

Note from the Attorney General's Office:

1920 Op. Att'y Gen. No. 20-1454 was overruled
by 1980 Op. Att'y Gen. No. 80-040.

1454.

TOWNSHIP TRUSTEES—DUTY OF CUTTING BRUSH, WEEDS, ETC.,
ALONG STATE, COUNTY AND TOWNSHIP HIGHWAYS—SECTION
7146 G. C. (108 O. L. 232) DOES NOT REPEAL SECTION 3374-2 G. C. (107
O. L. 94) BY IMPLICATION.

Section 7146 G. C. (108 O. L. 232) does not repeal section 3374-2 G. C. (107 O. L. 94) by implication; and notwithstanding the enactment of the former section, township trustees remain under the duty of cutting brush, weeds, etc., along state and county highways, as well as along township highways.

COLUMBUS, OHIO, July 23, 1920

HON. J. H. FULTZ, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—You have recently submitted the following:

“Section 7146 G. C. was repealed by senate bill No 125, 106 O. L. 574, then re-enacted by house bill No. 218, 108 O. L. 232, which provides for the destruction of weeds, etc., by township trustees, street commissioners and road superintendents ‘being within the limits of a county or township road or turnpike * * * within their jurisdiction’

By volume 107 O. L. 69, particularly pages 73 to 95, inclusive, the legislature providing for duties of township trustees at page 94, section 3374-1 requires trustees to clear all roads from obstructions by snow, then follows 3371-2 requiring trustees to cut weeds and brush growing along public highways.

Does the re-enactment of section 7146 relieve township trustees of the duty of cutting brush, weeds, vines, etc., along county and state roads?”

Said section 7146 as found in 108 O. L. part I, page 232, is part of “An act to re enact sections 7146, 7150, 7151, 7152 and 7153 of the General Code relating to the destruction of” certain specified kinds of thistles and weeds. Said section 7146 as thus “re enacted” reads:

“Township trustees or street commissioners having control of and being charged with the duty of repairing macadamized graveled or improved roads and turnpikes and road superintendents of county and township roads and the street commissioners of each city or village between the first and twentieth days of June, and between the first and twentieth days of August and if necessary between the first and twentieth days of September of each year shall destroy or cause it to be done. all brush, briars, burrs, vines, Russian and Canadian or common thistles, or other noxious weeds, growing or being within the limits of a county or township road, turnpike, improved, graveled or macadamized road, street or alley within their jurisdiction.”

Said sections 7150 to 7153 as so re-enacted are to the effect that upon written information that

“Canada or Russian thistles, wild parsnip, wild carrot, oxeye daisy or wild mustard are growing on lands in a township, and are about to spread or mature seeds,”

then the township trustees may proceed to notify the owner of such lands to destroy

such noxious weeds, and if the owner does not do so, the trustees may have the weeds cut and expense of cutting charged to the owner, etc.

Said sections 7146 and 7150 to 7153 appear in their earlier form in Page & Adams General Code (1912), and said earlier form was repealed by the so-called Cass act (106 O. L. 574, 665.) as a substitute for said section 7146, the Cass act provided section 7195, which read (106 O. L. 616):

"All brush, briars, burrs, vines, Russian or Canadian or common thistles or other noxious weeds growing along the public highways shall be cut between the first and twentieth days of June and the first and twentieth days of August of each year and if required by the county highway superintendent between the first and twentieth days of September of each year. This work shall be done by the township highway superintendents in their respective districts who shall employ the necessary labor to carry out the provisions of this section. All expenses incurred shall when approved by the township trustees, be paid from the township road fund by the township treasurer upon the warrant of the township clerk. The county highway superintendent shall enforce the provisions of this section."

Said section 7195 in its form as just quoted was in turn repealed by White-Mulcahy act (107 O. L. 69; 142), and as a substitute section 3374-2 was enacted (107 O. L. 94), reading:

"All brush, briars, burrs, vines, Russian or Canadian, or common thistles or other noxious weeds growing along the public highway shall be cut between the first and twentieth days of June and the first and twentieth days of August of each year, and if necessary between the first and twentieth days of September of each year. This work shall be done by the township trustees in their respective townships, or by the township highway superintendent, if one be appointed, who may employ the necessary labor to carry out the provisions of this section. All expenses incurred shall, when approved by the township trustees, be paid from the township road fund by the township treasurer upon the warrant of the township clerk."

However, no substitute appears to have been provided in either the Cass act or the White-Mulcahy act for sections 7150 to 7153. These last named sections, as has been seen, do not relate to noxious weeds on highways, but to weeds on private lands. Hence the fact seems to be that the General Assembly when repealing said sections with the enactment of the Cass act, did so by oversight. Then, when endeavoring to repair the oversight through the re-enactment in 108 O. L. 232, the general Assembly, as it seems, unintentionally re-enacted section 7146 along with said sections 7150 to 7153. This last statement is of course based principally on the fact that the situation dealt with in section 7146 had already been even more fully provided for in above quoted section 3374-2; but the statement finds further strong support in the fact that the title to the act in describing noxious weeds uses *verbatim* the language appearing in section 7150 instead of employing the much broader descriptive terms appearing in section 7146.

The fact remains, however, that both sections 3374-2 as appearing 107 O. L. and 7146 as appearing 108 O. L. are now in full force and effect so far as their letter is concerned; and since repeals by implication are not favored, it remains to reconcile the provisions of the two sections if that may fairly be done.

