HEALTH: PUBLIC WATER SUPPLY:
CRIME: PUBLIC NUISANCE:
ELEEMOSYNARY:

Health Board should submit evidence of violations of law regarding public water supply to Prosecuting Attorney and institute prosecutions; should submit evidence of public nuisance regarding water supply to Prosecuting Attorney or Attorney General. Water furnished by penal eleemosynary boards not supervised by health board.

April 25, 1940

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69

Honorable Harry F. Parker, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated March 8, 1940, in which you request our opinion in the following terms:

> "I wish to be advised as to whether or not in your opinion I am, as State Health Commissioner, discharging my duties and obligations as set forth in Sections 9031, 9032, 9033, and 9035 of the Revised Statutes 1929 concerning control of public water supplies. Further, if I am not complying with the Statutes I desire to be advised relative to the proper procedure.
>
> "In 1928 the attached regulations concerning public water supplies were adopted by the State Board of Health. At the present time the procedures outlined in the regulations are being required by this Board. Compliance is reasonably satisfactory except in certain cases of existing public water supplies where Sections 7, 8 and 9 of the regulations are being violated. In every case a careful investigation has been made and followed by a written report to the city officials outlining the defects and recommenda-

tions for correction prepared by our Engineering Division. Where corrections have not been made in reasonable time the city officials have been advised that their city water supply was no longer approved by this Board. No further action has been taken in any instance to force compliance with the State Board of Health regulations.

"It is in regard to this question of whether or not, and by what procedure, I should take further action in the case of unsatisfactory public water supplies that I particularly wish your opinion.

"I further desire your opinion as to whether or not water supplies maintained and operated by such state agencies as the Penal and Eleemosynary Boards should be considered public water supplies, or otherwise come under my legal supervision."

Sections 7, 8 and 9 of the Missouri Public Health Manual, Book V-Sanitary Code, Part VI, are as follows:

"Sec. 7. Quality - No water shall be provided or rendered available for use to the public for drinking or domestic use which is of unsatisfactory sanitary quality and is not approved by the State Board of Health.

"Sec. 8. Operation - Every owner is required to operate the water supply and water purification plant so as to obtain a degree of efficiency approved by the State Board of Health. A competent person, familiar with the principles and operation of a water supply and water purification plant, where treatment is required, shall be in charge of each plant. Whenever chemicals are used in connection with any purification process, a sufficient quantity of high grade material shall be kept on hand at all times to insure against ineffective operation due to delays in securing these materials.

"The owner shall make such suitable analyses and keep such records of operation as required by the State Board of Health, and shall submit copies of these records upon request to the State Board of Health.

"Sec. 9 Alteration or changes in Operation Required - If, after investigation, the State Board of Health finds that any water supply or water purification plant is in any way a menace to health on account of defective design, inadequacy, incompetent supervision or ineffective operation, or if the water is otherwise unsatisfactory for drinking or domestic purposes, such alterations and additions in the design or the construction or the equipment or such changes in the operation of the plant as are deemed necessary to produce satisfactory results shall be made in accordance with the recommendations of, and within the time limit set by the State Board of Health."

Section 9024 R. S. 1929, Mo. St. Ann., page 4180, providing certain duties for the Commissioner of Health, was repealed and re-enacted by the Laws of 1933, page 269, Section 1, which provided that said Commissioner "shall assume all duties heretofore conferred by law upon the Secretary of the State Board of Health heretofore authorized by law, which office is hereby abolished."

Section 9020 R. S. 1929, Mo. St. Ann., page 4179, providing certain duties for the Secretary, was repealed and re-enacted by Laws of 1933, page 269, Section 1, and provided in part that the "Commissioner of Health shall perform such duties as may be prescribed by the board and this article. * * *."

I.

Section 9031 R. S. 1929, Mo. St. Ann., page 4182, provides:

> "The state board of health shall make and enforce adequate rules and regulations for the maintenance of a safe quality of water dispensed to the public and for the collection of samples and analysis of water, either natural or treated, furnished by municipalities, corporations, companies, or individuals to the public and shall fix the fees for any service rendered under the rules and regulations to cover the cost of the service."

Section 9032, R. S. 1929, Mo. St. Ann., page 4182, provides, among other things, for the making of an analysis of water supplies to the public.

Section 9033 R. S. 1929, Mo. St. Ann., page 4183, provides:

> "On or before January 1, 1920, every municipal corporation, private corporation, company or individual supplying or authorized to supply water to the public within the state shall file with the state board of health a certified copy of the plans and surveys of the waterworks with a description of the methods of purification and of the source from which the supply of water is derived, and no additional source of supply shall thereafter be used without a written permit of approval from the state board of health, and no new supplies shall be established or dispensed to the public without first obtaining such written permit of approval. Whenever an in-

> vestigation of any water supply, plant, or methods used shall be undertaken by the state board of health, it shall be the duty of the municipality, corporation, company, institution or person having in charge the water supply under investigation to furnish on demand to the state board of health such information as that body considers necessary to determine the sanitary quality of the water being dispensed. Approval of new water supplies for municipalities must necessarily involve consideration of sewage provisions for safety to the public health."

