

# Public Health Law

BY JAMES A. TOBEY, DR.P.H., LL.D.

*Member of the New York Bar; Fellow, American Public Health Association; Associate Fellow, American Medical Association; Sometime Lecturer on Public Health Law at Harvard University School of Public Health and at Massachusetts Institute of Technology.*

*THIRD EDITION*

NEW YORK  
THE COMMONWEALTH FUND  
1947

FIRST EDITION COPYRIGHT 1926 BY  
THE WILLIAMS & WILKINS COMPANY

SECOND EDITION COPYRIGHT 1939 BY  
THE COMMONWEALTH FUND

THIRD EDITION COPYRIGHT 1947 BY  
THE COMMONWEALTH FUND

PUBLISHED BY THE COMMONWEALTH FUND  
41 EAST 57TH STREET, NEW YORK 22, N. Y.

## PREFACE TO THE SECOND EDITION

**D**URING the past few years there has been a tremendous expansion in the scope and influence of public health activities, both in their scientific aspects and in their administrative application. The need for adequate public health facilities has been recognized by governmental authorities, with a gratifying increase in trained personnel, and the value of public health efforts has come to be appreciated by the public.

These significant developments have made necessary another re-statement of the law of public health, especially since there is now no modern text on this important subject. In the long history of public health in this country, there have been, in fact, only three books dealing with the legal aspects of public health. The first of these, an excellent work by two eminent attorneys, was published nearly fifty years ago.<sup>1</sup> The second, by a physician, was issued more than thirty years ago,<sup>2</sup> and the third, by the author, was prepared more than a decade ago.<sup>3</sup>

The present work is much more comprehensive and, it is believed, more efficiently arranged than the author's earlier volume, which has been completely rewritten. An attempt has been made to present factual material only, with a minimum of personal opinion or comment. An endeavor has also been made to provide answers, based mainly on the decisions of courts of last resort, to most of the legal problems with which persons concerned with any phase of public health may be confronted.

Many of the author's colleagues in the medical, public health, and legal professions have been good enough to read and criticize parts of the manuscript. They have made numerous valuable suggestions, which are gratefully acknowledged, although the author assumes the responsibility for any errors or shortcomings in the book. Acknowledgment is also due to the Commonwealth Fund for making possible this new edition.

As the culmination of more than fifteen years' continuous study of the legal aspects of public health, it is to be hoped that this book will

1. L. Parker and R. H. Worthington, *The Law of Public Health and Safety and the Powers and Duties of Boards of Health*, Albany, Bender, 1892.
2. H. B. Heminway, *Legal Principles of Public Health Administration*, Chicago, Flood, 1914.
3. J. A. Tobey, *Public Health Law, A manual of law for sanitarians*, Baltimore, Williams & Wilkins, 1926.

PREFACE TO SECOND EDITION

prove of practical value to health officials and other sanitarians, to students of public health, to physicians, and to judges, attorneys, and government officials.

J. A. T.

*New York, April 1939*



## PREFACE TO THE THIRD EDITION

**T**HE noteworthy progress in recent years in public health administration has made necessary a third edition of this text. The work of revision was undertaken, therefore, immediately after the author's return from a service of nearly three years overseas with the military government of the United States Army.

Much new material has been added for this edition, although there have been relatively few changes in the fundamental legal principles set forth. About 250 new decisions of courts of last resort on various aspects of public health law have been referred to or abstracted, numerous alterations in governmental organization and administration have been noted, and important legislative trends have been reported.

It is hoped that the book may continue to serve a useful purpose in the interpretation of law to the public health officer, and of public health to the lawyer and the judge.

J. A. T.

*Rye, N. Y.  
October 1, 1946*

## FOREWORD

BY CHARLES V. CHAPIN, M.D., Sc.D., LL.D.

THE author has done well to begin by again quoting the oft quoted aphorism of the Earl of Derby that "sanitary instruction is even more important than sanitary legislation." Sanitarians work toward the ideal that all people will in time know what healthful living is, and that they will in time reach that moral plane when they will practice what they know. While hopeful for the millennium we must work. Law is still necessary. People still incline to acts which are not for their neighbors' good. In our complicated civilization, many restrictions must be placed on individual conduct in order that we may live happily and healthfully one with another. It is a common pastime to decry legislation. Many wittily declare that the most pressing duty of Congress and our state legislatures is to adjourn. Some of us differ decidedly from this view. Every one condemns unnecessary legislation and equally abhors ill considered and badly framed laws, but the relations of human beings are becoming more complex every day. It would appear that the rules governing these relations must become more complex. There is no doubt, too, that those who "on general principles" condemn "meddling legislation," when it comes to specific problems affecting themselves, are in favor of rat proofing plague infected cities, of stamping out virulent small-pox by drastic measures, of compelling one city to cease discharging its sewage into its neighbor's drinking water and of dealing summarily with him who peddles tuberculosis with his milk. Doubtless sanitary instruction will increase by leaps and bounds, but doubtless

NOTE. This Foreword was written by Dr. Chapin in 1925 for the first edition of this book. It is reproduced here with the special permission of Dr. Chapin, and of the Williams & Wilkins Company, publishers of the earlier volume.

Dr. Chapin was Superintendent of Health of Providence, R. I., from 1884 to 1931, a period of nearly half a century. In addition to numerous other duties, he served as lecturer at the Harvard-Technology School for Health Officers when the author was a student (1912-1916). He was president of the American Public Health Association in 1927, and received the Sedgwick Memorial Medal in 1929. Throughout his active career Dr. Chapin was one of America's foremost sanitarians. His book, *Municipal Sanitation in the United States*, was quoted extensively in one of the decisions of the United States Supreme Court (*California Reduction Co. v. Sanitary Reduction Works* [1905], 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204).

See *Papers of Charles V. Chapin, M. D.*, edited by C. L. Scamman, New York, Commonwealth Fund, 1934.

there will also be in the near future more, rather than fewer, sanitary laws.

Practically every one who enters the field of public health with enthusiasm, whether it be a health officer, a voluntary worker, or just a plain citizen, stimulated by some evil, or abuse, first turns to legislation as a means of hastening the millennium. Few health officers entering upon their work know much about law, or even about the structure of our government. The propagandists of great health movements are likely to know even less. They may fear that human nature may interfere somewhat with law enforcement, but they little realize the legal impediments in the way of securing the prompt adoption of their rules. It never occurs to them that the Federal Constitution may be in their way, or their state constitution, or some existing statute, or possibly a municipal ordinance. Still less do they realize the power of the courts. A judicial decision may possibly render void any law, or regulation. The author in a simple but concise manner thoroughly acquaints his reader with all these limitations to law making and rule making. Legislation is a serious business, and those interested in public health who expect to take a hand in it, and all who have to interpret and apply laws and regulations, need a volume on the desk which will guide them aright.

Of equal importance with an understanding of the principles of good sanitary legislation and its limitations is a knowledge of the technical construction of statutes and regulations. Dr. Tobey suggests that sanitary regulations should first be drawn by an expert in sanitary science, read and corrected by a master of English, and then be put into legal form and made to conform to constitutional and statutory requirements by a lawyer experienced in drafting legislation. It would be ideal if the three could have a joint meeting to complete the work. The necessity for the greatest care in this business cannot be too strongly insisted on. As Elihu Root said, quoted by Dr. Tobey, "There is a useless law suit in every useless word of a statute." Amendments are unfortunate and perhaps are best prevented by prior consultation with possibly adverse interests.

The last sentence of Chapter XX is pregnant with meaning. The admonition is that regulations should not be adopted unless it is intended that they be enforced. The sole purpose of law is to control individual action so that it will not injure another. Nevertheless, it is surprising that there are so many people who believe that education is a legitimate function of legislation. Health teachers, health officers, social workers and even a professor of sociology in a leading university, have argued that though it might be impossible to enforce a pro-

FOREWORD

xiii

posed statute, it should be made a law for its educational effect. Nothing is more certain to develop disrespect for law than this, and disrespect for law is the most menacing danger of the times.

Chapter XXI is very useful and practical. Very few laymen have any knowledge of court procedure. When appointed health officer, I knew nothing about such matters, and if I could have read a brief discussion like this, it would have saved much misunderstanding and annoyance. The remarks about evidence and witnesses are particularly instructive and if taken to heart will save many disappointments.

A large portion of the book is taken up with the discussion of the legal problems connected with particular phases of health work, such as the control of communicable diseases, nuisances, social hygiene, etc. A vast amount of information is contained therein which it is very useful for the health worker to have ready at hand.

Law and science are very unlike. It is unfortunate that the word law should be applied alike to the rules of conduct formulated by man, and the orderly procedure of the phenomena of Nature. The viewpoint and the modes of thought of the lawyer and of the scientist differ widely. As a student in the Massachusetts Institute of Technology and a pupil of Sedgwick, Dr. Tobey became imbued with true scientific spirit; as a student of and lecturer on law, he has become familiar with its principles and forms, and his years of intimacy with the most important health movements of the day have filled him with an earnest desire for the prompt application of science to the furtherance of the public health. He is eminently qualified then to interpret in simple language to the health worker the principles of sanitary law.

## TABLE OF CONTENTS

FOREWORD, by Charles V. Chapin, M.D., Sc.D., LL.D. ....	xi
---	----

### *PART I. PUBLIC HEALTH LAW AND ADMINISTRATION*

I. PUBLIC HEALTH AND THE LAW .....	3
Definitions of Public Health .....	4
Some Fundamental Legal Principles .....	6
Law and Equity .....	8
Public Health Law .....	9
The Development of Public Health Law .....	9
Early American Health Legislation .....	10
II. THE SOURCES OF PUBLIC HEALTH LAW .....	15
Sources of Law in the United States .....	15
The American Plan of Government .....	16
The Functions of the Legislature .....	17
The Functions of the Executive .....	18
The Functions of the Judiciary .....	19
The Federal Constitution .....	20
Regulation of Interstate and Foreign Commerce .....	22
The Taxing Power of Congress .....	24
Postal Laws and the Public Health .....	26
The Treaty-Making Power .....	28
The Government of Federal Territories .....	28
Federal Health Organization .....	29
The Social Security Act .....	33
Radio Control .....	34
Patents .....	35
State Constitutions .....	36
Health Activities in Canada .....	37
III. THE POLICE POWER AND THE PUBLIC HEALTH .....	40
The Nature of the Police Power .....	40
The Scope of the Police Power .....	42
Eminent Domain and Taxation .....	43
Limitations on the Police Power .....	44
Interference with Interstate Commerce .....	45
Due Process of Law .....	48
Class Legislation .....	49

TABLE OF CONTENTS

Regulation of Professions and Occupations .....	50
Freedom of Contract .....	51
Freedom of Religion .....	52
Hours of Labor and Minimum Wages .....	54
Eugenical Sterilization Laws .....	55
State Versus State .....	57
IV. STATE HEALTH ORGANIZATION .....	58
State Health Departments .....	58
State Boards of Health .....	60
The State Health Officer .....	61
Recognition by the Federal Government .....	62
Powers of State Health Departments .....	62
The Code-Making Power .....	63
Quasi-Judicial Powers .....	65
Administrative Duties .....	66
Supervision of Local Health Administration .....	73
Health Districts .....	73
Selection of Public Health Personnel .....	75
V. LOCAL HEALTH DEPARTMENTS .....	77
Local Government .....	78
County Health Departments .....	79
Multi-County Health Districts .....	82
Municipal Health Departments .....	82
The Board of Health .....	83
Health Officers .....	85
Municipal Ordinances .....	86
Board of Health Regulations .....	87
Jurisdiction .....	90
Licenses and Permits .....	90
Expenditures and Contracts .....	92
Organization .....	94
Personnel .....	96
Duties and Functions .....	97
Mental Hygiene .....	98
VI. HEALTH OFFICERS AND EMPLOYEES .....	99
The Office .....	99
The Appointment of Health Officers .....	100
De Facto Officers .....	102
Qualifications of Health Officers .....	102

TABLE OF CONTENTS

xvii

Osteopaths as Health Officers .....	105
Compensation .....	106
Powers and Duties .....	110
Contracts .....	112
Relation to Subordinates .....	113
Employees .....	113
Termination of Office .....	114

*PART II. POWERS AND DUTIES OF  
HEALTH DEPARTMENTS*

VII. VITAL STATISTICS .....	119
The Importance of Vital Statistics .....	120
Constitutionality of Vital Statistics Laws .....	122
Administrative Aspects of Vital Statistics .....	122
Payment of Fees to Registrars .....	125
Vital Statistics as Public Records .....	126
Vital Statistics as Evidence .....	126
VIII. THE CONTROL OF COMMUNICABLE DISEASES .....	128
The Communicable Diseases .....	128
Methods of Control .....	130
Administrative Control .....	131
Reporting .....	133
The Confidential Nature of Morbidity Reports .....	136
Laboratory Services .....	137
Isolation and Quarantine .....	138
Removal to Isolation Hospitals .....	140
The Quarantine of Carriers .....	141
Quarantine and Habeas Corpus .....	142
Expenses of Isolation and Quarantine .....	143
Epidemics .....	144
Disinfection .....	145
Immunization .....	145
Diseases of Animals .....	147
Leprosy .....	148
IX. THE CONTROL OF TUBERCULOSIS .....	149
The Nature of Tuberculosis .....	149
Administrative Control .....	151
Reporting of Tuberculosis .....	151
Privacy of Records .....	152

TABLE OF CONTENTS

Control of Cases and Contacts .....	153
Establishment and Maintenance of Public Sanatoria .....	154
Private Tuberculosis Institutions .....	156
Tuberculosis Hospitals as Nuisances .....	156
Industrial Aspects of Tuberculosis .....	158
Other Legal Aspects of Tuberculosis .....	160
<b>X. THE CONTROL OF THE VENEREAL DISEASES .....</b>	<b>162</b>
Syphilis .....	162
Gonorrhea .....	164
Ophthalmia Neonatorum .....	164
Other Venereal Diseases .....	166
Reporting of Venereal Diseases .....	166
Examination of the Venereally Infected .....	168
Quarantine of the Venereally Infected .....	171
Premarital and Antepartum Examinations .....	174
Illegal Exposure to Venereal Disease .....	177
Prohibition of Obscene Advertising and Literature .....	178
Prophylactic Devices .....	178
Social Hygiene .....	179
<b>XI. MILK CONTROL .....</b>	<b>181</b>
Milk Control and the Public Health .....	181
Standards for Milk and Dairy Products .....	183
The Administrative Control of Milk .....	185
Sanitation and Inspection of Milk Supplies .....	187
Licenses and Permits .....	189
Tuberculin Testing .....	190
Bang's Disease .....	191
Pasteurization .....	192
Containers for Milk .....	195
Price Fixing of Milk .....	197
Ice Cream .....	198
Filled Milk .....	200
<b>XII. FOODS, DRUGS, AND COSMETICS .....</b>	<b>201</b>
The Federal Food, Drug, and Cosmetic Act .....	202
Enriched Foods .....	206
False Advertising of Products in Interstate Commerce .....	208
The Federal Meat Inspection Act .....	209
Other Federal Laws on Food .....	210
Federal Narcotics Acts .....	212
State Control of Foods and Drugs .....	213



TABLE OF CONTENTS

xix

<b>XIII. NUISANCES AND SANITATION</b> .....	217
The Definition of a Nuisance .....	217
The Classification of Nuisances .....	218
Determination of a Nuisance .....	220
Responsibility for Nuisances .....	222
Remedies against Nuisances .....	223
The Prevention of Nuisances .....	226
Pollution of Waters .....	226
Shellfish Sanitation .....	229
Privy Sanitation .....	229
Plumbing .....	230
Housing .....	230
Insect Control .....	232
Animals .....	233
Other Nuisances .....	233
<b>XIV. VACCINATION</b> .....	235
The Legal Status of Vaccination .....	236
Compulsory Vaccination .....	238
The Vaccination of School Children .....	241
Methods of Vaccination .....	246
Vaccination Certificates .....	247
Expenses of Vaccination .....	247
Conflicts with Compulsory Education Laws .....	248
Injuries Caused by Vaccination .....	249
<b>XV. SCHOOL HYGIENE</b> .....	251
School Health Activities .....	252
Administration .....	253
Organization of School Health Work .....	255
Physical Examinations of Pupils .....	257
Exclusion of Children from School .....	257
Teachers .....	259
School Lunches .....	260
Private Schools .....	261
<b>XVI. INDUSTRIAL HYGIENE AND THE CONTROL OF OCCUPATIONAL     DISEASES</b> .....	262
The Need for Industrial Hygiene .....	262
Organization of Industrial Hygiene .....	263
State Workmen's Compensation Laws .....	266
Occupational Diseases .....	268

**TABLE OF CONTENTS**

Typhoid Fever as an Accident .....	270
Other Diseases as Accidents .....	271
Industrial Sanitation .....	273

**PART III. LIABILITY**

<b>XVII. LIABILITY OF MUNICIPAL CORPORATIONS .....</b>	<b>279</b>
Public Health as a Governmental Function .....	280
Proprietary Functions of Municipal Corporations .....	282
Garbage and Refuse Disposal .....	282
Sewage Disposal .....	283
Liability for Water-Borne Disease .....	285
Nuisances .....	290
Liability for Contracts .....	290
<b>XVIII. PERSONAL LIABILITY OF HEALTH OFFICERS .....</b>	<b>293</b>
Errors of Judgment .....	294
Culpable Errors .....	297
Illegal Actions .....	298
Destruction of Property .....	299
Seizure and Examination of Persons .....	300
Libel and Slander .....	301
The Effects of Statutes on Liability .....	301
<b>XIX. LIABILITY OF INDIVIDUALS AND CORPORATIONS IN MATTERS</b>	
<b>AFFECTING THE PUBLIC HEALTH .....</b>	<b>303</b>
Physicians and Other Professions .....	304
Manufacturers and Sellers of Food .....	306
Private Water Companies .....	309
Manufacturers and Sellers of Drugs and Biological Products ..	312
Individuals Who Spread Diseases .....	313
Industrial Employees .....	315
Libel and Slander .....	316
Copyright .....	320
Voluntary Health Associations .....	321
Liability for Cancer .....	321

**PART IV. LEGISLATION AND LAW ENFORCEMENT**

<b>XX. THE PREPARATION AND ADOPTION OF HEALTH LEGISLATION ..</b>	<b>327</b>
The Function of the Legislature .....	327
Ascertaining the Need for Health Laws .....	329

TABLE OF CONTENTS

xxi

Technical Assistance Necessary .....	330
The Actual Drafting of Legislation .....	331
The Subject Matter .....	333
Faults to Avoid .....	335
Construing Statutes .....	338
After a Bill Has Been Drafted .....	339
In the Senate and the House .....	340
Before the Executive .....	341
Municipal Ordinances and Regulations .....	341
XXI. LAW ENFORCEMENT AND COURT PROCEDURE .....	343
Courts in General .....	343
State Courts .....	344
Federal Courts .....	347
Court Procedure .....	349
Evidence and Witnesses .....	351
Expert Witnesses .....	353
Legal Remedies .....	354
Remedies against Health Authorities .....	354

APPENDICES

I. THE DECISION OF THE UNITED STATES SUPREME COURT IN THE CASE OF JACOBSON V. MASSACHUSETTS .....	359
II. USE OF THE REFERENCES .....	376
III. SELECTED BIBLIOGRAPHY .....	381
INDEX OF CASES .....	387
INDEX .....	408



**PART I**

**PUBLIC HEALTH LAW AND ADMINISTRATION**



## CHAPTER I

### PUBLIC HEALTH AND THE LAW

THE protection and preservation of the public health has been recognized from time immemorial as one of the necessary duties and as one of the primary functions of the sovereign power, the State. Not only is government organized for the purpose, among others, of safeguarding the health of the people,<sup>1</sup> but all progressive governments have realized that upon the efficient and effective performance of this important duty depends, in large measure, the survival of society and the social order.

While the remark attributed to one of the Earls of Derby, that "sanitary instruction is even more important than sanitary legislation," may be accepted as a truism,<sup>2</sup> it is equally true that practical laws, reasonably and equitably enforced, are essential as a foundation for the public health activities of government. Education and moral suasion, desirable as they may be in the practice of public health, will not bring results unless the people realize that behind them is the long arm of the Law. This is the inexorable law of human nature.

The legal aspects of public health administration are as important today as ever, even though it is alleged, rightly, that the modern science of public health has emerged from an era of dependence solely upon police measures. While the modern health officer must be an educator and a statesman, rather than merely a police officer, many of his duties are still necessarily concerned with law enforcement. As Dr. Charles V. Chapin has so cogently written:

Thus far the promotion of public health has been largely a matter of compulsion. The state took away men's property and men's liberty. . . . The rigorous enforcement of isolation took away man's most cherished right, his personal liberty. Police work is not pleasant work. It is slow work, and he who does it finds it difficult to obtain the good will of those whom he coerces.<sup>3</sup>

Police work, as Dr. Chapin indicates, is slow, arduous, and often disagreeable, but public health administration need not suffer from these handicaps and defects, if public health officials are sufficiently conversant with the legal principles applicable to their professional

1. *Powell v. Pennsylvania* (1888), 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253.

2. See the Foreword by Dr. Charles V. Chapin, page xi.

3. C. V. Chapin, The evolution of preventive medicine, *J.A.M.A.*, 76:215, January 22, 1921.

activities.<sup>4</sup> Health officers must be familiar not only with the extent of their powers and duties, but also with the limitations imposed upon them by law. With such knowledge available and wisely applied by health authorities, public health will not remain static, but will progress.

### *Definitions of Public Health*

The most generally accepted definition of modern public health is that given by C.-E. A. Winslow, Dr.P.H., Professor of Public Health of the Yale University School of Medicine, who writes:

Public health is the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency through organized community efforts for the sanitation of the environment, the control of community infections, the education of the individual in principles of personal hygiene, the organization of medical and nursing service for the early diagnosis and preventive treatment of disease, and the development of the social machinery which will ensure to every individual a standard of living adequate for the maintenance of health; organizing these benefits in such fashion as to enable every citizen to realize his birthright of health and longevity.<sup>5</sup>

Public health conceived in these terms, declares Professor Winslow, will be something vastly different from the exercise of the purely police power which has been its principal manifestation in the past.

Another professional definition of public health is that given in *Sedgwick's Principles of Sanitary Science and Public Health*,<sup>6</sup> where public health is said to include both personal hygiene and sanitation, together with administrative practices such as analyses of vital statistics, epidemiological studies and investigations, sanitary inspections, public health education, public health laboratory service, the maintenance of clinics, sanatoria, and hospitals, and other activities which cannot logically be classified under personal hygiene or sanitation. Personal hygiene is defined as the science and art of the conservation and promotion of personal health, while sanitation or public hygiene is defined as the science and art of the conservation and promotion of the public health through the control of the environment. Sanitary science is regarded as the embodiment of the principles that aid

4. Legal knowledge essential for sanitarians (editorial), *Am. J. Pub. Health*, 17:616, June 1927. J. A. Tobey, Public health and the law, *Am. J. Pub. Health*, 31:587, June 1941.

5. C.-E. A. Winslow, The untilled fields of public health, *Science*, 51 (n.s.):23, 1920; also *Mod. Med.*, 2:183, March 1920.

6. S. C. Prescott and M. P. Horwood, *Sedgwick's Principles of Sanitary Science and Public Health*, New York, Macmillan, 1935.



in an understanding of the sources of infection and modes of transmission of disease.

These definitions, like all attempts at definition, are approximations only. In law, definitions are always difficult to arrive at, but courts and eminent jurists frequently have been responsible for impressive descriptions of, and salient comments on, the scope and significance of public health. Thus, Blackstone wrote that, "The right to the enjoyment of health is a subdivision of the right of personal security, one of the absolute rights of persons."

In delivering an opinion of the United States Supreme Court, Mr. Justice Harlan stated in 1888: ". . . it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and public morals, it cannot divest itself of the power to provide for these objects. . . ."<sup>8</sup>

According to Parker and Worthington in their treatise on the law of public health and safety, published in 1892:

One of the legitimate and most important functions of civil government is acknowledged to be that of providing for the general welfare of the people by making and enforcing laws to preserve and promote the public health and the public safety. Civil society can not exist without such laws; they are, therefore, justified by necessity and sanctioned by the right of self preservation. The power to enact and enforce them is lodged by the people with the government of the State, qualified only by such conditions as to the manner of its exercise as are necessary to secure the individual citizen from unjust and arbitrary interference. But even under these restrictions, the power exists in ample measure to enable government to make all needful regulations touching the well-being of society. It is, therefore, made to extend, by a system of legislative precaution, to the protection of the life and health of all persons within the jurisdiction of the State, and no just exception can be taken to its exercise in any way that is reasonably necessary and proper for the promotion of the public good and for the protection of society from things hurtful to its comfort, security and welfare.<sup>9</sup>

A somewhat more modern, although no more convincing, attitude regarding public health was expressed by Mr. Justice Thompson of the Illinois Supreme Court in an important decision handed down in 1922, in the following language:

7. 1 *Blackstone's Commentaries* 129, 1765.

8. *Powell v. Pennsylvania* (1888), 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253. See also *Holden v. Hardy* (1898), 169 U.S. 366, 18 S. Ct. 383, 42 L. Ed. 780.

9. L. Parker and R. H. Worthington, *The Law of Public Health and Safety and the Powers and Duties of Boards of Health*, Albany, Bender, 1892, Sec. 1.

The health of the people is unquestionably an economic asset and social blessing, and the science of public health is therefore of great importance. Public health measures have long been recognized and used, but the science of public health is of recent origin, and with the advance of science, methods have greatly altered. . . . Among all the objects sought to be secured by governmental laws none is more important than the preservation of the public health.<sup>10</sup>

In a decision upholding the Multiple Dwellings Law of New York, it was stated by Mr. Justice Crane of the Court of Appeals of this state that, "The health of a community, we have discovered, thanks to science, has more to do with the general prosperity and welfare of a State than its wealth or its learning or its culture. The police power of the State has never been questioned when it dealt directly with hygienic conditions of a community. . . ." <sup>11</sup>

And finally, the importance of the public health is epitomized in an encyclopedia of law in these significant words, "Health being the *sine qua non* of all personal enjoyment it is not only the right but the duty of the state or municipality possessing the police power to pass such laws or ordinances as may be necessary for the preservation of the health of the people."<sup>12</sup>

Health, incidentally, is the state of being hale, sound, or whole in body, mind, or soul, and free from physical and mental disease.<sup>13</sup>

### *Some Fundamental Legal Principles*

The common definition of law, based on the expressions of Justinian, Blackstone, and other famous lawgivers and legal writers, is this: Law is a rule of civil conduct or action, prescribed or formally recognized as binding by the supreme power of a State, commanding what is right and prohibiting what is wrong. Law may also be defined as the rules or mode of conduct made obligatory by some sanction which is imposed and enforced for their violation by a controlling authority.<sup>14</sup>

In his book, *The State*, Woodrow Wilson offered this admirable definition, "Law is that portion of the established thought and habit which

10. *Barmore v. Robertson* (1922), 302 Ill. 422, 134 N.E. 815, 22 A.L.R. 835.

11. *Adler v. Deegan* (1929), 251 N.Y. 467, 167 N.E. 705, 252 N.Y. 615, 170 N.E. 164.

12. 12 *Corpus Juris* 913. See 39 *C.J.S.* 811.

13. J. A. Tobey, *The Common Health*, New York, Funk & Wagnalls, 1937.

14. Webster's Dictionary.

has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of government."<sup>15</sup>

The present system of law in the United States and in most of Canada is based upon the common law of England, which the early colonists of North America brought with them as a birthright from England.<sup>16</sup> The English common law is the unwritten law (*lex non scripta*) which has evolved from early times, and consists of general and particular customs that have received judicial sanction.

Although the common law has been superseded in part by written codes of law, adapted to the social needs of the times, the common law is still the foundation of our jurisprudence.<sup>17</sup> The constitutions, statutes, and codes which comprise the written law are but a relatively small fraction of the legal system. In the absence of legislation on a particular subject, or if legislative enactments are inconclusive, the rules of the common law always prevail.

Included under the term "unwritten law" are the decisions of courts of final appeal. These decisions are now recorded, at the rate of from 10,000 to 20,000 every year, but they are, nevertheless, precedents that are added to the bulk of the common law. The courts determine the law even more assiduously than do the legislatures, and what they decide is usually, in its mass, far beyond the comprehension of the layman. For this reason, authoritative textbooks and re-statements of the law pertaining to a particular subject are of value to laymen and lawyers alike.

Law may be classified as Private Law or Public Law. The former is concerned with the rights and duties of individuals in their relations to each other as private subjects or citizens; it is wide in scope and deals with property, obligations, and procedure. Private law includes the law of contracts, torts or legal wrongs, trusts, agency, partnership, private corporations, real and personal property, master and servant, and numerous other topics.

Public law is that branch of law which is concerned with the mutual rights of the State and all persons within its jurisdiction. Included within its purview are *a*) international law, the law governing the relations of nations; *b*) constitutional law, the fundamental law of the State, which contains the principle on which its government is

15. *The State: Elements of historical and practical politics*, Boston, Heath, 1918.

16. In Louisiana and New Mexico, and in Quebec, the civil law system, descended from Roman law and introduced by the original settlers, is still retained with modifications.

17. Jurisprudence is the science and philosophy of law.

founded, regulates the division of sovereign powers, directs as to what persons or departments shall be entrusted with these powers, and outlines the manner of their execution; *c*) criminal law, which deals with crimes and actions prejudicial to public welfare and contrary to public policy; and *d*) administrative law, which has been called the law of government in action, and is concerned with the manner of the conduct of governmental affairs.

Most of the law relating to public health comes under that division of the law known as Public Law, although some aspects of Private Law may likewise be of direct or indirect interest to the public health.<sup>18</sup>

### *Law and Equity*

As the common law developed in England, there grew up with it a system known as chancery or equity. Because the rules of the common law were so rigid and the pleading was so technical, justice more often than occasionally was not administered in individual cases. The aggrieved person thereupon petitioned the king, who referred the petition to the chancellor, or "keeper of the king's conscience." By the time of the reign of Edward III (1312-1377) these petitions were sent in the first instance directly to the chancellor, who gradually became a judicial rather than a ministerial officer.

At first the chancellor decided each case on its particular merits, more or less regardless of legal principles, but after his decisions began to be reported, early in the seventeenth century, he commenced to rely more and more upon precedents. Thus, the system of equity was evolved alongside the law. It has been said that equity hovers over the law, to be evoked when the law by reason of its universality is deficient or inadequate.

Equity will not act or apply where there is an adequate remedy at law. To a considerable degree, equity is preventive in its nature. If a nuisance exists, for example, the only modern remedies at law are for damages or criminal prosecution if the nuisance is a public one. Equity, on the other hand, will enjoin the continuance of the nuisance and thus will provide relief that is lacking at law. Equity issues commands to do or refrain from doing that which the law usually can merely penalize.

Although there are still separate courts of chancery in a few States, such as New Jersey, the partition between law and equity in this

18. See Chapter XIX, on Liability of Individuals and Corporations in Matters Affecting the Public Health.

country has in a measure been broken down. In some States the distinction has been abolished, or law and equity have been merged by legislative enactment. In a few States there are divisions of law and equity in the common-law courts, but in most States the law courts may administer equitable remedies when necessary. An injunction will usually be issued for cause by any state or federal court of general jurisdiction. Procedures in equity are frequently of considerable importance in public health practice and administration.

### *Public Health Law*

Public health law may be defined as that branch of jurisprudence which treats of the relation and application of the common and statutory law to the principles and procedures of hygiene, sanitary science, and public health administration.

Public health law differs from and is not a part of medical jurisprudence, more properly known as legal medicine or forensic medicine, which is the science treating of the application of medical facts to legal principles and legal principles to medical practice.

Since medicine is the science and art dealing with the prevention, cure, or alleviation of disease, public health is sometimes considered to be a branch of medicine. Actually, however, public health is a science that is broader than medicine, because it draws for its component parts not only upon preventive medicine and to some extent upon curative medicine, but also upon the arts and sciences of engineering, biology, chemistry, biochemistry, statistics, education, sociology, and law.

### *The Development of Public Health Law*

Since disease is as old as mankind itself, society has realized from its earliest beginnings that organized efforts by the sovereign power are necessary to cope with plague and pestilence.<sup>19</sup> Perhaps the earliest of the sanitary codes was that ordered by Moses for the government of the ancient Hebrews. This code, as given in Chapters 11 to 16 of the Book of Leviticus, was transcribed some five centuries before Christ, probably dates from about 1500 B.C., and is based in part upon the Code of Hammurabi of 4,000 years ago.

The ancient Greeks and the Romans recognized the value of sanitary measures, and were "the most sagacious and extensive legislators

19. J. A. Tobey, *The National Government and Public Health*, Baltimore, Johns Hopkins Press, 1926, chapter II.

in such matters."<sup>20</sup> Plato (427-347 B.C.) and Aristotle (384-322 B.C.) stated that no city should exist without health officers, positions which were filled in ancient Greece by such notable figures as Epaminondas, Demosthenes, and Plutarch, who wrote a book giving rules of health. The duties of the Roman aediles, whose office was established in 494 B.C., included sanitary supervision of city districts.

In medieval Europe, the first sanitary laws were promulgated by King John II of France in 1350, and in 1357 Edward III of England issued a royal edict against pollution of the Thames. In 1348, during an epidemic of plague, Venice appointed a board of health, which established rules for forty days' isolation of infected persons, thus giving rise to the term "quarantine." In 1374 Venice imposed a quarantine upon maritime commerce, a procedure which was followed by other cities, such as Ragusa and Marseille.

In the centuries that followed, sanitary ordinances were adopted from time to time, but when Queen Victoria ascended the throne of England in 1837, the science of public health was virtually unrecognized by the legislature. Through the influence of Edwin Chadwick, a lawyer who was secretary of the Poor Law Commission, physicians were employed to investigate conditions contributing to ill health. In 1842 Chadwick published a report on the sanitary condition of the laboring classes, and in 1843 a Royal Commission was appointed to study the health of large towns and populous districts.<sup>21</sup>

As a result of these activities, a General Board of Health was created in England in 1848. According to Dr. William H. Welch, the modern public health era dates from this event, "for," he says, "then for the first time in human history was the care of the health of the people fully recognized as an important administrative function of Government."<sup>22</sup>

### *Early American Health Legislation*

The first sanitary legislation in America apparently was an enactment of March, 1647 or 1648, by the General Court of Massachusetts Bay Colony, providing for a maritime quarantine against ships from the West Indies, where one of the periodic epidemics of yellow fever

20. L. Shattuck, *Report of the Massachusetts Sanitary Commission*, 1850. Reproduced in Volume I of *State Sanitation*, by G. C. Whipple (Cambridge, Harvard University Press, 1917).

21. E. Chadwick, *Parliamentary General Report on the Sanitary Condition of the Labouring Population in Great Britain*, 1842. See B. W. Richardson, *The Health of Nations*, London, Longmans, 1887.

22. W. H. Welch, *Public Health in Theory and Practice*, New Haven, Yale University Press, 1925.

was raging.<sup>23</sup> Temporary quarantine laws were also adopted in Connecticut in 1663 and 1679, and another was passed in Massachusetts in 1669 but was disallowed by the Privy Council in England.

Much of the early sanitary legislation in the American colonies was directed against smallpox, a widespread and ubiquitous malady in the seventeenth and eighteenth centuries. Boston, Salem, and Plymouth adopted local regulations against smallpox in 1678, and in 1742 the Massachusetts Bay Colony passed a law for the prevention of smallpox and other infectious sickness.

Nuisances affecting the comfort, and to some extent the health of the people, were subject to legislative control in the earliest days of the American colonies. A law for the control of nuisances was adopted in Massachusetts in 1692, shortly after South Carolina had passed legislation on this same subject. In 1704 Massachusetts regulated slaughterhouses in what was then presumed to be the interest of the public health, and in 1712 Philadelphia adopted legislation against nuisances.

Although the first local board of health in America was organized in Baltimore in 1793,<sup>24</sup> and the second in Philadelphia in 1794, as a consequence of a disastrous yellow fever epidemic, the first state law authorizing the establishment of local boards of health was passed in Massachusetts in 1797. In accordance with its terms, a board of health was organized by Newburyport in 1797, and by Boston in 1799. The growth of local health administration was slow, however, as is indicated by the fact that in 1873 there were only thirty-seven local health departments in the entire United States. In Canada, the first board of health or sanitary commission was appointed in Quebec in 1832, to be followed by the creation of a similar board in Toronto in 1833.

The most noteworthy event in the progress of public health and the development of public health law in this country was the publication in 1850 of the report of the Massachusetts Sanitary Commission.<sup>25</sup> This brilliant report was prepared entirely by one member of the commission, Lemuel Shattuck, who had derived much inspiration from the work of Chadwick in England. Like Chadwick, Shattuck was not a physician, but a teacher and statistician.

23. H. S. Mustard, *Government in Public Health*, New York, Commonwealth Fund, 1945.

24. *Baltimore Health News*, Dec. 1943.

25. This document is most readily available in Volume I of *State Sanitation*, by Whipple, *op. cit.*

At the beginning of this comprehensive report it is asserted that, The condition of perfect public health requires such laws and regulations as will secure to man associated in society the same sanitary enjoyments that he would have as an isolated individual; and as will protect him from injury from any influences connected with his locality, his dwelling house, his occupation, or those of his associates or neighbors, or from any other social causes. It is under the control of public authority, and public administration; and life and health may be saved or lost, as this authority is wisely or unwisely exercised.

Shattuck's report describes the sanitary movement abroad and at home, presents a history of public health legislation, and offers a complete plan and the reasons for a public health program for the State. He recommended that the laws relating to public health be thoroughly revised, saying, "We suppose that it will be generally conceded that no plan for a sanitary survey of the State, however good or desirable, can be carried into operation unless established by law. The legislative authority is necessary, to give it efficiency and usefulness. The efforts, both of associations and individuals, have failed in these matters."

Although the text of a proposed state law was offered by Shattuck, nothing was done about it for nearly twenty years. In 1869, however, the first state board of health in the United States was created by law in Massachusetts,<sup>26</sup> to be followed by the organization of similar boards of health in California in 1870, Minnesota and Virginia in 1872, Michigan in 1873, Maryland in 1874, Alabama in 1875, and gradually thereafter in all the States, the last such board having been set up in Texas in 1909.<sup>27</sup>

26. Porto Rico and Hawaii, now parts of the United States, are said to have had boards of health in 1768 and 1851, respectively. Louisiana had a temporary state board of health in 1855, which was reorganized in 1898. See J. W. Kerr and A. A. Moll, *Organization, Powers, and Duties of Health Authorities*, Public Health Bulletin No. 54, U.S. Public Health Service, 1912.

27. A noteworthy study of the activities, equipment, and accomplishments of the various state boards of health was made in 1914 by Dr. Charles V. Chapin, at the request of the Council on Health and Public Instruction of the American Medical Association (*A Report on State Public Health Work Based on a Survey of State Boards of Health*, Chicago, American Medical Association, 1915). Ten years after its publication, a comprehensive survey of the health departments of the United States and Canada was made by the International Health Division of the Rockefeller Foundation, and published in 1929 by the United States Public Health Service (*Health Departments of States and Provinces of the United States and Canada*, Public Health Bulletin No. 184). A revised edition was issued in 1932 for use in connection with the White House Conference on Child Health and Protection,

(Continued on next page.)



The adoption in 1866 of the Metropolitan Health Law in New York City was another notable advance in sanitary law, since this act was the basis of much future health legislation pertaining to local boards of health.<sup>28</sup>

The first instance in which the scope of public health law came up for discussion in a court of final appeal was in the famous case of *Gibbons v. Ogden*,<sup>29</sup> decided by the United States Supreme Court in 1824. Although the legal questions involved in this case were whether navigation was commerce and whether the regulation of interstate commerce was a federal or state power, both sides in their arguments had used quarantine acts as examples upholding their contentions. Chief Justice Marshall, in ruling that only the Federal Government had the power to regulate interstate commerce, discussed state laws coming under the police power in these words:

They form a portion of that immense mass of legislation which embraces everything within the territory of the State, not surrendered to the general government; all which can most advantageously be exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description . . . are component parts of this mass.

The earliest decision of a state court pertaining to a public health matter apparently is that of *Coates v. Mayor and Aldermen of New York City*,<sup>30</sup> decided in New York in 1827. This case upheld as valid a city ordinance regulating burials, despite the contention that the ordinance violated the constitutional privilege of freedom of contract. The court ruled that the ordinance was a public health measure and a policing regulation, to which the right of freedom of contract must yield, since all property must be so used as not to injure others.

The first, and for many years the only, textbook on public health law in this country was that written in 1892 by Leroy Parker and Robert H. Worthington of the New York Bar.<sup>31</sup> When this excellent book was published half a century ago, there was prevalent in the

which was called by President Hoover (*Public Health Organization*, New York, Century, 1932). The third edition of this valuable document, based on investigations by officers of the Public Health Service, was issued by that Service in 1943 (*Distribution of Health Services in the Structure of State Government*, Public Health Bulletin No. 184).

28. Stephen Smith, *The City That Was*, New York, Allaben, 1911 (National Historical Company, successor).

29. *Gibbons v. Ogden* (1824), 9 Wheat, 1, 6 L. Ed. 23.

30. *Coates v. Mayor and Aldermen of New York City* (1827), 7 Cowens 585.

31. L. Parker and R. H. Worthington, *The Law of Public Health and Safety*, Albany, Bender, 1892.

eastern states a serious epidemic of cholera, a disease which has not since been present in epidemic form in this country.

"Public health," wrote Benjamin Disraeli (1804-1881), Earl of Beaconsfield and Prime Minister of England, "is the foundation upon which rests the happiness of the people and the power of the State. The first duty of a statesman is the care of the public health." This much-quoted phrase has served as an inspiration and guide to many statesmen of later generations, for while it is undeniable that public health is an essential feature of government, statesmen sometimes need a reminder of that fact.

## CHAPTER II

### THE SOURCES OF PUBLIC HEALTH LAW

**T**HE government of the United States is said, rightly, to be one of laws and not of men. This is no mere platitude, but is a fundamental concept of a free democracy. It means that under a republican form of government such as ours, the people shall be governed not by the whims of a dictator or absolute monarch, but by themselves. They are governed, furthermore, in accordance with established laws and recognized legal principles that are enacted, enforced, and interpreted by their own chosen representatives. Despite a few inevitable defects, there is no better system of government, and none that offers greater opportunities for personal liberty.

An important feature of our form of government is its dependence upon written constitutions, both federal and state, which have been created and promulgated by the people and can be altered only by them. In England there is no formal written constitution, the law-making power being entirely in the hands of Parliament. England is, however, a democracy which has a definite, if unwritten, constitution, to be found chiefly in the common law but also in the statutes, in political usage, and in established legal customs and traditions of that commonwealth.

#### *Sources of Law in the United States*

The sources of the written or statutory law of the United States are, in the order of their relative importance, as follows:

1. The Federal Constitution
2. Acts of Congress and treaties
3. State constitutions
4. State legislation
5. Municipal charters granted by states
6. Municipal legislation

Rules, regulations, orders, and decisions of departments, bureaus, and commissions of the Federal Government and of the state governments are not actually a part of the statutory law. When adopted and issued under the authority of legislation for the purpose of carrying out the intent or principles of legislation, such administrative regulations will, however, be recognized as having the force and effect of law. In recent years there has been a tremendous growth in

the scope and variety of administrative regulations, particularly in the Federal Government. These regulations are first issued in the *Federal Register*, and compiled in the Code of Federal Regulations of the United States of America, which in 1946 contained 43 volumes, and is constantly being augmented.

Extensive as is our written or statutory law, it is less extensive than the unwritten or common law, that body of legal principles inherited from the common law of England and expressed and sanctioned in the decisions of our federal and state courts of final appeal. When constitutions and statutes are silent on a particular subject, as is frequently the case, the principles of the common law must be applied to the situation. The common law may, however, be altered or modified by statutes expressing the will of the people.

### *The American Plan of Government*

Another distinctive feature of our system of government is what is known as the separation of powers. The greatest statesmen and the leading authorities on political science have always believed that a true democracy can be achieved only if laws are made by one group of individuals, enforced by another, and adjudicated by a third. When the power of making, enforcing, and interpreting legislation is vested in a single individual or group, tyranny and oppression may be the result.

The framers of the Constitution of the United States provided, therefore, for a tripartite system of government, consisting of an executive department, a legislative department, and a judiciary.<sup>1</sup> Each of these three coordinate branches of the government has separate and distinct powers, each is of equal importance with the others, and each may exert, to a certain extent, a desirable check upon the others. The separation of powers in our existing government is not, however, a complete one, since the makers of the Constitution felt that it was expedient to provide for a certain amount of overlapping. Thus, the executive is given the veto power over legislation, the legislature is given the power to approve or disapprove certain executive appointments and treaties, the composition and scope of the judiciary is subject to legislative determination, and in practice the constitutionality and validity of legislation and executive activity are both subject to judicial determination.

1. F. A. Ogg and P. O. Ray, *Introduction to American Government*, 2d ed., New York, Century, 1925.

A similar separation of powers has been set up in all the States under their own constitutions. Although the federal and state constitutions each provides, among other matters, for the form of government, there is a fundamental political difference between the Federal Constitution and the constitutions of the several States. The former is a grant of power by the people of the States to the national government, while the latter are, in general, documents limiting the powers of the government of the State at the behest of the people. State constitutions originally were concise and simple, but in recent years most state constitutions, as amended and revised by the people represented in constitutional conventions, have become lengthy and complex, with a more or less detailed set of regulations for the operation of government and the conduct of the citizenry.

All health officials should be familiar with the Federal Constitution and with the constitution of their own State. A copy of the latter may usually be procured from the Secretary of State.

### *The Functions of the Legislature*

It is the duty of the legislative branch of government to ascertain the need for laws and to pass all necessary legislation. In order to determine the need for legislation, suitable investigations may be made and appropriate hearings conducted. After a law is passed, the legislature is no longer directly concerned with it, except to authorize necessary appropriations to carry out the law, or to amend or repeal it if such action seems desirable. After a law has been adopted, it is turned over to the executive branch of government for enforcement.

In the Federal Government and in all the States except Nebraska, the legislature consists of two parts, an upper and smaller chamber known as the Senate, and a lower and larger chamber known as the House of Representatives, the Assembly, or some other appropriate designation. The members of the legislature are elected by the people for stated terms. The Congress of the United States, consisting of a Senate and a House of Representatives, is the national legislature and also, under the Federal Constitution, the legislature for the District of Columbia. The Senate, comprising two senators from each State regardless of population, theoretically represents the States, while the House of Representatives, consisting of 435 members representing congressional districts apportioned by population, theoretically represents the people. The powers of Congress are set forth in detail in the Federal Constitution.

*The Functions of the Executive*

The principal duty of the executive branch of government is to administer and enforce all laws. The executive power of the Federal Government is vested in the President of the United States, while in the States the executive power is vested in the governor.

The Federal Constitution mentions other executive departments, but does not enumerate them. In the Federal Government there have been created by statute ten departments, in this order: State (1789), Treasury (1789), War (1789), Navy (1789), Justice (Attorney General 1789, Department 1870), Interior (1849), Agriculture (1862), Commerce (1903), Labor (1913). Each is under the direction of a Secretary or other officer, such as the Attorney General and the Postmaster General, the ten heads of these departments comprising the President's Cabinet. Within each department are numerous bureaus which have been created from time to time by law.

In addition to the ten departments of cabinet rank there are in the Federal Government numerous independent establishments and commissions, such as the Interstate Commerce Commission (1887), the Federal Trade Commission (1914), the Veterans Administration (1930), the Federal Works Agency (1939), and the Federal Security Agency (1939), the heads of which report directly to the President. Under the provisions of the Reorganization Act of 1939 (53 Stat. 561, 5 U.S.C. 133) the President transferred and regrouped various federal bureaus, setting up, among others, the Federal Security Agency.<sup>2</sup>

There is no national department of health, the public health activities of the Federal Government being undertaken by a number of different bureaus in the various executive departments and by several of the independent commissions. In 1879 Congress created a National Board of Health, but its duties were restricted in 1882, it received no appropriations after 1886, and it officially ceased to exist in 1893.<sup>3</sup> Numerous proposals for a Department of Health in the Federal Government have been made, but Congress had not acted favorably upon any of them up to the beginning of 1947.

Among the executive departments of the state governments, some or all of which are usually enumerated in state constitutions, is the board or department of health, under the direction of an executive

2. See *United States Government Manual*.

3. J. A. Tobey, *The National Government and Public Health*, Baltimore, Johns Hopkins Press, 1926. *Dunwoody v. U. S.* (1891), 22 Ct. Cl. 269; affirm. in 143 U.S. 578, 12 S. Ct. 465, 36 L. Ed. 269, 27 Ct. Cl. 562.

officer, known as the Secretary, State Health Officer, or State Commissioner of Health. Other departments of the State governments may also be, and frequently are, concerned with various aspects of the public health.

### *The Functions of the Judiciary*

The function of the courts is to interpret the laws, determine their constitutionality and the validity of their enforcement by the executive, and to apply the laws in the interests of justice in all cases brought before them. The courts cannot, as a rule, adjudicate a law except in the course of actual litigation, although the constitutions of some States provide that the justices of the highest court shall render an opinion on matters of special legal significance and on solemn occasions when officially requested to do so by the governor. In 1935, for example, the governor of Colorado asked the Supreme Court of that State for an opinion as to the constitutionality of a law requiring the licensing of places where food is prepared for human consumption. The decision of the Supreme Court was that the law was constitutional. The law was subsequently (1936) upheld by a United States District Court in a decision which was affirmed by the United States Supreme Court.<sup>4</sup>

The only court expressly provided for in the Federal Constitution is the United States Supreme Court, although Congress is given the power to establish inferior courts. Under the Judiciary Act of 1789 the Supreme Court was organized, and District Courts were provided for. More than 90 districts, including the District of Columbia, are now in existence, each having at least one judge. In addition there are ten judicial circuits and the District of Columbia, each having a Circuit Court of Appeals, with at least three judges, one of whom is a Supreme Court Justice. The United States District Courts and the Circuit Courts of Appeals are constitutional courts.

Since it has been held by the United States Supreme Court that courts other than these constitutional courts may be created by Congress for special purposes, such legislative courts have been set up. Included are the United States Court of Claims, the United States Court of Customs and Patent Appeals, the United States Customs Court, the Tax Court of the United States, certain courts of the District of Columbia, and the consular courts.

4. *In re Interrogatories of the Governor* (1935), 97 Colo. 587, 52 P. (2d) 663. *Kress & Co. v. Johnson* (1936), 16 F. Supp. 5; affirm. (1937) in 290 U.S. 511, 57 S. Ct. 49, 81 L. Ed. 378 (memo).

The state courts of record usually include courts of general jurisdiction, such as county, district, or superior courts, and courts of appellate jurisdiction, with one supreme court or court of appeals.

Judges of the federal courts are appointed by the President, with the advice and consent of the Senate. In the States, judges are sometimes appointed by the governor with the consent of the state senate, but in recent years the tendency has been toward the election of judges by the people.

The right of the United States Supreme Court to pass upon the constitutionality of Acts of Congress, and the right of the state courts of appeals to rule upon the constitutionality of state legislation, has been an established legal doctrine in this country for many years. Under our form of government, where constitutions represent the supreme law, some agency must of necessity have the power to say the final word as to the validity of a statute that has been assailed as unconstitutional.

In exercising this power of interpretation, the courts must, however, recognize the power of the legislature as a fact-finding and law-making body, and must not attempt to amend a law under the guise of interpretation, or substitute the factual ideas of the court for those of the legislature. A court can only apply to the law established legal principles as written or implied in the constitution, or established in the common law. If the law as written is unsatisfactory, it may be changed by the people and not by the courts, although the courts in their rulings may take proper cognizance of changing social conditions, as modified by the progress of science. In the past courts have occasionally, but only occasionally, overruled their former decisions. In recent years, however, there has been a tendency on the part of the United States Supreme Court, as now constituted, to overrule some of its previous decisions, apparently in an endeavor to keep pace with the changing social order.

"Logic, and history, and customs, and utility, and the accepted standards of right conduct," wrote the late Mr. Justice Cardozo, "are the forces which singly or in combination shape the progress of the law."<sup>5</sup>

### *The Federal Constitution*

"This Constitution," says Article VI of the Constitution of the United States of America, "and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which

5. B. N. Cardozo, *The Nature of the Judicial Process*, New Haven, Yale University Press, 1921.



shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The Federal Constitution, which superseded the Articles of Confederation, was finally adopted in March, 1789, more than a decade after the colonies had declared and won their independence. Ten amendments were proposed in September, 1789, and were ratified by ten States by the end of 1791. All these amendments restrict the powers of the Federal Government and guarantee certain rights of individuals, although some are also concerned with the powers of the States. In addition to the first ten, other amendments to the Constitution, totaling twenty-one in all, have been adopted from time to time. An amendment giving Congress the power to control child labor was proposed in 1925, but was not approved by a sufficient number of the States. In order to become a part of the Constitution, an amendment must be ratified by three-fourths of the States, usually within seven years.

Nowhere in the Federal Constitution is there any mention of the public health. The Preamble alludes to the promotion of the general welfare as one of the reasons for the Constitution, but the Preamble is merely a statement of the purposes of the instrument and has no legal effect.<sup>6</sup> The "general welfare" is also mentioned in Article I, Section 8 on the taxing power. Public health was not referred to in the Federal Constitution because the protection of the public health was the responsibility of the States when the Constitution was adopted, and this duty was not one of those granted to the national government. The States retained their responsibility for the care of the public health as a part of their police powers.<sup>7</sup> In the Tenth Amendment to the Constitution, it was stated, furthermore, that the powers not delegated to the United States by the Constitution or prohibited by it to the States, are reserved to the States respectively, or to the people.

Although there is no specific or direct mention of public health in the Federal Constitution, many of its provisions are of significance to public health law in this country. Not only does the Federal Government have certain public health powers of its own under the terms of the Constitution, but numerous clauses in the document af-

6. *Jacobson v. Massachusetts* (1905), 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765.

7. See Chapter III, on The Police Power and the Public Health.

fect the manner in which the police power can be exercised by the States.

The powers of the Federal Government over certain aspects of the public health are derived from those portions of the Federal Constitution which 1) empower Congress to regulate interstate and foreign commerce; 2) empower Congress to lay and collect uniform taxes; 3) empower Congress to establish post offices; 4) empower Congress to legislate for the District of Columbia and the territories; and 5) empower the President, with the advice and consent of the Senate, to make treaties.

### *Regulation of Interstate and Foreign Commerce*

Since commerce includes both persons and commodities, the Federal Government has the power to exclude from entry into the United States persons who are diseased or likely to become diseased, and articles or animals that are or may be dangerous to health.

