2795.

CATTLE—DETERMINATION OF VALUE OF CATTLE IN TUBERCULIN TESTS—NO AUTHORITY TO AGREE TO LIMIT VALUE BEFORE APPRAISEMENT.

SYLLABUS:

The State Board of Agriculture is without authority to agree with owners of infected cattle that the value thereof shall be determined in accordance with its rules providing certain maximum amounts as a limitation upon the award of the appraisers and requiring that such appraisers shall not take into consideration the fact that animals have been condemned for disease.

COLUMBUS, OHIO, October 29, 1928.

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

DEAR SIR:—This will acknowledge receipt of your communication, as follows:

> "Referring further to your opinion No. 2705, dated October 13, 1928, this department is confronted with a number of circumstances where owners of cattle are perfectly willing to submit to tuberculin tests and to have the reactors resulting from such tests destroyed, and to accept compensation therefor in accordance with the rules of our department prescribing maximum allowances in cases of pure bred and grade cattle.
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> In your opinion, is our department precluded by the conclusion in your opinion above referred to from taking any further steps in applying tuberculin tests in such cases where the owners of cattle are willing to accept compensation in accordance with our rules?"

In my previous opinion, to which you refer, I stated that the State Board of Agriculture is without authority to adopt rules and regulations and attempt to enforce the same which limit the indemnity paid to owners of pure bred cattle affected with tuberculosis and condemned for slaughter to eighty dollars, and which limit the indemnity paid to owners of grade cattle affected with tuberculosis and condemned for slaughter to fifty dollars. This conclusion was based on the fact that the statute specifically directed the manner in which the compensation to be paid to owners of infected cattle should be determined, viz., by appraisal by arbitrators under Section 1121-10 of the General Code, and there exists no right of the board to fix the maximum amount of compensation to be paid, thereby limiting the functions of the arbitrators.

You now inquire, however, whether the board may make settlement with individuals for cattle destroyed in accordance with such rules of the board in the event that the owners are willing to abide by such rules.

It is, of course, a general rule that almost any character of right or privilege may be waived under proper circumstances. This right of waiver extends to almost all descriptions of contractual, statutory and constitutional privileges. I accordingly feel that the statutory privilege conferred by Section 1121-10 of the Code with respect to the determination of the amount to be paid for the cattle may be waived by express agreement on the part of the owners of the cattle provided that the waiver is obtained in such a manner as would be recognized as proper by the courts. By this I mean that there are certain qualifications that must be noted with reference to the validity of waivers. The general rule is set forth in 27 R. C. L., p. 908, as follows:

"To constitute a waiver within the definitions already given, it is essential that there be an existing right, benefit, or advantage; a knowledge, actual or constructive, of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights, unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them, must plainly appear. A waiver may be expressed or implied, but in the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. To make out a case of waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part."

The same idea is expressed in 40 Cyc., p. 259, as follows:

"A waiver exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon that right. Knowledge of the existence of the right, benefit, or advantage on the part of the party claimed to have made the waiver is an essential prerequisite to its relinquishment. No one can be said to have waived that which he does not know; or where he has acted under a misapprehension of facts. Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim. The knowledge may be actual or constructive; one cannot be willfully ignorant and relieve himself from a waiver because he did not know. Knowledge of the existence of the right and the intention to relinquish it must concur to create a waiver by estoppel. The evidence must show knowledge, at the time the waiver is claimed to have occurred, of all material facts that would probably have influenced the conduct of the party."

The Supreme Court of Ohio, has thus expressed the rule in the case of *Auto Insurance Co.* vs. *Van Buskirk,* 115 O. S. 598, on page 605, as follows:

"The doctrine of estoppel or waiver is usually applied to a party, who, with knowedge of certain facts, acts to the prejudice of the other. The generally accepted definition of waiver is 'intentional relinquishment of a known right.' 27 Ruling Case Law, 904-908; *Bennecke* vs. *Connecticut Mutual Life Insurance Co.,* 105 U. S. 355, 26 L. Ed. 990. It would be an anomalous principle were we to hold that a party could be deemed to have waived material facts, the existence of which he did not know."

While perhaps the rule discussed in the foregoing authorities is not strictly applicable in this instance, since there would be no facts unknown or undisclosed to the owners of the cattle, yet in my opinion there is a possibility of a lack of knowledge on the part of the owners as to their legal rights in the premises. That is to say, the waiver may be induced by a misconception of their legal rights rather than a misunderstanding of the facts. Unless the owners are advised that the rules placing the limitation upon the amount to be paid as compensation are of no force and effect, and they are at liberty to have an award made in accordance with the provisions of the statute, there is a possibility that, under misapprehension of their rights, they

will acquiesce in the maximum amounts as being the limit to which they could lawfully make claim against the state. While it is probable that a misapprehension of the law would constitute no ground to set aside the waiver, yet I feel that a state department should not secure such waiver under circumstances which would amount to a concealment of the true legal right of the claimant.

