

at this option may retake such goods without complying with or being bound by the provisions of sections 15 to 23 inclusive, as to the goods retaken, upon crediting the buyer with the full purchase price of those goods."

It would seem, therefore, that the exception last above quoted gives the seller the right to immediately repossess the goods which constitutes the subject matter of the sale, if the contract of sale contains such a provision, without giving to the buyer any notice of his intention to retake and without granting any time for redemption.

Your attention is directed, however, to the last sentence of section 24 which reads as follows:

"So much of this credit as is necessary to cancel any indebtedness of the buyer to the seller shall be so applied, and the seller shall repay to the buyer on demand any surplus not so required."

It would seem that this provision would require such conduct on the part of the seller as might make him much prefer to follow the provisions of section 15, rather than to assert his rights under section 24.

VETERINARIAN, STATE: Animals, statute requiring bodies of dead, to be hauled to reduction plant licensed by state is exercise of police power. Interstate commerce not burdened by prohibiting transportation of dead animals outside of state.

July 16, 1937.

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

Dear Sir:

I have your letter requesting an opinion upon the construction and applicability of certain provisions of chapter 278, Acts of 1937, p. 1279. The title of the Act is as follows:

"An Act to control animal diseases and to regulate the transportation and disposal of the bodies of dead

animals; providing penalties for its violation; repealing certain specific acts and all other laws and parts of laws in conflict therewith; and fixing a time when this Act shall take effect."

By section 1 of the Act the public policy controlling its passage is set out as follows:

"Be it enacted by the General Assembly of the State of Indiana, That it is hereby declared to be the public policy of the State of Indiana, acting through its General Assembly, to control and regulate the transportation over the highways of this state and the disposal of the carcasses of dead animals, not slaughtered and intended for human food, to the end that the spread of animal diseases in this state shall be controlled and also that the public health and welfare of the citizens of this state shall be conserved and protected against dangers, annoyances and nuisances that might arise from such carcasses and from such transportation and disposal thereof, if the same be not required by law; and this Act is designed to effectuate such purposes and public policy, through the exercise of the public (police) powers of the state. This Act shall be liberally construed to effect such policy and to promote such objects."

The Act deals with the transportation and disposition of the bodies of dead animals not slaughtered or intended for human food.

A license is required by section 4 of the Act to operate a disposal plant, and only such licensee or person acting upon his behalf may transport dead animals over the highways of this state.

"No person shall engage in this state in the business of operating a disposal plant, as herein defined, without first obtaining for each such disposal plant so operated by him, or in his behalf, a license and any vehicle certificates required, as herein provided; and no person, except one holding a license to operate such a disposal plant in this state, or who is acting for such licensee, or who is otherwise excepted by this Act, shall either transport over any highways of this

state, or dispose of to any person, the bodies of any dead animals in any manner herein prescribed, or in any other manner not permitted by law."

Section 4, Acts of 1937.

"No person, except as herein provided, may haul or transport over the highways of the State of Indiana the bodies of any dead animals, except those that have been slaughtered and are intended for human food, without first obtaining and holding a license issued under the provisions of this Act and which bodies are being transported to a disposal plant located in this state and operated by a person holding a license to engage in such business."

Section 11 (a), Acts of 1937.

Section 11 (b) specifically provides that no license shall be issued solely for the purpose of transporting the bodies of dead animals, but such transportation must be done solely by persons holding a license for disposal plants:

"No license shall be issued to any person solely for the purpose of transporting the bodies of dead animals, but such transportation must be done solely by persons holding a license for disposal plants, so that such dead bodies may be properly and promptly disposed of under the requirements of this Act; except that any public official of this state, charged by law with such duties, may remove or supervise the removal of any such dead bodies and the disposal thereof by any method provided for by this Act where necessary to protect the public health and welfare."

Section 11 (c) describes the manner in which vehicles used to transport dead animals must be constructed, and section 11 (c) requires the cleansing and disinfecting of such vehicles at the disposal plant, after each trip, in such manner and with such solution as the state veterinarian shall by regulation prescribe, and also the washing of such vehicle with steam or hot water.

