

3713.

LIVE STOCK—KILLED BY DOG—TOWNSHIP TRUSTEES MAY NOT SUE OWNER OF DOG FOR DAMAGES, WHERE DOG WAS REGISTERED AND SUBSEQUENTLY DESTROYED—COUNTY COMMISSIONERS MUST PAY CLAIMS FOR DAMAGE UNDER SECTION 5840, GENERAL CODE.

SYLLABUS:

1. *Township trustees may not sue the owner of a dog for damages to horses, sheep, cattle, swine, mules or goats caused by such dog when the dog was registered and was destroyed within forty-eight hours after discovery that the loss was so caused.*
2. *Upon compliance with the terms of section 5840, General Code, county commissioners are required to pay a claim for loss caused by a dog to horses, sheep, cattle, swine, mules or goats.*

COLUMBUS, OHIO, October 30, 1931.

HON. DAVID CREGER, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—Your recent request for my opinion reads:

"I should like to have your opinion in regard to the interpretation of Sections 5838 and 5841 of the General Code of Ohio.

The Board of Trustees of Eden Township, Wyandot County, Ohio, have under consideration at the present time a sheep claim. Sheep were killed in a certain neighborhood of this Township and the dog was traced to the home of a neighbor and was killed by the Dog Warden within forty-eight hours after the damage was discovered. The dog had been at large during the previous night. Under Section 5838 the owner of the dog would be liable. Under Section 5841 he would not be liable if the dog was killed within forty-eight hours.

1. Would the fact that the dog was at large during the night make the owner liable under section 5841?
2. Should the County Commissioners pay the claim or should the owner of the sheep look to the owner of the dog for damages?
3. Section 5841 makes it the duty of the Trustees to bring this action. Is this matter left entirely to their judgment?"

A subsequent communication from you discloses the fact that the dog in question was registered.

Section 5838, General Code, to which you refer reads as follows:

"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."

It is to be noted that the last sentence of the above section imposes a liability

upon the owner of the dog for damage done to a person or his property. *Von Rohr v. Silverglade*, 107 O. S., 75.

Section 5840, General Code, sets forth the procedure to be followed by 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 upon his premises, in having a claim for such damage to his property paid by the county, by notifying the county commissioners of such injury and presenting the claim to the township trustees for allowance.

Section 5841, General Code, reads as follows:

“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 the 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.”

It should be noted that the last sentence of the above section specifically sets forth that the township trustees shall bring suit against the owner of the dog unless it is shown that the dog was registered and that it was destroyed within forty-eight hours after the discovery of the fact that the loss was so caused.

Since you state in your communication that the dog was registered and was destroyed within forty-eight hours after the loss was discovered, no suit may be brought against the owner of the dog under the section above quoted. The fact that the dog was at large during the night previous to the discovery of such loss is merely evidence that the loss was so caused, and would not affect the non-liability of the owner of such dog under the circumstances here in question.

Coming now to your second inquiry, in the event of a compliance with the provisions of Section 5841, General Code, it follows that the county commissioners may allow such claim. It should be noted that a suit instituted under Section 5841, General Code, is to reimburse the county for money paid under such section while the right of recovery given by the terms of Section 5838, General Code, is to the person damaged.

I believe that the answer to your first inquiry is dispositive of your third question.

In view of the foregoing, and in specific answer to your inquiries, I am of the opinion:

1. Township trustees may not sue the owner of a dog for damages to horses, sheep, cattle, swine, mules or goats caused by such dog when the dog was registered and was destroyed within forty-eight hours after discovery that the loss was so caused.

2. Upon compliance with the terms of section 5840, General Code, county

commissioners are required to pay a claim for loss caused by a dog to horses, sheep, cattle, swine, mules or goats.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3714.

LEGAL COUNSEL—COMMON PLEAS COURT MAY AUTHORIZE EMPLOYMENT OF OUTSIDE COUNSEL TO ASSIST PROSECUTING ATTORNEY—AUTHORITY TO INCLUDE COST OF ENGINEERING AND STENOGRAPHIC SERVICES—LIMITATIONS.

SYLLABUS:

1. *The Common Pleas Court has the discretion, under the terms of section 2412, General Code, to authorize the employment of legal counsel to assist the prosecuting attorney, on application therefor by the prosecuting attorney and the board of county commissioners, whenever legal services are required in any matter in which the expenditure of county funds is or may be involved.*

2. *An assistant prosecuting attorney, appointed under section 2412, General Code, may include the cost of engineering services, if other than that furnished by the county surveyor's office is required, as a reasonable expense of his employment, when the employment of such engineering services is not an abuse of discretion and if for the efficient conduct of the legal proceeding for which he was appointed.*

3. *An assistant prosecuting attorney, appointed under section 2412, may include the cost of stenographic service, if other than that furnished by the prosecuting attorney's office is required, as a reasonable expense of this employment, when the employment of such services is not an abuse of discretion and is for the efficient conduct of the legal proceeding for which he was appointed.*

COLUMBUS, OHIO, October 30, 1931.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge the receipt of your recent request for my opinion, which reads:

“In a certain county in this state the commissioners of the county made an appropriation of \$750.00 to pay an assistant to the prosecuting attorney to contest before the Public Utilities Commission an increase in telephone rates in that county. An attorney was employed, his bill presented for \$300.00, and he received payment. This payment was made to the attorney on December 6, 1928, and on December 31, 1928, the Common Pleas Court made an entry on its journal, of which the following is a copy:

‘It appearing to the court on request by the prosecuting attorney for an assistant in representing the taxpayers of M. county, Ohio, before the Public Utilities Commission of Ohio, at Columbus, in protesting the increase of rates made by The O. C. Telephone Corporation in M.