

2390.

COUNTY DITCH — BOARD OF COUNTY COMMISSIONERS,
RESPONSIBLE TO MAINTAIN AND REPAIR AT PLACE
WHERE DITCH CROSSES STATE HIGHWAY — COST PAID
FROM COUNTY GENERAL DITCH IMPROVEMENT FUND.

SYLLABUS:

1. *The board of county commissioners is responsible for the maintenance and repair of a regularly constructed county ditch at the place where said ditch crosses a state highway.*

2. *The payment of the cost of maintenance and repair by the county of the project set out in paragraph 1, shall be made from the county general ditch improvement fund.*

Columbus, Ohio, June 13, 1940.

Hon. J. Ewing Smith, Prosecuting Attorney,
Bellefontaine, Ohio.

Dear Sir:

This will acknowledge receipt of your letter of recent date, in which you request an opinion upon the following:

“Your opinion on the following questions will be appreciated:

(1) Is a County responsible for the maintenance and repair of a regularly constructed County ditch across a state highway?

(2) If a County is responsible for such maintenance and repair, under what authority is such repair made and from what fund or funds is the cost paid?”

To properly ascertain the relative duties and obligations of the separate units of government, namely the state and county, let us examine the pertinent statutes as they bear upon your questions.

Section 1184, General Code, setting out the general powers and duties of the state highway commissioner provides as follows:

“The director shall have general supervision of the construction, improvement, maintenance and repair of all roads comprising the state highway system, and the bridges and culverts thereon.

He shall aid the county commissioners in establishing, creating and repairing suitable systems of drainage for all highways within their jurisdiction or control and advise them as to the construction, improvement, maintenance and repair of such highways; and he shall approve the design, construction, maintenance and repair of all bridges, including superstructure and substructure, and culverts or other improvements on all roads comprising the state highway system. He may cause plans, specifications and estimates to be prepared for their construction, when so requested by the authorities having charge thereof. * * *"

Section 1194, General Code, setting out the authority and duty of the director of highways regarding construction, reconstruction, improvements, etc., provides as follows:

"The director is hereby authorized, and it shall be his duty in so far as funds therefor may be made available, to construct, reconstruct, improve, widen, maintain and repair the roads and highways, and bridges and culverts thereon, on the state highway system outside municipal corporations according to the required standards as may from time to time be established by him. * * *"

Section 7464, General Code, creating classes of highways within the state, provides:

"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 the 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, 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; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

Section 7467, General Code, providing for the maintenance of the highways provided for in Section 7464, General Code, states as follows:

"The state, county and township shall each maintain their

respective roads as designated in the classification hereinabove set forth; provided, however, that either the county or township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads under the control of the other. The state, county or township or any two or more of them may by agreement expend any funds available for road construction, improvement or repair upon roads inside of a village or a village may expend any funds available for street improvement upon roads outside of the village and leading thereto."

The duties and obligations of the county commissioners, so far as they relate to state highways, are very clearly set out in an opinion rendered by the then Attorney General on February 4, 1928, O. A. G. 1928, page 292. Section 1 of the syllabus of said opinion reads as follows:

"Under the provisions of the various sections of the General Code relating to the state highway system, as amended in House Bill No. 67, passed by the 87th General Assembly, (Norton-Edwards Act), county commissioners are not under obligation to furnish any money for the construction and maintenance of roads and highways in the state highway system."

Section 2 of the syllabus of that opinion provides as follows:

"By the terms of Section 7464, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act), county roads are defined as including all roads, which have been or may be established as a part of the county system of roads as provided for in Sections 6965, 6966, 6967 and 6968, General Code, (commonly called the Green law), which shall be known as the county highway system."

From the statutes and Attorney General's opinion above set forth, it would seem clear that the highway department is responsible for the maintenance of bridges and culverts on highways in the system of state highways, and that the county bears no duty or responsibility therefor.

The subject of cleaning and repairing of drains and water courses is fully covered by Chapter 8, General Code, under the subject of drainage. Section 6691, General Code, provides as follows:

"In any township or townships in which a ditch, drain or watercourse or part thereof has been or may hereafter be located and constructed, the county commissioners for the purpose of keeping such ditches, drains or watercourses clean and in repair, may delegate such duty to the county surveyor who shall execute the necessary work and assess the cost thereof in accordance with the provisions of this chapter as they relate to the duties of a ditch supervisor, or employ a ditch supervisor for such township; * * *"

Section 6693, General Code, provides as follows:

