

2153.

BANG'S DISEASE ACT—PROSECUTING ATTORNEY, UPON REQUEST, REQUIRED TO AID IN ANY INVESTIGATION, HEARING OR TRIAL UNDER PROVISION SECTIONS 1108-1 TO 1108-25 G. C.—JURISDICTION, DEPARTMENT OF AGRICULTURE—APPRAISAL—SLAUGHTER — DISEASED CATTLE —STATUS WHEN OWNER REFUSES TO ABIDE BY DECISION —SECTION 1108-12 G. C.—PROSECUTION UNDER SECTION 1119 G. C. WHERE PERSON VIOLATES ORDER 25 AS TO QUARANTINE AREA.

SYLLABUS:

1. *By virtue of Section 1106, General Code, the prosecuting attorney of any county, upon request, is required to aid in any investigation, hearing or trial had under the provisions of the Bang's disease act (Sections 1108-1 to 1108-23, inclusive, General Code.)*

2. *In the event of the refusal of the owner of cattle to participate in an appraisement, or the refusal of the owner of cattle to participate in the selection of a third appraiser as provided in Section 1108-12, General Code, the Department of Agriculture should proceed with its own appraisal, slaughter the diseased cattle and tender the proper amount, computed as provided in Section 1108-12, General Code, to the owner of the cattle.*

3. *The person bringing, or causing to be brought, into a quarantined area, cattle in violation of Order No. 25 of the Department of Agriculture, of the State of Ohio may be prosecuted under Section 1119 of the General Code.*

Columbus, Ohio, April 6, 1940.

Hon. John T. Brown, Director of Agriculture,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads as follows:

“We are requesting a written opinion on certain sections of Amended Senate Bill No. 67, approved April 28, 1939, to provide

a means to control and eradicate Bang's disease of cattle and to protect the public health from this disease. We also request your opinion on certain sections of Order No. 25, adopted November 1, 1939, to assist in the enforcement of the above mentioned Act.

Section 5 of Amended Senate Bill No. 67 provides that when ninety per cent of the dairy and breeding cattle of a township or of the entire state have been Bang's disease tested the Department of Agriculture may, through its authorized veterinarians, enter the premises where the remaining ten per cent are kept and test all breeding and dairy cattle excepting those that have been treated with a Brucella biologic and exempted by the Department of Agriculture and order the reactors destroyed without the consent of the owner, but the compensation or indemnity shall be paid as in other cases.

When it becomes necessary to test or order cattle destroyed without consent of the owner, what procedure should be followed and what are the duties of county prosecutors and sheriffs when called upon to assist in the enforcement of those provisions?

Section 12 of Amended Senate Bill No. 67 provides that the value of the reactors shall be determined by appraisal made by the owner and a representative of the Department; upon disagreement of the amount of the appraisal, a third disinterested person shall be selected at the owner's expense by the two to act with them in appraisal of the cattle.

When an owner refuses to assist in the appraisal or in the case of disagreement refuses to select a disinterested party to assist in appraising, what procedure should be followed and would a representative of the Department have the authority to make appraisal of the reactors and order them slaughtered?

Section 2 of Order No. 25, Paragraph 1, provides that cattle entering a quarantined area must originate in Bang's disease accredited areas or herds officially Bang's disease free accredited or they must be tested and found free of Bang's disease within thirty days prior to the date of entering the quarantined areas.

In the event an individual sells an animal which enters such an area and which is not eligible as provided in Order 25, is the seller or the buyer liable to the penalties for the violation of said Order? What procedure should be followed in the enforcement of Order 25?"

The questions asked by you will be discussed in the order of their presentation.

The duties of the prosecuting attorney with respect to laws relating to the Department of Agriculture are set out in Section 1106, General Code, which provides as follows:

"Upon the request of the secretary of agriculture, the attor-

ney general, or under his direction, the prosecuting attorney of any county, shall aid in any investigation, hearing or trial had under the laws which the board of agriculture or the secretary is required to administer, and shall institute and prosecute all necessary actions or proceedings for the enforcement of such laws, and for the punishment of all violations thereof, arising within the county in which he was elected."

It may be mentioned in passing that by virtue of Section 154-42, General Code, all powers and duties formerly vested in the Board of Agriculture and Secretary of Agriculture now rest with the Department of Agriculture.

The duties of the sheriff are set out in Section 2833, General Code, which provides, inter alia, that "Each sheriff shall preserve the public peace."

The exact question you have presented with regard to the duties of the sheriff was answered by the then Attorney General in Opinion No. 769, 1927 Opinions of the Attorney General, wherein the second branch of the syllabus reads:

"Where violence or other unlawful acts are threatened, when duly authorized officers, agents or employes of the Department of Agriculture are engaged in the lawful performance of their duties, sheriffs and constables should take such steps as they deem necessary to preserve the public peace, accompanying the representatives of the Department of Agriculture to the premises where they are to perform their duties, if necessary and proper, and should a violation of the law then occur in the presence of such sheriffs or constables it would be the duty of such officer to arrest the offenders."

In view of the above, I deem it unnecessary to discuss further your first inquiry, other than to quote Section 1110, General Code, which provides:

"Sheriffs and constables in the several counties shall execute all lawful orders of the board of agriculture or the secretary of agriculture in such counties, and shall immediately communicate to such secretary any notices given them under the provisions of law relating to live stock."

