

ments (that is, the requirements of section 8632 G. C.). * * * Building and loan associations are organized under the provisions of a special act, which act prescribes that before commencing business five per cent of the capital stock shall be subscribed. * * * The expression in section 9645, General Code, that five per cent of the capital stock shall be subscribed before business shall be commenced, excludes conditions which are not expressed. It is my conclusion that the provision of said section 9645 G. C. as to the subscription of stock of building and loan associations does not require that any part thereof shall be paid into the treasury of the company or association before such association shall commence business. Such subscription, however, should be made in good faith and by persons who have the ability to pay therefor, or who have a reasonable expectation of paying therefor."

As above indicated, the ruling of the former Attorney General has been in force for several years and has been accepted and acted upon as a proper interpretation of the law. During that period of time the General Assembly, although in general and extraordinary session several times, has not seen fit to amend the law so as to change the force or effect of the ruling, and until legislative action is taken you are advised that the former opinion should be adhered to.

Respectfully,

C. C. CRABBE,

Attorney General.

134.

NUISANCE—COMPLAINT—ORDER AND FINDING IN ACCORDANCE WITH SECTIONS 1249, 1250 and 1251 G. C.—MAY PROCEED UNDER SECTION 1249 WHEN DISTRICT HAS BEEN CREATED BY PROPER AUTHORITIES.

SYLLABUS:

A complaint, order and finding in accordance with sections 1249, 1250, and 1251, General Code of Ohio, is applicable when a municipality is discharging sewage or waste into a well defined underground water course and is thereby creating a nuisance detrimental to public health and comfort.

The state board of health may proceed under sections 1249, 1250 and 1251, General Code of Ohio, when a water and sewage district has been created by the county commissioners or other proper authority, and the plans for same have been submitted to them for their approval.

COLUMBUS, OHIO, March 9, 1923.

HON. JOHN E. MONGER, *Director of Health, Columbus, Ohio.*

DEAR SIR:—We are in receipt of your letter of recent date, as follows:

"The sewage and surface drainage from the city of Bellevue is disposed of by discharge into sink holes or drilled wells reaching a cavernous limestone formation underlying that vicinity. Available evidence indicates that the flow of underground water passes in a general northerly direc-

tion with outlets to the surface through springs located at various points in Margareta Township, Erie County. This underground water course or system of water courses has been established as a stream of water by a decision of the supreme court of Ohio in the case of Trout Club v. Sporting Club (8 O. C. C. 194; 8 O. C. D. 693).

"The board of county commissioners of Erie County has in accordance with section 6602-1 et seq. G. C. established a county sewer district in Margareta Township and submitted to this department general plans for sewerage and water supply systems for this district. The unincorporated community known as Castalia is designated as a sub-district and it is expected that the first improvements to be undertaken in the sewer district will be sewerage and water supply systems for the Castalia sub-district. While the general plans provide ultimately that the water supply for the entire district will be obtained from the public water supply system of the city of Sandusky, it is impossible for financial reasons to make this supply available to the Castalia sub-district in the original installation. The only available water supply is the underground water which would be obtained by means of a drilled well. This source of water supply is probably contaminated by the sewage from Bellevue and other localities in this general vicinity and while it is proposed to treat the water supply by disinfecting it with chlorine, it is apparently necessary that the contamination of the supply be stopped in order to insure a safe water supply. This department is called upon to approve or disapprove of the proposed well supply for the Castalia sub-district and before action is taken in this matter, we consider it important to ascertain what power this department can exercise to correct the pollution of the underground source of water supply. We desire, therefore, to submit to you the following queries:

1. Will a complaint, finding and order in accordance with sections 1249, 1250 and 1251, General Code, respectively, be applicable in this case?
2. Will it be necessary that the proposed well water supply system for the Castalia sub-district be developed and placed in use before proceedings under section 1249 et seq. are followed or can such proceedings be instituted immediately, interpreting 'the source of any public water supply' to define the underground stream of water at Castalia even before such source of water supply is actually developed and placed in use?"

Your first question is whether a complaint, finding and order in accordance with sections 1249, 1250 and 1251, General Code of Ohio, is applicable to conditions of affairs set out in your letter.

Sections 1249, 1250 and 1251, General Code of Ohio, provide:

Section 1249: "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. "If the commissioner of health finds that the discharge of sewage or other wastes from a city, village or public institution, or by a corporation, partnership or person, has so corrupted a stream, water course, canal, lake or pond, as to give rise to foul and noxious odors or to conditions detrimental to health or comfort, the source of public water supply of a city, village, community or public institution is subject to contamination, or has been rendered impure by such discharge of sewage or other wastes, he shall notify the mayor or managing officer or officers of such city, village, public institutions or corporation, partnership or person of his findings and of the time and place when and where a hearing may be had before the public health council. The notice herein provided shall be by personal service or by registered letter."

Section 1251. "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 will be noted from a reading of section 1249, quoted above, that the commissioner of health shall forthwith inquire into and investigate when a city, village, public institution, corporation, partnership or person is discharging or permitting to be discharged sewage or other waste into a stream, watercourse, canal, lake or pond and is thereby creating a public nuisance detrimental to health or comfort, or is polluting the source of any public water supply.

That is, the commissioner of health shall act when it is set forth in writing by the proper parties designated by statute that the act complained of is either a public nuisance detrimental to health or comfort, or when said act is polluting the source of any public water supply. It is not necessary, in order for the commissioner of health to act, that the act complained of be both a nuisance detrimental to health and comfort and polluting the source of the public water supply, but may be either.

This being true, it is necessary next to ascertain what is a stream or water course. The words "stream" or "water course" have not been defined by courts of this state.

In 40 Cyc. 553, we find the following:

"The word 'stream' in its usual signification denotes water running between defined banks, but it is not confined to that meaning, the essence of the definition being it is water in motion as distinguished from stagnant water."

As to whether a subsurface stream is a stream or watercourse, we find in 40 Cyc. 627, the following:

"Where a subterranean stream flows in a distinct, permanent and well-defined channel, it is governed by the same rules as apply to a natural watercourse on the surface."

In *Wyandot Club v. Sells*, 6 O. N. P., p. 64, the court says:

"A subsurface stream, of a defined channel and known course, is like a surface stream, and if plaintiff proves by a preponderance that such is its character, he can sustain an action for interference to the same extent as to a surface stream, and the damage will be the diminution of the value of his own land or punitive damage if malicious."

In the case of *Trout Club v. Sporting Club*, 8 O. C. O., p. 693, the court, in considering a case of diverting of water from an underground stream from this same district in Margarett Township, held that this underground stream is a well defined underground stream:

"Why, if the knowledge is obtainable from other sources other than surface indications—for instance in the case before us, from the report of Prof. Newberry, State Geologist of Ohio—why should that not answer the purpose as well as surface indications? Be that as it may, it is not the case at bar. The well is dug; the canal is made; result is known. Surface indications or not, science says the result could not be produced other than by a well defined channel or stream of water, and no one says nay to the proposition."

According to the above opinion, an underground stream running in a well defined course is subject to the same rules and regulations as a surface stream. This being true, the subterranean stream is a stream within the meaning of section 1249, quoted above.

Your second question is:

"Will it be necessary that the proposed well water supply system for the Castalia sub-district be developed and placed in use before proceedings under section 1249 et seq. are followed or can such proceedings be instituted immediately, interpreting 'the source of any public water supply' to define the underground stream of water at Castalia even before such source of water supply is actually developed and placed in use?"

Section 1249, General Code of Ohio, as pointed out above, provides that action may be taken when the discharge of sewage or waste is either creating a nuisance detrimental to health or comfort, or is polluting the source of a public water supply.