“The ditch supervisor shall have supervision of the cleaning out or repair of all ditches, drains or watercourses located and constructed in his township or townships, which have theretofore been located and constructed by township trustees, or by county commissioners as single county ditches, or by county commissioners as joint county ditches, and shall at all times be under the direction and control of the commissioners. The ditch supervisor is authorized to repair tile that are broken, uncovered, or stopped up; to open the outlet of tile; to repair any abutment, catch basin, or retaining wall that has been constructed on any ditch, drain or watercourse; and to clean out and keep ditches, drains or watercourses in repair as provided by law; * * * ”

Section 6702, General Code, which provides for the collection of the cost of such cleaning and repairing reads as follows:

“Upon the completion of the work as provided in this chapter, whether by contract or otherwise, the supervisor shall certify the cost thereof to the commissioners, who shall examine and correct the same, and shall order the auditor to place the correct amount upon the duplicates to be collected as other taxes and assessments; and this shall be credited to the general ditch improvement fund; such cost shall be a lien on the land to which said work was apportioned from the date of the filing of such certificate with the auditor. In all cases where the work has been under the supervision of the ditch supervisor and where the ditch repair or clean out has been done as a unit, the ditch supervisor shall make an estimate of the cost of such improvement, and shall apportion the estimated cost thereof according to benefits to the several tracts of land benefited, and shall file such estimates with the auditor; the auditor shall report such apportionments to the commissioners, and the commissioners shall fix a time when such apportionment shall be heard which shall be not more than twenty days after the date of filing such estimates. * * * ”

Upon consideration of the statutes here involved the exact purport and meaning of the term “culvert” seems significant. Inasmuch as the word is not legally defined in the statute, we must use it in this connection according to its common and accepted usage. Webster’s New International Dictionary, defines “culvert” as being “a transverse drain or waterway under a road, railroad, canal; an arched drain or sewer; also, a conduit.”

As before herein indicated, the county bears no responsibility for the maintenance and repair of bridges and culverts across and upon state highways, but such statement does not completely answer your question. A further query arises as to what agency of government has the duty of main-

taining the county ditch from the ends of the culvert to the fence line or property line of the owners abutting upon the state highway and below and beneath the substructure of a state highway bridge.

Likewise as stated above, the county government through the statutory authority provided, may cause repair and cleaning to be done upon county ditches and apportion the cost thereof to the benefit of the owner in direct proportion to the benefit derived from the drainage project.

In an Attorney General's Opinion rendered February 3, 1931, O. A. G., page 161, it is stated in the syllabus:

"Railroad right of way property may be assessed for a county ditch improvement benefiting such property, whether the same is owned in fee by the railroad company or is held as an easement by the company for railroad right of way purposes.

"The assessment levied upon a particular tract or parcel of railroad right of way property for such county ditch improvement should be commensurate with the special benefit received by such tract or parcel as compared with the whole of the benefits conferred by such improvement."

The query then arises as to whether or not the above opinion has application to the state highway department. In the case of *State of Ohio, ex rel Charles Parrott, et al v. Board of Public Works of the State of Ohio*, 36 O. S. 409, Section 3 of the syllabus states:

"The state is not bound by the terms of a general statute, unless it be so expressly enacted."

At page 414 the Court states in its opinion in its discussion of paragraph 3 of the syllabus:

"The doctrine seems to be, that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct."

In view of the Court's holding in this case, it is impossible to say that Chapter 8, General Code, on the subject of drainage, has any application so far as the State of Ohio or any of its agencies are concerned.

Regarding the county's authority to make such an expenditure as is herein involved, and from what fund such expenditure is to be made, Section 6492, General Code, provides as follows:

“The commissioners of each county shall provide and establish a fund, to be known as the general ditch improvement fund, which shall be used as a sinking fund for all bonds issued under the provisions of this chapter. Said fund shall consist of all funds in any ditch fund at the time this act takes effect, that are not then specifically appropriated, of any taxes then or thereafter levied and collected for ditch and drainage purposes under county levies, not by law otherwise disposed of, the proceeds of all bonds issued and sold under this chapter, the collections from all special assessments for benefits to property, as provided in this chapter, and such other funds as by law are or may be provided to be paid therein.”

Payment from the fund above mentioned is provided for in Section 6493, General Code.

“From the general ditch improvement fund, except as otherwise provided by law, all costs and expenses of improvements under this chapter shall be paid, including contract prices of construction and the costs of locating the improvement.”

In specific answer to your inquiry, therefore, it is my opinion that:

1. The board of county commissioners is responsible for the maintenance and repair of a regularly constructed county ditch at the place where said ditch crosses a state highway. The state highway department is responsible only for the construction and maintenance of culverts and bridges that go to make up a part of such county ditch.

2. The payment of the cost of the maintenance and repair by the county of the project set out in paragraph 1, shall be made from the county general ditch improvement fund.

Respectfully,

THOMAS J. HERBERT,
Attorney General.