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1. IT IS THE DUTY OF A BOARD OF TOWNSHIP TRUSTEES TO KEEP THE TOWNSHIP ROADS IN GOOD REPAIR; IT IS THEIR DUTY TO REMOVE AN OBSTRUCTING TREE EVEN IF PROPERTY OWNERS ALONG THE ROAD OWN UP TO THE CENTER OF THE ROAD.

2. WHERE A TREE LOCATED ON PRIVATE PROPERTY ALONG A TOWNSHIP ROAD HAS DANGEROUS BRANCHES HUNG OVER THE ROAD, REMOVAL IS THE DUTY PRIMARILY OF THE OWNER, BUT TOWNSHIP TRUSTEES ARE OBLIGATED TO REMOVE SAID TREE BY SUCH PROCEEDINGS AS NUISANCE ABATEMENT.

2. IT IS THE DUTY OF A MUNICIPAL CORPORATION TO REMOVE A DEAD TREE LOCATED IN A STREET RIGHT-OF-WAY IN SAID CORPORATION COSTS MAY BE ASSESSED AGAINST THE OWNER OF THE ABUTTING PROPERTY.

4. IT IS THE DUTY OF THE OWNERS OF A PIECE OF PRIVATE PROPERTY IN A MUNICIPAL CORPORATION TO REMOVE OVERHANGINGS FROM HIS PROPERTY OVER A PUBLIC STREET—THE MUNICIPAL CORPORATION ALSO IS RESPONSIBLE TO PROTECT THE USERS OF THE STREET AND MAY INSTITUTE ABATEMENT PROCEEDINGS—§§5571.-02, R.C. 3767.03, R.C. 927.02, R.C. 727.01, R.C. 3767.03, R.C. 927.22, R.C.

SYLLABUS:

1. Pursuant to the provisions of Section 5571.02, Revised Code, it is the duty of a board of township trustees to keep the township roads in good repair; and where a dead tree in a dangerous condition is located within the road right-of-way, the board has a duty to remove the tree even though property owners along the road own to the center of the road.

2. Where a tree is located on private property along a township road, but dead branches of the tree overhang the road and are dangerous to travelers on the road, the property owner has the primary duty to remove the dangerous condition, although the board of township trustees is also obligated to remove said dangerous condition; and the board may institute nuisance abatement proceedings under Section 3767.03, Revised Code, to compel the property owner to remove the danger, or the board may request that the director of agriculture act pursuant to Section 927.22, Revised Code, to alleviate the dangerous condition.

3. Where a dead tree is located in a street right-of-way in a municipal corporation and the tree is in a condition causing danger to users of the street, it is the duty of the municipal corporation to remove the tree; and pursuant to Section 727.01, Revised Code, the municipal corporation may assess the costs of removal of the tree against the abutting property owner.

4. Where in a municipal corporation a dead tree is located on private property but overhangs a public street so as to cause danger to users of the street, the owner of the property has the primary duty to remove the dangerous condition but the municipal corporation also has a responsibility to protect users of the street; and the municipal corporation may institute nuisance abatement proceedings under Section 3767.03, Revised Code, to compel the property owner to remove the dangerous condition, or may request that the director of agriculture act pursuant to Section 927.22, Revised Code, to alleviate the dangerous condition.

Columbus, Ohio, May 25, 1961

Hon. George E. Schroeder, Prosecuting Attorney
Putnam County, Ottawa, Ohio

Dear Sir :

Your request for my opinion reads as follows :

“The Dutch Elm disease is causing a considerable tree removal problem, and several of the political subdivisions in my County have asked questions on which I would like to have your opinion. The questions are as follows :

“1. In a township where the property owners own to the center of the road, and a dead tree in a dangerous condition is located between the edge of the pavement and the edge of the road right of way, is it the obligation of the township trustees or the adjoining land owner to remove said tree, and if it is the obligation of the property owner, what can be done to compel its removal?

“2. In a township where the property owners own to the center of the road, and a tree is located on the adjoining owner's land outside the right of way, but has large dead limbs overhanging the highway endangering the users of said highway, is it the obligation of the trustees or the land owner to remove said tree, and if it is the obligation of the land owner, and he refuses to remove said tree, what can be done to compel this removal?

