

ing business in this state or, unless a bank or a trust company, to make loans to retail sellers doing business in this state on the security of retail installment contracts or to engage in the business of making loans to retail sellers doing business in this state on the security of retail installment contracts, shall file an application for a license on forms prescribed by the department and pay the fees required herein."

This corporation is engaged in the retail sale of automobiles on installment contracts and, as such, it is a distinct and separate legal entity and transacts its business as such, wholly separate and apart from any of its individual stockholders.

It is my opinion, therefore, that any individual who purchases retail installment contracts from such retail seller is required to have a license to engage in such business, under the provisions of section 11 above quoted. The fact that he may own stock in the corporation with which he deals would not be sufficient to excuse him in law from complying with the conditions imposed by the above section.

HEALTH, STATE BOARD OF: Proposed ordinance for towns—sanitary privies.

April 20, 1937.

Verne K. Harvey, M. D., Director,
Indiana State Board of Health,
State House Annex,
Indianapolis, Indiana.

Att: Bureau of Sanitary Engineering.

My Dear Doctor:

You request in your letter of April 15, an opinion as to whether a sample ordinance which you submitted, and a copy of which is attached hereto, is in proper form and enforceable.

The ordinance provides for the elimination of the insanitary privy in incorporated towns and is to be submitted to the boards of trustees for their adoption.

Section 1 of the sample ordinance provides that it shall be unlawful for persons and others named to do certain

things. Relative to this section, I would first recommend that you add words which would confine the effects of the ordinance to the corporate limits of the town. It is true that without the words of limitation in the ordinance, the town officials could not reach beyond their jurisdiction, nevertheless, it is my opinion that it would be in better form if such limitation were to be set out.

The last clause of section 1 says, "that such conditions constitute a public nuisance." It is my feeling that the word "conditions" is not sufficiently definitive of what shall constitute a public nuisance. It is my further thought that instead of the word "conditions" being used, it would be better to repeat the thing or things which would constitute the nuisance. However, the one objection to this which might be made is that you would be confined then in the operation of the ordinance as far as the nuisance clause was concerned to those things which you defined as a nuisance. On the other hand, a court in construing the words "such conditions" would refer back to the body of the section. But there again I do not believe that the words in this clause would cover the act of placing or depositing, but would only refer to the deposit remaining after the act had been done. To make more clear exactly what I mean, let us suppose an illustration. If an unknown person were to deposit or place human excrement upon a vacant lot, the ordinance makes no provision for compulsory removal by the owner of the lot and it would be my opinion that such excrement could remain there as far as this ordinance is concerned.

In section 2, line 3, after the word "and" and before the word "public," I would suggest the insertion of the word "all." In the last three lines of section 2 under part (3) of the definition of a sanitary privy, the ordinance says that it shall be so located that waste material in the privy cannot contaminate a water supply by underground or surface drainage. I presume that what was in the mind of he who drafted the ordinance was the relative topographical position of a privy and a water supply. That is to say, the water supply should not be on a lower level than that level on which the privy is located. However, the words used are very broad and could be used for an arbitrary exercise of authority. It is my opinion that this portion of the definition should be more in detail as to the respective elevations of privies

and water supplies and as to the sealing of the vaults, cesspools or pits in such manner that there could not be seepage.

The second grammatical sentence of section 2 makes it mandatory upon a property owner owning property within one hundred feet of a sanitary sewer that he install sanitary inside or outside water-flushed toilets and that they shall be connected to a sewer system.

It is my opinion that this provision should contain a proviso excusing from its operation certain persons, who in the opinion of the health authorities, maintain sanitary toilets which are as effective for the accomplishment of the health motive underlying this ordinance as are those privies connected with the sewer. To illustrate again, suppose one were to have a costly cesspool to which chemicals were added and which completely consumed the excrement, or suppose that one had some other provision on his property for the disposal of human waste, sanitary in every particular. Might it not be unreasonable and arbitrary to demand that such individual connect with the sewer,

I believe that a great amount of litigation might be avoided by inserting such proviso after the word "system" in line 6 of section 2.

Section 3 speaks of the secretary of the board of health. It is not said which board of health, whether the county or state. It would be well to specify which. Section 3 also provides that an official notice shall be served upon the tenant and owner. It is my opinion that the form of this ordinance would be improved if the manner of serving this official notice be set out in the ordinance.

Section 4, which provides that it shall be the duty of the occupant or owner of the premises to make the installation in accordance with the Indiana State Board of Health regulations, makes no time provision. Presumably a reasonable time would be allowed, but what is a reasonable time is a matter largely within the discretion of a court. Thus, in the absence of a specific time for the installation to be finished, it would be my opinion that some of the effectiveness of the ordinance might be lost.

Section 5 in providing for a penalty and what shall constitute a violation, says that each day's violation of any such provision *may* constitute a separate and distinct offense. The use of the word "may" leaves it to the discretion of the court.

If the word "shall" were substituted for the word "may," each day's violation then would be a separate offense and the offender could be prosecuted for each or any. It would be my opinion that the use of the word "shall" would strengthen the ordinance materially.

Section 6 says in the first line, "Upon refusal or neglect of any owner," etc., without a time specification. It would seem to me that a limitation should be placed in this sentence so that there could not be laxity in enforcement. In other words, if the language of the ordinance is plain, then the enforcement officials would have the burden definitely of either enforcing it or submitting themselves to criticism. As the wording now is, what would constitute refusal or neglect? Line 3 of section 6 provides for the enforcement by the Department of Law. It is my opinion that the ordinance should provide for enforcement by the prosecuting attorney of the county in which the town is located.

Section 6 does not specify which board of health, whether of the county or of the state. I think there should be a designation, that is the State Board of Health, or County Board of Health, whichever is meant.

The next question is, whether or not this ordinance, if passed, would be enforceable? That is to say, first, is the ordinance constitutional? Unquestionably, the ordinance would be within the police power of the state.

In the case of *Hutchinson v. City of Valdosta*, 227 U. S. 303, 308, the court said:

"It is the commonest exercise of the police power of a state or city to provide for a system of sewers and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties."

In the case of *Fristoe v. City of Crowley*, 76 So. 812, the Supreme Court of Louisiana had presented to it the question of compulsory connection with a sewerage system. The ordinance under consideration in this case required that the owners of all improved property situated within three hundred feet from the public sewer connect their premises with the sewerage system. The constitutionality was attacked but the court said:

"This ordinance, in our opinion, is not an arbitrary or unreasonable act on the part of the municipal gov-

ernment, but is a legitimate exercise of the police power."

Furthermore, the ordinance is constitutional as to those properties already in existence. That is to say the ordinance does not have to be limited to those properties which are built after the enactment of the ordinance. That question was raised in the case of *The Commonwealth v. Roberts*, 155 Mass. 281, where the court said:

"There can be no doubt that the statute in question is within the constitutional powers of the legislature as a police power. It is an Act for the preservation of the public health, and relates to the disposal of one of the most dangerous forms of sewage."

It is my further opinion that from a practical point of view the ordinance would be enforceable and I believe that the majority of the citizens of a town would give it their approval. With public opinion supporting the ordinance, it would seem to me that the enforcement officials would have a relatively easy task in compelling compliance with the provisions of the ordinance.

ACCOUNTS, STATE BOARD OF: Right of county commissioners to purchase insurance on county-owned motor vehicles.

April 22, 1937.

Hon. W. P. Cosgrove,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of April 20 submitting the following question:

"Can county commissioners purchase public liability and property damage insurance to cover county-owned trucks and automobiles and legally pay the premium for such insurance out of public funds?"

In reply to this question beg to say that prior to 1929 the