

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY



June 26, 1967 INTER - OFFICE COMMUNICATION

To: C. B. Burns, Jr. *Op. No. 322*  
From: Edward B. Mitchell, Jr.  
Re: Water Pollution Control Bill (House Bill No. 319)

The Bill in part reads as follows:

" \* \* \* In any public nuisance abatement proceeding or injunction suit or administrative hearing, under this Act, service may be obtained by mail or publication, as provided for, by law if the land where the pollution originates is located within this state." (Emphasis supplied)

The question has been raised as to the constitutionality of the above quoted section with respect to the requirement that due process of law must be afforded. An action for injunctive relief, of either a mandatory or a prohibitory nature is an action in personam, determining the rights and obligations of an individual, rather than an action in rem. Quoting 16 A C.J.S. Constitutional Law §619, p. 786:

"Broadly speaking, the legislature may provide for such methods of service of process as it deems wise, provided the requirements of due process are observed. Due process of law requires that service of process shall always be made except when properly waived, and that before one can be bound by a judgment affecting his property right, some process be served on him calculated at least in some degree to give him notice of the proceedings.

Due process of law requires personal service to support a personal judgment, and, when the proceeding is strictly in personam brought to determine the personal rights and obligations of the parties, personal service within the state or a voluntary appearance in the case is essential to the acquisition of jurisdiction so as to constitute compliance with the constitutional requirement of due process."

See also Shelley v. Kramer, 334 U.S. 1, 68 S.Ct. 836.

Since the rights and obligations involved under the section as written, <sup>are personal in nature</sup> the legislation is vulnerable to challenge on constitutional grounds. In order that this vulnerability might be cured or substantially mitigated, it is suggested that the language of the Bill be amended to provide for summary nuisance abatement proceedings following notice to the owner of record. 16 A C.J.S Constitutional Law §612, P. 761, deals with the abatement of a nuisance by summary proceedings as follows:

"Abatement of nuisance. Since the summary abatement of a public nuisance was authorized by the principles of the common law, statutes extending the principle to new objects and situations declared to constitute nuisances are within the requirements of due process, as, for example, statutes authorizing the summary abatement of bawdyhouses, the removal of occupants of disorderly houses, the suppression of disorderly conduct, the closing of a building and the denial of a right to use it for any purpose where there is a violation of the liquor law, the confiscation or destruction of liquor illegally kept for sale, and the opening of drains along the roadbed of a railroad at the expense of the company. Such statutes usually provide for notice to the owner and an opportunity for a hearing before a final adjudication depriving him of his property, although summary abatement of a public nuisance may be authorized under due process requirements without notice and judicial hearing.  
\* \* \*"

If, upon notice, the property owner failed to abate the nuisance, the state could abate such nuisance upon summary proceedings, charging the cost of the abatement to the tax bill of the property owner. This process is similar to that which authorizes cities to abate nuisances which endanger the public health or safety under the provisions of Section 77.560, RSMo, 1959. Such a procedure, where the public health or safety are endangered by the continued existence of a nuisance, has been held not to violate the constitutional guaranty that an individual cannot be deprived of his property without due process of law. City of Nevada v. Welty, Mo., 203 S.W.2d 459:

Potashnick Truck Service, Inc. v. City of Sikeston, Mo., 173 SW2d 96.

Even where the owner is given no notice of the proceedings, the due process requirement has been held not to have been abridged. In North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, the United States Supreme Court said:

"There being no provision for a hearing, the acts were not void nevertheless, but the owner has the right to bring his action at common law against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he would have due process of law; and if he could show that the alleged nuisance did not in fact exist, he will recover judgment, notwithstanding the ordinance of the board of health under which the destruction took place."

See also Adams v. Milwaukee, 228 U.S. 572, 33 S.Ct. 610.

Similarly the New York Court has said of such summary procedure in Lawton v. Steele, 119 N.Y. 226, 23 N.E. 878, 7 L.R.A. 134, affirmed 152 U.S. 133:

"The right of summary abatement of nuisances, without judicial process or proceeding, was an established principle of the common law long before the adoption of our Constitution, and it has been supposed that this common law principle was abrogated by the provision for the protection of life, liberty and property in our state constitution; although the exercise of the right might result in the destruction of property."

" \* \* \* As the legislature may declare nuisances, it may also, where the nuisance is physical and tangible, direct its summary abatement by executive officers, without the intervention of judicial proceedings in cases analogous to those where the remedy by summary abatement existed at common law."

Another statement on this question by the New York Courts is found in Application of Barkin, 189 Misc. 358, 71 N.Y.S. 2d 267:

"It is well settled that the police power of the state which includes 'everything essential to the public safety, health and morals' justifies the 'abatement, by summary proceedings, of whatever may be regarded as a public nuisance.'"

Of course, if the due process requirements is satisfied in a summary proceeding without notice, a statute which provides for notice, even constructive notice, would be even less subject to attack on these grounds. Goodall v. City of Clinton, 196 Okl. 10, 161 P.2d 1011.

Thus the best insulation from attack on constitutional grounds would be to amend the Bill to parallel the provisions of Section 77.560, RSMo, 1959. If, however, it is desired that the Bill be enacted as written, some argument, although less substantial, can be made for its constitutionality. This argument would proceed on the same basis, health and safety provisions under the police power, as that for an injunction padlocking places where intoxicating liquor is illicitly sold, prohibiting the <sup>owner</sup>~~owner~~ of the premises from making further use thereof for such purposes even though he could not be personally served with process. See Denapolis v. United States, 3 F.2d 722; United States v. Lento 8 F.2d 432; Schlieder v. United States, 11 F.2d 345; Anno: 63 A.L.R. 698, 702. This position, however, is that of a minority of the jurisdictions in this country, and is mainly represented by federal decisions. Moreover, there is a Missouri Court of Appeals Case squarely contrary. Ely v. Bandall, 220 Mo. App. 1222, 299 S.W. 155. For this reason it is advised that an injunction proceeding, rather than one summary in nature, not be used.

Still another alternative is that constructive service could be made by using the theory that is used to sustain the so-called "long-arm statutes" pertaining to operation of motor vehicles in the state by non-residents. Graves v. State of Minnesota, 272 U.S. 425, 47 S.Ct. 122; Paduchik v. Mikoff, 110 N.E.2d 562. The difficulty with this approach, however, is that operating an automobile in the state is a privilege and involves the actual physical presence of the operator within the jurisdiction, while the ownership of property <sup>is a right, and the owner</sup> may never have been within the state. Weak argument could be made, however, that when one owns property in Missouri, he has sufficient contact with the State to constitute his consent to be subjected to the jurisdiction of its courts. This argument should be made, however, only when no other alternatives are available.

#### CONCLUSION

This Bill should be amended to provide for summary nuisance abatement proceedings upon actual or constructive notice to the owner of the property on which the pollution originates.

Respectfully submitted,

  
Edward B. Mitchell, Jr.

EBM: fms

