

244.

DOGS — RABIES QUARANTINE — VIOLATION PENALTY —
DOG REGISTRATION — SEIZING AND DESTROYING,
WHEN.*SYLLABUS:*

1. *The penalty imposed upon any dog owner for violation of any lawful quarantine of dogs is fine or imprisonment as provided by law.*

2. *When a rabies quarantine has been ordered by a board of health, dogs wearing valid registration tags may not be seized and destroyed when at large in violation of such quarantine unless they are chasing, worrying or injuring persons or animals as provided by Section 5838, General Code.*

COLUMBUS, OHIO, March 12, 1937.

HON. RALPH J. BARTLETT, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR: Your letter of recent date is as follows:

“General Code Section 5652-16 provides for a quarantine of dogs, but does not provide for the disposition of dogs which are not confined. The question has arisen, where the proper quarantine order has been issued by a district board of health, whether dogs must be impounded for three days, as provided in General Code Section 5652-9, or whether the board of health under General Code Section 5652-16 may provide that all dogs not confined may be disposed of immediately. Also whether it would be necessary for the board of health under General Code Section 5652-16 to distinguish between dogs properly licensed under General Code Section 5652 and dogs not so licensed, as to the disposition thereof.

Will you please give me your opinion on these matters at the earliest possible date.”

Your inquiry seems to assume that in the event of a quarantine of dogs, presumably after rabies have been declared to be prevalent, all dogs at large may be seized and upon that assumption you direct your inquiry to the matter of the destruction of dogs so seized.

The authority to seize and destroy dogs without respect to property rights is expressly conferred by statute. The laws conferring such power expressly limit its exercise to cases of non-registration of dogs as required by law. Section 5652-6, General Code, provides as follows:

“Every registered dog, except dogs constantly confined to

registered kennels, shall at all times wear a valid tag issued in connection with the certificate evidencing such registration. Failure at any time to wear such valid tag shall be prima facie evidence of lack of registration and shall subject any dog found not wearing such valid tag to impounding, sale or destruction, as hereinafter provided."

Section 5652-7, General Code, defining the powers of dog wardens, provides *inter alia*:

"* * * They shall patrol their respective counties, seize and impound on sight all dogs more than three months of age, found not wearing a valid registration tag, except dogs kept constantly confined in a registered dog kennel. * * *"

The statute does not confer upon dog wardens the power to seize and impound dogs except as set forth in Section 5652-7, *supra*. Section 5652-9, General Code, authorizing the destruction of dogs, is limited to those dogs which have been seized by the dog warden and impounded on account of not wearing valid registration tags. This section requires such dogs to be housed and fed for three days before they may be sold or destroyed.

A mere reading of these sections would appear to indicate the conclusion that except as to unregistered dogs or dogs not wearing valid registration tags which are running at large, they may not be seized and destroyed. Consideration of the statutes regarding quarantine is, however, necessary.

The quarantine of dogs based upon a finding by a city or general health district board of health or person performing the duties of a board of health that rabies is prevalent, is authorized by Section 5652-16, General Code. This section provides what such quarantine shall consist of, in the following language:

"The quarantine so declared shall consist of the confinement of any dog or dogs on the premises of the owner or in a suitable pound or kennel if a pound or kennel is provided by the city or county; provided, a dog may be permitted to leave the premises of the owner if under leash or under the control of the owner or other responsible person."

This language is clear and explicit and it is perfectly obvious that a dog owner who may be unable or not desirous of confining his dog on his premises may avail himself of the facilities of a pound or kennel

provided by the city or county. The section does not, however, authorize the seizing of dogs found at large during a quarantine, but on the contrary does provide a penalty for violation of the quarantine order in the concluding paragraph thereof as follows:

“The penalty for the violation of the rabies quarantine order shall be the same as provided for the violation of other orders or regulations of the board of health.”

The other section of the General Code providing for what amounts to a temporary quarantine is Section 5652-14a, General Code, which likewise provides a penalty for its violation and reads as follows:

“It shall be unlawful for the owner, keeper or harbinger of any female dog to permit such female dog to go beyond the premises of such owner or keeper at any time such dog is in heat, unless such female dog is properly in leash.

The owner or keeper of every dog shall at all times between the hours of sunset and sunrise of each day keep such dog either confined upon the premises of the owner or firmly secured by means of a collar and chain or other device so that it cannot stray beyond the premises of the owner or keeper, or under reasonable control of some person or when lawfully engaged in hunting accompanied by an owner or handler.

Whoever fails to keep any dog in their possession lawfully under control as provided in this act shall be liable to a fine of not less than ten dollars, nor more than twenty-five dollars.”

