

fifteen mill limitation and I know of no reason why the taxing authority may be said to be precluded from submitting such a question to the electors merely because such authority may have levied more than authorized.

Specifically answering your question, it is my opinion that the taxing authority of any subdivision may submit to the electors the question of a tax levy outside of the fifteen mill limitation as provided in Section 5625-15, et seq., General Code, notwithstanding the fact that such authority may have illegally levied a tax in excess of such limitation.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4580.

COUNTY ROAD—COUNTY COMMISSIONERS MAY ESTABLISH SUCH WITHIN MUNICIPAL LIMITS WHEN—DUTY OF COUNTY TO CONSTRUCT AND MAINTAIN BRIDGE ON SUCH ROAD—MUNICIPALITY MAY PAY PART OF COST OF SUCH BRIDGE.

SYLLABUS:

Where a street within the limits of a municipality constitutes an important link between a county and state road for through traffic, the commissioners have the authority with the consent of the council of such city to establish such street as a county road.

Upon the establishment of such street as a county road, the duty to construct and maintain a bridge on said street would be upon the county commissioners and the municipality would be authorized to co-operate with the county commissioners in the cost of the construction of such bridge.

COLUMBUS, OHIO, August 26, 1932.

HON. CALVIN CRAWFORD, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I acknowledge receipt of a communication from your office which reads as follows:

“We are enclosing herewith a drawing, showing the location of Sixth Street in the City of Miamisburg, Oh’o, in connection with state and inter-county highways.

The bridge across Sycamore Creek on this street is in an unsafe condition, and the Commissioners of this county are contemplating the construction of a new bridge.

As the drawing shows, Sixth Street is neither on a state nor county highway, but is merely a connecting link between the two.

We respectfully request your opinion as to the authority of the County Commissioners to construct this bridge and lay out and establish a county road on Kerschner Street and Sixth Street between Main Street (Dixie Highway) and Linden Avenue (county road), providing county traffic will warrant same.

We would also appreciate your opinion as to whether or not this bridge may be constructed jointly by the County Commissioners and the municipality.”

Section 2421, General Code, reads in part 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. 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."

Section 7557, General Code, reads as follows:

"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 corporations, 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."

Section 2421-1, General Code, provides that when the council of any city of not more than fifteen thousand population or of a village shall cause to be filed in the office of the county auditor a certified copy of a resolution of such council demanding some portion of the county bridge fund levied upon property within the corporation, the county commissioners may authorize the payment to such corporation of not to exceed sixty per cent of the county bridge fund then levied or collected, or in process of collection, upon the property in such corporation. Such funds shall be used for the construction, repair and maintenance of any bridges and viaducts within such corporation.

An opinion reported in Vol. II of Opinions of the Attorney General for 1919, page 1622, has held this latter section unconstitutional in so far as it relates to cities.

In the case of *The Interurban Railway & Terminal Company vs. Cincinnati*, 94 O. S. 269, the first branch of the syllabus reads as follows:

"It is the duty of county commissioners to construct and keep in repair necessary bridges in cities and villages on state or county roads of general public utility running into or through such cities or villages." The court says in the opinion:

"This court in the case of the *City of Piqua vs. Geist*, 59 Ohio St., 163, makes a clear distinction between the duties of county commissioners and officers of municipalities with reference to the supervision of bridges, which we believe to be pertinent here. It is there held that 'county commissioners are not required to construct and keep in repair bridges over natural streams and public canals, on streets established by a city or village for the use and convenience of the municipality, and not a part of a state or county road, though the city or village receive no part of the bridge fund levied on the property within the same. It is the duty of the city or village to construct and keep in repair such bridges, and is liable in damages to one injured by its neglect to do so.'

As there pointed out it is the exclusive duty of the municipal authori-

ties to construct and keep in repair any bridge which forms a part of a street established by a city, which is not a part of a state or county road, and the county commissioners have no duty or responsibility whatever in respect to the construction, care and maintenance of any such bridge. On the other hand, the provisions of the statute above cited, in clear and unmistakable language, place upon the county commissioners the duty of constructing and keeping in repair necessary bridges in cities and villages on state or county roads of general public utility running into or through such cities or villages."