Medical inspections of aliens have been undertaken by the Federal Government since 1890, under the provisions of an Act of Congress of 1882 (20 Stat. 214). The general supervision of the admission of aliens under present laws is administered by the Immigration and Naturalization Service of the Department of Justice, but medical inspections are made by officers of the United States Public Health Service of the Federal Security Agency. Officers of this Service are also in charge of foreign quarantine, including inspections of ships and passengers in foreign ports and upon arrival at ports in this country. Quarantine laws were adopted by Congress as early as 1796, although the first measures of this nature merely extended federal aid to the enforcement of local regulations. A national quarantine act was first passed by Congress in 1878 (20 Stat. 37).

Federal laws regulating the entry and transportation of diseased animals are administered by the Secretary of Agriculture through appropriate bureaus, such as the Bureau of Animal Industry, while the Food and Drug Administration of the Federal Security Agency administers laws pertaining to the importation of foods and drugs.

Under the federal power over interstate commerce, Congress has enacted a number of important laws of direct or indirect interest to the public health. Among them are an act of 1902 for the supervision and control of viruses, serums, toxins, antitoxins, and other biological products (U.S.C. title 42, secs. 141-148); the Food and Drugs Act of 1906, which was revised and extended in 1938;<sup>8</sup> the Meat Inspec-

8. See Chapter XII, on Foods, Drugs, and Cosmetics.

tion Act of 1907; a number of other laws relating to foods; the so-called Mann Act or "White Slave" Act of 1910, prohibiting the transportation of women and girls for immoral purposes (U.S.C. title 18, secs. 397-404);<sup>9</sup> and various laws regulating safety and health on interstate railroads.

Neither the word "commerce" nor the word "regulate" is defined in the Federal Constitution, but the legal application of these words in respect to interstate commerce has been expressed in the statutes passed by Congress on the subject and in the rulings of the United States Supreme Court, which is the final arbiter as to the constitutionality, meaning, and intent of all acts of Congress.

Commerce is understood to include transportation by land, water, or air, and the instrumentalities of such transportation, whether persons or things or both. Commerce embraces also the transactions, such as purchases and sales, which enter into trade, but interstate commerce has been held not to include sale of goods after they have reached their destination and have been commingled with other goods sold within a State. If sold in the original, unbroken package, however, goods are considered to be still in interstate commerce.

In recent years the scope of interstate commerce has been extended by federal statutes and by rulings of the Supreme Court to include the production of goods intended for shipment in interstate commerce, or which affect interstate commerce. Thus, the Federal Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. 201) includes provisions with regard to the wages and hours of persons engaged in the production of goods which are to be shipped in interstate commerce. It also prohibits child labor in connection with such production.

This law was sustained by the United States Supreme Court in a leading decision in 1941.<sup>10</sup> This decision specifically overruled an earlier case, the so-called *Child Labor Case*, in which it had been held that Congress did not have the power to forbid the transportation in interstate commerce of articles made in factories in the States where children under fourteen years of age were employed.<sup>11</sup> The *Child Labor Case* of 1918 was decided by a bare majority of the Court, with

9. Sustained in *Hoke v. U.S.* (1913), 227 U.S. 308, 33 S. Ct. 281, 57 L. Ed. 523, Ann. Cas. 1913 E 905, 43 L.R.A. (N.S.) 906, and other cases.

10. *U.S. v. Darby* (1941), 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609, 132 A.L.R. 1430. *Opp Cotton Mills v. Administrator of Wage and Hour Division* (1940), 312 U.S. 126, 61 S. Ct. 524, 85 L. Ed. 624.

11. *Hammer v. Dagenhart* (1918), 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918 E 724, 3 A.L.R. 649.

a brilliant dissenting opinion by Mr. Justice Oliver Wendell Holmes, which was characterized by Chief Justice Stone in the 1941 decision as a "powerful and now classic dissent."

Inspections of food establishments producing commodities which are intended for shipment in interstate commerce have long been undertaken by officers and employees of the Federal Government as a proper part of their duties, and in accordance with federal laws which have been upheld as valid and constitutional. In sustaining laws regulating the control of milk prices, it has been decided by the Supreme Court that the federal power over interstate commerce now extends to those activities which are purely intrastate in character, but which so affect interstate commerce as to make regulation of such activities an appropriate means to attain the legitimate end, the effective execution of the granted power of the Federal Government to regulate interstate commerce.<sup>12</sup>

While the power of Congress over interstate commerce is said to be plenary, this power is still subject to certain limitations when it conflicts with the police powers of the States. The legal problems involved in such conflicts are discussed in Chapter III, on The Police Power and the Public Health.

### *The Taxing Power of Congress*

Under Article I, Section 8, of the Federal Constitution, the Congress is given the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts, and excises must be uniform throughout the United States. There can be no tax on articles exported from one State to another.

Although the taxing power was conferred primarily for the purpose of raising revenue and not for the purpose of regulation, the regulatory aspect of revenue measures may often be significant. Thus, the Federal Narcotic Act (U.S.C. title 28, secs. 1040-1064), known as the Harrison Law (of 1914), not only imposes taxes on all persons dealing in narcotics, but regulates the use of these dangerous products. The constitutionality of this law, both as a revenue measure and as a regulatory one, has been upheld by the United States Supreme Court.

A federal law of 1886 imposing a tax upon oleomargarine when colored to resemble butter has been sustained as constitutional by the

12. *U.S. v. Wrightwood Dairy Co.* (1942), 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726.

United States Supreme Court.<sup>13</sup> Although the purpose of this law may have been to discourage sales of oleomargarine in competition with and (at that time) as an inferior substitute for butter, the law is valid as a revenue measure. Oleomargarine is, however, a legitimate object of interstate commerce, according to another decision of the United States Supreme Court,<sup>14</sup> but the methods of sale of this product in intrastate commerce may be regulated in a reasonable manner by the States.<sup>15</sup>

The power to tax was said by Chief Justice Marshall to involve the power to destroy. As the result of a prohibitive tax placed by Congress upon matches made with white phosphorus, a dangerous poison, the manufacture of these matches ceased when this law (37 Stat. 81) went into effect in 1912; it has produced no revenue, nor has it ever been contested in the courts. A similar tax on filled cheese (U.S.C. title 26, sec. 10) is in effect, and has not been challenged in court.

A prohibitive tax placed upon goods or persons may, however, be unconstitutional, as was shown in the second child labor case decided by the United States Supreme Court. Having failed in 1916 to control child labor under the federal power over interstate commerce, Congress passed a law in 1919 imposing a tax of 10 per cent on the net profits of any person, firm, or corporation employing child labor (40 Stat. 1138), but this law was declared unconstitutional by the United States Supreme Court on the grounds that under the guise of taxation Congress was attempting to interfere with a state right.<sup>16</sup>

Control of child labor is included in the Federal Fair Labor Standards Act of 1938, the so-called Wage and Hour Law (52 Stat. 1060, 29 U.S.C. 201-219). In addition to setting the minimum wages for persons engaged in producing goods for interstate commerce, this law prohibits the employment of children under sixteen years of age in such establishments, or under eighteen in dangerous trades. The child labor provisions of this act are administered by the Child Labor Division and the wage and hour provisions by the Wage and Hour and Public Contracts Division of the Department of Labor.

Under the power to tax and the power to appropriate monies, Con-

13. *McCray v. U.S.* (1904), 195 U.S. 60, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

14. *Schollenberger v. Pennsylvania* (1897), 171 U.S. 1, 18 S. Ct. 757, 43 L. Ed. 49.

15. *Powell v. Pennsylvania* (1888), 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253. *Plumley v. Massachusetts* (1894), 155 U.S. 461, 15 S. Ct. 154, 39 L. Ed. 223.

16. *Bailey v. Drexel Furniture Co.* (1922), 259 U.S. 20, 42 S. Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432.

gress has created and supported numerous bureaus in the executive departments which are concerned directly or indirectly with public health activities. In making appropriations, Congress sometimes has allotted funds to the States for public health purposes, such as the promotion of the hygiene of maternity and infancy or the control of venereal diseases, but only on condition that these allotments be matched by appropriations of the States themselves. Such an appropriation under the terms of the so-called Sheppard-Towner Law for the promotion of maternity and infancy (42 Stat. 224) was contested by the Commonwealth of Massachusetts and by a citizen of that State. The Supreme Court of the United States held, however, that neither the State nor the taxpayer had a status in court entitling them to bring such a cause of action, and dismissed the cases without actually passing upon the constitutionality of this law, although it was hinted in the decision that the law was not invalid.<sup>17</sup>

In 1937, however, the United States Supreme Court was called upon to decide the validity of the Social Security Act of 1935, which provided for various types of taxes, including federal taxes on employers, and the making of grants by the Federal Government to the States for the purpose of coping with unemployment under the terms of state laws approved by the Social Security Board. In sustaining this law as constitutional and valid, the Supreme Court stated that Congress had the power to spend money for the "general welfare,"<sup>18</sup> the term "general welfare" having been discussed at some length in a decision of the previous year upholding the Agricultural Adjustment Act.<sup>19</sup>

### *Postal Laws and the Public Health*

In accordance with the constitutional authority to establish post offices and post roads, Congress has passed laws prohibiting the use of the mails for the transmission of poisons, explosives, disease germs, and other dangerous articles, except under such rules and regulations as may be prescribed by the Postmaster General (35 Stat. 1131). The postal laws also prohibit the mailing of obscene matter, contraceptives and contraceptive information, and articles used for procuring

17. *Massachusetts v. Mellon* (1923), 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078.

18. *Steward Machinery Co. v. Davis* (1937), 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A.L.R. 1293. *Helvering v. Davis* (1937), 301 U.S. 619, 57 S. Ct. 904, 81 L. Ed. 1307, 109 A.L.R. 1319.

19. *U.S. v. Butler* (1936), 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914.

abortions. Fraudulent and spurious articles cannot be mailed nor can the advertising of fraudulent goods be sent through the mails. Included in these prohibited categories are false cures for cancer, diabetes, drug addiction, tuberculosis, venereal diseases, etc. Misbranded foods and drugs which are sent through the mails or advertised and promoted through the mails may be dealt with under the postal laws as well as under the Federal Food, Drug, and Cosmetic Act and the Federal Trade Commission Act.<sup>20</sup>

When evidence is collected by a postal inspector showing that a person, firm, or corporation is using the mails to defraud, to promote improper medical schemes, or to injure the public health in any way, the Postmaster General may cite the offender to appear for a hearing and may, if the evidence warrants, issue a fraud order denying the use of the mails to the perpetrator of the fraud, or may hand him over to the Department of Justice for prosecution under penal laws. A fraud order is not always issued in cases of wrongdoing, as an opportunity is often given for the immediate discontinuance of the reprehensible practice. Persons or concerns affected by a fraud order of the Post Office Department may be enjoined from receiving mail, and all of their postal communications will be marked "fraudulent" and returned to the sender.<sup>21</sup>

The postal laws in their application to public health matters have been held to be valid,<sup>22</sup> although the United States Supreme Court has ruled that the postal laws do not debar use of the mails to treatises on mental healing, where the efficacy of such a system is a matter of opinion and not necessarily a fraud.<sup>23</sup>

A health officer or other person who believes that a fraud against public health is being perpetrated through the mails should submit a report on the matter to the Chief Inspector, Post Office Department, Washington, D. C. Reports on certain mail order frauds, based on official reports, are frequently published in the weekly issues of the *Journal of the American Medical Association*.

20. See Chapter XII, on Foods, Drugs, and Cosmetics, page 201.

21. See *United States Official Postal Guide* (issued frequently, with supplementary bulletins).

22. *Leach v. Carlisle* (1922), 258 U.S. 138, 42 S. Ct. 227, 66 L. Ed. 511. In *Baker v. U.S.* (1940), 115 F. (2d) 533, conviction of a cancer quack for using the mails to defraud was sustained, and the methods employed were characterized as a hoax. The U. S. Supreme Court refused to review the case (1941), 312 U.S. 692, 715; 615 Ct. 711, 731; 85 L. Ed. —.

23. *American School of Magnetic Healing v. McAnulty* (1902), 187 U.S. 94, 23 S. Ct. 33, 47 L. Ed. 90.

State health officials are permitted to use penalty envelopes of the Federal Government for free transmission of mail to the United States Public Health Service on matters of official business.

### *The Treaty-Making Power*

Under the Constitution, the President of the United States may make treaties with foreign states, which are, however, subject to ratification by the Senate. Many treaties have been made, including a number that are directly concerned with the public health, such as adherence to the International Sanitary Convention and to the Pan American Sanitary Bureau. Where supplementary legislation is needed to carry out the terms of a treaty, Congress may pass the requisite laws, even though the subject might not be within the scope of Congress if it were not for the existence of the treaty.

### *The Government of Federal Territories*

Section 8 of Article I of the Federal Constitution gives to Congress complete jurisdiction over the government of the District of Columbia, the territories of the United States, and the reservations ceded to the Federal Government by the States. The power over the health of the residents of these areas is, therefore, complete and subject only to the constitutional rights of individuals. Congress may also provide for the health of the non-citizen Indians, Eskimos, and other wards of the government, and for the health and medical care of members of the national military establishments and other government services.

In 1923 the Supreme Court of the United States decided that an act of Congress fixing a minimum wage for employed women in the District of Columbia was unconstitutional as an infringement of the Fifth Amendment to the Constitution, which states that no person shall be deprived of life, liberty, or property without due process of law.<sup>24</sup> This restriction in the Fifth Amendment to the Constitution applies to the Federal Government, whereas a similar restriction in the Fourteenth Amendment applies to the States. The purpose of the law in question was declared to be for the protection of the health and welfare of women and minors of the District of Columbia, but the Supreme Court as then constituted felt that freedom of contract and of liberty was a more important right than the exercise of the police power in this type of social legislation. There were

24. *Adkins v. Children's Hospital* (1923), 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785, 24 A.L.R. 1238.



strong dissenting opinions in this case by Chief Justice Taft and Mr. Justice Holmes.

In 1937 this decision was overruled by the United States Supreme Court in a case in which a state law providing for a minimum wage for women and minors in the interests of their health and welfare was upheld as constitutional.<sup>25</sup> As before, the court was divided, three justices dissenting.

"What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?" said Chief Justice Hughes for the court in this case. "And if the protection of women is a legitimate end of the exercise of state power," he continued, "how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?"

### *Federal Health Organization*

Numerous bureaus in the various departments of the Federal Government are concerned with different aspects of the public health.<sup>26</sup> Most important of these agencies is the Public Health Service, a bureau of the Federal Security Agency. This bureau has evolved from the Marine Hospital Service, which was originally charged with the administration of medical relief to American seamen under federal laws dating from 1798. Until 1939 the Public Health Service was a bureau of the Treasury Department, but in that year it was transferred by the President's Reorganization Plan I, dated April 25, 1939, to the newly created Federal Security Agency. In 1944 the laws relating to the Public Health Service were consolidated and revised, the new law being known and cited as the "Public Health Service Act" (58 Stat. 714, 42 U.S.C. 201-286).

By the terms of this act the Public Health Service in the Federal Security Agency is administered by the Surgeon General under the supervision and direction of the Administrator. The Service consists of 1) the Office of the Surgeon General, 2) the National Institute of Health, 3) the Bureau of Medical Services, and 4) the Bureau of State Services. In the Service is a commissioned Regular Corps,

25. *West Coast Hotel Co. v. Parrish* (1937), 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330.

26. J. A. Tobey, *The National Government and Public Health*, Baltimore, Johns Hopkins Press, 1926. R. D. Leigh, *Federal Health Administration in the United States*, New York, Harper, 1927. White House Conference on Child Health and Protection, 1930, *Public Health Organization*, New York, Century, 1932. H. S. Mustard, *Government in Public Health*, New York, Commonwealth Fund, 1945.

and in time of national emergency, a Reserve Corps. Officers or employees of the Service may be detailed, upon request, to other federal executive departments, to state health authorities, or to nonprofit institutions engaged in health activities for special studies of scientific problems and the dissemination of information relating to the public health.

The powers and duties of the Public Health Service, as enumerated by law, include: 1) the conduct and promotion of scientific research relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man; 2) cooperation with and assistance to the States in the enforcement of quarantine and the prevention and suppression of communicable diseases, the control of venereal diseases, the control of tuberculosis, and the maintenance of adequate public health services; 3) health education; 4) the furnishing of medical and hospital care, and medical examinations to legal beneficiaries, such as merchant seamen, federal prisoners, federal employees, aliens, lepers, narcotics addicts, and others; 5) the regulation of biological products; 6) foreign quarantine and interstate quarantine; and 7) cancer research. For the purpose of carrying out these duties the Surgeon General is authorized to promulgate necessary regulations.

The responsibilities of the Public Health Service with respect to mental health were increased by the National Mental Health Act of 1946 (P. L. 410, 79th Cong.) which provides, among other matters, for the granting of subsidies to the States for psychiatric services, and for the establishment of a National Institute of Mental Health. In 1946 Congress also passed a bill providing for a program of hospital construction with federal aid, which is administered by the Public Health Service.

In addition to the Public Health Service, a number of other federal bureaus having important public health functions are now grouped in the Federal Security Agency. In 1940 the Food and Drug Administration was transferred to this agency from the Department of Agriculture, in which it had been created in 1928. In accordance with the President's Reorganization Plan No. 2 of 1946, the Children's Bureau (with the exception of its child labor functions) was transferred from the Department of Labor, where it had been since 1913; and the Division of Vital Statistics became a part of the Public Health Service. Since 1902 this Division had been a part of the Bureau of the Census, in the Department of Commerce (Commerce and Labor until 1913).

The Children's Bureau of the Social Security Administration of

the Federal Security Agency administers maternal and child health services, services for crippled children, and child welfare services under the Social Security Act. The bureau also investigates and reports on various aspects of child health and welfare.

The Division of Vital Statistics of the Public Health Service promotes the adoption of improved and uniform standards for registering births and deaths in the States, and compiles data so collected.

The Food and Drug Administration of the Federal Security Agency enforces the Federal Food, Drug, and Cosmetic Act, the Tea Act, the Import Milk Act, the Caustic Poison Act, and the Filled Milk Act.

Among other bureaus in the Federal Government having important public health functions and duties are:

The Bureau of Animal Industry of the Agricultural Research Administration of the Department of Agriculture, established in 1884, which administers the Meat Inspection Act, the Animal Quarantine Acts, the Diseased Animal Transportation Acts, and the Virus-Serum-Toxin Act. The bureau also conducts scientific investigations on animal diseases, many of which are transmissible to man.

The Bureau of Human Nutrition and Home Economics of the Department of Agriculture conducts research and disseminates information on foods and nutrition and other subjects.

The Bureau of Dairy Industry of the Department of Agriculture is concerned, among other things, with milk sanitation.

The Production and Marketing Administration of the Department of Agriculture, through its Food Distribution Programs Branch, is responsible for the administration of the National School Lunch Act of 1946, and for direct food distribution programs and industrial feeding programs. In this administration there is also a Foreign Food Programs Branch.

The Bureau of Narcotics of the Treasury Department, which administers the Harrison Narcotic Act, the Marihuana Tax Act, the Narcotic Drugs Import and Export Act, and various related statutes. In cooperation with the Public Health Service, this bureau determines the quantities of crude opium and coca leaves that may be imported into the United States for medical and other legitimate purposes.

The Bureau of Mines of the Department of the Interior administers the Coal Mine Inspection Act, and is concerned with the health and safety of miners.

The Office of Indian Affairs of the Department of the Interior supervises the health of the Indians and Eskimos, and operates hospitals for them.

The Federal Trade Commission, an independent establishment

of the government, enforces the Wheeler-Lea Act pertaining to deceptive advertising and unfair trade practices concerning foods, drugs, and cosmetics, and also administers numerous other laws.

The Veterans Administration, another independent establishment, through its Medical and Hospital Service, provides medical care, treatment, hospitalization, physical examination, and outpatient relief to legal beneficiaries of the various laws pertaining to veterans.

Other federal bureaus having less extensive and more indirect public health functions include: the Bureau of Labor Statistics of the Department of Labor, which studies and reports on industrial hygiene; the Women's Bureau of the Department of Labor, which studies and reports on the health of women in industry; the Office of Education of the Federal Security Agency, which among other things is interested in school hygiene; the Bureau of Entomology and Plant Quarantine of the Department of Agriculture, which deals among other matters with insects dangerous to health; and the Federal Works Agency, which administers the Lanham Act, including construction of public health, sanitation, and hospital facilities, with the Public Health Service acting as approving agency for this particular type of construction.

At the time of the transfer of the Children's Bureau and the Division of Vital Statistics to the Federal Security Agency, in 1946, President Truman stated that the size and scope of this agency and the importance of its functions clearly call for departmental status, and that he would soon recommend to the Congress that legislation be enacted to that end, making the Federal Security Agency an executive department with Cabinet status.

During the course of World War II a number of other federal bureaus, such as the Office of Defense Health and Welfare, were concerned with public health matters. Many of these were discontinued after the cessation of hostilities, but a few have been continued. Thus, the Office of Inter-American Affairs has a Health and Sanitation Division; the United Nations Relief and Rehabilitation Administration (UNRRA) was engaged in health and nutrition activities until the end of 1946, when its activities were to be liquidated. In 1946 a World Health Organization was formed, with the objective of the attainment by all peoples of the highest possible level of health, through direction and coordination of international health work.<sup>27</sup>

Quasi-governmental agencies which do health work include the Pan American Sanitary Bureau, the American National Red Cross,

27. See World health organization charter, *J.A.M.A.*, 131:1431, August 24, 1946

and the National Academy of Sciences through the Food and Nutrition Board of the National Research Council.

*The Social Security Act*

In 1935 Congress passed a law known as the Federal Social Security Act (53 Stat. 1360, 49 Stat. 620, 42 U.S.C. 301), which provides for grants to the States for old-age assistance; for federal old-age benefits; for grants to the States for unemployment compensation administration, for aid to dependent children, for maternal and child welfare, for public health work, and for aid to the blind; and provides also for federal taxation to support certain of these activities, and for the administrative machinery to carry them out. The act was amended in 1939 (53 Stat. 1360).

Title V of this law, pertaining to maternal and child welfare, authorized an annual federal appropriation of \$5,820,000 to be apportioned to the States for the operation of plans for maternal and child health services under the direction of state health departments. The state plans must be approved by the Chief of the Children's Bureau, which administers this section of the law. Other portions of this total annual appropriation are for state services for crippled children; child welfare, especially in rural areas; and vocational rehabilitation of the physically disabled.<sup>28</sup>

For the purpose of assisting States, counties, health districts, and other political subdivisions of the States in establishing and maintaining adequate public health services and in training personnel, Title VI of this act authorized annual federal appropriations of \$8,000,000. Allotments from this appropriation are made to the States by the Surgeon General of the United States Public Health Service, with the approval of the Federal Security Administrator, the amounts being determined by 1) the population, 2) the special health problems, and 3) the financial needs of the respective States. Plans for expenditures of the funds must be submitted by state health authorities to the Surgeon General and approved by him.<sup>29</sup> This title became part of the Public Health Service Act in 1944.

In addition to the sums granted to the States, this act authorized an annual appropriation of \$2,000,000 for investigations of disease and

28. *Facts About Child Health*, Bureau Publication 294, U.S. Children's Bureau, 1946.

29. See *The Public Health Program under Title VI of the Social Security Act*, Supplement No. 126 to *Pub. Health Rep.*, U.S. Public Health Service, 1937. J. W. Mountin and E. K. Hankla, Training Public Health Workers, *Pub. Health Rep.* 61:725, May 24, 1946.

problems of sanitation by the United States Public Health Service. The law provides, however, that no personnel of the Public Health Service shall be detailed to cooperate with the health authorities of any State except at the request of the proper authorities of the State.

Since the passage of this act, several thousand persons, including medical officers, engineers, nurses, sanitation officers, and laboratory workers, have received postgraduate training in public health work. A gratifying increase in the employment of full-time health officials and employees is also reported. Through grants-in-aid to the States, numerous specialized health activities likewise have been developed, including divisions of venereal disease control, industrial hygiene, and various other branches of public health endeavor.

### *Radio Control*

Supervision of radio activities is a function of the national government under the Federal Communications Act of 1934 as amended (48 Stat. 1064, 15 U.S.C. 21, 47 U.S.C. 35, 151), which is administered by the Federal Communications Commission, an independent establishment of the government. The Commission has broad powers to license and regulate broadcasting stations, and it also has jurisdiction over telephone and telegraph operations in interstate commerce. The Commission conducts research, makes investigations and inspections, holds hearings, issues and refuses licenses, and exercises general control over radio activities, including allocation of broadcasting stations and supervision of subject matter.

Under the Federal Trade Commission Act of 1938, the Federal Trade Commission also has jurisdiction over false advertising of foods, drugs, devices, and cosmetics over the radio.<sup>30</sup>

Since broadcasting facilities are often used for medical and health talks, and for the promotion of wares and commodities and other matters that may affect the public health, radio control is frequently a matter of public health significance.

In 1931 the Federal Radio Commission, which was superseded by the Federal Communications Commission in 1934, refused to renew the license of an individual who was using the radio to broadcast an alleged cancer cure, to oppose vaccination, and to criticize physicians and scientific medicine. When the owner of this station moved it to Mexico near the international boundary and continued to broadcast, using electrical transcriptions prepared in Texas, he was indicted and tried in the United States District Court, where he was convicted for

30. See Chapter XII, on Foods, Drugs, and Cosmetics.

violation of the Federal Communications Act.<sup>31</sup> On appeal, however, the Circuit Court of Appeals reversed this conviction on the grounds that the act as written did not prohibit the recording of sound waves in the United States and the sending of them to a foreign country to be reproduced and broadcast,<sup>32</sup> a decision which the United States Supreme Court refused to review.

Refusal by the Federal Radio Commission to issue a license in 1930 to a physician who was prescribing proprietary medicines of his own over the radio, on the grounds that such action was inimical to the public health and safety, was upheld by the Court of Appeals of the District of Columbia in 1931.<sup>33</sup> The revocation of this physician's license to practice medicine by the state board of medical examiners of Kansas was likewise upheld by the United States Circuit Court of Appeals,<sup>34</sup> the court pointing out that diagnosis and prescription by radio was not in the public interest, and that the revocation of the license was justified.

### *Patents*

Under Section 8 of Article I of the Federal Constitution, Congress is given the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and inventions. In accordance with this power, Congress has passed copyright<sup>35</sup> and patent laws, the former being administered by the Register of Copyrights of the Library of Congress, and the latter by the Patent Office of the United States Department of Commerce.

Under the Federal Patent Laws, any drug, medicine, therapeutic device, or remedy may be registered and patented if it is an original invention. The patent is then in force for seventeen years and may not be infringed by others. Numerous drugs and medicines have been patented in the past, some of them being clearly in the class of

31. *U.S. v. Baker* (1936), 18 F. Supp. 48.

32. *Baker v. U.S.* (1937), 93 F. (2d) 332, cert. den. 303 U.S. 642, 58 S. Ct. 332, 82 L. Ed. 1102. *Baker v. Arkansas* (1940), 199 Ark. 1005, 137 S.W. (2) 938, cert. den. 311 U.S. 666, 61 S. Ct. 25, 85 L. Ed. —.

33. *KFKB Broadcasting Ass'n v. Federal Radio Commission* (1931), 60 App. D.C. 79, 47 F. (2d) 670. In *Norman v. Radio Station KRMD* (La. 1939), 187 So. 831, the right of the station to breach a contract with an unlicensed chiropractor was upheld.

34. *Brinkley v. Hasstg* (1936), 83 F. (2d) 351. *Brinkley v. Hasstg* (1930), 130 Kan. 874, 289 P. 64; affirm. (1930) in 282 U.S. 800, 51 S. Ct. 39, 75 L. Ed. 720.

35. See page 320.

nostrums. There has been no scientific determination of the value or efficacy of these so-called "patent medicines," the sole criterion for the issuance of a patent having been that the formula shall not have been previously patented within the statutory limit. Trade marks are also issued by the Patent Office.

Many ethical products of importance to the public health, including insulin for use in the treatment of diabetes, methods of imparting vitamin D to milk, liver preparations for use in treating anemia, copper-iron preparations for similar use, and a serum for the prevention of scarlet fever, have been patented in this country.

Whether medical inventions should be patented or not is a question that has aroused much discussion,<sup>36</sup> some authorities holding that contributions to scientific medicine should be freely available to all physicians, while others have pointed out that patenting permits of reasonable control of the invention in the interests of the public welfare and prevents its misuse by incompetent and unauthorized persons.

It has been held that an employee of the Federal Government cannot patent a discovery or invention made while in the employ of the government and as a direct result of the employment.<sup>37</sup> In this case an employee of the Public Health Service invented or perfected a safe gas to be used as a fumigant, but his invention was held to belong to the government.

### *State Constitutions*

A state constitution is a grant of power by the people of the State to their government, setting forth legal limitations upon the government and those which may be imposed upon the people. It is the supreme law of the State, subject to the provisions of the Federal Constitution, acts of Congress, and treaties made by the President with the consent of the Senate. A state court of appeals cannot declare any part of a state constitution to be invalid, but such a court may interpret and apply its terms. The United States Supreme Court may, however, rule that parts of a state constitution are invalid as inconsistent with or opposed to the Federal Constitution.

Provisions regarding the public health are seldom written into state constitutions and actually are unnecessary, since the care of the public

36. A. G. Connolly, Should medical inventions be patented? *Science*, 86:383, October 29, 1937. M. Fishbein, Medical patents, *J.A.M.A.*, 109:1539, November 6, 1937.

37. *Houghton v. U.S.* (1930), 23 F. (2d) 386.



health is universally recognized as a lawful responsibility and duty of the State, a duty which need not be declared in its constitution, or supreme law. In a number of States, however, constitutions require the legislature to provide by law for the establishment, maintenance, and efficiency of a state board of health, and sometimes for county and other local boards of health.<sup>88</sup> These boards are sometimes declared in state constitutions to have supervision of all matters relating to public health, with such powers, duties, and responsibilities as may be prescribed by law.

The constitutionality, validity, scope, and legal significance of these powers and duties are discussed in the following chapters.

### *Health Activities in Canada*

Canada became a federal union in the British Empire by the terms of the British North America Act, adopted by the Imperial Parliament in 1867. This Act assigned to the Dominion Government jurisdiction over "quarantine and the establishment and maintenance of marine hospitals." The provinces were also authorized to establish and maintain hospitals, asylums, and charitable institutions, other than marine hospitals, in and for the provinces. The provinces were, furthermore, given jurisdiction over "property and civil rights in the province," and generally over all matters of a merely local or private nature.

In Canada the legal power over the public health is, therefore, accepted as being vested primarily in the provinces, just as in the United States this power belongs primarily to the individual States. In each of the nine Canadian provinces departments of public health have been organized, the first provincial board of health having been created in Ontario in 1882.

From the time of Confederation until 1872, Dominion health activities were under the control of the Department of Agriculture. Later, these activities were divided among a number of the federal departments. In 1919 a Federal Department of Health was established by Act of Parliament, and in 1928 another act merged it with the Department of Soldiers' Civil Re-establishment to become the Department of Pensions and National Health.

By Chapter 22 of the Act of 8 George VI, adopted in 1944, this department was superseded by a new Department of National Health and Welfare, presided over by a Minister with two Deputy Ministers.

The duties, powers, and functions of the Minister, as set forth in

88. J. A. Tobey, Public health in state constitutions, *Pub. Health Rep.*, 41:2065. September 24, 1926.

this law, include all matters relating to the promotion and preservation of the health, social security, and social welfare of the people of Canada over which the Parliament has jurisdiction, and particularly:

- a) Administration of acts of Parliament and orders or regulations of the Government relating to health;
- b) Investigation and research into public health and welfare;
- c) Inspection and medical care of immigrants and seamen, administration of marine hospitals, and such other hospitals as the Government may direct;
- d) Supervision, as regards the public health, of railways, boats, ships, and all other methods of transportation;
- e) Promotion and conservation of the health of the civil servants and other Government employees;
- f) Administration of the Food and Drugs Act, the Opium and Narcotic Drug Act, the Quarantine Act, the Public Works Health Act, the Leprosy Act, the Proprietary or Patent Medicine Act, and the National Physical Fitness Act, and all orders or regulations passed or made under any of these acts;
- g) Subject to the provisions of the Statistics Act, the collection, publication, and distribution of information relating to the public health, improved sanitation and social and industrial conditions affecting the health and lives of the people;
- h) Cooperation with provincial authorities with a view to the co-ordination of efforts made or proposed for preserving and improving the public health and providing for the social security and welfare of the people.

The law provides for a Dominion Council of Health, consisting of the Deputy Minister as chairman, the chief executive officer of the Provincial Board of Health of each province, and such other persons, not to exceed five in number, as may be appointed by the Governor in Council, whose terms shall be for three years.

It is stated that nothing in the Act or in any regulations made under it shall authorize the Minister or any other officer of the Department to exercise any jurisdiction or control over any provincial or municipal board of health or other health authority operating under the laws of any province.

Regulations to carry out the objects of the Act, including penalties, are authorized, but must have the approval of the Governor in Council and be published and laid before the Parliament.

As in the United States, other Canadian federal departments are also concerned with various aspects of public health. Thus, the De-

partment of Agriculture has certain jurisdiction over food and domestic animals; the Department of Mines and Resources controls sanitation in the national parks and supervises the health of Indians and Eskimos; the Bureau of Statistics compiles, tabulates, and publishes vital and public health statistics.

Five of the provinces, Prince Edward Island, Nova Scotia, Ontario, Saskatchewan, and Alberta, have separate Departments of Health. In New Brunswick there is a Department of Health and Social Service, in Quebec a Department of Health and Social Welfare, in Manitoba a Department of Health and Public Welfare, and in British Columbia the work comes under the Provincial Secretary.

Public health acts in the provinces generally require the appointment of local boards of health, a medical officer of health, and such number of sanitary inspectors as are required to enforce the public health laws and regulations.<sup>39</sup>

Although geographically part of Canada, Newfoundland is a separate governmental entity, and has its own system of public health organization.

39. *Health, Welfare and Labour, Reference Book for Dominion-Provincial Conference on Reconstruction*, 1945. *Re Provincial Board of Health*, 46 Ont. L. 587, 51 Dom. L.R. 444.



## CHAPTER III

### THE POLICE POWER AND THE PUBLIC HEALTH

**S**ALUS *populi suprema lex*. That the safety of the people is the supreme law is an ancient Roman maxim. It is a maxim that applies with equal force to modern government, for the sovereignty always has had, now has, and always will have the ineliminable duty of safeguarding its citizens against disease, disorder, poverty, and crime.<sup>1</sup>

The power inherent in the State, or sovereignty, to enact and enforce laws to protect and promote the health, safety, morals, order, peace, comfort, and general welfare of the people is known as the police power. It means the power of advancing the public welfare by restraining and regulating the use of liberty and property.<sup>2</sup>

Long before the Federal Constitution was adopted, the colonies in North America possessed the police power, and with it they possessed the undeniable and exclusive right of control over their own internal affairs. This power was not surrendered by the States to the Federal Government, and never has been relinquished, although sometimes encroached upon. The States cannot divest themselves of their police power, but it may be limited to a certain extent by federal and state constitutions, and by acts of Congress passed under constitutional authority. In recent years the Federal Government has developed a considerable police power of its own.

"That power," said the United States Supreme Court in 1878 in discussing the police power, "belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. . . . It rests upon the fundamental principle that every one shall so use his own as not to wrong or injure another."<sup>3</sup>

#### *The Nature of the Police Power*

In the exercise of the police power the States have complete control, within their own jurisdictions, over the public health. By virtue of this fact, "it is not only the right, but the bounden and solemn

1. *Letsy v. Hardin* (1890), 135 U.S. 100, 10 S. Ct. 681, 34 L. Ed. 128.

2. E. Freund, *The Police Power*, Chicago, Callaghan, 1904.

3. *Northwestern Fertilizing Co. v. Hyde Park* (1878), 97 U.S. 659, 24 L. Ed. 1036.

duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained . . . ; that all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive; and that, among these powers, are inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the State, and to prevent the introduction or enforce the removal of prohibited articles of commerce."<sup>4</sup>

A classic commentary on the nature of the police power is that of Chief Justice Shaw of Massachusetts, who wrote in 1851 that:

We think it is a settled principle, growing out of the nature of well-ordered civil society, that every owner of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the general enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and such reasonable restraints, and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain—the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefore. The power we allude to is rather the police power; the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties, or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and the sources of this power than to mark its boundaries, and prescribe the limits to its exercise.<sup>5</sup>

4. L. Parker and R. H. Worthington, *The Law of Public Health and Safety*, Albany, Bender, 1892. *City of New York v. Miln* (1837), 11 Pet. (U.S.) 102, 9 L. Ed. 648.

5. *Commonwealth v. Alger* (1851), 7 Cush. (Mass.) 53.

*The Scope of the Police Power*

The police power is "universally conceded to include everything essential to the public safety, health, and morals."<sup>6</sup> This is a broad and inclusive definition, but the police power is very broad in scope, extending to every aspect of the public welfare. It has been said, in fact, to be the most extensive of all governmental powers, which is all the more reason why it must be exercised in a reasonable and equitable manner.

The scope of the police power has been the subject of numerous decisions of the United States Supreme Court.<sup>7</sup> More than a century ago, Chief Justice Marshall pointed out in the celebrated case of *Gibbons v. Ogden*<sup>8</sup> that state laws coming under the police power include inspection laws, quarantine laws, and health laws of every description, mentioning in the course of his decision "the acknowledged power of a State, to provide for the health of its citizens." Again, in 1827, in the case of *Brown v. Maryland*,<sup>9</sup> holding invalid a state law requiring licenses of importers and wholesalers dealing in interstate commerce, Chief Justice Marshall said, "Indeed the laws of the United States expressly sanction the health laws of a State." The *License Cases*<sup>10</sup> in 1847, upholding state laws requiring licenses for the sale of liquor as valid under the police power, provoked some discussion of health laws by the court, Chief Justice Taney saying, "A State . . . is not bound . . . to abstain from the passage of any law which it may deem necessary or advisable to guard the health . . . of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenues of the general government." In this decision Mr. Justice McLean also stated that, "Everything prejudicial to the health and morals of a city may be removed."

The scope of the police power extends to the persons and the property of every natural person and corporation within the jurisdiction of a State. It extends to the conduct of business and the conduct of all private affairs. While the power cannot be divested by the States, it can be delegated to its political subdivisions, such as counties,

6. *Lawton v. Steele* (1894), 152 U.S. 136, 14 S. Ct.499, 38 L. Ed. 338.

7. J. A. Tobey, *The National Government and Public Health*, Baltimore, Johns Hopkins Press, 1926, chapter V.

8. *Gibbons v. Ogden* (1824), 9 Wheat. 1, 6 L. Ed. 23.

9. *Brown v. Maryland* (1827), 12 Wheat. 419, 6 L. Ed. 678.

10. *License Cases* (1847), 5 How. 504, 12 L. Ed. 256.

municipal corporations, boards of health, boards of education, and the like.

The right and duty of a State to exercise the police power in the interests of the health and general welfare has been sustained on hundreds of occasions by the courts of last resort in this country.<sup>11</sup> Whether the exercise of the police power is constitutional and reasonable in a particular instance is, however, a matter for specific determination in that case by the judiciary.

### *Eminent Domain and Taxation*

Along with the police power, the States enjoy the vested rights of eminent domain and taxation. Eminent domain is the right of the sovereignty to take private property for a public purpose without the consent of the owner. The State must, however, make adequate compensation for the property so taken.

Under the police power, private property may be seized or destroyed without the necessity of compensation by the State. If, for example, a disastrous conflagration requires the destruction of houses in the path of the flames, they may be justifiably destroyed for the common good. Similarly, property that might cause the spread of disease may be destroyed without thought of compensation to the owner.<sup>12</sup> In actual practice, compensation is sometimes given voluntarily by the State when property is destroyed under the police power.

The police power, said the United States Supreme Court, "is universally conceded . . . to justify the destruction or abatement, by summary proceedings of whatever may be regarded as a public nuisance."<sup>13</sup>

If property is desired and needed for a public water works, incinerator, sewage disposal plant, or for any other civic purpose which may affect the public health, it must, nevertheless, be taken only under the power of eminent domain, since the operation of public works of this nature by a political subdivision of a State is a proprietary or corporate function for the benefit of the community, and not a governmental function for the benefit of the State.<sup>14</sup>

Under the police power an individual cannot, as a rule, be required to devote his property to a particular purpose, but he may be compelled to refrain from using it for any purpose that is or may be detri-

11. See 25 *American Jurisprudence* 285-321 and cases cited.

12. *Dunbar v. Augusta* (1892), 90 Ga. 390, 17 S.E. 907.

13. *Lawton v. Steele* (1894) 152 U.S. 136, 14 S. Ct. 499, 38 L. Ed. 338.

14. *In re New Haven Water Co.* (1912), 86 Conn. 361, 85 A. 636.



mental to the public health. Thus, a nuisance may be abated or dealt with, or pollution of a stream may be prohibited or enjoined, even though property rights may be involved. The theory here is that the owner of the property may suffer some individual loss, but is compensated for it by sharing in the general benefits to the public health. His injury is what is legally known as *damnum absque injuria*, or damage without injury.<sup>15</sup> In times of great emergency, such as an epidemic, private property may be required to be used for a special public purpose, such as an isolation hospital.

The taxing power of the State is used for the purpose of raising revenue to carry out its governmental duties. The police power cannot be employed for the purposes of taxation, although reasonable fees may be charged under the police power to cover the costs of the administration of inspection, the issuance of licenses and permits, the issuance of copies of vital statistics, and other legitimate purposes. When such fees are excessive, they become taxes and are invalid as not proper under the police power.

#### *Limitations on the Police Power*

Broad as is the scope of the police power, it must be exercised within constitutional limitations. As early as 1849 the United States Supreme Court held in the *Passenger Cases*<sup>16</sup> that a state law imposing a tax on vessels, which was collected by the health commissioner but was not used for quarantine, was unconstitutional as an interference with the federal powers over commerce.

The operation of the police power frequently comes in conflict with provisions of the Federal Constitution, such as the power of the Federal Government over interstate and foreign commerce; the guarantees that no person shall be deprived by the Federal Government or by the States of life, liberty, or property without due process of law, or denied the equal protection of the laws by the States; the requirement that no State shall pass any law impairing the obligation of contracts; and the requirements that Congress shall make no law prohibiting religious freedom, the freedom of speech, and the right of the people peaceably to assemble, and that no State shall abridge the privileges and immunities of citizens of the United States.

Despite these constitutional provisions, the police power of the State will usually prevail when it is exercised in a reasonable manner for the common welfare. In its operation over public health matters,

15. *Mugler v. Kansas* (1887), 123 U.S. 664, 8 S. Ct. 273, 31 L. Ed. 205.

16. *Passenger Cases* (1849), 7 How. 283, 12 L. Ed. 702.

the police power will be upheld in all instances where action is undeniably necessary to protect the health of the people, but it will not be sustained when its exercise is unreasonable, frivolous, capricious, or equivocal, or is palpably an abuse of the police power. What is reasonable and what is not in public health procedures and other actions under the police power may give rise to some nice legal distinctions which only the courts can determine.

Necessary precautions in the use of the police power were set forth by Mr. Justice Harlan of the Supreme Court of the United States in these words:

In determining the validity of the ordinances in question it may be taken as firmly established in the jurisdiction of this court that the States possess, because they have never surrendered the power—and therefore municipal bodies, under legislative sanction, may exercise the power—to prescribe such regulations as may be reasonable, necessary and appropriate, for the protection of the public health and comfort; and that no person has an absolute right “to be at all times free from restraint”; but “persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, and general prosperity of the State”—the public, as represented by its constituted authorities, taking care always that no regulation, although adopted for those ends shall violate rights secured by the fundamental law nor interfere with the enjoyment of individual rights by the necessities of the case. Equally well settled is the principle that if a regulation, enacted by a competent public authority avowedly for the protection of the public health, has a real and substantial relation to that object, the courts will not strike it down upon the grounds merely of public policy or expediency.<sup>17</sup>

#### *Interference with Interstate Commerce*

A state law which, in its essential nature, is a legitimate exercise of the police power is not rendered invalid because of some incidental interference with interstate commerce. But a state law that merely purports to invoke the police power will not be permitted to interfere with the right of the Federal Government to regulate interstate commerce. Legitimate police measures of the States are always proper and valid, but when they go beyond the bounds of public necessity such laws become *ultra vires*, or invalid.

In 1877, for example, a law of the State of Missouri prohibiting the entry of Texas cattle between the months of March and November was held by the United States Supreme Court to be an unconsti-

17. *California Reduction Co. v. Sanitary Reduction Works* (1905), 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204. *Gardner v. People* (1905), 199 U.S. 325, 50 L. Ed. 212.

tutional restriction upon interstate commerce.<sup>18</sup> In this decision, it was stated by Mr. Justice Strong:

While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious and infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through a State, beyond what is absolutely necessary for self-protection.

To the same effect was a decision of this court in 1890, holding that a state law prohibiting the sale of meat for human consumption unless taken from an animal certified to be healthy was inapplicable to meat shipped in interstate commerce.<sup>19</sup>

Reasonable quarantine and health laws of the States, operating without discrimination and prohibiting the entry into a State of diseased persons or animals or of commodities that are dangerous to health, have been upheld in numerous instances by the United States Supreme Court.<sup>20</sup> Where, for example, one State placed an embargo upon persons and things coming from another State, because of an epidemic, the Supreme Court held that there was no justifiable controversy between the States, saying:

While it is true that the power vested in Congress to regulate commerce among the States is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the States in the exercise of their reserved powers come into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the Government.<sup>21</sup>

In a more recently decided case,<sup>22</sup> in which was sustained an order

18. *Railroad Co. v. Husen* (1877), 95 U.S. 465, 24 L. Ed. 527.

19. *Minnesota v. Barber* (1890), 136 U.S. 313, 10 S. Ct. 862, 34 L. Ed. 455. *Schollenberger v. Pennsylvania* (1897), 171 U.S. 1, 18 S. Ct. 757, 43 L. Ed. 49.

20. *Rasmussen v. Idaho* (1901), 181 U.S. 198, 21 S. Ct. 594, 45 L. Ed. 820. *Smith v. St. Louis R. Co.* (1901), 181 U.S. 248, 21 S. Ct. 603, 45 L. Ed. 847. *Reid v. Colorado* (1902), 187 U.S. 137, 23 S. Ct. 92, 47 L. Ed. 108. *Compagnie Française de Navigation à Vapeur v. Louisiana State Board of Health* (1902), 186 U.S. 380, 22 S. Ct. 811, 46 L. Ed. 1209. *Asbell v. Kansas* (1908), 209 U.S. 251, 28 S. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101.

21. *Louisiana v. Texas* (1900), 176 U.S. 1, 20 S. Ct. 251, 44 L. Ed. 347.

22. *Mintz v. Baldwin* (1933), 289 U.S. 346, 53 S. Ct. 611, 77 L. Ed. 1245.

of a state commissioner of agriculture, made pursuant to law, prohibiting entry of cattle into the State unless they were shown to be free of Bang's disease, the United States Supreme Court declared that:

The order is an inspection measure. Undoubtedly it was promulgated in good faith and is appropriate for the prevention of further spread of disease among dairy cattle and to safeguard public health. It cannot be maintained therefore that the order so unnecessarily burdens interstate transportation as to contravene the commerce clause.

On the other hand, the Supreme Court decided in 1942 that seizure of renovated butter by state officials in a plant which was producing the butter for shipment in interstate commerce was in conflict with the powers of the Federal Government.<sup>23</sup> Under the terms of federal law, the Internal Revenue Code (Secs. 2320-2327), the Secretary of Agriculture is required to cause to be made a rigid sanitary inspection of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. He cannot, however, condemn the packing stock butter, but only the finished product when it has entered interstate commerce.

"The test to be applied to the action of the state in seizing material intended solely for incorporation into a product prepared for interstate commerce," said Mr. Justice Reed for a bare majority of the Court, "is the effect of that action upon the national regulatory policy declared by the federal statute. Not only does Congressional power over interstate commerce extend, the 'Laws of any State to the Contrary notwithstanding,' to interstate transactions and transportation, but it reaches back to the steps prior to transportation and has force to regulate production 'with the purpose of so transporting' the product. *United States v. Darby*, 312 U.S. 100, 117."

In this case there was a strong dissenting opinion by Chief Justice Stone, who pointed out that the decision appears to depart radically from the salutary principle that Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless the state act, in terms of its practical application, conflicts with the act of Congress or plainly and palpably infringes its policy.

23. *Cloverleaf Butter Co. v. Patterson* (1942), 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754.

While a State may prevent the entry of diseased persons, it may not prevent the interstate migration of persons who are merely seeking opportunities for labor or who come to the State for climatic or other reasons. Mass migrations may, however, present special health problems, which are subject to control by the public health authorities of the State under the police power.

### *Due Process of Law*

The Fourteenth Amendment to the Federal Constitution requires that no State shall deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws. Under these clauses, health laws and the actions of public health officials frequently have been challenged in the courts.

Since the public welfare demands that the rights of the individual must yield on occasion to the rights of the people as a whole, valid policing regulations of a State that may actually deprive a person of liberty and property are not void because of the Fourteenth Amendment. Said the United States Supreme Court in discussing these rights:

But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industry of the State, develop its resources, and add to its wealth and prosperity.<sup>24</sup>

Due process of law means, furthermore, not only an orderly procedure before a court of justice, but also a summary proceeding by an administrative official, such as a health officer, where the public interest requires immediate action. As stated by Pomeroy:

Due process of law implies primarily that regular course of judicial proceeding to which our fathers were accustomed at the time the Constitution was framed; and, secondly, and in a subordinate degree, those more summary measures, which are not strictly judicial, but which had long been known in the English law, and which were in

24. *Barbier v. Connolly* (1885), 113 U.S. 27, 5 S. Ct. 357, 28 L. Ed. 923. *Sentell v. New Orleans R. Co.* (1897), 166 U.S. 698, 17 S. Ct. 693, 41 L. Ed. 1169. *New York Tenement House Dept. v. Moeschen* (1904), 179 N.Y. 325, 72 N.E. 231, 103 A.S.R. 910, 70 L.R.A. 704; affirm. (1906) in 208 U.S. 583, 27 S. Ct. 781, 51 L. Ed. 328 (memo.). *Laurel Hill Cemetery v. San Francisco* (1910), 216 U.S. 358, 30 S. Ct. 301, 54 L. Ed. 515. *Hutchinson v. Valdosta* (1913), 227 U.S. 303, 33 S. Ct. 290, 57 L. Ed. 520. *Northwestern Laundry Co. v. Des Moines* (1916), 239 U.S. 486, 36 S. Ct. 206, 60 L. Ed. 396.

familiar use when the Constitution was adopted. These summary measures generally, though not universally, form a part of that mass of regulations which many writers term Police, and which relate to the preservation of public quiet, good order, health, and the like. . . . The summary measures which may form a part of due process of law are those which have been admitted from the very necessities of the case, to protect society by abating nuisances, preserving health, warding off imminent danger, and the like, when the slower and more formal proceedings of the courts would be ineffectual.<sup>25</sup>

Compulsory vaccination and eugenical sterilization laws are illustrations of public health measures that represent a constitutional exercise of the police power without infringing upon the due process clause.<sup>26</sup> When such laws apply equally to all persons, they cannot be condemned either as class legislation or as a deprivation of life and liberty without due process of law.

### *Class Legislation*

In order that equal protection of the laws may be assured, all legislation must operate without discrimination. Statutes passed in the interests of the public health are void as class legislation, however, only when they make an unreasonable discrimination between persons and classes, or apply in an arbitrary manner only to certain persons or types of persons or things.

Where a municipal ordinance required that all persons desiring to establish laundries in frame houses must secure licenses, and the only persons affected by the ordinance were Chinese laundrymen, the law was declared by the United States Supreme Court to be unconstitutional as class legislation, which denied to a particular group the equal protection of the laws.<sup>27</sup> Similarly, an ordinance requiring licenses of the owners of milk wagons but not requiring licenses of other milk dealers was held void as class legislation.<sup>28</sup> So, too, where

25. J. N. Pomeroy, *Constitutional Law*, Hurd and Houghton, 1868.

26. *Lawton v. Steele* (1894), 152 U.S. 136, 14 S. Ct. 499, 38 L. Ed. 338. *Jacobson v. Massachusetts* (1905), 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. *Zucht v. King* (1922), 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194. *Buck v. Bell* (1927), 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000. See Chapter XIV, on Vaccination.

27. *Yick Wo v. Hopkins* (1886), 118 U.S. 366, 6 S. Ct. 1064, 30 L. Ed. 220.

28. *Read v. Graham* (1907), 31 Ky. L.R. 569, 102 S.W. 860. *Mobile v. Orr* (1913), 181 Ala. 308, 61 So. 920, 45 L.R.A. (N.S.) 575. In *State ex rel F. W. Woolworth Co. v. State Board of Health* (1941), 237 Wis. 638, 298 N.W. 183, a state law requiring the partitioning off of kitchens in new restaurants, but providing for exemption of existing business, was held void as class legislation.

a board of health required Chinese to be vaccinated against plague, regardless of previous residence or contact with the disease, and did not make the same requirements for other persons, the regulation was unconstitutional as class legislation.<sup>29</sup>

A certain amount of reasonable classification is, however, allowable, provided that the law operates equally and without discrimination upon all persons within the classification. Thus, sellers or vendors of foodstuffs may be classified for purposes of regulation as dairymen, butchers, bakers, restaurant keepers, etc., and different standards of operation and varying inspection fees may be applied to each. There may be, furthermore, reasonable classification within a group. Milk dealers, for example, may be classified as those producing raw market milk, certified milk, pasteurized milk, or milk for conversion into dairy products, such as butter, cheese, and ice cream, with a different set of reasonable regulations in force equally for those within each of these proper classifications.<sup>30</sup>

### *Regulation of Professions and Occupations*

Whenever the conduct of a business, occupation, or profession is a matter of public interest and concern and the manner of its operation may affect the public health or general welfare, the State under its police power may properly require that all persons entering, undertaking, or practicing such business or profession shall possess certain necessary and desirable educational, technical, and moral qualifications. The State may likewise impose reasonable and uniform standards and specifications for the conduct of various occupations and callings, and may require that all persons engaged in them shall secure from the State, or its political subdivisions, appropriate licenses or permits, which the State, acting through proper administrative agencies, may issue, withhold, or revoke at its discretion.

In accordance with this power, the State may regulate and license the practice of medicine, osteopathy, chiropractic, dentistry, veterinary medicine, nursing, physiotherapy, chiropody (podiatry), midwifery, optometry, optics, pharmacy, dental hygiene, laboratory practice, engineering, embalming, plumbing, and any other branch of the healing art or any professional, sub-professional, or occupational group, the activities of which may in any way affect the public health. A requirement that one healing group, such as chiropractic, be licensed

29. *Wong Wat v. Williamson* (1900), 103 F. 1.

