

VETERINARIAN, STATE: Appraisal and slaughter of tuberculous cattle. Keeping of tuberculous cattle a public nuisance; suit to abate.

April 5, 1937.

Dr. J. L. Axby,
State Veterinarian,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter stating that the status of Lake County as a modified tuberculosis-free area expired on January 1, 1937, and that the retesting of all cattle in the county, for the purpose of re-declaring the county a modified tuberculosis-free area, has just been completed.

You are requesting an official opinion from this Department as to the steps to be taken to accomplish the appraisal and slaughter of cattle which have been subjected to the tests and which have reacted thereto. Your authority to conduct such tests is to be found in Burns Ind. Statutes Annotated 1933, sections 16-507, 16-511, 16-512, 16-515, 16-517, and 16-601, the pertinent provisions of which read as follows:

16-507: "It shall be the duty of the State Veterinarian to protect the health of the domestic animals of the State, and to determine the most efficient and practical means for the prevention, suppression, control and eradication of dangerous, contagious and infectious diseases, and to investigate the cause, nature, means of prevention and treatment of such diseases as he may deem advisable, and, for these purposes, he is hereby authorized and empowered to establish, maintain, enforce and regulate such quarantine and other measures relating to the movements and care of animals and their products, the disinfection of suspected localities and articles, and the destruction of such animals and property, as he may deem necessary, and to adopt from time to time all such regulations as may be necessary and proper for the carrying out of the purposes of this Act: Provided, however, That in the case of any slowly contagious diseases, only suspected or diseased animals shall be quarantined."

16-511: "The State Veterinarian may accept in behalf of the State, the rules and regulations prepared and adopted by the Department of Agriculture of the United States for the suppression of any contagious diseases among domestic animals, and shall co-operate with the authorities of the United States in the enforcement of such rules and regulations."

16-512: "The inspectors of the Bureau of Animal Industry shall have the same right of inspection, quarantine and condemnation of animals affected with any contagious or infectious disease, or suspected to be so affected, or that may have been exposed to any such disease, and, for such purposes, they may enter upon any ground or premises, they may call upon the sheriffs, constables and other peace officers to assist them in the discharge of their duties and such sheriffs, constables or peace officers shall assist such inspectors when so requested, and such inspectors shall have the same power and protection as peace officers, when engaged in the discharge of their duties: Provided, That this State shall not be liable for any damages or expenses caused or made by such inspectors."

16-515: "The State Veterinarian shall, as far as possible, investigate such diseases of animals as are communicable to man, and such conditions of dairies as the State Board of Health may request."

16-517: "* * * the State Veterinarian or his duly appointed agents * * * may make such examinations into the conditions of the live stock of the State in relation to contagious and infectious diseases, including milk supplies of cities, towns, and villages, as may seem necessary, and to take proper measures to protect such milk supplies from contamination. * * * The decision of the State Veterinarian in all matters pertaining to diseases of domestic animals and his orders as to their disposition shall be final. He may call upon any peace officer for assistance in the discharge of his duties and such peace officer shall give assistance."

16-601: "For the purpose of establishing an effective method of controlling and eradicating tuberculosis in cattle, the State Veterinarian is authorized to

establish 'tuberculosis-free' accredited herds of cattle, in co-operation with the Bureau of Animal Industry of the United States Department of Agriculture, and under such rules and regulations as may be agreed upon from time to time by the State Veterinarian and the Secretary of Agriculture of the United States. He shall encourage the breeders of Indiana to place their herds under state and federal supervision for the eradication of tuberculosis; issue suitable certificates annually to the owners of such herds as qualify for tuberculosis-free accredited herds and publish annually a list of all herds that have qualified for the State list. If it is found necessary for the eradication of tuberculosis from such herds of cattle under state and federal supervision to quarantine or destroy animals affected by such disease, the State Veterinarian is hereby authorized to quarantine or direct and supervise the slaughter of such animals. In cases where cattle are condemned for slaughter, the State Veterinarian shall have them appraised in advance as hereinafter provided and to pay to the owner thereof one-third ($\frac{1}{3}$) of the difference between the appraised value of each animal so destroyed and the value of the salvage secured by the owner: Provided, however, That in no case shall any payment by the State be more than forty dollars (\$40.00) for any grade animal, or more than eighty dollars (\$80.00) for any pure bred animal."

