In the case of *Greene* vs. *Graham,* 5 Ohio, 264, the headnote of the case is as follows:

> "Land purchased with partnership funds and title taken to partners. One dies; Held, that the land was held as tenants in common, and the part of the deceased descended to his heirs, and, being sold under order of court, purchaser is entitled to partition."

In the case of *Weitz* vs. *Weitz,* 15 Ohio App. 134, it was held:

> "The interest of a deceased partner in real estate purchased with partnership assets, and managed and used by partnership as partnership property, the title to which is taken in the individual names of the several partners, in the absence of a partnership agreement to the contrary, passes to his heirs or devisees, unless needed to pay partnership obligations."

In this case the equities of the partnership as such have long since been satisfied; and I am inclined to the view that the deed executed by Louis Loeb, Joseph Freiberg and wife and by the heirs of Abraham Wallenstein and their respective husbands had the effect of passing the legal title to these lands to Edward Cunningham.

There are no mortgages or other encumbrances against this property noted in the abstract, and said Edward Cunningham has, in my opinion, a good and merchantable fee simple title to said lands subject only to the taxes for the year 1928, which of course are a lien.

The warranty deed of Edward Cunningham and Carol Cunningham, his wife, conveying the lands here in question to the State of Ohio has been properly executed and acknowledged, and is in form sufficient to convey to the State of Ohio a fee simple title to said lands free and clear of all encumbrances whatsoever.

Encumbrance Estimate No. 3397 submitted with said corrected abstract and deed has been properly executed and shows that there are sufficient balances in the proper appropriation account to pay the purchase price for said property. It likewise appears that the purchase of this property was authorized by the Board of Control at a meeting held by such board under date of April 23, 1928.

I am herewith returning said corrected abstract, warranty deed, encumbrance estimate and controlling board certificate.

Respectfully,
EDWARD C. TURNER,
Attorney General

2705.

CATTLE—TUBERCULIN TESTS—STATE BOARD OF AGRICULTURE—NO AUTHORITY TO PLACE MAXIMUM LIMIT ON INDEMNITY.

SYLLABUS:

The State Board of Agriculture is without authority under the provisions of Sections 1121-1 *to* 1121-25, *General Code, to adopt rules and regulations which limit the indemnity paid to owners of pure bred cattle affected with tuberculosis and condemned for slaughter to eighty dollars* ($80.00) *and which limit the indemnity paid to owners of grade cattle affected with tuberculosis and condemned for slaughter to fifty dollars* ($50.00), *and enforce the same.*

COLUMBUS, OHIO, October 13, 1928.

HON. VIC DONAHEY, *Governor of Ohio, Columbus, Ohio.*

DEAR GOVERNOR DONAHEY:—This will acknowledge your letter of recent date which reads:

"The Eighty-Sixth General Assembly passed Sections 1121-1 to 1121-25 of the General Code, providing for the examination of cattle for tuberculosis.

Section 1121-1 provides that owners of cattle may petition for such examination on condition that they 'will conform to and abide by the rules and regulations adopted by the State Board of Agriculture.'

Section 1121-8 provides that owners of cattle which are condemned and slaughtered 'shall be entitled to and receive indemnity as provided under the rules of compensation of the State Board of Agriculture.'

Section 1121-10 provides that 'the value of all cattle reacting to a tuberculin test * * * shall be determined by an appraisal, etc.'

Under a rule of the State Board of Agriculture the maximum indemnity for a pure bred is $80.00 and for a grade animal $50.00.

It is contended by some farmers that the State Board of Agriculture has no authority to fix maximums.

The question, of course, hinges on the interpretation of the words, 'value of cattle reacting'—some contending this refers to market value before animals are examined or condemned, while the Board of Agriculture interprets it to mean the value of animals after examination has shown them to be affected.

Common Pleas Courts have given varying opinions, although most of the decisions have been for the state.

The following are some of the cases:

Wayne County—*Don Moyer* vs. *Chas. V. Truax, et al.,* Opinion Judge Starn.

Summit County—*Geo. M. Stipe* vs. *Dr. C. H. Decker,* Opinion Judge Pardee.

Cuyahoga County—*James Ziska, Eva Handte, Edward Blythin* vs. *Roy F. Leslie, et al.,* Opinion Judge Hay.

Summit County—*Gus Wilke* vs. *C. H. Decker, Chris Weaver, F. A. Zimmer, Chas. V. Truax,* Opinion Judge Fritch.

Miami County—*H. Edwin Wilson, Dorsey Honeyman, Jesse Landis, Joseph Martin, P. V. Sigman, Milo Pittorf, etc.* vs. *Chas. V. Truax, F. A. Zimmer, Carl M. Senn, and Frank Matthews,* Opinion Judge Jones.