30. *St. John v. New York* (1906), 201 U.S. 633, 26 S. Ct. 554, 50 L. Ed. 896. *Stephens v. Oklahoma* (1931), 150 Okla. 199, 1 P. (2d) 367. *Coleman v. Little Rock* (1935), 191 Ark. 844, 88 S.W. (2d) 58.

by a State Board of Medical Examiners before being permitted to practice the healing art, is not class legislation.<sup>31</sup>

The right of the States to prescribe reasonable standards for, and to control the practice of, medicine, osteopathy, dentistry, and other branches of the healing art has been upheld as constitutional by the United States Supreme Court in a number of decisions.<sup>32</sup> The right of the State to regulate other occupations, callings, and businesses in the interests of the general welfare likewise has been sustained by this court.<sup>33</sup> Refusal of the State to issue a license, for proper cause, is not a deprivation of liberty or property without due process of law. When such a license is refused or revoked, the person so denied may have recourse to an action in court to compel its issuance, but the courts will seldom disturb such administrative decisions when they are sanctioned by law and are undertaken in good faith. A license is not a contract, but permits the enjoyment of a privilege granted by the State.

### *Freedom of Contract*

Freedom of contract is one of the rights guaranteed to individuals by the Federal Constitution, but it is not an absolute right and must yield whenever the public health requires. Freedom of contract, said the Supreme Judicial Court of Massachusetts, "is subject to reasonable

31. *Jackson v. State* (1924), 19 Ala. App. 633, 99 So. 826.

32. *Dent v. West Virginia* (1889), 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623. *Hawker v. New York* (1897), 170 U.S. 189, 18 S. Ct. 573, 42 L. Ed. 1002. *Reetz v. Michigan* (1903), 188 U.S. 505, 23 S. Ct. 390, 47 L. Ed. 563. *Watson v. Maryland* (1910), 218 U.S. 73, 30 S. Ct. 644, 54 L. Ed. 987. *Collins v. Texas* (1911), 223 U.S. 288, 32 S. Ct. 286, 56 L. Ed. 439. *Crane v. Johnson* (1916), 242 U.S. 339, 37 S. Ct. 176, 61 L. Ed. 348, Ann. Cas. 1917 B 796. *State ex rel. Hurwitz v. North* (1926), 271 U.S. 40, 46 S. Ct. 384, 70 L. Ed. 406. *Graves v. Minnesota* (1926), 272 U.S. 425, 47 S. Ct. 122, 71 L. Ed. 331. *Lambert v. Yellowley* (1926), 272 U.S. 581, 47 S. Ct. 210, 71 L. Ed. 422, 49 A.L.R. 575. *Hayman v. City of Galveston* (1927), 273 U.S. 414, 47 S. Ct. 363, 71 L. Ed. 714. *Semler v. Ore. State Bd. Dental Exam.* (1935), 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086. *Polhemus v. Am. Med. Assn.* (1944), 145 F. (2d) 357. Sustaining a State Basic Science Law, as applied to a naturopath. See also *Ellestad v. Swayze* (1942), 15 Wash. (2d) 281, 130 P. (2d) 349.

33. *Fischer v. St. Louis* (1904), 194 U.S. 361, 24 S. Ct. 673, 48 L. Ed. 1018 (milk). *Leiberman v. Van de Carr* (1905), 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305, 108 A.S.R. 781 (milk). *Schmidinger v. Chicago* (1913), 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364 (bread). *Baccus v. Louisiana* (1914), 232 U.S. 334, 34 S. Ct. 439, 58 L. Ed. 627 (itinerant drug vendors). *Nebbia v. New York* (1934), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 563, 89 A.L.R. 1469 (price of milk). *Roschen v. Ward* (1929), 279 U.S. 337, 49 S. Ct. 336, 73 L. Ed. 722 (sale of spectacles). *Bourjois v. Chapman* (1937), 301 U.S. 183, 57 S. Ct. 691, 81 L. Ed. 1027 (cosmetics).



legislative regulation in the interest of the public health, safety, and morals and, in a sense not resting merely on expediency, the public welfare. Valid statutes imposing limitations upon freedom of contract find numerous illustrations in our own decisions and those of the United States Supreme Court.<sup>34</sup>

In the *Slaughter House Cases*,<sup>35</sup> decided in 1872, the United States Supreme Court upheld a state law regulating slaughterhouses as a public health measure, even though the law granted one company the exclusive right to maintain such establishments. Although this was an infringement of the freedom of contract of other persons, the law was sustained as valid under the police power. Again, in 1878, this court ruled that a municipal ordinance regarding the abatement of nuisances was superior in effect to a charter granting certain privileges to a corporation.<sup>36</sup> It was declared by the United States Supreme Court in another case<sup>37</sup> that, "No legislature can bargain away the public health or the public morals."

In 1904, however, the Supreme Court of the United States held void a municipal ordinance fixing limits of an area in which gas works might be erected, such action being considered as beyond the scope of the police power.<sup>38</sup> The liberality with which the courts will construe proper health regulation was, however, expressed by the court in these words:

It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of the courts except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community.

Zoning laws usually represent a constitutional exercise of the police power, but health laws usually are not subordinate to zoning laws.

#### *Freedom of Religion*

In the First Amendment to the Federal Constitution, Congress is prohibited from making any law respecting an establishment of reli-

34. *Commonwealth v. Boston Transcript Co.* (1924), 249 Mass. 477, 144 N.E. 400.

35. *Slaughter House Cases* (1872), 16 Wall. 36, 21 L. Ed. 394.

36. *Northwestern Fertilizing Co. v. Hyde Park* (1878), 97 U.S. 659, 24 L. Ed. 1036.

37. *Stone v. Mississippi* (1879), 101 U.S. 814, 25 L. Ed. 1079.

38. *Dobbins v. Los Angeles* (1904), 195 U.S. 223, 25 S. Ct. 18, 49 L. Ed. 169.

gion, or prohibiting the free exercise thereof. The Federal Constitution nowhere directly places a similar limitation upon the States, but state constitutions generally do so.

The constitutional guarantee of religious freedom does not sanction the exemption of any person from the reasonable operation of public health laws and procedures. Religious beliefs of minority groups which happen to conflict with or differ from the sciences of medicine and public health cannot be permitted to interfere with the welfare of the great majority of the people, who recognize and approve the established principles and precepts of medical and sanitary science. Religious belief is never an excuse for an unlawful act.

Conflicts between the right of religious freedom and the exercise of the police power usually arise in cases of persons who believe in or practice some form of faith healing. Christian Science, for example, is recognized by law in some States and its adherents are permitted to practice as healers, but they are always subject to public health laws, either by legislative enactment or under the general authority of the police power of the State.<sup>39</sup> They are also restricted to the healing use of prayer and may not employ any other means of healing.

On the occasions when public health laws or procedures have been challenged on the grounds of interference with the right of religious freedom, almost invariably they have been upheld by the courts. Thus, requirements that physical examinations of school children shall be made at certain times by licensed physicians have been sustained as not violating the religious scruples or conscientious objections of Christian Scientists,<sup>40</sup> and physical examinations as prerequisite to the issuance of marriage licenses have likewise been upheld.<sup>41</sup> The conviction of faith healers who have sought to cure or treat cancer and other dangerous diseases by the use of medicines and other physical measures has likewise been upheld on the grounds that it was a violation of medical practice acts.<sup>42</sup> Where a city by charter amendment provided a system of health service for city employees and teachers, but exempted from it persons believing in the healing power

39. *People v. Cole* (1916), 219 N.Y. 98, 113 N.E. 790, L.R.A. 1917 C 816.  
*People v. Vogelsang* (1917), 221 N.Y. 290, 116 N.E. 977.

40. *Streich v. Board of Education* (1914), 34 S.D. 169, 147 N.W. 779, L.R.A. 1915 A 632, Ann. Cas. 1917 A 760. *Stone v. Probst* (1925), 165 Minn. 361, 206 N.W. 642.

41. *Peterson v. Widule* (1914), 157 Wis. 641, 147 N.W. 966, 52 L.R.A. (N.S.) 778, Ann. Cas. 1916 B 1060.

42. *State v. Verbon* (1932), 167 Wash. 140, 8 P. (2d) 1083. See *Regulation of the Practice of Medicine*, Chicago, American Medical Association, 1915.

of prayer, it was held by the court that this was not an improper or invalid classification, even though the persons involved in this exemption were required to reveal their religious beliefs.<sup>43</sup>

### *Hours of Labor and Minimum Wages*

Statutes fixing or restricting the hours of labor of industrial employees are valid under the police power of the States. In 1898 the United States Supreme Court sustained as constitutional and as a proper health measure a state law restricting the labor of miners to eight hours a day,<sup>44</sup> and several years later this court upheld a state law creating an eight-hour day for state and municipal employees.<sup>45</sup> In 1905, however, a state law limiting the working hours of bakers was held unconstitutional by a divided court, as exceeding the limits of the police power and as a violation of freedom of contract.<sup>46</sup>

This decision has been virtually overruled by subsequent opinions of the United States Supreme Court, which have upheld state laws regulating hours of labor for women,<sup>47</sup> and hours of labor generally.<sup>48</sup>

State laws fixing minimum wages have presented a more difficult legal problem. In 1923 the United States Supreme Court held that an act of Congress setting minimum wages for women in the District of Columbia was unconstitutional as a violation of the Fifth Amendment to the Federal Constitution,<sup>49</sup> and in 1936 a state law fixing

43. *Butterworth v. Boyd* (1938), 12 Cal. (2d) 140, 82 P. (2d) 434, 126 A.L.R. 838. *People ex rel State Medical Examiners v. Pacific Health Corp.* (1938), 12 Cal. (2d) 156, 82 P. (2d) 429, 119 A.L.R. 1284.

44. *Holden v. Hardy* (1898), 169 U.S. 366, 18 S. Ct. 383, 42 L. Ed. 780.

45. *Atkin v. Kansas* (1903), 191 U.S. 207, 24 S. Ct. 124, 48 L. Ed. 148.

46. *Lockner v. New York* (1905), 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133.

47. *Muller v. Oregon* (1908), 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 597. *Riley v. Massachusetts* (1914), 232 U.S. 671, 34 S. Ct. 469, 58 L. Ed. 788. *Miller v. Wilson* (1915), 236 U.S. 373, 35 S. Ct. 342, 59 L. Ed. 628, L.R.A. 1915 F 829. *Bosley v. McLaughlin* (1915), 236 U.S. 385, 35 S. Ct. 345, 59 L. Ed. 632. *Wilson v. New* (1917), 243 U.S. 332, 37 S. Ct. 298, 61 L. Ed. 755, L.R.A. 1917 E 938, Ann. Cas. 1918 A 1024. *Radice v. New York* (1924), 264 U.S. 292, 44 S. Ct. 325, 68 L. Ed. 690.

48. *Bunting v. Oregon* (1917), 243 U.S. 426, 37 S. Ct. 435, 61 L. Ed. 830, Ann. Cas. 1918 A 1043. *Stettler v. O'Hara* (1917), 243 U.S. 629, 37 S. Ct. 475, 61 L. Ed. 937; affirm. 69 Ore. 519, 139 P. 743.

49. *Adkins v. Children's Hospital* (1923), 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785, 24 A.L.R. 1238.

minimum wages for women was declared to be invalid.<sup>50</sup> Both these cases were, however, definitely overruled by the United States Supreme Court in 1937 in a notable decision upholding a state minimum wage law as a valid exercise of the police power in the interests of the health and welfare of women and minors.<sup>51</sup> Four of the nine justices dissented from the majority opinion of Chief Justice Hughes in this case.

State workmen's compensation laws were upheld by the United States Supreme Court in 1916 and subsequent years.<sup>52</sup>

### *Eugenical Sterilization Laws*

Since 1907 many of the States have adopted laws for the sexual sterilization of certain classes of degenerate persons, such as the feeble-minded, the criminally insane, and mental defectives. Many of the earlier statutes, including the first of them, the Indiana law of 1907, were declared to be unconstitutional by state courts, chiefly on the ground that they inflicted cruel and unusual punishment, contrary to the provisions of state constitutions.<sup>53</sup> There is a similar provision regarding cruel and unusual punishment in the Eighth Amendment to the Federal Constitution, but it applies only to the Federal Government. Some of these laws were also held to be unconstitutional because they denied due process of law.

When later statutes of this nature were so framed as to avoid the defects of class legislation, and were predicated upon the police power of the States, not as punitive measures but as necessary for the general

50. *Morehead v. New York ex rel. Ttpaldo* (1936), 298 U.S. 587, 56 S. Ct. 918, 80 L. Ed. 1347, 103 A.L.R. 1445.

51. *West Coast Hotel Co. v. Parrish* (1937), 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330.

52. *New York Central R. Co. v. White* (1916), 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L.R.A. 1917 D 1, Ann. Cas. 1917 D 629. *Hawkins v. Bleakly* (1916), 243 U.S. 210, 37 S. Ct. 255, 61 L. Ed. 678. *Mountain Timber Co. v. Washington* (1916), 243 U.S. 219, 37 S. Ct. 250, 61 L. Ed. 685, Ann. Cas. 1917 D 642, 13 N.C.C.A. 927. *Middleton v. Texas Power and Light Co.* (1918), 249 U.S. 152. *Arizona Employees Liability Cases* (1919), 250 U.S. 400, 39 S. Ct. 553, 63 L. Ed. 1058, 6 A.L.R. 1537.

53. H. H. Laughlin, *Eugenical Sterilization*, New York, American Eugenics Society, 1926. H. H. Laughlin, Further studies on the historical and legal development of eugenical sterilization in the United States, *Proceedings of the American Association on Mental Deficiency* 60:96, 1936. J. E. Hughes, *Eugenic Sterilization in the United States*, Supplement No. 162 to *Public Health Reports*, Washington, Federal Security Agency, 1940.

welfare, they have been upheld by the United States Supreme Court<sup>54</sup> and by many state courts<sup>55</sup> as a constitutional exercise of the police power and as not denying due process of law. In some instances laws have been held to be invalid for failure to provide notice and hearing for the person whom it was proposed to sterilize.<sup>56</sup> It is said that about 20,000 persons were operated upon under the state sterilization laws in force between 1907 and 1938.

"We have seen more than once," said Mr. Justice Holmes in the *Buck v. Bell* case decided by the United States Supreme Court, "that the public welfare may call upon its best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring of crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough."

A state law requiring sterilization of habitual criminals, or persons convicted two or more times for crimes amounting to felonies involving moral turpitude, was, however, held to be invalid by the United States Supreme Court in 1942, on the grounds that it was class legislation because the law applied to some crimes, or felonies, but did not apply to others.<sup>57</sup> In a concurring opinion Chief Justice Stone called attention to the fact that the law in question was also defective for want of due process.

"While the state may protect itself from the demonstrably inheritable tendencies of the individual which are injurious to society," said the Chief Justice, "the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him, before he is condemned to an

54. *Buck v. Bell* (1927), 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000.

55. *State v. Troutman* (1931), 50 Id. 673, 299 P. 668. *State ex rel. Smith v. Schaffer* (1928), 126 Kan. 607, 270 P. 604. *Smith v. Command* (1925), 231 Mich. 409, 204 N.W. 140. *Re Salloum* (1926), 236 Mich. 478. *In re Clayton* (1931), 120 Neb. 680, 234 N.W. 630. *In re Main* (1933), 162 Okla. 65, 19 P. (2d) 153. *Davis v. Walton* (1929), 74 Utah 80, 276 P. 921.

56. *Brewer v. Valk* (1933), 204 N.C. 186, 167 S.E. 638. *In re Opinion of the Justices* (1935), 230 Ala. 543, 162 So. 123. *In re Hendrickson* (1942), 12 Wash. (2d) 600, 123 P. (2d) 322.

57. *Skinner v. Oklahoma* (1942), 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655.

irreparable injury in his person, some opportunity to show that he is without such inheritable tendencies. The state is called on to sacrifice no permissible end when it is required to reach its objective by a reasonable and just procedure adequate to safeguard rights of the individual which concededly the Constitution protects."

*State Versus State*

A citizen of one State may not, under the terms of the Eleventh Amendment to the Federal Constitution, bring suit in law or equity against another State. One State may sue another, bringing an original action in the United States Supreme Court, and a citizen may sue the administrative officers of a State in the courts of the State and sometimes in the federal courts.

On a number of occasions one State has brought action against another State for infringement of the public health rights of its citizens, usually in connection with stream pollution, atmospheric pollution, other nuisances, or because of the danger of introduction of an epidemic disease.

While recognizing the principle that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them," the United States Supreme Court usually has refused to take drastic action and has suggested that cooperation and arbitration are much to be preferred in such cases to court action.<sup>58</sup> In one instance an injunction was granted to restrain a manufacturing plant in one State from discharging noxious fumes to the detriment of the health of the people of another State.<sup>59</sup> The United States Supreme Court will not interfere in purely political conflicts between the States.

58. *Louisiana v. Texas* (1900), 176 U.S. 1, 20 S. Ct. 251, 44 L. Ed. 347. *Missouri v. Illinois* (1901), 180 U.S. 208, 21 S. Ct. 331, 45 L. Ed. 497. *New York v. New Jersey* (1921), 256 U.S. 296, 41 S. Ct. 492, 65 L. Ed. 937. *Sanitary District of Chicago v. U.S.* (1925), 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352. *New Jersey v. City of New York* (1931), 288 U.S. 473, 51 S. Ct. 519, 75 L. Ed. 1176, 290 U.S. 237, 54 S. Ct. 136, 78 L. Ed. 291.

59. *Georgia v. Tennessee Copper Co.* (1907), 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038.

## CHAPTER IV

### STATE HEALTH ORGANIZATION

THE success or failure of any government," wrote the Governor of New York in 1932, "in the final analysis must be measured by the well-being of its citizens. Nothing can be more important to a state than its public health; the state's paramount concern should be the health of its people."

With these words the Honorable Franklin D. Roosevelt began a fifteen-page foreword to a comprehensive report on the administrative and legal aspects of public health in New York State.<sup>1</sup> This report, submitted to the Governor on December 31, 1931, had been prepared by a distinguished health commission under the chairmanship of Dr. Livingston Farrand. It contained numerous recommendations for improvements in local health administration, many of which have since been adopted.

The doctrine that the health of the people is the paramount concern of the State is now widely recognized and generally accepted. In its administrative application, however, there has been a decided lack of uniformity in public health legislation and in public health practice in the forty-eight sovereign States of the United States.<sup>2</sup> There have been, likewise, marked differences in the extent and the efficiency of public health administration in the States.

More uniform have been the decisions of the courts on public health matters. Despite some divergencies in these judicial opinions, the courts have been liberal in upholding all reasonable public health measures. Not only have the courts followed intelligent precedents, but they have kept pace reasonably well with the advance of science in its application to public health procedures.

#### *State Health Departments<sup>3</sup>*

Since the creation of the first state board of health in Massachusetts in 1869, every State and each of the nine Canadian provinces has

1. *Public Health in New York State*, Report of the New York State Health Commission, Albany, State Department of Health, 1932. A report of a similar nature was submitted in Massachusetts in 1936: *Report of the Special Commission to Study and Investigate Public Health Laws and Policies*, December 2, 1936 (Massachusetts House Document No. 1200).

2. J. A. Tobey, Public health legislation, *Am. J. Pub. Health*, 27:786, August 1937.

3. *Health Departments of States and Provinces of the United States and Canada*, (Continued on next page.)

provided by law for the organization of a state or provincial health department. Historically, local health organization preceded state and provincial health organization in North America by more than half a century. The central control of state health activities is, however, conceded to be a desirable administrative procedure, although the extent to which such control may be exercised varies in the several States. In some it is virtually complete, while in others the power over the public health has been almost entirely delegated to local authorities.

✓The power of state legislatures to provide by law for state health departments having state-wide jurisdiction over the health of the people has been upheld by the courts on numerous occasions.<sup>4</sup> "It is now settled law," said the Supreme Court of Ohio in a leading case,<sup>5</sup> "that the legislature of the State possesses plenary power to deal with [health] so long as it does not contravene the Constitution of the United States or infringe upon any right granted or secured thereby, or is not in direct conflict with any of the provisions of the constitution of this State and is not exercised in such an arbitrary and oppressive manner as to justify the interference of the courts to prevent wrong and oppression."

The state health department usually consists of a state board of health and an executive officer, who is known as the state health officer, state director of health or public health, state commissioner of health or public health or health commissioner, secretary or secretary and executive officer of the state board of health, or superintendent.<sup>6</sup>

Instead of a state board of health, a public health council or board

Public Health Bulletin No. 184 (revised), U.S. Public Health Service, 1932. *Distribution of Health Services in the Structure of State Government*, Public Health Bulletin No. 184, 3d ed., U.S. Public Health Service, 1943.

4. *Sawyer v. State Board of Health* (1877), 125 Mass. 182. *Wilson v. Chicago Sanitary District* (1890), 133 Ill. 443, 27 N.E. 203. *Keefe v. Union* (1903), 76 Conn. 160, 56 A. 571. *Munk v. Frink* (1905), 75 Neb. 172, 106 N.W. 425. *State Board of Health v. St. Johnsbury* (1909), 82 Vt. 276, 73 A. 58, 23 L.R.A. (N.S.) 766, 18 Ann. Cas. 496. *State v. Morse* (1911), 84 Vt. 387, 80 A. 189, 34 L.R.A. (N.S.) 190, Ann. Cas. 1913 B 218. *Shelby v. Cleveland Mill* (1911), 155 N.C. 196, 71 S.E. 218. *State v. Normand* (1913), 76 N.H. 541, 85 A. 899, Ann. Cas. 1913 E. 996. *Koeffler v. State* (1914), 157 Wis. 434, 147 N.W. 639. *State v. King County Superior Court* (1918), 103 Wash. 409, 174 P. 973.

5. *State Board of Health v. City of Greenville* (1912), 86 Oh. St. 1, 98 N.E. 1019, Ann. Cas. 1913 D 52. *Board of Health of City of Canton v. State* (1931), 40 Oh. App. 77, 178 N.E. 215.

6. *Directories of State and Insular Health Authorities*, issued annually since 1912 (except 1932) by the United States Public Health Service.



of public health advisors has been created in a number of States (Connecticut, Illinois, Maine, Massachusetts, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, and West Virginia). The functions of such a council or board are mainly advisory, although it may also be vested with code-making powers and sometimes with other duties. In several States and Territories (Idaho, Nebraska, Oklahoma, Alaska, and the Virgin Islands) there is neither a board of health nor a public health council, all powers of the state health department being administered by the health officer.<sup>7</sup> ✓

### *State Boards of Health*

✓ The state board of health is usually appointed by the Governor, its members, varying in number from three to fourteen, generally being appointed from different political parties for overlapping terms of from three to five years, although in some instances all terms expire simultaneously. In a few States there are ex-officio members, such as the Governor, Attorney General, Comptroller General, and Secretary of State. The state health officer sometimes serves as president or chairman of the board, sometimes as secretary, and sometimes merely as a member. In many States he is not a member of the board of health, but usually meets with it.

In two States, Alabama and South Carolina, the board of health is composed of the state medical society, which selects a small committee to act as the state board of health; in South Carolina a pharmacist nominated by the state pharmaceutical association is also appointed to the board by the Governor. In other States, the medical society often nominates medical members for appointment to the board.

✓ The qualifications of members of the state boards of health vary greatly in the different States. In most instances, the medical profession must be represented, and in a number of States all members of the board must be licensed physicians who have had from five to ten years' experience in the practice of medicine. Other professions which are often required to be represented on state boards of health include ✓ those of dentistry, pharmacy, osteopathy, sanitary or civil engineering, law, and education. In some States it is required that one or more women shall be appointed to the board, and some provide that at least one member shall be a layman. The members usually serve without compensation, although allowed necessary expenses.

While no standards for state boards of health have been laid down

7. The term "state health officer" will be used to designate the executive head of the state health department.

by any authoritative body, it seems to be the consensus among leaders in the public health movement that an ideal state board of health or public health council would consist of from five to seven members, including one public health engineer, one lawyer, one woman or business man, one dentist, and from one to three experienced physicians. The state health officer, a physician, would serve in an ex-officio capacity on such a board. The interest and ability of the individuals who serve on any official board are, however, more important than what they may represent.

Adequate representation on a board of health of the medical profession, a group primarily concerned with the prevention and control of disease, is eminently desirable, but delegation of the supervision of state health work to an extra-governmental body such as a state medical society has been severely criticized. On this subject Dr. Charles V. Chapin has written:

As neither the people nor their representatives have a voice in the selection of the censors [of the medical society] or in the management of medical associations we have a form of organization which does not commend itself to many persons outside of the State. It is dangerous to delegate so important a function and there is no evidence that it can be as well performed by a medical society as by a department of the state government as ordinarily established.<sup>8</sup>

### *The State Health Officer*

The executive officer of the state health department is appointed by the Governor in about half of the States, and by the state board of health in the remainder. He is generally required to be a licensed physician who has had a certain number of years of experience in the practice of medicine. In many States, but not in all, he is also required to be versed or skilled in sanitary science and the public health. In a few States there is no legal requirement that the state health officer should be a physician, but it is stated in the law that he must be a qualified sanitarian; in several States no legal qualifications of any kind are given for this officer. In 1946 all the state health officers were physicians possessing the degree of M.D. With the exception of a relatively few nonmedical sanitarians who have served as state health officers, this has always been the case.

8. C. V. Chapin, *A Report on State Public Health Work*, Chicago, American Medical Association, 1915. The system of appointment of the state board of health of Alabama by the state medical association was, however, upheld by the Supreme Court of that State in 1920 in the case of *Parke v. Bradley* (1920), 204 Ala. 455, 86 So. 28.

The state health officer is the executive of the state health department. His term of office is generally fixed by law, and may be changed by the legislature at will.<sup>9</sup> He is usually required to devote full time to his duties; his compensation is customarily fixed by the statutes, and may also be changed at will by the legislature.<sup>10</sup> He may be removed by the appointing authority, but as a rule only after notice and a hearing.

### *Recognition by the Federal Government*

State and local health departments have been recognized in acts of Congress from early times. Although Congress had passed a law in 1794 (1 Stat. 353) providing that when unusual conditions of disease existed at the seat of government Congress might meet elsewhere, the first real health law adopted by this body was an act of 1796 (1 Stat. 474) providing for federal cooperation with the States in the enforcement of the state quarantine laws. There were subsequent acts of Congress to the same general effect in 1799 (1 Stat. 619), 1832 (4 Stat. 577), and 1866 (14 Stat. 357). The national quarantine act of 1878 (20 Stat. 37) expressly stipulated that rules and regulations made for the enforcement of the law by the Marine Hospital Service must not "conflict with or impair any sanitary or quarantine laws or regulations of any state or municipal authorities."

In the act of Congress of July 1, 1902 (32 Stat. 712), enlarging the scope of the Marine Hospital Service and changing its name to Public Health and Marine Hospital Service, the Surgeon General of the Service was required to call an annual conference of the health authorities of the States, Territories, and the District of Columbia, and special conferences whenever "the interests of the public health would be promoted." He was also required to call a special conference at the request of not less than five state or territorial boards of health, quarantine authorities, or state health officers. Such annual conferences of state health officers have been held regularly since that time.

### *Powers of State Health Departments*

The legal powers and duties of state health departments are only those which have been expressly conferred by, or may be reasonably implied from, the acts of the legislature. These powers vary greatly in the different States. It is, of course, the function and duty of a

9. *State v. Matassarini* (1923), 114 Kan. 244, 217 P. 930. *State ex rel. Saint v. Dowling* (1928), 167 La. 907, 120 So. 593.

10. *Hard v. State ex rel. Baker* (1934), 228 Ala. 517, 154 So. 77. See Chapter VI, on Health Officers and Employees.

state legislature as part of the police power to make all laws that are necessary for the protection of the public health, but legislatures have had widely variant ideas as to how to exercise this power. In some States, the legislature has conferred upon the state health department almost plenary powers, while in others most of the public health authority has been delegated to municipal and other local health departments and the state health department has been relegated largely to the position of advisor. Since diseases operate without regard to fixed boundaries and often involve all or large parts of a State, considerable authority over the administrative control of disease must be given to every state health department.

The powers of a state health department do not extend beyond the boundaries of the State, although necessary and appropriate reciprocal agreements in public health matters may be made with other States.<sup>11</sup>

The legal powers of state health departments may, in general, be grouped under these five headings:

1. Quasi-legislative or code-making power
2. Quasi-judicial powers
3. Executive and administrative duties
4. Investigative functions
5. Educational functions

### *The Code-Making Power*

While it is a truism that under our form of government only the legislature may make the laws, and that this power cannot be delegated,<sup>12</sup> the legislature may empower administrative agencies such as health departments to make reasonable rules and regulations to carry out the intent and purposes of legislation.<sup>13</sup> When properly adopted

11. *La Forge v. State Board of Health* (1941), 237 Wis. 597, 296 N.W. 93.

12. *State v. Burdge* (1897), 95 Wis. 390, 70 N.W. 347, 60 A.S.R. 123, 37 L.R.A. 157.

13. *California Reduction Co. v. Sanitary Reduction Works* (1905), 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204. *Hurst v. Warner* (1894), 102 Mich. 238, 60 N.W. 440, 47 A.S.R. 525, 26 L.R.A. 484. *State v. Beacham* (1899), 125 N.C. 652, 34 S.E. 447. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 80 A.S.R. 195, 50 L.R.A. 64. *Isenhour v. State* (1901), 157 Ind. 619, 62 N.E. 40, 87 A.S.R. 228. *Lee v. Marsh* (1911), 230 Pa. 351, 79 A. 564. *State v. Morse* (1911), 84 Vt. 387, 80 A. 189, 34 L.R.A. (N.S.) 190, Ann. Cas. 1913 B 218. *State v. Snyder* (1912), 131 La. 145, 59 So. 44. *Hawkins v. Hoyer* (1914), 108 Miss. 282, 66 So. 741. *Horn v. State* (1920), 17 Ala. App. 419, 84 So. 883. *Miller v. Johnson* (1921), 110 Kan. 135, 202 P. 619. *Lawrence v. Briry* (1921), 239 Mass. 424, 132 N.E. 174. *Shilkett v. State* (Okla. 1925), 232 P. 127. *State v. Wood* (1927), 51 S.D. 485, 215 N.W. 487, 54 A.L.R. 719. *State v. City of Van Wert* (1933), 126 Oh. St. 78, 184 N.E. 12.

as authorized by law, such rules and regulations will have the force and effect of law, and must be obeyed by all persons affected by them.<sup>14</sup> Only the legislature, and not the state health department, can prescribe a penalty for the violation of such rules and regulations.<sup>15</sup>

This quasi-legislative, or code-making, power has been conferred by law upon many of the state boards of health and public health councils. It can be exercised only when it is conferred by the statutes<sup>16</sup> or may be properly implied from them. Sometimes broad phraseology in a public health law, such as a statement that the state board of health may adopt all necessary measures for the prevention of disease, has been construed as giving quasi-legislative powers. Occasionally the law simply authorizes the board of health to make necessary regulations for "the preservation of the public health," but the statutes may enumerate in some detail the subjects that may be regulated, such as the control of communicable diseases, the suppression of nuisances, the supervision of milk and food supplies, the control of water supplies and sewage, and the licensing of trades and occupations.

A law giving a state board of health authority to promulgate rules and regulations does not authorize it to delegate this power to still another board.<sup>17</sup> The rules and regulations of administrative boards must always be reasonable and carefully drafted,<sup>18</sup> since they will be more rigidly construed by the courts than legislation. While subject to review by the courts, they will not be reviewed unless they are arbitrary and capricious,<sup>19</sup> and they will not be held to be invalid unless such regulations are clearly unconstitutional and/or beyond the scope of the authority of the board.<sup>20</sup>

14. *Polinsky v. People* (1878), 73 N. Y. 65. *Cartwright v. Board of Health of Cohoes* (1901), 165 N.Y. 631, 59 N.E. 1120. *Belmont v. New England Brick Co.* (1906), 190 Mass. 442, 77 N.E. 504. *State Board of Health v. Suslin* (1913), 132 La. 569, 61 So. 661.

15. *Pierce v. Doolittle* (1906), 130 Ia. 333, 106 N.W. 751, 6 L.R.A. (N.S.) 143. *State v. Snyder* (1912), 131 La. 145, 59 So. 44. *State v. Normand* (1913), 76 N.H. 541, 85 A. 899, Ann. Cas. 1913 E 996. *People v. Blanchard* (1942), 288 N.Y. 145, 42 N.E. (2d) 7.

16. *State v. Goss* (1932), 79 Utah 559, 11 P. (2d) 340.

17. *Commonwealth v. Staples* (1906), 191 Mass. 384, 77 N.E. 712.

18. See Chapter XX, on Health Legislation.

19. *Community Chautauquas v. Caverly* (1917), 244 F. 893. *Ambruster v. Mellon* (1930), 41 F. (2d) 430, 59 App. D.C. 341.

20. *American Bakeries Co. v. Louisiana* (1937), 186 La. 433, 172 So. 518. *Wheeler v. River Falls Power Co.* (1927), 215 Ala. 655, 11 So. 907. See *Borough of Florham Park v. Department of Health* (1929), 7 N.J. Misc. 549. 146 A. 354, holding that a rule of the state department of health cannot alter the common law.

When rules and regulations are adopted by state health departments, they must be made known to the people, and particularly to those who are most directly affected. Such regulations should be published in official state journals, in bulletins or magazines issued regularly by the health department, and in the newspapers, and they should also be issued in pamphlet form for general distribution. The people are entitled to be apprised definitely and precisely of what is expected of them. The old adage that ignorance of the law is no excuse may still have some general legal significance, but in this day of multiplicity of rules and regulations by administrative as well as by legislative agencies, this adage is at least obsolescent.

### *Quasi-Judicial Powers*

While executive boards and ministerial officers cannot usurp the functions of the courts, they may be given certain quasi-judicial powers. Thus, state boards of health or public health councils often have the power to hold hearings, summoning before them persons who are charged with violations of state health laws and sanitary codes, or who have applied for licenses or permits, or have other business upon which the board may take action under the law. Witnesses may also be summoned to testify at these hearings, which are usually preliminary to action of some kind.

Decisions of state boards of health, arrived at in good faith after suitable notice and a fair hearing, will usually be upheld by the courts.<sup>21</sup> An individual or corporation who feels that his rights have been denied or infringed by the decision or order of a state board of health may always appeal to the courts, unless the state constitution has made the decision of the board final, as it has in one State.<sup>22</sup>

The exact scope of this quasi-judicial power of state boards of health in each State can be ascertained only from the statutes that apply. That the power must be exercised with caution, however, is indicated by a decision of the United States Supreme Court in 1938,<sup>23</sup>

21. *People v. Wilson* (1911), 249 Ill. 195, 94 N.E. 141. *State v. Quattropani* (1926), 99 Vt. 360, 133 A. 352. *Deborah Jewish Consumptive Relief Soc. v. State Board of Health* (1929), 7 N.J. Misc. 779, 147 A. 226. *State v. City of Van Wert* (1933), 126 Oh. St. 78, 184 N.E. 12. *Mintz v. Baldwin* (1933), 289 U.S. 346, 53 S. Ct. 611, 77 L. Ed. 1245.

22. *State v. King County Superior Court* (1918), 103 Wash. 409, 174 P. 973.

23. *Morgan v. U.S.* (1936), 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288. *Morgan v. U.S.* (1938), 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129. See J. P. Chamberlain, N. T. Dowling, and P. R. Hays, *The Judicial Function in Federal Administrative Agencies*, New York. Commonwealth Fund, 1942.

holding invalid an order of the Secretary of Agriculture because of failure to accord a fair hearing to those who were affected by the order. In delivering the opinion of the court in this case, Chief Justice Hughes stated that:

The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

These sagacious words are worth framing in the office of every health department.

#### *Administrative Duties*

In their beginnings, state health departments were undoubtedly intended to be mainly advisory bodies, except in those seaboard States where maritime quarantine was an important and often urgent function. The complete responsibility for maritime quarantine was, however, assumed by the Federal Government in 1878.

Since that time, many administrative duties have been handed over to or assumed by the various state health departments. Included among the legal duties are 1) the collection and recording of vital statistics for the State; 2) the prevention and control of the intrastate spread of communicable diseases; 3) the maintenance of public health laboratories; 4) the safeguarding of water and milk supplies and the control of environmental sanitation by means of public health engineering services; 5) the supervision of food supplies and nutrition; 6) the promotion of maternity, infant, child, and school hygiene; 7) public health nursing; 8) industrial hygiene; 9) the licensing of occupations; 10) popular health instruction; 11) the supervision of local health administration; 12) medical and dental services; 13) miscellaneous duties.

Not all these functions are undertaken by all state health departments, although all or practically all these departments are concerned with vital statistics, communicable disease control, sanitary engineering, child hygiene, and public health education. In some States, food and drug control, milk control, school hygiene, industrial hygiene, and the licensing of professional persons are under the jurisdiction of state departments, bureaus, or commissions other than the health depart-

ment. There is, in fact, a wide dispersion of public health functions among multiple agencies in the structure of state governments. Recent surveys have shown that no less than forty-eight separate agencies participate in health work in the different States.<sup>24</sup>

Proper state health functions have been set forth in an official declaration of the American Public Health Association.<sup>25</sup> Since this association is the established professional society of sanitarians and public health workers in North America, its declarations as duly adopted represent the consensus of scientific opinion on such matters. The statement, adopted in 1940, is as follows:

State health functions include at least the following:

1. Study of state health problems and planning for their solution as may be necessary.
2. Coordination and technical supervision of local health activities.
3. Financial aid to local health departments as required.
4. Enactment of regulations dealing with sanitation, disease control, and public health, which have the force of law throughout the state.
5. Establishment and enforcement of minimum standards of performance of work of health departments, particularly in communities receiving state aid for public health.
6. Maintenance of a central laboratory, and where necessary branch laboratories, for the standard functions of diagnostic, sanitary, and chemical examinations; production or procurement of therapeutic and prophylactic preparations, and their free distribution for public health purposes; establishment of standards for the conduct of diagnostic laboratories throughout the state; laboratory research into the causes and means of control of preventable diseases.
7. Collection, tabulation, and publication of vital statistics for each important political or health administrative unit of the state and for the state as a whole.
8. Collection and distribution of information concerning preventable diseases throughout the state.
9. Maintenance of safe quality of water supplies and controlling the character of the disposal of human waste for all communities of the state.
10. Establishment and enforcement of minimum sanitary standards for milk supplies.
11. Provision for services to aid industry in the study and control of health hazards due to occupation.
12. Prescription of qualifications for certain public health personnel.

24. *Distribution of Health Services in the Structure of State Government*, Public Health Bulletin No. 184, 3d ed., U.S. Public Health Service, 1943.

25. *Desirable Minimum Functions and Organization Principles for Health Activities*, American Public Health Association Year Book, 1940-1941, New York.



13. Formulation of plans in cooperation with other appropriate agencies for the prompt mobilization of services to meet the health needs.

The Association further recommends that local authorities should assume the primary responsibility for carrying out this program, because the major part of direct service to people can be most efficiently and economically rendered on a community basis. While public health is a primary responsibility of each local community, it is nevertheless indispensable that authority should be vested in the state health department to make certain for the state as a whole that the health in communities where local control is effective will not be jeopardized by the inertia, incompetence, or neglect of the local government of other communities.

In the Report of the Special Commission to Study and Investigate Public Health Laws and Policies, submitted to the Massachusetts Legislature in 1936, the functions of a state health department were declared to be: 1) an advisory body; 2) a correlating agency with power over intercommunity problems; 3) an agency offering certain specialized direct services; 4) an agency for the establishment of minimal standards for public health work; 5) the dissemination of information; and 6) research.

*Vital Statistics.*<sup>26</sup> In all States there are laws pertaining to vital statistics. In every State except one (Massachusetts), the state health department receives, tabulates, and records reports of all births, deaths, and stillbirths (and sometimes marriages), which are forwarded at regular intervals on standard forms by local registrars of vital statistics, who are sometimes appointed by the state health department, sometimes elected, and sometimes are ex officio, such as local health officers or municipal clerks. In Massachusetts the office of the Secretary of State has charge of vital statistics.

*Control of Communicable Diseases.*<sup>27</sup> Although the prevention and control of infectious and contagious diseases is in the first instance usually the responsibility of local health authorities, the state health department has certain important duties. It receives and studies reports of communicable diseases transmitted regularly by local health officers or sent directly by physicians. In cases of epidemics or emergencies, the state health department may assist local health officials or take charge of the situation. The state health department also conducts epidemiological studies in order to ascertain the cause and reason for the spread of diseases and epidemics. In a few States, the state health department itself has supervision of local quarantine. Special

26. See Chapter VII, on Vital Statistics.

27. See Chapter VIII, on Communicable Diseases.

activities against tuberculosis,<sup>28</sup> venereal diseases,<sup>29</sup> and diseases of unique local significance such as hookworm or pellagra, are undertaken by most state health departments.

*Laboratories.* Public health diagnostic and research laboratories have been maintained by state health departments for more than fifty years. A smallpox vaccine laboratory was established by the Minnesota State Board of Health in 1890, and a state diagnostic laboratory was set up in Rhode Island in 1894. Today every state health department maintains, or has access to, one or more laboratories for public health work. These laboratories provide diagnostic facilities for communicable diseases, and also for the examination of water, sewage, milk, foods, drugs, and sometimes pathological specimens. In some instances, biological products, such as vaccines, serums, and anti-toxins, are manufactured and distributed. Branch laboratories are occasionally located at strategic places in the State, and traveling laboratories are sometimes maintained.<sup>30</sup>

*Public Health Engineering.*<sup>31</sup> Bureaus or divisions of sanitary or public health engineering have been set up in most of the state health departments for the purpose of protecting water and ice supplies; supervising sewage and waste disposal, and for rodent and insect control; inspecting camp grounds, swimming pools, and similar establishments; and safeguarding milk supplies, although this last duty may be vested in some other division of the state health department or of the state government. Shellfish sanitation is usually conducted by public health engineers of the seaboard States.

*Food Supplies.*<sup>32</sup> In about half the States, the control of foods and drugs is a duty of the state health department, while in the remainder it is the duty of the state department of agriculture or some other bureau of the state government. Activities include medical examinations of food handlers, inspections of food establishments, examinations for adulteration, prevention of contamination of foods, enforcement of tuberculin-testing and Bang's disease testing of cattle and milk pasteurization laws, and laboratory analyses.

28. See Chapter IX, on Tuberculosis.

29. See Chapter X, on Venereal Diseases.

30. In a recent case in Florida it was held that licensed naturopaths are entitled to use the facilities of the laboratories of the state board of health. *Turner v. Baltzell* (1940), 144 Fla. 278, 197 So. 783.

31. See Chapter XIII, on Nuisances and Sanitation. G. C. Whipple, *State Sanitation*, Reprint No. 710, U.S. Public Health Service, 1921.

32. See Chapter XII, on Foods, Drugs, and Cosmetics.

*Nutrition.* The advent of World War II directed attention to the nutritional status of the people of the United States. As the result of national studies indicating widespread defects in the American dietary and the need for their correction, state and local nutrition committees were organized in every state, in every instance with health department representation. In accordance with recommendations of the Food and Nutrition Board of the National Research Council and other agencies, bread and flour were enriched with certain vitamins and minerals in compliance with standards promulgated by the Federal Food and Drug Administration in 1941 and 1943. By Food Distribution Order No. 1 of the Federal Food Distribution Administration, effective January 18, 1943, all bread and rolls in the United States were required to be enriched. Early in 1942 a state law requiring the enrichment of bread and flour was adopted in South Carolina, and later that year such a law was passed in Louisiana. Since that time (to 1946) similar legislation has been adopted in nineteen States, in most instances following a uniform bill recommended by the Council of State Governments. These laws are enforced, in general, by the Commissioners of Agriculture in the States.<sup>83</sup>

*Maternal and Child Hygiene.*<sup>84</sup> The first bureau of child health in a state health department was established in New York State in 1914. By 1919 there were similar bureaus in fifteen States. Efforts in behalf of maternal, infant, and child hygiene by state health departments received their greatest stimulus from the act of Congress of 1921 known as the Federal Act for the Promotion of Maternity and Infancy (42 Stat. 135) or "Sheppard-Towner Law," under the terms of which financial grants for this purpose were made to States which matched the federal funds allotted to them. This law was in force for the period from 1922 to 1929. By 1927 all States but one had organized bureaus or divisions of child hygiene in their state health departments. The Federal Social Security Act of 1935 provides for payments to the States for maternal and child health services.

Among state-wide activities carried on by these bureaus are maternity and prenatal work, including the regulation, licensing, and

83. R. M. Wilder and R. R. Williams, *Enrichment of Flour and Bread*, Bulletin No. 110, Washington, National Research Council, 1944. *The Facts About Enrichment of Flour and Bread*, National Research Council, October 1944 and February 1945. See also Chapter XII, on Foods, Drugs, and Cosmetics.

84. See T. Clark and S. D. Collins, *A Synopsis of the Child Hygiene Laws of the Several States, Including School Medical Inspection Laws*, Public Health Bulletin No. 110, U.S. Public Health Service, 1925.

supervision of midwives,<sup>35</sup> preschool hygiene, and school hygiene, although in some States the administration of school hygiene rests with the state department of education or public instruction. The maternal and child hygiene activities also include regulation of lying-in hospitals, orphanages, and other institutions, and the enforcement of laws for the prevention of ophthalmia neonatorum or acute infectious conjunctivitis of infants.

*Public Health Nursing.*<sup>36</sup> Public health nursing is often undertaken in the state health department in connection with maternal and child hygiene activities, although in a number of States there are separate bureaus of public health nursing in the health department. Public health nurses, who are registered nurses having special training in public health work, are employed by state health departments to conduct child health conferences; to organize and conduct classes for mothers, midwives, and teachers; to assist in or supervise school nursing and health education; to aid in establishing and conducting preventive clinics; and otherwise to act as "couriers of the gospel of good health."

*Industrial Hygiene.*<sup>37</sup> Prior to 1936 only five state health departments were concerned with industrial hygiene, or the protection of the health of the worker. Since that time, however, divisions of industrial hygiene or occupational diseases have been created in most state health departments. Activities of this nature are likewise often conducted by other departments of the State, such as the departments of labor or industry, the workmen's compensation commission, the industrial accident board, etc. The duties of such bureaus include investigations of occupational diseases, the abatement by persuasion or by law enforcement of industrial health hazards, and the promotion of industrial hygiene generally. For this purpose, physicians, engineers, and chemists are needed.

*Licensing.* In only a few of the States are the state health departments charged with the licensing of professional or sub-professional

35. *Barresi v. State Commissioner of Health* (1922), 196 N.Y.S. 376, 203 App. Div. 2.

36. J. A. Tobey, State laws on public health nursing, *Pub. Health Nurse*, 22:228, May 1930; a survey made in 1939 showed few changes. M. S. Gardner, *Public Health Nursing*, 3d ed. rev., New York, Macmillan, 1936.

37. See Chapter XVI, on Industrial Hygiene. R. R. Sayers and J. J. Bloomfield, Industrial hygiene activities in the United States, *Am. J. Pub. Health*, 28:1087, November 1936. J. J. Bloomfield and M. F. Peyton, *Evaluation of the Industrial Hygiene Problems of a State*, Public Health Bulletin No. 236, U.S. Public Health Service, 1937.

workers, such as physicians, nurses, midwives, undertakers, etc. This duty is, as a rule, delegated by the State to a special board or commission, or to the state board of regents. There is no logical reason why a state health department should be concerned with the examination and licensing of physicians and nurses, although it may properly issue licenses and permits to and set standards for persons engaged in occupations which may affect the public health, such as laboratory technicians, water works and sewage works operators, dairymen, proprietors of private hospitals and other institutions, camp directors, etc.

*Public Health Education.* The proper instruction of the people in the correct principles of public and personal hygiene is an important obligation of health officials. Such activities may appropriately be undertaken by state health departments and are, in fact, authorized by the statutes in many States. In the absence of specific legislation, this power may be implied from general legislation on public health subjects. In many of the state health departments there are divisions of public health education, which issue bulletins and pamphlets, provide appropriate newspaper publicity, arrange for exhibits, addresses, and radio programs, and distribute motion pictures.

*Cancer.* Activities for the control of cancer are undertaken in most of the States, although specific laws on the subject exist in only about a dozen jurisdictions. As early as 1898 New York enacted a statute for activities against cancer and Massachusetts adopted such a law in 1926. The disease or group of diseases known as cancer are reportable by law or regulation in sixteen States. In addition to study of the incidence of this morbid condition and other research, activities for cancer control include information for physicians and the laity, and stimulation of diagnostic and treatment facilities. A few States maintain divisions or bureaus of cancer control in state health departments, while several have separate state cancer control commissions.<sup>38</sup>

*Miscellaneous Duties.* Among the miscellaneous functions performed by some of the state health departments, usually under the sanction of law, are adult hygiene; mental hygiene, or attempts to improve and alleviate mental disorders and promote mental health; dental hygiene; hospitalization for the tuberculous;<sup>39</sup> housing; preven-

38. J. A. Tobey, *Cancer: What Everyone Should Know About It*, New York, Knopf, 1932. L. A. Scheele, Present status of state cancer control programs, *Pub. Health Rep.* 57:1613-1620, October 23, 1942.

39. See Chapter IX, on Tuberculosis.

tion of blindness and care of the blind; orthopedics and care of crippled children; scientific research which tends to improve the public health; and inspection of state institutions.

*Gifts.* State health departments are often given the power by law to accept, take, and administer any gift, grant, or bequest, the principal or interest of which may be applied to proper public health purposes, subject to any provisions of the general finance laws, or other laws, of the State.

### *Supervision of Local Health Administration*

The amount of control that can be exercised by state health departments over local health officials and local health conditions is governed by the statutes in each State. In some commonwealths this control is extensive, local health officers being appointed by the state health department, or such appointments being subject to the approval of the state health authorities. In other States the state health department has some control over county health officers, but very little legal jurisdiction over municipal health officials, although the department usually can intervene in local affairs in times of emergency, epidemics, or when the health of the people of a considerable part of the State is in jeopardy. In some of the larger cities, such as New York and Baltimore, municipal charters granted by the State have given complete or virtually complete control over the public health of the city to the local health authorities, and the State has practically no jurisdiction over health matters in these municipalities.

Whatever may be the terms of the law, it seems agreed among experts on public health that the state health department should assume leadership in the public health affairs of the State. This department should offer guidance to local authorities at all times, and exert actual control when conditions warrant such action.

### *Health Districts*

In a number of States provision has been made for health districts consisting of groups of counties or other areas. In charge of each district is a district or deputy state health officer, who is appointed by and reports directly to the state health department. He may be assisted in his work by one or more public health nurses, a public health engineer, and other employees. The principal duties of these district health officers are to aid in communicable disease control and environmental sanitation, to make investigations, and to supervise or

guide local health administration, this activity depending upon the scope and extent of the legislative authority.<sup>40</sup>

The State may also provide for so-called sanitary districts, organized chiefly for the purpose of caring for sewage disposal from designated areas, such, for example, as the Chicago Sanitary District.

The creation of such health and sanitary districts by the State has been upheld by the courts as a valid and proper exercise of the police power.<sup>41</sup> In upholding a law providing for general health districts consisting of groups of townships and villages, and municipal health districts consisting of separate cities, the Ohio Supreme Court pointed out that:

The legislature obviously felt that certain sections of the State are so populated as to make it advisable that there should be a series of city health districts, as distinguished from the general health districts for which it provided in other sections, and that the administrative machinery for the purpose of carrying out the law and accomplishing the purposes of the legislation should be somewhat different in the different districts.<sup>42</sup>

40. The duties of district health officers in New York State under the direction of the state commissioner of health are enumerated in the Public Health Law, Sec. 4a, as follows: 1) keep himself informed as to the work of each local health officer within his sanitary district; 2) aid each local health officer within his sanitary district in the performance of his duties, and particularly on the appearance of any contagious disease; 3) assist each local health officer within his sanitary district in making an annual sanitary survey of the territory within his jurisdiction, and in maintaining therein a continuous sanitary supervision; 4) call together the local health officers within his district or any portion of it from time to time for conference; 5) adjust questions of jurisdiction arising between local health officers within his district; 6) study the causes of excessive mortality from any disease in any portion of his district; 7) promote efficient registration of births and deaths; 8) inspect from time to time all labor camps within his district and enforce the regulations of the public health council in relation thereto; 9) inspect from time to time all Indian reservations and enforce all provisions of sanitary code relating thereto; 10) endeavor to enlist the cooperation of all the organizations of physicians within his district in the improvement of the public health therein; 11) promote the information of the general public in all matters pertaining to the public health; 12) act as the representative of the state commissioner of health, and under his direction, in securing the enforcement within his district of the provisions of the public health law and the sanitary code.

41. *People v. Nelson* (1890), 133 Ill. 246, 27 N.E. 217. *Wilson v. Chicago Sanitary District* (1890), 133 Ill. 443, 27 N.E. 203. *Woodvale v. Fruitvale Sanitary District* (1893), 99 Cal. 554, 34 P. 239. *In re Werner* (1900), 129 Cal. 567, 62 P. 97. *Judge v. Berman* (1913), 258 Ill. 246, 101 N.E. 574. *Drysdale v. Prudden* (1928), 195 N.C. 722, 143 S.E. 530. *City of Fort Smith v. Roberts* (1928), 177 Ark. 821, 9 S.W. (2d) 75. *People v. Bergin* (1930), 340 Ill. 20, 172 N.E. 60. *Wilkins v. Moore* (Oh. 1938); 24 F. Supp. 670.

42. *State v. Zangerle* (1921), 103 Oh. St. 566, 134 N.E. 686.

Health and sanitary districts are organized to promote the public health, but all their powers are subject to legislative authority and cannot, as a rule, go beyond those actually delegated by law to the district.<sup>43</sup> The formation of a health or sanitary district along the same lines as an existing county does not superimpose upon the county a public corporation exercising identical powers, for it is within the police power of the State to create such districts and give to them even greater authority over public health matters than is possessed by the county, which may have no jurisdiction over public health in incorporated cities and towns within the county.<sup>44</sup>

Where a statute relating to the creation of sanitary districts provided that 51 per cent or more of the resident freeholders within a proposed district could petition the board of county commissioners, and such board was required to hold a hearing and then transmit the petition to the state board of health, and where such a petition was filed and notice of hearing by the board had been given, but before any action was taken a considerable number of signers of the petition signified their desire to withdraw their names, it was held that they were within their rights and that the petition as finally presented for action did not contain the signatures of 51 per cent of the resident freeholders of the proposed district.<sup>45</sup>

#### *Selection of Public Health Personnel*

A merit system for public health personnel in the States was established in 1940. Authorization for such a system was given in the amendments to the Social Security Act of 1935, which were adopted by Congress in 1939 (53 Stat. 1360, 42 U.S.C. 302). By the terms of this act the Children's Bureau was empowered to require the States to provide for the establishment and maintenance of personnel standards on a merit basis in connection with public health activities supported by federal funds. A similar regulation was promulgated by the Surgeon General of the Public Health Service, applicable to the public health services which received grants-in-aid administered by the Surgeon General.

