

regulating funds to be expended by the prosecuting attorney's office in the hands of the commissioners, I am of the opinion that the commissioners are bound by Sections 5660, 5660-1 and 5661, but these sections do not go as far as to say that the final authority in regulating funds to be expended by the prosecutor's office is in the hands of the commissioners because, as I have said before, if the appropriation has been made, the prosecuting attorney may, and is entitled to, draw the money and expend it as he sees fit, limited only by the provision that it shall be expended in the performance of his official duties, and in the furtherance of justice, and the county commissioners have no control in this respect. However, by virtue of the authority vested in them with reference to fixing the amount of appropriations under Section 5649-3g and 5649-3h, they may, by failing or refusing to appropriate funds, render the action of the court in making allowances under Section 3004-1, ineffective.

Respectfully,
 EDWARD C. TURNER,
Attorney General.

77.

SALE OF NURSERY STOCK—SECTION 1138 G. C. IS VALID EXERCISE OF
 POLICE POWER—STATE MAY REQUIRE LICENSE FEE—ADMINIS-
 TRATIVE OFFICERS SHOULD COMPLY WITH STATUTE.

SYLLABUS:

1. *Section 1138, General Code, is a valid exercise of the police power and the State of Ohio may properly require a license fee as therein provided.*
2. *The provisions of the duly enacted statute should be followed by administrative officers unless and until such statute be declared unconstitutional by a court of competent jurisdiction.*

COLUMBUS, OHIO, February 12, 1927.

Department of Agriculture, MR. RICHARD FAXON, Chief, Division of Plant Industry, Columbus, Ohio.

DEAR SIR:—I am in receipt of your letter dated January 11, 1927, wherein you refer to Section 1138, General Code, and request my opinion "as to whether it is constitutional for the State of Ohio to require a license fee" as therein provided.

Article I, Section 10, Clause 2, of the Constitution of the United States, provides:

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. * * *"

The question that you present involves whether or not Section 1138, General Code, contravenes either the federal or state constitutions. So long as Congress has not invaded the field of regulation or inspection this power is reserved in the state.

The legislature has the right to determine the necessity, the policy and the wisdom of requiring inspection laws in the interest of public safety. A large discretion is vested in the legislature to determine what the interests of the public require and also what is necessary for the protection of such interests.

It is a matter of common knowledge that all forms of plant life are subject to

destructive and communicable diseases. It is now a well established principle and a general proposition of law that reasonable regulations enacted to prevent the spread of noxious vegetation and to prevent the infection of trees and nursery stock are within the police power of the state.

The need for stringent inspection of plants and nursery stock has been recognized by the federal government. In an act of August 20, 1912, which now appears as Section 8157, United States Statutes, the following provision appears:

"It shall be unlawful for any person to import or offer for entry into the United States any nursery stock, unless, and until a permit shall have been issued therefor by the Secretary of Agriculture, under such conditions and regulations as the said secretary of agriculture may prescribe and unless such nursery stock shall be accompanied by a certificate of inspection, in manner and form, as required by the Secretary of Agriculture, of the proper official of the country from which the importation is made, to the effect that the stock has been thoroughly inspected, and is believed to be free from injurious plant diseases and insect pests. * * *

The legislative history of our statutes relating to the agricultural inspection, shows that originally the inspection of plants and nursery stock was not provided for.

In 108 Ohio Laws, Part I, 358, the General Assembly revised its entire inspection laws on the subject and therein provided for the inspection of plants and nursery stock. At that time Section 1138, General Code, was enacted and it provides.

"All agents within the meaning of this act (G. C., Sections 1122 to 1140-6) selling nursery stock or soliciting orders for nursery stock within the state for any nurseryman or dealer located within the state or outside the state shall file annually with the Secretary of Agriculture a sworn statement that he will sell only stock that has been duly inspected by an official state or federal inspector, accompanying such statement with a fee of one dollar, and shall secure and carry an agent's certificate and a copy of the certificate held by his principal. Said agent's certificate shall be issued only by the Secretary of Agriculture to agents authorized by their principal or upon request of their principal. Names and addresses of such agents shall not be divulged by the inspector nor the Secretary of Agriculture."

As an incident to its power to enact valid inspection laws a state may impose a reasonable fee or charge for the purpose of defraying the expenses of inspection.

If properly exercised the legislature's purpose, in laying a charge for inspection, cannot be inquired into, and ordinarily the amount of the inspection fee is not a judicial question. It may be subject to attack, however, if the inspection charges are so unreasonable and disproportionate to the service rendered as to challenge the good faith of the law, or where it is made clearly to appear that they are obviously and largely beyond what is needed to pay the cost of inspection.

It is not necessary that the legislature determine with exact nicety the amount of the inspection charges required to carry its purpose into execution. Mere excess in net surplus revenue is of itself no warrant in disturbing the law. The question is—does the inspection tax impose a burden on such commerce largely in excess of the expense necessary for inspection?

In order that an inspection law may be valid, the fee imposed must be reasonable and must have reference to the cost of the service.

It cannot be said that the fee imposed by provisions of Section 1138, General

Code, is unreasonable when one considers that the income from such agent's certificates, according to figures furnished by your department, has been as follows:

1924	-----	\$738 00
1925	-----	639 00
1926	-----	592 00

Section 1138 supra, is not discriminatory because it includes resident and non-resident nurserymen or dealers.

Therefore, it is my opinion that Section 1138, General Code, is a valid exercise of the police power and the State of Ohio may properly require a license fee as therein provided. In passing it is proper to observe that the provisions of a duly enacted statute should be followed by administrative officers, unless, and until such statute be declared unconstitutional by a court of competent jurisdiction.

Respectfully,
 EDWARD C. TURNER,
Attorney General.

78.

DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS—MAY CONSENT TO CONSTRUCTION OF SWITCH TRACK ACROSS INTER-COUNTY HIGHWAY OR MAIN MARKET ROAD—DEPARTMENT HAS JURISDICTION WHERE STRUCTURES ERECTED.

SYLLABUS:

1. *The Department of Highways and Public Works may consent to the construction of a switch track across an inter-county highway or main market road upon such terms and conditions as will protect the interests of the traveling public.*

2. *In consenting to the placing of structures upon an inter-county highway or main market road, the department of highways and public works cannot bargain away its right to have such structures removed whenever, in the exercise of reasonable judgment, such structures become obstructions in the use by the traveling public of such road.*

COLUMBUS, OHIO, February 12, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your recent communication, which is as follows:

“The Keystone Gravel Company of Dayton has made application to this department to construct a grade crossing on one of our highways. This line will be used as a switch and there will be about twenty movements of cars per day. They are asking for this permission for a period of one year, at the end of which they will remove their tracks from the highway and either separate the grade or abandon the switch.

The writer is inclined to grant this permission if in your judgment the interest of the traveling public can be protected and this department assured at