Trumbull County—*C. B. Wade, etc.* vs. *Dr. L. M. Tarbill, etc.,* Opinion Judge Hay.

In the absence of a controlling opinion from a higher court, may I have your opinion?

Question: Is the State Board of Agriculture acting within its authority when it limits its indemnity for pure bred cattle to $80.00 and for grade cattle to $50.00?"

On March 27, 1925 (111 v. 202), the Legislature passed an act entitled:

"An Act—To provide a means to eradicate tuberculosis among cattle and to protect the public health against the spread of, or contamination from this disease, by the enactment of Sections 1121-1 to 1121-25 of the General Code."

By the terms of Section 1121-3, General Code,

"The term 'tuberculin test,' as used in Sections 1121-1 to 1121-25 of the General Code, shall mean any method of testing by tuberculin, or by any other method of testing, approved by the Department of Agriculture."

Section 1121-8, General Code, in so far as pertinent, provides:

"Cattle which are condemned because of tuberculosis, on a tuberculin test applied by a veterinarian who has first received a special written authorization from the Department of Agriculture to make such test, shall, when so ordered by the Department of Agriculture, be slaughtered in an establishment designated by said department, and the owner thereof shall be entitled to and receive indemnity as provided under the rules of compensation of the state Board of Agriculture. Such rules of compensation shall contain a provision that the order to slaughter said animals shall be issued by the Department of Agriculture indorsed that funds are available to pay the corresponding indemnity, and shall have thereon, the form of a voucher on the State Auditor for the payment of the indemnity when said order is properly indorsed by the veterinarian present and in charge of such destruction of said animals. The indorsement of the veterinarian shall be that said animals have been delivered to him for destruction but said animals shall not be destroyed until such voucher has been delivered to the owner properly signed by such veterinarian. Said voucher shall not be valid, however, until said veterinarian certified on said voucher that the premises have been cleaned and disinfected as provided in said rules. The auditor, on receipt of said voucher with such indorsement and certificate, shall issue to the owner a warrant on the State Treasurer for the indemnity due, according to the terms of said voucher. * * * "

Section 1121-10, General Code, provides:

"In order to secure indemnity as provided in the provisions of Sections 1121-1 to 1121-25 of the General Code, the value of the cattle reacting to a tuberculin test applied under the direction of the Department of Agriculture shall be determined by an appraisal made by a representative chosen by the owner and a representative chosen by the Department of Agriculture. In the event of a disagreement as to the amount of the appraisal, a third disinterested person shall be selected, at the owner's expense, by the two to act with them in the appraisal of the cattle."

As provided by Section 1121-12, General Code,

"All reactors or animals condemned on tuberculin tests or suspected of having tuberculosis and which are not slaughtered by the Department of Agriculture, shall be placed under quarantine at the owner's expense and kept in an inclosure in such manner as to not endanger healthy animals."

By the terms of Section 1121-14, General Code,

> "The State Board of Agriculture shall have authority to draft and adopt rules for the compensation to owners for tubercular cattle destroyed under the provisions of Sections 1121-1 to 1121-25 of the General Code, which compensation shall be subject to the appropriations made available by the General Assembly, and such rules shall provide for inspection where indemnity has been waived. The Department of Agriculture and all officers and employes thereof shall observe said rules. Said rules may also define any of the terms herein used."

You refer to a number of cases which have been decided and in which the constitutionality of Sections 1121-1 to 1121-25, General Code, has been challenged. The cases of *Ziska* vs. *Leslie, Handte* vs. *Leslie* and *Blythin* vs. *Leslie,* being Cases Nos. 262,484; 262,485 and 262,423, respectively, in the Common Pleas Court of Cuyahoga County, were consolidated in one case and on January 24, 1927, were affirmed by the Court of Appeals of the Eighth Appellate District. These cases are pertinent to the present inquiry only in that both the Common Pleas Court and the Court of Appeals held Sections 1121-1 to 1121-25, General Code, to be constitutional. To the same effect are the other cases to which you refer. In other words, the several courts in which the question has been presented have uniformly held that the Legislature, in the exercise of the police power, had authority to enact these sections of the General Code, and that in pursuance thereof, the Department of Agriculture, by and through its duly constituted agents, has the lawful right to institute and conduct a tuberculin test as provided by law.