See also *Newark vs. Jones*, 16 C. C. 563; Opinions of the Attorney General for 1919, Vol. II, page 1622; Opinions of the Attorney General for 1925, page 471; and Opinions of the Attorney General for 1927, Vol. III, page 2016. It therefore follows that so long as Sixth Street is neither a state nor a county road, the county commissioners have no authority to construct a bridge on this street over Sycamore Creek or to join with the city in the construction of such bridge.

From the plat submitted, it appears that Linden Avenue, which is a county road, runs eastwardly and westwardly, that Sixth Street intersects it at right angles and runs northwardly across Sycamore Creek to Kerschner Street, which street runs westwardly to Main Street, a state highway. It is seen, therefore, that Sixth Street and Kerschner Street are a connecting link between a county road and a state road, and I am of the opinion that if conditions warrant such action the portion of such streets lying between the county and state roads could with the consent of the council of the City of Miamisburg be established as a county road by the commissioners.

In the case of *Wells vs. McLaughlin, et al.*, 17 O. 99, the following is said:

"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.

That this road occupies a part of one of the streets of Wellsville is a matter of no concern to this plaintiff."

In the case of *State, ex rel., vs. Board of County Commissioners*, 107 O. S. 465, the syllabus reads as follows:

"Sections 2421 and 7557, General Code, do not authorize the board of county commissioners to build bridges other than on established roads.

Such board is without power to connect two state or county roads by a bridge, without first laying out and acquiring a road connecting such state or county roads. But where such board has been authorized by a vote of the electors under Section 5638, General Code, to expend in excess of \$18,000 in the construction of a bridge on a given site connecting two state or county roads, it may thereafter lay out and acquire a road on such site, and then construct the bridge within the limitations of the authorization."

An opinion reported in Opinions of the Attorney General for 1928, Vol. III, page 1688, says:

"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."

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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."

If these streets constitute an important link between the county and state roads for through traffic, as distinguished from purely local traffic within the municipality, the conditions would probably justify their establishment as a county road, and if the county commissioners decide to establish them as a county road, then the duty would be upon the commissioners to construct and maintain the bridge in question. The question then arises whether the municipality could co-operate in the cost of the construction of the bridge in the event these streets become a county road. The answer to this question depends upon whether or not the construction of a bridge is a road improvement within the meaning of section 6949, General Code, which reads 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."

In the case of *State, ex rel., vs. Blakemore*, 116 O. S. 650, the second branch of the syllabus reads in part as follows:

"A board of county commissioners is authorized by the provisions of Sections 2421, 6949 and 7557, General Code, to construct a bridge or viaduct as a part of a road improvement into, within or through a municipality in such county upon the consent of the council thereof."

In that case the improvement in question consisted of the construction of a viaduct, and on page 655 the opinion says:

"The improvement which is the basis of the controversy in this case has been undertaken by the county commissioners of Hamilton county under and by virtue of the provisions of Section 6949 of the General Code. That section authorizes the board of county commissioners to 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 provides that 'such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records.' It is further provided thereby that the council may assume and pay such portion of the costs and expenses of that part of the proposed improvement within said municipality as may be agreed upon between the board of county commissioners and the council."

It follows therefore that the improvement in question comes within the provisions of section 6949, General Code, which authorizes the city to pay a portion of the cost of such construction.

I am of the opinion, therefore, that where a street within the limits of a municipality constitutes an important link between a county and state road for through traffic, the commissioners have the authority with the consent of the council of such city to establish such street as a county road.

Upon the establishment of such street as a county road, the duty to construct and maintain a bridge on said street would be upon the county commissioners and the municipality would be authorized to co-operate with the county commissioners in the cost of the construction of such bridge.

Respectfully,

GILBERT BETTMAN,
Attorney General.