You further inquire as to the procedure to be followed when the owner of cattle refuses to assist in the appraisal provided for in Section 1108-12, General Code, which section provides:

"Bang's diseased reactors directed to be slaughtered shall be appraised at what would be their market value had they not reacted to the Bang's disease test, and this value shall be determined

by an appraisal made by the owner and a representative of the department.

Upon disagreement as to the amount of appraisal a third disinterested person shall be selected at the owner's expense by the two to act with them in appraisal of the cattle. After dairy or breeding animals are slaughtered following condemnation for Bang's disease, the owner or owners thereof shall be paid two-thirds the difference between the appraised value and the value of the gross salvage, which shall include the sum paid by the United States department of agriculture; provided, however, in no case shall payment by the state department of agriculture for any grade animal and for any purebred exceed that paid by the United States department of agriculture unless federal funds are exhausted, in which case the state department of agriculture shall also pay the federal department's share. Claims for purebred registered animals shall be supported at the time of appraisal by proper certificate of registration and transfer papers issued by recognized purebred registry associations. Owners of purebred cattle that are to be appraised shall be eligible for compensation when they comply with the provisions of the regulations of the United States department of agriculture.

Indemnity shall not be paid on grade bulls, nor shall indemnity be paid for Bang's diseased cattle which have been moved into the state in violation of the laws or regulations governing the importation of cattle."

In the case of *The Fire Association of Philadelphia vs. Appel*, Administrator, 76 O. S. 1, the second branch of the syllabus reads:

"When in such case one of the appraisers withdraws from the appraisement, without the fault of either party, and refuses to proceed with the appraisement, such conduct on his part does not revoke the appraisement; and it is the right and duty of the party who appointed such appraiser to choose another in his place, and where in such case the insurer refuses to choose another appraiser or to proceed further with the appraisement and demands and insists upon a new appraisement instead, such conduct of the insurer amounts to a waiver of the condition in the policy."

The general rule is stated in 22 O. J. 759, as follows:

"Where one of the parties to an appraisal agreement unreasonably refuses to carry out the agreement, the other party is absolved from compliance therewith."

In the case of *Uhrig vs. Williamsburg City Fire Insurance Company*, 101 N. Y. 362, the court said:

"When one arbitration fails from default of one of the

parties, the other is not bound to enter into a new arbitration agreement.”

In view of the above, it must be concluded that the refusal of the owner of cattle to participate in an appraisal or the refusal of the owner to participate in the selection of a third appraiser as provided in Section 1108-12, supra, must be deemed a waiver of his rights to join in the appraisal. Consequently, I am constrained to the view that the Department of Agriculture, in case of such refusal, should proceed with its own appraisal, slaughter the cattle and tender the amount, computed as provided in Section 1108-12, supra, to the owner of the cattle.

With regard to your third inquiry, Section 2 of Order 25, promulgated by the Department of Agriculture of the State of Ohio, provides in part:

“Modified Accredited Area: The extent of the area shall be determined by state and federal agencies cooperating. When testing is started, the area shall be placed under quarantine and the following rules shall be enforced:

1. All cattle which may be used for dairy or breeding purposes, except those for immediate slaughter, when imported, brought in or allowed to enter the quarantined area, shall conform to the following rules:

(a) Cattle from Bang’s disease accredited areas or herds officially Bang’s disease-free-accredited according to the U. S. D. A. standard, may enter the area without being retested. All such cattle shall be identified and shall be accompanied by approved certificates.

(b) All other male or female cattle shall be blood tested and found free of Bang’s disease by an officially recognized agglutination method within 30 days prior to the date of entry, and shall be maintained in quarantine separate from other cattle and shall be retested in not less than 30 nor more than 60 days after the date of entry. If found free, they shall be released from quarantine.”

The penal section covering violations of the above quoted order is Section 1119, General Code, which provides:

“A person firm or corporation who fails to comply with the rules of the board of agriculture, or with the rules of the secretary of agriculture, or fails to respect any lawful regulations, prescribed by them or either of them when notified so to do, shall be fined and pay not less than fifty dollars nor more than five hundred dollars.”

Your third question can not be answered categorically. It will be noted that Order No. 25, supra, uses the terms “imported” and “brought in.” It

can not be said that in every case of violation of such order, the buyer should be prosecuted, nor can it be said that in every case the seller is the violator. The individual who brings or causes the cattle to be brought into the area would be the violator of the order. For example, if the seller delivers the cattle to the buyer in the quarantined area, the seller would be the violator. However, if the buyer brings the cattle into the area, he should be prosecuted. Consequently, the answer to your third question would depend on the facts in the particular situation.

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

1. By virtue of Section 1106, General Code, the prosecuting attorney of any county, upon request, is required to aid in any investigation, hearing or trial had under the provisions of the Bang's disease act (Sections 1108-1 to 1108-23, inclusive, General Code).

2. The sheriff of any county, when violence or other unlawful acts are threatened, should cooperate, as above set out, with the representatives of the Department of Agriculture in carrying on their lawful activities.

3. In the event of the refusal of the owner of cattle to participate in an appraisal, or the refusal of the owner of cattle to participate in the selection of a third appraiser as provided in Section 1108-12, General Code, the Department of Agriculture should proceed with its own appraisal, slaughter the diseased cattle and tender the proper amount, computed as provided in Section 1108-12, General Code, to the owner of the cattle.

4. The person bringing, or causing to be brought, into a quarantined area, cattle in violation of Order No. 25 of the Department of Agriculture of the State of Ohio may be prosecuted under Section 1119 of the General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.