The exact question which you present has been clearly raised in two cases only. I refer to the case of *Wade* vs. *Tarbill,* No. 25259 in the Common Pleas Court of Trumbull County, decided November 11, 1927, and to the case of *Weston* vs. *Foster,* No. 6563 in the Common Pleas Court of Geauga County, decided June 21, 1928. The case of *Wilson* vs. *Truax,* No. 24292 in the Court of Common Pleas of Miami County, to which you refer, was reversed by the Court of Appeals of the Second Appellate District for the reason that "the trial court erred in passing upon the motion to dissolve the temporary injunction and to dismiss the petition in treating said motion as a general demurrer to the petition and sustaining the same." The opinion of Judge Jones will be later referred to in this opinion.

Your attention is invited to the fact that Judge Hay, who decided the case of *Wade* vs. *Tarbill, supra,* also decided the cases of *Ziska* vs. *Leslie, Handte* vs. *Leslie* and *Blythin* vs. *Leslie, supra,* which three cases were affirmed by the Court of Appeals of the Eighth Appellate District on January 24, 1927.

The judgment of the court in the case of *Wade* vs. *Tarbill, supra,* was to the effect that the temporary restraining order, theretofore granted, should be modified so as to permit the defendant to administer the tuberculin test to plaintiff's herd and quarantine any of them that are found to be infected with tuberculosis. The temporary restraining order was made permanent, however, insofar as it restrains the defendant from condemning and slaughtering any of the plaintiff's herd of cattle until the value of such cattle is paid to plaintiff after such value has been determined by an appraisal made in accordance with the provisions of Section 1121-10, General Code. To the same effect is the judgment of the court in the case of *Weston* vs. *Foster, supra.*

In his opinion in the case of *Wade* vs. *Tarbill, supra,* Judge Hay said:

> "In the instant case the injunction is not sought for the purpose of having our state law providing for the tuberculin test declared unconstitutional, but

for the purpose of having it administered in accordance with such law.
* * *

After quoting Sections 1121-8, 1121-10 and 1121-14, General Code, the opinion continues:

"The proper construction to be given to these three sections is the serious matter in dispute in this case. The least that can be said is that the General Assembly is not to be commended for its clearness of expression in framing these sections.
* * *

The question before us is not whether the General Assembly of Ohio had the power to enact a statute which would authorize the slaughter of diseased cattle without indemnity or for some partial indemnity which might be called a gratuity, but what the Legislature of this State actually did in the matter of providing indemnity to the owners of diseased cattle when it passed the Riggs Law. This so-called Riggs Law went into effect on July 15, 1925. The General Assembly undoubtedly felt that it was necessary to pass such an act. It probably also took into consideration the fact that a tuberculin test of all the cattle in Ohio would cause a tremendous loss to a class of its citizens ill able to bear such loss. These sections of the General Code in question were passed in the exercise of the police power reserved to the State for the benefit of the public health. It is evident from the three sections of the statutes which I have read that our law making body did not intend to add another crushing burden upon the farmers of the State, but meant to adopt a policy which would deal fairly with them while this law was being put into operation, and before the owners of cattle had had an opportunity to protect themselves against so serious a loss. The Legislature in its wisdom generously provided that the farmer should be indemnified for the loss of his cattle."

(The opinion then quotes Section 1121-10, General Code).

"Here is a clear, definite provision as to how the value of the condemned cattle shall be determined. No one can dispute that the method is fair and reasonable. One appraiser to be chosen by the owner of the cattle and another by a representative chosen by the Department of Agriculture. If the two cannot agree, a third is chosen to decide the matter.

Section 1121-14 which we have quoted provides that the State Board of Agriculture shall have authority to draft and adopt rules for the compensation of owners for tubercular cattle destroyed under the provisions of this Act, under provisions of 1121-1 to 1121-25 of the General Code, which compensation shall be subject to the appropriations made available by the General Assembly, etc.

This last section is the one under which the State Board of Agriculture claims the right to fix the amount of compensation to be paid to owners of cattle condemned to be slaughtered.

The Department of Agriculture, acting under the authority it assumes was conferred upon it by Section 1121-14, among other rules adopted the following:

'Section 6. Each reactor or tuberculous animal shall be appraised at its true value. In making such appraisal the fact that the animal has been condemned for disease shall not be considered. The owner or owners thereof shall be paid two-thirds of the difference between the appraised value and the value of the gross salvage thereof which shall include the sum paid by the United States Department of Agriculture; provided in no case shall payment by both the Ohio Department of Agriculture and the United States Department of Agriculture be more than $80 for any pure bred or $50 for any grade animal. * * * '

'In the event that the indemnity funds with the United States Department of Agriculture become exhausted, the State Department shall pay to the owner both proportions or the 2/3 as above provided.'

