2807.

SEWERAGE SYSTEM—WITHIN CORPORATE LIMITS OF MUNICIPALITY—STATE DEPARTMENT OF HEALTH HAS NO AUTHORITY TO COMPEL INSTALLATION AND OPERATION UNLESS—EXCEPTIONS NOTED.

SYLLABUS:

The State Department of Health or the Director of Health has no authority to compel a municipality to install, maintain and operate a system of sewers in any territory within the limits of such municipality unless the sewage or other wastes of such territory are corrupting or polluting a stream, water course, canal, lake or pond as provided in Sections 1249, *et seq., General Code.*

COLUMBUS, OHIO, January 9, 1931.

HON. CHARLES A. NEAL, *Director of Health, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

> "The State Department of Health recently received a complaint signed by sixty-four residents of the city of Cleveland relating to insanitary conditions prevailing in the area of Cleveland bounded by Puritas Avenue, the N. Y. C. Railroad, Brock Park Road and Grayton Road.
>
> The burden of this complaint was the necessity of the installation of sanitary sewers for this area which has not been sewered by the city of Cleveland and had not been sewered previous to the incorporation of this area into the city. This Department is familiar with the area described, and after consideration of the complaint referred the same to the city manager of the city of Cleveland for attention, as the only remedy for the complaint is the installation of a sewerage system with necessary provisions for the treatment of the sewage.
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> Since jurisdiction was given to the State Department of Health in 1893 in matters affecting the construction of sewerage systems and the treatment of sewerage systems and the treatment of sewage, this Department has been of the opinion and has acted upon the assumption that it does not have the authority to require a municipal corporation to install a sewerage system, but its jurisdiction under Sections 1240 and 1249, et seq., is limited to the approval of plans for sewerage systems and the abatement of nuisances caused by the discharge of sewage through a sewer or sewerage system. In other words, this Department has assumed that in the absence of a sewerage system the abatement of a nuisance caused by improper method of disposing of sewage was a local question and a local nuisance.
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> I shall be glad to have your opinion as to whether or not the State Department of health has the authority under existing statutes to compel a municipal corporation to install, maintain and operate a system of sewers and sewage treatment in an area that has not been provided with sewers by action of the municipal authorities."

Unless the Legislature has conferred upon the State Department of Health the authority to compel the installation of a system of sewers within the corporate limits of a municipality, it must necessarily follow that the State Department of Health does not have such authority, since public officers, boards and commissions have only such powers and authority as are conferred by law. Although your question is

predicated upon the authority to compel the installation of sanitary sewers within the limits of a municipality, it is necessary to consider the authority to compel the installation of sanitary sewers any place in the state, either within or without the corporate limits of municipalities, for the reason that municipalities are bound by the general laws relating to local sanitary regulations, notwithstanding the provisions of Article XVIII of the Constitution of Ohio. *State Board of Health* vs. *City of Greenville,* 86 O. S. 1; *City of Cleveland* vs. *Davis, et al.,* 95 O. S. 52; *State, ex rel.* vs. *Dean,* 95 O. S. 108; *City of Bucyrus* vs. *State Department of Health,* 120 O. S. 426; *State, ex rel.* vs. *Williams,* 120 O. S. 432.

The general powers and duties conferred upon the Public Health Council are provided in Section 1235, General Code, which section is as follows:

> "It shall be the duty of the public health council and it shall have the power:
>
> (a) To make and amend sanitary regulations to be of general application throughout the state. Such sanitary regulations shall be known as the sanitary code;
>
> (b) To take evidence in appeals from the decision of the commissioner of health in a matter relating to the approval or disapproval of plans, locations, estimates or cost or other matters heretofore required to be submitted to the State Board of Health for approval;
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> (c) To conduct hearings in cases where the law heretofore required that the State Board of Health shall give such hearings; to reach decisions on the evidence presented, which shall govern subsequent actions of the commissioner of health with reference thereto;
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> (d) To prescribe by regulations the number of divisions and qualifications of directors of divisions;
>
> (e) To enact and amend by-laws in relation to its meetings and the transaction of its business;
>
> (f) To consider any matter relating to the preservation and improvement of the public health and to advise the commissioner thereon with such recommendations as it may deem wise.
>
> The public health council shall not have nor exercise executive or administrative duties."

The Ohio sanitary code adopted and in force and effect until authority of the foregoing section should next be considered. A careful examination of the two hundred thirty-three regulations comprising the Ohio sanitary code discloses no provisions whereby it may be inferred that sewage either within or without a municipality must be disposed of by being carried away through any system of sanitary sewers. The sanitary code expressly recognizes on the contrary that in many sections of the state sanitary sewers are not available and provides in regulations 113 to 117, inclusive, for the construction, regulation, etc., of privies, privy vaults, chemical privy tanks and sewage disposal equipment. I find no provision in Section 1235, supra, or in the Ohio sanitary code which has been adopted from which it may be implied that all municipal corporations shall install a system of sanitary sewers. Of course, if no provision is made for the disposition of sewage of any territory within a municipality or if the provisions for such disposition which have been made are unsatisfactory, unsanitary and dangerous to health, undoubtedly the Department of Health has general power to require a municipality in which such condition exists to correct such a condition and observe the provisions of the Ohio sanitary code.

