

approval thereon and return the same to you herewith, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1757.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND L. R. KENNEDY, COLUMBUS, OHIO, FOR ELECTRICAL WORK FOR PHARMACY AND BACTERIOLOGY BUILDING AT OHIO STATE UNIVERSITY, COLUMBUS, OHIO, AT AN EXPENDITURE OF \$1,850.00—SURETY BOND EXECUTED BY THE GLOBE INDEMNITY COMPANY.

COLUMBUS, OHIO, April 10, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—There has been submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works for and on behalf of the board of trustees of Ohio State University, and L. R. Kennedy, of Columbus, Ohio. This contract covers the construction and completion of electrical contract and Alternate C, as covered by the form of proposal dated February 21, 1930, for Pharmacy and Bacteriology Building at Ohio State University and calls for an expenditure of one thousand eight hundred and fifty dollars (\$1,850.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted evidence that the Controlling Board has properly consented to and approved the expenditures of the moneys appropriated by the 88th General Assembly, for the purpose covered by this contract, in accordance with Section 11 of House Bill 510 of the 88th General Assembly. In addition, you have submitted a contract bond upon which the Globe Indemnity Company of New York appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the Workmen's Compensation Act, have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same to you herewith, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1758.

TOWNSHIP TRUSTEES—ABANDONMENT OF A TOWNSHIP ROAD UNAUTHORIZED.

SYLLABUS:

A board of township trustees has no power to abandon the unused portion of a road in connection with its proceedings under Section 3298-1, General Code.

COLUMBUS, OHIO, April 10, 1930.

HON. COLONEL G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

"The question has been raised by the board of township trustees of Granville Township as to whether they may abandon a township road. The proposed abandonment of such road was not made part of any plan of relocating a township road, so far as their records disclose. In point of fact, however, it might properly be considered a part of such relocation. Section 3298-1 of the General Code gives the trustees power to reconstruct public roads and they are wondering whether the power to abandon the unused portion of the old road would follow.

Accordingly, I shall be much indebted for your opinion as to whether the township trustees have this power."

I assume you use the term "abandon" in your communication synonymously with the term "vacate", which last mentioned term appears more generally in the legislation and judicial decisions dealing with the subject of your inquiry.

I have examined the statutes of Ohio and find none which expressly authorizes the board of township trustees to abandon or vacate a township road. Section 3298-1, General Code, which you cite, provides as follows:

"The board of trustees of any township shall have power, as hereinafter provided, to construct, reconstruct, resurface or improve any public road or roads, or part thereof, under their jurisdiction. Such trustees shall also have the power to construct, reconstruct, resurface or improve any county road or inter-county highway or main market road within their township; provided, however, that in the case of a county road the plans and specifications for the proposed improvement shall first be submitted to the county commissioners of the county and shall receive their approval and in the case of an intercounty highway or main market road such plans and specifications shall first be submitted to the state highway commissioner and shall receive his approval. The township trustees shall have power to widen, straighten or change the direction of any part of a road in connection with the proceedings for its improvement."

You ask my opinion as to whether the power of the board of township trustees to abandon a road would follow from the power of the board of township trustees, granted in Section 3298-1, General Code, supra, to reconstruct public roads.

The word "reconstruct" has no restricted legal definition and is used in the said section of the General Code in the sense of its commonly accepted meaning. It is defined in Webster's New International Dictionary as "to construct again; to rebuild; to remodel; to form again or anew." It is my opinion that the authority to reconstruct public roads, provided by Section 3298-1, General Code, supra, does not include in its definition the authority to relocate any such roads. Consequently I conclude that no authority of the board of township trustees to abandon public roads, or any portion thereof, can be implied in any event, from its authority to reconstruct such public roads.

I now address myself to the question implied from the statement in your communication which was, in substance, that the board of township trustees of Granville Township propose to abandon the unused portion of a road in connection with the relocation thereof. I assume you refer to the last provision of Section 3298-1, General Code, supra, as follows:

"The township trustees shall have power to widen, straighten or change the direction of any part of a road in connection with the proceedings for its improvement."

It is pertinent to the conclusion which I have reached in answer to your inquiry to review as briefly as possible some of the legislation of the past which has governed the exercise of the power to abandon and vacate roads in this state. A former provision of the statutes, Section 6972, Page & Adams General Code, Section 4683, Revised Statutes, provided as follows:

"When a township road becomes useless, one or more residents of the township, after giving the notice required in section sixty-nine hundred and fifty-eight, may petition the trustees to vacate such road. If the trustees are satisfied that the proper notice has been given, and no injustice will be done thereby, at their next regular meeting they shall declare the road vacated, and give notice thereof to the township clerk, who shall enter their proceedings on the records of the township. A person in the township feeling aggrieved, may appeal from the final decision of the trustees to the Probate Court in like manner as provided in chapter four of this title."