On the other hand, if the claimants are fully aware of their rights, I see nothing to prevent the appraisers from making the award in accordance with the rule of the board fixing the maximum. There is, however, another phase of the subject to be considered, in view of the general language of your inquiry.

In my prior opinion I quoted at length from the opinion of Judge Hay in the case of *Wade* vs. *Tarbill,* and expressed myself in accord with his views. In the course of that opinion appears the following:

> "The Department of Agriculture, acting under the authority it assumes was conferred upon it by Section 1121-14, among other rules adopted the following:
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> 'Section 6. Each reactor or tuberculous animal shall be appraised at its true value. In making such appraisal the fact that the animal has been condemned for disease shall not be considered. The owner or owners thereof shall be paid two-thirds of the difference between the appraised value and the value of the gross salvage thereof which shall include the sum paid by the United States Department of Agriculture; provided in no case shall payment by both the Ohio Department of Agriculture and the United States Department of Agriculture be more than $80.00 for any pure bred or $50.00 for any grade animal. * * * '
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> 'In the event that the indemnity funds with the United States Department of Agriculture become exhausted the State Department shall pay to the owner both proportions or the 2/3 as above provided.'
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> We are of the opinion that nowhere in the Riggs Law is authority conferred upon the Department of Agriculture to adopt such rule. Section 1121-10 provides how the value of these animals shall be determined. In order to hold that Section 1121-14 gives the Department of Agriculture the right to fix a maximum price for animals to be slaughtered, we must consider Section 1121-10 a nullity. We believe these sections should be construed together, and each one given force and effect if possible. We can readily see why the Legislature contemplated that there would be some details in the matter of the payment of compensation that could best be worked out by the Department of Agriculture but the law making body saw fit to provide first how the value of the animals should be determined.
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> It will be observed that Rule 6 provides that in making appraisal the fact that the animal has been condemned for disease shall not be considered. Sections 1121-10 contains no such provision. The reasonable construction of Section 1121-10 is that the appraisers selected should make an appraisement of the value of the animal at the time it was condemned for slaughter. It is manifest that a tubercular cow would not be worth as much as one not infected. It seems clear to us that the manifest intention of the General Assembly was that the farmer whose cattle were condemned for slaughter should be paid what they were reasonably worth at the time they were condemned and taken, and that value was to be determined by appraisal as provided in said section."

I believe that this expression as to the invalidity of Section 6 of the rules of the board is sound. The Legislature has made the mandatory requirement that the value

of the infected animal be determined by an appraisal in pursuance of the provisions of Section 1121-10 of the Code. As the court points out in the above quotation, one of the necessary elements in the determination of that value would be the health of the animal in question. If, in fact, the animal at the time of the appraisal is diseased, it necessarily follows its value is depreciated and the rule of the board would require the arbitrators to disregard arbitrarily this factor in arriving at their conclusion. The rule would obviously work to the benefit of the claimants, inasmuch as the factor of disease would necessarily depreciate the value of the animals. Consequently, if the rule be applied, it would be a departure from the statutory course and hence not authorized. It is well settled that expenditures from the public treasury must be in strict accord with statutory authority. Administrative boards, in expending the public moneys, are bound to follow the provisions of law authorizing expenditures. In this instance expenditure is only authorized after appraisal has been made in pursuance of law and the effect in following Section 6 of the rules of the board would, as pointed out by Judge Hay, be an expenditure of public money in a manner unauthorized by law.

I am accordingly forced to the conclusion that the State Board of Agriculture could not, on its part, waive the statutory method of determining the amount paid by agreeing to pursue the course authorized by those of its rules which, as before stated, are invalid.

In view of the foregoing considerations, I am of the opinion that the State Board of Agriculture is without authority to agree with owners of infected cattle that the value thereof shall be determined in accordance with its rules providing certain maximum amounts as a limitation upon the award of the appraisers and requiring that such appraisers shall not take into consideration the fact that animals have been condemned for disease.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2796.

ROAD—WIDENING OF STATE ROAD OVER EIGHTEEN FEET—CONSIDERATION OF METHOD OF DETERMINING COST—RESOLUTIONS MAY BE COMBINED.

SYLLABUS:

1. *Consideration of method to be pursued by Director of Highways in determining the cost occasioned by or resulting from the widening of the paved portion of any state road where the paved portion of such road is constructed or reconstructed to a width greater than eighteen feet.*

2. *Two resolutions proposing to assume the obligation of levying special assessments for a state highway improvement, as authorized by Section* 1214-1, *General Code, and agreeing to co-operate with the state in the cost of widening the paved portion of a state road where the paved portion of the state road is constructed or reconstructed to a width greater than eighteen feet, as authorized by Section* 1200 *of the Code, may be combined and one auditor's certificate thereto will be sufficient.*

COLUMBUS, OHIO, October 29, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent communication as follows: