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Power of State of Indiana to Prevent Pollution of the Ohio River

CONSERVATION

POWER OF STATE OF INDIANA TO PREVENT POLLUTION OF THE OHIO RIVER

The problem of the abatement of the pollution of the Ohio River has become so acute that the Interstate Commission on the Ohio Basin has been organized and has drafted and submitted the Ohio River Valley Water Sanitation Compact to the nine states of the Ohio basin for adoption.[1] Evidence of the extent of the pollution of the Ohio River is the fact that some 60 "cesspools" have been created as a result of the dams that are in the river to insure its navigability.[2]

This compact between the nine states gives adequate power to the commission to prevent pollution of the Ohio River. However, its taking effect is contingent upon the adoption of it by all nine states. Indiana has adopted it[3] as have all the other states except Pennsylvania, Virginia and Tennessee. Until the adoption by these states the compact remains inoperative.

Since the compact is inoperative, two questions arise: (1) Does Indiana have the power to prevent the pollution of streams that are within its jurisdiction? (2) Is the Ohio River within Indiana's jurisdiction for the exercise of these powers?

Different methods for the prevention of pollution of streams have been used in common law jurisdiction. One method is an indictment for a public nuisance as a result of polluting a stream.[4] The Indiana courts have recognized pollution of streams as public nuisances and successful indictments have been brought against the offenders for the abatement of them.[5]

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1. Yearbook of Indiana (1941) 383. These states are: Indiana, West Virginia, Illinois, Virginia, Ohio, Kentucky, Tennessee, Pennsylvania and New York.
2. Ibid. This problem is especially acute since many cities along the river use it as their source of public water supply and "the concentration of bacterial pollution in the river water . . . is far greater than that considered safe to be used as a source of public water supply. . . . " Ibid.
3. Ind. Stat. Ann. (Burns, June, 1942 Supp.) § 68-601.
4. Bl. Comm. (Gavit's ed. 1941) 609-610, "It is a nuisance . . . to corrupt or poison a watercourse by erecting a dye house or lime pit in the upper part of the stream, or in short to do any act therein that in its consequences must necessarily prejudice one's neighbors." For a definition of public nuisance see: Pound and Plucknett, Readings on the History and System of the Common Law 360; West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N.E. 879 (1904); City of Valparaiso v. Moffitt et al, 12 Ind. App. 250, 39 N.E. 909 (1904); U.S. Board and Paper Co. v. State, 174 Ind. 460, 91 N.E. 953 (1910); Paragon Paper Co. v. State, 19 Ind. 314, 49 N.E. 600 (1897).
5. One of the earliest cases is State v. Taylor, 29 Ind. 517 (1868). In this case Taylor was indicted and convicted for being guilty of an act constituting a public nuisance when he urinated in a small stream that was used for public drinking purposes. In State v. Herring, 21 Ind. App. 157, 48 N.E. 598, 51 N.E. 951 (1898) the defendant was indicted in Miami County for maintaining a public nuisance as a result of putting filth, offal and sewage from his factory in Wabash County into the Wabash River.

Around the turn of the century legislation concerning the pollution of streams began to appear.[6] However, the act that clearly and without exception gave the state board of health the power to prevent the pollution of rivers and streams was enacted in 1927.[7] This act made it unlawful for any person or corporation to drain any substance into any of the waters of this state which would be deleterious to the public health, or the prosecution of any lawful occupation, or the use of any political subdivision, or which would interfere with any beneficial animal, or vegetable life in the water.[8]

Another stream pollution act was passed in 1935. This act was to be construed as not "repealing any existing law or any of the

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The court held that Herring could be indicted in either county for befouling the stream. A case with practically the same facts and results is State v. Wabash Paper, 21 Ind. App. 167, 48 N.E. 653 (1898) where the court said that it was evidently the intent and purpose of the legislature in enacting a general nuisance statute to protect the people from the evils resulting from the pollution of the streams. Other cases concerning indictments for pollution of streams as public nuisances are: U.S. Board and Paper Co. v. State, 174 Ind. 460, 91 N.E. 953 (1910); Paragon Paper Co. v. State, 19 Ind. App. 314, 49 N.E. 600 (1897); Mergentheim v. State, 107 Ind. 567, 8 N.E. 568 (1886). These cases were indictments based upon general nuisances statutes. Such a nuisance statute is in force today. Ind. Stat. Ann. (Burns, 1933) § 10-2502.

