

2370.

GASOLINE TAX—TOWNSHIP'S PORTION ARISING THEREFROM—
TOWNSHIP TRUSTEES MAY PROCEED BY FORCE ACCOUNT.

SYLLABUS:

Township trustees, in expending the monies arising under Section 5541-8 of the General Code in constructing, widening and reconstructing the highways described in said section, may proceed by force account or by contract.

COLUMBUS, OHIO, September 25, 1930.

HON. DON W. MYERS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Acknowledgment is made of a communication from your office which reads:

“From the facts hereinafter stated it seems that it has become necessary for this office to ask the opinion of your office upon the following question:

Can the trustees of a township ‘construct’, or ‘widen and reconstruct’, unimproved dirt roads of the secondary or county system of highways in their respective township, and, if there are no such roads in such township, such township roads as such trustees may designate, provided such improvement shall be under the supervision and direction of the county surveyor as provided in Sec. 3298-15b, G. C., by ‘force account’ or ‘force work’, in a case where such improvement will cost in excess of \$500.00, and provided further that all the other conditions contained in Sec. 5541-8, G. C., in reference to such improvement, except that of entering into a contract for such work, be complied with?

Authorities of two townships of this county have expressed the belief that their proper roads can be constructed by using a part of their respective shares of the gasoline tax heretofore received by them by virtue of Section 5541-8, G. C., to better advantage by ‘force work’ than by contract, if they can legally so do. They also state, that, if such work can be so done, worthy men in their townships, now out of work, may be given employment,—and thus, in some instances at least may relieve the township of aiding one or more families wherein the head and support thereof is willing to work. If such work may be so done, such men can be given employment immediately upon the completion of the county surveyor’s preliminary plans; if such work can be done only by contract time will be lost in letting the contract, and then the contractor will likely employ his chosen laborers who may or may not be from the class of persons above mentioned.

In submitting this question to you I am mindful of the further fact that other townships of this county may come to this office with the same line of persuasion. I am not unmindful of the further fact that, excepting those which have been absorbed by large cities, there are perhaps more than thirteen hundred townships of the state in any of which a similar situation may exist.

Neither am I unmindful of the able opinion, No. 1358, and the holding therein of Hon. Edward C. Turner, as Attorney General of Ohio, reported in Vol. 4 (1927) at page 2466, O. A. G., construing section of the General Code existing prior to the enactment of the new gasoline statutes, Sections 5541-1 and 5541-8, G. C., inclusive, the syllabus of which is:

‘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, G. C.'

From a casual study of said opinion and the statutes therein cited and quoted, this office was at first inclined to the belief that township trustees were not authorized to proceed to use the money derived under Sections 5541-1, 5541-8, by virtue of 'force account'. Mr. H. T. Manner, a State Examiner, then working in this county, expressed a similar belief. Closer study of said opinion and statutes and of the new gasoline statutes above referred to, has raised great doubt as to the correctness of our first conclusion.

The opinion of Attorney General, Mr. Turner, above referred to, has reference, it should be noted, to Section 3393, General Code, providing that, 'in the *maintenance and repair* of road the township trustees may proceed either by contract or force account.'

Said opinion was rendered December 14, 1927, at which time, under Section 5541-8, G. C., as it then provided, township trustees received no portion of gasoline tax and neither were they authorized or empowered to 'construct, widen and reconstruct' any roads or highways in manner as now provided by said Section 5541-8, G. C., as amended and effective April 18, 1929 (Vol. 113, Ohio Laws, pages 71-72-73).

It seems well to note, also, that said opinion has reference to road work to be done 'under the direction of a member of the board of township trustees or of the township highway superintendent', as provided in Section 3373, G. C., and all money so expended must be paid out of 'the township road fund'; while Section 5541-8, G. C., as amended, provides, that all such improvement of roads shall be under the supervision and direction of the county surveyor as provided in Section 3298-15K, G. C., and that 'all disbursement of such funds shall be upon vouchers of the township trustees approved by the county surveyor'. 'Such funds' has reference only to the portion of the money arising from a tax on gasoline under the amended statutes, belonging to a township. By Section 5541-7, G. C., as amended and effective April 18, 1929, money derived from the gasoline tax is divided into two funds:

1. The rotary fund.
2. The highway construction fund.

By provisions of Section 5541-8, G. C., ten per cent of the highway construction fund shall be appropriated for and divided . . . among the several townships, and such portion of such highway construction fund, 'shall be used by the *township trustees* for the purpose of constructing, widening and reconstructing unimproved dirt roads' therein defined.

Said Section 5541-8, G. C., further provides:

'that no part of said funds shall be used for any purpose except

- (1) to pay in whole or part the contract price of any such work done by contract, or
- (2) to pay the cost of labor in constructing, widening and reconstructing such roads and highways and the costs of materials forming a part of said improvement.'

Our search for a legal definition of the phrase 'force account' or 'force work', except the quoted language following the figure (2) above, has not been fruitful. The Legislature, in enacting the new gasoline law, is presumed to have legislated with full knowledge and in the light of all statutory provisions touching the subject matter of the act.