“3. In a municipal corporation, where there is no ordinance covering trees, and a dead tree is located between the sidewalk and curb within the street right of way, and said tree is in a dangerous condition, is it the responsibility of the village or the adjoining land owner to remove said tree, and if it is the responsi-

bility of the adjoining property owner, what can be done to compel its removal?

"4. In a municipal corporation, where there is no ordinance covering trees, and a dead tree is located on private property, but overhanging a public street or alley in a dangerous condition, is it the responsibility of the village or property owner to remove said tree, and if it is the responsibility of the property owner, and he fails to remove said tree, what can be done to compel its removal?

"I have read the sections of the Code in regard to this problem, but have not found complete satisfaction. All these political subdivisions whom I represent are, of course, interested in knowing the situations in which it would be the responsibility of the property owner and if so, how, upon their refusal, to compel them to remove the tree or compel them to pay for the removal of the tree. I believe this problem is of interest to many political subdivisions in the State of Ohio due to the prevalence of Dutch Elm disease and an opinion from you, completely covering this whole field, would be greatly appreciated, I believe, by all of us."

Considering your first question, Section 5571.02, Revised Code, reads in part as follows:

"The board of township trustees shall have control of the township roads of its township and shall keep them in good repair. * * *"

Thus, it is the positive duty of a board of township trustees to maintain and keep in good repair the township roads under its control; and it would appear that the presence on a road, or the road right-of-way, of trees which are dangerous to travel over the road, would require that the board take action to remove the dangerous condition. The right to remove the trees, though not expressly granted by statute, arises by necessary implication from the statutory direction to keep the township roads in good repair.

In the particular situation as set out in the first question, in which the tree is in the road right-of-way, the township is in control of the roadway. Although the fee is in another, the use is, by nature of an easement, in the public and the landowner cannot freely use the property as he may desire. Since this land is really in the control of the public (it is "in the charge" of the board of township trustees as required under Section 927.22, *infra*.) it would be the responsibility of the board of town-

ship trustees to remove this dead or diseased tree and not the responsibility of the abutting property owner.

I note that Section 5543.14, Revised Code, also deals with the control of trees in a township road. This section reads:

“With the consent of the abutting landowner the county engineer shall have control of all trees and shrubs in the county roads of his county and *the board of township trustees shall have control of all trees and shrubs in the township roads of its township*. The department of agriculture or other proper department may, with the consent of the proper authorities and abutting landowner, take charge of the care of such trees. Such department may, with the consent of the proper authorities of the township, county, or state, plant trees along the public highway and may use any funds available for the development of forestry in the state to pay the expense of the planting and care of such trees. The ownership of all trees, so planted, shall remain in the public.”
(Emphasis added)

While this statute might be interpreted to limit the board's control over the trees and shrubs in the township roads to cases where consent of the abutting landowner has been obtained, the statute evidently refers to trees and shrubs which are not dead or diseased and which do not interfere with travel on the road, and does not pertain to diseased trees constituting a danger to travel on the road. Thus, I do not believe that the statute should be interpreted to affect my conclusion as to the first question.

In your second situation in which the dead tree is wholly outside of the right-of-way, but has large dead limbs overhanging the highway, and endangering the users of such highway, it would appear to be the obligation of the abutting property owner to trim his tree and, if necessary, destroy and remove the tree itself. In addition to such obligation of the property owner, the board would, of course, be authorized to remove limbs overhanging the road and endangering travel on the road; but I would assume that removal by the board in this set of circumstances would be done only in case of emergency.