6. Ind. Stat. Ann. (Burns, 1894) § 2169, "Whoever maliciously or mischievously puts any . . . putrid, noisome substance . . . in any stream, canal or spring shall be fined . . . "
The first statute of any import or detail was enacted in 1909 and has not been repealed. This statute gave the state board of health power to investigate upon complaint the acts of any "city, town, village, corporation, person or firm" that is "discharging . . . any sewage or other wastes" that befoul any stream to the injury of the public health, or "is polluting the source of any public water supply." If the board found the facts as alleged to be true, it was empowered to order the persons to stop the acts causing the pollution. Fines for refusal to obey the orders of the commission were collectable in the county court. While the prevention of pollution applied to any city, town, village, corporation or person, an exception in the statute said the act did not apply to any city, town or village located on a boundary stream if sewage from other states was allowed to be run into the river. From this it appears that persons and corporations along the Ohio River in Indiana could be prevented from polluting the river while a municipality could not. Ind. Stat. Ann. (Burns, 1933) § 35-201 to 35-210. An act was passed in 1913 which stated that it was unlawful to pollute a stream which pollution resulted in the injury or destruction of the lives of the fish therein. Ind. Acts 1913, ch. 147, § 4, p. 368.

7. Ind. Stat. Ann. (Burns, 1933) § 10-2506.

8. Provision for private abatement of the pollution is also made. Ind. Stat. Ann. (Burns, 1933) § 10-2507. Hearings and investigations by the state board of health are provided for. Ind. Stat. Ann. (Burns, 1933) § 10-2508 and 10-2509. The fine for violation of any order of the board is determined. Ind. Stat. Ann. (Burns, 1933) § 10-2510. The state board of health is empowered to investigate and study the cause of the pollution and make plans and suggestions for the method of correction. Ind. Stat. Ann. (Burns, 1933) § 10-2508.

provisions of any existing law . . . but . . . as (being) ancillary and supplementary...."[9] The act applied to all waters and watercourses within the jurisdiction of the state and was very explicit and detailed as to all elements of pollution and the prevention of it. However, the power to enforce the statute was vested in the department of Commerce and Industry.[10] This department is non-existent today[11] and the statutory authority for the creation of this department to which the powers had been granted has been repealed.[12] But since this 1935 act did not repeal the earlier pollution acts,[13] these earlier acts still remain operative and action to prevent pollution could be brought under them.

If Indiana does have the power to prevent the pollution of rivers within its jurisdiction, does the Ohio River come within its jurisdiction for the valid exercise of this power?[14]

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9. Ind. Stat. Ann. (Burns, Supp. 1942) § 68-501 to 68-509.
10. Ibid. As a result of the State Executive-Administrative Act of 1933 (Ind. Stat. Ann (Burns, 1933) § 60-101) the administrative departments of the state were reorganized and eight departments were created. The governor was authorized to assign any administrative power, duty or function previously existing to any one of the eight departments. Ind. Stat. Ann. (Burns, 1933) § 60-109. Pursuant to this authorization he assigned the board of health to the department of Commerce and Industries. Compiler's note after Ind. Stat. Ann. (Burns, 1933) § 35-102. The State Administrative Act of 1941, Ind. Stat. Ann. (Burns, Supp. 1941) § 60-135, expressly repealed the reorganization act of 1933 and provided for a new administrative organization which did not include any department of Commerce and Industries to which the power to abate pollutions had been granted by the 1935 pollution act. Ind. Stat. Ann. (Burns, Supp., 1942) § 68-501. But the State Administrative act of 1941 was declared unconstitutional and void in its entirety. Tucker v. State, 218 Ind. 614, 35 N.E. (2d) 270 (1941). To this already complicated picture one more confusing factor is added. The legislature of 1941, seemingly not content with repealing the 1933 State Executive-Administrative Act, in a section of the 1941 State Administration act supra, enacted a separate repealer. Ind. Acts of 1941, Chap. 4, § 1, p. 8. This act also repealed the 1933 State Executive-Administration act and all orders of the governor pursuant to the act. No decision has been found on the validity of this separate repealer. Because of this separate repealer it is probable that the 1933 State Executive-Administrative act is repealed and the organization of the departments of the state is back to the position they were in before the 1933 act. Ops. Att'y. Gen. (Ind. 1941) 212; Note (1941) 17 Ind. L. J. 133. If this presumption is true, the pollution act of 1935 is probably of little aid to the board of health since its powers were expressly granted to the department of Commerce and Industries which department has been destroyed by the separate repealer of 1941.
11. Roster of State Offices (Ind. 2d ed. 1941) 3-7. But see Ice, Municipal Home Rule in Indiana, 17 Ind. L. J. 375 at 387 (1942). The reference of the author to the Stream Pollution Board must have been an oversight since no such board is in existence in Indiana today.
12. See note 10 supra.
13. See note 9 supra.
14. For authority that Indiana does have the jurisdiction to do this, see Sikes, Indiana State and Local Government (1940) at 22 ff. But see Yearbook of Indiana (1940) 381.

