18, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, which is as follows:

“The Sandusky Bay Bridge Company is now constructing a toll bridge located across Sandusky Bay. There are two state highways leading to the south end of the bridge in Erie County. These were placed on the system in 1927. This department has adopted the policy of not holding hearings on the designation of new inter-county highways on account of the terms of the present law. Due to conflicting interests on the north side if an attempt were made to operate under the new law it would result in litigation without doubt in my opinion.

The bridge company represents that it will dedicate a sixty foot right-of-way for a road from the north bridge head in Ottawa County to a County Road No. 5 leading westwardly into Port Clinton. This road proposed to be dedicated will be about 3700 feet in length and the company contemplates grading it and constructing a traffic bound surface.

The question that arises in this connection is:

Does the state have authority to accept as a gift from the bridge company this road extending northerly from the north end of the bridge to a county road?

The donor agrees to assume the assessment of the abutting property owners for any improvement thereon.

The road in question may be considered an extension of a state road assuming that the state roads on the south end of the bridge cross over the bridge. Also the county road with which it connects, in my opinion, should be made a state road and undoubtedly will be, as soon as the present law is changed so to make it more workable.

I respectfully request your opinion in this matter.”

In the consideration of the questions made in your communication, it may be noted

that a private owner of lands may not, without the consent of the proper public authority, lay out and establish a public road on and over such lands. In the case of *Wallace vs. Clifton Land Co.*, 92 O. S. 349, where certain private owners of lots, in an addition laid out for residence building purposes, had undertaken to lay out a public thoroughfare through said addition over the lots owned by them, the court in its opinion said :

“Public ways cannot be established in this manner. The need of such thoroughfares is a question to be determined by the public authorities. When these authorities have determined the necessities of such ways, private property can be taken for such use, regardless of restrictions or limitations placed upon the same by deed, contract or otherwise, and when established, these ways come under the control of the public authorities, whose duty it is to keep them in repair, free from nuisance and open for public travel.”

Aside from the location and establishment of public roads by county commissioners under the authority of Sections 6860 et seq., General Code, as amended, (112 v. 484), the only way that public roads can be established in this state, so far as concerns any question here presented, is by statutory dedication, common law dedication or by prescription. *Overhelman vs. Allen*, 7 O. App. 251. In this connection it appears that aside from the authority granted to the Department of Highways to construct roads leading from state forests and forest parks by Section 1178-1, General Code (112 v. 257), the Director of Highways has no authority to lay out and establish roads. Neither is such authority now granted to township trustees.

The only statutory provisions relating to the dedication of lands for public roads are those contained in Section 6886, General Code, which 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. Provided, however, that if the lands so dedicated contemplate a change in an existing road, the same proceedings shall be had thereon, after the commissioners by proper resolution approve and accept the lands for such purpose, as are provided for in cases where the commissioners by unanimous vote declare their intention to locate, establish, widen, straighten, vacate or change the direction of a road without a petition therefor, but otherwise the proposal to dedicate land for road purposes together with the acceptance of the grant by the commissioners shall constitute the lands so dedicated a public road, without any further proceedings thereon.”

Under the provisions of Section 6886, General Code, above quoted, the bridge company mentioned in your communication, can dedicate a right of way from the north bridge head of the bridge now under construction to the county road mentioned in your communication by proceeding substantially in accordance with the requirements of this section of the General Code, which dedication, when accepted by the county commissioners of Ottawa County in the manner therein provided, will have the effect of establishing a public road in and over the lands so dedicated. In the event that a public road or highway is established by such dedication of lands by the bridge company and the acceptance thereof by the county commissioners of Ottawa County, the further question is suggested with respect to the classification of such highway under the road laws of this state and with respect to the duty of maintaining the same.

Touching this question, Section 7464, General Code, as amended (112 v. 496), provides 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."

From the provisions of this section of the General Code, it appears that state roads include the roads and highways on the state highway system, that is, inter-county highways and main market roads heretofore established by law and such other roads or highways as may be designated by the State Highway Director as a part of the state highway system under Section 1189, General Code, (112 v. 437).

