

cretion of the court to sell personal property otherwise than at public sale; but there is no such provision in the first section, which directs the method by which real property shall be sold."

For the reasons above stated it is my opinion that the sale by the receiver in the case under consideration to The Roderick Lean Manufacturing Company was invalid, and that said company never obtained any title to said property by virtue of said sale.

I am therefore of the opinion that the city of Mansfield, the purchaser of said real estate from the Roderick Lean Manufacturing Company, does not have a good and merchantable title to the real estate in question, and I am accordingly disapproving the same and am returning the deed and abstract to you herewith.

Respectfully,

EDWARD C. TURNER,

Attorney General.

347.

COUNTY COMMISSIONERS—HAVE AUTHORITY TO CONSTRUCT AND IMPROVE DITCHES PASSING THROUGH A MUNICIPALITY—SECTIONS 6442 AND 6443, GENERAL CODE, CONSTRUED.

SYLLABUS:

1. *County commissioners have jurisdiction to construct and improve ditches lying wholly within the county over their entire course, whether or not such ditches in their course pass into or through a municipality.*

2. *When a petition for a ditch improvement is presented to the county commissioners by the mayor of a city in accordance with the provisions of Sections 6442 and 6443 and related sections of the General Code, the county commissioners are authorized to receive and act upon such petition.*

COLUMBUS, OHIO, April 19, 1927.

HON. ELMER L. GODWIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication which is as follows:

"The city of Bellefontaine has a ditch which passes through the entire city, originating beyond the corporate limits of said city and terminated beyond the corporate limits of the city. This is an open ditch most of the way, excepting, perhaps, a quarter or half a mile through the business portion of said city where the same is arched by stone.

At the time of high waters or big rains considerable damage is done to property in the city. The city and the county commissioners have been passing the buck as to who has jurisdiction in this matter. I am writing you to ask your opinion as to whether or not the county commissioners have authority under Section 6442 of the General Code, et seq., upon presentation of a petition by the mayor of said city? My opinion is that they have but the county commissioners are requesting your opinion in this matter."

The answer to your inquiry involves consideration of two questions which will be taken up in their order.

1. Do the county commissioners have jurisdiction of such portions of a ditch such as you have described which lie within the boundaries of a municipality?

2. If the commissioners have jurisdiction to construct, repair or improve such portion of such ditch may they act upon the presentation of a petition by the mayor of the municipality?

· Before taking up your specific questions it will be well to note the provisions of certain statutes, portions of which I set out as follows:

Section 6442 of the General Code provides in part:

“The word ‘owner’, as used in chapters 1, 2, and 8 of this title, shall be construed to include any owner of any right, title, estate, or interest in or to any real property, and shall be held to include persons, partnerships, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or council of a city or village, the trustees of any state, county, or municipal public institution. * * *”

Section 6443, provides as follows:

“The board of county commissioners, at a regular or called session, upon the filing of a petition as provided in this chapter by any owner of any land, when the commissioners find that the granting of the petition and the construction of the improvement is necessary to drain any land, or to prevent the overflow of any land in the county, and further find that the construction of the improvement will be conducive to the public welfare, and further find that the cost of the proposed improvement will be less than the benefits conferred by the construction of the proposed improvement, may cause to be located, constructed, reconstructed, straightened, deepened, widened, boxed, tiled, filled, walled, or arched, any ditch, drain, or watercourse, or construct any levee, or straighten, deepen or widen any river, creek, or run, or vacate any ditch, by proceedings as provided in chapters 1 and 2 of Title III of the General Code of Ohio.”

The subsequent sections provide the mode of procedure for claims for compensation and damages for appeal, etc.

The drainage laws of the state of Ohio have been entirely re-codified several times during recent years and the law with reference thereto is to be determined entirely by the statutes now in force pertaining to the subject. Reported decisions of courts from other states with reference to the subject are of very little aid to us in determining the law with reference to drainage in Ohio. So also are the decisions of our own courts with reference to the subject, for the reason that the last codification which is found in 110 O. L. 161, et seq., has received very little judicial construction since its passage. The law with reference to single county ditches is now set out in Title III of the General Code of Ohio, and in chapter 1; hereof, of which Sections 6442 and 6443 of the General Code as quoted above are a part.

It will be noted from the provisions of Section 6443 as above set out that the county commissioners upon the filing of a petition by any owner of any land acquire jurisdiction to locate, construct, re-construct, straighten, deepen, widen, box, tile, fill, wall or arch any ditch, drain or watercourse within the county when they find that the improvement is necessary to drain any land or to prevent the overflow of any land in the county. The only question to be determined is whether or not the fact that a village or city is on the route of the ditch ousts the jurisdiction of the county commissioners which otherwise would be perfect.

It, of course, would appear clear that a ditch improvement should be taken as a whole as it is evident that the source and outlet of a ditch which is intended for drain-

age purposes would be of little use without the intervening spaces between such source and outlet and the authorities having jurisdiction over the source and outlet and the lands which are to be drained by the ditch should have jurisdiction over the entire course of the ditch. The only question is whether or not the statutes as they now exist give such jurisdiction to the authorities having jurisdiction over this source and outlet.