Secs. 16-507 and 16-508, enacted in 1901, vested in the State Veterinarian authority to direct the slaughter of animals infected with tuberculosis when deemed necessary "to prevent further spread of disease or protect the health of the public" and to adjust the claim with the owner or have the amount fixed by appraisal, all of which was to be paid out of the State Treasury.

By Sec. 16-608 authority to establish accredited tuberculosis-free areas is granted, and the authority to make retests for the purpose of maintaining such areas as accredited tuberculosis-free areas to conform to federal regulations is recognized. The section reads as follows:

"In order to enable the State Veterinarian to control and extirpate bovine tuberculosis more effectively, and to aid in establishing and maintaining within the State modified accredited tuberculosis-free areas, and to prevent the spread of the disease, county councils may, on their own initiative, and shall, upon the presentation of a petition signed by not less than fifty-one (51) per cent of the cattle owners of any county, make an annual appropriation of such sum of money as may be required, not to exceed five thousand dollars (\$5,000.00) which sum shall be used in assisting the State Veterinarian and the United States Bureau of Animal Industry in the employment of inspectors to apply tuberculin tests to all cattle within said county. If an appropriation shall have been made for any year for the establishment of any such county as a tuberculosis-free area, and if the work of testing the cattle in such county shall have been commenced within such year, then and in that event the county council shall make an annual appropriation thereafter for the continuation of such work until all cattle within the county shall have been tuberculin tested and the per cent of bovine tuberculosis shall have been reduced to not more than one-half of one (1) per cent, as indicated by the records in the office of the State Veterinarian or the local office of the Bureau of Animal Industry, United States Department of Agriculture. If two (2) or more counties, which are contiguous to any other county, shall have been or are in the process of being accredited as tuberculosis-free areas, the county council of such other unaccredited county shall, upon being notified by the State Veterinarian that such other two (2) or more contiguous counties have been or are in the process of being accredited, make an appropriation to defray the expenses of carrying on the work of testing cattle in such county not so accredited. Whenever the inspector in charge for the United States Bureau of Animal Industry and the State Veterinarian, shall determine that the cattle within any accredited county shall be retested, to conform to the federal regulations made and provided to govern the reaccrediting of counties, it shall be the

duty of the county council of such county to make the necessary appropriation to carry on such work."

When a tuberculin test has been made and reactors found, the statute directs the slaughter of all such reactors:

16-613: "All cattle which have heretofore reacted or shall hereafter react to a tuberculin test shall, immediately on such reaction, be marked by branding on the left jaw with the letter T, said letter to be not less than two (2) or more than three (3) inches in length, and shall be tagged in the left ear with a special tag to be adopted by the State Veterinarian, and all cattle so identified shall be slaughtered within a period of thirty (30) days immediately following such reaction, such slaughter to be under the direction of the State Veterinarian, and the owners thereof shall be indemnified for such animals so slaughtered in accordance with the provisions of the Acts of 1919, page 574, chapter 117: Provided, That in special and meritorious cases, the State Veterinarian may grant an extension of time for such slaughter."

In order to give effect to the provisions of Sec. 16-613 authorizing indemnity to owners of animals which are reactors and therefore ordered slaughtered, that section, which is Sec. 6 of Ch. 215, Acts of 1925, p. 608, must be construed along with the provisions of Secs. 16-602 and 16-603 which are Secs. 2 and 3 of Ch. 117, Acts of 1919, p. 574 and which, taken together, prescribe the manner in which such indemnity shall be determined and obtained.

These sections read as follows:

"Cattle affected with tuberculosis, and condemned for slaughter, shall be appraised in advance by two (2) disinterested persons, one to be selected by the State Veterinarian, and the other by the owner; and when these two (2) persons are unable to agree, they shall select a third appraiser, and their decision shall be final. In the appraisal of tuberculosis cattle, due consideration shall be given to their breeding value, as well as their dairy or meat value."

