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AGRICULTURE—DESTRUCTION OF CONTAMINATED ANIMALS—DETERMINATION BY DIRECTOR—§941.06 R.C.—APPRAISAL AND DESTRUCTION OF ANIMALS WHETHER FUNDS HAVE BEEN APPROPRIATED FOR INDEMNITY TO OWNER.

SYLLABUS:

Once the director of agriculture in the exercise of his discretionary power deems it necessary to destroy animals affected with or which have been exposed to dangerously contagious or infection disease, he is authorized to proceed in accordance with the provisions of Section 941.06, Revised Code, to have the animals appraised and killed regardless of whether or not any funds have previously been appropriated for the purpose of paying indemnity.

Columbus, Ohio, April 1, 1959

Hon. Robert H. Terhune, Director
Department of Agriculture, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“The Department of Agriculture is currently faced with a problem which appears to warrant a formal opinion relative to the course of action it may pursue, Viz:

“In December of 1958, a flock of pure-bred Suffolk Sheep was placed under quarantine by the Ohio Department of Agriculture because of evidence of the disease known as Scrapie. Prior to the date of this quarantine the U. S. Department of Agriculture quarantined the same flock to prohibit inter-state sale or movement for any purpose other than immediate slaughter.

“Enclosed herewith please find a memorandum of agreement between the State of Ohio and the U. S. Department of Agriculture, Agriculture Research Service, relating to procedures in the control and eradication of this disease.

“Since there were no funds available to pay indemnity, this department proceeded to request the Emergency Board of Control for an emergency appropriation to pay indemnity which request has not been granted, although the Director of Agriculture deems it necessary to destroy this flock of sheep since it has been determined that this is a source flock from which sheep have been positively diagnosed as being affected with Scrapie. Destruction has

not been ordered because the necessary funds to pay indemnity are not available. It might be pointed out that Scrapie is considered to be a dangerously infectious disease and has an estimated incubation period up to 42 months before the disease may be diagnosed by clinical and/or laboratory methods. Consequently it may necessitate an indefinite period of quarantine before it could definitely be determined whether or not any of the animals under quarantine are affected with the disease.

“Therefore, my questions to you are:

“1. May the Director of Agriculture order the destruction of this flock of sheep although there is no money available to pay indemnity?

“2. If not, how long may the Director enforce the present quarantine on this flock?

“In considering these questions, I direct your attention especially to Sections 901.19, 941.05, 941.06, 941.07, 941.08, 941.10, 941.12, 941.13, and 941.14 of the Revised Code in addition to the enclosed memorandum of agreement.”

Section 941.06, Revised Code, provides as follows :

“If the director of agriculture deems it necessary to destroy animals affected with or which have been exposed to dangerously contagious or infectious disease, he shall determine what animals shall be killed and cause them to be appraised by three disinterested citizens ; one to be selected by the owner of the animals to be destroyed ; one to be selected by the Director ; and those two so selected shall select the third. The three so selected shall meet and appraise said animals and shall make an award which award shall be final. After being so appraised, the director shall cause such animals to be killed and their carcasses disposed of in such a manner as he directs. No animal shall be killed under this section until it has been examined by a competent veterinarian in the employ of the department of agriculture, and the disease with which it is affected or to which it has been exposed has been adjudged a dangerous and contagious malady.” (Emphasis added)

As may be seen by reference to the above quoted Section 941.06, Revised Code, there are several conditions precedent that must be satisfied before the director may order animals to be killed. *First*, the director must make a finding of fact that certain animals are either affected with or have been exposed to a dangerously contagious or infectious disease. *Second*, said animals must be examined by a competent veterinarian in the employ of the department of agriculture. *Third*, the disease with which said ani-

mals are affected or to which they have been exposed must be adjudged to be a dangerous and contagious malady. *Fourth*, the director must then determine which of said animals are to be killed and cause them to be duly appraised.

It is my understanding that these animals have not been duly appraised in accordance with the provisions of this section, and therefore it would not be proper for you to order the destruction of this flock of sheep for the reason that all of the aforementioned conditions precedent have not been fully satisfied. For the purpose of answering your first question, however, I will assume that it is your intention to comply strictly with the requirements set forth in said Section 941.06, Revised Code, and that your question No. 1 should read as follows:

May the director of agriculture cause this flock of sheep to be appraised and order the destruction of this flock of sheep although there is no money available to pay indemnity?

It seems clear that once the director of agriculture makes a finding of fact that it is necessary to destroy animals affected with or exposed to dangerously contagious or infectious disease he has no further discretionary power to decide whether or not to proceed further, but rather he is then under a mandatory duty to proceed as directed by the statute.

It is stated in *State ex rel. Jones v. Farrar*, 146 Ohio St., 467, in the second paragraph of the syllabus that:

“As a general rule, statutes which relate to the essence of the act to be performed or to matters of substance are mandatory, and those which do not relate to the essence and compliance with which is merely a matter of convenience rather than substance are directory.”

Also, in the same case, on page 473, the court says:

“* * * The character of the statute may be determined by the consideration of (1) the words of the statute, (2) the nature, context and object of the statute and (3) the consequences of the various constructions. See *Miller v. State*, 3 Ohio St., 475.”