Certain of the rules of construction laid down by our supreme court in the matter of repeals by implication may be here noted.

In *Goff vs. Gates, et al., Commissioners*, 87 O. S. 142, the first syllabus is:

"1. An act of the legislature that fails to repeal in terms an existing statute on the same subject matter must be held to repeal the former statute by implication if the later act is in direct conflict with the former, or if the subsequent act revises the whole subject matter of the former act and is evidently intended as a substitute for it."

In *In Re Hesse*. 93 O. S. 230, the court at page 234 of the opinion says:

"* * * where two affirmative statutes exist, one is not to be construed to repeal the other by implication unless they can be reconciled by no mode of interpretation."

On the other hand

"Although repeals by implication are not favored, earlier legislation must give way when it is necessary to carry out the later expression of the legislative will." (State ex rel. vs. Kennedy, 90 O. S. 75; 87—citing earlier case).

No outstanding inconsistency appears between the two statutes so far as concerns cutting of brush and weeds on township roads, definition of which roads may be found in section 7464 G. C. As to state roads: It is plain that section 7146 makes no provision for cutting of weeds and brush, for the officer chargeable with their maintenance is the state highway commissioner (sections 1224 and 7464) and he is nowhere mentioned in section 7146. As to county roads: While in a sense by virtue of section 7184 the county surveyor is superintendent of county roads in that he has general charge of

"the construction, reconstruction, improvement, maintenance and repair of all bridges and highways within his county under the jurisdiction of the county commissioners,"

yet it is not believed that county surveyors can be said to be "road superintendents of county * * * roads" as those words are used in section 7146. For one thing, at the same session at which said section 7184 was amended into its present form (107 O. L. 111) and as part of the same act, section 6956-4 was passed (107 O. L. 142) reading:

"The words 'county highway superintendent' found in any section of the General Code of Ohio not herein amended or repealed shall after the taking effect of this act be read 'county surveyor.'"

Again, in the 1919 amendments to the road laws through the so-called Busby-Fouts act (108 O. L. 478), a new section was enacted, known as section 2788-1, making it the mandatory duty of the county surveyor to designate one of his deputies as "county maintenance engineer," who, acting under the general direction of the surveyor is to have charge of all road maintenance and repair work carried forward under the supervision of the county surveyor. The surveyor may also, if authorized by county commissioners, appoint maintenance supervisors, and establish a petrol or gang system of maintenance, with such supervisors in immediate charge. It thus appears that instead of having any such officer as "road superintendent of county roads," we now have a "county maintenance engineer" charged with maintenance and repair work; while on the other hand, the broad provisions of section 7184 above quoted cast upon the county surveyor much broader duties than may properly be described as those

of "road superintendent." Finally, section 3374-2 above quoted, makes specific provision that expense of cutting brush and weeds shall be paid from township road fund, thus providing for all highways; while said section 7146 makes no provision authorizing payment of cost out of county road funds.

Upon the whole, therefore, it may well be said that even if it be admitted that upon its face section 7146 "revises the whole subject matter" of section 3374-2 and is "intended as a substitute for it," yet from a practical standpoint it fails of any such effect. We are thus left to conclude that section 3374-2 is unrepealed in any particular, and that insofar as section 7146 has any effect it adds to the provisions of the former section in that it seeks to charge street commissioners with the duty of cutting weeds and brush on certain types of roads.

You are therefore advised in specific answer to your question that the re-enactment of section 7146 does not relieve township trustees of the duty of cutting brush, weeds etc., along county and state highways.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1455.

HIGHWAY DEPARTMENT—APPROPRIATIONS OF \$2,400 EACH FOR "TESTING ENGINEER" AND "GRADE III ENGINEER"—SECTION 1182 G. C. ACTS AS LIMITATION IN FIXING SALARY OF ONE OF ENGINEERS IN EXCESS OF \$2,400.

Appropriations of \$2,400 each for "Testing Engineer" and "Grade III Engineer, Highway Department, as appearing respectively in house bill No. 535 (108 O. L. 733, 849) and house bill No. 762 (108 O. L. 1321, 1327), cannot in view of the provisions of section 1182 G. C. (108 O. L. 480, 1332) be so apportioned by the state highway commissioner as to fix the salary of one of the engineers in excess of \$2,400. The controlling board is without power in the premises.

COLUMBUS, OHIO, July 23, 1920.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have recently submitted through Mr. H. E. McCollister, auditor of disbursements, highway department, the following:

"The state highway commissioner has presented a pay roll to this department for the first half of July, which carries 18 grade 3 engineers at \$2,750.00 each per year, and one grade 3 engineer at \$1,920.00 per year, under the authority of house bill No. 772, passed February 4, 1920, which amends section 1182 of the General Code to read in part as follows:

"The state highway commissioner shall also within the limits of the appropriations made by the General Assembly, appoint as many division engineers as may become necessary to carry out the provisions of this chapter. Each of said division engineers shall be paid a salary which shall be fixed by the state highway commissioner.

The civil service rules do not apply to salaries of division engineers as fixed by the state highway commissioner (see section 4 of S. B. 258 passed Feb. 4, 1920).

House bill 536, O. L. 108, p. 849, appropriates \$46,750.00 for 17 grade