

1661.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN
PORTAGE COUNTY, OHIO.

COLUMBUS, OHIO, November 24, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

1662.

AGRICULTURE—AUTHORITY OF SECRETARY OF AGRICULTURE TO
PRESCRIBE AND ENFORCE MEASURES TO PREVENT OUTBREAKS
OF DANGEROUS INSECTS OR PLANT DISEASES—EXERCISE OF
POLICE POWER—INSPECTORS SHOULD BE FURNISHED WITH
BADGES—SEE SECTION 1124 G. C.

1. *Section 1128 G. C. authorizes the secretary of agriculture, in cases of outbreaks of dangerous insects or plant diseases, to prescribe and enforce such remedial and preventive measures as he deems necessary. It is a valid exercise of the police power and not in conflict with the constitution.*

2. *Under the provisions of section 1124 G. C., the inspectors and deputy inspectors should be furnished with badges indicative of their authority which they should carry while on duty.*

COLUMBUS, OHIO, November 26, 1920.

The Department of Agriculture, Bureau of Plant Industry, Columbus, Ohio.

GENTLEMEN:—Your communication of recent date is as follows:

“Am enclosing copy of an order which we are contemplating sending out. There is some question in my mind whether we have authority to issue such an order. Section 1132 G. C. unquestionably grants to this bureau the authority to issue an order of like nature calling for the destruction of plants that are known to be infested or infected with dangerous insect pests or plant diseases. However, the case in hand is a little different for the plants do not always show external evidence of the disease at the time of inspection.

The common barberry plant serves as an alternate host for the black stem rust of wheat and other grains. It is a necessary part of the cycle of this disease, spores being produced on the leaves of the barberry in the spring, infection having come to this plant from wheat stubble of previous year's growth. From the barberry plant the spores are carried by the wind to grasses and grains where the disease multiplies very rapidly. There are sections in Ohio where wheat growing has been abandoned because of the presence of this disease. The plants, therefore, constitute a potential menace that may become real at any time.

Are the broad powers granted to the secretary of agriculture in section 1128 which gives him authority ‘to prescribe and enforce such preventative and remedial measures as he may deem necessary to the control or eradication of such outbreaks,’ in contravention of the property rights guaranteed to the citizens of this state under the constitution?

Also can this destruction of plants be required under the terms of section 1130 G. C.?

Will the requirements of section 1128 G. C. as to inspection or investigation by the inspectors and deputies be complied with if the inspection in the case of barberry plants is done by representatives of the federal government who carry letters of authorization issued from this office, signed by the chief of the bureau and the secretary of agriculture?"

Section 1128 of the General Code, about which you inquire, provides:

"The secretary of agriculture through the inspector and deputies is hereby empowered to investigate outbreaks of dangerous insect or plant diseases occurring within the state and to prescribe and enforce such preventive and remedial measures as he may deem necessary to the control or eradication of such outbreaks, and for such purposes shall have free access to any property or premises within the state."

Undoubtedly it was the intent of the legislature to enact this section in pursuance to the police powers with which it is clothed.

In the case of *Bloomfield vs. State*, 86 O. S. 253, it was held:

"The state is necessarily invested with that which is called police power, and which will be, and should be, put forth as an expression of the popular conception of the necessities of social and economic conditions. Under it may be done, and should be done, that which will best secure the peace, morals, health and safety of the community."

This doctrine has been frequently announced by the supreme court of Ohio. It has further been frequently proclaimed by the highest judicial authority of the state that every presumption is in favor of the view that the legislature has kept within its constitutional limits in the enactment of its laws. Measures intended to protect the public against plant disease or insects which destroy the things upon which life is sustained certainly are to be classed among the most important of police regulation. In view of the foregoing, it is not difficult to conclude that the section about which you inquire does not come within the inhibition of the constitution.

Under the provisions of sections 1128 G. C., *supra*, the secretary of agriculture is authorized to determine when there is an outbreak of dangerous plant disease or insects within the state, the extent of same, and empowered to prescribe such preventive or remedial measures as he deems necessary. The only limitation in this respect would be in the event the action taken should constitute an abuse of discretion.

Assuming that the facts stated in your letter relative to the barberry shrub being an alternative host for the black stem rust are true, there certainly can be no doubt that in those cases in which infection is found the secretary of agriculture could require its destruction under section 1132 G. C., which provides:

"(1) If the inspector or deputy shall find on examination any nursery, field or farm crop, orchard, small fruit plantation, park, cemetery, or any private or public premises infested or infected with injurious insects or plant disease, he shall notify the owner or person having charge of such premises to that effect, and the owner or person having charge of the premises shall within ten days after such notice cause the removal and

destruction of such trees, plants, shrubs or other plant material if incapable of successful treatment; otherwise cause them to be treated as the secretary of agriculture may direct. No damages shall be awarded to the owner for the loss or destruction of infested trees, plants, shrubs, or other plant material under this act. Such infested or infected trees, plants, shrubs, or other plant material shall be deemed to be a public nuisance.