In considering the words of this statute, we see that, once the director makes the finding of the fact of necessity, thereafter

“* * * *he shall determine* what animals *shall be* killed and cause them to be appraised * * *. After being so appraised, the director *shall cause* such animals to be killed. * * *

(Emphasis added)

The repeated use of the word "shall" which is mandatory in its usual connotation, especially when frequently repeated, obviously is a clear and unambiguous written manifestation of the legislative intent that such act must be done. See 37 Ohio Jurisprudence, 326.

In considering the nature, context and object of the statute we see as follows:

(1) That legislation of this nature comes within the constitutional exercise of the police powers of the state. See 65 A.L.R., 528; 12 A.L.R., 1136; 8 A.L.R., 69.

(2) That Section 941.06, Revised Code, must be considered within the context of Title IX, Revised Code, particularly in connection with Section 901.19, Revised Code, which reads as follows:

"The director of agriculture shall promote and protect the livestock interests of the state, prevent the spread of dangerously infectious and contagious diseases, and cooperate with the bureau of animal industry of the United States department of agriculture in such work. *He shall use all proper means in the prevention of the spread of infectious and contagious diseases among domestic animals and in providing for the extermination of such diseases.*"
(Emphasis added)

The sole object of Section 941.06, *supra*, is to provide for the disposition of animals by causing said animals to be killed upon the director making a determination that such measure is necessary. To cause the destruction of the animals is therefore the very essence of the act to be performed and it is certainly a matter of substance since it is the only manner designated by which the purpose and object of exterminating animal diseases may be accomplished.

In considering the consequences of various constructions of this statute, we see that, if the director does not have the authority to proceed to have the animals appraised and killed until such time as money may be appropriated to pay indemnity, then the financial burden upon both parties would increase. The owner of the animals would be faced with the continuing burden of feeding the animals and furnishing necessary veterinary care, and he could not have the animals killed prior to appraisal in order to eliminate these costs for the reason that he would thereby preclude himself from any possibility of receiving indemnity from the state because "Appraisalment of all animals slaughtered to prevent the spread of con-

tagious diseases, is necessary before the value thereof may be allowed under section 1114 G.C." See Opinion No. 88, Opinions of the Attorney General for 1919, p. 152. Likewise the state would be faced with the natural consequence through procreation of having more animals to appraise and over a period of time the potential claim of an owner against the state would therefore be substantially expanded as the newborn progeny increased the number of animals all of which must eventually be killed. In this way injury would result from ignoring the plain dictates of the statutes, and as stated in *Miller v. Lakewood Housing Co.*, 125 Ohio St., 152, on page 161 :

"Whether a statutory requirement is mandatory or directory depends upon its effect. If no substantial rights depend on it and no injury can result from ignoring it, and the purpose of the Legislature can be accomplished in a manner other than that prescribed and substantially the same results obtained, then the statute will generally be regarded as directory; but, if not, it will be mandatory. * * *"

The only logical conclusion that may be reached as to the character of Section 941.06, Revised Code, after consideration of (1) the words used (2) the nature, context and object of the statute and (3) the consequences of a different interpretation, is that this section places a mandatory duty upon the director of agriculture to proceed as provided therein.

The remaining problem is to determine what, if any, is the effect of there being no money available to pay indemnity. In this connection, Section 941.08, Revised Code, provides :

"All claims of owners of animals killed under sections 941.06 and 941.07 of the Revised Code as fixed by the appraisers or as fixed upon review by the director of agriculture, shall be paid immediately from funds appropriated by the general assembly for that purpose."

This section imposes no limitation upon the director's authority to proceed to cause such animals to be killed prior to the appropriation of funds. Indeed, similar situations have evidently arisen frequently in the past wherein animals have been slaughtered before the appropriation of any money to pay indemnity for there are three opinions of the Attorney General concerning problems which arose in such situations. See Opinion No. 923, Opinions of the Attorney General for 1951, page 740; Opinion No. 12, Opinions of the Attorney General for 1919, p. 16; Opinion No. 88, Opinions of the Attorney General for 1919, p. 152. In none of these

opinions is any doubt expressed as to the authority of the director to order animals slaughtered even though no funds had been appropriated.

On March 20, 1917, Section 2288-2, General Code, was enacted. Section 131.17, Revised Code, which contains substantially the same language, reads as follows:

“No officer, board or commission of the state shall enter into any *contract, agreement, or obligation* involving the expenditure of money, or *pass any resolution or order* for the expenditure of money, unless the director of finance first certifies that there is a balance in the appropriation, not otherwise obligated to pay precedent obligations, pursuant to which such obligation is required to be paid.” (Emphasis added)

It is obvious, however, that the director, proceeding to cause animals to be appraised and killed in accordance with the mandatory provisions of Section 941.06, Revised Code, is *not entering* into any *contract or agreement* involving the expenditure of money nor is he passing any *resolution or order* for the expenditure of money. It is likewise clear that such action by the director would not constitute his entering into any *obligation* involving the expenditure of money for the reason that, if there is any obligation thereby created, it is one created by Section 941.06, Revised Code, not by the director.

Inasmuch as my answer to the first question is in the affirmative, it is not necessary to consider the second question.

On the basis of the foregoing, it is therefore my opinion that once the director of agriculture in the exercise of his discretionary power deems it necessary to destroy animals affected with or which have been exposed to dangerously contagious or infectious disease, he is authorized to proceed in accordance with the provisions of Section 941.06, Revised Code, to have the animals appraised and killed regardless of whether or not any funds have previously been appropriated for the purpose of paying indemnity.

Respectfully,

MARK McELROY
Attorney General