

to share the fees or charges made by any physician or surgeon with any other physician or surgeon, or with any other person.

Upon notice and hearing, the board, by a vote of not less than five members, may revoke or suspend a certificate for like cause or causes."

If any of the physicians which the _____ Academy of Medicine classes as unethical are indulging in practice or acts which violate the provisions of Section 1275, supra, the proper procedure would be to call the alleged violations to the attention of the State Medical Board for proper action thereon by said board. If the medical board should, pursuant to proper proceedings, revoke or suspend the certificate of a physician classes as unethical by the _____ Academy of Medicine, the State Board of Health having adopted a regulation limiting laboratory service to licensed physicians and surgeons could properly refuse to furnish laboratory service to the persons whose certificate had been revoked or suspended, but such refusal would have to be based on the fact that the persons did not come within the class of persons (physicians and surgeons licensed to practice in Ohio) to whom the facilities and service of the laboratory are available rather than because of any unethical practice indulged in by such physicians and surgeons.

Clearly the State Board of Health could not accept the opinion of any academy of medicine or any other organized group of medical practitioners as to the ethical or unethical standards of any physician.

For the reasons above stated, I am of the opinion that the State Board of Health, having under authority of Section 1241, General Code, the power to establish and maintain a laboratory for the diagnosis of contagious and infectious diseases, has as a necessary incident to such power the right to make and enforce reasonable rules and regulations conducive to the efficient operation of such laboratory. That in making such rules and regulations the board may select a class or classes of persons, such as physicians and surgeons licensed to practice in Ohio, to whom the service of such laboratory shall be available on the theory that only such persons understand the handling of sterile instruments and media and the proper taking and preparation of specimens and cultures for examination. I am further of the opinion that said board may not refuse to furnish laboratory service to certain physicians and surgeons because of some practice or acts indulged in by such physicians and surgeons, which practices or acts are unethical as measured by the standards of the State Board of Health or any academy of medicine, unless such practice or acts are such as prevent the laboratory from accomplishing the objects of its creation.

Respectfully,

EDWARD C. TURNER,

Attorney General.

560.

COUNTY COMMISSIONERS—COMPENSATION FOR LIVE STOCK INJURED OR KILLED BY DOG—SECTIONS 5840, ET SEQ., CONSTRUED.

SYLLABUS:

1. *Under the provisions of Sections 5840, et seq., of the General Code, an owner of live stock injured or killed by a dog belonging to such owner is not entitled to receive compensation from the county funds for the injury to such live stock.*

2. *Where the owner of live stock injured or killed by a dog not belonging to such owner, presents a claim to the township trustees who hear such claim, make an allowance*

thereof and transmit their findings with the testimony to the board of county commissioners, whether or not the board of county commissioners allow such claim in whole or in part rests solely within the discretion of such board, whose action in the premises is subject to review by the Probate Court on appeal.

COLUMBUS, OHIO, June 2, 1927.

HON. W. M. MCKENZIE, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, which reads as follows:

“Statement of facts involving the question of rabies. Mr. A., of this county, was the owner of a registered dog, which developed rabies. The dog bit three cattle and they developed rabies. These cattle were examined by a local veterinary who suggested that the owner kill them at once. This he did and now he wants the county commissioners to pay for them.

Is there any liability on the part of the county commissioners to pay for the stock? If so, is it mandatory?”

You further advise me that Mr. A. owned the cattle in question. The specific questions that you present are:

1. Is it the duty of a board of county commissioners to pay the owner for certain cattle, which were bitten by a mad dog belonging to the owner of the cattle, which cattle developed rabies and were killed at the suggestion of a local veterinarian.
2. If it be the board's duty so to do, is such duty mandatory?

Your attention is directed to sections 5840 to 5850, both inclusive, of the General Code, relating to loss of or injury to animals caused by dogs.