This provision was repealed by Senate Bill No. 125, 106 O. L. 574, 664, Section 305, passed May 17, 1915, effective the first Monday in September, 1915. My search does not disclose that there was enacted any statute thereafter expressly authorizing the board of township trustees to abandon or vacate a township road. Former Section 6924, Page & Adams General Code, Section 4669, Revised Statutes, provided as follows:

"Alterations of county roads shall be a part of such roads. So much of the original roads as is rendered unnecessary by such alterations, in the opinion of the viewers and county commissioners, shall be vacated."

Section 6859, Page & Adams General Code, Section 4635, Revised Statutes, granted the same identical authority in reference to state roads. The two last named statutes were repealed simultaneously with the aforementioned provision expressly authorizing the board of township trustees to vacate township roads. 106 O. L. 574, 664.

It is to be noted that Section 6906, General Code, 112 O. L. 487, effective January 2, 1928, defining the general powers of county commissioners relating to roads follows very closely Section 3298-1, General Code, cited in your communication. It provides in part as follows:

" * * * The county commissioners shall have power to alter, widen, straighten, *vacate* or change the direction of any part of such road in connection with the proceedings for such improvement. * * * " (Italics the writer's.)

I am of the opinion that the insertion of the authority to vacate was intentional on the part of the Legislature and that similarly the omission of that word was equally intentional in Section 3298-1, General Code, supra.

I note further that Section 1202, General Code, 112 O. L. 440, 113 O. L. 610, specifically confers the power upon the Director of Highways to vacate and abandon an unused portion of any highway on the state highway system in connection with its alteration, relocation, etc. It evidently has been the intention of the Legislature to

confer the authority to abandon or vacate roads only upon the officers and governmental subdivisions to whom it is specifically given and, where such specific authority has been withdrawn by repeal of the empowering statute, correlatively it is clear that the Legislature intended that the authority should no longer be exercised.

The vacation and alteration of a road are distinct and different proceedings. *Geddes vs. Rice*, 24 O. S. 60; *Bacon vs. Noble*, 20 O. C. C. 281.

It is stated as the general rule that easements of all kinds may be abandoned. 1 O. Jur., 4. An examination of the decisions bearing on the application of this rule to unused portions of a township road resulting from proceedings under Section 3298-1, General Code, and an analysis of the underlying principles upon which these decisions are based raises a very grave doubt as to the applicability of the general rule to the present situation.

In *Kelly Nail and Iron Company vs. Lawrence Furnace Company*, 46 O. S., 544; 22 N. E., 639, it was held that non-user of a city street for the same period an adverse claimant must show possession in order to maintain title by force of the statute of limitations, or as long as required to raise a prescriptive right, to-wit 21 years, amounts to an abandonment of the street.

The analogy drawn in the above case between abandonment arising at a matter of law and the ripening of title by adverse possession under the statute of limitations makes a discussion of the law whereby individuals, etc., may obtain title in public ways by adverse possession pertinent. Such discussion is also valuable as determining what rights adverse occupants of unused portions of township roads, resulting from proceedings under Section 3298-1, General Code, supra, may obtain. It was held in the fifth branch of the syllabus in *Williams et al. vs. The First Presbyterian Society in Cincinnati et al.* 1 O. S., 478:

"The right of a county, or town, to property thus dedicated may be barred by the statute of limitations, or lost by lapse of time."

In *Cincinnati vs. Church*, 8 Ohio 299, and *Cincinnati vs. Evans*, 5 O. S. 594, it was held that adverse occupants to parts of streets in a city for 21 years or more who have erected valuable permanent structures thereon obtain complete title to the portions of the streets so occupied. The Supreme Court of Ohio subsequently, by implication, disapproved of the drastic rule laid down in the three cases above set forth and has limited its application. In *Heddleston, Supervisor, vs. Hendricks*, 52 O. S., 460, at page 465, the court lays down the general rule which has been many times cited and followed since, as follows:

"The general rule is that the statute of limitations does not apply as a bar to the rights of the public, unless expressly named in the statute; for the reason that the same active vigilance cannot be expected of it, as is known to characterize that of a private person, always jealous of his rights and prompt to repel any invasion of them."

Specifically discussing the rule laid down in *Cincinnati vs. Church*, *supra*, and *Cincinnati vs. Evans*, *supra*, the court in the same case, *Heddleston, Supervisor, vs. Hendricks*, *supra*, at page 465, said:

"But these cases are regarded as exceptional; and confined to municipal corporations in cases where their possession has been disturbed by the erection of large and valuable structures under such circumstances as preclude the idea that the encroachment was simply permissive on the part of the municipality."

The court quotes with approval the statement in *Lane vs. Kennedy*, 13 O. S., 42, that the decision in *Cincinnati vs. Evans* might better be based upon the ground of an estoppel in pais. In *Seese vs. Village of Maumee*, 7 O. C. C. (N. S.), 497, the court states that all three of these early cases (*Cincinnati vs. Church, supra*, *Williams vs. Church, supra*, *Cincinnati vs. Evans, supra*) should have been based on the principle of estoppel and that such an estoppel might be effective in a very short period of time and that the 21 year period should have no influence upon the question—at least should not be controlling. For a late case applying the principle of estoppel against a municipal corporation see *Joseph vs. City of Akron*, 19 O. App., 412. See also 1 O. Jur., 543, sec. 4; *Rittberger et al. vs. Flick et al.*, 4 O. Dec. Repr., 406; 2 Cleve. Law Repr., 215; *Wright vs. Oberlin*, 3 O. C. C. (N. S.) 242; 23 O. C. C., 509.

The later decisions indicate that the statute of limitations barring the public right in highways is applied against municipal corporations only and has no application against the state nor the other governmental subdivisions thereof. *Beard et al. vs. Beatty*, 3 O. App., 354; *Morehouse vs. Burgott*, 22 O. C. C. 174.

In *Morehouse vs. Burgott*, 22 O. C. C. 174, which involved the abandonment of a township road, the court said at page 178:

"Hence in a case of abandonment where a party claims the public authorities have abandoned in some other way than the statute provides, by mere silence, the public cannot be divested of its rights in the highway by any statute of limitations, unless some doctrine of equity comes in to estop the public authorities."

You will note that one of the underlying principles of the decision of *Kelly Nail and Iron Company vs. Lawrence Furnace Company, supra*, is that the statute of limitations runs against a municipality. As indicated, there is very grave doubt as to whether the statute of limitations is applicable as against a township. Consequently, it is doubtful whether a total non-user of a township road or portion thereof for 21 years or longer would, as a matter of law, result in an abandonment thereof.

Elliott on Roads and Streets, 4th Ed. Section 1177, states:

"The Legislature has power to vacate a street in a city, and this power it may delegate to the municipal authorities. But the power must be conferred in express terms or by necessary implication, and the construction of ambiguous words alleged to confer it 'ought to be in favor of the common right of way.'"

Although the above appears to be in terms a limitation on the power of municipal corporations, I am of the opinion that the elimination is equally applicable to a board of township trustees.

A board of township trustees can exercise only those powers conferred upon it by statute and such other powers as are necessarily implied in order to enable it to perform the duties imposed upon it. *Trustees vs. Miner*, 26 O. S. 452, 456.

The exercise of some of the powers granted to the township trustees in Section 3298-1, General Code, cited in your letter, will necessarily result in the non-use of portions of township roads. The authority to abandon or vacate such non-used portions thereof is not, however, necessary to the full exercise of the powers granted to the board of township trustees in Section 3298-1, General Code, *supra*, or in any other section or sections of the General Code.

The power of the board of township trustees to abandon or vacate a road is not a necessary incident to the express power granted in Section 3298-1, General Code, to widen, straighten or change the direction of any part of a road in connection with

the proceedings for its improvement and therefore cannot be implied from the express powers granted therein.

I do not express an opinion on the question of whether it is the duty of the board of township trustees to maintain and keep in good repair unused portions of township roads resulting from the proceedings, under Section 3298-1, General Code, supra, if not vacated pursuant to law, as this question is not raised by your communication. This question, however, is closely allied to your inquiry and I include herein a brief citation of the law dealing therewith. Section 3370, General Code, 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. * * *

Section 3298-17, General Code, provides:

"Each board of township trustees shall be liable in its official capacity for damages received by any person, firm or corporation by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties."

In *McQuigg et al vs. Cullins*, 56 O. S. 649, the township board of trustees was enjoined from closing a road which had been vacated under authority of Section 4683, Revised Statutes, Section 6972, Page and Adams General Code, then in effect. The court there held that the vacation of the road had the effect to relieve the public from any duty to keep such road in repair.

It would seem a reasonable and proper precaution for the board of township trustees to arrange to secure the vacation of unused portions of township roads resulting from its proceedings under Section 3298-1, General Code, agreeable to the provisions of the General Code hereafter cited. Section 6860, General Code, 112 O. L. 484, effective January 2, 1928, grants to county commissioners the power to vacate all roads within the county as provided therein and in the succeeding sections. Sections 6862, General Code, 112 O. L. 484, et seq. specify the manner and the mode of procedure by which this power shall be exercised.

In specific answer to your question, I am of the opinion that a board of township trustees has no authority, express or implied, to abandon or vacate a township road or portion thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1759.

BOND ISSUE—QUESTION MUST BE SUBMITTED TO ELECTORS AT NOVEMBER ELECTION—EXCEPTION.

SYLLABUS:

Section 2293-22, General Code, prohibits submitting to the electors of a subdivision at a primary or special election the question of issuing bonds for any purpose other than for rebuilding or repairing public property wholly or partially destroyed by fire or other casualty, or for building a new similar property in lieu of repairing or rebuilding such property.