"Each owner of tuberculous animals which have been condemned and appraised shall market the cattle

at the nearest federal inspection point, at a time designated by the State Veterinarian, and shall obtain from the purchaser a certified itemized bill of sale showing the amount of money actually paid for the animals. When the appraised cattle have been slaughtered and the amount of salvage ascertained, the owner of the animals shall present his claim to the State Veterinarian, which claim shall be accompanied by such reports as the State Veterinarian shall require."

Under the provisions of Secs. 16-602 and 16-613, *supra*, when reactors are found such reactors are to be appraised by "two disinterested persons." It is the duty of the State Veterinarian to select one such disinterested person, and the owner shall select the other. The statute prescribes no method by which the owner may be compelled to select such person. Such selection is, in my opinion, a privilege given the owner which may be waived by failure or refusal to select a disinterested person.

It nevertheless remains necessary that an appraisal of such reactors shall be made by two disinterested persons and in the absence of any statutory procedure for designating the appraiser to be selected by the owner upon the latter's failure to make such selection, it would be necessary that the State Veterinarian select, or cause to be selected, both disinterested persons.

In case an owner of reactors expressly waives his right to indemnity as given by Sec. 16-613, such animals may be ordered slaughtered by the State Veterinarian without following the method prescribed in Secs. 16-602 and 16-603, but an owner's waiver of the right given him by Sec. 16-602 to name an appraiser would not amount to a waiver of his right to be indemnified. In case of waiver of such indemnity by the owner of diseased animals, the State Veterinarian, under Sec. 16-507, *supra*, may "establish, maintain, and enforce * * * measures relating to * * * the destruction of such animals * * * as he may deem necessary," and in my opinion, may, if deemed necessary, direct his duly authorized agents to slaughter such diseased animals upon failure of the owner to do so within the time allowed by statute or as extended under authority of the statute.

After such appraisal has been made, it becomes the duty of the owner, at the direction of the State Veterinarian, to

market the reactors for slaughter at the nearest federal inspection point within thirty days immediately following such reaction, or within such time as extended by the State Veterinarian under the circumstances specified in Sec. 16-613.

Sec. 16-612 is as follows:

“The State Veterinarian, or his duly authorized agent, is hereby empowered to enter upon any premises, barns, stables, sheds or other places where cattle are housed or kept for the purpose of applying tests with tuberculin to ascertain whether or not the animals so tested are affected with tuberculosis, and the owners of such cattle shall render such reasonable assistance as may be required to enable the State Veterinarian or his agent to apply the test with accuracy and dispatch.”

If an owner interferes with or refuses upon proper request, to render such reasonable assistance as may be required in the tuberculin testing of cattle, such interference or refusal would constitute a violation of the provisions of Sec. 16-612. And an owner's failure or refusal to market reactors for slaughter at the nearest federal inspection point at the direction of the State Veterinarian, and within thirty days following such reaction or within the time as extended by the State Veterinarian would constitute a violation of Sec. 16-613. For any such violations the owner would be liable to prosecution and subject to fine or imprisonment or both as provided in Sec. 16-614.

Conviction of an owner charged with interference with a tuberculin test of his cattle was upheld by the Supreme Court of Illinois in the case of *People v. Anderson* (1934), 355 Ill. 289, 189 N. E. 338. The Court, in its opinion, recognized the condition sought to be corrected by legislation similar to our own statutes and approved such legislation, as follows:

“Tuberculosis is generally known to be a dangerous, infectious, or communicable disease which attacks both the human race and domestic animals. The existence of tuberculosis in dairy cattle is dangerous to human beings, particularly infants and children of immature years. Dairy and breeding cattle may become afflicted

with it from other cattle suffering from the disease. It may be communicated to mankind by milk and other food products from infected animals."

* * *

"The manifest purpose of the statute here under consideration is to protect the public health. Legislation in the interest of public health is a proper exercise of the police power of the State for the suppression and prevention of a disease deadly in its effects upon the human race and upon domestic animals. The State has the right to require dairy cows and breeding cows to be subjected to the tuberculin test."