Section 5840, so far as pertinent to your inquiry, provides:

“Any owner of * * * cattle * * * which have been injured or killed by a dog not belonging to him or harbored on his premises, may present to the township trustees of the township in which such loss or injury occurred, at a regular meeting of said trustees, within six months after such occurrence, a detailed statement of such loss or injury done, supported by his affidavit that it is a true account of such loss or injury. * * *”

Section 5841, General Code, reads as follows:

“Before any claim shall be allowed by the trustees to the owner of such * * * cattle, * * * 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.”

Section 5842 permits the township trustees to receive other information to enable them to determine the value of the cattle so killed or injured.

Section 5843 relates to the requirements relative to a claim for death or injury to registered stock.

Section 5844 provides:

"The township trustees shall hear such claims in the order of their filing and may allow them in full or such parts thereof as the testimony shows to be just. They shall endorse the amount allowed on each claim and transmit their findings with the testimony so taken and the fees due witnesses in each case over their official signatures, to the county commissioners in care of the county auditor, who shall enter each claim so reported upon a book to be kept for that purpose in the order of their receipt."

Section 5845 relates to witness fees and mileage and authorizes the filing of such claim by a tenant or employe of the owner.

Section 5846 provides in part as follows:

"The county commissioners at the next regular meeting after such claims have been submitted as provided in the preceding sections shall examine same and may hear additional testimony or receive additional affidavits in regard thereto and *may allow the amount* previously determined by the township trustees *or a part thereof, or any amount in addition thereto* as they may find to be just to be paid out of the fund created by the registration of dogs and dog kennels and known as the dog and kennel fund. * * *" (Italics the writer's.)

Section 5847 requires the county commissioners to furnish blank forms for filing claims.

Section 5848 provides in part as follows:

"An owner of * * * cattle * * * so killed or injured, not being satisfied with a final allowance made by the commissioners as provided in section fifty-eight hundred and forty-six, within thirty days thereafter may take an appeal from such finding to the probate court of the county by filing, as party plaintiff, a petition in such court setting out the facts in the case as contended for by the owner. Proceedings shall be had thereon as provided by law in civil cases and the county commissioners shall be made party defendant."

Section 5849 prescribes the procedure of such an appeal in the probate court.

Section 5850 restricts the amount which may be allowed for a head of registered sheep.

Thus it will be seen that sections 5840 and 5841, supra, respectively provide two classes of claims for loss or injury to live stock which may be presented to the township trustees.

1. The claim of 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 on his premises.*"

2. The claim of any owner of horses, sheep, cattle, swine, mules and goats which have been injured or killed by (a) a dog *not "kept or harbored on the owner's premises,"* or (b) a dog, which if *kept or harbored* on the owner's

premises, was duly registered and was "destroyed within forty-eight hours from the time of the discovery of the fact that the injury was so caused."

The question as to whether or not an owner of stock, which was killed after having been bitten by a dog because of the belief that such stock was afflicted with rabies, is entitled to damages under the sections of the code above enumerated was passed upon by this department in an opinion by my predecessor in office, reported in Opinions, Attorney General, 1920, Vol. II, page 918, The syllabus of this opinion is as follows:

"Whether or not the owner of sheep which were killed by reason of the belief that they were afflicted with rabies after having been bitten by a dog, is entitled to damages rests in the discretion of the township trustees and the county commissioners, under the provisions of sections 5840-5846 of the General Code."

In the opinion it was said:

"In an opinion of this department found in the Annual Report of the Attorney General for 1912, Vol. II, page 1311, it was held:

"The allowance of damages for injuries to sheep by a dog, under sections 5840-5846, General Code, rests in the discretion of the township trustees and county commissioners, under the procedure therein provided, and this discretion extends to damage caused by worry or fright to said sheep, though there exists no visible physical disorder."

While this opinion discusses the law as it existed prior to the amendment in its present form, the change in the law is not material in connection with your question.

