

and it follows that the abandonment must exist as a matter of law at such time each and all of the steps outlined in the statute have been taken. It further follows that when the Director of Highways complied with all of the requirements of the statutes, and certified his action to the County Commissioners, the old portion of the highway was abandoned as a matter of law. It would not seem that the use of the highway by the traveling public would have any bearing upon the question. Neither would the markings be determinative of the matter. The legislature has provided certain methods for establishing, changing and classifying highways. It further has provided what public authority shall have the responsibility of maintaining and keeping in repair the various highways. The manner of use on the part of the traveling public does not necessarily have any relation to the question as to whether or not a given road as a matter of law has been placed in a designated class.

In this connection, reference is made to section 7464, General Code, which defines state, county and township roads. Also, your attention is invited to section 7467, General Code, which provides that "the state, county and township shall each maintain their respective roads as designated" in the classification set forth in section 7464 and its related sections.

It is noted that in your letter you state that the abandoned portion of the highway could not be said to be of minor importance nor to traverse territory adequately served by another state highway. Without going into the merits of this contention, it would seem sufficient to point out that the statutory notice and procedure were followed and it would seem too late a date to collaterally attack the finding of the Director on such point.

Assuming that the road in question was formerly a county road, it is my opinion, in view of the facts stated, that as a matter of law the abandoned portion of the road you mention became a county road upon the receipt by the County Commissioners of the certification of the Director of Highways as to its being abandoned.

In reference to your second inquiry, it would seem clear that under section 2421, General Code, and its related sections, it is the duty of the County Commissioners to keep in repair bridges on county highways. Also section 2408, General Code, provides in part that the Board of County Commissioners "shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair."

From the above it is evident that if the party you mention can prove that there was negligence, and such negligence was the proximate cause of the injury to the truck, the liability would rest upon the county.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

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2460.

**TOWNSHIP TRUSTEES—ENTITLED TO \$2.50 PER DAY FOR SERVICES  
IN ADMINISTERING POOR RELIEF LAWS—LIMITATIONS.**

**SYLLABUS:**

1. *Under section 3294, General Code, the members of a board of township*

trustees are entitled to receive \$2.50 per day for their services in administering the poor relief law.

2. The \$2.50 per diem fee legally payable to township trustees for services in administering the poor relief laws is subject to the limitation that the total of such per diems plus the total of the fees payable to said trustees for other services performed in the business of the township and payable from the township treasury shall not exceed in any one year the sum of \$250.00.

COLUMBUS, Ohio, April 5, 1934.

HON. HOWARD S. LUTZ, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—This is to acknowledge receipt of a communication from you which reads as follows:

"For some reason trustees in this vicinity have an understanding from some source which I have not been able to trace that they are not entitled to per diem compensation at \$2.50 in administering poor relief.

I have advised them that under the reading of Section 3295 and a research I have made of Attorney Generals' opinions in connection with this question that I see nothing against their receiving such per diem compensation. I would appreciate your opinion in this connection."

The reference to section 3295, General Code, in your letter is evidently a typographical error as such section has no bearing on the matter you present. I presume the reference is to section 3294, General Code. Said section provides as follows:

"Each trustee shall be entitled to one dollar and fifty cents for each day of service in the discharge of his duties in relation to partition fences, to be paid in equal proportions by the parties, and two dollars and fifty cents *for each day of service in the business of the township,* to be paid from the township treasury. The compensation of any trustee to be paid from the treasury shall not exceed two hundred and fifty dollars in any year *including services in connection with the poor.* Each trustee shall present an itemized statement of his account for such per diem and services, which shall be filed with the clerk of the township, and by him preserved for inspection by any persons interested." (Italics mine.)

There has been no official opinion of this office holding categorically that the italicized language of section 3294, supra, authorizes the township trustees to be paid at the rate of \$2.50 per day when performing their duties in connection with the poor laws. However, there have been at least two opinions which have indirectly so held.

In Opinions of the Attorney General for 1919, volume I, page 377, it was held in the syllabus:

"Where township trustees so manipulate their official transactions in disbursing the poor relief, as to unnecessarily increase their compensa-

tion under section 3294 G. C., their service to the extent augmented with such object of personal gain is not 'service in the business of the township' as provided in said section and such trustees are not entitled to compensation therefor."