This does not mean, however, that under Section 1235 and the Ohio sanitary code, the State Department of Health has the authority to compel the installation of a sewage disposal system.

It is next necessary to consider the provisions of Sections 1249, et seq., relating to public water supply. Section 1249, General Code, provides as follows:

> "Whenever the council or board of health, or the officer or officers performing the duties of a council or board of health, of a city or village, the commissioners of a county, the trustees of a township or fifty of the qualified electors of any city, village or township, or the managing officer or officers of a public institution set forth in writing to the State Department of Health that a city, village, public institution, corporation, partnership or person is discharging or is permitting to be discharged sewage or other wastes into a stream, water course, canal, lake or pond, and is hereby creating a public nuisance detrimental to health or comfort, or is polluting the source of any public water supply, the commissioner of health shall forthwith inquire into and investigate the conditions complained of."

Section 1250, General Code, provides that if the commissioner of health finds that a stream, water course, canal, lake or pond has been corrupted so as to give rise to foul and noxious odors and to conditions detrimental to health or comfort, or has been rendered impure by the discharge of sewage or other wastes by a city, village, public institution, corporation, partnership or person, he shall so find and grant a hearing to the mayor or managing officer or officers of such city, village, public institution, corporation, partnership or person.

Section 1251, General Code, is pertinent to the matter here under consideration and provides as follows:

> "After such hearing if the public health council shall determine that improvements or changes are necessary and should be made, the commissioner of health shall notify the mayor or managing officer or officers of such city, village, public institution, or corporation, partnership or person to install works or means, satisfactory to the commissioner of health, for purifying or otherwise disposing of such sewage or other wastes, or to change or enlarge existing works, in a manner satisfactory to the commissioner of health. Such works or means must be completed and put into operation within the time fixed in the order. The order of the commissioner of health and the time fixed for making the improvements or changes shall be approved by the public health council, and notification shall be had by personal service upon or by registered letter to the mayor or managing officer or officers of the city, village, public institution or corporation, partnership or person to whom said order shall apply. But no city or village discharging sewage into a river which separates the State of Ohio from another state shall be required to install sewage purification works so long as the unpurified sewage of cities or villages of another state is discharged into such river above such city or village of this state."

It must be borne in mind that jurisdiction under Section 1249 is predicated upon the pollution or contamination of "a stream, water course, canal, lake or pond". In the event of the pollution of such stream, water course, canal, lake or pond, it is evident that the director of health has express authority to require that there be installed works or means satisfactory to him for purifying or otherwise disposing of the sewage or other wastes which are polluting a stream, water course, canal, lake

or pond, as set forth in Section 1251, supra. Under such circumstances, even though there may be no established system of sanitary sewers in a given territory within a municipality, conditions may be such as to warrant the director of health, in the exercise of his sound discretion, in refusing to approve any proposed means for sewage disposal other than by a system of sanitary sewers and a sewage disposal plant. That is to say, where the matter of water pollution is involved, a portion of a municipality may, for instance, be so thickly populated that no means of sewage disposal other than a system of sanitary sewers leading to an adequate sewage disposal plant, would be sufficient to prevent such water pollution. Under whatever circumstances it may be contended that the director of health has authority to compel a municipality to install sanitary sewers, such authority under Sections 1249 to 1251, inclusive, General Code, may only be exercised in the event of the pollution of a stream, water course, canal, lake or pond.

Sections 1252 to 1261, inclusive, General Code, relate to the jurisdiction of the State Department of Health in matters affecting the public water supply and provide the machinery for enforcing the orders of the State Department of Health in relation thereto.

Referring to the particular complaint which gave rise to your inquiry, it appears from an examination of the brief submitted in support of the complaint that it is claimed that sewage is actually being discharged into small streams and water courses which empty into Rocky River. You do not, however, state this to be a fact. It is of course a matter for your determination. If such proves to be the fact, I should have little difficulty in concluding that you as Director of Health have jurisdiction in the premises under Sections 1249, et seq., hereinabove commented upon.

In view of the foregoing, it is my opinion in specific answer to your inquiry that the State Department of Health or the Director of Health has no authority to compel a municipality to install, maintain and operate a system of sewers in any territory within the limits of such municipality unless the sewage or other wastes of such territory are corrupting or polluting a stream, water course, canal, lake or pond as provided in Sections 1249, et seq., General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2808.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN WOOD COUNTY, OHIO.

COLUMBUS, OHIO, January 9, 1931.

Hon. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

2809.

CHATTEL LOAN ACT—JEWELRY AND LOANS——SPECIFIC INSTANCE DEEMED TO COME WITHIN THE PROVISIONS OF SUCH ACT.

SYLLABUS:

When a jewelry store is engaged in the business of selling jewelry and loaning money, and the consideration for making loans is two fold, first, that the borrower pay interest at the rate of eight per centum per annum, and, second, that the borrower