Section 9035, R. S. 1929, Mo. St. Ann., page 4183, provides:

> "That every corporation, railway, common carrier, company or individual that shall fail to comply with the regulations prescribed by the state board of health under this article shall be guilty of a misdemeanor."

Section 9015, R. S. 1929, Mo. St. Ann., page 4178, in part provides that, "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."

The above cited and quoted sections of the law make it the duty of the State Board of Health, where it has evidence of violations of the statutes and regulations governing public water supplies, to submit such evidence to the Prosecuting Attorney of the county where the violations occurred, and to take such action as is necessary to institute a criminal prosecution.

The statutes and regulations above cited and quoted make it the duty of municipalities, corporations, companies and individuals operating public water supplies to maintain the same free from pollution according to law and the regulations of the State Board of Health.

II.

As a part of the duty of the State Board of Health to enforce the statutes and regulations governing public water supplies, it should submit evidence in its possession of the illegal and improper manner of operation of a city water supply to the Prosecuting Attorney in the county affected, or to the Attorney General, for consideration whether such manner of operation constitutes a public nuisance which may be abated by an injunction, and whether suit for such injunction could be instituted and maintained.

In State ex rel Attorney General v. Canty, 207 Mo. 439, l. c. 456, 105 S. W. 1072, 15 L. R. A. (N.S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cases 787, the court said:

> "It never was the law, in the absence of legislative authority, that courts of equity could enjoin the commission of crime generally. (Crawford v. Tyrrell, 128 N. Y. 341.).
>
> "This court has uniformly held that a court of equity has no jurisdiction to enjoin the commission of a crime, but that resort must be had to the criminal courts, which possess ample power to punish and prevent crime. (State ex rel. v. Schweickardt, 109 Mo. 496; State ex rel. v. Zachritz, 166 Mo. 307; State ex rel. v. Uhrig, 14 Mo. App. 413.)."

On that authority it is clear that the manner of operating a city water supply can not be enjoined merely on the ground that it is in violation of laws or regulations of a state board of health, and no statute in this state authorizes such action. However, a court of equity has jurisdiction to abate a public nuisance by injunction.

In State ex rel. Attorney General v. Canty, supra, at l. c. 459 of 207 Mo., the court ruled:

> "The contention of respondents that a court of equity has no jurisdiction to abate a public nuisance where the offenders are amenable to the criminal laws of the State is not tenable, as is fully shown by the following authorities: 2 Story's Equity Jurisprudence (13 Ed.), secs. 923 and 924; Crawford v. Tyrrell, 128 N. Y. 341; People v. St. Louis, 48 Am. Dec. 340; 21 Am. and Eng. Ency. Law (2 Ed.), 704; Attorney-General v. Jamaica Pond Aq. Corp., 133 Mass. 361; Carleton v. Rugg, 149 Mass. 550; Reaves v. Oklahoma, 13 Okla. 403."

For the purposes of this opinion it is assumed that the Board of Health can produce evidence that the city water supply is "of unsatisfactory sanitary quality," "a menace to health," "otherwise unsatisfactory for drinking or domestic purposes" (Secs. 7 and 9, Manual, supra,), or is poluted, and evidence of the manner of operation of such city water supply which causes or permits those conditions. The principles herein stated are general and each case will depend upon its own facts.

A. Polution of a city water supply constitutes a public nuisance. 2 Joyce on Injunctions, Section 1111a, page 1614. That authority cites Martin v. Gleason, 139 Mass. 183, l. c. 189, 29 N. E. 664, wherein it was ruled regarding a city water supply, that "the fouling of the water since the right to foul it ceased would be a public nuisance," and cited Brookline v. Mackintosh, 133 Mass. 215, 225, and Morton v. Moore, 15 Gray, 573, 576.

In Joyce on Law of Nuisances, Section 304, page 411, the above mentioned rule is stated, and it is said that "it constitutes an exercise of one of the ordinary functions of the police power of a state to abate such a nuisance as polution of a source of a city's water supply."

The location and operation of a piggery in such a manner as to pollute a public water supply was held to be abatable as a public nuisance in the following Pennsylvania cases: Commonwealth v. Soboleski, 153 Atl. 898, 303 Pa. 53; Lutz v. Department of Health of Commonwealth, 156 Atl. 235, 304 Pa. 572, followed in Commonwealth v. Goodwin, 156 Atl. 238, 304 Pa. 581; Commonwealth v. Banholzer, 156 Atl. 237, 304 Pa. 578, followed in Commonwealth v. Goodwin, 156 Atl. 238, 304 Pa. 581.

