PUBLIC HEALTH - Jurisdiction of Board of Health to protect city water supply from pollution by city sewer, Jefferson City.

November the Seventeenth

1933

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Honorable E. T. McCaul,
State Health Commissioner,
The State Board of Health of Missouri,
Jefferson City, Missouri.

Dear Sir:

A request for an opinion under date of October 3, 1933 has been received from you, such request being in the following terms:

> "I wish to be advised concerning this department's power in a matter involving the purity of a city water supply.
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> At the present time, Jefferson City is served by a water plant which is owned by the Capital City Water Company, a private corporation. This plant has as its source of supply the Missouri River. Water from this river is coagulated, filtered, chlorinated and subsequently delivered to the city distribution system. The intake is located upstream from the present sewer outlets of the city and has been at this location since 1888. The city now proposes to sewer a heretofore unsewered area and to discharge this sewage into the Missouri River at a point approximately 2000 feet above the water works intake. This department is of the opinion that the discharge of sewage into the river will constitute a potential menace to the sanitary quality of the water supply, if the water works intake is allowed to remain in its present location.
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> The City of Jefferson City contends that, since this proposed outfall follows the normal drainage, it is the water company's duty to either move its intake or to pay the cost of piping the sewage to a point below the intake. The water company contends that, since its intake has been at its present location for 45 years and since it will be difficult to move, it is the city's duty to pipe the sewage below the intake.
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> Will you please advise us specifically on the following questions:
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> (1) What power does the State Board of Health have in preventing this hazard?
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> (2) If the State Board of Health has legal power to prevent this hazard, would it be exercised in prohibiting the city from installing the sewer or would it be exercised in forcing the water company to move its intake or pipe the sewage below the intake?
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> (3) If the State Board of Health has legal power to prevent the hazard, what procedure should be followed in exercising this power?

For your information, we are enclosing copies of this department's Regulations Governing the Installation, Extension, and Operation of Public Water Supplies and Regulations Governing the Installation, Extension and Operation of Public Sewerage Systems."

I.

JURISDICTION OF BOARD OF HEALTH

The State of Missouri has a right, under the police power, to protect its inhabitants by regulating the water supply of its navigable rivers. The Supreme Court of the United States in the case of Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828 (1908) enunciated its doctrine as follows:

> "* * *it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. Kansas v. Colorado, 185 U. S. 125, 141, 142, 46 L. ed. 838, 844, 845, 22 Sup. Ct. Rep. 552, s. c. 206 U. S. 46, 99, 51 L. ed. 956, 975, 27 Sup. Ct. Rep. 655; Georgia v. Tennessee Copper Co., 206 U. S. 230, 238, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618."

Revised Statutes of Missouri of 1929, Section 9015, provides in part as follows:

> "It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state."

Section 9028 provides in part as follows:

> "All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities."

Under the power given to the State Board of Health under the two statutes just cited the Board has adopted certain rules these being contained in Missouri Public Health Manual Book V - Sanitary Code - Part V of which is entitled "Regulations Governing the Installation, Extension, and Operation of Public Sewerage Systems" which provides in effect that no new sewer system shall be constructed or put in operation without the owner thereof first securing the approval of the Board of Public Health therefor, and Part VI of which is entitled "Regulations Governing the Installation, Extension and

Operation of Public Water Supplies which enact substantially the same regulations as to any waterworks supplying the public with water. Section 1 of both Part V and Part VI includes cities within the definition of owner. The Sanitary Code just referred to would prevent any change of the status quo with respect to the Jefferson City water supply and sewer system without the approval of the Board of Health, and would give the Board of Health jurisdiction to prevent any disturbance of the status quo which might be threatened, and such preventative action could be taken by an injunctive proceeding in the Circuit Court, provided the Board of Health under the statutes had jurisdiction and power to promulgate the regulations in the Sanitary Code above referred to.

The only obstacle in the way of such jurisdiction would be Section 9034 of the Revised Statutes of Missouri of 1929 which provides as follows:

> "Nothing in this article shall apply to the municipal water supply in cities in which a constant supervision of the said city water supply to insure a safe quality of water dispensed is conducted by or is acceptable to the city department of health of that city."

If Section 9034 removes from the jurisdiction of the Board of Health all municipal water supplies which are inspected to the satisfaction of city authorities, as in Section 9034 provided, then Section 9034 would prevent the Board of Health from interfering in any way or assuming any jurisdiction over the water supply of Jefferson City, because then nothing in Article I of Chapter 52 of the Revised Statutes of 1929, from which article alone the Board of Health derives its powers, would authorize any action by the Board of Health.

Section 9034 was enacted in 1919 as one of five sections constituting Laws of 1919, page 370, the whole of such enactment now being found as Revised Statutes of 1929, Sections 9031-9035, inclusive. These sections deal with a particular scheme for analyzing water supplies, and it might well be held by a court that Section 9034 in exempting certain municipal water supplies from the jurisdiction of the Board of Health was not intending to exempt them from the general jurisdiction of the Board of Health as defined in Section 9015 above quoted, which was enacted as Laws of 1919, page 372.