In the States the merit system may utilize existing civil service, as

43. *Stumpf v. San Luis Obispo County* (1901), 131 Cal. 364, 63 P. 663, 82 A.S.R. 350. *Guptil v. Kelsey* (1907), 6 Cal. App. 35, 91 P. 409.

44. *Stuckenbruck v. San Joaquin County* (1924), 193 Cal. 506, 225 P. 857.

45. *Idol v. Hanes* (1941), 219 N.C. 723, 14 S.E. (2d) 801. In *Coblentz v. Sparks* (1940), 35 F. Supp. 605, a county board was held guilty of an abuse of discretion in establishing a sewer district in a sparsely populated area.



created by statute, or may provide by agreement and regulation for a joint merit system of two or more state agencies, and in certain instances for a single system in the health department. It is administered by a merit system supervisor, with the aid of an advisory council.

The system provides that professional personnel of the state health department and of such local health departments as are recipients of federal funds shall be selected on the basis of a competitive examination, or an unassembled examination. The system also provides for promotion and increases in compensation based on ability and length of service, and elimination of partisan politics in the selection, promotion, and activities of the personnel. The state health officer and members of the board of health and certain other advisory boards, and certain other persons, are exempt from the provisions of the system.

At the request of the Children's Bureau and the Public Health Service, the examination material used in the States for this purpose has been developed by the American Public Health Association, which has organized a Merit System Unit. Since 1941 such examinations have been offered on a voluntary basis to the States in such fields as administrative public health, public health nursing, laboratory work, and environmental sanitation.<sup>46</sup>

46. R. M. Atwater and L. D. Long, New methods for the selection of public health personnel, *Canad. J. Pub. Health*, 36:1-5, January 1945.



## CHAPTER V

### LOCAL HEALTH DEPARTMENTS

A LOCAL health department is one organized by law to serve a political subdivision of a State, such as a county, township, city, town, village, borough, or a group of communities or counties. The local health department consists, as a rule, of a duly constituted board of health and a duly appointed health officer, with such assistants as may be deemed necessary. In a number of communities, particularly in some of the larger cities, the health department consists only of a health officer or commissioner of health with a corps of assistants.

The system of local health departments in the United States and Canada preceded by many years the organization of state and provincial health departments, most of which were created in the period from 1869 to 1900. The first board of health in this country was appointed in 1793 for the City of Baltimore, and the second came into existence in Philadelphia in the following year.<sup>1</sup> In both instances these boards of health were organized for the purpose of coping with epidemics of yellow fever, although the scope of their activities was broadened in subsequent years.

The importance of the local health department has been ably set forth by the Committee on Local Health Units of the American Public Health Association in the following words:

Whatever may be the functions of the federal government and state governments authorized by law to protect and promote the health of the people of the United States, it can be assumed now from the unanimity of professional opinion and the practical attitude of local government that the delivery of the half-dozen essential, basic, or primary services of public health should continue to be, as has been the case in the past in this country, an important function of units of local government responsive intimately, and it may be said personally, to the needs of the families of each community, and provided for chiefly if not wholly through tax resources appropriated by the elected officers of local government, except in instances where the lack of financial resources of local jurisdiction makes aid from state and federal sources imperative.<sup>2</sup>

This report also states that it is not a matter of primary importance or of sharp distinction whether local units of health jurisdiction are

1. See page 11.

2. H. Emerson and M. Luginbuhl: *Local Health Units for the Nation*, New York, Commonwealth Fund, 1945, p. 1.

created by local initiative or authority and by cooperative or legally specified procedures, or are developed under mandatory or permissive legislation by state health departments. What is essential is that no population unit or area of the United States shall be without a full-time medically directed health service responsive to the needs and wishes of the people.

### *Local Government*

Political subdivisions of a State have a different relationship to the State than has the State to the Federal Government. Whereas the United States may exercise only those powers granted to it by the people of the States, as expressed in the Constitution, local governments not only have ceded no powers to the State, but they are purely creatures of legislative enactment possessing only those powers actually conferred upon them by the State, either through statutes or in charters. A political subdivision of a State may, therefore, exercise only those powers granted to it by the State, or which are incidental to its creation or organization, or which can be reasonably implied from statutory authority.

State legislatures have given extensive powers to municipal corporations, and in recent years have also bestowed upon them an increasing measure of home rule. Other political subdivisions of the State are likewise given wide authority, although it is usually somewhat less extensive than that of municipal corporations. These agencies are, however, always subject (within certain limitations) to the will of the legislature, and they are also subject to reasonable control by the executive and judicial branches of the state government.

The significance of political subdivisions and local governments varies in the different States. In all States, municipal corporations such as cities of various classes and incorporated towns are important units of government. Every municipal corporation usually has a health department, since such a department is an obvious necessity for the protection of the public health in urban communities.

There are three types of local rural government in the United States. In New England and some other States the town is important; in the South the town is absent or rudimentary, but the county assumes importance; in many other States, such as New York and Pennsylvania, both the county and the town or township are important units of government. Local health departments outside cities may, therefore, be organized in towns or in counties, or in both.

✓ In many States, local health departments of certain types are distinct political agencies of the State, created by legislative authority

and endowed with special powers. In most cases, however, local health departments are divisions of local governments, subordinate to them but possessing some special and unique powers.

That the police power of the State, including the power over the public health, may be delegated by the State to its political subdivisions, such as counties, municipal corporations, towns, and boards of health, is a well-established principle of American jurisprudence, which has been upheld on numerous occasions by the courts,<sup>3</sup> as has also the power of legislatures to provide for local health departments.<sup>4</sup>

### *County Health Departments*

Although the county is now recognized as a logical unit of government for necessary health services, county health departments are of comparatively recent origin. The first county health department in the United States is reported to have been organized in Jefferson County, Kentucky, in 1908, and it was still in operation forty years later.<sup>5</sup> In 1911 the second and third full-time county health services in this country came into existence within a month of each other. On June 1, 1911, the Guilford County health department in North Carolina was organized, while on July 1, 1911, a similar unit was established in Yakima County, Washington. The fourth was in Robeson County, North Carolina, organized in 1912.<sup>6</sup>

Since that time the growth of the county health movement has been rapid, due largely to stimulation from the United States Public

3. *Salem v. Eastern R. Co.* (1868), 98 Mass. 431, 96 Am. Dec. 650. *Bryant v. City of St. Paul* (1885), 33 Minn. 289, 23 N.W. 220, 53 Am. R. 31. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 80 A.S.R. 195, 50 L.R.A. 64. *Hengehold v. Covington* (1900), 108 Ky. 752, 57 S.W. 495, 22 Ky. L. 462. *Jacobson v. Massachusetts* (1905), 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. *Butera v. Ayotte* (1933), 53 R.I. 366, 166 A. 820.

4. *Comm. v. Swasey* (1882), 133 Mass. 538. *Wallor v. Wood* (1884), 101 Ind. 138. *State v. Seavey* (1894), 7 Wash. 562, 35 P. 389. *Attorney General v. McCabe* (1899), 172 Mass. 417, 52 N.E. 717. *State v. Zimmerman* (1902), 86 Minn. 353, 90 N.W. 783, 91 A.S.R. 351, 58 L.R.A. 78. *Keeffe v. Union* (1903), 76 Conn. 160, 56 A. 571. *Istan v. Naar* (1913), 84 N.J.L. 113, 85 A. 1012. *Crayton v. Larabee* (1917), 220 N.Y. 493, 116 N.E. 355, L.R.A. 1918 E 432. *Rock v. Carney* (1921), 216 Mich. 280, 185 N.W. 798, 22 A.L.R. 1178.

5. *Jefferson County v. Jefferson County Fiscal Court* (1938), 269 Ky. 535, 108 S.W. (2d) 181.

6. J. A. Ferrell and P. A. Mead, *History of County Health Departments in the United States*, Public Health Bulletin No. 222, U.S. Public Health Service, 1936. A. W. Freeman, *A Study of Rural Public Health Service*, New York, Commonwealth Fund, 1933. H. S. Mustard, *Rural Health Practice*, New York, Commonwealth Fund, 1936.

Health Service, the International Health Division of the Rockefeller Foundation, state health departments, and other agencies. By 1921, for example, there were 186 county health departments; in 1926 there were 347, and in 1931 there were 610 such units in 36 States. Along with this progress in rural health service, there has also occurred the discontinuance of a number of county health departments for various reasons. In 1938 there were about 1,000 health departments serving the 3,070 counties in this country, and in 1946 there were about 1,700.<sup>7</sup>

Authority for the organization and administration of a county health department is provided in state legislation, but the county board of health or health department has only such powers as are conferred upon it by the statutes, either expressly or by necessary implication.<sup>8</sup> The department generally consists of a county board of health and a full-time county health officer, with necessary assistants such as public health nurses, sanitary officers, or public health engineers, clerks, and others.

The county board of health is either appointed by the governing body of the county, which is known by various terms such as the board of supervisors, board of freeholders, county commissioners, or police jury (in Louisiana, where counties are called "parishes"), or it may be an *ex-officio* board consisting of all or part of the governing body of the county.

The county health officer, who is usually a physician,<sup>9</sup> is appointed by the county board of health for a definite term of years. In some States he may serve as both county health officer and as city health officer of a municipality within the county.<sup>10</sup> As a rule, however, a county health department has no jurisdiction over incorporated cities and towns, or cities of certain sizes, although in some States the laws provide that municipalities may elect to join a county health district, usually by vote or resolution of the mayor and council.

In Connecticut, by a law of 1893, county health officers are attorneys, whose chief duty is to appoint town health officers in all towns except those whose limits are coterminous with the limits of cities or boroughs. These county officers assist local health officers in legal mat-

7. *Directories of County Health Officers*, issued annually by the United States Public Health Service.

8. *Champion v. Vance County Board of Health* (1943), 221 N.C. 96, 19 S.E. (2d) 239.

9. In California the health officers of a county or district is required to be "the holder of a degree in medicine, in sanitary engineering, or in public health."

10. *State v. Waldo* (1928), 222 Mo. App. 396, 5 S.W. (2d) 653.

ters, and they may also fill vacancies in city or borough health officerships which have existed for more than thirty days.<sup>11</sup>

The county health officer is usually subject to considerable supervision by the state health department, which is often authorized by law to appoint, approve the appointment of, set qualifications for, and under certain conditions to remove the county health officer.<sup>12</sup>

The organization and powers of county health departments have been upheld by the courts on numerous occasions.<sup>13</sup> County boards of health are often empowered to adopt regulations to carry out the purposes of public health laws, although sometimes they operate only under state laws and the regulations of the state board of health. The county itself usually does not possess legislative powers, although sometimes counties are authorized by law to adopt ordinances for certain purposes.<sup>14</sup> A county is not a municipal corporation, but is generally regarded as a quasi-corporation.

Since county boards of health or health departments are established by the general laws of the State, special local laws passed for the purpose of organizing a board of health for a particular county will not be valid, according to recent decisions in North Carolina and Georgia.<sup>15</sup> In most state constitutions there are provisions that no special law shall be enacted for a purpose covered by existing general legislation.

Imposition of taxes by county authorities in accordance with state

11. I. V. Hiscock and F. M. Munson, Public health practice in small cities and towns in Connecticut, *Am. J. Pub. Health*, 14:934, November 1924.

12. *Ware v. State* (1916), 111 Miss. 599, 71 So. 868. *Mississippi State Board of Health v. Matthews* (1917), 113 Miss. 510, 74 So. 417. *State Department of Health v. San Miguel County* (1921), 26 N.M. 634, 195 P. 805.

13. *Valle v. Shaffer* (1905), 1 Cal. App. 183, 81 P. 1028. *Henderson County Board of Health v. Ward* (1900), 107 Ky. 477, 54 S.W. 725, 21 Ky. L.R. 1193. *City of Bardstown v. Nelson County* (1904), 25 Ky. L.R. 1478, 78 S.W. 169. *Yandell v. Madison County* (1902), 81 Miss. 288, 32 So. 918. *Davless County Board of Health v. McFarland* (1923), 197 Ky. 838, 248 S.W. 179. *Miller v. Tucker* (1925), 142 Miss. 146, 105 So. 774. *State ex rel. Parish Board of Health v. Police Jury of Calcasieu* (1926), 161 La. 1, 108 So. 104. *Board of Health of Buncombe County v. Lewis* (1929), 196 N.C. 641, 146 S.E. 592. *City of Jackson v. Ferguson* (1933), 167 Miss. 819, 150 So. 531. *Jefferson County v. Jefferson County Fiscal Court* (1938), 269 Ky. 535, 108 S.W. (2d) 181.

14. *Gordon v. Montgomery County* (1933), 164 Md. 210, 164 A. 676. *Stanislaus County Dairymen's Prot. Ass'n v. Stanislaus County* (1937), 93 Cal. 230, 261, 85 P. (2d) 1305.

15. *Sams v. Board of County Comrs.* (1940), 217 N.C. 284, 7 S.E. (2d) 540. *Hood v. Burson* (1942), 194 Ga. 30, 20 S.E. (2d) 755.

laws, to support public health activities in counties and districts, is a valid exercise of the taxing power of the State.<sup>16</sup>

#### *Multi-county Health Districts*

In many of the States the laws permit or authorize the formation of multi-county health departments in accordance with procedures set forth in the statutes. Such multi-county health departments may be created by resolution of the boards of county supervisors, by vote of the people, or by a combination of these methods, as by the presentation of a petition to the county board from a certain percentage of the citizens, followed by a hearing and suitable action. Sometimes the approval of the state health department is also required.

When organized according to law, the health districts thus established have the same public health powers in the several counties as would the separate county board of health.

#### *Municipal Health Departments*

Counties are further divided into smaller political units, such as townships, cities, towns, villages, and boroughs, although occasionally a large city, such as New York, may include in its boundaries one or more counties. Cities and towns, and some villages, are incorporated by the State, which grants charters to them. These municipal corporations are agents of the State for governmental purposes, such as the protection of the public health and safety, but they are also business organizations which undertake certain proprietary functions, such as various types of public works, for the benefit of the local inhabitants.

The health departments of municipal corporations are generally major units of the local government, under the ultimate control of the mayor and council, but in some instances they are divisions of other major units of the government, such as a department of welfare. In a relatively few jurisdictions local health departments are virtually independent governmental units, and in one or two States they are or have been incorporated.<sup>17</sup>

A municipal health department may consist of a board of health and a health officer, which is the customary form of organization in

16. *People ex rel. Wangelin v. Pennsylvania R. Co.* (1939), 372 Ill. 223, 23 N.E. (2d) 38. *Yazoo and M.V.R. Co. v. Bolivar County* (1939), 186 Miss. 824, 191 So. 426.

17. *Forbes v. Board of Health* (1891), 28 Fla. 26, 9 So. 862, 13 L.R.A. 549. *Board of Health v. Copcutt* (1893), 140 N.Y. 1, 35 N.E. 320, 23 L.R.A. 481, 37 A.S.R. 522.



smaller cities and towns, or merely of a health officer or commissioner of health acting under the immediate direction of the mayor, city manager, or one of the city commissioners where there is a commission form of government. The single commissioner of health without a board of health is found most frequently but not exclusively in the larger metropolitan cities.

As to which is the better system is a matter that has caused some difference of opinion among both political scientists and sanitarians. In favor of a board of health it is stated that the membership of the board usually consists of physicians and other persons familiar with or interested in the public health; that it is a continuing body, since its membership usually does not change all at one time; that it represents more than one political party; that where it appoints the health officer the appointment is less likely to be influenced by politics; and, finally, that the board serves not only as an advisor to the health officer, but as a sympathetic supporter and interpreter of his activities, and as a tribunal to which both he and the public may appeal under certain conditions.<sup>18</sup>

On behalf of the single commissioner of health, it is stated that the trend in municipal government is properly toward the strong city executive, either a mayor or city manager, with single executives in charge of each department under his direction, and that such a system makes for efficiency in administration.<sup>19</sup>

Under the proper conditions of qualified personnel and official and public support, either system works effectively. Both are legal, when authorized by the statutes.

### *The Board of Health*

A municipal board of health may consist of from three to fifteen members, although five or seven is the usual number. In some States all members of the board are required to be licensed physicians, although the better system, in effect in most States, is to require that two or three members shall be physicians and the remainder non-medical persons. Women are eligible.

The members of the board of health are generally appointed by the mayor or other head of the municipal government, sometimes

18. *Municipal Health Department Practice for the Year 1923*, Public Health Bulletin No. 164, U.S. Public Health Service, 1926.

19. C. E. McCombs, *City Health Administration*, New York, Macmillan, 1927. A local law creating a department of health consisting of a single commissioner, and replacing a board, was upheld in *Fisher v. Kelly* (1942), 264 App. Div. 596, 36 N.Y.S. (2d) 497, affirm. in 289 N.Y. 161, 44 N.E. (2d) 413.

with the approval of the city council, for stated terms of from two to five years, so arranged that the terms do not all expire in any one year. Occasionally there are ex-officio boards of health, as in cities having the commission form of government where the commissioners may be the board, or in towns where the board of selectmen act in this capacity. The health officer is usually not a member of the board, although he may be its president or chairman, its secretary, or ex-officio a member. In a few instances, the selection of local boards of health may be vested in the state health department.<sup>20</sup>

The board of health usually has quasi-legislative and quasi-judicial powers, but less frequently possesses direct administrative authority except in the appointment of the health officer. The board may adopt rules and regulations to carry out public health laws or ordinances, and it may hold hearings preliminary to taking necessary action in quasi-judicial proceedings, such as the abatement of nuisances, the issuance or revocation of licenses, and similar matters. It is, in general, a well-recognized legal principle that the duties of local boards of health are purely governmental.<sup>21</sup>

Suggestions for an ideal type of municipal health organization have been given by the Committee on Administrative Practice of the American Public Health Association as follows:

A board of health or advisory council is considered an essential factor in the administrative plan, to advise the health officer in regard to general policies, to assist him in preparing a sound budget, and to promulgate a sanitary code that will conform to state regulations. . . .

The board of health or council might consist of five unpaid members, preferably appointed by the mayor from representative professional and lay groups, to serve for overlapping terms. Members of such a board should be appointed on a non-partisan basis, and at the time of appointment should not be employees or elected officers of local government. The term of office for members of a board of this size should be five years, with provision for replacement or reappointment of one member annually.

The composition of boards or councils varies with local conditions, but experience indicates the value of a mixed board having both medical and lay representation. Although it may frequently be desirable to appoint a woman who is active in civic affairs, a business man,

20. *Davock v. Moore* (1895), 105 Mich. 120, 63 N.W. 424, 28 L.R.A. 783. *McCullers v. Wake County* (1912), 158 N.C. 75, 73 S.E. 816, Ann. Cas. 1913 D 507.

21. *Taylor v. Philadelphia Board of Health* (1855), 31 Pa. 73, 72 Am. Dec. 724. *Williams v. Indianapolis* (1901), 26 Ind. App. 628, 60 N.E. 367. *Watts v. Princeton* (1911), 49 Ind. App. 35, 96 N.E. 658. *Detroit Civil Service Comm. v. Engil* (1915), 184 Mich. 269, 150 N.W. 1081.

an educator, or an engineer to such a board, it would seem wise not to establish specific requirements for the composition of this body beyond the stipulation that it shall have both lay and medical representation. Whether or not the members of the board or council represent the professional groups suggested, it is fundamental that they be known to have interest in and familiarity with public health work and public affairs.<sup>22</sup>

✓ Meetings of the board of health are generally required to be held at regular intervals, usually once a month. Action at such meetings can be taken, as a rule, only when a quorum is present. The board usually has a chairman or president, elected by the members, and a secretary or clerk who keeps permanent records of the action at all meetings. The clerk may amend or correct the records at a future time to make them conform to the truth.<sup>23</sup>

Members of the board of health usually can be removed before the expiration of their terms only on charges and after a hearing. It has been held that a member of a city board of health vacates his office by holding another office under the city government, in this case as a member of the board of education.<sup>24</sup>

The personal liability of members of boards of health is discussed in Chapter XVIII.

The powers granted by the State to municipal and other local boards of health will be liberally construed by the courts,<sup>25</sup> whose proper function it is to review the actions of health officers and boards of health when they seem clearly to trespass upon the constitutional rights of individuals and to abuse the discretion conferred upon them.<sup>26</sup>

### Health Officers

The appointment, qualifications, compensation, powers and duties, and removal of health officers are discussed at length in Chapter VI.

22. I. V. Hiscock, editor, *Community Health Organization*, 3d ed., New York, Commonwealth Fund, 1939, pp. 35-36.

23. *Inhabitants of Swansea v. Pivo* (1929), 265 Mass. 520, 164 N.E. 390.

24. *Metzger v. Swift* (1931), 248 N.Y.S. 300, 231 App. Div. 598.

25. *State v. Taft* (1896), 118 N.C. 1190, 23 S.E. 970, 54 A.S.R. 768, 32 L.R.A. 122. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 80 A.S.R. 195, 50 L.R.A. 64. *Miles City v. State Board of Health* (1909), 39 Mont. 405, 102 P. 696, 25 L.R.A. (N.S.) 589. *Covington v. Kollman* (1913), 156 Ky. 351, 160 S.W. 1052, 49 L.R.A. (N.S.) 354. *State ex rel. Horton v. Clark* (1928), 320 Mo. 1190, 9 S.W. (2d) 635.

26. *Naccari v. Rappelet* (1907), 119 La. 272, 44 So. 13, 13 L.R.A. (N.S.) 640. *State v. Withnell* (1912), 91 Neb. 101, 135 N.W. 376, 40 L.R.A. (N.S.) 898. *Birchard v. Board of Health* (1918), 204 Mich. 284, 169 N.W. 901, 4 A.L.R. 990.

*Municipal Ordinances*<sup>27</sup>

The governing bodies of municipal corporations usually consist of an executive and a council, board of aldermen, or other group of selected representatives who have been empowered by the State to adopt ordinances to regulate persons and things within the jurisdiction of the city or town. Such ordinances must be consistent with the state laws and all other higher grades of legislation or quasi-legislation, and they cannot exceed the powers actually granted in a charter or by statutes to the municipality. The governing authorities of cities are, in general, prohibited by constitutions and statutes from entering a field of legislation that has been occupied by general legislative enactments, but this limitation does not extend to those ordinances which are permitted by or are in harmony with constitutional and statutory provisions.<sup>28</sup>

An ordinance cannot, as a rule, be inconsistent with a state sanitary code or the regulations of a state board of health made in conformity to law.<sup>29</sup> Such regulations are not laws, but they have the force and effect of law, and emanate from a higher authority of the State than the municipality. A penalty for violation may generally be prescribed in a municipal ordinance.

Municipal ordinances pertaining to the public health have been upheld as constitutional and valid by the United States Supreme Court on numerous occasions.<sup>30</sup> Where, for example, a city ordinance stated that all school children in the city must be vaccinated as a condition precedent to attendance at school, the United States Supreme Court sustained the ordinance as constitutional, and pointed out in a brief decision that it is within the police power of the State to provide for compulsory vaccination,<sup>31</sup> that the State may delegate

27. See H. Walker, *Federal Limitations Upon Municipal Ordinance Making Power*, Columbus, Ohio State University Press, 1929.

28. *Prescott v. City of Borger* (Tex. 1942), 158 S.W. (2d) 578.

29. *City of Seattle v. Cottin* (1927), 144 Wash. 572, 258 P. 520.

30. *Jacobson v. Massachusetts* (1905), 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 8 Ann. Cas. 765. *California Reduction Co. v. Sanitary Reduction Works* (1905), 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204. *Gardner v. Michigan* (1905), 199 U.S. 325, 50 L. Ed. 212. *North American Cold Storage Co. v. Chicago* (1908), 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276. *Laurel Hill Cemetery v. San Francisco* (1910), 216 U.S. 358, 30 S. Ct. 301, 54 L. Ed. 515. *Adams v. Milwaukee* (1913), 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971. *Hutchinson v. Valdosta* (1913), 227 U.S. 303, 33 S. Ct. 290, 57 L. Ed. 520. *Schmidinger v. Chicago* (1913), 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364. *Northwestern Laundry Co. v. Des Moines* (1916), 239 U.S. 486, 36 S. Ct. 206, 60 L. Ed. 396.

31. See Chapter XIV, on Vaccination.

to a municipality the authority to determine under what conditions health regulations shall become operative, and that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law.<sup>32</sup>

Municipal ordinances on public health subjects have also been upheld by state courts of last resort in many decisions.<sup>33</sup>

### *Board of Health Regulations*

The power to make necessary rules and regulations to supplement existing health legislation is usually conferred by the State upon local boards of health. Unlike municipal ordinances, which are generally regarded as legislation, board of health regulations are administrative rules or orders. They are accorded the force and effect of legislation, however, and for all practical purposes may be considered as health laws, even though they are in the category of quasi-legislative acts. "Health regulations are of the utmost consequence to the general welfare, and, if they be reasonable, impartial, and not against general policies of the State, they must be submitted to by individuals for the good of the public."<sup>34</sup> This power has often been upheld by the courts,<sup>35</sup> who will construe such regulations liberally except when the rights of individuals under the common law or under constitutional requirements are infringed, when they may be more strictly construed.<sup>36</sup> They will not be set aside unless the power has been transcended.<sup>37</sup>

32. *Zucht v. King* (1922), 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194.

33. See 39 *Corpus Juris Secundum* 811 and cases cited. *Walker v. Jameson* (1894), 140 Ind. 591, 37 N.E. 402, 39 N.E. 869, 49 A.S.R. 222, 28 L.R.A. 679. *Ex parte Hennessey* (1929), 95 Cal. App. 762, 273 P. 826. *City of Albany v. Newhof* (1930), 246 N.Y.S. 100, 230 App. Div. 687; affirm. in 256 N.Y. 661, 177 N.E. 183. *Pemberton v. City of Greensboro* (1935), 208 N.C. 466, 181 S.E. 258. *City of Rockford v. Hey* (1937), 366 Ill. 526, 9 N.E. (2d) 317. *Sptiler v. Munster* (1938), 214 Ind. 75, 14 N.E. (2d) 579, 115 A.L.R. 1395.

34. 12 *Rulling Case Law* 1271, and cases cited.

35. 29 *Corpus Juris* 241 ff., and cases cited. *State v. Martin* (1918), 134 Ark. 420, 204 S.W. 622. *State v. Wood* (1927), 51 S.D. 485, 215 N.W. 487, 54 A.L.R. 719. *State ex rel. Horton v. Clark* (1928), 320 Mo. 1190, 9 S.W. (2d) 635. *Abel v. State* (1941), 190 Ga. 651, 10 S.E. (2d) 198.

36. *Crayton v. Larabee* (1917), 220 N.Y. 493, 116 N.E. 355, L.R.A. 1918 E 432.

37. *Barrett v. Rieta* (1922), 93 So. 636, 207 Ala. 651. *Simon v. City of Cleveland Heights* (1933), 46 Oh. App. 234, 188 N.E. 308. *People on Complaint of Yonofsky v. Blanchard* (1942), 288 N.Y. 145, 42 N.E. (2d) 7. *Kurinsky v. Bd. of Health of Lakewood* (1943), 128 N.J.L. 185, 24 A. (2d) 803.

Local health regulations have the force of state laws,<sup>38</sup> but they must not be inconsistent with state laws.<sup>39</sup> Higher standards may, as a rule, be imposed by a city ordinance than are contained in the state law, provided that the local ordinance remains consistent with the state law.<sup>40</sup> A local board of health may not by vote authorize doing what a general city ordinance forbids.<sup>41</sup> The great criterion of all health regulations is that they must be reasonable and without discrimination. As to what is "reasonable" is for the courts to decide, but if there is a responsible body of competent professional opinion in favor of a certain regulation it will usually be upheld.<sup>42</sup> The presumption is in favor of legality.<sup>43</sup> The board of health's own interpretation of its rules will be followed, if possible.<sup>44</sup> Any unreasonable regulation or one contrary to state law will be held void.<sup>45</sup>

The regulations promulgated by a board of health must be properly drafted,<sup>46</sup> officially considered at an open meeting of the board at which a quorum is present and the public is permitted to be heard in favor or opposition, published in a stated number of issues of the

38. *Anable v. Montgomery County* (1904), 34 Ind. A. 22, 71 N.E. 272, 107 A.S.R. 173.

39. *In re Keeny* (1890), 84 Cal. 304, 24 P. 34. *Hurst v. Warner* (1894), 102 Mich. 238, 60 N.W. 440, 47 A.S.R. 525, 26 L.R.A. 484. *State v. Burdge* (1897), 95 Wis. 390, 70 N.W. 347, 60 A.S.R. 123, 37 L.R.A. 157. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 80 A.S.R. 195, 50 L.R.A. 64. *Chicago v. Union Ice Cream Mfg. Co.* (1911), 252 Ill. 311, 96 N.E. 872, Ann. Cas. 1912 D 875. *New Orleans v. Stein* (1915), 137 La. 652, 69 So. 43. *State v. Temple* (1916), 99 Nebr. 505, 156 N.W. 1063. *Rock v. Carney* (1921), 216 Mich. 280, 185 N.W. 798, 22 A.L.R. 1178. *Fougera v. City of New York* (1918), 224 N.Y. 269, 120 N.E. 642, 1 A.L.R. 1467. *Moorehouse v. Hammond* (1922), 60 Utah 593, 209 P. 883.

40. *Kansas City v. Henre* (1915), 96 Kan. 794, 153 P. 548. *New Orleans v. Ernst* (1924), 155 La. 426, 99 So. 391. *People v. Dept. of Health* (1932), 256 N.Y.S. 856, 235 App. Div. 819, holding that powers of health department are not subordinated to zoning ordinances. *City of Phoenix v. Breuninger* (1937), 50 Ariz. 372, 72 P. (2d) 580.

41. *Kelly v. Board of Health of Peabody* (Mass. 1924), 143 N.E. 39.

42. *Borden v. Montclair* (1911), 81 N.J.L. 218, 80 A. 30. *State v. Morse* (1911), 84 Vt. 387, 80 A. 189, 34 L.R.A. (N.S.) 190, Ann. Cas. 1913 B 218.

43. *Smith v. St. Louis R. Co.* (1901), 181 U.S. 248, 21 S. Ct. 603, 45 L. Ed. 847.

44. *Thomas v. State Board of Health* (1913), 72 W. Va. 776, 79 S.E. 725, 49 L.R.A. (N.S.) 150.

45. *State v. Robb* (1905), 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275. *Mobile v. Orr* (1913), 181 Ala. 308, 61 So. 920, 45 L.R.A. (N.S.) 575. *Jardine v. City of Pasadena* (1926), 199 Cal. 64, 248 P. 225, 48 A.L.R. 509. *Simon v. City of Cleveland Heights* (1933), 46 Oh. App. 234, 188 N.E. 308.

46. See Chapter XX, on Health Legislation.

local press, finally adopted by the board, reduced to writing, signed, and recorded, and issued in pamphlet form for the convenience of the public.<sup>47</sup> In some States a hearing is not required by law for the adoption of health regulations, and the lack of such a hearing does not vitiate them.<sup>48</sup> Furthermore, in some States certain local boards of health may adopt temporary but not permanent regulations, such temporary regulations being in the nature of orders for the correction of specific nuisances or causes of disease.<sup>49</sup> Sometimes a city loses its powers to pass health ordinances or adopt health regulations when it becomes a part of a county health department.<sup>50</sup> An ordinance or regulation adopted under one form of municipal government is continued in force under another form, such as a change from the mayor and council system to the commission or city manager plan, unless the ordinance or regulation is expressly repealed.<sup>51</sup> A mayor usually has no veto power over a board of health regulation, although he may veto a municipal ordinance. A regulation may prescribe only the penalty for its violation that is set forth in the statutes, and the penalty must usually be collected by a civil action.

A board of health regulation may properly incorporate by reference in the regulation any duly enacted statute, ordinance, code, standard, or other appropriate material, such for example as the United States Public Health Service Milk Ordinance, the standards of the American Association of Medical Milk Commissions, the pharmacopeia, or federal regulations or standards. The entire material thus incorporated by reference, insofar as it affects rules of conduct to be observed, must be published when the regulation is published in the public press according to law. This is because satisfactory notice must be given to the public, and can not be so given by mere reference to rules or terms on file in the office of the health department.<sup>52</sup>

✓ Among some novel subjects of board of health regulations and ordinances which have been upheld by courts in recent years are the location and conduct of cemeteries and mortuaries,<sup>53</sup> regulating the

47. *State v. Trask* (1927), 170 Minn. 6, 211 N.W. 673.

48. *Draxton v. Fitch* (1926), 166 Minn. 498, 207 N.W. 639.

49. *State v. Moher* (1929), 57 N.D. 929, 224 N.W. 890.

50. *City of Jackson v. Ferguson* (1933), 167 Miss. 819, 150 So. 531.

51. *Quacci v. City of Union City* (1932), 10 N.J. Misc. 1102, 163 A. 719.

52. *State v. Waller* (1944), 143 Oh. St. 409, 53 N.E. (2d) 654.

53. *City of Tucson v. Arizona Mortuary* (1929), 34 Ariz. 495, 272 P. 923. *Gordon v. Montgomery County* (1933), 164 Md. 210, 164 A. 676. *Moore v. U. S. Cremation Co.* (1937), 275 N.Y. 105, 9 N.E. (2d) 795, 11 N.E. (2d) 743, 113 A.L.R. 1124.

local distribution of contraceptives,<sup>54</sup> regulating the installation of gas appliances,<sup>55</sup> and authorizing the distribution of impounded dogs to medical schools and hospitals.<sup>56</sup> In several cities regulations have been adopted for the control of blood donors.

### *Jurisdiction*

The jurisdiction of a health department obviously extends over the area embraced by the municipality and includes all persons and things within its boundaries. It does not extend beyond in the absence of a state law conferring extra-territorial jurisdiction,<sup>57</sup> but the board or the municipality may take action to bring about the abatement of a nuisance outside the municipal limits if the health of its inhabitants is affected thereby. Where matters arise which concern the health of several communities, and they cannot be satisfactorily adjusted without outside interference, it is the function of the state health department to take charge and alleviate the conditions. A local board of health may, moreover, place a quarantine against another city, according to one court decision,<sup>58</sup> but it cannot quarantine against the county or the whole State. A local health department may make inspections of dairies beyond the city limits, but its only redress for violations of sanitary regulations is to debar the sale within the city of the milk from the outside dairy, or by its seizure and destruction in the city as a nuisance.<sup>59</sup>

### *Licenses and Permits*

A frequent method of control employed by municipal health departments is that of licensing. A license has been defined as a formal

54. *McConnell v. City of Knoxville* (1937), 172 Tenn. 190, 110 S.W. (2d) 478.

55. *Portsmouth Stove and Range Co. v. Baltimore* (1929), 156 Md. 244, 144 A. 357.

56. *Ill. Antivivisection Soc. v. City of Chicago* (1937), 289 Ill. App. 391, 7 N.E. (2d) 379.

57. *State v. Temple* (1916), 99 Nebr. 505, 156 N.W. 1063. *City of Rockford v. Hey* (1937), 366 Ill. 526, 9 N.E. (2d) 317. *Ex parte Ernst* (1940), 138 Tex. Cr. R. 441, 136 S.W. (2d) 595. The Baltimore City Charter states (Sec. 6) that "The Mayor and City Council of Baltimore shall have full power and authority: To preserve the health of the city. To prevent and remove nuisances. To prevent the introduction of contagious diseases within the city, and within three miles of the same upon land, and within fifteen miles thereof upon the navigable waters leading thereto. . . ."

58. *Allison v. Cash* (1911), 143 Ky. 679, 137 S.W. 245.

59. See Chapter XI, on Milk Control.



permission from the proper authority to perform certain acts. The State has the undeniable right to license and regulate professions, trades, and occupations, and it may delegate this power to municipal corporations and other political subdivisions of the State. Licenses and permits may be required by a municipality either for the purpose of regulation, in accordance with the police power, or in order to raise revenue, under the taxing power, or for both these purposes, but a fee charged for a license issued under the police power must be reasonable and not so high as to become a tax. Health departments have no power to tax. The precise extent and scope of the licensing power of a municipal health department must be ascertained in each case from state health legislation, or, possibly, from the charter of the municipal corporation. As a rule, however, the licensing power includes also the right to determine the necessity for the issuance of the permit, the prescribing of conditions prerequisite to such issuance, the enforcement of the power, and, where the public health is involved, discretion as to the individuals who may be recipients of the permits.<sup>60</sup>

As in the case of the exercise of other public health powers, municipal ordinances or regulations imposing licenses must be reasonable. Since the right to issue a permit carries with it the right to refuse to issue it for cause, it has been held that where an ordinance states that licenses "may" be issued, an aggrieved party cannot compel a board of health to grant a permit as a matter of course.<sup>61</sup> Where an ordinance requiring permits is not actually based on public health needs or other public policy, it is an infringement of personal rights.<sup>62</sup> Where, for instance, plumbers were required to be licensed solely as an alleged public health measure, the ordinance was held to be invalid.<sup>63</sup> Various trades and callings are, nevertheless, legitimately subject to licensing, and there are many decisions upholding the requirement of such permits. The classification and even the sub-classification of businesses for licensing purposes is not unconstitutional.<sup>64</sup> A license granted by a municipality does not excuse the maintenance

60. *Hanzal v. San Antonio* (Tex. 1920), 221 S.W. 237. *Brown v. City of Seattle* (1928), 150 Wash. 203, 272 P. 517. *City of Dayton v. Jacobs* (1929), 120 Oh. St. 225, 165 N.E. 844.

61. *Doben v. Board of Health of Paterson* (1925), 3 N.J. Misc. 38, 127 A. 38.

62. *Wyeth v. Cambridge Board of Health* (1909), 200 Mass. 474, 86 N.E. 925, 128 A.S.R. 439, 23 L.R.A. (N.S.) 147 (undertakers). *Philips v. City of Siloam Springs* (1930), 182 Ark. 139, 30 S.W. (2d) 220.

63. *Replogle v. Little Rock* (1924), 166 Ark. 617, 267 S.W. 353, 36 A.L.R. 1333.

64. *Gundling v. Chicago* (1899), 177 U.S. 183, 20 S. Ct. 633, 44 L. Ed. 725.

of a nuisance by the licensee.<sup>65</sup> Licenses may be revoked for cause, and if public health is in jeopardy such action may be summary; otherwise a hearing must be held.<sup>66</sup>

Barbers and the trades of barbering, hairdressing, beauty culture, manicuring, and cosmetics may be licensed and regulated in the interests of the public health,<sup>67</sup> but such regulations must be reasonable or they will be void. The courts have held in a number of cases that local ordinances or regulations requiring that barber shops must be closed between certain hours, such as from 6:30 p. m. to 8:00 a. m., are void as having no reasonable relation to the public health.<sup>68</sup> Sanitary requirements for barber and beauty shops, to prevent any possible spread of communicable diseases from patron to patron or from operator to patron, are proper and valid, and the municipality has the right to inspect the shops and enforce such regulations.

### *Expenditures and Contracts*

✓ Budgets for health departments are usually drawn up by the health officer and submitted to the board or council for adoption, though sometimes statutes or charters require a different procedure, as the preparation by a fiscal officer. The health department itself cannot appropriate municipal funds for its own use, but such monies must be granted to the health department by the governing body of the

65. *Garrett v. State* (1886), 49 N.J.L. 693, 7 A. 29. See Chapter XIII, on Nuisances.

66. *People ex rel. Lodes v. Department of Health of New York* (1907), 189 N.Y. 187, 82 N.E. 187, 13 L.R.A. (N.S.) 894.

67. *Stoll v. Zeno* (1900), 79 Minn. 80, 81 N.W. 748, 79 A.S.R. 422, 48 L.R.A. 88. *State v. Sharpless* (1903), 31 Wash. 191, 71 P. 737, 96 A.S.R. 893. *La Porta v. Board of Health of Hoboken* (1904), 71 N.J.L. 88. *Moler v. Whisman* (1912), 243 Mo. 571, 147 S.W. 985, 40 L.R.A. (N.S.) 629. *Ann Cas.* 1913 D 392. *Gerard v. Smith* (Tex. 1932), 52 S.W. (2d) 347. *Ransone v. Craft* (1933), 161 Va. 332, 170 S.E. 610. *Mundell v. Graph* (1934), 62 S.D. 631, 256 N.W. 121. *Turner v. Bennett* (Tex. 1938), 108 S.W. (2d) 967. *Unit Enterprises v. Dubey* (1942), 128 F. (2d) 843.

68. *Newman v. City of Laramie* (1929), 40 Wyo. 74, 275 P. 106. *Marx v. Maybury* (N.D. 1929), 30 F. (2d) 839. *Knight v. Johns* (1931), 161 Miss. 519, 137 So. 509. *Ernesti v. City of Grand Island* (1933), 125 Neb. 688, 251 N.W. 899. *Patton v. City of Bellingham* (1934), 179 Wash. 566, 38 P. (2d) 364, 98 A.L.R. 1076. *Ganley v. Claey's* (1935), 2 Cal. (2d) 266, 40 P. (2d) 817. *City of Huron v. Munson* (1939), 67 S.D. 88, 289 N.W. 416. *Kellerman v. City of Philadelphia* (1940), 139 Pa. Super. 569, 13 A. (2d) 84. *City of Louisville v. Kuhn* (1940), 234 Ky. 684, 145 S.W. (2d) 851. *Saccone v. City of Scranton* (1941), 341 Pa. 526, 20 A. (2d) 236. See page 201 for cases upholding state laws regulating barbers and beauty shops.

municipality. They may then, be used in accordance with the approved budget. Whether this can be changed or not during the course of a fiscal year depends upon the requirements of statutes, ordinances, or charters, but in the absence of an authorized procedure it cannot be changed. Of course sudden emergencies may arise in which funds may of necessity have to be diverted, but such use must be ratified and usually special funds can be obtained for use during exigencies. All expenditures must be properly audited,<sup>69</sup> although methods vary widely. As a general proposition the auditing should be done by another branch of the municipal government.

Contracts may be entered into between the health department and individuals, firms, partnerships, corporations, and others, since this right is necessary to the proper conduct and administration of the department.<sup>70</sup> A health officer may not contract with himself as a private individual, however, and it is improper for a board to contract with one of its members,<sup>71</sup> though there may arise conditions when such a contract may be valid if properly safeguarded.<sup>72</sup> The health officer must have the approval of his board for all contracts unless he has blanket authority to make them, and if contracts are made without such authority they will not be good against the board unless ratified by it. A contract is an agreement made between two or more competent parties for a valuable consideration to do or refrain from doing some lawful thing. An agent may be authorized to contract for his principal, and the health officer is, generally speaking, the agent of his board. In fact, in Massachusetts, the executive of a local board of health is officially called the "Agent." When contracts of importance are to be arranged, the health department should seek the aid of a competent lawyer, as there are many legal technicalities which may need consideration.

In paying bills, local health departments should require submission of all claims and bills on standard vouchers, preferably the same as those used by the municipal authorities for financial transactions. When approved, these vouchers are forwarded to the fiscal officer of the municipality for payment out of the appropriation of the health

69. *Dawe v. Board of Health* (1906), 146 Mich. 316.

70. *Lambrie v. Manchester* (1879), 59 N.H. 120, 47 Am. R. 179. *Delano v. Goodwin* (1868), 48 N.H. 203, 97 Am. Dec. 601. *Elliot v. Kalkaska* (1885), 58 Mich. 452, 25 N.W. 461, 55 A.S.R. 706. *Frankfort v. Irvin* (1904), 34 Ind. 280, 72 N.E. 652, 107 A.S.R. 179.

71. *Spearman v. Texarkana* (1894), 58 Ark. 348, 24 S.W. 883, 22 L.R.A. 855. *Fort Wayne v. Rosenthal* (1881), 75 Ind. 156, 39 Am. R. 127.

72. *St. John v. Board of Supervisors* (1897), 111 Mich. 609, 70 N.W. 131.

department. A copy or copies are retained for the records of the health department. In some instances, health departments have their own funds in suitable bank accounts and pay bills with checks signed by the president and secretary. These accounts are subject to annual audit by the municipal authorities, as are also all revenues obtained from license fees and other fees.<sup>73</sup>

### *Organization*

The organization of a local health department is primarily an administrative matter, but it may have legal implications. The organization suggested by the Committee on Administrative Practice of the American Public Health Association for a large city health department under the direction of a health officer is as follows:<sup>74</sup>

- Bureau of Administration
  - Division of Administration
  - Division of Public Health Education
- Bureau of Vital Statistics and Records
- Bureau of Communicable Disease Control
  - Division of Epidemiology
  - Division of Tuberculosis
  - Division of Venereal Diseases
- Bureau of Maternal and Child Health
  - Division of Maternal, Infant, and Preschool Health
  - Division of School Health
- Bureau of Public Health Nursing
- Bureau of Environmental Sanitation
  - Division of Public Health Engineering
  - Division of Milk Control
  - Division of Food Control
- Bureau of Laboratories

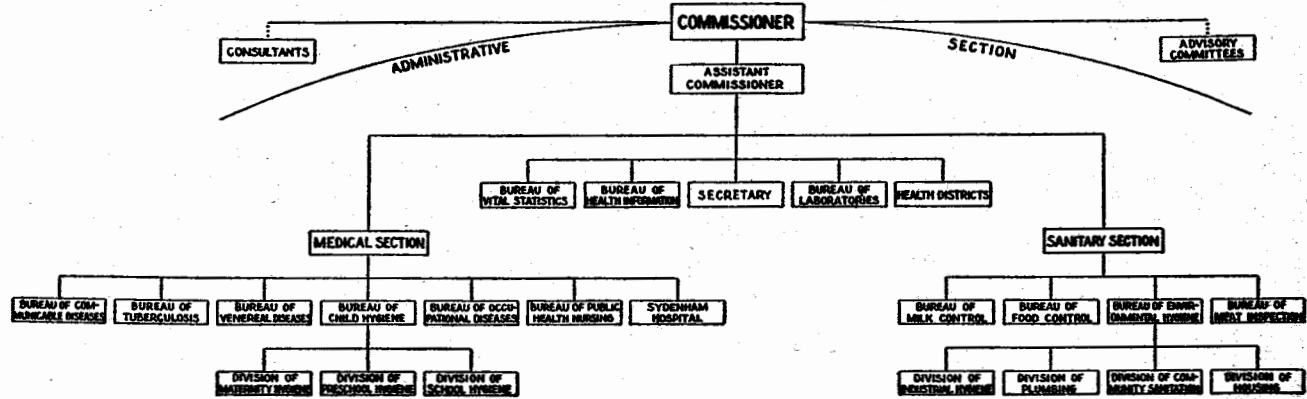
In smaller community health departments and in county health departments, several of these functions may, of course, have to be combined in one administrative division.

Health departments must, of course, be provided with adequate headquarters for the proper conduct of their activities. Statutes often require, in fact, that municipalities shall furnish sufficient and suitable offices and quarters for the use of the health department. It has been ruled by the Attorney General of Ohio that a law stating that

73. See Payment of health board bills, New Jersey Department of Health, *Public Health News*, March 1930.

74. I. V. Hiscock, editor, *Community Health Organization*, 3d ed., New York, Commonwealth Fund, 1939.

## ORGANIZATION CHART BALTIMORE CITY HEALTH DEPARTMENT



county commissioners and city councils may furnish suitable quarters for boards of health and health departments is mandatory, and means that they must do so.

*Personnel*

Since the quality of local health service depends upon the quality of the personnel engaged in public health activities, such personnel should be professionally trained, and adequate in number for the area, population, local problems, resources, and type of community served.

Recommendations for the personnel needed in various communities have been given by the Committee on Local Health Units of the American Public Health Association. For a city of 50,000 population it is stated that there will be needed one full-time professionally trained and experienced medical officer of health, a full-time public health or sanitary engineer, a sanitarian of nonprofessional grade, ten public health nurses, one of whom should be of supervisory grade, and three persons for clerical work. Part-time medical services will also be needed in most such units of population for diagnosis and control of tuberculosis and venereal diseases, and for antepartum, infant, preschool, and school health services. Specialist or consultant and advisory services should also be available from the state health department.

For a city or population unit of 150,000 there should be in addition to the full-time commissioner of health, two other administrative medical officers, in charge of bureaus of communicable diseases and maternity and child hygiene, respectively; a chief of the bureau of environmental sanitation, who should be of professional grade; five assistant sanitary officers; thirty public health nurses, of whom four would be of supervisory grade; and ten persons of secretarial and clerical grades, and one statistician or statistical clerk, one full-time veterinarian, three persons for public health laboratory work (one of professional grade, and one technician), one full-time dentist and two full-time dental hygienists, and one health educator.

In 1945 there were in the United States 1,160 full-time local health departments serving approximately 2,100 cities and counties. The Committee on Local Health Units of the American Public Health Association has recommended that there should be 1,197 units of local health jurisdiction in this country.<sup>75</sup>

75. H. Emerson and M. Luginbuhl, *Local Health Units for the Nation*, New York, Commonwealth Fund, 1945. M. E. Altenderfer, Full-time public health positions in local health departments, *Pub. Health Rep.* 61:866-874, June 14, 1946.

*Duties and Functions*

While the powers of health authorities are often outlined in detail in statutes, it may be said that they embrace everything which can be reasonably included as affecting the public health. In discussing the scope of health regulations, a leading encyclopedia of law says, "So far as concerns the subject matter, it may be stated as a general proposition that all rules and regulations reasonably calculated to preserve health are valid and may be established by health authorities."<sup>76</sup>

The six basic functions of a local health department, as stated by the Committee on Local Health Units of the American Public Health Association,<sup>77</sup> are as follows:

1. Vital statistics, or the recording, tabulation, interpretation, and publication of the essential facts of births, deaths, and reportable diseases.

2. Control of communicable diseases, including tuberculosis, the venereal diseases, malaria, and hookworm disease.

3. Environmental sanitation, including supervision of milk and milk products, food processing and public eating places, and maintenance of sanitary conditions of employment.

4. Public health laboratory services.

5. Hygiene of maternity, infancy, and childhood, including supervision of the health of the school child.

6. Health education of the general public so far as not covered by the functions of departments of education.

Until 1938 the main elements of a desirable municipal health program were appraised by means of a numerical score devised by the Committee on Administrative Practice of the American Public Health Association, which allowed a total of 1,000 points for ten different items, such as communicable disease control, school hygiene, sanitation, etc. This plan has been supplanted by an evaluation schedule for use in the study and appraisal of community health programs, which contains the following general headings:<sup>78</sup>

- A. Basic data and community facilities
- B. Definition of problems
- C. Community health education
- D. Communicable disease control
- E. Tuberculosis control program
- F. Syphilis and gonorrhoea control

76. 12 *Ruling Case Law* 1276, and cases cited.

77. H. Emerson and M. Luginbuhl, *Local Health Units for the Nation*, New York, Commonwealth Fund, 1945, p. 2.

78. Evaluation schedule, American Public Health Association, 1944. Health practice indices 1943-44, New York, American Public Health Association, 1945.

- G. Maternal health
- H. Infant health
- I. Preschool health
- J. School health
- K. Adult health
- L. Water supplies and excreta disposal
- M. Food control
- N. Milk control
- O. Housing
- P. Financial support for local health work
- Q. Special activities.

As an aid to the proper conduct of these activities, suitable records must be kept by the health department, as outlined in recent publications.<sup>79</sup>

Legal aspects of the various specific functions of health departments, such as vital statistics; control of communicable diseases, tuberculosis, and venereal diseases; milk and food control; nuisances and sanitation; vaccination; school hygiene; and industrial hygiene, are outlined in detail in subsequent chapters in Part II.

### *Mental Hygiene*

In a number of States laws are now in effect providing that patients may be sent directly to a mental hospital on the certificate of a health officer. Such patients must be accepted by the superintendent for a certain period, from five to thirty days according to the laws in the different States, at the end of which time they may be discharged, or be legally committed to the institution, usually by court order. Such laws apply only to the noncriminal insane.

While persons may be voluntarily admitted to state mental disease hospitals, they may be committed as a rule only by means of judicial processes, which are set forth in a variety of state legislation.<sup>80</sup> In a few States the anachronistic system of trial of the alleged insane person by a lay jury still prevails, but in most jurisdictions commitment is made by a judge following examination by two or more qualified medical examiners. In a few States there are independent commissions of lunacy.

79. W. F. Walker and C. R. Randolph, *Recording of Local Health Work*, New York, Commonwealth Fund, 1935. J. W. Mountin and E. Flook, *Devices for Reducing Health Department Records and Reports*, Supplement No. 187, U. S. Public Health Service, 1945.

80. G. A. Kempf, *Laws Pertaining to the Admission of Patients to Mental Hospitals Throughout the United States*, Supplement No. 157, U. S. Public Health Service, 1939.



## CHAPTER VI

### HEALTH OFFICERS AND EMPLOYEES

**A** HEALTH officer is defined in Webster's Dictionary as "one charged with the enforcement of the sanitary laws." Legally, this definition is an apt one, but actually the modern health officer is more than a civil agent for the enforcement of laws. He is the guardian of the health of the State or of a community of the State. As such, his duties are advisory and educational as well as executive. He is the agent, director, and expert advisor of the health department and sometimes he is the health department. He is, furthermore, the health advisor and health supervisor of the people who are under his legal jurisdiction.

The modern health officer must, therefore, be not only a sage and capable administrator of laws, but a scientist, a statesman, an educator, and a human engineer. Public health work today is a distinct specialty. It is not a branch of medicine or of engineering or of biology, although it draws from these arts and sciences as well as from many others. The modern sanitarian must be specially trained in his profession. A health officer is a qualified sanitarian in an administrative capacity, the holder of an office conferred by an act of governmental power.

#### *The Office*

An office is a special duty, charge, trust, or position conferred by an exercise of governmental authority for a public purpose. An officer is a person who legally holds an office, and who is thereby entitled to the tenure, duration, duties, and emoluments embraced by it. Any public office is a public trust, conferred not for the benefit of the holder, but for the benefit of society.

An office is to be distinguished from an employment, which is an occupation in another's service, usually under a contract. An officer or official possesses some degree of governmental authority, whereas an employee is merely a workman in the service of an employer, whether that employer be the State, a municipal corporation, or a natural person or private corporation.

Federal, state, district, county, and municipal health officers are almost always officers and not employees. Members of boards of health are likewise officers. The assistants of the health officer, appointed by him or by the board of health, usually are employees, although occa-

sionally a subordinate in a health department may be an officer if his position has been created and defined by law. An office is more or less permanent, subject only to change by the legislature, but an employment is transitory. Officers may change, but the office endures.

All local health officers are, furthermore, officers of the State. Their jurisdiction is, of course, confined to their own communities or to the areas designated by law, but they are, nevertheless, official agents of the State since they are officers of political subdivisions of the State.<sup>1</sup>

The distinction between officers and employees in public health work is of importance for several reasons, although in the practical operation of public health activities, the people affected are seldom concerned with or bothered by the distinction. Not only is there a difference in the authority of an officer and an employee, but there are significant differences in the financial status, tenure of office, liability, and discretionary powers of each. An officer may delegate certain activities to others who are acting under his direction, but he cannot delegate the discretionary power conferred by law upon him as a ministerial officer.