From the foregoing the conclusion must be that the township trustees and county commissioners are the sole judges as to whether an injury has been sustained, and if so as to the amount of the claim that should be allowed.

Whether or not the circumstances were such as to require the killing of the sheep to which you refer must be determined by the trustees and the commissioners from the evidence before them. Of course, the best method would have been to have had an analysis of the dog's head to determine whether the dog was afflicted with rabies, yet I know of no law that would compel this procedure."

It remains to be determined then, if the fact that the owner of the cattle was also the owner of the dog prevents recovery.

An examination of the legislative history of said sections shows that originally these statutes were confined solely to claims arising from injury to or loss of sheep and appeared as Section 4215, Revised Statutes, which section was passed May 5, 1877 (74 O. L. 177), and read in part as follows:

"Any person damaged by the killing or injury of sheep may present a detailed account of the injury done, with the damages claimed therefor, * * * to the commissioners of the county wherein such sheep were killed or injured * * * and also make it appear that *such injury was not caused, in whole or in part, by any animal kept or harbored by him* * * *; the commissioners shall hear such accounts * * * and may allow the same, or such parts thereof as they may deem right. * * *'" (Italics the writer's.)

It will be noted that the owner sustaining such a loss presented his claim to the county commissioners and if it appeared that the injury was not caused by an animal

kept or harbored by such owner the county commissioners, in their discretion, might allow the same or a part thereof or reject it in its entirety.

On March 22, 1892 (89 O. L. 129), this section was amended to read in part as follows:

“Any person damaged by the killing or injury of sheep by dog or dogs may present a detailed account of the injury done, with the damages claimed therefor * * * at any regular meeting of the trustees of the township where the damage or injury occurred * * * and shall make it appear to the satisfaction of the trustees * * * that such injury was not caused in whole or in part *by any animal kept or harbored by him, or by any employe or tenant of the owner upon said owner's premises.* * * *. The trustees shall hear such claims * * * and may allow the same or such parts thereof as they may deem right * * * and if satisfied that such claim is correct and just, they shall * * * transmit the same * * * to the county commissioners * * * (who) shall * * * examine the same and if found in whole or in part correct and just, order the payment thereof, or such parts as they may have found correct and just. * * *” (Italics the writer's.)

From the date of the above enactment up to April 30, 1908, this section was amended by six acts of various legislatures but the wording of the act of March 22, 1892, above quoted in part, was not changed in any material respect.

On April 30, 1908 (99 O. L. 250), such section was again amended to read as follows:

“Any person damaged by the killing or injuring of sheep by dog or dogs may present a detailed account of the injury done, with the damages claimed therefor * * * at any regular meeting of the trustees of the township where the damage or injury occurred * * *, and the person owning said sheep or having charge of them shall also make it appear that such injury was not caused in whole or in part by any animal *kept or harbored by him, or by employe or tenant of the owner upon such owner's premises* * * *. The trustees shall hear such claims * * * and may allow the same or such parts thereof as the testimony shows to be right and just * * * and transmit the same * * * to the county commissioners * * *. The county commissioners shall * * * examine the same and may hear any additional testimony * * * and may allow the amount determined by the township trustees or any part thereof or may allow any amount in addition to the allowance of the trustees that the commissioners find to be correct and just. * * * Any owner of sheep killed or injured who is not satisfied with a final allowance made by the commissioners * * * may * * * take an appeal to the probate court * * * and the county commissioners shall be made party defendant. * * *” (Italics the writer's.)

The law was again amended by the legislature in 1910 when it adopted the work of the codifying commission, which commission divided Section 4215, Revised Statutes, into two sections and numbered them General Code Sections 5840 and 5841. In that action the portion of the section which was enacted into Section 5840, General Code, did not limit the persons to whom compensation for damage done might be paid. Such limitation was found in Section 5841, as re-enacted at that time, as follows:

“The person owning such sheep or having charge thereof must make it appear that such injury was not caused in whole or in part by an animal

*kept or harbored by him or by an employe or a tenant of the owner upon such owner's premises. * * ** (Italics the writer's.)