A further argument to the same effect is found in the fact that before 1919 two statutes prohibited the State Board of Health from interference with cities, such sections being Revised Statutes of 1909, Section 6662 and 6653, which provided as follows:

> "Sec. 6662. Rules of board not binding, when. - - No rule or regulation adopted by this board shall be legal or binding which shall conflict with any law of the state, or any ordinance of any municipality or town in the state."

> "Sec. 6653. Its powers and duties. - - The state board of health shall have general supervision over the health and sanitary interests of the citizens of the state. It shall be their duty to recommend to the general assembly of the state such laws as they

> may deem necessary to improve and advance the sanitary condition of the state; to recommend to the municipal authorities of any city, or to the county courts of any county, the adoption of any rules that they may deem wise or expedient for the protection and preservation of the health of the citizens thereof."

Said Section 6653 was repealed and superseded by Revised Statutes Missouri 1929, Section 9015, above quoted, and Section 6662 of the 1909 statutes was repealed at the same time, these changes having been made by Laws of 1919 page 372, so it seems to have been the intent of the 1919 General Assembly to extend the jurisdiction of the State Board of Health to cities. Aside from these technical considerations, it would be unthinkable that there should be no power to protect the inhabitants of a city from being exposed to the dangers of drinking polluted water, and the State Board of Health is the only state instrumentality created by statute which would have the power to prevent such an evil.

Another possible argument in favor of the power of the State Board of Health to prevent such evil might be in a construction of the phrase "municipal water supply" in Section 9034 as meaning water supply owned by a city which would not be an unreasonable construction, and since the Jefferson City waterworks is not publicly owned, it would not fall within Section 9034. Furthermore, the Supreme Court of this state has adopted an attitude of liberal construction toward the powers of the State Board of Health. Thus, in the case of State ex rel Horton v. Clark, 9 S. W. 2d, 635 (1928) the Court said:

> " * * *it is a wholesome and well-recognized rule of law that powers conferred upon boards of health to enable them effectually to perform their important functions in safeguarding the public health should receive a liberal construction. 29 C. J. Sec. 30, p. 248, also section 6, p. 243. While boards of this character cannot act arbitrarily, or without substantial evidence (State ex rel. v. Adcock, 206 Mo. 550, loc. cit. 558, 105 S. W. 270, 121 Am. St. Rep. 681), yet, when any act, requiring the exercise of judgment and the employment of discretion, is within the scope of the exercise of a reasonable discretion, it will not be interfered with." (9 S. W. 2d, 638).

For the above reasons, it is our opinion that Section 9034 would not prevent the State Board of Health from taking jurisdiction to prevent the threatened danger, and that such Board of Health would have power and authority to prevent such threatened evil by either requiring the water company to move its intake before the new sewer system is put in operation, or by requiring the new sewer system to have its outlet at some place where it will not injuriously affect the water at the present intake of the water company.

II.

WHAT ORDER SHOULD BE MADE

As has been demonstrated above, the State Board of Health as a matter of power and jurisdiction could either under its regulations in the Sanitary

Code and under its general powers refuse to approve an outlet for the sewer system above the water intake, or could prohibit the water company from using its present intake if the proposed sewer outlet is approved. The remaining part of this opinion will deal with the rights of the parties apart from the jurisdiction of the State Board of Health. In the controlling statute it is provided that "public sewers shall be established along the principal courses of drainage" which provision, being a part of Revised Statutes of 1929, Section 6644, governs cities of the second class, and the same provision is found in Section 6822 dealing with cities of the third class, and since according to your request for an opinion the contemplated sewer follows the natural drainage course it would seem that Jefferson City would be directed by statute to place its outlet where it is now planning to place it.

However, even a city cannot discharge its sewage so as to damage the land of a lower riparian owner. The rule of the Supreme Court of Missouri is well stated in the case of Joplin Consolidated Mining Co. v. City of Joplin, 124 Mo. 129, 27 S. W. 406 (1894) where the court, at page 135, said:

> "The proprietor of land through which a stream flows can not insist that the water shall come to him in the natural pure state. He must submit, and that, too, without compensation, to the reasonable use of it by the upper proprietors; and he must submit to the natural wash and drainage coming from towns and cities. But a city has no right to gather its sewage together and cast it into a stream so as to injure the lower proprietor. For damages thus sustained, the lower proprietor will have an action, and in many instances injunctive relief. Proprietors of Locks, etc. v. Lowell, 7 Gray 223; Haskell v. New Bedford, 108 Mass. 208; Vale Mills v. Nashua, 63 N. H. 136; Chapman v. Rochester, 110 N. Y. 373; Lewis on Eminent Domain, section 65. The author just mentioned says: 'But we see no reason why this could not be done if authorized by law and compensation was made for taking the right to pure water.'
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> Section 1541, Revised Statutes, 1879, provides:
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> 'Public sewers shall be established along the principal courses of drainage, at such times, to such extent, of such dimensions and under such regulations as may be provided by ordinance.' And other sections give the city ample power to condemn private property for sewer purposes, the compensation to be ascertained by five freeholders to be appointed by the mayor. Secs. 1524 and 1544. The fair, and, we think, clear, implication of the language used in section 1541 is that the principal courses of drainage may be used for sewer purposes, until sewers are constructed along the same. Indeed, these courses of drainage constitute the only receptacles for such matter. We, therefore, hold that the city of Joplin has the right and power to construct the public sewer in question so that it will discharge its contents into Joplin creek. Whether the city can do this so as to create a public nuisance we need not inquire, for in our opinion the evidence makes out no such