Section 5 of the Act provides, in part, that "any person, except one holding a license to operate such a disposal plant in this state, or who is acting for such licensee, or who is

otherwise excepted by this Act, * * * who shall obtain from any other person * * * the body of any such dead animal * * * for the purpose of transporting the same over any highway of this state and of disposing of the carcass * * * to any person or by any method designated to effect a profit therefrom for himself, shall be guilty of violating this Act, and shall be subject to all the penalties of this Act."

The question raised by your letter is whether the Act is constitutional insofar as it purports to prohibit the transportation of the bodies of dead animals into other states by a person who does not hold a license to operate a disposal plant in Indiana, and is not acting for a person holding such a license; or whether, to that extent, the Act is unconstitutional, as imposing a burden upon Interstate Commerce.

As indicated in section 1, the Act in question was adopted in furtherance of a legislative policy of controlling the spread of animal diseases and protecting the public health and welfare of the citizens of the state against dangers, annoyances, and nuisances that might arise from the transportation and disposal of the carcasses of dead animals.

The power exercised by the legislature in dealing with the subject of this Act is commonly recognized as the police power, and affords the basis for delegating to municipal corporations the authority to provide for the removal of dead animals, garbage, and ashes from within the boundaries of such corporations.

Sec. 46-1902, Cl. 16, Burns Ind. St. Ann., 1933;

Sec. 48-4236, Burns Ind. St. Ann., 1933;

Sec. 48-4238, Burns Ind. St. Ann., 1933.

It is to be noted that the 1937 Act governing the transportation and disposition of dead animals does not require that the owner of a dead animal shall dispose of it to a licensee; he may bury it in a manner prescribed by law upon his own or other available premises, if transportation of the body along the highway is not required. (Sec. 12). But if the body is not buried by the owner, the provisions of this Act controlling its transportation and disposition become applicable.

"It is within the general power of a government to preserve and promote the public welfare even at the expense of private rights. 18 Am. and Eng. Encyc.,

etc., 739, 740. Police power is defined in *New Orleans Gas & Light Co. v. Hart*, 40 La. 474, 8 Am. St. Rep. 574, where it is said: It is the right 'of a state functionary to prescribe regulations for the good order, peace, protection, comfort and convenience of the community which do not encroach on the like power vested in Congress by the federal constitution.'

"In *Commonwealth v. Alger*, 7 Cush. (Mass.), 53, the court lays down the rule that 'rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.'

"In *Thorpe v. Rutland, etc., R. R. Co.*, 27 Vt. 140 (149), 62 Am. Dec. 628, it is said: 'By this general policy power of the state, persons and property are subjected to all kinds of restraints and diligence in order to secure general comfort, health and prosperity of the state.'

"In *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, the court said: 'The police power of the state is co-extensive with self-protection, and is applicably termed the law of overruling necessity. It is the inherent and plenary power in the state, which enables it to prohibit all things hurtful to the comfort and welfare of society.' *Hale v. Lawrence*, 21 N. J. Law 714; *Wiedeman's Lim. of Police Power*, section 1."

Walker v. Jameson (1895), 140 Ind. 591, 596, 597.

Whether public health, public safety and public welfare require the General Assembly to treat dead animals as nuisances and impose stringent regulations, restrictions, and prohibitions upon their disposal, is a question for legislative determination. While the General Assembly lacks the power to treat these things as nuisances which cannot under any reasonable view become nuisances, it is well settled that where, from their character, things may and do become nuisances, courts will not review a legislative determination treating them as such.

"It resolves itself solely into a question of power and not of mere reasonableness. We recognize the rule that a municipal corporation has no power to treat a thing as a nuisance which can not be one; but it is equally well settled that it has the power to treat as a nuisance a thing that, from its character, location and surroundings, may, or does become such. In doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question."

Walker v. Jameson, *supra*, p. 598.

In the case of Jansen Farms, Inc. v. City of Indianapolis (1930), 202 Ind. 138, 171 N. E. 199, 72 A. L. R. 514, the Indiana Supreme Court said:

"The power and duty of the state, and municipalities acting by its authority, to control and regulate the manner of the collection and disposition of garbage, refuse, filth, dead animals, manure, etc., exists both under the rules relating to nuisances and to the public health, safety and welfare. The tendency of garbage to ferment rapidly and become a source of annoyance and a cause of disease warrants stringent police regulations, and it is uniformly held that municipalities may require all garbage to be placed in proper receptacles, may prescribe the time and mode of removal and disposition, may provide that it shall have the exclusive right of removal, or grant the exclusive right to remove the same to one or a number of contractors. One of the earliest and leading cases stating this doctrine is Walker v. Jameson (1894), 140 Ind. 591, 37 N. E. 402, 39 N. E. 669, 28 L. R. A. 679, 683, 49 Am. St. 222. (Citation of authority.)

