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CULVERTS IN ROADS ON TOWNSHIP SYSTEMS—NO MANDATORY DUTY IMPOSED BY LAW ON BOARD OF COUNTY COMMISSIONERS TO CONSTRUCT.

SYLLABUS:

No mandatory duty is imposed by law on the board of county commissioners to construct culverts in roads on township systems.

Columbus, Ohio, December 5, 1945

Hon. Earl Henry, Prosecuting Attorney
Cambridge, Ohio

Dear Sir :

Your letter of recent date is at hand wherein you ask my opinion concerning the state of the law on the mandatory duty of the board of county commissioners in relation to the installation of culverts in township roads.

This question has been presented to this office numerous times in the past but usually in the form of "Can the board of county commissioners furnish and install culverts in township roads?" and that has been answered in the affirmative many times in the past.

The question as it is now put raises not what the board can do but what is its mandatory duty in this connection, and I shall stay within the question.

The public roads of Ohio are by statute divided into three classes, to-wit, roads in the state highway system, county roads and township roads. (See Section 7464, G. S.)

The statutes also provide that each political subdivision shall maintain its roads as classified in Section 7464, G. C. Section 7467 of the General Code of Ohio reads in part as follows :

"The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads.

(a) State roads shall include the roads and highways on the state highway system.

(b) County roads shall include all roads which have been or may be established as a part of the county system of roads as provided for under G. C. Sections 6965, 6966, 6967 and 6968, which shall be known as the county highway system, and all such roads shall be maintained by the county commissioners.

(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; * * *"

Some confusion has been created in the consideration of the instant question by embracing the construction of bridges with the maintenance and construction of culverts. However, they should be kept separate.

They are not the same and do not perform the same function. The former is, according to Bouvier's Law Dictionary :

"A structure erected over a river, creek, stream, ravine or other place to facilitate the passage thereof ; including by the term both arches and abutments."

The latter has been defined as being :

"A waterway or water passage, whether of wood or stone, square or arched ; a covered drain under a road designed for the passage of water from one side of the road to the other."

It therefore seems that a bridge is a structure placed in and becoming a part of a road, the purpose of which is to carry traffic over a watercourse or depression, and a culvert is an opening under a road for the purpose of draining water from one side of the road to the other.

In the case of County of Dufferin v. County of Wellington, reported in 10 Ontario Weekly Reports, Page 239, the Court held that a large concrete pipe installed across a road and covered with a foot of gravel was a *culvert*, notwithstanding the fact that it replaced an old worn out bridge.

Having defined a culvert, let us now consider who must construct them on township roads. I am unable to find any specific statutory provision making it mandatory for the board of county commissioners to provide and install culverts in township roads but the subject of bridges is covered in Section 2421 of the General Code of Ohio, which 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. * * * (Emphasis the writer's.)"

No help can be drawn from this section as culverts and bridges are not the same, although according to the definitions set forth herein, the

difference lies not so much in their physical form but their function.

Webster defines a stream :

“A current or course of water or other fluid flowing on the earth as a river, brook, etc. * * * a steady flow as of water, etc.”

It appears to be rather well established from the last quoted section and definition that it is the mandatory duty of the board of county commissioners to build bridges over watercourses that fall within the definition of streams on township roads, but the language employed cannot be said to be sufficient to include culverts. This interpretation is verified by reference to Section 2422 of the General Code of Ohio which reads as follows :

“Except as therein provided, the commissioners shall construct and keep in repair, approaches or ways to all bridges named in the preceding section. But when the cost of the construction or repair of the approaches or ways to any such bridge does not exceed fifty dollars, such construction *or repair shall be performed by the township trustees.*”

(Emphasis the writer's.)

During former times the law provided that all bridges and culverts costing not more than \$50.00 must be built by the township trustees. This provision has been repealed, leaving the responsibility for culverts to fall on the various classes of roads and their separate political subdivisions. The Legislature must have had this conclusion in mind when it enacted Section 3373 of the General Code of Ohio (effective August 23, 1941,) which reads in part as follows :

“* * * Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in constructing, reconstructing, maintaining and repairing roads and culverts within the township. * * *”

I am not unmindful of the opinions written in the past on this subject, but reference thereto will disclose that irrespective of the form of the inquiry, the answer, due to the state of the statutory law, was always given on the basis of what the county *could do*, or what the township *could do* and the troublesome question of mandatory duty was thus evaded. The present state of the statutes is such that cooperation in matters of road, bridge and culverts is possible between all the levels of government, federal, state, county, township and municipal. (See Sections 1181, G. C.

to 1181-3, inclusive, State-Federal; Section 1182-16, Municipal-State; 1178-43, State-County; 1178-42, State-Municipal Corporations and the general state, county, township cooperation in Section 7467, G. C.) This imposed in itself no additional mandatory duties on the various political subdivisions.

These are my conclusions. The law has divided the roads of Ohio into state, county and township and unless specifically provided by law, each must do all things necessary to be done in the building and maintenance of the roads under the several jurisdictions. No statutory authority places the burden of constructing the culverts in township roads upon the board of county commissioners, hence it falls normally on the township.

Therefore, and in specific answer to your question, it is my opinion that if in the construction and maintenance of a township road, the erection of a bridge over a stream or canal becomes necessary, this burden falls upon the county but the construction and maintenance of culverts for drainage on township roads remains the duty of the board of township trustees in their respective townships.

Respectfully,

HUGH S. JENKINS

Attorney General