

1357.

DOG AND KENNEL FUND—CLAIMS ALLOWED IN FORMER YEARS, BUT UNPAID, NOT BASIS FOR DETERMINING EXISTENCE OF SURPLUS.

*SYLLABUS:*

*Claims allowed in former years, but unpaid, cannot be considered as a basis for determining whether or not a deficit exists in the dog and kennel fund in any current year. Such claims can be paid only when a surplus exists in the dog and kennel fund after the expenses of administration and the claims allowed for such current year have been paid.*

COLUMBUS, OHIO, December 14, 1927.

HON. FRANK F. COPE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated December 7, 1927, which reads as follows:

“Under Section 5652-7a, G. C., where a deficit appears in form of unpaid claims, is it possible for the commissioners to make the tax for the coming year sufficient to take care of the deficit of former years?”

To be more explicit, our proposition is that for the years 1923, 1924 and 1925 the county owes to persons losing stock by dogs, the sum of \$2,800.00.

1926 was sufficient to take care of itself and also 1927. Now, under the section above referred to, is it possible to raise this tax sufficient to take care of the deficit of those three years, or how under the new law are these old claims to be paid?”

The question that you present was considered in a recent opinion of this department, being Opinion No. 1351, dated December 12, 1927, Opinions, Attorney General for 1927, the third paragraph of the syllabus of which reads:

“Claims allowed in former years, but unpaid, cannot be considered as a basis for determining whether or not a deficit exists in the dog and kennel fund in any current year. Such claims can be paid only when a surplus exists in the dog and kennel fund after the expenses of administration and the claims allowed for such current year have been paid.”

The above opinion, a copy of which I am herein enclosing, is determinative of the question which you present.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

1358.

TOWNSHIP ROADS—WHEN IMPROVEMENT AMOUNTS TO “NEW CONSTRUCTION” TOWNSHIP TRUSTEES NOT AUTHORIZED TO PROCEED BY FORCE ACCOUNT.

*SYLLABUS:*

*Where the improvement of a township road is of such a nature as to constitute*

"new construction", it is unlawful for township trustees to follow the method of force account as provided in Section 3373, General Code.

COLUMBUS, OHIO, December 14, 1927.

HON. W. W. BADGER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

"Please give me your opinion as to what amount township trustees can spend in doing road work by force account.

I have a board of trustees who are grading and graveling about one mile of township road, by force account, to cost in or about \$3,000. Can this work be legally carried on?

Section 3373, G. C., provides that trustees may proceed by force account or contract, placing a limit on the contract work at which it may be let without advertising, but saying nothing about force account work.

I have recommended to the trustees in the above case that they suspend payment on said improvement until we receive your opinion."

In a second communication, in answer to my request for additional information relative to the nature of the proposed improvement, you state:

"This is a township road that has had a little gravel placed on it at some former date. Then the trustees decided to improve the same by widening, extending the drainage system, relocating a part of the mile of improvement and additional graveling of the same. Under the circumstances the county surveyor is unable to say if this is new construction or maintenance and repair. All the work is being done by the trustees by force account and not under the direction of the county surveyor or by direction of the county commissioners."

It is necessary in considering your question to determine at the outset whether the improvement in question will constitute "new construction" or "maintenance and repair" as those terms are usually recognized and applied.

"Maintenance and repair", as used in Section 6309-2 of the General Code, which section provides for the distribution of funds collected from the licensing of motor vehicles, is defined in said section as follows:

"\* \* \* 'Maintenance and repair' as used in this section includes all work done upon any public road or highway or upon any street, in which the existing foundations thereof is (are) used as a sub-surface of the improvement thereof, in whole or in substantial part. \* \* \* "

While it is true that the above definition is a statutory one and has particular application to the expenditure of the funds distributed under the provisions of Section 6309-2, General Code, yet said definition may be applied generally in determining what constitutes "maintenance and repair" as those terms are used in other statutes relating to roads.

It is noted that the improvement in question involves a widening of a portion of the existing road. In the case of *State ex rel. Janes, vs. Brown, Secretary of State*, reported in 112 O. S. 591, where the question of the right to submit House Bill No. 44, known as the "Gasoline Tax Bill", (112 O. L. 294) to a referendum was involved

and where the constitutionality of said act was under consideration, it was contended by the relator that that portion of Section 2 of the act which reads:

“For the purpose of providing revenue for maintaining the main market roads and inter-county highways of this state in passable condition for travel, for repairing the damage caused to such highway system by motor vehicles used on the same, *for widening existing surfaces on such highways where such widening is rendered necessary by the volume of motor vehicle traffic thereon,*” (Italics the writer’s.)

did not constitute maintenance and repair and therefore was not a matter of current operating expense.