We are of the opinion that nowhere in the Riggs Law is authority conferred upon the Department of Agriculture to adopt such rule. Section 1121-10 provides how the value of these animals shall be determined. In order to hold that Section 1121-14 gives the Department of Agriculture the right to fix a maximum price for animals to be slaughtered, we must consider Section 1121-10 a nullity. We believe these sections should be construed together, and each one given force and effect if possible. We can readily see why the Legislature contemplated that there would be some details in the matter of the payment of compensation that could best be worked out by the Department of Agriculture but the law making body saw fit to provide first how the value of the animals should be determined.

It will be observed that Rule 6 provides that in making appraisal the fact that the animal had been condemned for disease shall not be considered. Section 1121-10 contains no such provision. The reasonable construction of Section 1121-10 is that the appraisers selected should make an appraisement of the value of the animal at the time it was condemned for slaughter. It is manifest that a tubercular cow would not be worth as much as one not infected. It seems clear to us that the manifest intention of the General Assembly was that the farmer whose cattle were condemned for slaughter should be paid what they were reasonably worth at the time they were condemned and taken, and that value was to be determined by appraisal as provided in said section.

We are therefore of the opinion that nowhere in the Riggs Act is the Department of Agriculture authorized to fix any maximum price for either a grade or pure bred animal or to have any appraisement made other than the one provided for in Section 1121-10. Nor was any authority given such board to cause an appraisement to be made without considering the fact that such animal had been condemned as diseased.

We entertain no doubt as to the constitutionality of these sections of the General Code in question. We believe that a proper and rigid enforcement of these is not only for the benefit of the general public, but for the benefit of every owner of cattle in the State. In administering the law, however, the burden upon the farmer should not be made any greater than the Legislature contemplated when it passed this Riggs law. The benefits arising from the enforcement of this law are so many we deem it unnecessary to enumerate them. The health authorities in nearly all of our large cities are prohibiting the sale of milk therein unless it comes from tuberculin tested cows. It is considered necessary to so guard the health of infants, as well as adults.

This undoubtedly is one of the reasons why the rate of mortality among infants has been materially reduced. * * * "

I have carefully read the opinion of Judge Jones in the case of *Wilson* vs. *Truax, supra,* (which case was reversed by the Court of Appeals of the Second Appellate District). Nowhere in its opinion does the Court discuss the pertinent sections of the General Code. The major portion of the opinion is devoted to a very able discussion of the police power of the State and the right thereunder to destroy private property without any compensation therefor to the owner thereof. I agree with the Court and believe the law to be that a state, in the exercise of the police power, may enact such laws as it deems necessary, except as restricted by the Constitution. The unanimous weight of authority is to the effect that it is within the province of the Legislature, in the exercise of police power, to require the examination, inspection and testing of cattle for bovine tuberculosis, and if such disease is found to exist, to make provisions for the summary destruction of the diseased animals.

In the words of Judge Hay "The question before us is not whether the General Assembly of Ohio had the power to enact a statute which would authorize the slaughter of diseased cattle without indemnity or for some partial indemnity which might be called a gratuity, but what the Legislature of this State actually did in the matter of providing indemnity to the owners of diseased cattle when it passed the Riggs Law."

I have examined the laws pertaining to the tuberculin test of cattle of other states and find none similar *in toto* to that of Ohio. Typical of the laws in other states is Section 2671 of the Code of Iowa (1927), which reads as follows:

"When breeding animals are slaughtered following any test, there shall be deducted from their appraised value the proceeds from the sale of their salvage. The owner shall be paid by the state one-third of the sum remaining after the above deduction is made, but the state *shall in no case pay to such owner a sum in excess of seventy-five dollars for any registered pure-bred animal or fifty* dollars for any grade animal." (Italics the writer's.)

Your attention is invited to the fact that the Legislature of Iowa, by the enactment of Section 2671, supra, *provided* by *statute* a maximum amount which the State would pay for animals condemned for slaughter following a tuberculin test. No such provision appears in Sections 1121-1 to 1121-25, General Code.

I deem it unnecessary to discuss at length herein the power of the Legislature to delegate legislative powers to mere boards, department heads, etc. Suffice it to say, I agree with the reasoning and judgment expressed by Judge Hay in the case of *Wade* vs. *Tarbill, supra,* and the judgment expressed by Judge Sperry in the case of *Weston* vs. *Foster, supra.*

Answering your question specifically, it is my opinion that the State Board of Agriculture is without authority to adopt rules and regulations and attempt to enforce the same which limit the indemnity paid to owners of pure bred cattle affected with tuberculosis and condemned for slaughter to eighty dollars ($80.00) and which limit the indemnity paid to owners of grade cattle affected with tuberculosis and condemned for slaughter to fifty dollars ($50.00).

Respectfully,
EDWARD C. TURNER,
Attorney General.