Where a state law provided that in any city health district the board of health shall appoint for whole-time or part-time service a health commissioner and may appoint such public health nurses, clerks, physicians, guards, and other employees as they deem necessary, it was held by the Supreme Court of Ohio that the health commissioners thus appointed were employees and not public officers, thus permitting them to come within the provisions of the General Code which stated that present employees of city health districts and departments shall continue to hold their positions until removed in accordance with the civil service laws.<sup>2</sup>

### *The Appointment of Health Officers*

In order to hold an office and be entitled to it, a person must be legally elected or appointed to the office. Health officers are usually appointed in accordance with methods set forth in the statutes. Thus, some state health officers are appointed by the Governor, often with the consent of the Senate or Governor's Council, while others are appointed by state boards of health, the members of which are ap-

1. *White v. City of San Antonio* (1901), 94 Tex. 313, 60 S.W. 427. *Brodman v. Rade* (1925), 101 N.J.L. 207, 127 A. 249.

2. *Scofield v. Strain* (1943), 142 Oh. St. 290, 51 N.E. (2d) 1012.

pointed by the Governor.<sup>3</sup> If the state health officer is not appointed by the Governor, he cannot, as a rule, be suspended or removed by that executive.<sup>4</sup>

Various systems are now in force for the appointment of local health officers. Municipal health officers are sometimes appointed by mayors or city managers, sometimes by boards of health, and sometimes by state health departments.<sup>5</sup> In a number of States, the appointment is made by the mayor or local board of health but must be approved by the state health department<sup>6</sup> or the state health officer; or the person appointed must possess qualifications for the office which have been set by the state health department in accordance with legislative authority. Whatever may be the statutory requirements for the appointment of local health officers, they must be rigidly complied with in making the appointment.<sup>7</sup>

A procedure for the appointment of local health officers has been suggested in a Model Health Code prepared by a committee of the American Public Health Association, as follows:

Regulation 1. There shall be a health department in the (City of ..... , Town of ..... ) under the direction of a Health Officer. He shall be appointed by the Mayor, subject to the approval of the state health authorities. He shall be subject to removal by the Mayor, but may have a public hearing if he desires. He shall be suitably trained or experienced in public health administration. He shall devote his full time to the duties of his office. He shall execute and enforce all statutes, ordinances, and regulations for the protection and promotion of health and shall take such other action as is necessary for the public health. He shall have the power to appoint and remove, and fix the duties of such other employees as are necessary for the administration of the health department. He shall have the power to fix the salaries of the employees of the health department, subject to the approval of the legislative authorities of the (City of ..... , Town of ..... ).

Not all sanitarians and political scientists are agreed that appointment and removal of the health officer by the mayor is always the

3. See page 60. *Perkins v. Hughes* (1939), 53 Ariz. 523, 91 P. (2d) 261.

4. *In re Advisory Opinion to the Governor* (1919), 78 Fla. 9, 82 So. 608.

5. *Davock v. Moore* (1895), 105 Mich. 120, 63 N.W. 424, 28 L.R.A. 783. *McCullers v. Wake County* (1912), 158 N.C. 75, 73 S.E. 816, Ann. Cas. 1913 D 507.

6. *State Department of Health v. San Miguel County* (1921), 26 N.M. 634, 195 P. 805.

7. *Braman v. New London* (1902), 74 Conn. 695, 51 A. 1082. *Keefe v. Union* (1903), 76 Conn. 160, 56 A. 571. *Valle v. Shaffer* (1905), 1 Cal. App. 183, 81 P. 1028. *Young v. City of Ashland* (Ky. 1910), 125 S.W. 737. *State ex rel. Blue v. Waldo* (1928), 222 Mo. App. 396, 5 S.W. (2d) 653.

best procedure. This method is often in effect in the larger cities, but in smaller communities the appointment is more frequently made by the board of health.

The appointment of a health officer should be made in writing, or there should be on file a resolution or official document which records the appointment. It has been held that an appointment by drawing lots among board members, where there was a tie vote, is an invalid method.<sup>8</sup> If the health officer is required to take an oath of office, failure to do so will invalidate his appointment.<sup>9</sup>

Health officers are sometimes given a civil service status, either at the time of appointment or after the lapse of a certain number of years in the office. Employees are often under civil service. The tenure of office depends upon the terms of the statutes, or, if no provision is made in the law, upon the will of the board or executive official who makes the appointment.<sup>10</sup>

### *De Facto Officers*

An officer who is not properly and legally appointed, but who holds office under the supposition that he is so appointed and whose occupation of the office is acquiesced in by the public, is called a *de facto* officer in distinction to a *de jure* officer who is properly appointed. The acts of a *de facto* officer are given the same faith and credit as a *de jure* officer, but the former runs the risk of being unable lawfully to recover compensation for his services, and he is also civilly liable for damages due to negligence in the performance of his duties. There are several other drawbacks to this status, so that it is eminently desirable that appointments be proper and legal.

### *Qualifications of Health Officers*

Qualifications for state and local health officers are usually set forth in statutes pertaining to the organization of health departments, although in some States no special qualifications are required of holders of these offices. A frequent legal requirement is that the health officer should be a medical graduate or a licensed physician. Occasionally, the health officer is required to be suitably versed in sanitary science and public health, whether he is a physician or not. Women having the proper qualifications are eligible for appointment as health of-

8. *Meany v. Staehle* (1915), 160 Wis. 452, 152 N.W. 165.

9. *People ex rel. Walton v. Hicks* (1916), 158 N.Y.S. 757, 173 App. Div. 338, *affirm.* (1917) in 221 N.Y. 503, 116 N.E. 1069.

10. *State v. Seavey* (1894), 7 Wash. 562, 35 P. 389.

ficers. Another common, if illogical, requirement is that the health officer should be a citizen and resident of the community at the time of the appointment, and sometimes for a stated period prior to the appointment.<sup>11</sup>

An authoritative statement regarding the desirable qualifications of municipal health officers is given by the committee on Administrative Practice of the American Public Health Association, as follows:

It is essential that the health officer be a sanitarian especially equipped by training and experience for administrative health work. Four years of successful experience as a health officer in a small city or as a bureau chief in a large city, or graduate instruction in public health leading to an M.P.H., a C.P.H., or a Dr.P.H. coupled with at least two years of experience in health administration, is considered a desirable minimum qualification. He should be well trained in the fundamental sciences and have a thorough knowledge of preventive medicine. There are many advantages if he is medically trained, although this training alone is not sufficient.<sup>12</sup>

A National Health Officers Qualifying Board of the United States Conference of Mayors recommended in 1938 the following standards for municipal health officers.

*Grade I* (applicable, in general, to cities of 500,000 population and over). Graduation in medicine from a Grade A medical school and not less than 6 years' full-time experience in public health work, 3 years of which must be in a responsible administrative position; 2 of the 3 years of general experience may be substituted by a course in public health of not less than one scholastic year in residence at a recognized institution of learning.

*Grade II* (applicable, in general, to cities of from 100,000 to 500,000 population). Graduation in medicine from a Grade A medical school and not less than 4 years' full-time experience in public health work, 1 year of which must be in a responsible administrative position; 2 of the 3 years of general public health experience may be substituted by a course in public health of not less than one scholastic year in residence at a recognized institution of learning.

*Grade III* (applicable, in general, to cities under 100,000 population). Graduation in medicine from a Grade A medical school and not less than 2 years of full-time experience in public health work, or, 1 year of such full-time experience and the completion of a course in public health of not less than 1 year in residence at a recognized institution of learning.<sup>13</sup>

11. *Nay v. Underhill* (1899), 71 Vt. 66, 42 A. 610.

12. I. V. Hiscock, editor, *Community Health Organization*, 3d ed., New York, Commonwealth Fund, 1939, p. 34. See Proposed report on the educational qualifications of health officers, *Am. J. Pub. Health*, 36:904, August 1946.

13. *Am. J. Pub. Health*, 28:110, January 1938. See *The Public Health Program* (Continued on next page.)

Recognition in these standards of the need for adequate public health training of municipal health officers is generally approved, but many sanitarians disagree with the suggested requirement that health officers should invariably be graduates in medicine.<sup>14</sup> Many nonmedical sanitarians and public health workers have served with distinction and satisfaction as health officers of both large and small cities. A person holding the degree of Doctor of Public Health from a reputable institution is, in fact, fully as well qualified, professionally and technically, to serve as a health officer as is a Doctor of Medicine who has had adequate experience in public health work. A Doctor of Public Health is, likewise, more suitably trained for the position of health officer than is a medical graduate who has had no experience or training in public health. A qualified sanitary or public health engineer is, in general, in the same category as a Doctor of Public Health with respect to his technical ability to serve as a health officer of a municipality. In a county it is desirable that the health officer be a medical graduate.

While a knowledge of medicine is unquestionably a valuable asset to a health officer, and while theoretically the best qualified health official would be a physician who is also trained and experienced in public health work, a medical degree is by no means an indispensable requirement for health officers. A knowledge of public health is the indispensable element. A municipal health officer should, therefore, be either a graduate in medicine who has had the experience in public health set forth in the standards of the National Conference of Mayors, or a graduate with an advanced or special degree in public health from a recognized institution of learning.<sup>15</sup>

*Under Title VI of the Social Security Act, Supplement No. 126, to Pub. Health Rep., U.S. Public Health Service, 1937.*

14. In June 1938, the Massachusetts Public Health Association adopted a resolution opposing the report of the National Health Officers Qualifying Board, in so far as it excludes properly trained and otherwise qualified nonmedical public health workers from serving as health officers. A number of other associations have adopted similar resolutions.

15. Recognized institutions offering public health training leading to post-graduate degrees (C.P.H., M.S., D.P.H., M.P.H., Ph.D., Sc.D., and Dr. P.H.) include Columbia University, Harvard University, Johns Hopkins, University of California, University of Michigan, University of Minnesota, University of North Carolina, University of Toronto, and Vanderbilt University. In the past the Massachusetts Institute of Technology was also one of the leading institutions offering such degrees. Many other recognized universities and colleges offer degrees in sanitary engineering and other specialties. See Public health degrees and certificates granted in 1944-1945, *Am. J. Pub. Health*, 35:1311, December 1945.

Sanitarians and political scientists are agreed that the requirement of residence in the community where the health officer is appointed is an unnecessary and undesirable restriction. In order to secure a suitably qualified person for the important position of municipal health officer, it may be necessary and desirable to select a candidate from another community or another State. Such a system tends to minimize the dangers of purely political appointments, since merit for the position should be the sole criterion.

In a few States, local health officers, sanitary inspectors, and other health workers are required to be licensed by the state health department after passing a suitable examination. In other States, local health officers are required to possess qualifications specified by the state health authorities and cannot be appointed unless they conform to these requirements. The merit system for selection of health officers is discussed on page 75.

In 1942 it was reported that there were then in this country about 5,500 local health officers, out of a total personnel engaged in local health work of approximately 41,000. Four-fifths of these health officers and more than one-quarter of the entire personnel were serving on a part-time basis. Of the health officers, somewhat over 60 per cent were physicians. There were at that time more than 14,000 public health nurses serving with local health departments.<sup>16</sup>

### *Osteopaths as Health Officers*

Where the law requires that a municipal health officer shall be a physician, the question as to whether an osteopath is eligible for appointment to this office depends upon the precise wording of the statutes, particularly those referring to the qualifications and duties of the health officer, the medical practice acts, and the laws governing the practice of osteopathy. If the laws under which osteopaths are licensed permit them to undertake a more or less unlimited practice, including the use of the drugs and biological products that may be necessary in public health work, and there are no other legal restrictions, such an appointment would seem to be valid.

The appointment of an osteopathic physician and surgeon as a health officer of a city of the third class in the State of Washington was upheld by the Supreme Court of that State in a decision handed down in 1930,<sup>17</sup> in which the court pointed out that although an osteo-

16. *Directories of City Health Officers*, issued annually by the United States Public Health Service.

17. *Walker v. Dean* (1930), 155 Wash. 383, 284 P. 756.

path held a limited license, he was a physician under the statutes in force at the time of his appointment as health officer. On the other hand, the appointment of an osteopath as a medical inspector of schools has been held, in 1929, to be invalid under laws in existence at the time the statute providing for school medical inspectors was adopted.<sup>18</sup> By a law of 1985, osteopaths in this State, New Jersey, are licensed under the Medicine and Surgery Act.

The right of a licensed osteopath to receive health and development credentials, qualifying the holder to perform certain health services for the school system, was upheld by a District Court of Appeals in California in 1939, the Court pointing out that this right had existed prior to 1922 when osteopaths were licensed by the Board of Medical Examiners, and should be continued during their licensure by the Board of Osteopathic Examiners.<sup>19</sup>

The attorney generals of Minnesota, Michigan, and West Virginia have ruled that osteopaths are eligible for appointment as local health officers in those States under existing laws. Osteopaths also serve by appointment, under statutes, on some state and local boards of health.

There was nothing in the training of chiropractors, sanipractors, or naturopaths in 1946, nor has there ever been anything in their training, that qualifies such healers to serve as health officers. Doctors of Veterinary Medicine are occasionally appointed as local health officers, although they, like Doctors of Medicine, should be specially trained in public health work in order to qualify for the position. The same may be said of dentists, pharmacists, and nurses, who have sometimes occupied or now occupy this office.

### *Compensation*

The salary or compensation paid to a health officer is a privilege of the office, and is not based on a contractual relation, as is the case with an employee. The amount of the health officer's salary may be fixed by the statutes, or may be left to the discretion of the board of health. Sometimes a maximum or minimum figure is set by law. Where the amount is fixed by law, the health officer is entitled only to that

18. *Chastney v. State Board of Education* (1929), 7 N.J. Misc. 385, 145 A. 730.

19. *Jordt v. Calif. State Board of Education* (1939), 35 Cal. App. 591, 96 P. (2d) 809. See *Hecker v. Gunderson* (1944), 245 Wis. 655, 15 N.W. (2d) 788, and *State Board of Health v. Wilson* (Tex. 1945), 188 S.W. (2d) 999, upholding exclusion of osteopaths from participation in the Emergency Maternity and Infant Care program for wives and infants of service men under state plans approved by federal bureaus.



sum,<sup>20</sup> but where the amount is not regulated by law, the compensation of the health officer may be increased or decreased by the board of health or other governmental authority in charge during the incumbency of the health officer.<sup>21</sup> Where the salary is fixed by law, it may be changed by the legislature or other legislative body during the term of office,<sup>22</sup> unless there is a constitutional provision to the contrary. If the office is abolished by the governing authority, the salary ceases.<sup>23</sup> If the appropriating body of the municipality or other governmental agency fails to appropriate necessary funds to pay the salary of the health officer, it cannot be paid and he cannot collect it.<sup>24</sup>

Where, however, a state board of health fixed the salary of the state superintendent of health at an amount considerably in excess of the sum appropriated for the purpose by the legislature, it was held by the Supreme Court of Arizona that the sum fixed by the board should be paid, since the public health fund was derived not only from appropriations but also from receipts from other sources.<sup>25</sup> Mandamus was, therefore, granted against the state auditor for the payment out of "funds available therefor."

Minimum standards for the salaries of state and local health officers were suggested several years ago by a committee of the American Public Health Association, as follows:

a. Five thousand dollars should be the minimum salary received by a full-time qualified state health officer and from this figure it should increase up to not less than ten thousand dollars depending upon the population involved, industries, area, and length of service of the executive.

b. With regard to the salaries of chiefs of divisions in the state health departments, the Committee believes that it is difficult to set definite standards. The salary depends upon numerous factors, such as the training, experience, length of service, personality, and general qualifications of the individual, and also upon the type of work, population of state, magnitude of problems, and salary of his superior. The Committee believes, however, that no salaries less than three thousand dollars should be paid in any State to chiefs of divisions, and that in most instances more than this should be paid, bearing in mind the factors outlined above.

20. *Watts v. Princeton* (1911), 49 Ind. App. 35, 96 N.E. 658.

21. *Wallor v. Wood* (1884), 101 Ind. 138. *Perkins v. Panola* (Miss. 1902), 32 So. 316. *Fredericks v. West Hoboken Bd. of Health* (1912), 82 N.J.L. 200, 82 A. 528.

22. *Hard v. State ex rel. Baker* (1934), 228 Ala. 517, 154 So. 77.

23. *Fisher v. City of Paducah* (1934), 256 Ky. 300, 76 S.W. (2d) 21.

24. *Creek County v. Robinson* (1929), 140 Okla. 142, 282 P. 299.

25. *Manning v. Frohmiller* (1941), 58 Ariz. 405, 120 P. (2d) 416.

c. No qualified county health officer should receive less than \$3,000 a year.

d. Minimum salaries of qualified municipal health officers for full-time work should be as follows, according to population:

<i>Population</i>	<i>Salary</i>
1,500,000 and above .....	\$10,000
1,000,000 to 1,500,000 .....	7,500
750,000 to 1,000,000 .....	7,000
500,000 to 750,000 .....	6,000
100,000 to 500,000 .....	5,000
50,000 to 100,000 .....	4,000
25,000 to 50,000 .....	3,500
10,000 to 25,000 .....	3,000
Less than 10,000 .....	2,500

The minimum salaries of qualified chiefs of divisions in municipal health departments should be approximately three-fifths of the above scale.

Changing economic conditions may, of course, make these recommendations obsolete. Probably the figures given for health officers of cities in the lower population groups are now too low.

The Committee on Local Health Units of the American Public Health Association recommends that the salary of a medical health officer should not be less than the net income of the good surgeons and medical clinicians or internists of the community.

Litigation regarding compensation due or alleged to be due to health officers has often arisen and the courts have frequently been called upon to adjudicate such matters. It has been held that a county health officer, appointed according to law, is entitled only to the salary fixed in advance for his official services and cannot recover in legal action for services rendered, no matter how great.<sup>26</sup> The salary of a health officer should, in fact, be fixed in advance.<sup>27</sup> If it is determined in advance, the health officer is entitled to it, whether his duties were prescribed in a formal manner according to law or not.<sup>28</sup> He is entitled to his salary as long as he is not removed, whether he discharges his duties properly or not.<sup>29</sup> Where a statute says that the salary fixed by

26. *Yandell v. Madison County* (1902), 81 Miss. 288, 32 So. 918. *Halford v. Senter* (1915), 169 N.C. 546, 86 S.E. 525. *Creek County v. Robinson* (1929), 140 Okla. 142, 282 P. 299. *Dorough v. Carter County* (1937), 179 Okla. 109, 64 P. (2d) 851.

27. *Adams County v. Aikman* (1910), 57 Miss. 6, 52 So. 513.

28. *People v. Blood* (1907), 105 N.Y.S. 20, 120 App. Div. 614.

29. *People v. Stipple* (1905), 96 N.Y.S. 897, 109 App. Div. 788.

the appointing body should be a "reasonable" amount, the health officer has a right to appeal to the courts if the compensation is unreasonably meagre, but it must clearly appear that the salary is inadequate.<sup>30</sup> As a general proposition, a health officer is not entitled to extra compensation for performing duties which come within the scope of his office,<sup>31</sup> but extra compensation has been allowed for duties in addition to those for which he has been appointed.<sup>32</sup>

Where a physician is a part-time health officer, it is, as a rule, proper for him to conduct his own private practice. The provision for part-time health officers is not a wise one, however, and many instances are likely to arise which are on the border-line between official duties and personal ones.

When the regular term of a health officer expires, but he continues to serve pending the appointment of a successor or because of failure of such a new appointment, he is entitled to compensation for this service.<sup>33</sup> The person who holds legal title to an office is entitled to the legal right to the salary.

The salaries of public officers are not subject to garnishment, a sound principle on the grounds of public policy, nor can the unearned salary be assigned, according to the better rule. When an office is abolished the salary is automatically discontinued, unless the officer has a special arrangement to receive compensation for a definite period of time.

If the salary of a health officer is refused and he believes that such action is wrongful, a remedy is to go to court and bring an action of mandamus against the board or other supervising authority.<sup>34</sup> Mandamus is the legal action to compel a department or officer of the government (federal, state, or local) to perform a proper ministerial function which has been refused or neglected. A municipal corporation may also be sued for salaries withheld. The State may be sued

30. *Graves v. City of Paducah* (1905), 28 Ky. L. 576, 89 S.W. 708. *Trabue v. Todd County* (1907), 125 Ky. 809, 102 S.W. 309. *Butler County v. Gardner* (1906), 29 Ky. L. 922, 96 S.W. 582.

31. *Tabor v. Board of Supervisors of Berrien County* (1909), 156 Mich. 176, 120 N.W. 588. *Bourke v. Sanitary District of Chicago* (1900), 92 Ill. A. 333. *Sloan v. Peoria* (1902), 106 Ill. App. 151. *Reynolds v. Mt. Vernon* (1898), 50 N.Y.S. 473, 26 App. Div. 581; affirm. (1900) in 164 N.Y. 592, 58 N.E. 1091. *Brown v. Livingston County* (Mich. 1901), 85 N.W. 745.

32. *Allen v. De Kalb County* (Tenn. 1900), 61 S.W. 291. *Vandenbergh v. Town Board of Colonie* (1938), 4 N.Y.S. (2d) 434, 254 App. Div. 54.

33. *Mahoney v. City of Biddeford* (1931), 130 Me. 295, 155 A. 560.

34. *Clay v. Civil Service Commission* (1916), 89 N.J.L. 194, 98 A. 312.

only if it consents, but the appropriate fiscal officer of the State may be sued for withholding a salary that is due to an officer of the government.

In the conduct of his legal activities, a health officer is generally entitled to remuneration for necessary expenses that may be incurred. It has been held in Mississippi, however, that a county board of supervisors has no authority to pay the expenses of a health officer who attends a convention outside the county.<sup>85</sup> In some States there is definite statutory authorization for payment of the expenses of health officers in attending public health conferences, whether called by the state health authorities or other professional agencies, since attendance at such meetings and conventions is usually beneficial.

### *Powers and Duties*

The health officer is the administrative officer and executive of the board of health or health department.<sup>86</sup> Where there is no board of health, the health officer or health commissioner stands in lieu of the board and exercises the authority that such a board would have.<sup>87</sup>

The functions and duties of health officers are those set forth in the statutes, usually including the enforcement of all public health laws, ordinances, and regulations; the organization and administration of the activities of the health department; the carrying out of the policies and orders of the board of health; the selection and supervision of the personnel of the health department; the preparation of the budget and responsibility for expenditures; advice and counsel to the board of health, the municipal government, and the people generally; and such specific activities as are necessary for the prevention and control of disease and the promotion of the health of the community.

"A health officer who is expected to accomplish results," said the Supreme Court of Wisconsin,<sup>88</sup> "must possess large powers and be endowed with the right to take summary action, which at times must trench closely on despotic rule."

85. *Miller v. Tucker* (1925), 142 Miss. 146, 105 So. 774.

86. *McAnaly v. Goodier* (1905), 195 Mo. 551.

87. *Commonwealth v. Collins* (1927), 257 Mass. 580, 154 N.E. 266. *Fisher v. Kelly* (1942), 289 N.Y. 161, 44 N.E. (2d) 413, affing. 32 N.Y.S. (2d) 1018, 263 App. Div. 836.

88. *State ex rel. Nowotny v. Milwaukee* (1909), 140 Wis. 38, 121 N.W. 658, 133 A.S.R. 1060.

An outline of the legal powers and duties of health officers, written more than fifty years ago but impressively modern in its point of view, is the comprehensive statement of Parker and Worthington:

The general duties of a medical officer of health are such as naturally pertain to the office of the chief executive officer and adviser of the board of health. He should inform himself, as far as practicable, respecting all influences affecting or threatening to affect injuriously the public health within his district; he should inquire into and ascertain, by such means as are at his disposal, the causes, origin, and distribution of diseases within the district, and determine to what extent the same have depended on conditions capable of removal or mitigation; he must be prepared to advise the board of health on all matters affecting the health of the district, as to the means of preventing or removing nuisances and causes of disease, and as to the propriety of adopting general sanitary regulations or special orders in particular cases; he must take all practicable means to secure early information of the occurrence of cases of communicable disease; and on receiving notice, or having good reason to believe that there is, within his district, a case of disease dangerous to the public health, he must investigate the subject without delay; advise the persons competent to act as to the measures required to prevent the extension of the disease; order the prompt isolation of those sick with the disease, and the vaccination or isolation of those who have been exposed to the disease; if necessary, furnish the means for proper medical care and nursing; give public notice of all infected places by placard on the premises, and otherwise, if necessary; notify teachers or superintendents of schools concerning families in which there are contagious diseases; supervise funerals of persons who die from diseases dangerous to the public health; disinfect rooms, clothing, and all articles likely to be infected, or direct their destruction, if necessary; and finally, he must keep the local board of health and the State board of health informed respecting all cases of infectious or contagious diseases which come to his knowledge and are likely to endanger the public health.<sup>39</sup>

Since the health officer is an administrative officer, he has no power to legislate,<sup>40</sup> though under certain conditions, as where there is a single commissioner of health, he may prescribe regulations for carrying into effect the laws as promulgated by the legislative bodies. As a rule, all health regulations are made by boards, and then are to be applied and enforced by the health officer, as the executive of the board. In exercising discretion, as by determining to whom licenses should be issued under a law or regulation, a health officer is not usurping legislative or judicial powers, but is carrying on his adminis-

39. L. Parker and R. H. Worthington, *The Law of Public Health and Safety*, Albany, Bender, 1892.

40. *People v. Hamilton* (1919), 177 N.Y.S. 222, 188 App. Div. 783.

trative duties, and these and other executive or directory functions may be properly delegated to him.<sup>41</sup>

### Contracts

A board of health is generally given authority to make such contracts as are necessary to the proper administration of its affairs. These contracts and agreements are usually drawn by the health officer as agent of the board or department. All such contracts should, however, be authorized or approved by the board.<sup>42</sup> All contracts should be made in writing, even though the law recognizes some which are verbal. An administrative officer should have records of his acts, especially in the case of agreements and contracts. Ordinary correspondence is usually sufficient for minor matters, but in any transaction in which considerable amounts of money are involved or in which important policies are implicated, there should be a formal document. Witnesses to a contract are not necessary unless required by statute, though sometimes the parties consider witnesses desirable. Health officers should not hesitate to invoke the aid of municipal attorneys or solicitors in drafting important legal papers.

A board of health may not make a special contract with the health officer for services which he is expected to render in accordance with the terms of his appointment.<sup>43</sup> As a general rule, the board of health may, however, properly contract with the health officer for extra duties or services not regularly within the scope of his office or employment.<sup>44</sup> The health officer may recover for such earned compensation.<sup>45</sup> The

41. See *Moy v. City of Chicago* (1923), 309 Ill. 242, 140 N.E. 845 (laundry regulations).

42. *Schmidt v. Stearns County* (1885), 34 Minn. 112, 24 N.W. 358. *Collier v. Scott* (1905), 124 Wis. 400, 102 N.W. 909. *Sawyer v. Wepello County* (1911), 152 Ia. 749, 133 N.W. 104. *Chapman v. Muskegon County* (1912), 169 Mich. 10, 134 N.W. 1025.

43. *Sloan v. Peoria* (1902), 106 Ill. App. 151. *Cochran v. Vermillion County* (1903), 113 Ill. App. 140. *Yandell v. Madison County* (1902), 81 Miss. 288, 32 So. 918. *Congdon v. Nashua* (1904), 72 N.H. 468, 57 A. 686. *Reynolds v. Mt. Vernon* (1898), 26 App. Div. 581, 50 N.Y.S. 473; affirm. (1900) in 164 N.Y. 592, 58 N.E. 1091.

44. *Dewitt v. Mills County* (1904), 126 Ia. 169, 101 N.W. 766. *St. Johns v. Clinton County* (1897), 111 Mich. 609, 70 N.W. 131. *Schmidt v. Stearns County* (1885), 34 Minn. 112, 24 N.W. 358. *Hudgins v. Carter County* (1903), 115 Ky. 133, 72 S.W. 730, 24 Ky. L. 1980. *Cedar Creek Twp. v. Wexford County* (1903), 135 Mich. 124, 97 N.W. 409. *Buffalo Lake Bd. of Health v. Renville County* (1903), 89 Minn. 402, 95 N.W. 221.

45. *Selma v. Mullen* (1871), 46 Ala. 411. *Plumb v. York County* (1914), 95 Neb. 655, 146 N.W. 938, Ann. Cas. 1915 D 1195.

health officer, as an official, may not contract with himself as an individual for any purpose, nor can a board of health contract with one of its members.<sup>46</sup>

### *Relation to Subordinates*

A health officer usually has subordinates in the health department. They are subject to his authority and receive their instructions from him. The health officer is not responsible for the misfeasance or positive wrongs, or for the nonfeasance, or negligences, or omissions of duty, of the sub-agents or other persons properly employed, in the discharge of their official duties. Any powers definitely and positively entrusted to the health officer himself cannot be delegated to deputies, but he may have such deputies and assistants as may be necessary to aid in the general fulfillment of his duties. Thus, a board of health was not allowed to delegate to a committee the power of the board to employ a physician.<sup>47</sup> Where deputies are properly appointed, they have the powers of their principal. A deputy is, moreover, not to be confused with an assistant, for the former is one who fills the shoes of his principal, while the latter is a mere helper.<sup>48</sup>

Subordinates must be appointed or employed in accordance with authority, express or implied, in the statutes, and in the manner therein set forth, if any. Where a mayor and health officer employed a physician to assist them in certain yellow fever work and there was no record of any authority for such employment, the physician was unfortunately unable to recover for his services.<sup>49</sup>

### *Employees*

Health department employees, or persons who are employed to render specific services for specific compensation, usually include chiefs of bureaus and divisions and practically always include physicians, public health nurses, sanitary engineers, sanitary and other inspectors, statisticians, clerks, stenographers, laborers, helpers, and all other personnel. Under some conditions, such as in cities or towns of

46. *Fort Wayne v. Rosenthal* (1881), 75 Ind. 156, 39 Am. R. 127. *Spearman v. Texarkana* (1894), 58 Ark. 348, 24 S.W. 883, 22 L.R.A. 855. *Bjelland v. Mankato* (1910), 112 Minn. 24, 127 N.W. 397, 140 A.S.R. 460. *Lesteur v. Inhabitants of Rumford* (1915), 113 Me. 317, 93 A. 838.

47. *Young v. Blackhawk County* (1885), 66 Ia. 460.

48. *Dillon's Municipal Corporations* (5th ed., 1911).

49. *Magee v. Town of Osyka* (Miss. 1908), 45 So. 836. *Pue v. Lewts and Clark County* (1926), 75 Mont. 207, 243 P. 573. *Sweeney v. Town of Peterborough* (1929), 84 N.H. 155, 147 A. 412.

certain classes, the health officer himself may under existing laws have the status of an employee instead of an officer.<sup>50</sup>

While the salary of a public officer, such as a health officer, attaches to the office and is not dependent upon the performance of service, the compensation or wages of employees is for actual service performed or rendered in accordance with the arrangements made.

Employees of health departments are frequently on a civil service status. Where, however, a local board of health is created by law as a separate political agency and is given the power to appoint sanitary inspectors, physicians, and other necessary agents, municipal ordinances imposing civil service requirements will not apply to employees of the board of health.<sup>51</sup> An employee who is under civil service can be discharged only in accordance with the terms of the law or rules that apply.<sup>52</sup>

Desirable qualifications for employees holding technical positions in health departments, such as bureau chiefs, public health nurses, public health engineers, and sanitarians, have been recommended by the Conference of State and Territorial Health Officers, and are given in a bulletin issued by the United States Public Health Service,<sup>53</sup> and in the reports of the Conference. Such qualifications have also been issued by the Committee on Professional Education of the American Public Health Association.

### *Termination of Office*

An office may be terminated by the death of the incumbent, expiration of term, or by his resignation, suspension, removal, impeachment (in a limited class of cases), incapacity, or by abandonment. If the tenure of office is not definitely fixed, the health officer may be removed at any time by the board.<sup>54</sup> The removal of a health officer is not a breach of contract, as a rule.<sup>55</sup> The actual methods of removal

50. *Conolly v. Craft* (1923), 200 N.Y.S. 69, 205 App. Div. 583. *Safransky v. City of Helena* (1935), 98 Mont. 456, 39 P. (2d) 644. *Scotfield v. Strain* (1943), 142 Oh. St. 290, 51 N.E. (2d) 1012.

51. *Murphy v. Cooper* (1929), 149 S.C. 449, 147 S.E. 438. *Board of Health of City of Canton v. O'Wesney* (1931), 40 Oh. App. 77, 178 N.E. 215.

52. *State ex rel. Roe v. Seattle* (1915), 88 Wash. 589, 153 P. 336. *Dettlinger v. Ocean Township* (1928), 6 N.J. Misc. 485, 141 A. 737, 101 N.J. Eq. 442. *Kohn v. City of Philadelphia* (1944), 156 Pa. Super. 112, 39 A. (2d) 531.

53. *The Public Health Program Under Title VI of the Social Security Act*, Supplement No. 126 to *Pub. Health Rep.*, U.S. Public Health Service, 1937.

54. *Patton v. Board of Health* (1899), 127 Cal. 388, 59 P. 702, 78 A.S.R. 66.

55. *Young v. City of Ashland* (Ky. 1910), 125 S.W. 737.



are frequently set forth in the statutes and must be complied with.<sup>56</sup> An office may be forfeited by misconduct, failure to perform the duties, physical or mental incapacity, or refusal to act in the official capacity. Court action, by means of the writ of quo warranto, is sometimes necessary to vacate an office. The legislature may abolish or reduce the term of an office, provided there is no constitutional limitation.<sup>57</sup>

The power of summary removal of an officer or employee or appointee is usually an incident to the power of appointment.<sup>58</sup> Such removal of officers can generally be accomplished, however, only after the officer has been accorded a hearing on charges.<sup>59</sup> Where, for example, a health officer resigned before the expiration of his three-year term, and another person was appointed in his place, the new appointee was held to be entitled to the office and removable only for cause, despite an attempt by the board of health to rescind his appointment and name someone else.<sup>60</sup> It has been held, however, that a health official who files his resignation at the time of his appointment, the resignation to be used at some future time, has acted legally.<sup>61</sup>

Where a state health department was given the power by law to remove a local health officer for failure or refusal to enforce necessary laws and regulations to prevent and control the spread of contagious or infectious diseases or where an emergency existed, and the charter of a city gave the mayor power to appoint and remove the health officer, it was held that the state health department could not remove the health officer merely for the reason that he did not devote full time to his duties.<sup>62</sup>

In a situation where a board of health of a town in Massachusetts entered into a written contract with an individual to serve as agent

56. *Attorney General v. Stratton* (1902), 194 Mass. 51.

57. *State ex rel. Saint v. Dowling* (1928), 167 La. 907, 120 So. 593. *Gouax v. Smith* (1926), 160 La. 617, 107 So. 466.

58. *Young v. Huff* (1929), 209 Ia. 874, 227 N.W. 122. *Board of Comr's of Colfax County v. Dept. of Public Health* (1940), 44 N. Mex. 189, 100 P. (2d) 222. *State ex rel. West v. Feyler* (1941), 138 Oh. St. 251, 34 N.E. (2d) 441. *Cook v. St. Francis County* (1943), 349 Mo. 484, 162 S.W. (2d) 252 (a nurse).

59. *Buckley v. Laidlaw* (1936), 14 N.J. Misc. 139, 182 A. 819. *Ware v. State* (1916), 111 Miss. 599, 71 So. 868. *Mississippi State Board of Health v. Matthews* (1917), 113 Miss. 510, 74 So. 417. *Larkey v. City of Bayonne* (1939), 123 N.J.L., 134, 8 A. (2d) 68.

60. *Clay v. Browne* (1921), 91 N.J.L. 544, 114 A. 808.

61. *Byrne v. St. Paul* (1917), 137 Minn. 235, 163 N.W. 162, L.R.A. 1917 F 545.

62. *State ex rel. Churchman v. Hall* (1920), 86 W. Va. 1, 102 S.E. 694.

for the board of health for a year, but after two months voted to dispense with his services, in strict accord with the terms of the contract, but subsequently a town meeting voted to ratify the contract and rescind the provisions regarding termination, it was held by the highest court of the State that the board of health was acting under statutory authority and that the vote of the town meeting was ineffective with regard to its actions in this matter.<sup>63</sup> "A municipality," said the Court, "can exercise no direction or control over one whose duties have been defined by the legislature."

The legal liability of health officers is discussed at length in Chapter XVIII.

63. *Breault v. Town of Auburn* (1939), 303 Mass. 424, 22 N.E. (2d) 46.

**PART II**  
**POWERS AND DUTIES OF HEALTH DEPARTMENTS**



## CHAPTER VII

### VITAL STATISTICS

**T**HE collection, recording, and keeping of vital statistics, including notices of births, deaths, stillbirths, marriages, and divorces, is now an established function of government, although at one time it was chiefly the responsibility of religious organizations under canon law.

Because of the importance of permanent records of vital statistics to the State and its citizens, proper requirements that such data shall be reported by appropriate persons to duly appointed state and local registrars of vital statistics for permanent filing are generally recognized as a valid exercise of the police power of the State.<sup>1</sup>

The obligation of sovereignty to collect and preserve such valuable records was recognized in North America as early as 1639. In the proceedings of the General Court of the Massachusetts Bay Colony for that year, it was ordered, "that there bee records kept of all wills, administrations, inventories, as also of every marriage, birth and death of every person within this jurisdiction."<sup>2</sup> Acting pursuant to this law and subsequent statutes adopted between 1639 and 1644, the Massachusetts Bay Colony is stated to have been the first political unit in the world to record these vital facts.<sup>3</sup> In 1644 the Connecticut Colony required "Town Clarkes or Registers" to keep records of marriages and births, and in 1650 included records of deaths.<sup>4</sup> Similar legislation was enacted in Virginia and other colonies during this same period.

Today, every State in the United States provides by law for the collection and keeping of vital statistics, a duty that is mentioned specifically in the constitutions of two States, Texas and Washington. Only in comparatively recent times, however, has the obligation been recognized by many of the States, and its administration undertaken in an efficacious manner.

In order to stimulate more adequate and accurate reporting of deaths in this country, a national death registration area was estab-

1. W. T. Fales, E. W. Kopf, and J. A. Tobey, Vital statistics: constitutional, statutory, and administrative aspects, *Am. J. Pub. Health*, 17:799, August 1927.

2. *Records of the Governor and Company of the Massachusetts Bay in New England*, Boston, 1853, volume I, page 270.

3. Fales, Kopf, and Tobey, *op. cit.*

4. *The Public Records of the Colony of Connecticut (1636-1776)*, Hartford, 1850-1890.

120 POWERS AND DUTIES OF HEALTH DEPARTMENTS

lished in 1880 by the United States Bureau of the Census, the federal bureau charged with the taking of our decennial censuses. This original death registration area included only the States of Massachusetts and New Jersey, the District of Columbia, and nineteen cities, since at that time these were the only places having satisfactory laws, suitable systems of registration, and at least 90 per cent completeness of reporting.

By an act of Congress approved March 6, 1902 (32 Stat. L. 51, U.S.C. title 13, sec. 101), providing for a permanent Census Office, the collection of national birth and death statistics was authorized, and a Division of Vital Statistics was created in the Bureau of the Census for that purpose.<sup>5</sup> A national birth registration area, comparable to the death registration area, was established in 1915 with a nucleus of ten States and the District of Columbia.

Both the national death and birth registration areas were gradually extended until in 1933 all States were included in each of these areas. The Division of Vital Statistics does not keep public records of the births and deaths of individuals, which are on file in the States, but collects and scrutinizes certificates for necessary corrections, and compiles and publishes useful data on birth and death statistics for the entire country, prepares and issues national life tables and other valuable statistical material, and stimulates more accurate and complete reporting and recording. In 1938 this division issued a preliminary draft of a state model vital statistics law, which was submitted in 1939 to the National Conference of Commissioners on Uniform State Laws. After securing approval of the American Bar Association, a Uniform Vital Statistics Act was issued by the Conference in 1942, with the recommendation that it be enacted in all the States. This law has been adopted, in whole or in part, in a considerable number of the States.

*The Importance of Vital Statistics*

Vital statistics are necessary to the efficient administration of state and local health departments, which are particularly concerned with birth and death rates and stillbirths but are not especially interested in marriages and divorces. The application of mathematical methods

5. J. A. Tobey, *The National Government and Public Health*, Baltimore, Johns Hopkins Press, 1926. The Division of Vital Statistics was transferred in 1946 from the Bureau of the Census in the Department of Commerce to the Public Health Service in the Federal Security Agency.

to these data is known as the science of biometry or biometrics,<sup>6</sup> while the statistical study of all the broad aspects of human life is known as demography, of which vital statistics is but one division.

To the individual, a birth record is of importance as a legal document, which may be necessary to prove age, parentage, legitimacy, sex, place of birth, citizenship, and other significant personal facts. A birth certificate is usually necessary to prove age for such purposes as permission to enter or leave school; to secure working papers under state laws; to decide questions of child labor; to have the right to vote, to marry, to obtain a passport, to hold public office, to inherit property, to obtain a pension, to enter or be exempt from military service; to obtain licenses of various kinds; to determine the age of consent in sex crimes; to determine criminal responsibility of minors; to establish liability of parents for acts of minor children; to determine the validity of contracts made by alleged minors; to obtain insurance at certain rates; and for many other purposes.

Similarly, a death certificate is or may be necessary to secure a burial permit; to prove the fact of death in insurance or workmen's compensation matters; to secure inheritance or a pension; to remarry; to aid in the prosecution or defense of malpractice or the illegal practice of medicine, nursing, or midwifery; and for many other purposes.

The importance of vital statistics to the State has been recognized by the courts on numerous occasions since 1882, when an Iowa statute requiring physicians to report births and deaths was upheld as a valid exercise of the police power.<sup>7</sup> This decision was followed by a Kentucky case in 1903,<sup>8</sup> but in 1911 the Supreme Court of Ohio ruled that reports of the fact of birth or death might be required from physicians and others by the legislature, but that supplementary data, such as the status of legitimacy of newborn infants, could not be required without the payment of compensation.<sup>9</sup> This ruling, which stands alone in the jurisprudence applicable to vital statistics, was predicated upon certain provisions in the "Ordinance of 1787," an act of Congress providing for the government of the Northwest Territory, which is said to be fundamental law in Ohio, superior even to the state constitution.

6. Raymond Pearl, *Introduction to Medical Biometry and Statistics*, Philadelphia, Saunders, 1930.

7. *Robinson v. Hamilton* (1882), 60 Ia. 134, 14 N.W. 202, 46 Am. R. 63.

8. *Commonwealth v. McConnell* (1903), 116 Ky. 358, 76 S.W. 41, 25 Ky. L.R. 552.

9. *State v. Boone* (1911), 84 Oh. St. 346, 95 N.E. 924, Ann. Cas. 1912 C 683, 39 L.R.A. (N.S.) 1015; 85 Oh. St. 313, 97 N.E. 975, 39 L.R.A. (N.S.) 1019.

*Constitutionality of Vital Statistics Laws*

Subsequent to this decision, state laws providing for comprehensive systems of reporting births and deaths to state health departments were upheld as constitutional in Tennessee<sup>10</sup> and Michigan.<sup>11</sup> "Such a system," declared the Supreme Court of Tennessee, "is just as necessary to a campaign by the board of health as is information concerning the enemy's movements to the general in command of an army. There can be no specialized or well-directed effort by the board without such knowledge." This case was an appeal by an undertaker from an indictment for handling and removing a dead body without a permit as required by one section of the law.

In the Michigan case, the conviction of a physician for failure to register a birth within five days, as required by law, was affirmed, the court dismissing as untenable and without merit the defendant's contentions that the five-day reporting period imposed undue hardship upon physicians, and that lack of compensation for the report was a deprivation by the State of property without due process of law, as well as being class legislation. The penalties imposed, a fine of \$5 for the first offense and a fine of not less than \$25 or more than \$100 or imprisonment in the county jail not to exceed 60 days for each subsequent offense, were held not to be cruel or unusual punishment. Delegation of authority to the state health department to adopt rules and regulations was likewise sustained.

A state law providing for a system of vital statistics for the entire State has been held to abrogate a local ordinance enacted prior to the statute, which imposed a local fee for a burial permit, when the state law provided that no second permit or additional fee should be required.<sup>12</sup> In this case an undertaker had secured a burial permit in one county and had been improperly convicted for failure to pay a fee in another borough.

*Administrative Aspects of Vital Statistics<sup>13</sup>*

The administrative features of the various state vital statistics laws are, in general, fairly uniform since they are based upon a model vital statistics law. A central bureau of vital statistics in the state

10. *State v. Norvell* (1917), 137 Tenn. 82, 191 S.W. 536, L.R.A. 1917 D 586.

11. *People v. Cramer* (1929), 247 Mich. 127, 225 N.W. 595. *Department of Health v. Dunn* (1911), 129 N.Y.S. 29.

12. *Borough of Yeadon v. Galen* (1933), 108 Pa. Sup. 114, 164 A. 837.

13. See also J. S. Strahorn, A lawyer's view of vital statistics, *Am. J. Pub Health*, 27:1207, December 1937.



health department, with a state registrar in charge, is usually set up to enforce the law and to be responsible for the collection and custody of reports of births and deaths. The state health department may enact rules and regulations to carry out the law.

Local registrars and deputies in registration districts throughout the State are appointed and removed by the state health department, although sometimes certain local officials, such as health officers or city and town clerks, are made ex-officio registrars of vital statistics. The power of a state board of health to appoint local registrars in accordance with law has been upheld by the courts.<sup>14</sup>

Births are usually required to be reported on standard forms to local registrars within ten days by physicians, midwives, persons acting as midwives, or where no one was in attendance by the father, mother, or householder, although a shorter time for making reports may be required.<sup>15</sup>

Whoever assumes custody of a child of unknown parentage, or a foundling, must immediately report to the local registrar. This report constitutes the certificate of birth, the place and date of birth being determined by approximation. Adopting parents cannot require a state registrar of vital statistics to issue a birth certificate where the birth has not been registered in the State.<sup>16</sup>

Since the duties of the registrar are ministerial, he cannot refuse to accept a birth certificate from a person duly licensed by the State to practice the healing art, whether it be osteopathy or medicine.<sup>17</sup> An osteopath who officiates at a birth, or is in attendance at the time of death, is now generally required to report,<sup>18</sup> although it has been held in the past that osteopaths and chiropractors could not report under state laws then in existence.<sup>19</sup>

Where a birth is not reported within the ten days or other period required by law, a registrar must accept a report made subsequently

14. *People ex rel. Hershey v. McNichols* (1932), 91 Colo. 141, 13 P. (2d) 266. *McNichols v. Hershey* (1933), 92 Colo. 469, 22 P. (2d) 131. *Darnaby v. Furlong* (1926), 216 Ky. 475, 287 S.W. 913. *State ex rel. McKittrick v. Langston* (Mo. 1935), 84 S.W. (2d) 131.

15. *People v. Cramer* (1929), 247 Mich. 127, 225 N.W. 595.

16. *Penick v. Abercrombie* (1945), — Ga. —, 33 S.E. (2d) 293.

17. *People v. Heckard* (1927), 244 Ill. App. 112, modif. in 341 Ill. 144, 173 N.E. 124.

18. *People ex rel. Gage v. Stntan* (1917), 278 Ill. 256, 115 N.E. 817. *In re Opinion of Justices* (1919), 42 R.I. 249, 107 A. 102.

19. *Keimingham v. Blake* (1919), 135 Md. 320, 109 A. 65, 8 A.L.R. 1066 (osteopath). *State v. Fahey* (1922), 152 Minn. 220, 188 N.W. 260 (chiropractor).

by the parent, since the primary object of the statute is to make a record of births.<sup>20</sup> The time mentioned is not a limitation of power or right on the part of the registrar, whose duty it is to file a report if he is satisfied as to its correctness. A delayed birth certificate should, in general, be reported upon a special form, and great care taken to assure its accuracy.

Where a commissioner of public health refused to have a birth recorded, it has been held in New York that the proper remedy under the statutes is to apply first to the board of health, and then have the action of the commissioner reviewed in a court by an action of certiorari, and not by an application to the court for an order directing the commissioner to record the birth.<sup>21</sup>

In the reporting of deaths it is usually required that the standard death certificate be used, that the medical certificate be signed by the physician in attendance and submitted within three days, that no burial permit be issued until an accurate and complete death certificate has been filed, that in case of death without medical attention the undertaker notify the local registrar and that he in turn notify the health officer, that no person in charge of a place of interment shall permit interment or other disposition of the body unless accompanied by a burial, removal, or transit permit.<sup>22</sup> Coffin makers are generally required to keep records of sales and names of deceased persons, which are open to inspection by the state registrar.

A stillbirth, or delivery of a dead fetus after the twentieth week of gestation, was formerly required to be registered as both a birth and a death, though the notation of stillbirth was made on the certificates in place of the name of the child. Midwives are not permitted by the vital statistics laws to sign certificates of stillborn children, and such cases are treated in the same manner as deaths without medical attention. In the new model vital statistics law, a stillbirth is reported only as a stillbirth and not as a birth and a death.

Reports of births and deaths are transmitted by local registrars to the state registrar at monthly intervals, the originals being forwarded and copies being retained in the local office. The local registrar must see to it that all certificates received are correct, complete, and satis-

20. *Seung v. Mikkelson* (1929), 150 Wash. 289, 272 P. 968. See F. J. Reeder, Delayed certificates. *Am. J. Pub. Health*, 27:1216, December 1937. In *Department of Health v. Owen* (1904), 88 N.Y.S. 184, 94 App. Div. 425, it was held that a report of a birth can be mailed by a physician.

21. *Matter of Kunhardt* (1920), 181 N.Y.S. 142, 111 Misc. 240.

22. See Survey of state certificates of birth, stillbirth, and death, *Vital Statistics—Special Reports* (U. S. Bureau of the Census), 3:271, November 20, 1937.

factory. Causes of death are usually required to be reported in accordance with the *International List of Causes of Death*, which has been issued in pamphlet form by the United States Bureau of the Census.

If the circumstances suggest that a death or stillbirth was caused by other than natural causes, the local registrar must refer the case to the coroner or medical examiner for investigation and certification.

#### *Payment of Fees to Registrars*

The vital statistics laws generally provide for the payment of fees, usually 25 to 50 cents, to local registrars for each birth or death certificate, and suitable fees may also be charged by registrars for furnishing copies of the certificates to interested and proper persons. Sometimes fees are likewise authorized for physicians and others who make the reports to the registrars, although as previously pointed out, the reports may be legally required without compensation.<sup>23</sup>

The payment to local registrars of fees from public monies has been upheld by the courts as valid,<sup>24</sup> even when such fees are in addition to the regular salary received by the officer charged with the collection of vital statistics.<sup>25</sup> The denial of such payments has been upheld, however, in a case where a definite arrangement was made with a secretary of a board of health to act as registrar without added compensation, even though the statutes provided for the fees.<sup>26</sup> In this case, the registrar was held to have waived the privilege.

Where a state constitution permitted the legislature to delegate to counties the power to levy taxes for "necessary sanitation," it was held by the Georgia Supreme Court in 1925 that this language did not empower counties to levy taxes to pay fees of registrars of vital statistics, as the term "sanitation" was not considered or intended to cover vital statistics.<sup>27</sup> Subsequent to this decision a constitutional amendment was adopted granting the power, and a new law passed in 1927 included authorization of the payment of these fees.

23. Fees to physicians and midwives were upheld in *Asher v. Stacy* (1945), 299 Ky. 476, 185 S.W. (2d) 958.

24. *Burgess v. Johnson County* (1923), 158 Ark. 218, 250 S.W. 10. *City of Sacramento v. Simmons* (1924), 66 Cal. App. 18, 225 P. 36. *People ex rel. Hershey v. McNichols* (1932), 91 Colo. 141, 13 P. (2d) 266. *Darnaby v. Furlong* (1926), 216 Ky. 475, 287 S.W. 913. *State v. Rose* (1926), 313 Mo. 369, 281 S.W. 396.

25. *Minnehaha County v. Foster* (1933), 61 S.D. 406, 249 N.W. 688.

26. *Fox v. City of Monroe* (1930), 15 La. App. 192, 131 So. 483.

27. *Smith v. State* (1925), 160 Ga. 857, 129 S.E. 542.

*Vital Statistics as Public Records*

The vital statistics laws usually provide that certified copies of birth and death records shall be furnished to citizens on application to state and local registrars, and upon the payment of legal fees.<sup>28</sup> Inspection of these public records is likewise permitted, although the officer having custody of the records may exercise a reasonable discretion in making regulations in regard to the inspection and use of the records, such as with respect to the hours during which the inspections may be made, the production of evidence from an attorney or other person as to his authority to examine the records, the payment of suitable fees for this privilege and for abstracts or copies, and the proper conduct of all persons involved. The citizen has a right to examine public records, but he cannot abuse that right and must exercise it only under proper supervision.

With respect to disclosure of illegitimacy of birth, or of information from which it can be ascertained, the Uniform Vital Statistics Act provides that such disclosure should be made only upon order of a court in a case where such information is necessary for the determination of personal or property rights, and then only for such purpose. In cases of legitimation the state registrar, upon receipt of proof thereof, prepares a new certificate of birth in the new name of the legitimated child, and seals and files away the evidence, to be opened only upon court order. The same procedure is used in cases of adoption.

Although a birth or death certificate may be corrected or amended within a reasonable time after it has been received, it usually cannot be changed or altered after it has become a public record. Where, for example, a physician reported a death as due to a certain cause and ten months later a coroner's inquest found a different cause of death, it was held that the state registrar of vital statistics could not supplant the original record.<sup>29</sup>

*Vital Statistics as Evidence*

Statutes generally provide that public records such as birth and death certificates shall be prima facie evidence of the facts they set forth, and they may be introduced in court actions for that purpose.

28. *Scott v. Culpepper* (1930), 220 Ala. 393, 125 So. 643. *Prudential Insurance Co. v. Calvin* (1933), 227 Ala. 146, 148 So. 837. *Labofish v. Berman* (D.C. 1932), 60 Wash. L.R. 100, 55 F. (2d) 1022.

29. *Continental Casualty Co. v. Nashville & American Trust Co.* (1933), 166 Tenn. 342, 61 S.W. (2d) 461.

Since the original record is appropriate as evidence of this nature, a certified copy issued by a qualified officer is equally valid.<sup>30</sup> This is one exception to the rule of evidence prohibiting testimony in court that is hearsay.

Under the rules of evidence there are, however, some distinct limitations to the information revealed in a birth or death certificate, since these facts are presumptive only. Thus, a death certificate is good evidence as to the fact of death and the time of death, but is not conclusive as to the cause of death, especially in cases of litigation between private parties,<sup>31</sup> nor can it be offered in evidence as to who caused the death.<sup>32</sup> The information given by a physician on a death certificate is acquired through his professional relationship with the patient, and is, therefore, privileged and need not be divulged by him except in criminal cases.<sup>33</sup>

In the absence of records of vital statistics, there may be admitted as evidence in courts data from family Bibles, gravestones, genealogical charts, and baptismal and other religious records, provided that suitable proof of their authenticity is adduced.