The southern boundary of Indiana is the low-water mark on the northern bank of the Ohio River and the river itself is within the boundaries of Kentucky.[15] However Indiana can and does exercise concurrent jurisdiction over the river.[16] The United States Supreme Court has upheld Indiana's exercise of concurrent jurisdiction over the river,[17] and so have the courts of Kentucky.[18] This concurrent jurisdiction over the Ohio River has been defined by Kentucky to mean that Indiana is entitled to as much power; "legislative, judiciary, and executive, as that possessed by Kentucky, over so much of the Ohio River as flows between them."[19] The Indiana courts have upheld the exercise of jurisdiction on the Ohio River in both civil and criminal cases.[20] This concurrent jurisdiction over the river has been held to mean, "that laws enacted by the General Assembly extend to and are in force in the territory over which the jurisdiction of the State is concurrent, without any special or particular provision on the subject...."[21] For these reasons Indiana has the power to enforce its pollution laws on persons who dump sewage directly into the Ohio River and who are subject to its jurisdiction.

CONSTITUTIONAL LAW

RIGHT OF INDIGENT PRISONER TO COUNSEL

Petitioner, indigent and of meager education, was indicted for robbery and requested that counsel be appointed for him. His request was denied on the ground that it was contrary to local practice except

15. Handly's Lessee v. Anthony, 5 Wheat. 374 (U.S. 1820); Indiana v. Kentucky, 136 U.S. 479 (1890); Carlisle et al. v. State, 32 Ind. 55 (1869); Sherlock et al. v. Alling Adm., 44 Ind. 184 (1873) aff'd 93 U.S. 99 (1876); McFall v. Commonwealth, 59 Ky. 394 (1859); Perks et al. v. McCracken, 169 Ky. 590, 184 S.W. 891 (1916); Nicoulin v. O'Brien, 172 Ky. 473, 189 S.W. 724 (1916). But see Watts v. Evansville, Mtc. and N. Ry. Co. et al. 191 Ind. 27, 129 N.E. 315 (1919).

16. Virginia Revised Code (1819) 59. By this act Virginia ceded her land which became the state of Kentucky and said that the jurisdiction on "The river [Ohio] shall be concurrent . . . with the states which may possess the opposite shores of the said river." Accord: Ind. Const. Art. 14, § 2, "Indiana shall have . . . concurrent jurisdiction in civil and criminal cases with the state of Kentucky on the Ohio River. . . . "

17. Wedding v. Meyler, 192 U.S. 573 (1904); also, Sherlock et al. v. Alling Adm., 93 U.S. 99 (1876).

18. Nicoulin v. O'Brien, 172 Ky. 473, 189 S.W. 724 (1916); McFall v. Commonwealth, 59 Ky. 394 (1859); Church et al. v. Chambers, 33 Ky. 274 (1835).

19. Arnold and Parrish v. Shields et al., 35 Ky. 18, 22 (1837).

20. Carlisle et al. v. State, 32 Ind. 55 (1869) (conviction of murder committed upon the Ohio River); Welsh v. State, 126 Ind. 71, 25 N.E. 883 (1890) (conviction for violation of Indiana liquor laws upon the river); Dugan v. State, 125 Ind. 130, 25 N.E. 171 (1890) (conviction for violation of Sunday laws on the Ohio River); Memphis and Cincinnati Packet Co. v. Pikey Adm., 142 Ind. 304, 40 N.E. 527 (1895) (prosecution of a tort committed upon the river).

21 Sherlock et al. v. Alling Adm., 44 Ind. 184 (1873), aff'd, 93 U.S. 99 (1876).