"While it is recognized that garbage has a value as food for hogs or for rendering purposes, its value in the past has been considered so slight as compared with the danger to public health, if it is disposed of without restriction, that the courts, on the ground of

public policy, have uniformly upheld ordinances which provide for the exclusive collection of garbage, and thus, in effect, deprive the owner of the opportunity of receiving compensation for his garbage, interfere with a source of supply of hog raisers, and destroy the means of livelihood of other scavengers. 19 R. C. L. 824, 43 C. J. 377, 379. 'In such circumstances,' said the court in *Gardner v. Michigan*, *supra*, 'the property rights of individuals in the noxious materials . . . must be subordinated to the general good.'

Jansen Farms, Inc. v. City of Indianapolis, (1930),
202 Ind. 138, 144, 145.

In the Jansen case, *supra*, the court construed the definition of garbage as not including "food products left from the tables, not shown to be offensive as handled," and held that such products were not subject to the exclusive control of the garbage contractor. But in the case of *City of Indianapolis v. Ryan* (1937), 7 N. E. (2nd) 974, the Indiana Supreme Court held that the "legislature has the right to regulate the disposal of the material if it is dangerous to the public health or welfare, or if it may become dangerous."

The reasoning of the court in upholding the legislative grant of authority to a municipal corporation to provide for the collection of garbage in a manner that creates an exclusive right or privilege in a certain person or class of persons applies with equal force to legislation creating, in a certain licensed class of persons, the exclusive right to remove and dispose of dead animals.

"Once it is conceded that there is a public interest in the disposal of such substances, and it cannot be questioned that there is, the government is not required to prove that in each specified case the particular items and substances were handled in such a manner as to be offensive and harmful. If such were the law, the command of the statute that the city shall haul away and dispose of all such matter, and that no other person may lawfully haul such matter from the place of its production, would be subject to the requirement that, in respect to each private residence, the duty of the city would only extend to disposing of matter 'offensive or harmful as handled' by others,

who, by the express terms of the statute, are forbidden to handle it at all, and the duty of the city would vary from time to time, depending upon its ability to establish to the satisfaction of a court that the kitchen refuse from each private residence is 'offensive or harmful as handled' at the particular instant. Such a construction would destroy the statute as written and substitute therefor a rule requiring the city to haul away and dispose of garbage not otherwise being disposed of or hauled away by other persons in a manner that cannot be shown to be offensive or harmful. Since it may be reasonably believed that a uniform system of collecting and disposing of garbage is necessary in order to protect the public from danger, the legislature had power to provide for such a uniform system, notwithstanding that in some cases it would otherwise be disposed of without harm to the public."

City of Indianapolis v. Ryan (1937), 7 N. E. (2) 976, 977.

While it is well settled that the General Assembly has no power to unreasonably burden Interstate Commerce, a reasonably necessary exercise of the police power of the state for the protection of the safety or health of its citizens, even though incidentally affecting Interstate Commerce, does not constitute a regulation of commerce within the meaning of the Constitution and will not be construed by the federal courts as imposing a burden upon such commerce.

"In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution * * * And it may be said generally, that any of its regulations, not relating to the rights, duties, and liabilities of citizens, and only directly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in

commerce, foreign or interstate, or in any other pursuit.' ”

Sherlock v. Alling, 93 U. S. 99, 103;
 See Crossman v. Lurman, 192 U. S. 189;
 Plumley v. Massachusetts, 185 U. S. 461.

The Supreme Court of Indiana in the case of State, ex rel., v. Indiana, etc., Mining Company, recognized that the police power, particularly the power to provide for the safety of our citizens, may not be used as a guise for restricting the transportation of natural resources to other states, or for a legislative prohibition directed solely against a certain class of persons engaging in a particular business.

“The states may, so long as they do no more than legitimately exercise the police power, legislate upon matters connected with Interstate Commerce. Sherlock v. Alling, *supra*; County of Mobile v. Kimbell, 102 U. S. 691; Smith v. Alabama, *supra*; Nashville, etc., R. R. Co. v. Alabama, *supra*.