* * *

"The legislature had the power to pass a law upon the subject of the suppression of tuberculosis in dairy and breeding cattle. As a necessary adjunct to such power it had the right to adopt a procedure for the administration of such law. It had the lawful right to invest the department with certain discretion to be exercised by it, acting through its agents, in the discharge of its functions as a ministerial and administrative agency. The powers granted were neither judicial nor legislative."

In addition to constituting a criminal offense, the keeping of such reactors beyond the time allowed for marketing them, in the light of scientific knowledge concerning tuberculosis in cattle, of which the courts will upon suggestion take notice, would be injurious to public health and would essentially interfere with the comfortable enjoyment of life and property and therefore would constitute a nuisance under Sec. 2-505, Burns Ind. Statutes Annotated 1933, which section reads as follows:

"Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

"The prevalence of tuberculosis in dairy cattle is a menace to the public health of both adults and chil-

dren. * * * Cattle which are infected with a dangerous communicable, or infectious disease are public nuisances at common law. * * * The jurisdiction of courts of equity to restrain the maintenance of public nuisances is of ancient origin and has been traced as far back as the reign of Queen Elizabeth. * * * The ground of the jurisdiction of courts of equity in cases of public nuisance is their ability to give a more complete and perfect remedy than is attainable at law in order to prevent irreparable mischief and also to suppress oppressive and vexatious litigation." *People v. Huls* (1934), 355 Ill. 412, 169 N. E. 346.

In view of the fact that criminal proceedings for violation of the statutory provisions would result only in a judgment for a fine or imprisonment, or both, against the owner and would not necessarily result in removal of the menace to public health, an action to enjoin or abate such nuisance would lie. The fact that penalties may be inflicted, or that another remedy is provided, does not bar the right to an injunction. *State v. The Ohio Oil Co.* (1898), 150 Ind. 21; *High on Injunctions*, 4th Ed., Sec. 745, p. 710:

"While it is a general rule of law that, where the acts complained of constitute a breach of the criminal law, courts of equity will not for that reason alone take jurisdiction to enjoin the further continuance or prevention of threatened illegal acts, yet, where the enforcement of the criminal law is merely incidental to the general relief sought and the acts complained against constitute a nuisance or danger to the public health and welfare and a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity will, on the request of the duly constituted authority, grant the relief sought by injunction." *People v. Huls*, *supra*.

Under the authority of the decisions from which the foregoing excerpts are quoted, and the cases cited therein, the right to injunction is not barred by the fact that the owner may be prosecuted criminally for interfering with a tuberculin test, for refusing to furnish reasonable assistance when required or for failing to market cattle for slaughter which

are shown to have tuberculosis, when directed to do so by the State Veterinarian.

It seems well settled that a suit to enjoin such a nuisance may be brought by the State of Indiana on relation of the Attorney General and Prosecuting Attorney. *State v. The Ohio Oil Co., supra.*

In answering your questions, I would advise that where tuberculin tests have been made, and cattle having tuberculosis are found, and no agreement can be reached with the owner as to their value, an appraisal by two disinterested persons shall be obtained; and upon refusal of the owner to name an appraiser you may select both such appraisers, naming disinterested persons, and after appraisal you may direct the owner to market such cattle for slaughter at the nearest federal inspection point within the time fixed by statute, or as extended. Upon failure or refusal of such owner to slaughter such tuberculous cattle as directed, he may be prosecuted under the penal section of the statute above referred to and/ or suit, in the name of the state, may be brought to abate the nuisance maintained by such owner in keeping such tuberculous cattle.

Besides resorting to the courts for the purpose of invoking the penal provisions of the statutes and securing compliance on the part of the owner by court order in injunction proceedings, the statutory provisions, construed together, confer sufficient authority upon the State Veterinarian, upon failure of the owner to comply with his orders, as required by statute, to cause such diseased animals to be slaughtered in conformity with regulations and measures which he may establish, maintain, enforce, and adopt, relating to the destruction of such animals as he may deem necessary. (Sec. 16-507, *supra.*)