3726.

BOARD OF HEALTH (CITY)—NOT AUTHORIZED TO REPAIR PUBLIC SANITARY SEWER IN CITY STREET WHEN NO EMERGENCY EXISTS.

A city board of health is not authorized by the nuisance statutes—sections 4420 to 4424 G. C.—to repair a public sanitary sewer in a city street on the refusal of the Director of Public Service to obey its order to make such repair because of a lack of funds appropriated for such purpose, by furnishing the material and labor and causing the work to be done at a time when no epidemic or threatened epidemic or the unusual prevalence of a dangerous communicable disease is alleged or stated to exist.

COLUMBUS, OHIO, November 16, 1922.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You have asked for the opinion of this department on the following question:

"In view of the provisions of sections 4325 et seq. G. C., which makes it the duty of the director of public service to repair sewers within the corporation limits, has the local board of health authority to make such repairs and pay for the same out of funds under their control when the director of public service refuses or neglects to do so?"

Your statement of the facts involved is as follows:

"In an instance which has come to our attention a board of health of a city had notified the director of public service to repair a sanitary sewer. This the director in question neglected to do, owing to lack of funds appropriated for this purpose. The local board of health has proceeded to tear up the street and repair the sewer and proposes to pay the cost thereof from the funds under their control, presumably under the authority of section above quoted."

The statute to which you refer by the term "above quoted" is section 4421 G. G., which reads:

"The board of health may also regulate the location, construction and repair of yards, pens and stables, and the use, emptying and cleaning thereof, and of water closets, privies, cesspools, sinks, plumbing, drains and other places where offensive or dangerous substances or liquids are or may accumulate. When a building, erection, excavation, premises, business, pursuit, matter or thing, or the sewerage, drainage, plumbing, or ventilation thereof is, in the opinion of the board of health, in a condition dangerous to life or health, and when a building or structure is occupied or rented for living or business purposes and sanitary plumbing and sewerage are feasible and necessary, but neglected or refused, the board of health may declare it a public nuisance and order it to be removed, abated, suspended, altered, or otherwise improved or purified by the owner, agent or other person having control thereof, or responsible for such condition, and

may prosecute them for the refusal or neglect to obey such order. The board may also, by its officers and employes, remove, abate, suspend, alter, or otherwise improve or purify them and certify the costs and expense thereof to the county auditor, to be assessed against the property, and thereby made a lien upon it and collected as other taxes."

This statute appears under the sub-title "Nuisances" comprising sections 4420 to 4424 of the General Code, both inclusive, in chapter 11, subdivision 2 of division 5 of the Ohio laws. The sections on nuisances are of long standing. When the health code of the state was amended in 108 O. L. Pt. 1, p. 249 and 108 O. L. Pt. 2, p. 1085, these sections were retained with little, if any, change in terms.

Observe that section 4421 G. C. provides for the regulation of the location, construction and repair of yards, pens and stables, and the use, emptying and cleaning thereof, and of water closets, cesspools, etc., "or other places where offensive or dangerous substances or liquids are or may accumulate." It names a building, excavation, premises, pursuit, matter or thing, or the sewerage, drainage, plumbing or ventilation thereof. The other portion of the statute provides two methods by which a board of health may abate and remove the nuisances mentioned: First, order the owner, lessee, agent or other person interested, to abate, remove, alter, etc.; or, second, the board of health by its officers and employes may remove, abate, alter, etc. them, and certify the costs thereby incurred to the county auditor to be placed upon the duplicate and collected as other taxes.

In the case presented by your question the board of health pursued the second method provided in the statute, paying the expenses incurred out of its own funds. Nothing, however, is said as to the method of collecting the costs of the work so as to reimburse the health fund. Since this action was the repair of a public sanitary sewer in a city street, it would be interesting to know just how the costs were assessed to repay the health fund.

The things enumerated in this section appear to mean only privately owned property and do not include specifically a public sanitary sewer in a city street. A rule of statutory construction seemingly applicable here is that the enumeration of certain things excludes others not mentioned. If this statute applies only to private property, this rule would exclude a sanitary sewer, since such a thing is not enumerated therein. It is evident from the method of assessment provided to repay the health fund that each piece of property is expected and required to stand for the cost necessary to correct the nuisance found upon it. It is just as evident also that such method of assessment cannot be used in the repair of a public sanitary sewer in a city street, unless the laws relating to assessments for such construction are read into this section. The contention that section 4421 G. C. is not intended to apply to public sanitary sewers, is supported further by the express provisions of section 4424 G. C. authorizing the abatement of nuisances found on public school property under the control of the board of education. It is well known that the property and funds of a board of education are not subject to assessment. Had the legislature intended the local health board to have power to repair public sanitary sewers in city streets, it would have provided a method therefor, just as it did for the abatement of nuisances found on public school property. By neglecting to do that it is to be presumed that the legislature did not intend to give such power to a local board of health over the sewers in the streets of a municipal corporation.

The statement in the present instance does not recite an epidemic or threatened epidemic, or the unusual prevalence of a dangerous communicable disease, so as

to indicate the existence of the emergency described in section 4450 G. C. under which emergency a council is authorized to borrow the money needed by the board of health to abate or remove such nuisance to pay the cost thereof where such council or such board of health has not the funds necessary for that purpose. I am unable to find any statute in the health code that expressly authorizes a local or city board of health to repair public sanitary sewers.

Section 1240 G. C. provides that plans for a sewerage system shall be approved by the state board of health before being constructed by a municipal corporation, and the presumption is that the sanitary sewer in the instant matter was so approved by the state board of health in the absence of a statement to the contrary, which does not here appear. Section 4420 G. C. also contains a restriction upon boards of health as to the power to locate, construct and repair water closets, cesspools, etc., in cities having a building department.

Under section 1240 G. C. the power to compel municipal corporations to repair, build and maintain an approved sanitary sewer system seems to be reserved to the state board of health, since its approval of the plans of such system is required.

Section 4413 G. C. has this general provision:

> "The board of health of a city may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. * * *"

In Belden v. State, 10 Ap., 292, the third part of the syllabus says:

> "Sections 4413 and 4414 G. C. relating to orders and regulations by a board of health of a municipality and prescribing a penalty for violation thereof, must be construed with section 4420 G. C. authorizing abatement of nuisances * * *."

It is equally true that section 4421 G. C. must be so construed with section 4422 because this section and the following section gives other powers to the board of health to be used in abating nuisances, and if it is proper to read these statutes touching the duties of a city board of health where an individual was ordered to abate a nuisance and failed to obey such order as was the fact in the case cited, it is certainly proper to so read them where a city board of health repairs a sanitary sewer in the city streets.

Section 4413 G. C. provides that orders and regulations not for the government of the board of health, but intended for the general public shall be enacted like ordinances, having the same force and effect, and in cases of emergencies become emergency orders effective upon enactment.

Section 4414 G. C. provides a fine and a prison sentence or both for "whoever violates" any order of the board of health. In this case the public service director neglected to obey the order to repair the sewer, not because he was unwilling to do so but because of lack of funds appropriated for that purpose. Appreciating the difficulty of arresting and convicting this municipal officer for not doing what he had not funds to do, the board of health proceeded under sections 4422 and 4423 to furnish the material and labor and cause the work to be done. Your statement does not say that the citation and hearing was had as required in section 4423 G. C. However, citation and hearing are provided so that property may not be taken

without due process of law. Here, again, under these statutes it is shown by requiring this citation and hearing that they were not intended to be applied to the repair of a public sanitary sewer since that is under the control of such municipality.

Section 3889 G. C. reads:

> "When it is deemed necessary, council may provide for the repair or reconstruction of any sewer, ditch or drain and the proceedings for that purpose shall be the same, so far as applicable, as are herein required for the original construction thereof."

Section 3647 G. C. gives the council of a municipality power to open, construct and keep in repair sewerage disposal works, sewers, etc., and section 3819 provides limitations on the amounts that may be assessed against a property for sewer or other public improvements because of the special benefits conferred upon such property.

Section 3629 G. C. vests control, use, establishment, etc. of the streets of a municipality in the council. Quite clearly the paramount control of the streets and sewers of the municpal corporation is vested in the council thereof. Under section 4404 the council establishes the city board of health. The mayor appoints a director of public service who supervises improvements and repairs of streets and sewers. There is presented in this case the curious situation of two branches or functions of a city government, to wit, the health department and the public service department trying to use funds provided for one out of the same treasury which provides funds for the other to perform the duty directly assigned by the statutes to the service department through the implied power given to the health department, although the health department under the authority assumed to be implied from this statute for the abatement of nuisances is proceeding to so act when no emergency is declared to exist requiring such act to be performed. Plainly, this is an attempt by the health department to do by indirection what could later have been done through the orderly process specifically provided in the statutes for the conduct of the service department. Evidently the health fund has not been reimbursed for this expense, and could not be so reimbursed unless the statutes which govern assessments according to special benefits are used by the board of health. Reading the statutes on assessments according to benefits received by implication into the statutes in the Health Code for abatement of nuisances is a construction improper and untenable, especially so, too, since they have their own scheme of assessment.

The query suggested herein whether or not the state board of health has the initiative where the repair of city sewers for the protection of the public health is thought to be required is not answered, that being only incidental to the question you ask. A careful reading of the code governing local health boards certainly does not sustain a belief in the implied authority of the nuisance statutes for repair to sanitary sewers in city streets under the circumstances you state.

For the reasons advanced herein, it is the opinion of this department that a city board of health has no authority to repair a public sanitary sewer in a city street in the abatement of a nuisance when the service director is unable to do so

because of the lack of funds being appropriated for that purpose, and when no emergency as stated in section 4450 of the General Code is declared to exist.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3727.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENTS IN PREBLE COUNTY.

COLUMBUS, OHIO, November 16, 1922.

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

3728.

TAXES AND TAXATION—"INVESTMENT IN BONDS" SHOULD BE RETURNED AT TRUE VALUE IN MONEY, THE FULL MARKET VALUE OF THE SECURITIES—TWO EXAMPLES.

"1. *A purchases bonds of the value of* $10,000.00 *from B, paying* $4,000.00 *in cash and obligating himself to B for the payment of the balance.*

2. *Instead of obligating himself to B for the balance, A borrows* $6,000.00 *from the bank and pays B in full.*"

HELD: In both of these cases A should return at their true value in money of his "investment in bonds" the full market value of the securities.

COLUMBUS, OHIO, November 16, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The Commission has requested the opinion of this department upon the following questions:

> "1. A purchases bonds of the value of $10,000.00 from B, paying $4,000.00 in cash and obligating himself to B for the payment of the balance.
>
> 2. Instead of obligating himself to B for the balance, A borrows $6,000.00 from the bank and pays B in full."
>
> Query: Under these conditions what is the amount of A's 'investment in bonds'? The answer to this query involves an interpretation of Section 5323 General Code."