

"It became the duty of the then governor at once to make a new appointment. Until that was done Slater was a *de facto*, but not a *de jure* official."

In the case of *State ex rel vs. Craig*, 69 O. S., 236, it was said by the court:

"When there is some color of title, resort must first be had to *quo warranto*, but where there is no such color, but a mere nullity, a legal appointment may be made to fill the office, and then if the party in the wrong still persists in holding onto the office, he may be ousted by proceedings for that purpose."

In the above case the council appointed certain of its members as members of the health board. As this was contrary to statute, the court held such pretended appointment a nullity. In the case under consideration the action was not a nullity but was avoidable.

While it is not necessary to resort to *quo warranto* to oust such *de facto* members before the mayor may nominate others, if the incumbents refuse to relinquish their office, *quo warranto* would be the only means of removing them.

Respectfully,

C. C. CRABBE,

*Attorney General.*

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1554.

BRIDGES AND VIADUCTS ARE NOT PART OF STREET OR HIGHWAY  
WITHIN THE MEANING OF SECTION 6309-2 G. C.—MOTOR VEHICLE  
LICENSE TAX—HOW MUNICIPALITY SHOULD EXPEND SAME.

COLUMBUS, OHIO, June 2, 1924.

*SYLLABUS;*

1. *Bridges and viaducts are not a part of a street, road or highway, within the meaning of sub-division 2 of Section 6309-2 of the General Code, providing that the portion of the motor vehicle license tax going to a municipal corporation shall be used for the maintenance and repair of public roads, highways and streets and for no other purpose.*

2. *No part of the portion of the motor vehicle license tax going to a municipality may be expended in the maintenance and repair of such bridges and viaducts.*

*Department of Auditor of State, Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

Gentlemen:—

Receipt is acknowledged of your recent communication, which reads:

"Section 6309-2, General Code, paragraph 2, provides that the fund created by the state automobile license tax in the municipal treasury shall be used for the maintenance and repair of streets wherein the existing founda-

tion is used as the sub-surface of the improvement in whole or in substantial part. In the City of Cincinnati there are many bridges and viaducts crossing the canal and other streams, which are in a sense highways. The question arises as to the right of the City to expend the automobile license tax fund for the purpose of maintaining and repairing such bridges and viaducts.

"Your opinion in connection with the above matter will be greatly appreciated.

Section 6309-2 of the General Code, referred to by you, is a part of Chapter 21, which is entitled "Motor Vehicles." This chapter, among other things, provides for the registration and licensing of motor vehicles. Each municipal corporation and each county, outside the limits of municipal corporations, are constituted districts of registration. The chapter further provides for the collection of a motor vehicle license tax.

The distribution and use to be made of the motor vehicle license tax collected is provided for in section 6309-2. Said section reads:

"The revenue collected under the provisions of this chapter shall be distributed as follows:

1. All fees collected under this chapter shall be paid into the state treasury to the credit of a fund to be designated as the 'State maintenance and repair fund.'

2. Fifty per centum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district of registration as provided in this chapter. Such moneys shall be paid into the treasury of the proper county as provided herein and distributed as are other taxes. In the treasuries of such municipal corporations and counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads and highways and streets and for no other purpose, and shall not be subject to transfer to any other fund. '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 foundation thereof is used as the sub-surface of the improvement thereof, in whole or in substantial part.

3. Fifty per centum of all taxes collected under the provisions of this chapter, shall be paid by the secretary of state into the state treasury to the credit of the 'State maintenance and repair fund.'

The 'State maintenance and repair fund' provided for herein shall be available for the use of the secretary of state in defraying the expenses incident to carrying out and enforcing the provisions of this chapter and for the use of the state highway commissioner in the manner provided by law. The general assembly shall make appropriations therefrom for such purpose."

Under the above quoted section, fifty per cent of the motor vehicle license tax collected from a municipal district of registration is ultimately distributed to the municipality, and when so distributed the same becomes and continues a fund to be used in the maintenance and repair of public streets.

Under this legislative situation, your inquiry is resolved to a single question, namely, is a bridge or viaduct within the bounds of a public street, road or highway, a part of such street, road or highway within the meaning of the words as used in said section?

Dillon on Municipal Corporations (Sec. 1157) says that bridges are usually part of the street or highway.

In the case of *Newark vs. McDowell*, 16 C. C. 556, it is said, at page 565 of the opinion:

“An important matter in reaching a solution of this question is to remember that bridges are a part of the street of the city; \* \* \*.”