The proposed road here in question, on its establishment by the dedication of the necessary right of way by the bridge company and its acceptance by the county commissioners of Ottawa County, would not, therefore, be a state road until thereafter designated as such by the Director of Highways under the authority of Section 1189, General Code. Under the provisions of Section 7464, General Code, above quoted, county roads are all roads within the county that have been designated by the county commissioners as a part of the county system of roads in the manner provided by the Green law, so called, Sections 6965 et seq., General Code. The proposed road here in question would not, therefore, on its establishment, be a county road until designated by the county commissioners as a part of the Ottawa County system of roads in the manner provided by the sections of the General Code just noted. Inasmuch as, under the provisions of Section 7464, General Code, township roads are all public highways of the state other than state or county roads, it follows that the proposed road here in question, on its establishment by statutory dedication in the manner provided by Section 6896, General Code, would be a township road until otherwise designated.

Aside from the establishment of the proposed road by statutory dedication in the manner above discussed, said road may be established by common law dedication of the required right of way for the purpose of such road; which dedication, upon the acceptance thereof by the proper authorities would be effective to establish a public road or highway on and over the lands so dedicated. With respect to this subject the rule in this state is that to effect the establishment of a road or highway by a common law dedication, it is essential that the owner of the land clearly indicates his intention to donate it for that use and purpose, and that such dedication be accepted by the public authorities whose duties it will be to maintain and care for the road upon its establishment. *Railroad vs. Roseville*, 76 O. S. 108, 117; *Pennsylvania Railroad Co. vs. Donovan*, 111 O. S. 341, 347; *Oberhelam vs. Allen*, supra.

As before indicated the road here in question, when thus established, will, in the first instance, be a township road, which the township trustees under the provisions of Sections 7464 and 3370, General Code, will be required to repair and maintain. Under the authorities above noted it may be said therefore that the bridge company mentioned in your communication may effect a common law dedication of its land for public road purposes by deed, or by any other unequivocal act, clearly indicating its intention to donate its land for this purpose. It likewise appears from what has been said above that the township trustees upon whom is imposed the duty of repairing and maintaining this road upon its establishment, are the only public authority who can accept such common law dedication of land for road purposes and thereby establish the land dedication as a public road. As above noted this road when thus established would be a township road until the same is thereafter designated as the part of the county road system of Ottawa County, or as a part of the state highway system, as the case may be.

In your communication you ask my opinion on the question whether the state has the authority to accept as a gift from the bridge company this proposed road extending northerly from the north end of the bridge to the county road mentioned in your communication. With respect to this question it may be said that as a general rule the right of a state to acquire and hold property is as full and complete as that of an individual. In 36 Cyc. at page 869, the following is said upon this point:

“A state has in general the same rights and powers in respect to property as an individual. It may acquire property, real or personal, by conveyance, will, or otherwise, and hold or dispose of the same or apply it to any purpose, public or private, as it sees fit. The power of the state in respect to its property rights is vested in the Legislature, and the Legislature alone can exercise the power necessary for the enjoyment and protection of those rights, by the enactment of statutes for that purpose.”

Further on this point Section 18 of the General Code, provides as follows:

“The state, a county, a township or cemetery association, the commissioners or trustees thereof, a municipal corporation, the council, a board or other officers thereof, a benevolent, educational, penal or reformatory institution, wholly or in part under the control of the state, the board of directors, trustees or other officers thereof, may receive by gift, devise or bequest, moneys, lands or other properties, for their benefit or the benefit of any of those under their charge, and hold and apply the same according to the terms and conditions of the gift, devise or bequest. Such gifts or devises of real estate may be in fee simple or of any lesser estate, and may be subject to any reasonable reservation. This section shall not affect the statutory provisions as to devises or bequests for such purposes.”

It thus appears that under the provisions of Section 18 of the General Code, as well as independent of its provisions, the State of Ohio is authorized to receive from the bridge company a conveyance of the necessary right of way for the proposed road here in question, whether as mere land or as a roadway already improved by the bridge company. However, before property donated to the state by deed or otherwise can pass to and become vested in the state for any purpose it must in some manner accept the same. If by statutory provision some officer or board is designated with authority to accept property on behalf of the state for any purpose, the acceptance of the property by such officer or board for such purpose will be effective to vest title to such property in the state. See *State ex rel. vs. Turner, Attorney General*.

