

weight restrictions were established in order to prevent damage to the highways.

In conclusion, and in specific answer to your inquiry, I am of the opinion that the question as to whether a particular public highway is "improved" or "unimproved" is a question of fact that can only be determined from an examination of the facts and circumstances in the particular situation.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

904.

DIRECTOR OF AGRICULTURE—MAY ADOPT REGULATION TO PERMIT NON-RESIDENT NURSERY MAN, DEALERS AND AGENTS TO SHIP NURSERY STOCK INTO OHIO—PROCEDURE—FILE CERTIFIED COPY ORIGINAL STATE CERTIFICATE AND OBTAIN REQUIRED OHIO CERTIFICATE—HOUSE BILL 444, 93RD GENERAL ASSEMBLY.

SYLLABUS:

Under the provisions of House Bill No. 444, passed by the 93rd General Assembly, the Director of Agriculture may adopt a regulation permitting non-resident nurserymen, dealers and agents, desiring to ship or transport nursery stock into the State, to file a certified copy of their original state certificate with the Director of Agriculture, and thereby obtain a certificate permitting such person to ship or transport nursery stock into this State.

COLUMBUS, OHIO, July 20, 1939.

HON. JOHN T. BROWN, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR: Receipt is acknowledged of a letter from the Chief of the Division of Plant Industry, Department of Agriculture, requesting my opinion as follows:

"The General Assembly of Ohio at the last session passed House Bill 444 on May 23, 1939. This law will go into effect August 27, 1939, and will take the place of the old Plant Pest Law of Ohio.

The new Act leaves out the old Section 1136 G. C., Section 15.

The Department of Agriculture and the Division of Plant Industry feel this has been a serious oversight. Since there has

been a reciprocal arrangement between states over a long period of years in issuing permits, and it is generally expected among nurserymen and law enforcement officers in the states that this practice be continued, the Department believes that in the best interests of the Citizens of Ohio, the attached regulation should be adopted and put into practice.

May we have your opinion in regard to the legality of such regulation?"

The regulation which your Department desires to adopt provides in part:

"1. Non-resident Certification—Nurserymen, Dealers or Agents, residing or doing business outside the State, desiring to ship or transport nursery stock into this State, shall upon filing a certified copy of their original state certificate with the Director of Agriculture, obtain a certificate permitting such person to ship or transport nursery stock in this State."

It will be noted that the proposed regulation provides for the filing by non-resident nurserymen, dealers or agents of a certified copy of their original state certificate with the Director of Agriculture. I understand that in many states the same procedure is followed as is established in Ohio by virtue of Sections 1133 and 1135 of the General Code.

Section 1133, General Code, provides:

"Nurserymen, dealers, and collectors selling or delivering nursery stock in this state except as herein otherwise provided, shall make application in writing before May 15 of each year to the director of agriculture for inspection of their nursery stock growing in this state, or failing to give such notice, such nurserymen, dealers, or collectors shall be liable for the additional expense of the inspector for the inspection of the nursery stock."

Section 1135, General Code, provides:

"(1) The director of agriculture shall cause to be issued to each nurseryman in this state, after the nursery stock in his nursery has been officially inspected as provided in this act and found to be apparently free from injurious or harmful insects or plant disease, and the fee provided for in Section 1137 of the General Code has been paid, a certificate signed by the inspector setting forth the fact of such inspection. Said certificate shall be valid not to exceed one year from September 15. A certified copy of such certificate shall, at all times, be conspicuously posted in each place of business operated by such nurseryman.

(2) It shall be unlawful for any person to sell or offer for sale or to remove or ship from a nursery or other premises any nursery stock unless such stock has been officially inspected and a certificate or permit signed by the inspector has been granted by the director of agriculture."

I assume the "original state certificate" referred to in the proposed regulation means a certificate required in other states similar to that provided for by Section 1135, *supra*.

Former Section 1136, General Code, to which the Chief of the Division of Plant Industry refers, and which was repealed by House Bill No. 444, passed by the Legislature on May 23, 1939, provided as follows:

"Nurserymen, residing or doing business outside the state, desiring to solicit orders for nursery stock in the state shall upon filing a certified copy of their original state certificate with the secretary of agriculture, obtain a certificate permitting such persons to solicit orders for nursery stock in the state."