The foregoing authorities show that the pollution of a city water supply by private persons constitutes a public nuisance. Causing or permitting such pollution by the persons or corporation whose duty it is, as stated in Point I of this opinion, to operate such city water supply free from pollution according to law and regulations of the State Board of Health, likewise constitutes a public nuisance. "A nuisance may exist not only by reason of doing an act, but also by omitting to perform a duty." Joyce on Laws of Nuisances, Section 2, page 2.

B. Anything which endangers public health or safety is a public nuisance, and may be abated by injunction even before actual injury occurs.

The following definition is found in Joyce on Law of Nuisances, Section 5, page 10:

> "A public or common nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty which the common good, public decency or morals, or the public right to life, health, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons; even though the extent of the annoyance, injury, or damage may be unequal or may vary in its effect upon individuals."

Volume II, Joyce on Injunctions, Section 1055, page 1521: "A Board of health is entitled to maintain an action for an injunction where the State and city ordinance so provides and the nuisance endangers the public health."

In City of Ludlow v. Commonwealth, 56 S. W. (2d) 958, l. c. 959, 247 Ky. 166, the Court of Appeals of Kentucky affirmed a judgment imposing on a city a fine of $1500.00 for maintaining a common nuisance, saying, at l. c. 168 of 247 Ky., "As a matter of fact, however, the accumulation of filth in the basements was not only offensive to the owners and occupants of the houses, but necessarily imperiled the health of the people of the neighborhood, and no rule of law is better settled than that whatever endangers the public health is a public nuisance."

In Town of Cheektowaga v. Saints Peter and Paul etc. Church, 205 N. Y. S. 334, 335, 123 Misc. Rep. 458, the proposed use of land for a cemetery was enjoined as a public nuisance because it appeared water would drain from the cemetery to wells used to catch drinking water, and would, among other things, "annoy" or "endanger" public health or safety. To the same effect is Surratt v. Dennis, 155 S. E. 865, 199 N. C. 757.

In Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361, a corporation chartered to supply fresh water to the public was enjoined from doing, in connection with that work, certain things which would constitute a public nuisance. At l. c. 363 of 133 Mass. the court said:

> "This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a nuisance, by partially draining the pond and exposing its shores, thus endangering the public health.
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> "The defendant contends that the law furnishes a plain, adequate and complete remedy for this nuisance by an indictment, or by proceedings under the statutes for the abatement of the nuisance by the board of health. Neither of

> these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land and the underground currents to the same condition in which they are now. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy. Cadigan v. Brown, 120 Mass. 493."

In Board of Health of Lyndhurst, tp. v. United Cork Companies, 172 Atl. 347, 116 N. J. Eq. 4, affirmed Err. & App. 176 Atl. 142, 117 N. J. Eq. 437, operation of a cork factory producing conditions "hazardous to public health" was enjoined as a public nuisance, and, at l. c. 351 of 172 Atl. the court said:

> "Nor is there any legal merit to the insistment that the public nuisance here assailed is not 'hazardous to the public health' and, therefore, neither cognizable nor enjoinable in this statutory proceeding, since no one has been shown to have actually become afflicted with disease as a result thereof. The fallacy of this contention is in the fact that it would make the statutory operation dependent upon the existence of actual injury instead of mere hazard."

At the same page the court quoted with approval the following:

> "'Manifestly, the law-making power did not intend to create a board of health with power to act only when and after they had watched the "source of foulness" from its beginnings and along its various grades of progression, until it has embraced the strong, debilitated the healthy, and prostrated the weak.'"

In the cases above quoted the court was referring to a statute authorizing a board of health to maintain a suit for an injunction to abate a "nuisance hazardous to public health." This above stated rule that a public nuisance hazardous to public health may be abated before actual injury occurs applies to such a public nuisance in Missouri, because here even a threatened public nuisance may be abated by injunction.

In State ex rel. v. Canty, supra, bull fights and use of property in St. Louis for that purpose were enjoined. The principles therein stated applied to this case, because each is a case of a public nuisance affecting the public health. In State ex rel. v. Canty, supra, at l.c. 457, 458 of 207 Mo. the Supreme Court of Missouri quoted and followed this doctrine:

> "'A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the Attorney-General of England, and at the suit of the State, or the people, or municipality, or some proper officer representing the commonwealth, in this country.'
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> *
>
> "They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future;

> whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community."

Operation of the city water supply in such a manner as to cause to permit pollution thereof and to supply water which is of "unsatisfactory sanitary quality" or "a menace to health" certainly endangers the public health, and is a public nuisance hazardous to public health. Such a manner of operation, undoubtedly, is a threatened public nuisance which may be prevented.