93 O. S. 379. In the absence of statutory provision authorizing some designated officer or board to accept property for and on behalf of the state, there is no way in which such property can be accepted otherwise than by an act of the Legislature. This would be especially true where as in this case, the conveyance to the state would not be absolute and unrestricted, but would be, so to speak, in trust for a particular purpose, to-wit: The use of the same as a public road or highway. See *State vs. Blake*, 69 Conn. 64. There is in this state no statutory provision authorizing the Director of Highways or any other officer to accept donations of land for road purposes and the only acceptance that could be made of the land mentioned in your communication, whether improved as a road or otherwise, would be by an act of the Legislature passed for the purpose. When so accepted the road thus established would be a part of the state's system of highways in the sense that the ultimate proprietary right with respect to all roads is in the state for purposes of public travel thereon; but, unless otherwise provided in the act of the Legislature accepting this roadway, the same would not be a state road within the classification of public roads made by Section 7464, General Code, until the same may be designated by the Director of Highways as a state road under the authority of Section 1189, General Code.

The above discussion does not, however, conclude the questions presented by your communication. Although under the authority of the case of *Railroad vs. Roseville*, supra, and like decisions, it appears that the dedication of a roadway for public road purposes must in some way be accepted by the proper public authorities before such public authorities will be required to maintain and repair such road, and although, as above noted, a conveyance of such roadway or an interest therein to the state as property will have to be accepted before such roadway or interest therein can vest in the state in its proprietary capacity, I see no reason why as between the bridge company, the owner of said right of way, and the general public, this roadway cannot be established as a public road by any unequivocal act dedicating this roadway to the public by the bridge company, for purposes of public travel thereon, and the acceptance of such dedication by the public by using the same for purposes of public travel. Touching this question, the following is said in 18 Corpus Juris, at pp. 77 et seq:

"An offer of dedication, to bind the dedicator, need not be accepted by the city or county or other public authorities, but may be accepted by the general public—to deny this would be to deny the whole doctrine of dedication. The general public accepts by entering upon the land and enjoying the privileges offered—or briefly, by user. And a proviso in a statute against divesting the title of an owner by using without improving his land for a road has no relevancy to the mode in which a voluntary dedication may be accepted by the public, but only to the mode in which an involuntary or prescriptive right may be acquired against the owner by adverse use. To constitute an acceptance it is not necessary that there should be a use for a time sufficient to constitute a way by prescription, or to acquire title to the land dedicated by adverse possession. Except when user is relied on to raise a presumption of dedication it is not necessary that such user should continue any definite length of time, although its duration may be a fact for the jury to help out the proof of acceptance when the acts of acceptance are not positive. All that is necessary is that there should be a user for such a length of time as will indicate an intention to accept; and this will depend in a measure on the character of the property dedicated; since from its nature it might be extensively used, greater use will be required to show an acceptance than if it was not of such character. So it is unnecessary that so long as the persons enjoying it have done so as members of the general

public, and not as neighbors or licensees, or otherwise in their individual capacity, they should be of any defined number. The acceptance of land for a public highway, the use of which would actually be limited to the summer time and to foot travel, is effectively shown by its use by pedestrians during the summer. While no dedication will be presumed from user alone unless the user has been so long and so general that the public convenience would be materially affected by its interruption, no such requirement applies strictly as to user which constitutes the acceptance of a dedication otherwise established, it being only necessary that those who would naturally be expected to enjoy it do, or have done so, at their pleasure and convenience."

Speaking with respect to the uncertainty in the earlier decisions with respect to the kind and nature of acceptance of a dedication necessary to establish a public highway, Elliott, in *Roads and Streets*, Vol. I, Section 170, says:

"This uncertainty is, in some respects at least, removed by the later authorities, and it may now be considered as the prevailing opinion that an acceptance may be implied from a general and long continued use by the public as of right. This seems clearly to be the better and prevailing rule as against the dedicator in ordinary cases."

In the case of *Gleason vs. Cleveland*, 49 O. S. 431, the Supreme Court of this state recognized the principle that a donation or dedication of lands for public purposes could be made to the public generally as distinguished from any political subdivision in which such lands might be located. This case was one involving lands donated or dedicated for the purpose of a public park in the city of Cleveland. The same principle, however, would apply in the case of the donation or dedication of lands to the general public for highway purposes; and I am of the opinion that the proposed roadway here in question may be established by any affirmative and unequivocal action on the part of the bridge company dedicating this roadway to the public for purposes of public travel, and by the acceptance thereof by the public in using the same for general public travel thereon. The classification of the public road so established will be governed by the provisions of Section 7464 and other related sections of the General Code, above discussed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2119.

APPROVAL, BONDS OF MONTGOMERY COUNTY—\$15,000.00.

COLUMBUS, OHIO, May 18, 1928.

Industrial Commission of Ohio, Columbus, Ohio.