Section 1125, General Code, contained in House Bill No. 444, authorizes the Director of Agriculture "to prescribe, modify, and enforce such rules, regulations and orders as may be needed to carry out the provisions of this act * * *"

While Section 1139, General Code, also a part of House Bill No. 444, authorizes the Director of Agriculture "to enter into such reciprocal contracts and agreements as he may deem proper and expedient, with the proper authorities of other states regulating the shipment, selling and trafficking of nursery stock in the state of Ohio by persons residing and located outside the state of Ohio, in accordance with all the provisions of this act," the proposed action of the Director would not fall within this authority. The proposed regulation is not predicated on whether the State of the non-resident nurseryman makes like exemptions to Ohio nurserymen. Rather the proposed regulation is to be effective regardless of the treatment received by Ohio nurserymen in such other state. This situation could not be said to involve reciprocity, and Section 1139, *supra*, can not be deemed the authority for promulgating the proposed regulation. However, by virtue of Section 1124, *supra*, it appears that the Director of Agriculture would have the authority to adopt such a regulation if there is no provision of law with which such a regulation would conflict. The possibility of such a situation must be considered inasmuch as any regulation that the Director may prescribe must be "needed to carry out the provisions of this act."

Section 1140-3, General Code, provides in part:

"Except as herein otherwise provided, it shall be unlawful for any person to accept for transportation any nursery stock

without a valid certificate plainly affixed on the outside of the package, box, bale, vehicle or car containing the same, showing that the contents have been duly inspected by an official state or federal inspector, or without a valid certificate of inspection, or copy thereof, as provided in section 1135 of the General Code. If nursery stock is shipped into this state from another state, county or province without having attached thereto the valid certificate of inspection of an official state or federal inspector, such failure must be promptly reported to the director of agriculture by the person transporting the same into this state, stating the names and addresses of the consignor and consignee and the nature of the shipment, and such nursery stock shall not be delivered to the consignee unless and until the inspector shall inspect and, finding such nursery stock apparently free from insect pests and plant diseases, shall release such nursery stock for delivery to consignee."

An examination of this section indicates that nursery stock can be shipped into Ohio if there appears thereon "a valid certificate of inspection of an official state or federal inspector." It appears that this certificate of inspection may be given by an official state inspector of the state from which said nursery stock was shipped. Nothing in this section nor in the act indicates that the Legislature intended to mean only an official Ohio inspector. This view is strengthened by a consideration of Section 1127, General Code, which provides in part:

"He (director of agriculture) shall also have the authority to inspect or reinspect at any time or place any nursery stock shipped in or into the state * * *."

It will be noted that this section does not make it mandatory for the Director of Agriculture to inspect such nursery stock.

The above sections are cited to show that there are no statutory provisions with which such proposed regulation would conflict. Rather it appears that such proposed regulation would be consistent with such statutory provisions.

It will also be seen that such a regulation would likewise be consistent with the intent of the law. The purpose of the law was to provide for the proper inspection of nursery stock. The proposed regulation tends in no way to defeat the purpose of the law, inasmuch as it requires inspection by such other state, or by a federal inspector before such nursery stock may be shipped into Ohio.

In view of the above, and in specific answer to your inquiry, I am of the opinion that under the provisions of House Bill No. 444, passed by the 93rd General Assembly, the Director of Agriculture may adopt a

regulation permitting non-resident nurserymen, dealers and agents, desiring to ship or transport nursery stock into the state, to file a certified copy of their original state certificate with the Director of Agriculture, and thereby obtain a certificate permitting such person to ship or transport nursery stock into this state.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

905.

LEASE—OFFICE SPACE, STATE WITH HARRY S. BLACK COMPANY, ROOMS 405, 406, 28 PARK AVENUE WEST, MANSFIELD, USE, INDUSTRIAL COMMISSION OF OHIO.

COLUMBUS, OHIO, July 20, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certain lease executed by Harry S. Black Company, a Corporation, of Mansfield, Ohio, in and by which there are leased and demised to the State of Ohio, acting through you as Director of the Department of Public Works, certain premises for the use of the Industrial Commission of Ohio.

By this lease, which is one for a term of eighteen months, commencing on the first day of July, 1939, and ending on the thirty-first day of December, 1940, and which provides for an annual rental of \$900.00, payable in monthly installments of \$75.00 each, there are leased and demised to the State for the use of the Industrial Commission, Rooms Nos. 405 and 406 on the Fourth floor of the lessors building located at 28 Park Avenue West, in the City of Mansfield, Ohio.

This lease has been properly executed by Harry S. Black, the lessor, by the hand of one H. S. Black, President. I likewise find that this lease and the provisions thereof are in proper form.

The lease is accompanied by contract encumbrance record No. 124, which has been executed in proper form and which shows that there are unencumbered balances in the appropriation account sufficient in amount to pay the rental under this lease for the months of July, August and September, 1939. This is a sufficient compliance with the provisions of section 2288-2, General Code. This lease is accordingly approved by me and the same is herewith returned to you.

Respectfully,

THOMAS J. HERBERT,
Attorney General.