I have wondered whether or not it, by the use of the language above quoted, authorized township trustees to use of their portion of said funds only

in 'constructing, widening and reconstructing roads', etc.; and empowered such trustees so to proceed either by contract or by force account work, as the phrase is defined in the above quoted language following the figure (2), provided the trustees comply with all other provisions of said statute pertaining to such work done by trustees, as to the choice of the road or roads to be improved, and as to the duties and powers of the county surveyor therein contained."

In view of the complete discussion of the subject contained in your communication, a prolonged discussion of the question is unnecessary for the purposes of this opinion.

As pointed out in your communication, the opinion of my predecessor, found in the Opinions of the Attorney General for the year 1927, page 2466, construed the law prior to the amendment of the gasoline tax by the 88th General Assembly. The opinion referred to undoubtedly was correct in view of the provisions of the law in effect at the time of the rendition of the opinion. However, Section 5541-8, General Code, as amended by the 88th General Assembly, provides, among other things, that ten per cent of the highway construction fund shall be divided in equal proportions among the several townships. Said section, with reference to the use of said fund so distributed to the townships, in so far as your question is concerned, provides:

" * * * than no part of said funds shall be used for any purpose except to pay in whole or part the contract price of any such work done by contract or to pay the cost of labor in constructing, widening and reconstructing such roads and highways and the cost of materials forming a part of said improvement; and provided further that all such improvement of roads shall be under the supervision and direction of the county surveyor as provided in Section 3298-15k of the General Code; and provided further that no obligation against such funds shall be incurred unless and until plans and specifications for such improvement, approved by the county surveyor, shall be on file in the office of the township clerk; and provided further that all disbursements of such funds shall be upon vouchers of the township trustees approved by the county surveyor. The trustees of any township are hereby authorized at their discretion to pass a resolution permitting the county commissioners to expend such township's share of said funds, or any portion thereof, for the improvement of such roads within said township as may be designated in said resolution."

From the above it will be seen that Section 5541-8, General Code, as last amended, in itself fairly clearly answers the question which you present. In other words, the section expressly provides that no part shall be used for any of the purposes mentioned in the section except to pay in whole or in part the contract price, or to pay the cost of labor in constructing, widening and reconstructing such roads and highways and the cost of materials forming a part of said improvement. The alternative is very clearly expressed and I feel it unnecessary to seek further legislative authority for township road construction work without contract in view of the language employed.

While the definition of what constitutes "force account" is not definitely set forth, as a matter of custom the term is generally well understood. When force account work is to be permitted the Legislature authorizes the use of funds for the purpose of paying for labor and material by the subdivision rather than awarding a contract. Of course, it is probable that if a section simply authorized the purchase

of materials it could be argued that such materials could be purchased in pursuance of competitive bidding. However, no such construction can be justified in the case under consideration for the reason that the statute itself recognizes two different methods of procedure. One is by contract and the other is by paying for labor and material. While the section does not expressly mention force account, no other logical conclusion can be reached in view of the language used.

In view of the foregoing, it is my opinion that township trustees, in expending the monies arising under Section 5541-8 of the General Code in constructing, widening and reconstructing the highways described in said section, may proceed by force account or by contract.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2371.

APPROVAL, ABSTRACT OF TITLE TO LAND OF EVE A. BUTLER, IN
THE CITY OF COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, September 25, 1930.

HON. CARL E. STEEB, *Business Manager, Ohio State University, Columbus, Ohio.*

DEAR SIR:—There has been submitted for my examination and approval an abstract of title, warranty deed and encumbrance estimate No. 1143, relating to a certain parcel of land situated in the city of Columbus, Franklin County, Ohio, and being more particularly described as Lot No. 37 in R. P. Woodruff's subdivision of the south half of the south half of the south half of lot No. 278 of R. P. Woodruff's Agricultural College Addition to said city, as said lot is numbered and delineated upon the recorded plat thereof, of record in Plat Book 3, page 421, Recorder's Office, Franklin County, Ohio.

Upon examination of the abstract of title with respect to said property, which is owned of record by one Eve A. Butler, I find that said Eve A. Butler has a good and indefeasible title to said property, subject only to the undetermined taxes for the year 1930, which, of course, are a lien.

Upon examination of the warranty deed submitted, I find that the same has been properly executed and acknowledged by said Eve A. Butler, who is a widow, and that as to form said deed is sufficient to convey said property to the State of Ohio by fee simple title, free and clear of all encumbrances except such taxes as may be due and payable on and after the December, 1930, payment.

Encumbrance estimate No. 1143, which has been likewise examined by me, has been properly executed and approved and the same shows that there are sufficient balances in the proper appropriation account to pay the purchase price of said property, which is the sum of \$325.00. Said encumbrance estimate further carries a recital that the money necessary to pay the purchase price of this property has been released for this purpose by the controlling board.

I am herewith returning to you, with my approval, said abstract of title, warranty deed and encumbrance estimate.

Respectfully,
GILBERT BETTMAN,
Attorney General.