By an act passed March 21, 1917 (107 O. L. 534), Section 5840 was enacted to read as it now appears in the General Code, and Section 5841 was enacted to read as follows:

"The owner of such killed or injured horses, sheep, cattle, swine, mules and goats, or the person having charge thereof, must make it clear to the trustees that the loss or injury complained of was not caused in whole or in part *by a dog or dogs kept or harbored upon the owner's premises. * * **" (Italics the writer's:)

This section as above quoted, together with Section 5840; were construed in a former opinion of this office, which appears in Vol. II, Opinions, Attorney General, 1918, page 1629, the first paragraph of the syllabus of which reads:

"Under the law a person is not entitled to recover either from the township trustees or the county commissioners, for an injury to a horse bitten by a dog, when the owner of the horse is also the owner of the dog."

On May 9, 1919 (108 O. L., Part I, 534), Section 5841, supra, was again amended to read as it now appears in the General Code.

From this resume of the legislative history of these sections of the code it will be seen that there can be no question whatever but that prior to the enactment of Section 5841 in its present form (108 O. L., Part I, 534) neither the *owner* of a dog, nor one who kept or harbored a dog on his premises, was entitled to have a claim allowed for injury to stock done by such dog. In the amendment of March 21, 1917 (107 O. L. 534), when Section 5840 was enacted to read as it now reads, the right of owners of stock injured by dogs to present claims was limited to owners whose stock was injured or killed by a dog "*not belonging to him* or harbored on his premises." This section has never been expressly changed, and the sole question presented is whether or not the amendment of Section 5841 on May 9, 1919 (108 O. L. Part I, 534), repealed by implication that part of Section 5840, which permits an owner of stock injured or killed by a dog "*not belonging to him*" to present a claim for damages.

In the construction and interpretation of statutes, it is a cardinal rule that repeals by implication are not favored, and that before it can be said that the one statute impliedly repeals another, either the two statutes must not only be inconsistent, but *irreconcilable*, or the intent of the legislature to repeal must be so clearly expressed as to leave no room for doubt. The law is thus stated in 36 Cyc. 1071:

"But the repeal of statutes by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. It follows that where the intention not to repeal is apparent or manifest from an act there is no room for repeal by implication, or the application of rules regarding implied repeal."

In *Buckingham, et al. vs. Railroad Co.*, 10 O. S. 25, the rule is stated by Chief Justice Brinkerhoff as follows:

"Repeals by implication are not favored in law; and such repeal will not be recognized unless the repugnancy between the prior and subsequent

act of legislation be necessary and obvious, and so great that the two can not be reconciled by any fair course of reasoning."

There is of course a clear distinction between a person presenting a claim for injuries to stock caused by a dog "belonging to him" and injuries caused by a dog "harbored on his premises", or "kept or harbored on such owner's premises." In the first place, Section 5840 recognizes the distinction because it uses both phrases. Ownership of a dog is one thing, having one kept on the premises is another. A person might have a tenant or employe on his farm who owns a dog and that dog would be kept and harbored on the premises but not owned by the owner of the stock. A dog might with the permission of the owner be kept or harbored on the premises by a visitor who is there for the purpose of hunting or otherwise. Many cases might arise where a dog is kept or harbored on the premises of an owner of stock who does not own the dog. It is plain, therefore, that while Sections 5840 and 5841 are apparently inconsistent, yet they are in no wise irreconcilable.

That the legislature recognized the distinction between one who owns and one who keeps or harbors a dog is plainly apparent when the act of May 9, 1919, (108 O. L. Part II, 534), the one in which Section 5641 was last amended, is examined. Section 5652, General Code, amended in the same act, relates to a person who "owns, keeps or harbors a dog." Section 5652-11 refers to the "owner, keeper or harbored of any dog." Section 5652-14 reads "whoever, being the owner, keeper or harbored of a dog" and Section 5652-15 says "whoever owns, keeps or harbors a dog." Section 5841, *supra*, however, *amended in the same act*, as above pointed out refers only to dogs "kept or harbored" on the premises of the owner of the stock injured and omits all reference to dogs *owned by* or "*belonging to him*," this being the term used in Section 5640.