The decisions universally hold that a public bridge is a part of the highway which passes over it, *except where the language of some particular statute is such as to show plainly that the term is not intended to include bridges.*

The question then is, does the term “street, road or highway” as used in the section, include bridges and viaducts?

It is a rule of construction that laws in *pari materia* shall be construed together.

A study of the legislation discloses the fact that our legislature has not included bridges and viaducts in the term “highway, road or street.”

It will be noted that, under the provisions of Section 3629 of the General Code, the council is authorized to lay off, establish, plat, grade, open, widen, narrow, straighten, extend, improve, keep in order and repair, light, clean and sprinkle, streets, alleys, public grounds, places and buildings, wharves, landings, docks, *bridges*, viaducts and market places, within the corporation, including any portion of any turnpike or plank road therein, surrendered to or condemned by the corporation.

Under the provisions of Section 3714 of the General Code, the council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, *bridges*, aqueducts and viaducts, within the corporation, and shall cause them to be kept open and in repair, and free from nuisance.

Under the provisions of sub-division 22 of section 3939 of the General Code, councils are authorized to issue and sell bonds for the purpose of re-surfacing, repairing or improving any existing street or streets, as well as other public highways.

Under sub-division 26 thereof, council is authorized to issue and sell bonds for the purpose of constructing or repairing *viaducts*, *bridges* and culverts.

A reading of these provisions clearly shows that the legislature, in using the term “street” did not thereby intend it should include everything within the boundaries thereof, such as bridges and viaducts. If it were intended that the term “street” include bridges and viaducts, why then was it necessary to add the words “bridges and viaducts?”

The statute with which you are concerned only uses the words “public highways, roads and streets.” The words “bridges and viaducts” are not included and no doubt were omitted with the view that bridges and viaducts were not intended to be considered as a part of a street, road or highway. It would not be seriously contended that, within the meaning of the words contained in said section, side-walks were to be considered as a part of a street, road or highway. In no more seriousness could it be contended that within such meaning bridges and viaducts were a part of a street, road or highway. On the other hand, it may be presumed that had the legislature intended the fund to be available for the maintenance and repair of bridges and viaducts, it would have specifically included bridges and viaducts, as it did in the above referred to legislation.

In the case of *Dayton vs. Harmon*, 12 Ohio Cir. Dec. 574, it was held that a bridge was not part of a street within the meaning of Section 7444 of the General Code, requiring county commissioners to keep in repair all parts of roads within municipal limits. By analogy the same reasoning is applicable to your question.

It would seem then, that in the use of the words "highways, roads and streets", by the legislature, bridges and viaducts are not a part of such highway, roads or streets.

This theory of interpretation is strengthened by the language used by the legislature in defining "maintenance and repair", 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 foundation* thereof is used as the *sub-surface* of the improvement thereof, in whole or in substantial part."

The word "foundation" has been defined as "that on which anything is founded or grounded." A bridge or viaduct rests upon piers or abutments, and no part of either a bridge or a viaduct is known as a "sub-surface."

In conclusion, I am of the opinion, and you are advised, that bridges and viaducts are not part of a street, road or highway, within the meaning of Section 6309-2 of the General Code, and a city is without authority to expend its portion of the motor vehicle license tax, or any part thereof, for the maintenance and repair of such bridges and viaducts.

Your inquiry does not go to the question of whether or not the fund created by the statute under discussion may be used by a municipal corporation in the maintenance and repair of the surface or pavement covering a bridge or viaduct and that question is not considered herein.

Respectfully,

C. C. CRABBE,  
*Attorney-General.*

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1555.

ABSTRACT, STATUS OF TITLE, LOT NO. 98, HAMILTON'S SECOND GARDEN ADDITION, COLUMBUS, OHIO.

COLUMBUS, OHIO, June 2, 1924.

HON. CHARLES V. TRUAX, *Director of Agriculture, Columbus, Ohio.*

Dear Sir:

An examination of an abstract of title submitted by your office to this department discloses the following:

The last continuation of the abstract under consideration bears date of May 26, 1924, and pertains to the following premises:

Being Lot No. 98, of Hamilton's Second Garden Addition to said City, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book No. 7, page 186, Recorder's Office, Franklin County, Ohio, excepting six feet off the rear end thereof reserved for use as an alley.

Upon examination of said abstract, I am of the opinion same shows a good