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DITCH, COUNTY — OBSTRUCTION, CAUSES WATERS FLOWING THROUGH TO OVERFLOW UPON LANDS OF ANOTHER — REMOVE OBSTRUCTION, SECTION 6443 G.C. — SUCH POWER NOT GRANTED BY SECTIONS 6693, 6694, 6695 G.C.

SYLLABUS:

An obstruction placed in a county ditch, which causes the waters flowing through said ditch to overflow upon lands not belonging to the

person who placed such obstruction in said ditch, may be removed under authority of Section 6443, General Code. The power to clean and repair county ditches granted under Sections 6693, 6694 and 6695, General Code, does not include the power to remove such obstruction.

Columbus, Ohio, June 18, 1941.

Hon. Joe M. Moorhead, Prosecuting Attorney,
Findlay, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“An owner of land, through which a county ditch flowed, filled in or caused it to be filled in, thus preventing and changing the natural flow of water in the same. The resulting overflow of water over adjoining and near by lands after rains caused damages to the owners thereof. A remedy, as under former Section 6499 of the General Code of the State of Ohio (repealed) no longer being available, the question is: may such ditch be opened up and obstructions removed either by virtue of Sections 6693, 6694, 6695 of the General Code or by Sections 6443, 6444 and those immediately following?”

The procedure for the removal of obstructions from ditches or water-courses set forth under former Section 6499, General Code, now repealed, authorized the commissioners of the county, upon the application of any owner affected by the obstruction, to cause the removal thereof.

The repeal of Section 6499, General Code, was specific in nature and was accomplished by two acts passed during the 92nd General Assembly, now embodied in the General Code under Sections 474-1 to 474-5 and 6443 to 6443-1. The reason for the repeal was quite obvious in view of the fact that the present General Code sections referred to encourage the construction of dams by authorizing landowners and boards of county commissioners to conserve the state water supply. The terms “dam” and “obstruction” being so nearly synonymous necessitated the repeal in order that repugnancy might be avoided and to make certain that the legislative sanction would not be defeated.

Section 474-1, General Code, with reference to the authorization conferred upon landowners, provides as follows:

“Any landowner or groups of landowners or lessors in the state of Ohio not within the corporate limits of any municipality in this state, who shall by the construction of a dam across any watercourse form upon his own land one or more reservoirs for the collection and storage of surface water, and who shall maintain such reservoir or reservoirs in such condition as to collect and store such water, or who shall donate to the state of Ohio or any of its agencies a tract or tracts of land on which the state, or any of its agencies, may erect and maintain a reservoir for the storage of water, shall be entitled to a reduction of the assessed valuation of the tract or tracts of land upon which such reservoir is located, of forty dollars (\$40) for each acre-foot of storage capacity afforded by such dam or dams: Provided, That the total amount of such reduction shall not exceed forty per cent of the assessed valuation of the entire contiguous acreage owned by the landowner and upon which such reservoir or reservoirs are located.”

Section 6443, General Code, pertaining to the authority of the county commissioners, provides:

“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 for controlled drainage of any land, for irrigation, 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, dammed, 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 (G.C. Sections 6442 to 6563-48).”

It is apparent that while Section 474-1, supra, permits the obstruction of watercourses by the erection of dams for the purpose of forming reservoirs upon the land of the owner causing the obstruction, authority is lacking to erect a dam that will cause an overflow on the land of another. In case such an overflow is caused it would appear that by the express language of Section 6443, supra, the county commissioners upon the filing of a petition by any owner of any land may by reconstructing the watercourse prevent such an overflow upon the finding that the improvement will be conducive to the public welfare and that the cost will be less than the benefits conferred.

The procedure under Section 6443, supra, for the removal of dams or obstructions by the exercise of the power to reconstruct does not conflict with the legislative sanction granted to landowners under Section 474-1, supra. The authority of the county commissioners under the present facts is to be exercised for the prevention of an overflow upon any land in the county and is in keeping with that which has been stated above, namely, that the landowner although authorized to construct a dam may not in so doing form a reservoir on the land of another.

You also inquire whether Sections 6693, 6694 and 6695, General Code, authorize the removal of the obstruction in question.

Said sections in substance refer to the duties delegated by the county commissioners to the county surveyor and the ditch supervisor for the purpose of keeping watercourses clean and in repair. It is evident that the Legislature by specifically repealing Section 6499, General Code, in order that obstructions might be erected, and at the same time leaving untouched the sections in question, impliedly intended the words "cleaning" and "repairing" to be construed as being in harmony with, rather than repugnant to, the provisions of section 474-1, supra. If, by the process of cleaning and repairing, dams or obstructions could be removed, the authority granted to the landowners to conserve the state water supply by constructing dams and obstructions would be meaningless. My answer to such question is therefore in the negative.

In view of the foregoing and in specific answer to your question, it is my opinion that an obstruction placed in a county ditch, which causes the waters flowing through said ditch to overflow upon lands not belonging to the person who placed such obstruction in said ditch, may be removed under authority of Section 6443, General Code. The power to clean and repair county ditches granted under Sections 6693, 6694 and 6695, General Code, does not include the power to remove such obstruction.

Respectfully,

THOMAS J. HERBERT,
Attorney General.