“It is almost impossible, however, in view of the conflicting and confused state of the law as declared by the Federal Supreme Court, to determine what that tribunal, with which rests the ultimate decision of the question, will eventually regard as a legitimate exercise of the police power by the states, since the doctrine declared in the case of Western Union Tel. Co. v. Pendleton, 129 U. S. 347, is much more restrictive of the rights of the states than that asserted in Smith v. Alabama, *supra*; Nashville, etc., R. R. Co. v. Alabama, *supra*; Dunn v. State, 94 U. S. 113, and many earlier cases. But it is evident that the Act under examination can not, under the rule laid down by the court of last resort, be deemed a legitimate exercise of the police power. The Act does not assume to provide for the safety, health, or comfort of the citizens, but its object is to prevent the sinking of gas wells and the laying of pipe lines by persons who desire to convey gas out of the state. It is not a regulation of the mode of procuring, transporting, or using natural gas designed to secure the health, safety, or comfort of the citizens of Indiana. Neither in the title nor in the body

of the Act is it professed to be the legislative purpose to regulate the mode of procuring, transporting, or using natural gas. From beginning to end the purpose is plainly and unmistakably manifested, and that purpose is to prohibit the transportation of natural gas beyond the limits of the state. The Act is, in effect, as it is in words, a legislative prohibition directed solely against a designated class of persons. It is not the mode of transportation against which the prohibition is directed, but the persons who engage in the business. Plainly—too plainly for denial—the object of the statute is to keep natural gas within our borders. Its object is not to protect our citizens from injury from the mode of procuring and transporting gas adopted by those who engage in the business of procuring or transporting it. The Act can not be taken out of the operation of the federal decisions upon the theory that it is a valid exercise of the police power resident in every sovereign state, for the theory is without foundation.”

State, ex rel., Corwin v. The Indiana, etc., Mining
Co., 180 Ind. 575, 580, 581.

But an analysis of the problem with which chapter 278, *supra*, purports to deal, and the provisions of the Act, indicates that the General Assembly, recognizing that the bodies of dead animals afford a source of disease affecting human beings as well as animals and constitute a public nuisance, actual or potential, decided that the transportation and disposition of such bodies were so correlated as to require an effective supervision and inspection of both to insure effective health safeguards and the abatement of nuisances. Such inspection and supervision could only be obtained by subjecting to the continuous jurisdiction of its officers all of the steps in the process of transporting and disposing of such animals, as the construction of the vehicle in which they are transported, the location, with reference to surroundings of the plant to which they are transported, the type and construction of such plant, the method used in disposing of the animals and the cleansing and disinfecting of the vehicle after use.

The General Assembly was warranted in concluding that its control of diseases and nuisances caused by dead animals

would be materially impaired if it permitted the transportation of such animals in vehicles to plants, over which vehicles and plants it could not exercise the supervision provided for in this Act.

In my opinion, the provisions of chapter 278, Acts 1937, constitute a valid exercise by the General Assembly of the police power of the state which, in a legal sense, does not burden Interstate Commerce.

TAX COMMISSIONERS, STATE BOARD OF: County council, appropriation of public welfare funds.

July 19, 1937.

Hon. C. B. Benjamin, Commissioner,
State Board of Tax Commissioners,
231 State House,
Indianapolis, Indiana:

Dear Sir:

I have before me your recent letter which reads as follows:

“On June 1, 1937, the County Council of Owen County met in special session, transacted business and adjourned. No second or subsequent day’s session was held.

“Requests for appropriation of \$20,914.00 were considered and allowed in total amount of \$12,455.00.

“Is the above described action legal?

“Does section 129, chapter 3, Act 1935, repeal Burns 1933 edition, section 26-521 to legalize action of Owen County Council June 1?”

To answer these two questions will necessitate a consideration of a number of acts and in so doing the answer to your second question will be first considered as the answer to your first question is governed by the answer to your second question.

Section 100, chapter 3, Acts of 1936, provides for the appropriation of additional funds for welfare work by the County Council if all available funds are exhausted, in which case the additional appropriation is deemed an emergency appropriation under chapter 150 of the Acts of 1936. The