Mortality tables to indicate the expectation of life of individuals are admissible as evidence in civil litigation, according to numerous decisions.<sup>34</sup>

The question of morbidity reports as public records is treated in Chapter VIII, on the Control of Communicable Diseases.

30. *Mass. Mutual Life Insurance Co. v. Bush* (1930), 236 Ky. 400, 33 S.W. (2d) 351. *State v. Worden* (1932), 331 Mo. 566, 56 S.W. (2d) 595. *Hunter v. Derby Foods* (1940), 110 F. (2d) 970, 133 A.L.R. 255.

31. *Bozicevitch v. Kenilworth Mercantile Co.* (1921), 58 Utah 458, 199 P. 406, 17 A.L.R. 346. *Washington Fidelity National Life Ins. Co. v. Anderson* (1933), 187 Ark. 974, 63 S.W. (2d) 535. *State v. Hecht* (1934), 165 Md. 415, 169 A. 311. *Mayor and City Council of Baltimore v. State* (1937), 173 Md. 287, 195 A. 571. *Aitken v. John Hancock Mut. Life Ins. Co.* (1940), 124 N.J.L. 58, 10 A. (2d) 745.

32. *Okla. Aid Ass'n v. Thomas* (1927), 125 Okla. 190, 256 P. 719.

33. *Davis v. Supreme Lodge, Knights of Honor* (1900), 165 N.Y. 159. *Beglin v. Insurance Co.* (1903), 173 N.Y. 374, 66 N.E. 102. *Key v. Cosmopolitan Life, Health & Accid. Ins. Co.* (Mo. 1937), 102 S.W. (2d) 797.

34. *Donoghue v. Smith* (1931), 114 Conn. 64, 157 A. 415. *Penley v. Teague & Harlow Co.* (1928), 126 Me. 583, 140 A. 374. *Fournier v. Zinn* (1926), 257 Mass. 575, 154 N.E. 268. *Lyons v. Joseph* (1933), 124 Neb. 442, 246 N.W. 859. *Auer v. Sinclair Refining Co.* (1927), 103 N.J.L. 372, 137 A. 555. *Patne v. Gamble Stores* (1938), 202 Minn. 462, 279 N.W. 257, 116 A.L.R. 416.



## CHAPTER VIII

### THE CONTROL OF COMMUNICABLE DISEASES

**T**HE prevention and control of disease is the first and most important duty of public health authorities. Other activities of health departments are, in general, subordinate and supplemental to this responsibility. The protection and preservation of the public health may, of course, involve various positive measures for the promotion of health, but in the contemplation of law this official task is fundamentally a matter of disease control.

Diseases may be classified as: 1) communicable diseases, including all infectious and contagious diseases; 2) occupational diseases, arising from conditions of occupation; 3) diseases of metabolism, such as diabetes, goitre, and the endocrine disorders; 4) food infections and poisonings; 5) nutritional deficiency diseases, such as rickets, scurvy, beri-beri, and pellagra; 6) organic diseases, such as cancer, heart disease, and kidney diseases; 7) psychogenic diseases due to mental conditions; and 8) miscellaneous diseases, including the allergies, intoxications, digestive, respiratory, and various other maladies. Most diseases are preventable by recognized scientific and administrative methods.

#### *The Communicable Diseases*

Communicable diseases may be defined as diseases caused by microorganisms that may be transmitted directly or indirectly from man to man, or from animals to man. The term "infectious disease" is synonymous with "communicable disease," and means any disease caused by vegetable or animal microorganisms that is capable of being transmitted by infection, with or without contact.

Contagious diseases are those that are spread from person to person, or from the sick to the well, by direct or indirect contact, either by intimate personal contact with a patient or through contact with his secretions or with an object recently contaminated by him.

All contagious and infectious diseases are communicable diseases, but many infectious diseases are not contagious. Examples of non-contagious infectious diseases are malaria, typhus fever, and other afflictions that are spread only by the bites of insects of certain species.

These scientific distinctions are not of great importance from the legal point of view, since courts often have used the various terms interchangeably, without materially affecting the legal principles applicable to disease control. A federal court has, moreover, upheld a

regulation of the United States Public Health Service declaring that the word "contagious" is synonymous with "communicable."<sup>1</sup>

A list of communicable diseases for which notification usually is or should be required by states and cities in the United States has been given by a committee of the American Public Health Association as follows:<sup>2</sup>

Actinomycosis	Pneumonia, acute lobar
Anthrax	Poliomyelitis
Chancroid	Psittacosis
Cholera	Puerperal infection (puerperal septicemia)
Conjunctivitis, acute infectious	Rabies
Dengue	Relapsing fever
Diarrhea of the newborn, epidemic	Ringworm (scalp)
Diphtheria	Rocky Mountain spotted (or tick) fever
Dysentery, bacillary	Scarlet fever (scarlatina)
Favus	Septic sore throat (streptococcus throat infection)
Food infections (salmonellosis)	Smallpox (variola)
Food poisoning	Syphilis
Glanders	Tetanus
Gonorrhoea	Trachoma
Hepatitis, infectious	Trichinosis
Hookworm disease (Ancylostomiasis)	Tuberculosis, pulmonary
Influenza	Tuberculosis, other than pulmonary
Kerato-conjunctivitis, infectious	Tularemia
Leprosy	Typhoid fever
Malaria	Typhus fever
Measles (rubeola)	Undulant fever (brucellosis)
Meningococcus meningitis	Yellow fever
Paratyphoid fever	
Pertussis (whooping cough)	
Plague, bubonic, septicemic, pneumonic	

A list of communicable diseases and infestations occurring in the United States and its insular possessions, but for which notification

1. *Ex parte Liang Buck Chew* (1924), 296 F. 182.

2. *The Control of Communicable Diseases*, 6th ed., New York, American Public Health Association, 1945. This report is official with the U. S. Public Health Service and the U. S. Navy, and has been approved in principle by the Surgeon General, U.S. Army. Also issued as Reprint No. 1697 by the Public Health Service, 1945.



is not everywhere required nor need be required, is also given, as follows:

Ascariasis	Mononucleosis, infectious
Chickenpox (varicella)	Mumps
Choriomeningitis	Pediculosis
Coccidioidomycosis	Pemphigus neonatorum
Common cold	Rat-bite fever
Dysentery, amebic (amebiasis)	Rheumatic fever
Encephalitis, infectious	Scabies
Filariasis	Schistosomiasis
German measles (rubella)	Trypanosomiasis
Granuloma inguinale	Vulvovaginitis in children
Impetigo contagiosa	Yaws
Lymphogranuloma venereum <sup>3</sup>	

### *Methods of Control*

In the invaluable report of the American Public Health Association mentioned above, complete and accurate data are given for each of the communicable diseases, with full information on: 1) recognition of the disease; 2) etiological agent; 3) source of infection; 4) mode of transmission; 5) incubation period, if known; 6) period of communicability; 7) susceptibility and immunity; 8) prevalence; and 9) methods of control.

Under "methods of control" are included such established procedures as the following:

- A. The infected individual, contacts, and environment
  - 1. Recognition of the disease and reporting
  - 2. Isolation
  - 3. Concurrent disinfection
  - 4. Terminal disinfection
  - 5. Quarantine
  - 6. Immunization
  - 7. Investigation of source of infection
- B. General measures
- C. Epidemic measures

Among the general measures applicable to the control of communicable diseases are such matters as popular health instruction, personal cleanliness and prophylaxis, food inspection and control, general sanitation, protection of water supplies, control of insects, and the

3. This title does not include granuloma venereum (inguinale), which is a different clinical condition.

location and control of human or animal carriers and contacts. Specific measures may, of course, also be important in specific diseases, as, for example, the use of silver nitrate solution in the eyes of the newborn to prevent conjunctivitis (ophthalmia neonatorum).

### *Administrative Control*

The administrative control of the communicable diseases is primarily a function of the States,<sup>4</sup> which may delegate this responsibility to counties, municipal corporations, boards of health, school boards, and other political subdivisions of the State.<sup>5</sup>

It is the proper function of the Federal Government to prevent and control the entry of disease into the United States from foreign countries, by means of supervision of foreign commerce<sup>6</sup> and medical inspection and denial of entry of diseased immigrants,<sup>7</sup> but state quarantine and health laws and regulations are recognized by the Federal Government.<sup>8</sup> The United States is also concerned with the prevention and control of communicable diseases in interstate commerce and through the mails. Where, however, a health official of the Federal Government is requested to aid in the suppression of an epidemic in a community, the national government cannot be charged with the expense of controlling the epidemic.<sup>9</sup>

4. *Morgan's S.S. Co. v. Louisiana State Board of Health* (1886), 118 U.S. 455, 6 S. Ct. 1114, 30 L. Ed. 237. *Bartlett v. Lockwood* (1896), 160 U.S. 357, 16 S. Ct. 334, 40 L. Ed. 455. *Haverty v. Bass* (1876), 66 Me. 71. *Spring v. Hyde Park* (1884), 137 Mass. 554, 50 A.S.R. 334. *Brown v. Murdock* (1885), 140 Mass. 314, 3 N.E. 208. *Forbes v. Board of Health* (1891), 28 Fla. 26, 9 So. 862, 13 L.R.A. 549. *In re Smith* (1895), 146 N.Y. 68, 40 N.E. 497, 48 A.S.R. 769, 28 L.R.A. 820. *Highland Park v. McMurtry* (1916), 169 Ky. 457, 184 S.W. 390.

5. *Train v. Boston Disinfecting Co.* (1887), 144 Mass. 523, 11 N.E. 929, 59 A.S.R. 113. *Hurst v. Warner* (1894), 102 Mich. 238, 60 N.W. 440, 47 A.S.R. 525, 26 L.R.A. 484. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 80 A.S.R. 195, 50 L.R.A. 64. *Hengehold v. Covington* (1900), 108 Ky. 752, 57 S.W. 495, 22 Ky. L. 462. *People v. Tait* (1913), 261 Ill. 197, 103 N.E. 750. *Quebec Board of Health v. Cateau Landing* (1917), 52 Que. Super. 195.

6. *The Dago* (Md. 1894), 61 F. 986, 10 C.C.A. 224. *The African Prince* (Mass. 1914), 212 F. 552. *The Squanto* (N.Y. 1926), 13 F. (2d) 548.

7. *Oceanic Steam Navig. Co. v. Stranahan* (1909), 214 U.S. 320, 29 S. Ct. 671, 53 L. Ed. 1013.

8. *Peete v. Morgan* (1874), 19 Wall. 581, 22 L. Ed. 201. *Morgan's S.S. Co. v. Louisiana State Board of Health* (1886), 118 U.S. 455, 6 S. Ct. 1114, 30 L. Ed. 237. *Compagnie Française de Navigation à Vapeur v. Louisiana State Board of Health* (1902), 186 U.S. 380, 22 S. Ct. 811, 46 L. Ed. 1209.

9. *McClenny v. U.S.* (1910), 45 Ct. Cl. 305.

Since 1699, when the General Court of Massachusetts Bay Colony enacted a law "to prevent the spread of infectious sickness," every State has adopted legislation for the prevention and control of infectious, contagious, and communicable diseases.<sup>10</sup>

The respective legal duties of state and local health authorities in controlling communicable diseases may, in general, be summarized as follows:

#### *Duties of State Health Authorities*

1. To enforce and supervise the enforcement of all state health laws and regulations.
2. To prepare and issue reasonable regulations for the prevention and control of communicable diseases.
3. To receive and record reports of communicable diseases from local health officials and others.
4. To investigate outbreaks of disease, where necessary, and supervise local health measures in times of epidemics.
5. To make necessary laboratory diagnoses and studies.
6. To manufacture and distribute serums, vaccines, and prophylactics.
7. To enforce interstate and intrastate quarantine.
8. To distribute educational literature.
9. To cooperate with federal and local public health authorities.

#### *Duties of Local Health Authorities<sup>11</sup>*

1. To enforce all state health laws and regulations and all local health ordinances and rules and regulations.
2. To adopt necessary local regulations for the control of communicable disease.
3. To receive and record reports of disease from physicians and others, and to report all such cases to the state health authorities in accordance with law.
4. To investigate all cases of disease, carriers, and contacts.
5. To isolate or quarantine cases of communicable diseases, and assist quarantined persons.
6. To furnish vaccines, serums, etc.
7. To perform disinfection where necessary.
8. To supply laboratory service.
9. To attend conferences with state health officials for concerted measures in the suppression of disease.

10. *Communicable Diseases, An analysis of the laws and regulations for the control thereof in force in the United States*, Public Health Bulletin, No. 62, U.S. Public Health Service, 1913. *Distribution of Health Services in the Structure of State Government*, Public Health Bulletin No. 184, U.S. Public Health Service, 1943.

11. See I. V. Hiscock, editor, *Community Health Organization*, 3d ed., New York, Commonwealth Fund, 1939.

Although state health departments have the primary and usually complete authority over the control of communicable diseases, in a number of States other divisions of the government are vested by law with certain functions concerning disease control. Among these governmental agencies are departments of education, agriculture, and welfare, state hospitals and universities, and boards of entomology.

### *Reporting*

Prompt and accurate notification of the existence of a communicable disease is one of the first requisites for its proper control by health departments. This principle has been recognized legally since 1883, when Michigan adopted legislation for a comprehensive system of notification of infectious diseases. In the following year, Massachusetts took similar action, and now all States have provided by law for morbidity reporting.<sup>12</sup>

These laws and regulations generally provide that reports of communicable diseases shall be made immediately, or sometimes within twelve hours, to local health officers by physicians, or, when no physician is in attendance, by certain other persons. The reports are usually required to be in writing, or by telephone, telegraph, or messenger, although in some instances oral reports other than by telephone are stated to be permissible.

Laws, ordinances, and regulations of this nature have been sustained by courts of last resort on numerous occasions.<sup>13</sup> As early as 1887 the Supreme Court of Errors of Connecticut upheld the constitutionality of a municipal ordinance requiring physicians to report cases of communicable diseases to the local health department.<sup>14</sup> In affirming the conviction of a physician for violation of the ordinance by failure to report a case of diphtheria, the court pointed out that this ordinance was not invalid as class legislation, but that the burden of reporting was properly placed on the one class, the medical profession, which is best qualified to discharge this necessary public duty.<sup>15</sup>

12. W. Fowler, *Laws and Regulations Relating to Morbidity Reporting*, Supplement No. 100 to *Pub. Health Rep.*, U.S. Public Health Service, 1933. W. Fowler, *The Reportable Diseases; Diseases and Conditions Required to be Reported in the Several States*, Reprint No. 2544, U.S. Public Health Service, 1944.

13. Review of court decisions pertaining to morbidity reports, *Pub. Health Rep.*, 43:3369, December 21, 1928.

14. *State v. Worden* (1887), 56 Conn. 216, 14 A. 801.

15. See *Brown v. Purdy* (1886), 54 N.Y. Super. 109, 8 N.Y.R. 143.

A state board of health regulation that required physicians to submit morbidity reports on the first of each month has likewise been upheld by the Supreme Court of Mississippi.<sup>16</sup> A Christian Scientist, however, is not legally obligated to report communicable diseases under the terms of a city ordinance, according to a Kansas decision in 1902 in which it was held that such a practitioner is neither a physician nor is presumed to be familiar with these diseases.<sup>17</sup> Today, however, a Christian Science practitioner who has reason to suspect the existence of communicable disease where no physician is in attendance would be required to report that fact to the public health authorities, unless such report has been made by the parent pursuant to law.

When a statute specifies that reports shall be made "immediately," an oral notification of the existence of a case of diphtheria by a physician eight days after he had seen the disease has been held not to be the notice required by law.<sup>18</sup> But where the law stated that it was the duty of every physician prescribing for the sick to report diphtheria within twenty-four hours, a dispensary physician who saw a case which he thought to be diphtheria, but refused to treat it and advised the mother to isolate the patient and call a physician, was held not to have violated the law, as the patient was not "in his charge."<sup>19</sup>

This decision, handed down in 1906 by the Court of Appeals of the District of Columbia, may have been correct in its rigid, technical interpretation of a defectively worded statute, but it was contrary to the spirit of the law and to the best interests of the public health. Modern statutes generally require that any physician who sees a case of communicable disease must report it, regardless of the circumstances. When, for example, a physician saw a patient afflicted with smallpox and attempted to communicate with the health department but failed to reach the department, and then merely sent the patient with a card to the health department the next morning, the Illinois Appellate Court held that this action was failure to report and affirmed a conviction of the doctor.<sup>20</sup>

A statute requiring physicians to report cases of smallpox, cholera, diphtheria, scarlet fever, or any other disease dangerous to the public health was held to include tuberculosis, if that disease was in fact

16. *Smythe v. State* (1921), 124 Miss. 454, 86 So. 870.

17. *Kansas City v. Batrd* (1902), 92 Mo. App. 204.

18. *People v. Brady* (1892), 90 Mich. 459, 51 N.W. 537.

19. *Johnson v. D.C.* (1906), 27 App. D.C. 259.

20. *Chicago v. Craig* (1912), 172 Ill. App. 126.

dangerous to health.<sup>21</sup> In a second trial of the case the jury found that tuberculosis was dangerous,<sup>22</sup> an indisputable fact which would now receive judicial notice in any court.<sup>23</sup>

When a physician charged with violation of a morbidity reporting law claims in defense that he did not recognize the disease, evidence may be offered in court to prove that he did, including the existence of similar cases in the community, positive laboratory reports, and autopsy reports,<sup>24</sup> and if a jury or court finds from the evidence that the physician recognized the disease but failed to report, the conviction will usually be upheld.<sup>25</sup> But where a reporting ordinance fails to impose any penalty or punishment, the revocation of the license of a physician for failure to make a written report, when he did make a verbal report, will not be upheld, according to a Utah decision.<sup>26</sup>

Suspected cases of communicable diseases are frequently required to be reported to health authorities. When a physician makes such a report in good faith, so that a child is quarantined for smallpox but actually does not have the disease and contracts it as a result of contact with other patients in the hospital, the physician will not be liable for damages.<sup>27</sup> In this case the Missouri Supreme Court stated that:

Public policy favors the discovery and confinement of persons afflicted with contagious diseases, and we think it is not only the privilege, but the duty, of any citizen acting in good faith and on reasonable grounds to report all suspected cases that examination may be made by experts and the public health thereby protected. We hold this may be done without being subjected to liability for damages.

Reports may be required from physicians on persons who are carriers of diseases. Such persons may be healthy or not sick, but carry in their systems the microorganisms of dangerous maladies, such as typhoid fever, diphtheria, or the venereal diseases, which may be transmissible to others through their actions. Records of such persons are not privileged.<sup>28</sup>

If a physician fails to report a case or suspected case of communicable disease, such as smallpox, as required by law, and as a conse-

21. *People v. Shurly* (1900), 124 Mich. 645, 83 N.W. 595.

22. *People v. Shurly* (1902), 131 Mich. 177, 91 N.W. 139.

23. See Chapter IX, on Tuberculosis.

24. *State v. Pierce* (1913), 87 Vt. 144, 88 A. 740.

25. *Comm. v. Evans* (1915), 59 Pa. Super. 607.

26. *Moorehouse v. Hammond* (1922), 60 Utah 593, 209 P. 883.

27. *McGulre v. Amyx* (1927), 317 Mo. 1061, 297 S.W. 968, 54 A.L.R. 644.

28. *Munzer v. State* (1943), 41 N.Y.S. (2d) 98.

quence of his failure to report the disease spreads to others, he will be liable for damages to the person afflicted, or to his heirs,<sup>29</sup> but negligence on the part of the physician in reporting must be definitely proven to be the proximate cause of the injury.<sup>30</sup>

### *The Confidential Nature of Morbidity Reports*

Reports of communicable diseases received and recorded by health departments are administrative records and not public records. Unless a statute authorizes to the contrary, all reports of individual cases are confidential and may not be revealed to any person, association, corporation, or private agency, except in those instances where the protection of the public health requires that the information be given, as to a school physician, to an official of a public or private institution, or possibly to a welfare agency.

Reports of communicable diseases need not be produced in court in litigations between private parties, even if demanded by subpoena, and the refusal of a health officer to produce such records or laboratory reports generally will be upheld.<sup>31</sup> Directly contrary to this principle, however, is a recent decision of the Supreme Court of Alabama, in which this court upheld the introduction in evidence in civil litigation of a certified copy of the record of a physical examination in the files of the state health department, which showed that one of the parties was afflicted with tuberculosis.<sup>32</sup>

In New York, public records of communicable diseases, compiled in accordance with the Public Health Law and the Sanitary Code, are not now privileged within the purview of the Civil Practice Act, according to a recent decision of the Court of Appeals of that State.<sup>33</sup> In this case a negligence action was brought by the administrator of the estate of a deceased person who had died of typhoid fever contracted from a typhoid carrier at defendant's hotel. The plaintiff endeavored to secure by subpoena from a county health department a record showing that the person involved was a typhoid carrier. In

29. *Jones v. Stanko* (1928), 118 Oh. St. 147, 160 N.E. 456.

30. *Davis v. Rodman* (1921), 147 Ark. 385, 227 S.W. 612, 13 A.L.R. 1459.

31. *Brotherhood of Painters v. Barton* (1910), 46 Ind. App. 160, 92 N.E. 64. *McGowan v. Metropolitan Life Insurance Co.* (1931), 253 N.Y.S. 551, 141 Misc. 834; affirm. (1932) in 255 N.Y.S. 130, 234 App. Div. 366; app. dism. 259 N.Y. 454, 182 N.E. 81. *In re Marks* (1936), 121 Pa. Super. 181, 183 A. 432. *Tinsley v. Wash. Nat. Ins. Co.* (1936), — Mo. App. —, 97 S.W. (2d) 874.

32. *Woodmen of the World Life Ins. Soc. v. Guyton* (1940), 239 Ala. 216, 194 So. 655.

33. *Thomas v. Morris* (1941), 286 N.Y. 266, 36 N.E. (2d) 141, 136 A.L.R. 854.

the lower court the order for production of the record was issued, but the health commissioner refused to produce it, and was upheld in this action by the Appellate Division. On appeal to the highest court, however, the decision was reversed.

In its decision the Court of Appeals pointed out that privilege in such instances does not exist unless conferred by some statute, and that here the statutes point the other way. Since 1909, for example, it has been provided by law that reports on tuberculosis shall not be divulged or made public, and in 1939 the Legislature amended this section by making similar requirements for chancroid, syphilis, and gonorrhoea. "It seems to follow," said the Court, "that similar reports as to other communicable diseases are not so privileged." The Court also gave its reasons in the following words:

Why should the record of compliance by the County Health Officer with these salutary requirements be kept confidential? Hidden in the files of the health office, it serves no public purpose except a bare statistical one. Made available to those with a legitimate ground for inquiry, it is effective to check the spread of the dread disease. It would be worse than useless to keep secret an order by a public officer that a certain typhoid carrier must not handle foods which are to be served to the public.

The Court furthermore distinguished between this case and a previous decision, in which it had been held that hospital records need not be produced on a subpoena issued by a legislative committee, as well as when issued by a court.<sup>34</sup>

Local health officers must, of course, notify state health authorities of reports of communicable diseases received by them. Health departments may also compile and publish statistics of diseases.<sup>35</sup>

### *Laboratory Services*

In order to aid in the diagnosis and recognition of the communicable diseases, laboratory facilities are necessary. The State may establish and operate a central laboratory at the headquarters of the state health department or at some other appropriate place, and may also have district laboratories elsewhere in the State.

The larger communities usually have laboratories in connection with their health departments, and in some States legislation makes mandatory the establishment and financial support of public health

34. *Matter of City Council of City of New York v. Goldwater* (1940), 284 N.Y. 296, 31 N.E. (2d) 31.

35. *Manual for Coding Causes of Illness*, Misc. Publ. No. 32, U.S. Public Health Service, 1944.



laboratories in cities of certain classes or populations. The right of municipalities to establish such laboratories has been upheld by the Supreme Court of Alabama, which declared in its opinion that: "The court discovers in the health and quarantine laws of the State no expressed or implied purpose to deny to a municipal corporation the authority to procure for the use of its officers and people in the administration of their affairs expert knowledge of things that may affect the safety, health, and comfort of the community."<sup>36</sup>

Private laboratories organized for commercial purposes may be regulated by the State, and licenses may be required of technicians who operate or are employed in such laboratories.

### *Isolation and Quarantine*

Isolation, as the term is used in public health administration, has been defined as the separating of persons suffering from a communicable disease, or carriers of the infecting microorganism, from other persons, in such places and under such conditions as will prevent the direct or indirect conveyance of the infectious agent to other persons.

Quarantine has been defined as the limitation of freedom of movement of persons or animals who have been exposed to communicable disease for a period of time equal to the longest usual incubation period of the disease to which they have been exposed. The incubation period is the time between the date of infection and the appearance of the first symptoms of the disease, and will vary in different diseases from a few days to several weeks. A list of incubation periods for all the common communicable diseases is given in the report on the control of these diseases issued by the American Public Health Association.

The difference between isolation and quarantine, therefore, is that the former applies to limitations of movement of the known sick and of carriers of disease, while the latter applies to persons and animals who have been exposed to or in contact with cases of infectious disease. In the past the courts have used these terms more or less interchangeably, however, and have generally accepted "quarantine" as meaning any forced stoppage of travel, communication, or intercourse on account of contagious or infectious disease. An example of an early judicial definition of quarantine is as follows: "To quarantine persons means to keep them, when suspected of having con-

36. *State ex rel. Sholl v. Duncan* (1930), 162 Ala. 196, 50 So. 265. See *Diagnostic Procedures and Reagents; Technics for the Laboratory Diagnosis and Control of the Communicable Diseases*, 2d ed., New York, American Public Health Association, 1945.

tracted or been exposed to an infectious disease, out of a community, or to confine them in a given place therein, and to prevent intercourse between them and the people generally of such community."<sup>87</sup>

The right of health officials to restrain the movements of persons and animals who are or are likely to be dangerous to the public health, and to deprive them temporarily of their liberty, is an important phase of the police power, and one that has been upheld frequently by the courts,<sup>88</sup> but the power must always be exercised in a reasonable manner.<sup>89</sup> "Quarantine laws," said the court in a leading case, "are a familiar exercise of the police power of the State. Their enactment is within its lawful province, and the making of regulations for their enforcement has always been entrusted to subordinate boards."<sup>40</sup>

No particular formality is required in imposing isolation or quarantine, as a rule, although at one time warrants were sometimes necessary, and notice to the person who is to be isolated or quarantined is usually desirable. It has been held, for example, that where the law provides that quarantine is to be declared by municipal authorities on written notice that contagious disease exists, and no such notice has been given, the local board has no authority to enforce quarantine.<sup>41</sup> Considerable discretion as to the necessity for isolation or quarantine and the period to be observed must, however, be given to health authorities, who may also adopt and enforce summary measures when the protection of the public health makes them necessary.<sup>42</sup>

37. *Daniel v. Putnam County* (1901), 113 Ga. 570, 38 S.E. 980, 54 L.R.A. 292.

38. *St. Louis v. McCoy* (1853), 18 Mo. 238. *Haverty v. Bass* (1876), 66 Me. 71. *Spring v. Hyde Park* (1884), 137 Mass. 554, 50 A.S.R. 334. *Brown v. Murdock* (1885), 140 Mass. 314, 3 N.E. 208. *Train v. Boston Disinfecting Co.* (1887), 144 Mass. 523, 11 N.E. 929, 59 A.S.R. 113. *State v. Speyer* (1895), 67 Vt. 502, 32 A. 476, 48 A.S.R. 832, 29 L.R.A. 573. *Mills v. Vancouver* (1903), 10 B.C. 99. *Beeks v. Dickinson County* (1906), 131 Ia. 444, 108 N.W. 311, 6 L.R.A. (N.S.) 831, 9 Ann. Cas. 812. *Kirby v. Harker* (1909), 143 Ia. 478, 121 N.W. 1071. *State v. Raczkowski* (1913), 86 Conn. 677, 86 A. 606, 45 L.R.A. (N.S.) 580, Ann. Cas. 1914 B 410. *Crayton v. Larabee* (1917), 220 N.Y. 493, 116 N.E. 355, L.R.A. 1918 E 432. *In re Vaughan* (1922), 189 Cal. 491, 209 P. 353, 24 A.L.R. 858. *City of Seattle v. Cottin* (1927), 144 Wash. 572, 258 P. 520.

39. *In re Smith* (1895), 146 N.Y. 68, 40 N.E. 497, 28 L.R.A. 820, 48 A.S.R. 769. *Jew Ho v. Williamson* (1900), 103 F. 10. *Wilson v. Ala., Ga., S. Ry. Co.* (1900), 77 Miss. 714, 28 So. 567. *State v. Kirby* (1903), 120 Ia. 26, 94 N.W. 254. *Kirk v. Aiken Board of Health* (1909), 83 S.C. 372, 65 S.E. 387, 23 L.R.A. (N.S.) 1138.

40. *Train v. Boston Disinfecting Co.* (1887), 144 Mass. 523, 11 N.E. 929, 59 A.S.R. 113.

41. *State v. Kirby* (1903), 120 Ia. 26, 94 N.W. 254.

42. *State v. Raczkowski* (1913), 86 Conn. 677, 86 A. 606, 45 L.R.A. (N.S.)

(Continued on next page.)

The quarantine of a whole house has been upheld, even though only one case of contagious disease had occurred there,<sup>43</sup> but the quarantine of a district having a population of 10,000 persons is not a reasonable exercise of this power.<sup>44</sup> Nor may a board of health require that attendance upon all cases of infectious diseases be restricted to the health officer, but must permit private treatment of quarantined persons by any licensed physician selected by the patient.<sup>45</sup>

Special measures applicable to the isolation of venereally infected persons are discussed at length in Chapter X.

When cases of communicable disease are isolated at home, placards announcing the presence of the disease and the existence of quarantine may be placed upon the house in a conspicuous manner.<sup>46</sup> In an early case it was held that removal and destruction by a householder of a health department placard where no contagious disease existed was not an improper action,<sup>47</sup> although removal of a lawfully affixed placard is usually a misdemeanor. It is the duty of quarantined persons to remain in quarantine whether guarded or not,<sup>48</sup> but violation of a quarantine order must be definitely proven in a court action.<sup>49</sup> A quarantine order is not a criminal proceeding which entitles a person to the right of bail.<sup>50</sup>

#### *Removal to Isolation Hospitals*

When a person suffering from a communicable disease can be isolated at home without endangering the public health, there is generally no legal reason for making other arrangements, although the patient, or the parent or guardian of a patient who is a minor, may voluntarily agree to hospitalization in a suitable institution.

An infected person who cannot be safely or properly cared for in his home, and whose presence there would be a hazard to the public

580, Ann. Cas. 1914 B 410. *Plymouth Township v. Klug* (1914), 26 N.D. 607, 145 N.W. 130.

43. *Highland Park v. Schulte* (1900), 123 Mich. 360, 82 N.W. 62.

44. *Jew Ho v. Williamson* (1900), 103 F. 10.

45. *Trabue v. Todd County* (1907), 125 Ky. 809, 102 S.W. 309.

46. *Brown v. Murdock* (1885), 140 Mass. 323, 3 N.E. 208. *Ex parte Culver* (1921), 187 Cal. 437, 202 P. 661.

47. *Memphis v. Smythe* (1900), 104 Tenn. 702, 58 S.W. 215.

48. *In re Vaughan* (1922), 189 Cal. 491, 209 P. 353, 24 A.L.R. 858. *Keefe v. Union* (1903), 76 Conn. 160, 56 A. 571.

49. *People v. Tait* (1913), 261 Ill. 197, 103 N.E. 750.

50. *Varholy v. Sweat* (1943), 153 Fla. 571, 15 So. (2d) 267.

health, may be removed to a public isolation hospital where adequate facilities for his care are provided.<sup>51</sup> In the absence of statutory authority, however, this power must be exercised with great caution by health authorities, and the need for the action must be capable of definite and conclusive proof as a reasonable public health measure.<sup>52</sup> It has been held in a leading case that a municipal corporation may enact regulations authorizing a health officer to order the removal of a smallpox patient to a properly equipped pesthouse, and that he may do so where it does not appear that the removal would endanger the patient's life.<sup>53</sup>

In moving patients to an isolation hospital, due care must be employed,<sup>54</sup> and adequate, sanitary quarters must be provided.<sup>55</sup> It has been held that a health officer cannot be compelled to remove a patient to an isolation hospital when no funds are available for such removal.<sup>56</sup>

The establishment of an isolation hospital is a proper governmental function, which does not create a nuisance *per se*,<sup>57</sup> but an injunction has been granted against the placing of a pesthouse in a residential district.<sup>58</sup>

A person who breaks quarantine, or escapes from isolation, whether in a hospital, home, or other place, may be fined and/or committed to jail.<sup>59</sup>

### *The Quarantine of Carriers*

A carrier is a person who is apparently healthy, but who harbors in his system the microorganisms of a disease and may spread it through his infected discharges or by other means. Since such persons are or may be dangerous to the public health, appropriate measures may be

51. *Aaron v. Broiles* (1885), 64 Tex. 316, 53 Am. Rep. 764. *Hengehold v. Covington* (1900), 108 Ky. 752, 57 S.W. 495, 22 Ky. L. 462. See *Boom v. City of Utica* (1848), 2 Barb. (N.Y.) 104.

52. *Kirk v. Aiken Board of Health* (1909), 83 S.C. 372, 65 S.E. 387, 23 L.R.A. (N.S.) 1138.

53. *Hengehold v. Covington* (1900), 108 Ky. 752, 57 S.W. 495, 22 Ky. L. 462.

54. *Aaron v. Broiles* (1885), 64 Tex. 316, 53 Am. Rep. 764.

55. *Moody v. Wickersham* (1922), 111 Kan. 770, 207 P. 847, 24 A.L.R. 794. *Hunt v. Rowton* (1930), 143 Okla. 181, 288 P. 342.

56. *Gould v. Keller* (1915), 36 S.D. 253, 154 N.W. 649.

57. See Chapter XIII, page 220.

58. *Birchard v. Board of Health* (1918), 204 Mich. 284, 169 N.W. 901, 4 A.L.R. 990.

59. *State ex rel. Kennedy v. Head* (1945), — Tenn. —, 185 S.W. (2d) 530.

taken by health authorities to prevent the dissemination of disease by them. Such measures may include quarantine or restriction of movement or of livelihood. The most famous instance of a carrier was that of "Typhoid Mary," who was responsible for several epidemics, and who was kept under close surveillance by health departments for many years until her death in 1938.

The right of health authorities to restrain the liberty of a carrier of disease has been recognized by the Illinois Supreme Court in a leading case,<sup>60</sup> in which the law was clearly set forth, as follows:

It is not necessary that one be actually sick, as that term is usually applied, in order that the health authorities have the right to restrain his liberty by quarantine regulations. Quarantine is not a cure—it is a preventive. As the term is used in this opinion, quarantine is the method used to confine the disease within the person in whom it is detected, or to prevent a healthy person from contracting the infection. Disease germs do not usually travel through the air unaided, but they are carried by insects, by dumb animals, and by human beings. Effective quarantine must, therefore, be not so much the isolation of the person who is sick or affected with the disease as a prevention of the communication of the disease germs from the sick to the well. . . . Quarantine, in the very nature of the regulation, is not a definite or uniform measure, but it must vary according to the subject. One of the important elements in the administration of health and quarantine regulations, is a full measure of common sense. It is not necessary for the health authorities to wait until the person affected with a contagious disease has actually caused others to become sick by contact with him before he is placed under quarantine.

This case was concerned with a typhoid carrier who was quarantined by the health commissioner of the City of Chicago. In a similar case in California, the quarantine of a diphtheria carrier was upheld by the courts.<sup>61</sup>

#### *Quarantine and Habeas Corpus*

In both cases cited above, the quarantined person attempted to secure liberty by means of the writ of habeas corpus. Whenever any person is subject to restraint and is deprived of liberty by arrest, quarantine, or other legal detention, he is entitled as a matter of right to have the propriety of his detention determined by a court of law. This judicial examination is accomplished by the writ of habeas corpus, an ancient privilege that even antedates the Magna Charta of 1215 A.D.

This right has been invoked on numerous occasions by persons

60. *Barmore v. Robertson* (1922), 302 Ill. 422, 134 N.E. 815, 22 A.L.R. 835.

61. *Ex Parte Culver* (1921), 187 Cal. 437, 202 P. 661.

who have been quarantined or isolated by health authorities. Whenever it has been shown to the satisfaction of the court that the imposition of the quarantine was justified for the protection of the public health, the writ has been denied, as in the Illinois and California cases cited above and in numerous cases involving the venereal diseases,<sup>62</sup> but the courts have consistently upheld the right of individuals to have their detention passed upon judicially,<sup>63</sup> except in one instance where special legislation under a state constitution had made the state board of health the final arbiter, on appeal, of the validity of the quarantine.<sup>64</sup>

### *Expenses of Isolation and Quarantine*

Statutes often require that all necessary expenses for food, medical and nursing care, and drugs and medicines for quarantined persons shall be borne by the public authorities, at least in the cases of those who are indigent<sup>65</sup> or are likely to become so as the result of the quarantine or isolation.<sup>66</sup> In the absence of statutory authority, such supplies would still be provided for the indigent.<sup>67</sup> Where, however, a physician was called to see a case of diphtheria, which he reported, and which was isolated, and he was told by the health officer to administer antitoxin, it was held that he could not recover expenses from the town under existing law.<sup>68</sup>

Impressment of private citizens to aid in the care of quarantined persons sometimes has been upheld in the past, but the need for such drastic action in behalf of the public service seldom occurs today and would be appropriate only in periods of grave emergency such as a widespread epidemic.

62. See Chapter X, pages 171-173.

63. *Ex parte Hardcastle* (1919), 84 Tex. Cr. 463, 208 S.W. 531, 2 A.L.R. 1589. *Dowling v. Harden* (1921), 18 Ala. App. 63, 88 So. 217.

64. *State v. King County Superior Court* (1918), 103 Wash. 409, 174 P. 973.

65. An indigent person has been defined as one who is unable to maintain himself or the members of his family lawfully dependent on him for support, or one who ordinarily is able to maintain himself or his family but because of his illness or the illness of some member of his family, or for any other reason, is or becomes unable to do so.

66. *Bellows v. Bd. of Supvrs. of Seneca County* (1911), 133 N.Y.S. 586, 73 Misc. 566. *Pulaski County v. Somerset* (1907), 30 Ky. L. 387, 98 S.W. 1022.

67. *Dodge County v. Diers* (1903), 60 Nebr. 361, 95 N.W. 602, 15 Ann. Cas. 232.

68. *Sweeney v. Town of Peterborough* (1929), 84 N.H. 155, 147 A. 412. *Bryant v. Nolin* (1927), 261 Mass. 358, 158 N.E. 791 (antirabic treatment). *Lesteur v. Inhabitants of Rumford* (1915), 113 Me. 317, 93 A. 838.

### *Epidemics*

In times of epidemic, or the occurrence of an unusual number of cases of infectious disease in a locality at the same time, more stringent measures may be put into effect by the health authorities than during times of the normal or usual prevalence of the disease. Thus, compulsory vaccination of the general population, or of the school population, will be upheld in most jurisdictions when an epidemic of smallpox is present but may not be sanctioned at other times.<sup>69</sup>

The declaration of an epidemic, which is defined in Webster's Dictionary as: "common to, or affecting at the same time, a large number in a community; applied to a disease which, spreading widely, attacks many persons at the same time," is a matter within the discretion of the health authorities, who are the officials best qualified to judge whether the prevalence of a disease is usual or unusual. The courts have ruled that the prevention and control of epidemics must be left to the discretion of public health officials.<sup>70</sup>

During an epidemic, the health authorities may order the closing of schools,<sup>71</sup> theaters,<sup>72</sup> carnivals,<sup>73</sup> churches, and other public assemblies,<sup>74</sup> but any action taken must be reasonable and may be subject to review by the courts. Summary action for the actual protection of the public health will always be upheld in times of real emergency. If an epidemic gets beyond the control of the local authorities, or if it involves several communities, the state health authorities may intervene and if necessary or desirable may assume control.

In the presence of an epidemic, juries may not be called for court duty, and the ensuing postponement of trial cannot be successfully challenged as a failure to give a speedy trial as required by law.<sup>75</sup> The epidemic in this case was one of infantile paralysis.

69. See Chapter XIV.

70. *Highland Park v. Schulte* (1900), 123 Mich. 360, 82 N.W. 62. *Alston v. Charleston Board of Health* (1913), 93 S.C. 553, 77 S.E. 727. *Highland Park v. McMurtry* (1916), 169 Ky. 457, 184 S.W. 390.

71. *Globe School District v. Globe Board of Health* (1919), 20 Ariz. 208, 179 P. 55. See 140 *American Law Reports* 1048.

72. *Alden v. State* (1919), 20 Ariz. 235, 179 P. 646. *State v. Swanson Theatre Circuit* (1921), 59 Utah 150, 202 P. 544, 19 A.L.R. 539.

73. *Benson v. Walker* (1922), 274 F. 622.

74. *Community Chautauqua, Inc. v. Caverly* (Vt. 1917), 244 F. 893. *Roslyn v. Pavlinovitch* (1920), 112 Wash. 306, 192 P. 885.

75. *Ex parte Venable* (1927), 86 Cal. App. 585, 261 P. 731.

### *Disinfection*

Disinfection, or the destroying of the vitality of pathogenic microorganisms by chemical or physical means directly applied, may be ordered by health officials when regarded as necessary.<sup>76</sup> Concurrent disinfection, performed during the course of a disease, is now considered more effective as a public health procedure than is terminal disinfection, undertaken after the disease is over.

Disinfestation, or destruction of insect and animal carriers of disease, and delousing may likewise be required when conditions warrant these methods.

### *Immunization*

Protection against many diseases can be achieved by means of immunization with vaccines, serums, or antitoxins. While vaccination against smallpox may be required in certain instances, as explained elsewhere,<sup>77</sup> the compulsory use of other biological products has not yet been accorded general legal sanction in this country, although compulsory diphtheria immunization laws are in effect in North Carolina, West Virginia, and Hawaii.<sup>78</sup> Immunization against typhoid fever is required of certain classes of persons, such as food handlers, known carriers, and family contacts, in Arkansas, Mississippi, New Jersey, and New Mexico.

The employment in certain instances of established immunization procedures, either for individual cases or for routine use, may be eminently desirable from the standpoint of the protection of the public health, and may properly be required. In the absence of a statute, however, an individual who refuses to be immunized cannot be compelled to submit to this procedure where quarantine or isolation of a contact or exposed person would be an equally efficacious procedure.

In most of the States local health units are required to report to the state health department all immunizations performed, and in a few States there is a similar requirement for private physicians, although usually such physicians are required to report only those immunizations carried out with materials supplied free by the State. These free biological products may be furnished by the State without

76. *Allison v. Cash* (1911), 143 Ky. 679, 137 S.W. 245. *Train v. Boston Disinfecting Co.* (1887), 144 Mass. 523, 11 N.E. 929, 59 A.S.R. 113. *Hurst v. Warner* (1894), 102 Mich. 238, 60 N.W. 440, 47 A.S.R. 525, 26 L.R.A. 484.

77. See Chapter XIV.

78. W. Fowler, State diphtheria immunization requirements, *Pub. Health Rep.*, 57:325, March 6, 1942.



restriction, or they may be limited to indigents, or to the clients of local health units.

A law requiring the compulsory immunization of all children against diphtheria during the second and third year of life was adopted in France in 1938.<sup>79</sup> This law requires the use of toxoid (*Lanatoxine*) for the purpose and makes parents and guardians personally responsible for carrying out the measure; it also requires that all children under fourteen years of age who have not been vaccinated against diphtheria shall be subjected to such immunization. Antidiphtheria vaccination has also been obligatory in the Dominican Republic since 1937, when a decree to that effect was adopted.

Where the use of a biological product is generally considered to be a necessary part of the proper treatment of a disease, such as anti-toxin for diphtheria, anti-tetanus serum for tetanus, or the Pasteur treatment for rabies, the failure of a parent to permit the use of such a product to save the life of a minor child will usually be held to create liability for criminal negligence. The State has the power to control and regulate the custody of children and to prevent or punish actions by parents or others that endanger the health of children, and such laws do not violate religious freedom.<sup>80</sup>

Private institutions, such as private schools, colleges, and industries, may properly require vaccination or immunization as a prerequisite to entry, enrollment, or employment, and may refuse to receive those who will not be immunized.<sup>81</sup>

A regulation of a board of health requiring that all Chinese should be vaccinated against plague, regardless of previous conditions such as residence and exposure, and not making similar requirements for other races has been held void as class legislation.<sup>82</sup>

A municipal ordinance requiring that all dogs in a city should be vaccinated against rabies before a fixed date in each calendar year was upheld by the Supreme Court of Alabama in 1938.<sup>83</sup> The ordinance

79. Diphtheria immunization made compulsory in France, *Pub. Health Rep.*, 53:1301, July 29, 1938. France makes diphtheria immunization compulsory (editorial), *J.A.M.A.*, 111:849, August 27, 1938.

80. *People v. Pierson* (1903), 176 N.Y. 201, 68 N.E. 243, 98 A.S.R. 666, 63 L.R.A. 187. In *Janssen v. Mulder* (1925), 232 Mich. 183, 205 N.W. 159, a chiropractor was held liable for failure to diagnose and properly treat a case of diphtheria in a child.

81. *Williams v. Wheeler* (1913), 23 Cal. App. 619, 138 P. 937.

82. *Wong Wai v. Williamson* (1900), 103 F. 1.

83. *City of Birmingham v. West* (1938), 236 Ala. 434, 183 So. 421, cert. den. 306 U.S. 662.

was ruled to be valid, despite the fact that a state law requiring the vaccination of dogs against rabies exempted those kept in an enclosure, under leash, or muzzled. The court pointed out that under the Alabama constitution a municipality could not adopt legislation inconsistent with state laws, but it could properly enlarge upon such laws by requiring more restriction than the statute creates. The United States Supreme Court refused to review this case.

### *Diseases of Animals*

Since domestic animals suffer from various diseases and maladies, all of which are dangerous to the animals and some of which are transmissible to man, health departments and other divisions of the government may take all necessary and proper measures to prevent and control such diseases. Among the animal diseases which may be communicated to man, either by direct contact or by the milk or other secretions, are anthrax, glanders, plague, psittacosis, rabies, rat-bite fever, streptococcal infections, trichinosis, typhoid fever, tuberculosis, tularemia, and undulant fever. Other diseases may be communicated to man by ticks or other insects with which the animals may be infested.

In the control of rabies in dogs, a health department may properly require by regulation that all dogs shall be muzzled or adequately controlled by leash or chain, and may provide that all dogs not thus restrained may be seized and impounded for a reasonable period. Thus, in a recent New York case it was held that a resolution to that effect adopted by the New York City Board of Health was valid, even though authority was delegated to a private agency, the American Society for the Prevention of Cruelty to Animals, to act as agent for the health department in carrying out the terms of the order, which was to be in effect for six months.<sup>84</sup> Destruction of dogs not claimed by their owners within 48 hours and six months' quarantine in an approved veterinary hospital of claimed dogs were also sustained as valid, although it has also been held that proof of proper action is necessary to justify the destruction of animals.<sup>85</sup>

Local requirements that all dogs shall be licensed have been upheld by the United States Supreme Court.<sup>86</sup>

84. *Chalfin v. Am. Soc. Prev. Cruelty to Animals* (1945), 53 N.Y.S. (2d) 174, 184 Misc. 15. *Steinberg v. Stebbins* (1945), 55 N.Y.S. (2d) 503, 184 Misc. 794, rev. in 56 N.Y.S. (2d) 453, 269 App. Div. 910.

85. *Preudhomme v. Stebbins* (1945), 55 N.Y.S. (2d) 397, 269 App. Div. 409. *People v. Adorjan* (1946), 60 N.Y.S. (2d) 651.

86. *Nicchia v. New York* (1920), 254 U.S. 228, 41 S. Ct. 103, 65 L. Ed. 235, 13 A.L.R. 826.

It is within the power of the Federal Government to require that domestic cattle be treated to eradicate infectious diseases, according to a recent decision upholding the conviction of persons who assaulted inspectors of the United States Bureau of Animal Industry who were engaged in the dipping of cattle for Texas fever.<sup>87</sup>

Legal matters concerned with the control of tuberculosis and Bang's disease in cattle are outlined in Chapter XI, on Milk Control.

### *Leprosy*

Leprosy is a contagious disease caused by a bacillus, the *Mycobacterium leprae*. Although much dreaded, it is only mildly contagious in the temperate zone and is stated by authorities to be less contagious in this country than tuberculosis. The disease is common in certain tropical countries, but is rare in the United States, as shown by the fact that from 1894 to 1942 only 1,374 cases were admitted to the National Leprosarium. Of these, 404 were foreign born. A number of cases occur annually, however, in the Gulf Coast States.

In 1917 Congress enacted legislation providing for a national leprosarium under the administration of the United States Public Health Service. Due to World War I action on the matter was postponed until 1921 when the Federal Government purchased the Louisiana Leper Home at Carville, La., which had been established in 1894. The hospital was expanded in 1924, and again in 1941, so that today it has facilities for 65 hospital and 480 ambulatory patients, and is considered to be the finest institution of its kind in the world.

Under regulations promulgated by the Surgeon General of the Public Health Service, the following types of patients may be admitted to the National Leprosarium:

1. Any person afflicted with leprosy who presents himself or herself for care, detention, and treatment, or
2. Who may be apprehended under authority of the United States Quarantine Acts, or
3. Any person afflicted with leprosy duly consigned to said home by the proper health authorities of any State, Territory, or the District of Columbia.<sup>88</sup>

87. *Carter v. U.S.* (1939), 38 F. (2d) 227.

88. G. H. Faget, *The Story of the National Leprosarium*, Reprint No. 2374, United States Public Health Service, 1942.



## CHAPTER IX

### THE CONTROL OF TUBERCULOSIS

FOR many years tuberculosis was the leading cause of death in the United States and the most urgent of all public health problems. In 1914, however, tuberculosis yielded first place in the mortality tables to heart disease, and by 1938 it had dropped to seventh place. Tuberculosis has continued, nevertheless, to be the leading cause of death in certain age groups, particularly in the period from fifteen to twenty-five years of age.

Despite the gratifying decline in the mortality from tuberculosis, from a rate of more than 200 deaths per 100,000 population in 1900 to less than 40 per 100,000 in 1942, with a corresponding decrease in the morbidity rate, the control of tuberculosis is still one of the most important functions of health departments. It is estimated that there are at least 500,000 cases of the disease every year, and that only 150,000 of these patients are given adequate care in sanatoria.

Many factors, medical, sanitary, economic, educational, sociological, and legal are involved in the prevention and control of tuberculosis. Not the least significant of these factors is the adoption of effective legal measures against this scourge. Since 1893, when tuberculosis was first made a reportable disease by a regulation of the Michigan Board of Health, every State has promulgated legislation dealing with this disease. Since 1895, when Massachusetts established the first state sanatorium for the tuberculous, every State has provided by law for state, county, or municipal hospitals for persons afflicted with tuberculosis.<sup>1</sup> In 1900 there were only thirty-four sanatoria exclusively for sufferers from this malady, whereas in 1946 there were more than seven hundred public and private institutions for this purpose, with a capacity of 97,000 beds.

#### *The Nature of Tuberculosis<sup>2</sup>*

Tuberculosis is a communicable disease caused by a microorganism known as *Mycobacterium tuberculosis*, also called the tubercle bacillus. There are numerous forms of the disease, but the most common is the type that affects the lungs, known as pulmonary tuberculosis,

1. J. A. Tobey, *A Manual of Tuberculosis Legislation*, New York, National Tuberculosis Association, 1928.

2. See H. D. Chadwick and A. S. Pope, *The Modern Attack on Tuberculosis*, rev. ed., New York, Commonwealth Fund, 1946.

consumption, or phthisis. The childhood type of the disease is distinct from the adult type, but if not diagnosed and treated it may progress to the typical adult case of consumption. Tuberculosis is not hereditary.

When tuberculosis is generally disseminated throughout the body, it is known as miliary tuberculosis. When it affects the skin, it is generally called lupus, while tuberculosis of the glands is known as scrofula. The disease may affect the bones and joints, particularly in children, as well as various organs of the body. When promptly diagnosed and competently treated, tuberculosis can usually be arrested or even cured.

Tuberculosis is most often spread by direct contact, the infection generally taking place in childhood and usually after continuous and prolonged exposure. The disease may also be transmitted by means of articles freshly contaminated by the sputum and other discharges of patients, and by raw milk from cattle infected with bovine tuberculosis. When contaminated milk is the carrier, bone and joint tuberculosis is usually the result, although a few cases of pulmonary tuberculosis have been reported as definitely traced to this source. The spread of bovine tuberculosis can be prevented by the pasteurization of milk, a process that destroys any tubercle bacilli that may be present in a milk supply.

Although most communicable diseases are acute, with a relatively sudden onset, tuberculosis usually develops slowly after the initial infection or series of infections. Occasionally, an acute case of pulmonary tuberculosis will occur. The disease is diagnosed with the aid of the so-called Mantoux test, in which tuberculin is injected under the skin and the reaction noted; by x-rays (roentgen rays) of the chest; by physical examination; by microscopic examination of sputum for the causative organism; and by characteristic clinical signs, if present. Childhood tuberculosis can usually be detected only by means of the tuberculin test and the x-ray.

In making tuberculin tests, the product now commonly used is the purified protein derivative of the tubercle bacillus, which is known as Tuberculin P.P.D. A solution of this substance is injected into the skin (intra-dermally) of the forearm, and the skin reaction is noted at the end of forty-eight hours. The test is harmless to the patient, as is also the same test made with Old Tuberculin.

Immunization against tuberculosis may be accomplished by means of the Bacillus Calmette-Guerin vaccine, commonly known as BCG. This product was originated in France and has been extensively used in Europe, where well over a million children have been vaccinated

with it. Investigations conducted in recent years by the United States Bureau of Indian Affairs have indicated that this method may be effective. Since tuberculosis has now reached a relatively low morbidity, authorities do not consider that immunization of the general public against tuberculosis would be practical, as in the case of small-pox, but that such immunization is desirable in groups exposed to special risks, such as student nurses, patients in mental hospitals, American Indians, and others with proven susceptibility to the disease.

### *Administrative Control*

Efficient public health control of tuberculosis depends upon the prompt discovery and registration of all cases of the disease; the segregation of all the carriers of the disease, and the proper hospitalization of as many as possible; the removal of all possibilities of contact between the sick and the well; the investigation of all contacts; the education and instruction in hygienic measures of patients, contacts, and their respective families; and appropriate measures in industry to prevent silicosis and other health hazards.