In such opinion the communication of the prosecuting attorney showed that he assumed township trustees were acting "in the business of the township" when disbursing township funds for the relief of the poor, and his sole question was as to whether or not the township trustees could legally manipulate the township business of poor relief so as to increase the number of days for which they might charge the per diem compensation of \$2.50 allowed them by section 3294, General Code.

The then Attorney General evidently considered the prosecuting attorney's assumption to be correct for he proceeded to hold, as disclosed by the syllabus, supra, that the township trustees could not collect the per diem fee of \$2.50 for disbursing poor relief where evidence showed that said trustees' services were performed through fraudulent action.

In Opinions of the Attorney General for 1930, volume I, page 274, it was held in the syllabus of an opinion:

"In the absence of an apparent abuse of discretion or evidence of bad faith in a particular case, it cannot be said as a matter of law, that it is unlawful for township trustees, after determining the need and propriety of a conference with the trustees of other townships for the purpose of discussing matters pertaining to the duties of township trustees in carrying out their powers with respect to highways, cemeteries *and poor relief*, to credit themselves with time expended in attending such a meeting as being 'service in the business of the township' for which they are entitled to per diem compensation, in accordance with section 3294, General Code." (Italics mine.)

After quoting section 3294, General Code, the then Attorney General stated at pages 275 and 276:

"It is a fundamental proposition of law that officers are entitled to only such fees or compensation as are specifically provided by law. Inasmuch as the section above quoted refers to the compensation that a trustee is to receive 'for each day of service in the business of the township,' it obviously becomes necessary to determine whether the meetings referred to (including a meeting for the purpose of establishing or carrying on a uniform system of poor relief throughout the county) have reference to the business of the township in a legal sense.

There has never been a judicial pronouncement of just what constitutes 'business of the township' in the prosecution of which township trustees may be paid. It is a familiar principle of law that such administrative officers as township trustees have such powers only as are expressly granted to them by statute, together with such incidental powers as are reasonably necessary to effectuate the express powers so granted. Courts have jealously guarded this rule by not permitting such officers to exercise powers beyond those expressly granted or necessarily implied

therefrom but will not invade the field of discretion where discretion in the manner of the performance of a statutory duty is at issue.

Township trustees are expressly authorized by section 3298-1, and related sections of the General Code, to construct, reconstruct, resurface or improve certain public highways within the township, in some instances in co-operation with the county commissioners. *They are expressly authorized by sections 3476, et seq., of the General Code, to extend relief to certain needy poor within the township.* Certain specific duties of township trustees with respect to the establishment and maintenance of cemeteries are fixed by statute. Section 3441, et seq., General Code." (Words in parenthesis and italics mine.)

From the language of the foregoing opinion, it is apparent that the then Attorney General considered that township trustees in performing their duties under the poor laws, were engaged in "service in the business of the township" within the meaning of such phrase as used in section 3294, General Code.

In view of the foregoing opinions of former Attorneys General, and the clear language of section 3294, General Code, I am of the opinion that township trustees are entitled to \$2.50 per day for their services in administering poor relief laws, so long as the total of per diems, plus the total of the fees payable to said trustees for other services performed in the business of the township and payable from the township treasury does not exceed in any one year the sum of \$250.00.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

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2461.

SPECIAL ASSESSMENTS—COLLECTION OF LEVY ASSESSED FOR SEWER DISTRICT RESTRAINED BY COURT—COUNCIL OF MUNICIPALITY MAY RE-ASSESS WHEN—VOLUNTARY PAYMENT OF TAXES MAY NOT BE RECOVERED—COUNCIL MAY APPROPRIATE FUNDS TO REFUND TAXPAYER WHEN.

*SYLLABUS:*

1. *When a municipality has levied special assessments "according to benefits" for a sewer district, and thereafter a court of competent jurisdiction restrains the collection of such assessments on the ground that certain items were illegally included therein and that certain assessments were illegally made, the council of such municipality may re-assess the special assessment, using the same method of assessment as was theretofore used omitting from the amount thereof that quantum held by the court to be illegal.*

2. *When a city has assessed the cost of the construction of a sewer against the property benefited and has certified such assessment to the county auditor to be spread upon the general tax list and duplicate of real property, and thereafter a court of competent jurisdiction enjoins the collection of such taxes by reason of illegality in the manner of assessment the council of such municipality may be required by such bondholders to reassess such taxes according to the same method,*