In construing the statutes which I have above quoted in part and other sections of the law with reference to the subject it is well to notice the provisions of Section 6603, General Code, with reference to township ditches which is a part of the same act as are the sections relating to county ditches and reads as follows:

"A petition for the improvement of a ditch or drain which is located wholly within a township, which does not pass into or through a municipality, which has an outlet within the township in a public watercourse, which does not benefit or damage land outside of the township, and which has not theretofore been located as a county ditch, may be filed with the clerk of such township instead of with the auditor of the county as provided in chapter one of this title. If such petition is filed with the clerk of the township, the clerk of the township shall at his office, do all things required to be done by the auditor, and the board of trustees of the township shall at their usual place of meeting do all things required to be done by the board of county commissioners in drainage improvements as is provided in chapter one of this title. The proceedings for such improvement shall be had pursuant to the provisions of chapter one of this title, and shall be governed by all the provisions of chapter one of this title, except as modified in this chapter."

This section last above quoted is determinative of the jurisdiction of township trustees over ditches located wholly within a township and I set it out merely to show that with reference to such ditches the legislature has provided that the township trustees shall have jurisdiction over ditches which are located wholly within such township *which do not pass into or through a municipality*, Section 6443, supra, not containing any such provision with reference to ditches under the jurisdiction of county commissioners. It would seem clear that if the legislature had intended that the commissioners who have jurisdiction over a ditch are to be deprived of their jurisdiction over that portion of the ditch running into or through a municipality merely because it runs into or through such municipality it would have said so inasmuch as it has said so with reference to township ditches. It seems equally clear that Section 6443, supra, is comprehensive in its terms and rests in the county commissioners' jurisdiction over ditch improvements to drain any land or to prevent the overflow of any land in the county. There is no further provision of the drainage laws which takes away the jurisdiction of the commissioners over any portion of a ditch over which they have acquired or are given jurisdiction.

In the case of *Greek vs. Joy*, 81 O. S. 315, the court had under consideration the question of whether or not the township trustees under the law as it existed at that time had jurisdiction over a ditch within the township that extended through the corporate limits of a village and while the decision of that case turned on the construction of the statutes that were in force at that time the court in commenting on the subject said:

"The village is in and forms a part of the township and its citizens take part in electing the trustees and other officers of their township and are under their jurisdiction in many governmental particulars."

The county ditch law seems complete in itself and while it cannot be contended

that the authorities of the municipality therein have no jurisdiction over the ditch, yet it is plain that the provisions of Section 6443 give to county commissioners complete jurisdiction and there are no other provisions of law which take it away. Whatever jurisdiction the municipality has over the ditch is concurrent with that of the commissioners.

Coming now to your second question as to whether or not a petition presented by the mayor of the city is sufficient compliance with the law to authorize the commissioners to act under the petition.

Under an earlier form of the drainage laws as they were written prior to the recent codification it was provided by Section 6494, General Code, that the council of a municipal corporation might authorize the mayor to present a petition, signed by him officially and addressed to the county commissioners, to locate and construct a ditch described in the resolution or they might authorize the mayor to sign officially a petition for a ditch to be presented to the county commissioners by parties interested whose lands are without the limits of the corporation. In the later codification this statute in such form was omitted and there was substituted in its place Section 6442, which I have quoted above.

It will be noted that in Section 6443 and succeeding sections of the General Code, the word "owner" is used as descriptive of the person who might present a petition and in Section 6442, supra, the word "owner" is defined as including the mayor or council of a city or village. It would, therefore, seem to be clear that such definition of the word "owner" is determinative of the question here under consideration.

Answering your questions specifically it is my opinion that:

1. The county commissioners have jurisdiction over the ditch which you have described as running through the city of Bellefontaine, and
2. The county commissioners are authorized to act when a petition for a ditch improvement is presented to them by the mayor of the city of Bellefontaine.

Respectfully,

EDWARD C. TURNER,

Attorney General.

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NOTES—ISSUANCE IN ANTICIPATION OF FUNDS ARISING FROM AN AUTHORIZED BOND ISSUE MADE UNDER SECTION 5654-1, GENERAL CODE, MAY BY RESOLUTION BE MADE TO BEAR DATES FOR FUTURE DELIVERY—AUTHORITY OF FISCAL OFFICER TO CERTIFY.

SYLLABUS:

An issue of notes in anticipation of funds arising from an authorized bond issue made under Section 5654-1 may by resolution be made to bear dates for future delivery, and when such notes are sold, and a binding contract with proper security entered into with the purchaser, whereby the purchaser agrees to take the notes and advance the money thereon when delivered in the future, the fiscal officer of the subdivision authorizing the issue, may certify that the money for the improvement is in the treasury or in process of collection.

COLUMBUS, OHIO, April 19, 1927.

HON. GEORGE H. BLECKER, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication which reads as follows: