

183.

DOG AND KENNEL FUND—TOWNSHIP TRUSTEES—NOT REQUIRED TO MAKE FINDING OWNER OF DOG CAUSING DAMAGE NOT ABLE TO PAY DAMAGES—SECTION 5841 G. C.—COUNTY COMMISSIONERS CANNOT REJECT CLAIM ON GROUND OWNER OF DOG FINANCIALLY RESPONSIBLE—SECTION 5840 G. C.—LANDLORD NOT RESPONSIBLE FOR DOG OF TENANT UNLESS HE CARES FOR OR EXERCISES CONTROL OVER DOG.

SYLLABUS:

1. *Section 5841 of the General Code does not require the township trustees to make a finding that the owner of dogs causing the damage is not able to pay damages.*
2. *The county commissioners can not reject a claim made under Section 5840, General Code, on the ground that the owner of dogs is financially responsible.*
3. *The landlord is not responsible for a dog of a tenant living on the property of the landlord unless he cares for or exercises control over the dog.*

COLUMBUS, OHIO, February 21, 1939.

HON. GEORGE E. GERHARDT, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR: This is to acknowledge your recent request for an opinion, which request reads as follows:

“I would like an opinion from your office in regards to a question that has been troubling County Commissioners in the past and has again at the January Session of our County Commissioners here in Pickaway County, Ohio, been troublesome.

The question has been growing out of the Dog and Kennel Fund in the interpretation of Section 5841 O. G. C. which reads as follows:

Sec. 5841. 'Proof required of owner. Before any claim shall be allowed by the trustees to the owner of such horses, sheep, cattle, swine, mules or goats, it shall be proved to the satisfaction of the trustees:

(1) That the loss or injury complained of was not caused in whole or in part by a dog or dogs kept or harbored on the owner's premises, or;

(2) If the dog or dogs causing such loss or injury were kept or harbored on such owner's premises, that such dog or dogs were duly registered and that they were destroyed within forty-eight hours from the time of the discovery of the fact that injury was so caused.

If the owner of the dog or dogs causing such loss or injury is known, it shall be the duty of the trustees to bring an action to recover such damage from the owner of said dog or dogs, if in their judgment said damage could be collected, unless it is shown to said trustees that said dog or dogs were duly registered and that they were destroyed within forty-eight hours after discovery of the fact that the loss was so caused."

The question arises from the last paragraph which you will note states it shall be the duty of the trustees to bring an action to recover damages from the owner of said dog or dogs if in their judgment said damage could be collected unless it is shown to the trustees that said dog or dogs were duly registered and were destroyed forty-eight hours after the discovery of said loss occurred.

The questions we would like answered specifically are as follows:

1. Does the Code by the last paragraph make it the duty of the trustees to make a finding that the owner is not in their judgment able to pay damages?

2. Should this finding be made a part of the transcript sent to the County Commissioners; if so, should it be a written finding?

3. Can the County Commissioners where proof is shown to them that the owner of the dog or dogs is financially responsible reject said claim at their hearing upon said case by virtue of Section 5846? This is, of course, if trustees have made no finding of financial responsibility.

4. Does the land-lord become responsible for the dogs of a tenant living on his place and must he see that said tenant obtains licenses for his dogs, in order not to be liable under statute which says keep or harbor dogs?"

The sections of the General Code which are pertinent to the situa-

tion presented by you are Sections 5838, 5840, 5841, 5844 and 5846. Section 5841 has been correctly quoted by you in your communication. The other sections provide as follows:

Section 5838, General Code:

“A dog that chases, worries, injures or kills a sheep, lamb, goat, kid, domestic fowl, domestic animal or person, can be killed at any time or place; and, if in attempting to kill such dog running at large a person wounds it, he shall not be liable to prosecution under the penal laws which punish cruelty to animals. The owner or harbinger of such dog shall be liable to a person damaged for the injury done.”

Section 5840, General Code:

“Any owner of horses, sheep, cattle, swine, mules and goats which have been injured or killed by a dog not belonging to him or harbored on his premises, in order to be entitled to enter a claim for damages must notify a county commissioner in person or by registered mail within forty-eight hours after such loss or injury has been discovered, and such commissioner shall immediately notify the dog warden or other enforcing officer of such loss or injury, whose duty it shall be to have the facts of such loss or injury investigated at once. The owner of such horses, sheep, cattle, swine, mules or goats, may present to the township trustees of the township in which such loss or injury occurred, within sixty days a detailed statement of such loss or injury done, supported by his affidavit that it is a true account of such loss or injury. A duplicate of such statement shall be presented to the county commissioners of the county in which such loss or injury occurred. If such statements are not filed within sixty days after the discovery of such loss and injury no compensation shall be made therefor. Such statement shall set forth the kind, grade, quality and value of the horses, sheep, cattle, swine, mules and goats so killed or injured, and the nature and amount of the loss or injury complained of, the place where such loss or injury occurred, and all other facts in the possession of the claimant which would enable the dog warden to fix the responsibility for such loss or injury. Statements of the nature and amount of the loss or injury complained of shall be supported by the testimony of at least two freeholders who viewed the results of the killing or injury and who can testify thereto.”