It was held in *State v. Hensley*, 75 O. S. 255:

"The term 'public' in its enlarged sense, takes in the entire community, the whole body politic * * *."

In view of the above decision, it is apparent that what is meant by "the public water supply" is the water supply for public use or for the use of the whole community.

In *Light, Heat & Power Company v. White*, 5 O. N. P. (N. S.), p. 201, it was held:

"Under certain general principles, however, upon which the decisions are based, the term 'public use' is usually intended to cover a use affecting the public in general, or any number thereof, as distinguished from particular individuals."

Section 1240, General Code of Ohio, is as follows:

"No city, village, public institution, corporation or person shall provide or install for public use, a water supply or sewerage system or purification works for a water supply or sewage, of a municipal corporation or public institution, or make a change in the water supply, water works intake, water purification works of a municipal corporation or public institution, until the plans therefor have been submitted to and approved by the state board of health. No city, village, corporation or person shall establish a garbage disposal or manufacturing plant having a liquid waste which may enter any stream within twenty miles above the intake of a public water supply until the location of such garbage or manufacturing plant, including plans for disposing of such liquid waste, is approved by the state board of health. Whoever violates any provision of this section shall be fined not less than one hundred nor more than five hundred dollars."

This section provides that all plans for water works and sewerage system must have the approval of the State Board of Health before any steps are taken to install same.

In this instance the district has been created by the county commissioners of Erie County and plans for water supply submitted to your department for approval. When the district was created and plans adopted for supplying the district with water, which will make use of this underground channel of water, this source of water supply became at once a source of public water supply. To say that under these circumstances the state board of health could not proceed under section 1249 et seq., would mean that they must either disapprove the plans for the only available water supply, or that they must approve plans which would necessitate the expenditure of a great amount of money and then find that they could not make use of the same because of the water being contaminated. In answer to your first question I am of the opinion that a complaint, order and finding in accordance with section 1249, et seq., is applicable to the case.

In answer to your second question, this department is of the opinion that it will not be necessary that the proposed well water supply system be developed and placed in use before proceeding under section 1249 et seq., but that they may proceed

under the above section whenever the district has been created by the proper authorities and the plans for such public water supply have been presented to your department for approval.

Respectfully,
C. C. CRABBE,
Attorney General.

135.

APPROVAL, BONDS OF CLARK TOWNSHIP RURAL SCHOOL DISTRICT, BROWN COUNTY, \$46,000.00, TO CONSTRUCT A FIREPROOF SCHOOL BUILDING.

COLUMBUS, OHIO, March 9, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

136.

APPROVAL, CONTRACT OF THE STATE OF OHIO WITH THE T. E. McSHRAFFREY CONSTRUCTION COMPANY, AKRON, OHIO, FOR CONSTRUCTION OF TIMBER WALL ALONG EMBANKMENT OF OHIO CANAL FROM ERIE RAILROAD CROSSING TO AKRON-BARBERTON RAILROAD CROSSING—SURETY BOND EXECUTED BY ROYAL INDEMNITY COMPANY.

COLUMBUS, OHIO, March 9, 1923.

Department of Highways and Public Works, Division of Public Works, Columbus, Ohio.

GENTLEMEN:—Your letter of March 2, 1923, with which you enclosed for consideration and approval a contract dated January 3, 1923, between the State of Ohio by Leon C. Herrick, Director of Highways and Public Works, party of the first part, and The T. E. McShraffrey Construction Company, of Akron, Ohio, parties of the second part, and also bond of the Royal Indemnity Company, industrial insurance certificate, etc., in the matter of the construction of timber wall along the embankment of the Ohio canal from the Erie Railroad crossing to the Akron-Barberton Railroad crossing, was duly received.

The several documents referred to have been examined and found to be in proper legal form, and accordingly are approved by this department.

Respectfully,
C. C. CRABBE,
Attorney General.