In discussing this question on pages 605 and 606 of the opinion of said case, Judge Robinson has this to say:

“We therefore are of opinion that the department of highways and public works, the counties and the municipalities of the state, are limited in the expenditure of the respective appropriations made to them in this act to make maintenance and repair, and that the power of such department, or subdivisions, to use this particular fund for the purpose of *widening* the surfaces of the highways *must be measured by whether such widening constitutes maintenance and repair*, or, on the other hand, is of such a character as to amount to new construction. \* \* \* ” (Italics the writer’s.)

You will note from the above that the widening of a road may constitute “maintenance and repair”, or, such widening may be of such a nature as to amount to “new construction”. In the instant case I am assuming that more than the surface of the road is being widened and that consequently the improvement will amount to “new construction”. The view that it is “new construction” is further strengthened by the facts set forth in your letter to the effect that nothing has ever been done to the road in question, other than placing a little gravel on it, and that the present improvement contemplates a relocation of part of the road as well as an extension of the drainage system thereupon. If nothing has ever been done to said road, other than the placing of a little gravel thereupon, it is reasonable to assume that there is no existing foundation of the old road which may be used in whole or in substantial part as a sub-surface for the improvement. In view of this assumption the improvement would fail to meet the “maintenance and repair” test provided for in Section 6309-2 of the General Code, and said improvement would constitute “new construction”.

An examination of the statutes pertaining to township trustees, their powers and duties, will reveal that the only statute authorizing them to accomplish road improvements by the method of force account is Section 3373, General Code. Said section provides as follows:

“In the maintenance and repair of roads the township trustees may proceed either by contract or force account. When they proceed by contract the contract shall, in case the amount involved exceeds two hundred dollars, be let by the township trustees to the lowest responsible bidder after advertisement for bids once not later than two weeks prior to the date fixed for letting of such contract, in a newspaper published in the county and of general circulation within such township, if there be any such paper published in the county, but if there be no such paper published in the county, then in a newspaper having general circulation in said township. If the amount involved is

two hundred dollars or less the contract may be let without competitive bidding. Such contract shall be performed under the supervision of a member of the board of township trustees or the township highway superintendent. Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township. The township trustees shall provide suitable places for housing and storing machinery and tools owned by the township. They shall have the power to purchase such material and to employ such labor and teams as may be necessary for carrying into effect the provisions of this section, or they may authorize the purchase or employment of the same by one of their number or by the township highway superintendent at a price to be fixed by the township trustees. All payments on account of machinery, tools, material, labor and teams shall be made from the township road fund as provided by law. All purchases of materials, machinery, and tools, shall, where the amount involved exceeds five hundred dollars, be made from the lowest responsible bidder after advertisement made in the manner hereinbefore provided. All force account work shall be done under the direction of a member of the board of township trustees or of the township highway superintendent."

It will be observed that Section 3373, supra, is found in a chapter of the General Code entitled "Road Superintendent." This chapter is composed of Sections 3370 to 3376, both inclusive, of the General Code. All of these various sections under the chapter entitled "Road Superintendent" deal with some phase of the maintenance and repair of highways and nowhere in said chapter is any mention made of the construction or relocation of highways.

The statutes being entirely silent as to conferring authority upon township trustees to undertake "new construction" of roads by the method of force account, it is my opinion that where the improvement of a road is of such a nature that it constitutes new construction, it is unlawful for township trustees to follow the method of force account as provided in Section 3373, supra.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

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1359.

#### TAX AND TAXATION—FRANCHISE TAX ON CORPORATIONS—METHOD OF COMPUTING.

##### SYLLABUS:

1. *In the determination of the proportion of the capital stock of a foreign corporation, upon which the payment of the fee required by Section 184 of the General Code is based, the amount of business done is presumed to be in direct proportion to property owned in this state, and, therefore, in reaching the proportion consideration should be given solely to the property owned and used in Ohio and the total property owned and used.*
2. *Long continued administrative interpretation of legislation is entitled to great weight where such legislation is susceptible of more than one meaning.*
3. *In determining the proportion of the capital stock of a foreign corporation represented by property owned and used and business done in this state under Section*