Another well settled rule of construction is that it is presumed that the legislature in passing a statute acted with full knowledge of the existing condition of the law and with reference to it. 36 Cyc. 1146. It must be said, therefore, that when Section 5841 was last amended the legislature had full knowledge of the fact that by the terms of Section 5840 a person could not recover for injuries to his live stock caused by a dog "*belonging to him*." There was no express repeal of that part of Section 5840. Section 5841 is not only not irreconcilable with Section 5840 but is not even necessarily inconsistent. As above pointed out, the last amendment of Section 5841 was accomplished in an act which in several sections thereof specifically uses the term "owner", "keeper" and "harbored" of a dog. The very fact that the legislature in certain parts of the act used all of these terms and in Section 5841 omitted the word "owner" is significant. For these reasons, it seems clear that the legislature did not intend that the owner of live stock injured by a dog belonging to such owner should be recompensed from the public funds raised from the imposition of the dog tax.

While these conclusions render unnecessary an answer to your second question, it is very apparent from a reading of Section 5846, General Code, that the board of county commissioners is not required to allow all or any part of a claim presented by a person whose stock has been killed or injured by a dog not belonging to such person. The statute provides for an examination by the board of county commissioners of the claims submitted by the township trustees and for the hearing of additional testimony or receiving additional affidavits. The fact that there is a hearing necessarily implies a discretion to be exercised by the commissioners as a result of the hearing. The terms of the statute to the effect that the commissioners "may allow the amount previously determined by the township trustees or a part thereof, or any amount in addition thereto as they may find to be just" conclusively show that the question of making any allowance is within the discretion of the board of county commissioners, which discretion is by the terms of Section 5848 subject to review by the Probate Court.

Specifically answering your questions, I am of the opinion that:

1. Under the provisions of Sections 5840, et seq., of the General Code, an owner of live stock injured or killed by a dog belonging to such owner is not entitled to receive compensation from the county funds for the injury to such live stock.

2. Where the owner of live stock injured or killed by a dog not belonging to such owner, presents a claim to the township trustees who hear such claim, make an allowance thereof and transmit their findings with the testimony to the board of county commissioners, whether or not the board of county commissioners allow such claim in whole or in part rests solely within the discretion of such board, whose action in the premises is subject to review by the Probate Court on appeal.

Respectfully,
EDWARD C. TURNER,
Attorney General.

561.

APPROVAL, NOTE OF LUHRIG SPECIAL SCHOOL DISTRICT, ATHENS COUNTY—\$864.00.

COLUMBUS, OHIO, June 2, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

562.

COUNTY COMMISSIONERS—BURIAL EXPENSES OF COUNTY CHARGES
—BURIAL EXPENSES OF INDIGENT PERSON WHO DIED IN A
DISTRICT TUBERCULOSIS HOSPITAL.

SYLLABUS:

It is the duty of the board of county commissioners to pay the burial expenses of county charges and where an indigent person, who had been supported in whole or in part by a city, was committed by the proper county officers to a District Tuberculosis Hospital where such person subsequently died, it is the duty of the county commissioners of the proper county to pay the burial expense of such person.

COLUMBUS, OHIO, June 2, 1927.

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

GENTLEMEN:—I acknowledge receipt of your letter of recent date reading as follows:

“Section 3495 General Code provides for the burial of the dead at public expense in certain instances.

An indigent person who had been supported by a city under authority of the outdoor relief laws developed tuberculosis and was committed by the county commissioners to a joint county tuberculosis hospital where he subsequently died.

Question: Is the city or county liable for the burial expense?”