> a case. It does, however, tend to show that the plaintiff's lands will be damaged by the discharge of the sewer matter into the creek. Whether this damage would amount to the taking of private property for public use is not important to inquire; for our constitution declares that private property shall not be taken or damaged without just compensation. If the discharge of the sewer matter into the creek will decrease the value of the plaintiff's land through which the creek runs, then the damage thus done is clearly within the constitutional provision, and the plaintiff must have compensation therefor. Van De Vere v. Kansas City, 107 Mo. 84." (124 Mo. 135)

To the same effect see Smith v. City of Sedalia, 152 Mo. 283, 53 S. W. 907 (1899) wherein the court at page 302 said:

> "The fact that sewers are necessary to a city and that the statute directs that they shall follow as nearly as practicable the natural drainage of the country, afford no justification to the action of a city in emptying its sewers on the land of an individual to his damage. Our Constitution declares that private property shall not be taken or damaged without payment of just compensation. The Legislature therefore could not, if it so intended, confer authority on a city to injure private property for the public good without first paying the damage. But subject to this qualification, private interest mutt yield to the public good. If it is a public necessity that the plaintiff's land be taken or damaged in order to dispose of the sewage of the defendant city, it may be so condemned according to law, but the city must first pay him the just compensation."

Likewise, in City of Cape Girardeau v. Munze, 314 Mo. 438, 284 S. W. 471 (1926) the Court at page 471 said:

> "In other words, if the city does not cause the waters of Cape La Croix Creek to be polluted beyond the extent of their pollution from the natural wash and drainage coming from the city and upper proprietors before the opening of the sewer system, or to be rendered more unfit for use than such waters were prior to the construction of the sewer, appellants have no lawful claim for compensation or damages. Ample evidence was offered at the trial tending to show that the waters of the creek were polluted and contaminated by reason of the natural wash and drainage from its watershed from slaughter houses, open cesspools and street or gutter drainage, before the construction and operation of the proposed sewer system. On the other hand, however, the city must respond in damages in the event that its use of the creek so pollutes the waters thereof as to render the same more unfit for use than they were prior to the construction and operation of the sewer system, or so pollutes the stream as to deprive the appellants of the uses of the water they would otherwise reasonably enjoy. This principle is recognized

in Joplin Consolidated Mining Co. v. City of Joplin, supra, wherein we said: 'But a city has no right to gather its sewage together and cast it into a stream so as to injure the lower proprietor. For damages thus sustained, the lower proprietor will have an action."

From the above cases it is apparent that the city cannot claim the protection of the statute directing it to have its sewers follow the natural courses of drainage so as to relieve itself from paying lower riparian landholders who have been damaged, so that probably the water company would have a remedy at law against the city for the expense involved in moving its intake if the Board of Health approves the proposed sewer construction, and because such remedy exists and because the Board of Health would have power to make whatever kind of order would seem to it most proper, and especially since the Board of Health could withhold approval of the proposed new sewer system, then it might be entirely proper for the State Board of Health either to withhold approval of the proposed sewer system, and only to approve a sewer system which did not prejudice the present water company's intake, or to approve the present sewer system on the condition that the city pay damages to the water company, i. e. the amount necessary for the establishment of a new intake above the proposed sewer outlet. For an admirable collection of authorities dealing with the rights of lower riparian owners against pollution see the brief for the State of Missouri in the case of Missouri v. Illinois, 200 U. S. 496, 50 L. ed. 572 (1906). The Supreme Court of the United States in the case of Darling v. Newport News, 249 U. S. 540, 63 L. ed. 759 (1919) seems in conflict with the Supreme Court of Missouri but, of course, the Missouri rule would govern the present situation, and in any event Darling v. Newport News might be distinguished on the ground that the polluted area was a part of the ocean and not a fresh water stream.

For the reasons above stated it is our conclusion (1) that the State Board of Health has jurisdiction to prevent the threatened hazard, (2) that this power could be exercised by withholding approval of the proposed sewer system or by ordering the water company to move its intake in the event the proposed sewer system is approved, or in making approval of the proposed sewer system conditional upon the city paying the cost to the water company of moving the intake, the latter alternative seeming most in accordance with the law of this state, and (3) that the proper method of exercising its power would be for the State Board of Health to make appropriate orders in conformity with its decision, and if such orders are not obeyed by instituting proceedings in equity in the Circuit Court to prevent such non-compliance with its orders.

Yours very truly,
EDWARD R. MILLER

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL