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1. COUNTY COMMISSIONERS—AUTHORIZED TO REMOVE OBSTRUCTIONS FROM RIVER WITHIN COUNTY WHEN DEEMED NECESSARY OR ADVISABLE—PROPER LOCATION FOR PROPOSED BRIDGE OR ROAD OR TO PROTECT STATE ROAD OR BRIDGE—SECTIONS 2427-1, 2428 G. C.
2. COUNTY COMMISSIONERS—AUTHORIZED TO REMOVE OBSTRUCTIONS FROM RIVER WHICH INTERFERE WITH FREE FLOW OR ENDANGER A COUNTY OR TOWNSHIP ROAD—REMOVAL AUTHORIZED WHEN CONDUCTIVE TO PUBLIC HEALTH, CONVENIENCE OR WELFARE SECTION 6729 G. C.
3. SANITARY DISTRICT, DIRECTORS — AUTHORIZED TO CLEAR RIVER OR OTHER STREAM OF OBSTRUCTIONS ONLY WHEN NECESSARY TO CARRY OUT POWERS OF DISTRICT AND PURPOSE OF ORGANIZATION—SECTION 6602-49 G. C.
4. CONSERVANCY DISTRICT, DIRECTORS — AUTHORIZED TO CLEAR RIVER OR OTHER STREAM OF OBSTRUCTIONS ONLY WHEN NECESSARY TO ACCOMPLISH PURPOSES FOR WHICH DISTRICT IS FORMED — SECTION 6828-15 G. C.

SYLLABUS:

1. County commissioners are authorized by Sections 2427-1 and 2428, General Code, to remove obstructions from a river within their county, when they deem it necessary or advisable in order to provide a proper location for a proposed bridge or road or to provide proper protection of a state road or of a bridge or road within their control.

2. County commissioners are authorized by Section 6729 et seq. and under the conditions therein set forth, to remove obstructions from a river which interfere with the free flow thereof or endanger a county or township road, or when such removal will in their opinion be conducive to the public health, convenience or welfare.

3. The directors of a sanitary district are authorized by Section 6602-49, General Code, to clear a river or other stream of obstructions only when such action is necessary to carry out the powers of such district and the purposes of its organization.

4. The directors of a conservancy district are authorized by Section 6828-15, General Code, to clear a river or other stream of obstructions only when such action is necessary to accomplish the purposes for which such district is formed.

Columbus, Ohio, July 9, 1948

Hon. Herbert R. Freeman, Prosecuting Attorney

Huron County, Norwalk, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“Many years ago a certain electric railroad crossed the Huron River at several points throughout Huron County.

“At one of the places of crossing, the railroad abandoned its line and left two large concrete abutments on either side of the river. One of these abutments is gradually moving into the river, and will cause a substantial obstruction to the flow of the river.

“I should like your opinion as to, first, whether or not the county commissioners or county engineers have any duty with reference to removal of this threatened obstruction, or to the removal of it after it becomes an obstruction; and second, if the county officials above named hold no duty with reference to the obstruction, upon whom does the duty rest, if upon any public official or body?”

Section 2427-1, General Code, provides as follows:

“When, in their opinion, it is necessary or advisable, in order to provide a proper location for a proposed bridge or road, or to provide proper protection for same, the county commissioners may divert, alter, straighten or clean out a river, creek or other water course, and for such purpose may acquire the necessary property and settle all claims for damages of any persons interested, and the expenses so incurred shall be payable out of the funds provided for the protection or construction of said bridge or road.”

The sections which immediately follow, provide for appropriation proceedings where necessary to accomplish the purposes aforesaid, and for payment of compensation and damages. It will be noted that the exercise of the authority given in the section above quoted to clean out a river, creek or other watercourse is predicated on the finding by the commissioners that it is necessary or advisable to do so in order to provide a proper location for a proposed bridge or road or to provide proper protection for same.

Section 2428, General Code, provides as follows :

“The commissioners may cause a river, creek or watercourse to be straightened or cleaned out for the protection of any bridge or road within their control.”

Section 2429, General Code, provides in part as follows :

“Before the commissioners proceed to straighten or clean out any river, creek or watercourse, there must be filed with the county auditor of the county a petition, signed by one or more taxpayers of the county, setting forth the benefits to be derived from straightening or cleaning out such river, creek or watercourse, * * *”

The three sections which immediately follow, provide for an examination and report by a competent engineer, “stating whether he deems the straightening or cleaning out of the river, creek or watercourse will be beneficial for the protection of any bridge, state road or county road, or other road under the control of the commissioners, and if so, an estimate of the cost thereof.” Further provision is made for doing the work, the cost of which is to be paid from the bridge fund of the county.

Considerably broader authority for removing obstructions from streams is found in Section 6729 et seq. of the General Code. It is provided by Section 6729 :

“The board of county commissioners may cause to be removed, from a river, watercourse or creek, within the county, drift, timber, piling or other obstruction placed or allowed to remain therein by a person, company or corporation, which obstructs to any extent, the free flow of the water, or endangers a county or township road, or free turnpike, after giving thirty days’ notice to such person, company or corporation, or an agent thereof, to remove the obstruction within said time.”

(Emphasis added.)

Section 6730 provides as follows :

“The expenses of such removal shall be paid out of the county treasury, and the amount so paid together with fifty per cent penalty shall be placed upon the duplicate by the county auditor, against such person, company or corporation to be collected as other taxes.”