Regarding the method to pursue to compel a property owner to remove a dangerous tree, it would appear that the tree would constitute a nuisance within the purview of Chapter 3767., Revised Code, and that the board would be authorized to initiate proceedings under Section 3767.03, Revised Code, to abate the nuisance. Also, the state director of agriculture has certain powers under Section 927.22, Revised Code, to eliminate

infested or diseased trees and the board of township trustees could request that the department take action in a particular instance. Said Section 927.22 reads as follows :

“If the inspector or deputy finds on examination any nursery, greenhouse, field or farm, crop, orchard, small fruit plantation, park, cemetery, or any private or public premises, infested or infected with injurious insects or plant disease, he shall notify the owner or person having charge of such premises to that effect, and the owner or person having charge of the premises shall within seven days after such notice cause the removal and destruction of such trees, plants, shrubs, or other plant material, if they cannot be successfully treated; otherwise such owner or person shall cause them to be treated or apply any other preventive or remedial measures for the control or retardment of said injurious insects or plant disease on said premises as the director of agriculture may direct. Preventive measures shall be required and shall be enforced in the same manner on any such additional premises in the vicinity of the premises where said injurious insect or plant disease was found as seems necessary in accordance with the judgment of the director. No damages shall be awarded to the owner for the loss or destruction of infested or infected trees, plants, shrubs, or other plant material, or reimbursement made for expenses incurred incident to the application of said prescribed preventive or remedial measures. Such infested or infected trees, plants, shrubs, or other plant material are a public nuisance.

“In case the owner or person in charge of such premises refuses or neglects to carry out the orders of the director within seven days after receiving written notice, the director may proceed to treat or destroy the infested or infected plants or plant material or to apply any other necessary preventive or remedial measure. The expense shall be assessed, collected, and enforced, as taxes are assessed, collected, and enforced, against the premises upon which such expense was incurred. The amount of such expense when collected shall be paid to the director and by him deposited with the treasurer of state.”

Coming to your third question which regards the situation where a dead tree is on the tree lawn in a village, Section 723.01, Revised Code, reads as follows :

“Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of such municipal corporation shall have the care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance.”

As to a tree lawn, it is generally accepted that the same is included as a part of the highway. The case of *Hubler v. Dayton*, 26 Ohio Law Abs., 679, at page 681, cites the statement in the case of *Barnesville, v. Ward*, 85 Ohio St., 1, that the "court recognized that the strip between the sidewalk and curb, ordinarily spoken of as the treelawn is a part of the highway and, therefore, the municipality is under the statutory obligation to keep it open, in repair and free from nuisance, as against the usual mode of travel."

It will further be noted that Section 727.01, Revised Code, grants to municipal corporations the power to levy and collect special assessments on abutting property owners for costs connected with removing shade trees from a public road. Thus, although the municipal corporation has the responsibility of removing a dangerous tree from a tree lawn, the abutting owner may be assessed for the costs of removal.

Specifically answering your third question, I conclude that the municipal corporation and not the adjoining landowner would be responsible for the removal of a diseased tree located between the sidewalk and curb within the street right-of-way in a municipal corporation.

As to your fourth question regarding a dead tree on private property, but with limbs overhanging the public street, the owner of the tree would appear to be primarily responsible for removing the danger to people using the street. The municipal corporation does, however, also have a duty in this regard. As stated in the case of *Yackee, Adm., v. Napoleon*, 135 Ohio St., 344, at page 349:

"A municipal corporation holds the fee in its streets in trust for the purpose of public travel and transportation, subject to the right of the state to direct the method and manner by which such trust shall be administered, and is charged at all times by reason of Section 3714, General Code, with the inescapable duty to keep such streets open, in repair and free from nuisance. This duty and requirement extends to the space above as well as to the surface of the street. 'The public right goes to the full width of the street and extends indefinitely upward and downward so far at least as to prohibit encroachment upon such limits by any person by any means by which the enjoyment of such public right is or may be in any manner hindered or obstructed or made inconvenient or dangerous.' 44 Corpus Juris, 1007, note. * * * 'There is no sound reason why the duty of a municipal corporation to keep its streets 'in safe condition' should not require it to take reasonable precautions against dangers from

overhead as well as under foot.' *Bohen v. City of Waseca*, 32 Minn., 176, 19 N.W., 730, 50 Am. Rep., 564. See also *Hume v. Mayor*, 74 N.Y., 264."