Such procedures are generally authorized by statutes and are administered under these laws by duly constituted state and local health authorities. In a few States, separate state commissions on tuberculosis have been authorized, although the control of this disease should logically be vested in the state health department, with suitable powers delegated to local health departments. In a number of States, bureaus of tuberculosis under the direction of an executive have been set up in the state health department in accordance with statutory authority or by the action of the state board of health. The existence and the powers and duties of such bureaus have been upheld by the courts on several occasions.<sup>3</sup>

### *Reporting of Tuberculosis*

Since the adoption about half a century ago of the first regulation for the reporting of all cases of tuberculosis, every State has required by appropriate legislation or by regulations of the state health department that cases of all forms of tuberculosis, a dangerous communicable disease, shall be reported promptly to local health officers by physicians, officials of hospitals and other institutions, and by other persons aware of the disease when no physician is in attendance. Such

3. *Sacramento County v. Chambers* (1917), 33 Cal. App. 142, 164 P. 613. *South v. Fish* (1918), 181 Ky. 349, 205 S.W. 329. *Brash v. State Tuberculosis Board* (1936), 124 Fla. 167, 167 So. 827.

reports are usually required to be made in writing on forms provided by the state health authorities for the purpose, within twenty-four hours after the case has come to the attention of the person reporting. Copies of the reports are forwarded by local health officers to the state health department at weekly intervals.

Where a statute required the reporting of certain specific diseases and "all other dangerous communicable diseases," it was held in one of the early cases that tuberculosis was reportable under this provision.<sup>4</sup>

The requirement that suspected cases of tuberculosis shall also be reported is a reasonable procedure in the interests of public health protection, as is also the requirement of reports of recoveries and deaths from the disease and of removals of patients.

#### *Privacy of Records*

Although vital statistics, which include reports of births, marriages, and deaths, are public records and are open to reasonable inspection by interested citizens,<sup>5</sup> morbidity reports are not in this same category. Reports of disease are, in general, considered to be administrative or departmental records, which may properly be kept confidential if the public interest so demands. In many States, laws or regulations require specifically that reports of tuberculosis shall not be made public.

The validity of a board of health regulation stating that records of cases of tuberculosis shall not be open to inspection by the public or to any person except representatives of the health department and such persons as may be authorized by them has been sustained by the Appellate Division of the Supreme Court of New York.<sup>6</sup> In this case an insurance company applied for a subpoena directing the health department to produce at a trial its records in the case of a person who was alleged to have had tuberculosis when he applied for insurance, although claiming not to have it. In upholding the refusal of the health department to produce these records, the court pointed out in this case that, "The security inspired by such a rule gives confidence to those requiring treatment and encourages them to cooperate with

4. *People v. Shurly* (1900), 124 Mich. 645, 83 N.W. 595; (1902), 131 Mich. 177, 91 N.W. 139. See page 134.

5. See Chapter VII, page 119.

6. *McGowan v. Metropolitan Life Insurance Co.* (1931), 253 N.Y.S. 551, 141 Misc. 834; affirm. (1932) in 255 N.Y.S. 130, 234 App. Div. 366; app. dism. 259 N.Y. 454, 182 N.E. 81. *Thomas v. Morris* (1941), 286 N.Y. 266, 36 N.E. (2d) 141, 136 A.L.R. 854.



the department of health in an effort to control and eradicate such diseases."

In the absence of statutory authority establishing the confidential nature of reports of tuberculosis, it is within the discretion of the health authorities to grant or withhold the privilege of public inspection of such records. The Superior Court of Pennsylvania has reversed a judgment of contempt of court in the case of the director of a bureau of infectious diseases of a city health department, who appeared in court pursuant to a subpoena but on the advice of the city solicitor refused to produce the record of a case of tuberculosis. The litigation in this action was likewise concerned with insurance.<sup>7</sup>

In another action on a life insurance policy, it was held by a Missouri court that exclusion from evidence of the records of public health nurses of a city health department with regard to tuberculous patients was proper, since such records are privileged.<sup>8</sup> In Alabama, however, the Supreme Court of that State has held that a certified copy of a medical examination in the files of the state health department showing that a litigant in an insurance action was suffering from tuberculosis is admissible in evidence.<sup>9</sup> The Court stated that it had been unable to find any express statutory authority for the admission in evidence of such documents, but apparently predicated its ruling on the fact that the state board of health had been authorized by law to conduct campaigns for the eradication of tuberculosis, a duty which carried with it the duty to make and keep records.

#### *Control of Cases and Contacts*

After a case of tuberculosis has been reported, it is the duty of the local health officer to take appropriate and reasonable measures to prevent any possibility of the spread of the disease. If a patient with open lesions cannot be sent to a sanatorium, he must be isolated, except for a qualified attendant, and he must be required to dispose of his sputum and other discharges in a manner that will not be dangerous to the public health. The attending physician should also be required by law or regulation to put into effect such procedures as will insure adequate protection for the patient's family and other persons.

In some States the health officer is authorized to furnish to tuber-

7. *In re Marks* (1936), 121 Pa. Super. 181, 183 A. 432.

8. *Tinsley v. Wash. Nat. Insur. Co.* (1936), — Mo. App. —, 97 S.W. (2d) 874.

9. *Woodmen of the World Life Ins. Soc. v. Guyton* (1940), 239 Ala. 216, 194 So. 655.

culous patients suitable sputum cups and other necessary sanitary equipment, and is empowered to undertake or require any necessary disinfection of the premises during occupancy by the patient or after he dies or moves away.

Compulsory isolation or hospitalization is frequently authorized by law for recalcitrant or careless patients who refuse or neglect to follow the instructions of physicians and health officials, although it is usually provided that commitment shall take place only on a court order requested by the health officer. Under certain conditions, summary quarantine may be proper if the protection of the public health demands such drastic action and its necessity can be shown.

The power of health authorities to quarantine all communicable diseases, including tuberculosis, that are or may be dangerous to the public health is now well established in American jurisprudence as a valid exercise of the police power of the State.

Legislation prohibiting the employment or presence of tuberculous persons in commercial establishments where food is handled and dispensed for human consumption is likewise valid as a reasonable public health measure, as is prohibition of employment of the tuberculous as teachers in public or private schools.

A regulation of the Board of Health of New York City providing that school authorities should require biennially of all teachers and other employees who work in schools and come in contact with the children a certificate from a physician certifying that such teacher or employee is free from active tuberculosis has been upheld as a valid exercise of the power vested in the Board of Health to protect the public health.<sup>10</sup> Although attacked as class legislation, the Court said that there is no constitutional prohibition against class legislation as such if the classification is based on some reasonable ground and is not essentially arbitrary. Having in mind the purpose of the regulation, it was not unreasonable or arbitrary to place school teachers and employees in a different category from the policeman, the fireman, the motorman, the street cleaner, and the clerk.

#### *Establishment and Maintenance of Public Sanatoria*

Since adequate facilities for the proper hospital care and treatment of tuberculous persons are necessary for the protection of the public health and for the general welfare, statutes providing for the estab-

10. *Conlon v. Marshall* (1945), 59 N.Y.S. (2d) 52. In *Board of Education of Cleveland v. Ferguson* (1942), 88 Oh. App. 514, 39 N.E. (2d) 196, the board was held to have no statutory authority to furnish sleeping garments and lunches to tuberculous pupils in special classes.

lishment, erection, financing, maintenance, and conduct of state, county, district, and municipal tuberculosis hospitals, and for the regulation and licensing of private sanatoria have been generally adopted in the States. Such laws have been upheld in numerous instances by the courts, although specific provisions in them occasionally have been ruled invalid or have been subject to judicial interpretation.<sup>11</sup>

In some of the States, as in Massachusetts and New York, counties of certain populations are required by law to establish tuberculosis sanatoria, while in other States the county governments are authorized or permitted, but not compelled, to establish such sanatoria. In many statutes, provision is made for a popular referendum, in which the voters of counties, and sometimes of municipalities, may decide by ballot whether to establish a county, district, or municipal hospital for the tuberculous.

Referenda of this nature have been upheld by the courts,<sup>12</sup> although it has been pointed out that all provisions of the law must be strictly followed.<sup>13</sup> The granting of subsidies by the State to counties for hospitals of this nature likewise has been held valid.<sup>14</sup> Where, however, a state constitution forbids the imposition by the legislature of taxes

11. *Baker v. Hill* (1929), 180 Ark. 387, 21 S.W. (2d) 867. *Sacramento County v. Chambers* (1917), 33 Cal. App. 142, 164 P. 613. *City and County of San Francisco v. Boyle* (1923), 191 Cal. App. 172, 215 P. 549. *People ex rel. Graff v. Wabash Ry. Co.* (1918), 286 Ill. 15. *People v. Hines* (1919), 293 Ill. 419, 127 N.E. 693. *People v. Illinois Central Ry. Co.* (1921), 301 Ill. 288, 133 N.E. 779. *Beck v. Bd. Comrs. of Shawnee County* (1919), 105 Kan. 325, 182 P. 397. *District Board v. Bradley* (1920), 188 Ky. 427, 222 S.W. 518. *Hunter v. City of Louisville* (1923), 199 Ky. 834, 252 S.W. 119. *District Board, etc., v. City of Lexington* (1928), 227 Ky. 7, 12 S.W. (2d) 348. *County Comrs. v. Mayor* (1925), 252 Mass. 407, 147 N.E. 901. *Essex County v. City of Newburyport* (1926), 252 Mass. 407, 150 N.E. 234. *State ex rel. Eaton v. Gmelich* (1907), 208 Mo. 152, 106 S.W. 618. *Smith v. Smith* (1916), 174 App. Div. 473, 160 N.Y.S. 574. *People v. Biggs* (1916), 171 App. Div. 373, 156 N.Y.S. 1038. *People v. Hamilton* (1919), 108 Misc. 585, 178 N.Y.S. 702. *Sanatorium v. State Treasurer* (1917), 173 N.C. 810, 92 S.E. 689. *Armstrong v. Board* (1923), 185 N.C. 405, 117 S.E. 388. *Brissell v. State* (1912), 87 Oh. St. 154, 100 N.E. 348. *Simmons v. Stuckey* (1925), 113 Okla. 200, 241 P. 124. *St. Louis-San Francisco Ry. Co. v. Morris* (1929), 143 Okla. 160, 288 P. 306. *Bank of Picher v. Morris* (1932), 157 Okla. 122, 11 P. (2d) 178. *Comm. v. Woodring* (1927), 289 Pa. 437, 137 A. 635. *Law v. City of Spartanburg* (1928), 148 S.C. 229, 146 S.E. 12. *People v. Chenango County* (1943), 39 N.Y.S. (2d) 785.

12. *Smith v. Smith* (1916), 174 App. Div. 473, 160 N.Y.S. 574. *Armstrong v. Board* (1923), 185 N.C. 405, 117 S.E. 388. *Essex County v. City of Newburyport* (1926), 252 Mass. 407, 150 N.E. 234. *Comm. v. Woodring* (1927), 289 Pa. 437, 137 A. 635.

13. *People v. Biggs* (1916), 171 App. Div. 373, 156 N.Y.S. 1038.

14. *Sacramento County v. Chambers* (1917), 33 Cal. App. 142, 164 P. 613.

for the purposes of any county, city, town, or other municipal corporation; a law authorizing a tax levy in a city for the support of a county tuberculosis hospital was held to be unconstitutional, although the original law providing for the establishment and maintenance of the hospital as a county institution was valid.<sup>15</sup>

A county is not a municipal corporation but a local subdivision of the State, created without the direct consent of its inhabitants, and it is a proper instrumentality of the State for the carrying out of its public health procedures and policies, such as the hospitalization of the tuberculous,<sup>16</sup> unless the state constitution provides otherwise.<sup>17</sup> A municipal corporation cannot pass an ordinance prohibiting the erection within the city limits, on a site selected by the county board, of a county tuberculosis hospital authorized by state legislation.<sup>18</sup>

### *Private Tuberculosis Institutions*

In order to safeguard the public health by preventing the establishment and operation of private tuberculosis hospitals, camps, schools, resorts, and boarding homes by unqualified persons, state laws usually require that permits for such institutions must be obtained from state or local health authorities. These permits may be revoked by the issuing authority for cause, after a hearing.

Where the legislature has given to a state board of health sole authority to grant or refuse a permit for a private hospital for the care of tuberculous persons, the refusal, decided upon after a full hearing, will be upheld by the courts when no caprice or improper motives on the part of the board are shown.<sup>19</sup> When such a permit is granted, a town cannot by subsequent ordinance prohibit the establishment of the private hospital or limit its location.<sup>20</sup>

### *Tuberculosis Hospitals as Nuisances*

On a number of occasions the courts have been called upon to decide whether tuberculosis hospitals are nuisances, or are likely to

15. *District Board, etc. v. City of Lexington* (1928), 227 Ky. 7, 12 S.W. (2d) 348.

16. *Sacramento County v. Chambers* (1917), 33 Cal. App. 142, 164 P. 613.

17. *St. Louis-San Francisco Ry. Co. v. Morris* (1929), 143 Okla. 160, 288 P. 306. *Protest of Chicago, R. I. & P. Ry. Co.* (1933), 164 Okla. 118, 23 P. (2d) 157.

18. *Law v. City of Spartanburg* (1928), 148 S.C. 229, 146 S.E. 12.

19. *Deborah Jewish Consumptive Relief Soc. v. State Board of Health* (1929), 7 N.J. Misc. 779, 147 A. 226.

20. *Jewish Consumptive Relief Soc. v. Town of Woodbury* (1930), 243 N.Y.S. 686, 230 App. Div. 228, affirm. in 256 N.Y. 619, 177 N.E. 165.

become nuisances if they are established. Although there are on record a few early cases in which the operation and prospective use of private hospitals for the tuberculous in residential districts have been held to be nuisances,<sup>21</sup> these decisions have been overruled in numerous later cases.<sup>22</sup> It is now a well-established principle of law that a tuberculosis hospital is not *per se* a nuisance, although it might be conducted in such a manner as to become one.

The modern doctrine on this subject has been well expressed by the Supreme Court of California in a decision enjoining the enforcement of a municipal ordinance which declared every hospital for the treatment of contagious and infectious diseases in the city to be a nuisance.<sup>23</sup> Said the court in this case:

That a well-conducted modern hospital, even one for the treatment of contagious and infectious diseases, is not such a menace, but, on the contrary, one of the most beneficent of institutions needs no argument. There is not the slightest danger of the spread of disease from it, and this is the only possible ground on which objection could be made to it. We have no hesitation in holding an ordinance prohibiting the maintenance anywhere within a city of an institution so necessary in our modern life and so beneficent to be wholly unreasonable and invalid.

The hospital in this case was already established.

In denying an action for an injunction brought by several citizens against the erection of a proposed private tuberculosis hospital, the Supreme Court of Louisiana pointed out not only that individual citizens have no standing to champion the rights of the public in abating a nuisance, but that a well-kept tuberculosis hospital is not a menace to health, and the presumption is that the hospital will be well kept.<sup>24</sup> So, too, it was declared by the Supreme Judicial Court of Massachusetts that a municipal hospital for the care of tuberculous persons, to be established according to law, cannot be assumed in

21. *Cherry v. Williams* (1908), 147 N.C. 452, 61 S.E. 267, 125 A.S.R. 566, 15 Ann. Cas. 715. *Everett v. Paschall* (1910), 61 Wash. 47, 111 P. 879, 31 L.R.A. (N.S.) 827, Ann. Cas. 1912 B 1128. *Brink v. Shephard* (1921), 215 Mich. 390, 184 N.W. 404.

22. J. A. Tobey, Tuberculosis and the courts, *Journal of Outdoor Life*, 24:413, July 1927.

23. *San Diego Tuberculosis Ass'n v. City of East San Diego* (1921), 186 Cal. 252, 200 P. 393, 17 A.L.R. 513.

24. *Le Bourgeois v. City of New Orleans* (1919), 145 La. 274, 82 So. 268. *Law v. City of Spartanburg* (1928), 148 S.C. 229, 146 S.E. 12. *Mitchell v. Detsch* (1929), 179 Ark. 788, 18 S.W. (2d) 364.

advance to be a nuisance and its erection enjoined.<sup>25</sup> In this decision, it was pointed out that fear of a dread disease by nearby residents of the hospital does not create a nuisance, a proposition that also has been expressed in other decisions.<sup>26</sup>

In an action brought by a teacher to recover damages on the ground that she had contracted tuberculosis in a school where her predecessor had had this disease, it was held that no nuisance had been maintained by the school authorities, and, furthermore, that they were not liable for proven negligence, because the school district was carrying out governmental functions under a state law.<sup>27</sup>

### *Industrial Aspects of Tuberculosis*

Under workmen's compensation laws in some States, tuberculosis resulting from or aggravated by an accident while at work, or arising as an immediate result of employment, is compensable,<sup>28</sup> but the direct relationship between the occurrence of the disease and the injury or the working conditions must be clearly proven.<sup>29</sup> In other States, tuberculosis arising from occupational conditions has been held not to be compensable under existing legislation.<sup>30</sup> Other respiratory afflictions

25. *Cook v. City of Fall River* (1921), 239 Mass. 90, 131 N.E. 346, 18 A.L.R. 119.

26. *City of Northfield v. Atlantic County* (1915), 85 N.J. Eq. 47, 95 A. 745. *Ventnor City v. Home* (1910), 77 N.J. Eq. 464, 78 A. 677.

27. *Bang v. Independent School Dist.* (1929), 177 Minn. 454, 225 N.W. 449. See Chapter XVII, page 279.

28. *Baker v. Ind. Accid. Bd.* (1933), 135 Cal. App. 616, 27 P. (2d) 769. *Kovalski v. Collins Co.* (1925), 102 Conn. 6, 128 A. 288. *Retmier v. Cruse* (1918), 67 Ind. App. 192, 119 N.E. 32, 17 N.C.C.A. 870. *Fraze v. McClelland Co.* (1925), 200 Ia. 944, 205 N.W. 737. *Brim v. Home Accid. Ins. Co.* (1931), 15 La. App. 681, 131 So. 762. *Healey's Case* (1924), 124 Me. 145, 126 A. 21. *Skelly Oil Co. v. Rose* (1936), 176 Okla. 313, 55 P. (2d) 1019. *Kelly v. Watson Coal Co.* (1922), 272 Pa. 39, 115 A. 885. *Barron v. Texas Emphy. Ins. Co.* (Tex. 1931), 36 S.W. (2d) 464. *Cambridge Mfg. Co. v. Johnson* (1931), 160 Md. 248, 153 A. 283. *Heilman Brewing Co. v. Schultz* (1915), 161 Wis. 46, 152 N.W. 446. *Milwaukee County v. Indus. Comm.* (Wis. 1937), 272 N.W. 46. *Grain Handling Co. v. Sweeney* (1940), 102 F. (2d) 464. *MacRae v. Unemployment Compen. Comm.* (1940), 217 N.C. 769, 9 S.E. (2d) 595.

29. *Madore v. New Departure Mfg. Co.* (1926), 104 Conn. 709, 134 A. 259. *Dodd v. Independent Stove and Furnace Co.* (1932), 330 Mo. 662, 51 S.W. (2d) 114. *Mattson v. Dept. Lab. and Ind.* (1937), 176 Wash. 561, 60 P. (2d) 248. *O'Connor v. Pillsbury Flour Mills* (1937), 197 Minn. 534, 267 N.W. 507. *Ind. Comm. v. Ackerman* (1936), 51 Oh. App. 125, 199 N.E. 857.

30. *Madeo v. I. Dibner & Bro.* (1936), 121 Conn. 664, 186 A. 616, 105 A.L.R. 1408. *Wager v. White Star Candy Co.* (1926), 217 N.Y.S. 173, 217 App. Div. 316.

(Continued on next page.)

arising out of the nature and conditions of employment, such as pneumoconiosis, silicosis, asbestosis, and the like, which may be accompanied by tuberculosis, are frequently compensable either as accidents or as occupational diseases.<sup>31</sup>

At common law it was, and is, the duty of an employer to furnish his employees with a reasonably safe place in which to work, so that they will not contract tuberculosis or any other disease or suffer from avoidable accidents.<sup>32</sup> Where tuberculosis is not included in the terms of a state workmen's compensation law, this general principle still prevails, although it has been held that the rule does not apply to provision for means of minimizing the possibility of contraction of a lung disease through inhalation of dusts of manufacture.<sup>33</sup> At common law, the employer is liable only for those injuries to workmen that result from the negligence of the employer, either directly or in the hiring of fellow workmen.

A nurse or intern in a hospital who contracts tuberculosis as a direct

*Campbell v. Ind. Comm.* (1926), 22 Oh. App. 454, 153 N.E. 276. *Clinchfield Carbocoal Corp. v. Kiser* (1924), 139 Va. 387, 124 S.E. 271. *Depre v. Pacific Coast Forge Co.* (1927), 145 Wash. 263, 259 P. 720; (1929), 151 Wash. 430, 276 P. 89. *Maupin v. American Cigar Co.* (1935), 229 Mo. App. 782, 84 S.W. (2d) 218. *Reed v. Ellis* (1916), 38 Ont. L. 123, 32 D.L.R. 592. *Smith's Case* (1940), 307 Mass. 516, 30 N.E. (2d) 536. See M. G. Mack, *Medical and Legal Aspects of Tuberculosis as an Occupational Disease and as an Accidental Injury*, New York, National Tuberculosis Association, 1938.

31. *Rousu v. Collins Co.* (1931), 114 Conn. 24, 157 A. 264. *First Nat. Bank of Ottawa v. Wedron Silica Co.* (1933), 351 Ill. 560, 184 N.E. 897. *Gilliland v. Ash Grove Lime, etc., Co.* (1919), 104 Kan. 771, 180 P. 793. *Sullivan's Case* (1929), 265 Mass. 497, 164 N.E. 457. *Wenrich v. Warning* (1924), 182 Wis. 379, 196 N.W. 824. *Allen Gravel Co. v. Curtis* (1935), 173 Miss. 416, 161 So. 670. *Feola v. Nat. Brass Mfg. Co.* (1935), 284 N.Y.S. 242, 246 App. Div. 678. *Rebel v. Standard Sanitary Mfg. Co.* (1940), 340 Pa. 313, 16 A. (2d) 534. *Dean v. Dalton Foundries* (1941), 119 Ind. App. 377, 34 N.E. (2d) 145; Contra: *Johnson v. Concrete Materials Co.* (1944), — S.D. —, 15 N.W. (2d) 4. See *Occupational Disease Legislation*, American Public Health Association, 1931; also R. W. Goldberg, *Occupational Diseases*, New York, Columbia University Press, 1931, and 105 *American Law Reports* 80.

32. *Suess v. Arrowhead Steel Prod. Co.* (1930), 180 Minn. 21, 230 N.W. 125. *Depre v. Pacific Coast Forge Co.* (1927), 145 Wash. 263, 259 P. 720; (1929), 151 Wash. 430, 276 P. 89. *Ford Motor Co. v. Brady* (1934), 73 F. (2d) 248. *Price v. New Castle Refractories Co.* (1939), 332 Pa. 507, 3 A. (2d) 418. *Applequist v. Oliver Iron Mining Co.* (1941), 209 Minn. 230, 296 N.W. 13. L. U. Gardner, editor, *Industry, Tuberculosis, Silicosis and Compensation*, New York, National Tuberculosis Association, 1945. See Chapter XVI, on Industrial Hygiene.

33. *McCreery v. Libby-Owens-Ford Glass Co.* (1936), 363 Ill. 321, 2 N.E. (2d), 290, 105 A.L.R. 75.

result of the service or employment, if this fact can be proven, will be entitled to compensation for the disease.<sup>34</sup>

Where a veteran of World War I permitted his war risk insurance to lapse, and thirteen years later, when he was totally disabled by tuberculosis, put in a claim for disability during the life of the policy, it was held by the United States Circuit Court of Appeals that it could not be reasonably inferred that he was so disabled when the policy was in effect.<sup>35</sup>

### *Other Legal Aspects of Tuberculosis*

**Bovine Tuberculosis.** Since bovine tuberculosis is transmissible to human beings by means of infected raw milk, laws and regulations for the detection and control of this disease in cattle and for the pasteurization of market milk are valid under the police power, as described more fully in Chapter XI, on Milk Control.<sup>36</sup>

**Marriage.** Fraudulent concealment of tuberculosis has been held to be sufficient grounds for the annulment of marriage<sup>37</sup> or for divorce, this principle being similar to the rule in the case of venereal disease.

**Patent Medicines.** Refusal by the United States Patent Office of a patent for horseradish as a remedy for tuberculosis has been upheld in the federal courts.<sup>38</sup> The Federal Government has also been successful in the prosecution of nostrums offered as "cures" for tuberculosis.<sup>39</sup>

**Spitting.** In most of the States there are laws and ordinances making promiscuous expectoration a misdemeanor punishable by fine. In the early days of the anti-tuberculosis movement, campaigns against spitting were undertaken with much vigor, but public expectoration is not now considered a very important factor in the spread of this

34. *Miller v. New York* (1939), 14 N.Y.S. (2d) 680, 257 App. Div. 1092, rev. in 282 N.Y. 707, 26 N.E. (2d) 821 on grounds of evidence. *Vanore v. Mary Immaculate Hospital* (1940), 22 N.Y.S. (2d) 350, 260 App. Div. 820. *Nyelassey v. City of New York* (1946), 62 N.Y.S. (2d) 110.

35. *U.S. v. Middleton* (1936), 81 F. (2d) 205. *U.S. v. Sumner* (1934), 69 F. (2d) 770. *Runkle v. U.S.* (1930), 42 F. (2d) 804.

36. See pages 190-191. J. A. Tobey, *Legal Aspects of Milk Sanitation*, 2d ed., Washington, Milk Industry Foundation, 1947.

37. *Sobol v. Sobol* (1914), 150 N.Y.S. 248, 88 Misc. 277. *Grover v. Zook* (1906), 44 Wash. 489, 87 P. 638, 120 A.S.R. 1012, 7 L.R.A. (N.S.) 582, 12 Ann. Cas. 192. *Davis v. Davis* (1919), 90 N.J. Eq. 158.

38. *In re Trattner* (1929), 30 F. (2d) 879.

39. *The B. & M. Case, J.A.M.A.*, 99:578, August 13, 1932. *U.S. v. 17 Bottles of B. & M.* (1932), 55 F. (2d) 264.



THE CONTROL OF TUBERCULOSIS

161

disease. Proper disposal of the sputum of tuberculosis patients is, however, a matter of significance.

*Treatment.* The treatment of tuberculosis is usually a lengthy process, the average duration of sanatorium care generally exceeding six months. Since medical care legally continues until the patient is discharged, and may continue for an even longer period than that, all measures adopted for the care and treatment of the patient in a sanatorium, including occupational therapy and vocational rehabilitation, may legally be considered as medical treatment. This problem sometimes arises in connection with the allotment and use of public funds appropriated for the treatment of the tuberculous in public institutions.



## CHAPTER X

### THE CONTROL OF THE VENEREAL DISEASES

**I**NCLUDED among the so-called "venereal" diseases are syphilis, gonorrhea, chancroid or soft chancre, venereal lymphogranuloma (inguinale), and granuloma inguinale. In their acute stages all are dangerous communicable diseases; in either their acute or chronic stages they are hazardous to health.

Theoretically, the venereal diseases should be controlled by health departments in the same manner that other contagious diseases are controlled. Because of their moral implications, however, certain special procedures are usually necessary or desirable.

The word "venereal" implies that the disease is the consequence of illicit sexual relations with an infected person. Many cases may, nevertheless, be acquired innocently. In this category are congenital syphilis; the infection of a wife or husband by a diseased spouse; the infection of a newborn infant by the mother; the infection of a doctor, nurse, midwife, or wet-nurse by a diseased patient; and, finally, the relatively few cases that are acquired from freshly contaminated articles, such as drinking cups, towels, public toilets, and in other ways not involving direct sexual relations.

When the term "venereal disease" is used in a law, ordinance, or regulation, it is generally interpreted to include those diseases that are innocently acquired as well as those that are contracted through immoral sexual acts.<sup>1</sup>

Since all the venereal diseases are unquestionably dangerous to the public health and welfare, reasonable legislative and administrative measures for their prevention and control are recognized as a valid exercise of the police power of the State.<sup>2</sup> In numerous instances the courts have enunciated legal principles regarding proper measures for the regulation of venereal infections.

#### *Syphilis*

Syphilis, an acute or chronic disease caused by a spirochetal organism known as the *Treponema pallidum*, is the most important and severe of the venereal diseases. According to reliable authorities, more

1. *Coleman v. Nat. Life & Accid. Ins. Co.* (La. 1933), 145 So. 298.

2. B. Johnson, *Digest of Laws and Regulations Relating to the Prevention and Control of Syphilis and Gonorrhea*, New York, American Social Hygiene Association, 1940.

than 500,000 new cases seek medical treatment each year in the United States.<sup>3</sup> Approximately one fifth of the cases occur in persons under twenty years of age, and about six cases occur in males to four in females. The disease is stated to be more prevalent in cities than in rural areas, and is six times as prevalent among Negroes as among white persons.

Syphilis in pregnant women is said to be responsible for 60,000 cases of congenital syphilis in newborn infants every year. The disease causes from 10 to 12 per cent of all deaths from heart disease, the leading cause of death in this country. It is also responsible for paresis and other types of neuro-syphilis, and in its chronic stage may cause numerous physical troubles which resemble the symptoms of many other serious ailments.<sup>4</sup> As Sir William Osler said, "Syphilis is a great imitator."

The disease can be diagnosed, both by means of examination of infected tissue under the microscope and by standard blood tests such as the Wassermann, Kahn, Kline, and other tests. The disease is likewise amenable to early treatment with a combination of such chemicals as arsenic preparations (arsenobenzols, such as salvarsan and neosalvarsan), and mercury and bismuth, and with the antibiotic penicillin. When promptly and efficiently treated, syphilis is usually rendered noninfectious, and the patient may be said to be "chemically quarantined." When not treated, the disease usually attacks the entire body.

Recommendations for the administrative control of syphilis in States and cities were drafted in 1936 by an advisory committee appointed by the United States Public Health Service, as follows:

1. There should be a trained public health staff to deal with syphilis in each state and city.
2. Minimum state laws should require reporting of cases, follow-up of delinquents, and the finding of sources of infection and contacts.
3. Premarital medical certificates, including serodiagnostic tests, should be a legal requirement.
4. Diagnostic services should be freely available to every physician without charge and should meet minimum state standards of performance.
5. Treatment facilities should be of good quality, with convenient

3. T. Parran, Control of syphilis, Reprint No. 70 from *Venerel Disease Information*, U.S. Public Health Service, 1937.

4. W. F. Snow, *Venerel Diseases; Their Medical, Nursing, and Community Aspects*, New York, Funk & Wagnalls, 1937. For legal definitions of "communicability" and "treatment" of venereal disease, see J. H. Lade, The legal basis for venereal disease control, *Am. J. Pub. Health*, 35:1041, October, 1945.

hours and location. Wherever possible the clinic service should be a part of an existing hospital dispensary. Hospital beds should be provided for patients needing bed care.

6. The state should distribute antisyphilitic drugs to physicians for the treatment of all patients.

7. Routine serodiagnostic tests need to be used much more widely. In particular, every pregnancy, every hospital admission, every complete physical examination should include this test.

8. The informative program in modern diagnosis, treatment and control should be prosecuted vigorously, among physicians and health officers, especially through the use of trained consultants.

9. The public educational program must be persistent, intensive, and aimed especially at those individuals in the age groups in which syphilis is most frequently acquired.<sup>5</sup>

### *Gonorrhoea*

Gonorrhoea is an acute or chronic contagious disease caused by the organism known as the *Neisseria gonorrhoea*, sometimes called the gonococcus. According to reliable estimates, there are more than a million new cases of acute gonorrhoea each year in the United States.<sup>6</sup> The rate is higher among Negroes than white persons, and is higher in cities of 50,000 to 500,000 population than in larger cities or in rural areas. Only about one fourth of the cases occur in females.

This venereal disease is diagnosed by means of cultures, complement fixation, and microscopic examinations of bodily discharges for the presence of the causative organism. Prompt treatment, particularly with the sulphur drugs, is generally successful, although it is often difficult to determine when the patient has become completely non-infectious. The disease is, as a rule, somewhat more serious in women than in men.

A disease known as vulvovaginitis, an inflammation due to infection with the gonococcus and other organisms, occurs in childhood, particularly among girls in institutions. It is nonvenereal in origin and results from various kinds of direct contact.

### *Ophthalmia Neonatorum*

Gonorrhoeal infection of the eyes of newborn infants causes a disease known as ophthalmia neonatorum (acute infectious conjunctivitis)

5. T. Parran, Syphilis: a public health problem, *Science*, 87 (n.s.):147, February 18, 1938. R. A. Vonderlehr et al, Recommendations for a venereal disease control program, *J.A.M.A.*, 116:2585, June 7, 1941.

6. R. A. Vonderlehr and L. J. Usilton, The gonorrhoea problem in the United States, *J.A.M.A.*, 109:1425, October 30, 1937.

or "babies' sore eyes." Unless adequate measures for the prevention of this disease are taken at birth, blindness may result.

State laws and the regulations of state health departments almost universally require that physicians and midwives in attendance at births shall routinely and promptly treat the eyes of all newborn infants with a suitable prophylactic (usually a solution of silver nitrate) approved by the health authorities, and that these attendants shall report to local and state health officers all cases of ophthalmia neonatorum. In many States a standard prophylactic for this purpose is distributed by the state health department.

In one instance where the law required that the prophylactic be administered by the physician in charge within one hour after birth, a child was born in the absence of a physician, who arrived eight hours later and did not then apply the prophylactic. The Michigan Supreme Court held that he was not criminally liable for subsequent blindness in the infant, although he might be civilly liable for malpractice if good practice required the use of the treatment eight hours after birth.<sup>7</sup>

Where a nurse employed in a hospital selected by the mother was told by the attending physician to put drops in the infant's eyes and by mistake used a 30 per cent solution of silver nitrate instead of the one per cent solution prescribed by the state board of health, it was held in a North Carolina decision that the physician was not absolutely liable in damages for the resulting injury.<sup>8</sup> In this case, the hospital that supplied the nurse might have been liable, but there was no malpractice on the part of the physician.

While these two cases deal with liability, they also inferentially sustain the validity of these state laws for the control of ophthalmia neonatorum.

It has been held in Tennessee that a gonorrhoeal infection of the eyes of a workman is an accident under the workmen's compensation laws.<sup>9</sup> The loss of a workman's eye from a gonorrhoeal infection is likewise compensable in Oklahoma,<sup>10</sup> but has been held not to be com-

7. *People v. Clobridge* (1930), 249 Mich. 376, 228 N.W. 692.

8. *Covington v. Wyatt* (1928), 196 N.C. 367, 145 S.E. 673. *Walden v. Janes* (1942), 289 Ky. 395, 158 S.W. (2d) 609. *Dietsch v. Mayberry* (1942), 70 Oh. App. 527, 47 N.E. (2d) 404.

9. *McFarland v. Mass. Bonding & Insurance Co.* (1930), 160 Tenn. 546, 26 S.W. (2d) 159.

10. *Bishop v. Wilson* (1931), 147 Okla. 224, 296 P. 438. *Turitto v. St. Mary's Hospital* (1939), 14 N.Y.S. (2d) 647.

pensible in Ohio.<sup>11</sup> In the latter case the court held that the infection was not caused by a physical injury under the terms of existing state law.

### *Other Venereal Diseases*

Unlike syphilis, which may become a systemic disease, and gonorrhea, which is a disease of the mucous membranes, chancroid is a local ulcer caused by the Ducrey bacillus. It is also called a "soft chancre," to distinguish it from the hard chancre that usually appears in syphilitic infections. Chancroid is generally less severe than the other venereal diseases, but it is a loathsome malady that may cause disability.

Granuloma inguinale, literally "tumor of the groin," and venereal lymphogranuloma (inguinale) are contagious diseases of bacterial or virus origin.<sup>12</sup> They are less prevalent than the other venereal diseases, although they are recognized with increasing frequency, and only in recent years have they aroused medical interest in this country.

The five venereal diseases may occur singly or in combination, so that an infected person may have one of them or several or all at one time. In whatever way or to whatever degree he may be infected, he is obviously a menace to the public health and must be properly supervised in order to prevent the spread of the disease to others.

### *Reporting of Venereal Diseases*

In order that effective control may be instituted, prompt reports to health authorities of all cases of venereal diseases are necessary. Such written reports on prescribed forms are customarily required by law from physicians and other professional attendants. Unlike the reports of other communicable diseases to local health departments, venereal diseases usually may be or are required to be submitted by number or initials only, the name of the patient being kept as a confidential record by the physician. Upon special request by health officials or when the patient becomes delinquent, the name must, as a rule, be revealed to the health authorities for special investigation or for other purposes that are necessary to the protection of the public health.

Legal requirements for the prompt reporting of communicable diseases to health departments have been upheld as valid by the courts on numerous occasions,<sup>13</sup> and these decisions apply with equal force to the venereal diseases.

11. *Indus. Comm. of Ohio v. Hosafros* (1934), 47 Oh. St. 261, 191 N.E. 832.

12. W. Frei, Venereal lymphogranuloma. *J.A.M.A.*, 110:1653, May 14, 1938.

13. See Chapter VIII, page 133.

THE CONTROL OF THE VENEREAL DISEASES 167

Where a statute provides that a physician or any other person who knows that a prostitute is afflicted with "any infectious or contagious venereal disease" must immediately notify the police authorities of the town, and for failure to do so is guilty of a misdemeanor, it has been held by the Supreme Court of Nevada that the State Board of Medical Examiners acted properly in revoking the license to practice of a physician who had neglected to make such a report.<sup>14</sup>

What happens, however, when a physician reports a case of venereal disease to a person to whom such reports are not required by law? The imputation that a person is suffering from a venereal disease is libelous and is *prima facie* actionable.<sup>15</sup> But where a ship's doctor told a woman in the presence of other persons that she could not embark because she had a contagious venereal disease, it has been held by the United States Circuit Court of Appeals that this remark was not slanderous because the physician was carrying out his duties and was acting without malice.<sup>16</sup>

A similar case occurred where a physician acting as a hotel doctor discovered that one of the guests had syphilis and notified the hotel owner that the guest was suffering from "a contagious disease," with the result that the guest was forced to leave. An action for damages against the physician for alleged breach of duty arising from the confidential relationship between doctor and patient was dismissed by the Supreme Court of Nebraska.<sup>17</sup> So, too, where a school physician informed the parents of a pupil that she was afflicted with a venereal disease, he was held not to be liable in damages for libel.<sup>18</sup>

A physician is not required to testify on the witness stand as to the presence of venereal disease in a person whom he has treated in a professional capacity, since such information is privileged, although the privilege may be waived by the patient.<sup>19</sup> A health officer cannot be required to testify in a civil action regarding the presence or absence of venereal disease in an individual, as shown by a report made officially to him or by a laboratory examination made by or reported to the health department. Such questions often arise in divorce proceedings, actions on insurance, and other civil litigation, but the of-

14. *In re Reno* (1937), 57 Nev. 314, 64 P. (2d) 1036.

15. *Cooley on Torts*. See pages 294, 310-314 *infra*. *Kirby v. Smith* (1929), 54 S.D. 608, 224 N.W. 230.

16. *New York & Porto Rico S.S. Co. v. Garcia* (1926), 16 F. (2d) 734.

17. *Stimonsen v. Swenson* (1920), 104 Neb. 224, 177 N.W. 831, 9 A.L.R. 1250.

18. *Kenney v. Gurley* (1923), 208 Ala. 623, 95 So. 34, 26 A.L.R. 813.

19. *Howe v. State* (1926), 34 Okl. Cr. 33, 244 P. 826.



cial record in such cases is a confidential one for the purposes of public health administration, and is not a public record in the sense that reports of births and deaths are public records,<sup>20</sup>

### *Examination of the Venereally Infected*

Health officials are frequently authorized or directed by state laws, municipal ordinances, and board of health regulations to examine or cause to be examined any person who has or is reasonably suspected of having a contagious venereal disease. The exercise of this authority has given rise to a number of important court decisions.

The right to examine any person is not an absolute right. An examination for venereal disease can be conducted without the consent of an individual or against his will only when a health officer is possessed of definite facts that give him reasonable grounds to suspect the existence of the disease,<sup>21</sup> and only when in his judgment such an examination is actually necessary to the protection of the public health. Mere caprice or curiosity is not a sufficient ground for the action, and a mere assumption of the presence of the disease is not sufficient cause for examination.<sup>22</sup>

There is reasonable suspicion of the existence of venereal disease in the cases of all persons who are known to be or are proven to be prostitutes, and statutes frequently authorize the routine examination of such persons as coming within the classification of suspects. Where, however, the health authorities did not prove in court that a woman arrested and held for examination was a habitual prostitute, she was released from custody on a writ of habeas corpus.<sup>23</sup> On the other hand, the action of a magistrate in ordering the detention of a person arrested for vagrancy until a blood test could be taken has been upheld on appeal.<sup>24</sup>

In dismissing a writ of habeas corpus in this case, the New York Supreme Court pointed out that the sections of the state law authoriz-

20. *In re Marks* (1936), 121 Pa. Super. 181, 183 A. 432. *Thomas v. Morris* (1941), 286 N.Y. 266, 36 N.E. (2d) 141, 136 A.L.R. 854.

21. *Rock v. Carney* (1921), 216 Mich. 280, 185 N.W. 798, 22 A.L.R. 1178.

22. *Ex parte Shephard* (1921), 51 Cal. App. 49, 195 P. 1077. *City of Jackson v. Mitchell* (1924), 135 Miss. 767, 100 So. 513.

23. *Ex parte Arata* (1921), 52 Cal. App. 380, 198 P. 814. *Ex parte Dillon* (1919), 44 Cal. App. 239, 186 P. 170. *Huffman v. District of Columbia* (1944), 39 A. (2d) 558.

24. *People ex rel. Krohn v. Thomas* (1928), 231 N.Y.S. 271, 133 Misc. 145. *People v. Fox* (1911), 144 App. Div. 611, 129 N.Y.S. 646. *Hayt v. Brewster* (1921), 199 App. Div. 68, 191 N.Y.S. 176.

ing the examination were enacted for "the benign purpose of protecting the public against the ravages of venereal diseases," and that the statutes should receive a liberal interpretation.

If a person is proven to be an inmate of a house of ill fame, the courts have ruled that she can be held for an examination.<sup>25</sup> When a person is taken into custody without a warrant, voluntarily submits to the examination, and is found to have gonorrhœa, she may be quarantined.<sup>26</sup> So, too, where a magistrate told a woman to have the examination and that she would be released if free from disease, but it was revealed on examination that she had a venereal disease, her release was refused on a writ of habeas corpus.<sup>27</sup>

While these decisions uphold the right of examination for venereal disease on reasonable suspicion, none of the cases was decided by a court of final appeal. The highest court in Iowa considered this matter in the case of a man and woman who were arrested in Des Moines for lewd cohabitation. The woman was examined and found to have gonorrhœa, and the man was detained for examination before trial but sued out a writ of habeas corpus for his release. In granting the writ, the Supreme Court of Iowa pointed out that, while the rules of the board of health provided for examinations of prostitutes and derelicts, there was no express or implied authority in any law or regulation for the examination and taking of a blood test of the man in this case.<sup>28</sup>

"This petitioner may be a bad man," said the court, "but we have no right to assume such a fact for the purpose of minimizing his claim to protection of the ordinary rights of person which law and the usage of civilized life regard as sacred until lost or forfeited by due conviction of crime." While this decision denies the right of examination in the absence of statutory authority, and properly upholds the personal privileges of the individual, the State may lawfully provide for proper technical examinations, including blood tests, where reasonable interference with private rights is necessary for the protection of the public health. This particular case was discussed but not followed in

25. *Ex parte Dayton* (1921), 52 Cal. App. 635, 199 P. 548. *Ex parte Clemente* (1923), 61 Cal. App. 666, 215 P. 698.

26. *Ex parte Johnson* (1919), 40 Cal. App. 242, 180 P. 644.

27. *Ex parte Travers* (1920), 48 Cal. App. 764, 192 P. 454.

28. *Wragg v. Griffin* (1919), 175 Ia. 243, 170 N.W. 400, 2 A.L.R. 1327. In *State v. Height* (1902), 117 Ia. 650, 91 N.W. 935, 94 A.S.R. 323, 59 L.R.A. 437, it was held that a compulsory examination of a person accused of rape, to ascertain the existence of venereal disease, is a denial of due process of law. See also *Mann v. Bulgin* (1921), 34 Id. 714, 203 P. 463.

a decision of the Nebraska Supreme Court upholding the quarantine of a person for venereal disease after an examination as provided by law.<sup>29</sup>

In 1944, however, the Supreme Court of Illinois upheld as valid under the police power the compulsory detention and examination of persons reasonably suspected of being afflicted with communicable venereal disease.<sup>30</sup> In this case two women had been arrested under the terms of a state law for soliciting prostitution and had been ordered by a justice of the peace to submit to the examination authorized by law. They refused, and petitioned for writs of habeas corpus, which were denied in the lower courts.

The Supreme Court of Illinois, in sustaining this action, pointed out that prostitutes are natural subjects of and carriers of venereal diseases, and that for the protection of the public health their detention and examination is proper and reasonable. A city ordinance to the same effect was upheld by the Supreme Court of Arkansas in 1942,<sup>31</sup> although this case was more concerned with the detention and quarantine of the diseased person, whose venereal disease had been revealed by a physical examination ordered by the lower court in accordance with the terms of the ordinance.

A regulation of the Commissioners of the District of Columbia requiring examinations for venereal disease was upheld in 1944 by the Municipal Court of Appeals of the District of Columbia, but the manner of its execution by the public health authorities in a particular case was held to be invalid.<sup>32</sup> A health department physician in this case had received a report that a soldier had contracted venereal disease from a certain woman, and had gone to her residence to interview her. There the physician was unable to gain admission, but conducted a conversation through a locked door with an unknown person while a dog was barking loudly. The woman was, nevertheless, haled to court, although her attorney offered to show by independent medical examination that his client was free from venereal disease. The

29. *Brown v. Manning* (1919), 103 Neb. 540, 172 N.W. 522.

30. *People ex rel. Baker v. Strautz* (1944) 386 Ill. 360, 54 N.E. (2d) 441.

31. *City of Little Rock v. Smith* (1942), 204 Ark. 692, 163 S.W. (2d) 705. In *Ex parte Kilbane* (1946), — Oh. —, 67 N.E. (2d) 22, a lower court upheld a regulation of a city health department for examination and quarantine of the venereally infected. In *State v. Jones* (1946), 132 Conn. 682, 47 A. (2d) 185, a law providing for examination for venereal disease of persons charged with an offense against chastity was construed.

32. *Huffman v. District of Columbia* (1944), 39 A. (2d) 558.

trial court refused to entertain this evidence and convicted the woman, who appealed to the higher court.

The Municipal Court of Appeals sustained the regulation, but held that no reasonable grounds for suspicion had been proven in the case. The burden, said the court, is not upon the person suspected unless she be a known prostitute, but upon the health officer.

In an order restraining a superior court from granting a writ of habeas corpus to a person who had been examined and detained by a city health officer, the Supreme Court of Washington pointed out that under the constitution and laws of that State the determination and rulings of the health officials were final and could not be upset by habeas corpus proceedings.<sup>33</sup> Habeas corpus was also denied by the Supreme Court of Missouri in the case of a prostitute who had been examined and quarantined as provided in a city ordinance.<sup>34</sup>

In a dictum in a case upholding the isolation of a person infected with a venereal disease, the Supreme Court of Kansas stated that the reasonableness of examination of suspects "affects the public health so intimately and so insidiously, that considerations of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril. Only those invasions of personal privacy are unlawful that are unreasonable, and reasonableness is always relative to gravity of the occasion."<sup>35</sup>

#### *Quarantine of the Venereally Infected*

The power of legislative bodies to authorize the quarantine or isolation of venereally infected persons and the right of health officials to establish such quarantine are universally recognized in American jurisprudence. "The right of the Legislature under the police power to establish quarantine, to prevent the spread of contagion and infection, is too well established by adjudication and grounded in common sense to be questioned or doubted," said the Alabama Court of Appeals in upholding the quarantine of a person arrested for vagrancy, although the court stated that the detention should be in a hospital rather than in a jail.<sup>36</sup>

33. *State v. King County Superior Court* (1918), 103 Wash. 409, 174 P. 973. *Dowling v. Harden* (1921), 18 Ala. App. 63, 88 So. 217.

34. *Ex parte Lewis* (1931), 328 Mo. 843, 42 S.W. (2d) 21.

35. *Ex parte McGee* (1919), 105 Kan. 574, 185 P. 14, 8 A.L.R. 831.

36. *Dowling v. Harden* (1921), 18 Ala. App. 63, 88 So. 217.

In 1922 the Supreme Court of Ohio in a leading decision<sup>37</sup> sustained the detention of two prostitutes who had been found to be suffering from venereal disease. In this instance they had been quarantined under the terms of the Sanitary Code, which had been adopted by the state public health council. Exactly along the same lines is a Florida decision of 1943, in which the Supreme Court of that State upheld the quarantine of a person afflicted with gonorrhoea, in accordance with the rules of the state board of health.<sup>38</sup>

Although a person may be quarantined without a judicial hearing under a law, ordinance, or health department regulation requiring the examination and hospital quarantine of persons having venereal disease,<sup>39</sup> the courts have also held that a person so detained is later entitled to a hearing in court on a writ of habeas corpus in order to determine the legality and justification of the detention.<sup>40</sup> There is an exception to this rule in the State of Washington, where under the state constitution, the findings of the state board of health are final when such cases are taken on appeal to this board.<sup>41</sup> In no instance where the writ of habeas corpus has been invoked in such cases has the court failed to sustain the validity of the law or regulation imposing the quarantine or isolation.

Quarantine may, furthermore, be imposed in any suitable place. Thus, in the recent Arkansas decision<sup>42</sup> it was held that detention of a prostitute from Little Rock in that State in a government hospital in Hot Springs was proper. It has likewise been held in a recent Tennessee case that a person who escapes from a quarantine for venereal disease may be fined as well as recommitted, and that such quarantine is a procedure for which bail is not granted.<sup>43</sup>

Determination by a health officer that a person is infected with venereal disease usually is conclusive in the absence of bad faith, and

37. *Ex parte Company* (1922), 106 Oh. St. 50, 139 N.E. 204.

38. *Varholy v. Sweat* (1943), 153 Fla. 571, 15 So. (2d) 267.

39. *Ex parte Lewis* (1931), 328 Mo. 843, 42 S.W. (2d) 21. *Ex parte Johnson* (1919), 40 Cal. App. 242, 180 P. 644. *Duncan v. Lexington* (1922), 195 Ky. 822, 244 S.W. 60. *Ex parte Caselli* (1922), 62 Mont. 201, 204 P. 364. *Ex parte Company* (1923), 106 Oh. St. 50, 139 N.E. 204.

40. *Re Smith* (1895), 146 N.Y. 68, 40 N.E. 497, 28 L.R.A. 820, 48 A.S.R. 769. *Ex parte Hardcastle* (1919), 84 Tex. Cr. 463, 208 S.W. 531, 2 A.L.R. 1589. *Ex parte Caselli* (1922), 62 Mont. 201, 204 P. 364. *Ex parte Roman* (1921), 19 Okl. Cr. 235, 199 P. 580.

41. *State v. King County Superior Court* (1918), 103 Wash. 409, 174 P. 973.

42. *City of Little Rock v. Smith* (1942), 204 Ark. 692, 163 S.W. (2d) 705.

43. *State ex rel. Kennedy v. Head* (1945), — Tenn. —, 185 S.W. (2d) 530.

is sufficient evidence to justify continued quarantine and the refusal by a court to grant a writ of habeas corpus.<sup>44</sup>

Where, however, a man was arrested for vagrancy and had given bond for bail, it was held by the Supreme Court of Alabama that he must be released by the sheriff on a writ of habeas corpus, despite an order by the local health officer that the alleged vagrant be held in jail for a blood test for venereal disease.<sup>45</sup> The court stated in this case that quarantine laws were acknowledged to be a valid exercise of the police power, and pointed out that the statutes provided for an examination for venereal disease of persons actually committed to jail for vagrancy or prostitution, but held that prior to such final commitment mere vagrancy was not sufficient to raise reasonable suspicion of venereal disease and that a jail was not the proper place for a diseased person, who was not a criminal merely by reason of the infection.

The existence of venereal infection in an individual may be determined by laboratory tests or clinical examination or both. A single positive or negative laboratory test, particularly in the case of syphilis, should be confirmed by a second, because these tests are reliable but not infallible. If two tests give divergent results, a third should be made. In this way adequate evidence will be available for introduction in court in case of necessity. A health officer who orders quarantine of an individual merely on the strength of a single positive test for venereal disease may find that he has been guilty of poor judgment, for which he may not be personally liable, but which may cause him embarrassment.<sup>46</sup>

It is the duty of the sheriff of a county to execute and the duty of the board of commissioners to bear the expense of an order of a local health officer for the isolation of a woman infected with venereal disease.<sup>47</sup> When a person who is quarantined is cured of the disease, as

44. *Ex parte McGee* (1919), 105 Kan. 574, 185 P. 14, 8 A.L.R. 831. *Ex parte Fisher* (1925), 74 Cal. App. 225, 239 P. 1100. *Ex parte King* (1932), 128 Cal. App. 27, 16 P. (2d) 694. *Ex parte Lewis* (1931), 328 Mo. 843, 42 S.W. (2d) 21. *Ex parte Rothrock* (1921), 19 Okl. Cr. 234, 199 P. 581. *Ex parte Brooks* (1919), 85 Tex. Cr. R. 397, 212 S.W. 956. *Ex parte Gilbert*, (1940), 138 Tex. Cr. R. 269. 135 S.W. (2d) 718. *Ex parte James* (1944), — Tex. Cr. R. —, 181 S.W. (2d) 83.

45. *State v. Hutchinson* (1944), 246 Ala. 48, 18 So. (2d) 723. *Dowling v. Harden* (1921), 18 Ala. App. 63, 88 So. 217.

46. J. A. Tobey, The city's legal rights in the examination and detention of the venereally infected, *American City*, October, 1946, pp. 105-106.

47. *Nyberg v. Board of Commissioners* (1923), 113 Kan. 158, 216 P. 282.

shown by suitable evidence, a release from detention will be granted,<sup>48</sup> but the decision as to the appropriateness of such a release from quarantine is in general a matter within the discretion of the health officer.<sup>49</sup>

When a city fails to segregate a person infected with venereal disease so that a fellow prisoner in a city jail contracts the disease as a direct result of this negligence, the city will be liable for damages.<sup>50</sup>

### *Premarital and Antepartum Examinations*

Since 1913 a number of States have had in effect laws requiring that one or both of the applicants for a marriage license shall be free from venereal disease, as shown by an examination by a licensed physician. The first law of this nature was, in fact, adopted in the State of Washington in 1909, but was repealed in the following year. In 1913 such laws, applying only to the male, were passed in North Dakota, Oregon, and Wisconsin, and remained continuously in effect until amended or replaced in recent years. Between 1919 and 1929 five other States required by law that the male applicant for a marriage license be free from venereal disease, although laboratory tests were not made mandatory, and penalties for violations usually were not imposed.