It will be observed that the above quoted sections contemplate thirty days’ notice to the person or corporation responsible for the obstruction,

and limit the right of the commissioners to proceed until after giving such notice. The case stated in your letter suggests the possibility that the company responsible for the abutment may long since have passed out of existence and it might therefore be impossible to give them notice.

The next sections, beginning with Section 6731, appear to contemplate a somewhat different basis of procedure. It is there provided that upon the filing with the county auditor of a petition signed by five or more taxpayers of the county, the county commissioners shall appoint a disinterested person to go on the lines of such river or watercourse and make an examination, and report his conclusions as to the advisability and necessity of doing such work, "for the protection of a state or county road or bridge" together with an estimate of cost. If the report recommends the clearing of the watercourse, the commissioners shall let the work by competitive bidding, and by the terms of Section 6734, the cost is to be paid out of the county bridge fund.

Section 6735, General Code, adds authority based on somewhat different considerations. That section provides as follows:

"The county commissioners, when in their opinion it will be conducive to the *public health, convenience, or welfare* and upon petition of the owner of land adjoining or adjacent to a stream of living water, may remove, or cause to be removed drift, timber, *or other obstructions*, except water-works, or flood-gates, that *may hinder the free passage of water* in the natural channel of such stream." (Emphasis added.)

Here it will be noted that the action is predicated upon public health, convenience or welfare, and obstructions may be removed that would hinder the free passage of water in the natural channel of the stream. This procedure contemplates a petition by an adjoining landowner and the giving by him of a bond conditioned to pay all expense incurred in case the commissioners should refuse to grant the prayer of the petition. After notice to the landowners who will be affected by the proceedings, a hearing is had, and if the improvement is found conducive to the public health, convenience or welfare, the commissioners may order it to proceed, and apportion the cost, according to benefits, to the owners of the land adjacent to such stream.

Section 6742, General Code, provides:

"When the county commissioners deem it right and just, they shall assist in the clearing of such stream, by common levy,

not to exceed five-tenths of one mill on the dollar's valuation in any year, in the county."

The above would appear to me to afford abundant authority to the commissioners to remove the abutment in question, when it has actually become an obstruction to the stream. Your letter indicates that the abutment in question has not yet become an obstruction, but that it is gradually moving into the river and will cause a substantial obstruction to the flow of the river. If it is reasonably certain that the abutment will in time fall into the river, it would appear to me to be an absurdly narrow construction of the law to hold that the commissioners are powerless to do anything until it has actually so fallen. Manifestly, such delay would make the removal much more difficult and expensive, and it is my opinion that the commissioners would not be exceeding their powers to take steps to check the movement of the obstruction, and thereby prevent its becoming a complete obstruction.

Turning to your second inquiry, as to the authority of any other public official or body in the premises, I note that under the provisions of Section 6602-49, General Code, the board of directors of a sanitary district is authorized, under certain circumstances, to clean out a stream or watercourse. That section provides in part, as follows:

"* * * In order to effect the proper collection and disposal of sewage and other liquid wastes produced within the district, to provide a water supply for domestic, municipal and public use within the district, to promote the public health, comfort, convenience and welfare, and to accomplish all other purposes of the district, the board of directors is authorized to clean out, straighten, alter, deepen, or otherwise improve any stream, watercourse, or body of water receiving sewage or other liquid wastes and located in or out of said district; * * *"

This authority, it will be noted, is limited to the circumstances stated, and plainly gives no authority to clean out a river or other watercourse except for the purpose of carrying out the objects of the sanitary district law which are for the conservation of the public health, comfort and welfare, by providing proper water supply and disposal of sewage and other waste.

I also find that by Section 6828-15, General Code, the directors of a conservancy district have certain authority relative to rivers. That section provides in part:

“In order to accomplish the purposes of the district, the board of directors is authorized and empowered:

“(a) To clean out, straighten, widen, alter, deepen, or change the course or terminus of any ditch, drain, sewer, river, water course, pond, lake, creek or natural or artificial stream located in or out of said district. * * *”

Here, again, the authority to clean out a river or other watercourse is predicated upon the assumption that such action is necessary in order to accomplish the purposes of the district which in general are the prevention of floods, the conservation of water supply and other related purposes. I have not found any other provisions of law which appear to give authority to any other public officer or body to clean out a river or to remove such an obstruction as you mention.

As to none of the public bodies hereinabove mentioned does the law impose any mandatory duty in regard to the removal of obstructions from a river or other watercourse. When the power given should be exercised, it is left to the discretion of the authorities. It is accordingly my opinion and you are advised:

1. County commissioners are authorized by Sections 2427-1 and 2428, General Code, to remove obstructions from a river within their county, when they deem it necessary or advisable in order to provide a proper location for a proposed bridge or road or to provide proper protection of a state road or of a bridge or road within their control.

2. County commissioners are authorized by Section 6729 et seq. and under the conditions therein set forth, to remove obstructions from a river which interfere with the free flow thereof or endanger a county or township road, or when such removal will in their opinion be conducive to the public health, convenience or welfare.

3. The directors of a sanitary district are authorized by Section 6602-49, General Code, to clear a river or other stream of obstructions only when such action is necessary to carry out the powers of such district and the purposes of its organization.

4. The directors of a conservancy district are authorized by Section 6828-15, General Code, to clear a river or other stream of obstructions

only when such action is necessary to accomplish the purpose for which such district is formed.

Respectfully,

HUGH S. JENKINS,
Attorney General.