C. Operating a city water supply in such a manner as to constitute a public nuisance may be enjoined without stopping the legal and proper water supply to the public.

In 2 Joyce on Injunctions, Section 1072, pages 1547, 1548, the rule is stated in these terms:

> "In many cases, especially where property is used for the carrying on of a business, the nuisance is caused by the manner in which the business is conducted and not from the business itself. In such cases the injunction should not be granted against the carrying on of the business but should be against it being carried on in such a manner as to constitute a nuisance. Where a business can be so carried on that it will not constitute a nuisance an injunction restraining the carrying on of such business will not be issued but the court will so frame its order that the business may be continued, provided that it is so conducted as not to create a nuisance." (Citing authorities and examples)

In accordance with this rule, the St. Louis Court of Appeals approved an injunction restraining conduct of a rock quarry only in such a manner as to constitute a nuisance, in Schaub v. Construction Co., 82 S. W. 1094, 108 Mo. App. 122.

46 C. J. Section 416, page 792:

> "* * * Where the business or use of property alleged to be a nuisance is lawful and can be carried on without causing the injuries complained of, defendant should not be restrained from carrying it on at all; but the injunction should go merely against carrying it on so as to prove injurious or offensive, leaving defendant the right to carry it on in a proper manner, and the court may require defendant to use such appliances and methods as will remedy the nuisance, which methods or appliances should be practicable. * * *"

There need be no interruption of the supply of water to the city, because the court may allow a reasonable time for abatement of the conditions constituting a nuisance. The rule is thus stated in 46 C. J. Section 419, pages 793 and 794:

> "Where a use of property is found to be a nuisance it is proper to allow defendant a reasonable time to rearrange or remodel his appliances so that they will not further operate as a nuisance, or to remove his plant, before an injunction against the business or use is allowed to take effect.* * * * * * * * * * * In case the business cannot be conducted in the particular locality without the annoyance complained of, defendant may be enjoined from conducting the business in the locality altogether after a reasonable time, and mean-

> while he may be required to conduct the business in such manner as to cause the least annoyance possible, as the court may determine."

Substantially the same rule was applied by the St. Louis Court of Appeals in Magel v. Grueth Benev. Soc., 203 Mo. App. 335, 218 S. W. 704; and was applied in Grant v. Rosenberg, 196 P. 626, 112 Wash. 381, reversing judgment on rehearing (1920), 192 P. 889, 112 Wash. 361.

D. The Prosecuting Attorney of the county affected has authority to institute a suit for an injunction to abate a public nuisance. In State ex rel. v. Lamb, 237 Mo. 437, l. c. 455, 448-54, 141 S. W. 665, the court said:

> "Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance, and that he could proceed without giving bond. * * * *"

E. The Attorney General has authority to institute in the county affected a suit for an injunction to abate a public nuisance. It was so ruled in State ex rel. Wear v. Springfield Gas and Electric Co., (Springfield Court of Appeals), 204 S. W. 942, and in State ex rel. Crow, Attorney General v. Canty, supra, where, at l. c. 448 of 207 Mo., it was said:

> "It is too well settled to challenge discussion that the suit was properly brought in the circuit court of St. Louis county, in the name of the State at the relation of the Attorney-General.* * * *"

III.

Section 9031, supra, gives the State Board of Health legal supervision of water furnished by "municipalities, corporations, companies or individuals." Those terms do not include the penal or eleemosynary boards.

Said Section 9031, supra, gives the State Board of Health legal supervision of water furnished "to the public." That term means "open to all; common to all or many, general; open to common use." It means the "community at large;" and is "not limited or restricted to any particular class of the community." It has been defined as "the body of the people at large; the people of a neighborhood; the community at large." 4 Words & Phrases (5th Ser.), pages 1068-1070, In the sense here employed, water furnished "to the public" does not include water furnished to inmates of penal or eleemosynary institutions.

Because of the foregoing propositions, water furnished by the penal and eleemosynary boards to its inmates is not subject to the legal supervision of the State Board of Health under existing legislation.

CONCLUSION

Where the State Board of Health has evidence of violation of the statutes and regulations governing public water supplies, it should submit such evidence to the prosecuting attorney of the county where the violation occurred and take such action as is necessary to institute a criminal prosecution. As a part of the duties of the State Board of Health to enforce the statutes and regulations governing public water supplies, it should submit evidence in its possession of illegal and improper manner

of operation of a city water supply to the prosecuting attorney in the county affected, or to the Attorney General, for consideration whether such a manner of operation constitutes a public nuisance which may be abated by an injunction, and whether suit for such injunction could be instituted and maintained. Water furnished by the penal and eleemosynary boards to its inmates is not subject to the legal supervision of the State Board of Health under existing legislation.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

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