Section 5844, General Code:

“The township trustees shall hear such claims in the order of their filing and may allow them in full or such parts thereof as

the testimony shows to be just. They shall endorse the amount allowed on each claim and transmit their findings with the testimony so taken and the fees due witnesses in each case over their official signatures, to the county commissioners in care of the county auditor, who shall enter each claim so reported upon a book to be kept for that purpose in the order of their receipt."

Section 5846, General Code:

"The county commissioners at the next regular meeting after such claims have been submitted as provided in the preceding sections shall examine same and may hear additional testimony or receive additional affidavits in regard thereto and may allow the amount previously determined by the township trustees or a part thereof, or any amount in addition thereto as they may find to be just, to be paid out of the fund created by the registration of dogs and dog kennels and known as the dog and kennel fund. * * *"

The answer to your first inquiry depends on the interpretation of the last paragraph of Section 5841, General Code. It will be noted that the Legislature places a positive duty upon the trustees to bring an action to collect damages "if in their judgment said damage could be collected". The point involved is whether the above language requires a finding as to financial responsibility of the owner of the dogs. The Legislature has placed a proviso on this otherwise positive duty. In other words, the Legislature did not intend that the trustees should do a useless thing. An action need not be brought if the damage could not be collected. In 25 R. C. L. at page 216, we find the following language used:

"In the interpretation and construction of statutes the primary rule is to ascertain and give effect to the intention of the Legislature."

At Page 217, the following language is used:

"The current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation."

The language used in the statute, since the true meaning is uncertain, should be read in the light of the general rules of construction and interpretation. The words "in their judgment" do not seem to contemplate a formal determination or finding. Rather the natural interpretation would seem to exclude the necessity of such a formal finding. It would have been simple for the Legislature to have definitely provided that a formal

finding should be made if the same had been the intent. In addition, such finding would serve no practical purpose as will be more clearly seen in the answer to your third inquiry. Furthermore, if the trustees are lax in their action, they can be compelled to take action to collect damages.

The answer to your first inquiry is dispositive of your second question.

Coming now to your third inquiry, we find the duties of the county commissioners set out in Section 5846, *supra*. It is to be noted that no mention of financial responsibility is made. In addition, I refer you to the 1931 Opinions of the Attorney General at page 1308. In that opinion the Attorney General ruled:

“Upon compliance with the terms of Section 5840, General Code, the county commissioners are required to pay the claim for loss caused by a dog to horses, sheep, cattle, swine, mules or goats.”

The present wording of Section 5841, *supra*, has existed since 1919. This section formerly read as follows:

“The owner of such killed or injured horses, sheep, cattle, swine, mules and goats or the person having charge thereof must make it clear to the trustees * * * that the owner of the dog or dogs which caused the loss or injury is to him unknown; or if owner is known, he must make it clear to the trustees that a judgment for the damages complained of could not be collected upon execution.”

The above statute is found in 107 O. L., page 538. This section was changed to its present form in 108 O. L., Pt. 1, page 538.

You will note that formerly the financial responsibility of the owner of the dog or dogs was made an essential element in the allowance of claims. The aggrieved person had to make it clear to the trustees that he could not recover from the owner of the dog. Now, however, that proof of financial irresponsibility is no longer an element. Consequently, as was pointed out in the 1931 Attorney General's opinion cited above, if the aggrieved party complies with Section 5840, *supra*, the county commissioners are required to pay such amount to the claimant as they may find to be just. It must also be borne in mind that this action of the township trustees in attempting to collect damages is for the purpose of the reimbursement of the county commissioners rather than an action for the benefit of the aggrieved party.

Coming now to your fourth inquiry, the only sections referring to liability for damage done by dogs are Sections 5838 and 5841, *supra*. The first refers to “owner or harborer”. The second merely refers to “owner.” In Vol. 3 of Cor. Jur. at page 106 we find the following language used:

“The word ‘keeper’ is equivalent to ‘the person who harbors’, Harboring means protecting and one who treats a dog as living in his house and undertakes to control his actions is the owner or keeper within the meaning of the law, but the casual presence of an animal on his premises, if not so treated, does not constitute him such owner or keeper.”

In the light of the above, the landlord would not be responsible for the dogs of the tenant living on his place if the elements of care and control, etc. were not present.

In view of the foregoing and in specific answer to your inquiries, I am of the opinion that: (1) Section 5841 of the General Code does not require the township trustees to make a finding that the owner of dogs causing the damage is not able to pay damages; (2) the county commissioners can not reject a claim made under Section 5840, General Code, on the ground that the owner of dogs is financially responsible; (3) the landlord is not responsible for a dog of a tenant living on the property of the landlord unless he cares for or exercises control over the dog.

Respectfully,

THOMAS J. HERBERT,
Attorney General.