And at page 350 of the same case :

"* * * This is a responsibility from which the municipality cannot relieve itself by any attempt to place the performance of such duty upon another. * * *

"If the municipality fails in this duty, and its failure results in injury to one lawfully using such street, it becomes liable to him in an action at law for damages. * * * and, even where the nuisance or dangerous condition in its street is created by another without its authority a municipality is nevertheless liable to one receiving an injury because of such nuisance, if the injury occurs after it acquires actual knowledge of the existence of such nuisance, or after sufficient time has elapsed that under the circumstances it should have acquired knowledge of the existence thereof."

The case of *Taylor v. Cincinnati*, 143 Ohio St., 426, dealt with a city's liability for absolute nuisances or qualified nuisances situated in the area of the street. The fifth paragraph of the syllabus of that case reads :

"The duty resting upon municipal corporations, under Section 3714, General Code, to keep their streets and other public ways open, in repair and free from nuisance, requires only reasonable care and vigilance, in view of all the surroundings, to keep such streets and ways in a reasonably safe condition for travel in the usual and ordinary modes, and does not exact that which is unreasonable or impracticable. Municipal corporations are not insurers of the safety of their public ways, and are liable only for negligence in creating a faulty condition in such ways, or in failing to repair, remove or guard against defects or obstructions therein, after actual or constructive notice of their existence. The standard of care required to be exercised by municipal authorities in keeping streets in repair and free from nuisance is that care which persons of reasonable and ordinary prudence exercise under like circumstances and conditions."

To answer your fourth question, therefore, I am of the opinion that the primary duty of removing a dead or diseased tree located on private property, but creating a danger to people using the adjoining street, is on the owner of the property, but that since the municipal corporation might be held liable for injuries incurred by persons using the street, the municipal corporation should take all necessary steps to remove the dangers. As with the board of township trustees discussed in the second question, the municipal corporation could initiate proceedings for the abatement of the

nuisance under Section 3767.03, *supra*, or could request that the state director of agriculture proceed under Section 927.22, *supra*.

Since your letter of request specifically mentions elm disease, I believe I should make some mention of Sections 927.39 to 927.42, inclusive, Revised Code, which sections deal specifically with the combating of elm disease and phloem necrosis. These sections grant to counties, townships and municipal corporations the authority to purchase equipment to combat elm disease and to hire employees to operate this equipment. Authority is also given these political subdivisions to authorize an agent to inspect lands within the subdivision with the permission of the landowner. Agents may enter onto private land to spray and treat trees, or to destroy and remove such, at the cost of the landowner. The Department of Agriculture of Ohio or that of the United States may be called for assistance. The statement in the statute that the cost will be assessed to the landowner would indicate that, although the subdivision may take it upon itself to eliminate the diseased or infected trees, the landowner is still the responsible party and the statute is not intended to shift such responsibility.

In summary, therefore, it is my opinion and you are advised:

1. Pursuant to the provisions of Section 5571.02, Revised Code, it is the duty of a board of township trustees to keep the township roads in good repair; and where a dead tree in a dangerous condition is located within the road right-of-way, the board has a duty to remove the tree even though property owners along the road own to the center of the road.

2. Where a tree is located on private property along a township road, but dead branches of the tree overhang the road and are dangerous to travelers on the road, the property owner has the primary duty to remove the dangerous condition, although the board of township trustees is also obligated to remove said dangerous condition; and the board may institute nuisance abatement proceedings under Section 3767.03, Revised Code, to compel the property owner to remove the danger, or the board may request that the director of agriculture act pursuant to Section 927.22, Revised Code, to alleviate the dangerous condition.

3. Where a dead tree is located in a street right-of-way in a municipal corporation and the tree is in a condition causing danger to users of the street, it is the duty of the municipal corporation to remove the tree; and pursuant to Section 727.01, Revised Code, the municipal

corporation may assess the costs of removal of the tree against the abutting property owner.

4. Where in a municipal corporation a dead tree is located on private property but overhangs a public street so as to cause danger to users of the street, the owner of the property has the primary duty to remove the dangerous condition but the municipal corporation also has a responsibility to protect users of the street; and the municipal corporation may institute nuisance abatement proceedings under Section 3767.03, Revised Code, to compel the property owner to remove the dangerous condition, or may request that the director of agriculture act pursuant to Section 927.22, Revised Code, to alleviate the dangerous condition.

Respectfully,

MARK McELROY

Attorney General