(2) In case the owner or person in charge of such premises shall refuse or neglect to carry out the orders of the secretary of agriculture within ten days after receiving written notice, the secretary of agriculture may proceed to treat or destroy the infested or infected plants or plant material. The expense thereof shall be assessed, collected and enforced as taxes are assessed collected and enforced against the premises upon which such expense was incurred. The amount of such expense when collected shall be paid to the secretary of agriculture and by him deposited with the state treasurer."

In those cases in which infection is not found it is believed that under the provisions of sections 1128, supra, the secretary of agriculture is empowered to determine whether or not conditions are such as to demand its destruction, and may issue such orders as in his judgment the situation requires. As above indicated, it is believed that the secretary is limited only in case he should take such action as the court should determine to be an abuse of his discretion. However, as above stated, whether or not a dangerous condition exists, and further what preventive or remedial measures should be taken, are matters in the first instance to be determined solely by the secretary of agriculture.

You submit a form of notice and request me to pass upon the sufficiency of the same in view of your statement of facts. Said form reads as follows:

"In accordance with section 1128, General Code of Ohio, your premises located in _____ Township, _____ County, Ohio, were inspected _____, 19--, by a duly authorized representative of this department and common or European barberry plants found growing thereon.

These plants serve as the almost exclusive host of a stage of the black stem rust (*Puccinia graminis*) of wheat and other cereals and grasses and constitute a means of maintaining the presence and promoting the destructiveness of this disease on cereals.

As provided in section 1132, General Code of Ohio, you are hereby instructed to destroy all plants of the common or English barberry (*Berberis Vulgaris*) and all of its horticultural varieties now growing on your premises. Such destruction to be by digging up and burning said barberry plants, the same to be completed on or before _____, 19--."

For the reasons heretofore set forth it is believed that the form is proper in those cases in which the plants ordered to be destroyed have been found by your inspectors to be infested or infected. However, in the event you order the destruction of plants which have not been found to be infested or infected as a preventive measure, it is believed that you should omit from the notice reference to section 1132 of the General Code.

You further inquire relative to the sufficiency of a letter of authorization, signed by the chief of the bureau of horticulture and the secretary of agriculture, carried by deputy inspectors. Section 1124 G. C. provides:

"The secretary of agriculture is hereby authorized to appoint deputy inspectors who shall carry out the instructions of the inspector in the enforcement of the provisions of this act. Such deputy inspectors are hereby invested with the same police power as the inspector and shall be furnished with official badges or other insignia of authority which shall be carried while on duty."

The statute is plain that the deputy inspector must carry an "official badge" or "other insignia of authority." The only question is: What can "other insignia of authority" be construed to mean?

Webster defines "insignia":

"Badges of honor or authority."

While undoubtedly the certificate would be sufficient if it were honored by the party whose premises are inspected, yet, in view of the language used, it is my opinion that in order to strictly comply with the law the inspectors and deputies should possess and carry badges indicating their authority.

It is believed that what has been said relative to the destruction of plants under the provisions of section 1132 G. C. will apply to the question presented in the third paragraph of your letter relative to section 1130 G. C. Therefore no specific reply to said inquiry has been made.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1663.

ROADS AND HIGHWAYS—WHERE CONTRACT UNDER STATE AID IMPROVEMENT SIGNED BY STATE HIGHWAY COMMISSIONER—FUNDAMENTAL CHANGES IN PLANS OF CONSTRUCTION REQUIRED BY PHYSICAL CONDITIONS FOUND TO EXIST IN CONNECTION WITH CONTEMPLATED WORK—CONTRACTOR NOT AT FAULT—MAY TREAT CONTRACT AS NOT HAVING BEEN ENTERED INTO.

Where a contract under the state aid improvement statutes has been signed by the state through the State Highway Commissioner, and it is thereupon found that fundamental changes in plans of construction are required by physical conditions found to exist in connection with the contemplated work, by reason of which fact the contractor without fault on his part has been prevented through an entire working season from beginning work and cannot in any event carry out the original plans, the State Highway Commissioner may treat the contract as not having been entered into.

COLUMBUS, OHIO, November 26, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your letter of November 17th is received, reading as follows:

"Attached find copy of Journal entry of the board of commissioners of Jefferson county.

I have been informed by division engineer that the statements con-