With respect to the penalty provided in Section 5652-14a, *supra*, its provisions are clear and need no further comment. As to the penalty provided for violation of Section 5652-16, *supra*, relating to violation of a rabies quarantine, the reference is to Section 4414, General Code, as to violations of regulations of a board of health of a city health district. This section provides as follows:

“Whoever violates any provision of this chapter, or any order or regulation of the board of health made in pursuance thereof, or obstructs or interferes with the execution of such order, or wilfully or illegally omits to obey such order, shall be fined not to exceed one hundred dollars or imprisoned for not to exceed ninety days, or both, but no person shall be imprisoned under this section for the first offense, and the

prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted, contains the allegation that the offense is a second or repeated offense."

The foregoing section also provides the penalty for violation of an order or regulation of a general health district in view of the provisions of Section 1261-30, General Code, which provides that all penalties for violation of the regulations of the board of health of a municipality shall be construed to have been transferred and applicable to violations of regulations of a district board of health.

It is recognized that boards of health have broad powers in the adoption of regulations for the protection of the public health and these powers have been upheld generally as not constituting an unlawful delegation of legislative power, in the case of *Ex Parte Company*, 106 O. S. 50. In the determination of the question here under consideration, however, I am confronted with the situation where the legislature has preempted the field and not only made specific provision as to the circumstances under which a dog running at large may be seized, impounded and destroyed, but has expressly defined the penalties for violation of a lawful quarantine, be it established on account of rabies or a quarantine under Section 5652-14a, *supra*.

Any order or regulation providing a different penalty for violation of a dog quarantine cannot in my judgment be anything but an amendment of the penalty provided by the legislature. The situation may well be said to be analogous to the lack of power in a municipality to reduce the speed limit provided by state law for the operation of motor vehicles. *Schneiderman vs. Sesanstein*, 121 O. S. 80.

It is pertinent here to consider the fact that the legislature has elsewhere made provision for destruction of diseased animals in order to protect the public health. I refer to Section 1121-5, General Code, which authorizes the destruction of tubercular cattle, but this section and Section 1121-8 provide for the indemnification of the owner by the state for the cattle so destroyed.

I am not unmindful of the fact that the conclusion which I have indicated in answer to your inquiry might be said to be at variance with an opinion of this office appearing in *Opinions of the Attorney General for 1925*, page 155, the syllabus of which is as follows:

"Whether or not a board of health is justified in making regulations under the provisions of Section 1261-42, requiring the muzzling of dogs, and the killing thereof when not muzzled, to prevent the spread of rabies, is a question of fact to be determined in the first instance by the board of health. Under

such circumstances such a regulation will not be disturbed unless in a proper judicial proceeding the court has found the same to be an abuse of the power and discretion of the board."

In the body of the opinion, after discussing general principles relative to the exercise of the police power, the then Attorney General apparently did not see fit to answer the question propounded. The concluding paragraph of the opinion appearing on page 157 reads as follows:

"However, as above indicated, it is not within the power of this department to specifically state in what instances such a power may be exercised; neither is it within its power to state that the action contemplated by the board of health is a reasonable exercise of the power. This is a question of fact to be determined in the first instance by the board of health, and the determination of the board of health will not be disturbed unless it should be found by the courts to be an abuse of discretion."

In so far as the foregoing opinions may be construed as authorizing the destruction of dogs in cases of quarantine violations, it is overruled.

In your letter you apparently have reference to the seizure and destruction of all dogs found at large in violation of a quarantine order regardless of any question as to their behavior and it should be here observed that any person at any time has statutory authority to kill a dog which is chasing or attacking persons or animals. Section 5838, General Code, provides 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."

Specifically answering your questions and in view of the foregoing, it is my opinion that:

1. The penalty imposed upon any dog owner for violation of any lawful quarantine of dogs is fine or imprisonment as provided by law.
2. When a rabies quarantine has been ordered by a board of health, dogs wearing valid registration tags may not be seized and destroyed

when at large in violation of such quarantine unless they are chasing, worrying or injuring persons or animals as provided by Section 5838, General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

245.

COLUMBUS, OHIO, March 12, 1937.

APPROVAL — ARTICLES OF INCORPORATION OF THE
PROGRESSIVE MUTUAL INSURANCE COMPANY.

HON. WILLIAM J. KENNEDY, *Secretary of State, Columbus, Ohio.*

DEAR SIR: I have examined the articles of incorporation of The Progressive Mutual Insurance Company which you have submitted to me for my approval.

Finding the same not to be inconsistent with the Constitution or laws of Ohio or of the United States, I have endorsed my *approval* thereon and return the same to you herewith.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

246.

APPROVAL—FIVE GRANTS OF EASEMENT IN LANDS IN
MARION TOWNSHIP, ALLEN COUNTY, OHIO.

COLUMBUS, OHIO, March 12, 1937.

HON. L. WOODDELL, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval certain grants of easement executed to the State of Ohio by several property owners in Marion Township, Allen County, Ohio, conveying to the State of Ohio, for the purposes therein stated, certain tracts of land in said township and county.

The grants of easement here in question, designated with respect to