In 1935 the legislature of Connecticut passed an act requiring both applicants for a marriage license to submit to local registrars certificates showing them to be free from syphilis in a communicable form, and providing for punishment of any local registrar who issued a license without first receiving the necessary certificate. Since that time, premarital examination laws have been adopted in about two-thirds of the States, some of them having been based on model legislation suggested by the American Social Hygiene Association.<sup>51</sup>

These laws provide that the license shall be refused if the applicant has syphilis, and sometimes if he has gonorrhoea, in the infectious stage of the disease. Some state laws, as in Connecticut, Illinois, Michigan, New Hampshire, New Jersey, New York, Rhode Island, and Wis-

48. *Ex parte Roman* (1921), 19 Okl. Cr. 235, 199 P. 580.

49. *Ex parte Irby* (1923), 113 Kan. 565, 215 P. 449.

50. *Lewis v. City of Miami* (1937), 127 Fla. 426, 173 So. 150. See Chapter XVII, on Liability of Municipal Corporations.

51. G. F. Forster and H. J. Shaughnessy, *Premarital examination laws in the United States*, J.A.M.A., 118:790, March 7, 1942. M. R. Zwalley and J. F. Mahoney, *Requirements of Premarital Legislation*, Bulletin No. 98, United States Public Health Service, 1945.

consin, specifically require blood tests for syphilis on the part of both men and women, while other state laws prohibit the marriage of venereally infected persons but do not define the measures to be used in discovering the disease, although in some instances personal affidavits declaring freedom from infection are required prior to issuance of the license.

The New York law, which was adopted in 1938, provides that no application for a marriage license shall be accepted by a town or city clerk unless accompanied by a confidential statement signed by a licensed physician that the applicant has been given an examination for syphilis, including a standard serological test, not less than twenty days prior to the application, and showing that the person is not infected with syphilis, or if infected is not in a stage of the disease whereby it may become communicable. When granted, the marriage license must be used within sixty days.

Under the terms of this law, the examination may be dispensed with because of emergency on order by a judge of the supreme court, a county court, or a county children's court, if the judge is satisfied that the public health and welfare will not be injuriously affected thereby, but his order must be accompanied by a confidential memorandum reciting the reasons for granting it. The physician's report and the judge's order are confidential and are not open to public inspection, but may be ordered produced in court for proper purposes.

A standard serological test is defined in this law as a laboratory test for syphilis approved by the state commissioner of health. Violation of any provision of the law is declared to be a misdemeanor.

A state law of this nature is justified by the fact that health is recognized as an important factor in marriage, with respect to both the partners involved and their future offspring. The State has a legitimate responsibility to ascertain whether applicants for marriage are healthful and to prevent the spread of dangerous diseases through the marital relationship.

The constitutionality of the so-called eugenic marriage law was sustained in 1914 by the Supreme Court of Wisconsin,<sup>52</sup> but in 1946 this decision was the only one in which a state premarital examination law had been passed upon by a court of last resort. This law required examinations only of male applicants, but the court held that this was not an unreasonable classification. The law also required the use

52. *Peterson v. Widule* (1914), 157 Wis. 641, 147 N.W. 966. In *Lyannes v. Lyannes* (1920), 171 Wis. 381, 177 N.W. 683, it was held that this law does not apply to marriages contracted outside the state.



by examining physicians of "recognized clinical and laboratory tests" for venereal disease, and set \$3.00 as the legal fee for such an examination. The court held that the law did not necessarily require the making of a Wassermann test, and stated further that the meagerness of the fee was not sufficient to invalidate the statute.

"The power of the state to control and regulate by reasonable laws the marriage relation, and to prevent the contracting of marriage by persons afflicted with loathsome or hereditary diseases, which are liable either to be transmitted to the spouse or inherited by the offspring, or both, must on principle be regarded as undeniable," declared the Supreme Court of Wisconsin in this case. Subsequent to the decision, this law was amended in several particulars.

In 1939 the Appellate Court of Illinois had before it the question as to whether a marriage contracted in another state by residents of Illinois was void because of failure to comply with the Illinois law requiring a certificate from the parties showing freedom from venereal disease. The court decided that the marriage was not void, because the statute was directory and not prohibitory.<sup>53</sup> In a case concerned with a common law marriage, however, the Pennsylvania Superior Court decided in 1944 that common law marriages in that State would be void after 1939 unless there was compliance with the law enacted in that year, which required the parties to the proposed marriage to produce certain evidence of freedom from syphilis.<sup>54</sup>

This law, said the court, is clearly a public health measure designed to assist in the eradication of syphilis, and to prevent the communication of syphilis by a diseased spouse to the other, who was free from it, and to prevent the birth of children with syphilitic weaknesses and deformities. Certainly, continued the court, the legislature never intended that such an important hygienic statute could be circumvented by the simple device of the parties entering into an informal marriage contract, or common law marriage, either with or without a license. In New York the law requiring a premarital blood test has been construed in its application to a member of the military forces.<sup>55</sup>

When extreme cruelty is a statutory ground for divorce, communication of a venereal disease by one spouse to the other is generally held to come within the definition of extreme cruelty,<sup>56</sup> but a mere

53. *Boysen v. Boysen* (1939), 301 Ill. App. 573, 23 N.E. (2d) 231.

54. *Fisher v. Sweet and McClain* (1944), 154 Pa. Super. 216, 35 A. (2d) 756.

55. *In re Lewicki* (1942), 38 N.Y.S. (2d) 944.

56. *Danielly v. Danielly* (1922), 93 N.J. Eq. 556, 118 A. 335. *Gartner v. Gartner* (1931), 109 N.J. Eq. 112, 156 A. 673. *C----- v. C-----* (1914), 158 Wis. 301, 148 N.W. 865, 5 A.L.R. 1013.

request for sexual intercourse by an infected spouse is not cruelty,<sup>57</sup> although concealed existence of syphilis is cause for annulment of marriage.<sup>58</sup>

Serological blood tests for syphilis are required of all pregnant women by laws adopted in 1938 in New York, New Jersey, and Rhode Island, and subsequently in more than half of the States. Blood must be taken by a physician, and the test must be one approved by the state department of health. The fact that it has been performed and the date must be stated by physicians in reporting births and stillbirths, but no report of the result of the test is permitted.

### *Illegal Exposure to Venereal Disease*

A person infected with venereal disease who exposes another person, including his wife, to the disease is guilty of felony, according to the terms of some state laws. The conviction of a man who exposed a female to gonorrhea under such a statute has been affirmed by the Criminal Court of Appeals of Oklahoma,<sup>59</sup> but it has also been held that a physician could not testify as to the condition of the accused when his knowledge was due to a professional relationship and the right of privileged communication had not been waived.<sup>60</sup> Confinement in prison of persons who wilfully infect others with venereal disease, contrary to the terms of a statute making such exposure a criminal offense, has been upheld in two recent cases by the Oklahoma Criminal Court of Appeals.<sup>61</sup>

It has been held by the Supreme Court of North Carolina that a wife can maintain an action for damages under the laws of that state against her husband for coercing her and wilfully and maliciously giving her a venereal disease, in this case gonorrhea.<sup>62</sup> The damages in this case amounted to \$10,000 in favor of the wife.

In a prosecution against a house of ill fame, it has been held that the general reputation of the place could be shown, and that it was

57. *Bowman v. Bowman* (Del. 1934), 171 A. 444.

58. *Doe v. Doe* (Del. 1933), 165 A. 156. *Svenson v. Svenson* (1904), 178 N.Y. 54, 70 N.E. 120. *Watson v. Watson* (1940), — Mo. App. —, 143 S.W. (2d) 349.

59. *Reynolds v. State* (1930), 49 Okl. Cr. 215, 292 P. 1046. *Contra: Austin v. State* (1911), 100 Miss. 189, 56 So. 345.

60. *Howe v. State* (1926), 34 Okl. Cr. 33, 244 P. 826.

61. *Epps v. State* (1942), 69 Okl. Cr. 460, 104 P. (2d) 262. *Ex parte Brown* (1943), 77 Okl. Cr. 96, 139 P. (2d) 196.

62. *Crowell v. Crowell* (1920), 180 N.C. 516.

proper to admit evidence by health physicians as to the diseased condition of the inmates.<sup>63</sup> In all states there are laws dealing with prostitution.<sup>64</sup> In 1941 Congress passed a law prohibiting prostitution in the vicinity of military and naval establishments, and in 1946 re-enacted it.

### *Prohibition of Obscene Advertising and Literature*

Laws prohibiting the advertising of alleged cures for venereal disease have been sustained by the courts,<sup>65</sup> and the revocation of the license of a physician who violated such a law has likewise been upheld.<sup>66</sup>

A sincere and ethical pamphlet on sex hygiene sent through the mails does not, however, violate the United States Criminal Code (18 U.S.C.A. 334), which prohibits the mailing of obscene, lewd, and lascivious pamphlets.<sup>67</sup> The test, said the court, is whether the literature would tend to deprave the morals of those who received it, but a truthful exposition of the sex side of life, evidently calculated for instruction, would not be likely to do so. Pointing out that the old theory that information about sex matters should be left to chance has greatly changed, the court declared that the direct aim of such pamphlets as the one under consideration was to promote understanding and self control, and not to arouse sex impulses.

### *Prophylactic Devices*

Laws and ordinances which provide for the control and use of devices for the prevention of venereal diseases, devices which may also prevent conception, are in effect in many states. An ordinance prohibiting the sale of such devices except by licensed physicians, licensed

63. *Anzine v. U.S.* (1919), 260 F. 827.

64. See 161 *American Law Reports* 356. B. Johnson and G. Gould, *Digest of State and Federal Laws Dealing with Prostitution and Other Sex Offenses*, New York, American Social Hygiene Association, 1942. *Techniques of Law Enforcement Against Prostitution*, Div. of Social Protection, Federal Security Agency, 1943.

65. *People v. Kennedy* (1913), 176 Mich. 384, 142 N.W. 771. *State v. Hollinshead* (1915), 77 Ore. 473, 151 P. 710. *Hughes v. State Medical Examiners* (1926), 162 Ga. 246, 134 S.E. 32. *Davis v. State* (1944), — Md. —, 37 A. (2d) 880.

66. *Kennedy v. State Bd. of Registration* (1906), 145 Mich. 241, 108 N.W. 730, 9 Ann. Cas. 125.

67. *U.S. v. Dennett* (1930), 39 F. (2d) 564. *U.S. v. Nicholas* (1938), 97 F. (2d) 510.

drugstores, and others specially licensed has been upheld as valid.<sup>68</sup> Where, however, a statute prescribed a standard for condoms, or prophylactic rubbers, and provided that sales should be made only from prescription counters of licensed retail drugstores, these portions of the law were upheld, but a requirement that only wholesale druggists should be issued licenses to sell these devices at wholesale was ruled void as a purely arbitrary classification.<sup>69</sup>

State laws forbidding the use by any person of any drug, medicinal article, or instrument for the prevention of conception, and making no exceptions in favor of physicians, have been sustained as constitutional,<sup>70</sup> as have also laws permitting physicians to employ such devices under certain circumstances.<sup>71</sup>

### *Social Hygiene*

Although the control and reduction of the venereal disease is a most important aspect of social hygiene, this term, as used in the United States, means the practical promotion of a better understanding and wiser use of human sex endowments. The social hygiene movement involves sex education, the repression of prostitution, the employment of protective social measures, and provision for wholesome recreation, as well as the prevention and regulation of the venereal diseases. A national program of social hygiene is sponsored by the American Social Hygiene Association, a voluntary agency, which has headquarters in New York City. Advice as to many of the legal features of social hygiene and venereal disease control is available from this organization.<sup>72</sup>

Official activities against the venereal diseases are undertaken by state and local health authorities, with the advice and cooperation of the Division of Venereal Diseases of the United States Public Health Service. By an act of Congress approved May 24, 1938 (Public—No. 540—75th Congress) there was authorized to be appropriated for the fiscal year ending June 30, 1939, the sum of \$3,000,000 for the purpose

68. *McConnell v. Knoxville* (1937), 172 Tenn. 190, 110 S.W. (2d) 1178, 113 A.L.R. 966.

69. *Markendorf v. Friedman* (1939), 280 Ky. 484, 133 S.W. (2d) 516, 127 A.L.R. 416.

70. *Commonwealth v. Gardner* (1938), 300 Mass. 372, 15 N.E. (2d) 222. *State v. Nelson* (1940), 126 Conn. 412, 11 A. (2d) 856. *Lanteen Laboratories v. Clark* (1938), 294 Ill. App. 81, 13 N.E. (2d) 678.

71. *People v. Sanger* (1918), 222 N.Y. 192, 118 N.E. 637.

72. *Forms and Principles of State Social Hygiene Laws*, New York, American Social Hygiene Association, 1944.

of assisting States, counties, health districts, and other political divisions of the States in establishing and maintaining adequate measures for the prevention, treatment, and control of the venereal diseases; for investigations and the training of personnel; and for the administration of the act. The appropriation authorized for the same purpose for the following fiscal year was \$5,000,000; for the fiscal year ending June 30, 1941, \$7,000,000; and for subsequent years such sums as are deemed necessary.

This act is administered by the Surgeon General of the United States Public Health Service, who allots sums to the various States upon the basis of population, the extent of the venereal disease problem, and the financial needs of the respective States. The Surgeon General also approves plans of state health authorities, and is empowered to prescribe rules and regulations to carry out this act, which have been issued.

A State, to be eligible to receive a grant-in-aid for venereal disease work must submit to the Surgeon General a comprehensive statement of its existing venereal disease control organization, program, and budget; a proposed plan for improving the service, including a merit system for personnel; specific plans for the control of gonorrhea; a proposed plan for extending and improving district, county, and city venereal control services; and a statement indicating ways in which the proposed expenditure of federal funds may be expected to stimulate permanent progress in the prevention and control of venereal diseases in both urban and rural areas.

Any laboratory, state or otherwise, receiving federal funds must demonstrate by a suitable method that the serologic tests performed have a satisfactory sensitivity and specificity rating, and must provide laboratory services for venereal diseases on the same basis as other communicable diseases. Free diagnostic and treatment facilities for both syphilis and gonorrhea must be provided by all health departments or clinics receiving federal funds. Antisyphilitic drugs must be distributed free on the request of any physician duly authorized by law to administer such drugs.



## CHAPTER XI

### MILK CONTROL

**I**N the field of human nutrition there is no more important food than pure milk. Physicians and scientists are generally agreed that a liberal amount of pure milk is indispensable in the daily diets of all normal infants and growing children and of all expectant and nursing mothers, and that milk of good quality is necessary or desirable for invalids, malnourished persons, and all normal adults.<sup>1</sup>

Pure milk is commonly known as "our most nearly perfect food," because it is an exceptionally well-balanced combination of most of the chemical substances required by the human body, including fat, carbohydrate, complete proteins, minerals, vitamins, and water. An adequate supply of clean and safe milk is, therefore, a matter of definite and acknowledged significance to the public health.

It has been pointed out by the Supreme Court of the United States<sup>2</sup> that the production and distribution of milk is a paramount industry of a State (in this case, New York) and largely affects the health and prosperity of its people. The dairy industry is, in fact, the greatest single source of agricultural income in the United States, yielding about 20 per cent of the total agricultural income in this country.

#### *Milk Control and the Public Health*

Since milk is in universal use as a food and when pure is the most wholesome of all foods, and since milk is a perishable product that is also peculiarly liable to dangerous contamination and adulteration, the reasonable regulation of the production, processing, storage, handling, distribution, and sale of milk and dairy products in the interest

NOTE. A more comprehensive discussion of this subject, together with a list of approximately 400 court decisions on milk, is given in the author's book, *Legal Aspects of Milk Sanitation*, published (1947) by the Milk Industry Foundation, Washington, D. C. Subsequent court decisions on milk control are, however, mentioned in this chapter.

1. See S. J. Crumbine and J. A. Tobey, *The Most Nearly Perfect Food*, Baltimore, Williams & Wilkins, 1929; J. A. Tobey, *Milk, the Indispensable Food*, Milwaukee, Olsen, 1933; and *Nutrition*, Final report of the League of Nations mixed committee for the study of problems of nutrition, New York, Columbia University Press, 1937.

2. *Nebbia v. New York* (1934), 291 U.S. 502, 78 L. Ed. 563, 54 S. Ct. 505, 89 A.L.R. 1469.

of the public health is universally recognized as an established and proper function of government.<sup>3</sup>

The necessity for such legal regulation of milk is indicated by the fact that there were reported annually in the United States between 1924 and 1936 an average of forty-three milk-borne epidemics each year, involving more than 1,500 cases of preventable diseases and some fifty needless deaths annually.

Most of these outbreaks have been of typhoid fever, with septic sore throat in second place. Other diseases represented have included diphtheria, scarlet fever, gastro-enteritis, bacillary dysentery, diarrhea, and food poisoning. In addition to these communicable maladies, contaminated milk may also cause the spread of tuberculosis and brucellosis (undulant fever), bovine diseases that are transmissible to man. Poliomyelitis (infantile paralysis) has been mentioned in one or two instances as having been spread by infected milk, but the scientific evidence on this matter is not conclusive.

Nearly all the milk-borne epidemics reported in the United States and also in Canada have been caused by contaminated raw milk of grades below that known as certified milk. In 1927, for example, an epidemic of typhoid fever in Montreal, responsible for 5,110 cases and 537 deaths, was traced to the infection of raw milk by a human carrier of this disease and the subsequent mixing of this raw milk with a pasteurized supply.

Public health authorities and other scientists are agreed that pasteurization of all market milk supplies is a necessary safeguard for this important food. Pasteurization, the heating of all particles of milk to at least 142° F. for thirty minutes, or the heating of the milk to at least 160° F. for fifteen seconds, following in each instance by rapid cooling to 50° F. or less, is a process that has been proven to be destructive to all pathogenic bacteria, if they are present in a milk supply.<sup>4</sup>

Since the adoption of the first state law prohibiting the adulteration of milk, a Massachusetts act of 1856, and the first recorded court decisions on milk control, handed down in Massachusetts in 1860 and 1864,<sup>5</sup> all States in this country have adopted legislation on this subject and also on the sanitary control of milk supplies. On numerous occasions these laws and the manner of their enforcement have come

3. Tobey, *Legal Aspects of Milk Sanitation*, *op. cit.*

4. See also page 192.

5. *Comm. v. Flannelly* (1860), 81 Mass. (15 Gray) 195. *Comm. v. Farren* (1864), 91 Mass. (9 Allen) 489.



before courts of last resort.<sup>6</sup> The earlier cases were concerned mainly with the adulteration of milk, but since 1896, when the first important decision on a milk sanitation ordinance was reported,<sup>7</sup> most of the adjudications on milk control have been concerned with the legality and validity of state and local sanitary requirements for the production and distribution of milk and other dairy products.

These decisions have, in general, upheld as constitutional and valid the proper regulation of milk by the State under its police power, the delegation of this responsibility to municipal corporations and boards of health, the imposition of reasonable standards for commercial milk and dairy products, the requirement of licenses and permits for the production and sale of these products, the inspection and sanitary supervision of public milk supplies, the seizure and destruction of impure milk, the requirement of tuberculin testing of all dairy cattle and the destruction of diseased animals, requirements for the pasteurization of market milk supplies, requirements for sanitary containers properly labelled, and, in recent years (since 1937), emergency control by the State of the prices of milk and dairy products.

Although the courts have been liberal in upholding all reasonable regulations and control of milk by the legislative and executive branches of the government, the judiciary has also recognized the existence of certain constitutional limitations upon the scope and extent of such control, especially when the legal rights of individuals under the federal and state constitutions have been or are likely to be infringed. In order to be lawful, the application of official sanitary control of milk, like any other phase of public health administration, must be reasonably calculated to protect and preserve the health of the people.<sup>8</sup>

### *Standards for Milk and Dairy Products*

Legislatures cannot wholly forbid or prevent the sale of a wholesome article of food such as milk, but legislatures may regulate an industry and impose reasonable standards of purity, freedom from adulteration, and proper chemical composition upon a food or food

6. See Tobey, *Legal Aspects of Milk Sanitation*, *op. cit.*

7. *State v. Nelson* (1896), 66 Minn. 166, 34 L.R.A. 318, 61 A.S.R. 399, 68 N.W. 1066.

8. *Adams v. Milwaukee* (1913), 228 U.S. 572, 57 L. Ed. 971, 33 S. Ct. 610. *Sheffield Farms v. Seaman* (1935), 114 N.J.L. 455, 177 A. 372.

product<sup>9</sup> and prohibit the sale of products of a quality inferior to that required by law.<sup>10</sup>

In accordance with this power, legal standards for milk and dairy products have been adopted in all States, although there is considerable variation in the statutory requirements.<sup>11</sup> These laws usually impose minimum standards for butterfat and total solids of milk and dairy products, prohibit the use of certain dangerous preservatives, adulterants, and deceptive coloring materials, set minimum bacterial standards for various defined grades of milk and milk products, and outline necessary procedures for determining the sanitary and chemical quality of products that are actually offered for sale. The sale of a substandard product is, in general, a criminal offense regardless of the knowledge or lack of knowledge on the part of the seller.

Where an arbitrary standard for the chemical composition of milk, as fixed by the legislature, cannot be met by certain breeds of cattle, the law is not thereby invalidated, since milk of the proper standard can be secured from cattle of mixed herds.<sup>12</sup> Where, however, an unreasonably high standard of chemical composition is required for a product, and it has no substantial relation to the public health, the law is invalid.<sup>13</sup> In this case, the court held that a municipal ordinance requiring a minimum of 12 per cent butterfat for plain ice cream and 10 per cent for fruit ice cream was unreasonable.

The standards for milk and dairy products required by state legislation may, in general, be exceeded or made more rigid in an ordinance adopted by a municipality of the State in accordance with the powers conferred in its charter or by legislation, provided that the ordinance is not inconsistent with the state law and does not contravene its terms.<sup>14</sup> Thus, where a state law permitted the sale of a chocolate milk drink having only 2 per cent butterfat but authorized cities

9. *St. John v. New York* (1906), 201 U.S. 633, 50 L. Ed. 896, 26 S. Ct. 554, 5 Ann. Cas. 909. *Hutchinson Ice Cream Co. v. Iowa* (1916), 242 U.S. 153, 61 L. Ed. 217, 37 S. Ct. 28, Ann. Cas. 1917 B 643. *People v. Biesecke* (1901), 169 N.Y. 53, 57 L.R.A. 178, 88 A.S.R. 534, 61 N.E. 990.

10. *St. Louis v. Liesing* (1905), 190 Mo. 464, 1 L.R.A. (N.S.) 918, 109 A.S.R. 774, 4 Ann. Cas. 112, 89 S.W. 611.

11. *Milk Control; Governmental Regulation of the Dairy Industry in the United States*, Chicago, Public Administration Service, 1937.

12. *People v. Cpperly* (1886), 37 Hun. 319, rev. in 101 N.Y. 634, 4 N.E. 107. *People v. Butler* (1910), 140 App. Div. 705, 125 N.Y.S. 556.

13. *Rigbers v. Atlanta* (1910), 7 Ga. App. 411, 66 S.E. 991.

14. *Kansas City v. Henre* (1915), 96 Kans. 794, 153 P. 548. *City of Phoenix v. Breuninger* (1937), 50 Ariz. 372, 72 P. (2d) 580.

to adopt higher standards, a municipal ordinance requiring that all chocolate milk drinks should be manufactured from grade A whole milk, raw or pasteurized, containing 3.5 per cent butterfat, has been upheld by the courts.<sup>15</sup>

Milk has been defined for legal purposes as "the whole, fresh lacteal secretion obtained by the complete milking of one or more healthy cows, excluding that obtained within 15 days before and 5 days after calving, or such longer period as may be necessary to render the milk colostrum free. The name 'milk' unqualified means cow's milk."<sup>16</sup> This same definition is given in the United States Public Health Service Standard Milk Ordinance and Code,<sup>17</sup> with the addition of the following at the end of the first sentence: "which contains not less than eight per cent of milk solids-not-fat, and not less than three and one quarter per cent of milk fat"; the second sentence is omitted.

A milk company which standardized its market milk with pasteurized cream which had also been homogenized, so that it contained 5 per cent butterfat, has been held not to have violated a city ordinance prohibiting the sale of milk which has had the cream line increased by any artificial means.<sup>18</sup> The court stated in this case that the mechanical process of homogenization was not an artificial means within the intent of the ordinance. A product consisting of pasteurized cream, sugar, vanilla, and nitrous oxide gas to give it a foamy character, and sold under a trade name, has been held not to be a milk product as defined in the Sanitary Code of New York, despite an amendment to the code adding to the definition of milk products the words, "cream to which any substance has been added and for use in fluid state or whipped."<sup>19</sup> Here the court held that the amendment as applied to this product was unreasonable, discriminatory, and arbitrary and a denial of due process of law and the equal protection of the laws.

#### *The Administrative Control of Milk*

The right to conduct a lawful business, such as dairying and the sale of milk and its products, does not also confer the absolute right

15. *Anderson v. Tampa* (1935), 121 Fla. 670, 164 So. 546.

16. *Service and regulatory announcements, food and drug no. 2* (5th rev.): *Definitions and standards for food products, for use in enforcing food and drugs act.* U. S. Food and Drug Administration, November 1936.

17. *Public Health Service Milk Ordinance and Code: 1939*, Public Health Bulletin No. 220, 1939 edition, U.S. Public Health Service.

18. *Arden Farms Co. v. City of Seattle* (1940), 2 Wash. (2d) 640, 99 P. (2d) 415.

19. *Aerated Products Co. v. Godfrey* (1943), 290 N.Y. 92, 48 N.E. (2d) 275. See *Aerated Products v. Dep't Health* (N.J. 1945), 59 F. Supp. 652.

upon the vendor to conduct his business in any way that he may see fit, regardless of any resulting effect upon the public health. Any such business must be undertaken only in accordance with reasonable sanitary requirements of the State and its political subdivisions.<sup>20</sup>

In every State some aspect of milk sanitation and control is undertaken at the state level in accordance with law. In about one half of the States this activity is the function of the health department; in the remainder it is the duty of the department of agriculture or some similar authority. In counties, cities, and other local jurisdictions, milk control is almost invariably the function of the local health department, which acts as agent of the State in the enforcement of the statutes and duly authorized regulations, and also enforces any applicable local ordinances and regulations, which must be consistent with state requirements.

In some States both the health department and the department of agriculture are concerned with certain aspects of the sanitary control of milk and dairy products. In 1940 it was necessary for the Supreme Court of Kansas to make an exhaustive study of the relative functions of the two departments in a case involving the conviction of a milk dealer for violation of certain regulations of the state board of health. It was decided that, with the exception of the adulteration and misbranding of milk, the control of this product was within the exclusive jurisdiction of the board of agriculture of that State.<sup>21</sup>

Where a state agricultural code authorized municipalities to provide higher standards for grades of market milk than that provided in the state laws, and authorized municipalities to set up their own systems of dairy inspection, it was held that other powers over milk vested in the State had not been relinquished, and that a city ordinance providing that no person should be issued a permit to sell milk in the city unless the dairy had been inspected by the health officer of the city was in direct conflict with the agricultural code, which stated that when a producer sold in two or more cities or counties, the director of agriculture shall designate the county or city to conduct the inspection.<sup>22</sup>

So, too, where a state law had set up a comprehensive scheme for the control of the manufacture and sale of frozen desserts, and had placed its administration with the commissioner of the department of agriculture and markets, and the commissioner had issued a permit

20. *Owensboro v. Evans* (1916), 172 Ky. 831, 189 S.W. 1153.

21. *State v. Reynolds* (1940), 152 Kan. 762, 107 P. (2d) 728.

22. *Meridian v. Stippy* (1942), 54 Cal. App. (2d) 214, 128 P. (2d) 884.

to a company to manufacture such products in a sanitary and well-kept basement in New York City, it was held that the department of health of New York City could not refuse to issue a permit for the retail sale of these products, despite a regulation prohibiting manufacture in basements.<sup>23</sup>

### *Sanitation and Inspection of Milk Supplies*

For the administration and enforcement of necessary sanitary standards, state and city governments may appoint or delegate officers and employees to inspect dairies, examine milk-producing cattle, test the products, and take such other proper measures as are necessary to the effective administration of the laws, ordinances, and duly adopted regulations.<sup>24</sup>

Although the jurisdiction of a municipal ordinance extends only to persons and things within the corporate limits of the municipality, the courts have uniformly held that inspections of dairies beyond the city limits are justifiable and proper measures for the protection of the public health and do not represent extraterritorial operation of a milk ordinance.<sup>25</sup>

A municipality may not lawfully prohibit the entry and sale of wholesome milk or other foods from beyond its borders,<sup>26</sup> but reasonable limitations may be placed upon the extent of an inspection area, and uninspected milk usually may be debarred from sale within the city. What is a reasonable limit to an inspection area seems to depend upon the circumstances in a particular case. Thus, in a recent decision it was held that a city ordinance prohibiting the shipment of ice cream into the city from outside a board of health's inspection area having a radius of sixty miles from the city was a reasonable public health measure,<sup>27</sup> but in another recent case it was held that the regulation of a city health commissioner prohibiting the use of cream produced

23. *S. H. Kress & Co. v. Department of Health of City of New York* (1940), 283 N.Y. 55, 27 N.E. (2d) 431.

24. *Norfolk v. Flynn* (1903), 101 Va. 473, 62 L.R.A. 771, 99 A.S.R. 918, 44 S.E. 717.

25. *State v. Nelson* (1896), 66 Minn. 166, 34 L.R.A. 318, 61 A.S.R. 399, 68 N.W. 1066. *Norfolk v. Flynn* (1903), 101 Va. 473, 62 L.R.A. 771, 99 A.S.R. 918, 44 S.E. 717.

26. *Whitney v. Watson* (1931), 85 N.H. 238, 157 A. 78. *Grant v. Leavell* (1935), 259 Ky. 267, 82 S.W. (2d) 283. *Meridian v. Stippy* (1942), 54 Cal. App. (2d) 214, 128 P. (2d) 884. *Bryant & Chapman Co. v. Lowell* (1942), 129 Conn. 321, 27 A. (2d) 637.

27. *Wright v. Richmond County Dept. of Health* (1936), 182 Ga. 651, 186 S.E. 815.

more than fifty miles from the city for the manufacture of ice cream in the city, was an unreasonable interference with a legitimate business and hence invalid.<sup>28</sup> This court pointed out that the sanitary condition of all cream could be easily ascertained by the health department, and if found unwholesome it could be prohibited from entry, but if it was wholesome and pure it could not be excluded merely on the capricious grounds of distance.

Among the specific sanitary requirements for milk that have been upheld by the courts as valid have been the prohibition of the employment at dairies of persons suffering from contagious or infectious diseases,<sup>29</sup> the requirement of a maximum temperature for milk,<sup>30</sup> the requirement of a separate room for cooling and bottling milk<sup>31</sup> and of the proper cleansing of bottles and utensils.<sup>32</sup>

In order to protect the public health from the danger of contaminated milk supplies, health officials and other appropriate public authorities may place embargoes upon unwholesome milk supplies from insanitary dairies,<sup>33</sup> order the closing of dairies for proper cause,<sup>34</sup> and seize and destroy milk and dairy products if they are actually dangerous to the public health.<sup>35</sup> The health officer who confiscates and destroys private property such as milk in a summary manner must, however, be able to prove the impurity of the milk in a court action, should it arise.

Similar precautions must be observed by health officers in taking samples of milk and milk products for analysis. Where, for example, only one of twenty cans of milk was tested in a supply which was to be commingled, it was held that there was insufficient evidence to convict.<sup>36</sup>

28. *Miller v. Williams* (Md. 1935), 12 F. Supp. 236. *City of Rockford v. Hey* (1937), 366 Ill. 526, 9 N.E. (2d) 317.

29. *Hoar v. Lancaster* (1927), 290 Pa. 117, 137 A. 664.

30. *Chi. v. C. & N.W. Ry. Co.* (1916), 275 Ill. 30, L.R.A. 1917 C 238, 113 N.E. 849.

31. *State v. Davis* (1911), 1 Tenn. C.C.A. 550.

32. *People v. Frudenberg* (1913), 209 N.Y. 218, 103 N.E. 166. *People v. Sotefer Farms* (1938), 295 N.Y.S. 177, 251 App. Div. 174. See page 195.

33. *Bellows v. Rayner* (1913), 207 N.Y. 389, 101 N.E. 181. *Leontas v. Savannah* (1927), 164 Ga. 278, 138 S.E. 154.

34. *Alston v. Charleston Board of Health* (1913), 93 S.C. 553, 77 S.E. 727.

35. *Nelson v. Minneapolis* (1910), 112 Minn. 16, 29 L.R.A. (N.S.) 260, 127 N.W. 445. *Adams v. Milwaukee* (1913), 228 U.S. 572, 57 L. Ed. 971, 33 S. Ct. 610.

36. *People ex rel. Goldstein v. Eichen* (1938), 5 N.Y.S. (2d) 817, 168 Misc. 276.

*Licenses and Permits*

Since the dairy business is vested with a public interest, municipal corporations and boards of health are recognized as having the right to require the licensing of all persons undertaking this business and to deny or revoke such licenses for adequate causes.<sup>37</sup> Even where no statute expressly authorizes the requirement for a permit, it has been held that a public health council regulation prohibiting sale of milk without a permit is valid under the general power to adopt regulations for clean and safe milk.<sup>38</sup> The regulation in this case was, however, held to be void for failure to state the day on which it took effect, pursuant to the terms of the state code.

Licensing requirements must, however, operate without discrimination upon all classes of persons, although a certain amount of classification of milk dealers and dairymen, such as according to the number of cows giving milk, may be proper, provided the fees and other requirements operate equally upon all persons within the appropriate classifications.<sup>39</sup> Licenses may be required by a municipality from dairymen and others whose farms or plants are beyond the municipal limits.<sup>40</sup>

A reasonable fee may be charged for licenses and permits, since this cost is an inspection charge and not a tax.<sup>41</sup>

Under a state law requiring anyone who sells milk or cream to a hotel, restaurant, boarding house, or the public to obtain a license from the commissioner of agriculture, it was held by the Supreme Court of Michigan in 1937 that a farmer who sold about twenty quarts of surplus milk a day to his friends and neighbors was not selling to the public, and so was not guilty of selling milk without a license.<sup>42</sup> There was considerable discussion in this decision as to what was meant by the term "the public," the court stating that if the defendant

37. *State v. Milwaukee* (1909), 140 Wis. 38, 133 A.S.R. 1060, 121 N.W. 658. *Stracquando v. Dep't of Health of N.Y. City* (1941), 285 N.Y. 93, 32 N.E. (2d) 806. *Reck Milk Co. v. Humphreys* (1938), 119 N.J.L. 526, 197 A. 279. *Milk Control Board v. Phend* (1937), 104 Ind. App. 196, 9 N.E. (2d) 121. *Leach v. Coleman* (Tex. 1945), 188 S.W. (2d) 220.

38. *State v. Bunner* (1943), 126 W. Va. 280, 27 S.E. (2d) 823.

39. *Noble v. Carlton* (Fla. 1930), 36 F. (2d) 967. *Stephens v. Oklahoma City* (1931), 150 Okla. 199, 1 P. (2d) 387. *Coleman v. Little Rock* (1935), 191 Ark. 844, 88 S.W. (2d) 58.

40. *Korth v. Portland* (1927), 123 Ore. 180, 261, P. 895.

41. *Littlefield v. State* (1894), 42 Neb. 223, 28 L.R.A. 588, 47 A.S.R. 697, 60 N.W. 724. *Asheville v. Nettles* (1913), 164 N.C. 315, 80 S.E. 236. *City of Newport v. Hiland Dairy* (1942), 291 Ky. 561, 164 S.W. (2d) 818.

42. *People v. Powell* (1937), 280 Mich. 699, 274 N.W. 372, 111 A.L.R. 721.

should extend his business of selling to a substantial part of the people of the locality or to anyone who might desire or seek to purchase milk to the extent of his capacity or ability to furnish it; there would be no question but that he might be liable under the statute. The ruling in this case would not apply in States where the laws do not use the phrase "sell to the public" and are so framed that no person is allowed to sell any milk to consumers without a permit from the proper authorities.

The administration of the licensing power may be and usually is delegated to a ministerial officer, such as the health officer. While he is usually permitted considerable discretion in granting, denying, withholding, or revoking licenses, he must follow procedures set forth in the statutes, such as by holding hearings, or his actions will be invalid.<sup>43</sup>

A license to sell milk may not be denied for frivolous reasons having no relation to the public health, as where the applicant is a nonresident whose milk supply has not been shown to be impure,<sup>44</sup> or on the grounds that the municipality already has an adequate supply of milk.<sup>45</sup>

### *Tuberculin Testing*

Inasmuch as milk from diseased cattle may be dangerous to health, the State and its political subdivisions may properly require that all dairy cattle shall be free from bovine tuberculosis, Bang's disease, and other maladies, as shown by appropriate scientific tests, such as the tuberculin test.<sup>46</sup>

On numerous occasions since 1896<sup>47</sup> the courts have sustained as valid and constitutional state laws, municipal ordinances, and board of health regulations prohibiting the entry of diseased cattle,<sup>48</sup> providing for the state-wide or county-wide eradication of bovine tuberculosis and the appropriation of monies raised by taxation for that purpose,<sup>49</sup> requiring the tuberculin testing of all dairy cows,<sup>50</sup> and

43. *Grandview Dairy v. Baldwin* (1934), 239 App. Div. 640, 269 N.Y.S. 116.

44. *Whitney v. Watson* (1931), 85 N.H. 238, 157 A. 78.

45. *Sheffield Farms v. Seaman* (1935), 114 N.J.L. 455, 177 A. 372. *Urban v. Taylor* (1936), 14 N.J. Misc. 887, 188 A. 232.

46. See Tobey, *Legal Aspects of Milk Control*, chapter VII.

47. *State v. Nelson* (1896), 66 Minn. 166, 34 L.R.A. 318, 61 A.S.R. 399, 68 N.W. 1066.

48. *Reid v. Colorado* (1902), 187 U.S. 137, 47 L. Ed. 108, 23 S. Ct. 92, 12 Am. Cr. R. 506. *Mintz v. Baldwin* (1933), 289 U.S. 346, 77 L. Ed. 1245, 53 S. Ct. 611.

49. *Schulte v. Fitch* (1925), 162 Minn. 184, 202 N.W. 719. *Fevold v. Board*

(Continued on next page.)



requiring or permitting the destruction of diseased cattle, with or without indemnity to their owners.<sup>51</sup>

### *Bang's Disease*

Bang's disease, or contagious abortion, in cattle is a malady which may cause undulant fever (brucellosis) in man, either by contact with the cattle or through ingestion of raw milk infected with the *Brucella melitensis*. The same disease, caused by a different strain of the organism, also infective to man, occurs in goats and swine.

Legislation for the control of Bang's disease, in effect in most of the States, has been upheld by the United States Supreme Court as a valid exercise of the police power.<sup>52</sup> In 1940 a state law for the eradication of diseases in domestic animals, including tuberculosis, foot and mouth disease, anthrax, and Bang's disease, came before the Supreme Court of Appeals of Virginia, which was called upon to adjudicate that portion of the act which required the state veterinarian to make agglutination tests for Bang's disease and to quarantine and destroy cattle found to be infected with it.<sup>53</sup>

In upholding this law as constitutional, the court stated that it is in the public interest that healthy cattle be produced and kept free from disease, and that animal products, such as milk from healthy cows, be secured in abundance. The court also pointed out that it had upheld a statute providing for the eradication of disease among cedar trees, and commented, "It would, indeed, be a queer state of reasoning to hold that a disease of a tree is more dangerous to the public or more of a public nuisance than an infectious and contagious disease of an animal."

In this same year (1940) the Supreme Court of Washington sustained an award of damages against a milk dealer who had sold raw

(1926), 202 Ia. 1019, 210 N.W. 139. *People v. Anderson* (1934), 355 Ill. 289, 189 N.E. 338. *Stanislaus County Dairymen's Protective Ass'n v. Stanislaus County* (1937), 93 Cal. 230, 261, 65 P. (2d) 1305.

50. *Borden v. Montclair* (1911), 81 N.J.L. 218, 80 A. 30. *Adams v. Milwaukee* (1913), 228 U.S. 572, 57 L. Ed. 971, 33 S. Ct. 610. *People v. Teuscher* (1928), 248 N.Y. 454, 162 N.E. 484. *Agular and Bello v. Brock* (Cal. 1938), 24 F. Supp. 692. *Afonso Bros. v. Brock* (1938), 29 Cal. App. (2d) 21, 84 P. (2d) 515. *Dorssom v. City of Atchison* (1942), 155 Kan. 225, 124 P. (2d) 475.

51. *Kropflin v. Truax* (1929), 119 Oh. St. 610, 165 N.E. 498. *Patrick v. Riley* (1930), 209 Cal. 350, 287 P. 455. *Anderson v. Russell* (1936), 268 N.W. 386, 64 S.D. 426.

52. *Mintz v. Baldwin* (1933), 289 U.S. 346, 53 S. Ct. 611, 77 L. Ed. 1245.

53. *Stickney v. Givens* (1940), 176 Va. 548, 11 S.E. (2d) 631. *Yoder v. Givens* (1942), 179 Va. 229, 18 S.E. (2d) 380.

milk to an individual who contracted undulant fever from it.<sup>54</sup> The raw milk, which had been prescribed by a sanipractor, failed to comply with a city ordinance making it unlawful to sell for human consumption milk drawn from cows suffering from any disease. The court took occasion to point out in its decision that if all milk were efficiently pasteurized or boiled there would be no brucellosis except in those occupational groups which come in contact with cattle.

Where, contrary to law, cattle having Bang's disease are sold to a person ignorant of the infection, the sale is invalid, according to a recent case decided in Alaska.<sup>55</sup>

### *Pasteurization*

Pasteurization is the process of heating every particle of milk or milk products in approved and efficiently operated apparatus to a temperature of not less than 142° F. (or 143° F.) and holding at that temperature for 30 minutes, or heating to 160° F. or more for 15 seconds. It is now generally recognized as a necessary public health safeguard for all market milk supplies. The courts have even taken judicial notice of the protective value of pasteurization,<sup>56</sup> although the principle of judicial notice does not extend to the actual methods employed.

Since 1914, when the first decision of a higher court upholding a municipal ordinance requiring pasteurization under conditions prescribed by the health officer was reported,<sup>57</sup> courts of last resort in numerous States have sustained the validity of pasteurization laws, ordinances, and regulations, including requirements that *all* milk sold in a city should be pasteurized,<sup>58</sup> that all milk except the grade known as "certified" should be pasteurized or be from tuberculin-tested cattle,<sup>59</sup> and that milk may be properly classified or graded as pasteurized

54. *Nelson v. West Coast Dairy* (1940), 5 Wash. (2d) 284, 105 P. (2d) 76, 130 A.L.R. 606.

55. *Martin v. Sheely* (1944), 144 F. (2d) 754.

56. *First National Stores v. Lewis* (1931), 51 R.I. 448, 155 A. 534. *City of Phoenix v. Breuninger* (1937), 50 Ariz. 372, 72 P. (2d) 580.

57. *Koy v. Chicago* (1914), 263 Ill. 122, 104 N.E. 1104, Ann. Cas. 1915 C 67.

58. *State v. Edwards* (1924), 187 N.C. 259, 121 S.E. 444.

59. *Pfeffer v. City of Milwaukee* (1920), 171 Wis. 514, 177 N.W. 850, 10 A.L.R. 128. *People v. McGowan* (1921), 118 Misc. 828, 195 N.Y.S. 286, affirm. in 200 App. Div. 836, 191 N.Y.S. 946. *Moll v. Lockport* (1922), 194 N.Y.S. 250, 118 Misc. 573. *State v. Edwards* (1929), 109 Conn. 249, 146 A. 382. *City of Phoenix v. Breuninger* (1937), 50 Ariz. 372, 72 P. (2d) 580. *Brielman v. Munroe* (1938), 301 Mass. 407, 17 N.E. (2d) 187.

or raw milk for the purpose of imposing different license fees.<sup>60</sup> In only one instance has an ordinance requiring pasteurization been held invalid, chiefly for lack of proper presentation of evidence in favor of the process,<sup>61</sup> although in several cases pasteurization requirements have been overruled by the courts for purely technical reasons, such as lack of jurisdiction by local authorities<sup>62</sup> or conflict with state legislation.<sup>63</sup>

A comprehensive milk ordinance of the city and county of San Francisco provided that market milk for sale and distribution should consist of only four grades, all of which were required to be pasteurized, except certified milk. The ordinance was attacked in court by the Natural Milk Producers Association, who were interested in the sale of "guaranteed" raw milk, a grade which did not conform to certified milk. It was alleged that the ordinance conflicted with the state agricultural code, which permitted the sale of raw milk but also authorized cities and counties to adopt higher standards not in conflict with the law. It was also contended that the ordinance was discriminatory, and that there was an unconstitutional delegation of legislative power in the portion of the ordinance which provided that certified milk was the product conforming to the methods and standards of the American Association of Medical Milk Commissions, an unofficial body.

The ordinance was upheld in the court of first instance, the Superior Court for the city and county, and was appealed to the District Court of Appeals, which likewise sustained the ordinance in an able opinion. It was then appealed to the California Supreme Court, which affirmed the decision.<sup>64</sup> In a careful examination of the law, the court stated that where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power may make such new and additional regulations as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable. It was pointed out that here it was obvious that the legislature did not intend to occupy the field so that no room was left for municipal regulation.

60. *Stephens v. Oklahoma City* (1931), 150 Okla. 199, 1 P. (2d) 367. *Coleman v. Little Rock* (1935), 191 Ark. 844, 88 S.W. (2d) 58.

61. *State v. Kinsey* (1926), 314 Mo. 80, 282 S.W. 437.

62. *City and County of Denver v. Gibson* (Colo. 1933), 24 P. (2d) 751.

63. *Shelton v. City of Shelton* (1930), 111 Conn. 433, 150 A. 811.

64. *Natural Milk Producers Ass'n v. City and County of San Francisco* (1942), 20 Cal. (2d) 101, 124 P. (2d) 25, affmg. 112 P. (2d) 930; vac. in 317 U.S. 423, 63 S. Ct. 589.

In drawing attention to the substantial differences between certified and guaranteed raw milk, the court declared that the ordinance did not make an unreasonable and arbitrary classification, since the standards for certified milk are established by medical experts, a fact of which the legislature was aware; and that the reference to these standards, even if changed from time to time, was not unlawful. In discussing the due process clause, the court stated that it cannot be doubted that the requirement that all milk for human consumption be pasteurized is a proper police regulation.

Subsequently it was held by the Supreme Court of Ohio that it was proper to incorporate by reference in a regulation of a district board of health the United States Public Health Service Milk Ordinance, since legislation by reference is valid, but it was also decided in this case that it was necessary to publish the ordinance in full in order that the public might be apprised of the rules of conduct.<sup>65</sup>

The question as to whether a city may require milk sold as pasteurized milk to be pasteurized only within the city has come before the courts in a number of cases. A municipal ordinance of this tenor was upheld by a court of intermediate jurisdiction in New York and was affirmed in general by the Court of Appeals, although the higher court did not actually pass upon the validity of this specific requirement but held that the plaintiff in the case was not in a position to question that part of the ordinance until he had applied for and been refused a license for failure to pasteurize in the city.<sup>66</sup>

Although it has been held in a California decision that under existing state law a city may require pasteurization within the city of milk brought in from another inspection district,<sup>67</sup> it has also been held that a city may not prohibit the sale of pasteurized milk within its borders merely because the milk has been pasteurized in a plant outside the city limits but in the same milk inspection district, as provided in the state agricultural code.<sup>68</sup> In this case reliance was placed, in part, upon a Minnesota decision which had declared void and unreasonable an ordinance requiring all milk sold as pasteurized to be pasteurized within the city.<sup>69</sup>

65. *State v. Waller* (1944), 143 Oh. St. 409, 55 N.E. (2d) 654.

66. *Lang's Creamery v. Niagara Falls* (1928), 224 App. Div. 483, 231 N.Y.S. 368, affirm. in 251 N.Y. 343, 167 N.E. 464.

67. *Witt v. Klumm* (1929), 97 Cal. App. 13, 274 P. 1039.

68. *LaFranchi v. City of Santa Rosa* (1937), 8 Cal. (2d) 331, 65 P. (2d) 1301, 110 A.L.R. 639.

69. *State v. City of Minneapolis* (1933), 190 Minn. 138, 251 N.W. 121. *Grant v. Leavell* (1935), 259 Ky. 267, 82 S.W. (2d) 283.

In 1942 the District Court of Appeals of California affirmed and modified a judgment against a city which had attempted to require by ordinance that no milk should be sold in the city unless pasteurized therein.<sup>70</sup> Relying on its previous decision,<sup>71</sup> the court held that this part of the ordinance was void. So, too, in the same year the Texas Court of Civil Appeals held invalid a city ordinance to the same effect, on the grounds that it was in direct conflict with a state law. "The power to provide facilities by which the grades of milk may be determined," said the court, "does not include the power to dictate the location of the plants in which the milk is pasteurized."

Since the protection of the public health depends not upon the location of a milk pasteurizing plant, but upon the care, skill, and probity with which it is operated, there would seem to be very little legal justification for a requirement that milk be pasteurized within the city where it is sold, except in special circumstances such as extreme distance or undue difficulties of inspection and control. Such a requirement is, in general, a violation of a milk dealer's constitutional rights of property and contract.<sup>72</sup>

### *Containers for Milk*

Not only may a milk dealer be required to observe proper cleanliness and sanitation in connection with the bottling and the use of bottles and other containers or packages for milk and dairy products,<sup>73</sup> but the State and municipalities may debar the sale of loose or dipped milk and may require that all milk be sold only in properly sealed and capped bottles and containers approved by the health authorities.<sup>74</sup> The nature of the labelling and the weights or volumes of these containers may also be regulated by law,<sup>75</sup> but this regulation must be reasonable and cannot, for example, prohibit such a proper

70. *Van Gammeren v. City of Fresno* (1942), 51 Cal. App. (2d) 235, 124 P. (2d) 621.

71. *Prescott v. City of Borger* (Tex. 1942), 158 S.E. (2d) 578.

72. *State v. City of Minneapolis* (see 69). *City of Rockford v. Hey* (1937), 366 Ill. 526, 9 N.E. (2d) 317.

73. *Covington v. Kollman* (1913), 156 Ky. 351, 49 L.R.A. (N.S.) 354, 160 S.W. 1052. *People v. Frudenberg* (1913), 209 N.Y. 218, 103 N.E. 166.

74. *Covington v. Kollman* (see 73). *Mannix v. Frost* (1917), 100 Misc. 36, 164 N.Y.S. 1050, affirm. in 181 App. Div. 961, 168 N.Y.S. 1118. *Herkimer v. Potter* (1924), 124 Misc. 57, 207 N.Y.S. 35. *City of Milwaukee v. Childs* (1928), 195 Wis. 148, 217 N.W. 703. *Economy Dairy Co. v. Kerner* (1940), 303 Ill. App. 259, 25 N.E. (2d) 108.

75. *Chicago v. Bowman Dairy Co.* (1908), 234 Ill. 294, 17 L.R.A. (N.S.) 684, 123 A.S.R. 100, 84 N.E. 913, 14 Ann. Cas. 700.

matter as the appearance of the trade name of the manufacturer on a bottle.<sup>76</sup>

The registration of the names and marks of owners of bottles and containers may be required, and legislation may be enacted to prevent the unlawful use of such property by others than the owners.<sup>77</sup>

The question of the use of paper milk bottles has come before the courts in recent leading cases. In 1935 the city of Chicago required by ordinance that milk in quantities of less than one gallon would be sold only in "standard milk bottles." A milk company, a Michigan corporation, brought suit in the Federal District Court for a decision as to whether its paper containers for milk were standard milk bottles. A master, to whom the case was referred, reported that these containers complied with the ordinance, but the District Court held that they did not. Meanwhile a state law had been enacted, containing provisions for the proper use of paper milk bottles. On appeal to the Federal Circuit Court of Appeals, this court held that the District Court had erred, but stated that the ordinance was void because in conflict with the state law. The case then went to the United States Supreme Court, which decided that the whole matter was one for the state courts to decide, and vacated the judgment of the Circuit Court.<sup>78</sup>

The ultimate result was that the Illinois Supreme Court decided that the ordinance of the city was valid, and that the term "standard milk bottles" was intended to mean glass and not paper bottles. The power of the city to prohibit the use of single-service containers was held not to have been abridged by the statute in question.<sup>79</sup> The city council was the sole judge of the necessity and wisdom of the ordinance.

Approved types of single-service paper containers for milk are, however, permitted for general use in numerous municipalities, and are regarded by public health authorities as suitable for this purpose.

76. *Logan v. Alfieri* (1933), 100 Fla. 439, 148 So. 872. *State v. Brockwell* (1936), 209 N.C. 209, 183 S.E. 378.

77. *People v. Cannon* (1893), 139 N.Y. 32, 34 N.E. 759, 36 A.S.R. 668. *Black v. Powell* (1929), 248 Mich. 150, 226 N.W. 910. *People v. Ryan* (1930), 230 App. Div. 252, 243 N.Y.S. 644. *Pacific Coast Dairy v. Police Court* (1932), 214 Cal. 668, 8 P. (2d) 140, 80 A.L.R. 1217. *Associated Dairies v. Fletcher* (1936), 143 Kan. 561, 56 P. (2d) 106. *Wichita Natural Milk Producers v. Capp* (1936), 144 Kan. 238, 59 P. (2d) 29.

78. *City of Chicago v. Fieldcrest Dairies* (1942), 316 U.S. 168, 62 S. Ct. 986, 86 L. Ed. 1355, vacg. 122 F. (2d) 132.

79. *Dean Milk Co. v. City of Chicago* (1944), 385 Ill. 505, 53 N.E. (2d) 612.

### *Price Fixing of Milk*

Although the sanitary control of milk and dairy products has been the recognized prerogative and duty of government for more than half a century, the economic control of these products by the State has been undertaken only in comparatively recent years. In 1933 the Congress of the United States passed a law (amended in 1935) known as the Agricultural Adjustment Act that provided, among other things, for the classification of milk shipped in interstate commerce and the fixing of uniform minimum prices for each classification. In 1937 Congress passed the Agricultural Marketing Agreement Act, which made further provisions regarding handling of milk in the "current" of interstate commerce. Since 1932 the legislatures of most of the States have adopted laws to regulate prices of market milk, under the theory that in times of emergency the economic control of milk and its products is as much justified under the police power as is its control in the interests of the public health.

These various laws have been before the courts in numerous instances.<sup>80</sup> In general, it has been held that the State in the exercise of its police power may enact emergency legislation for the reasonable regulation of wholesale and retail prices in a business (such as milk) affected with a public interest, may classify dealers so long as there is no discrimination, and may delegate the administration of the laws to ministerial officers whose orders issued in conformity to law are valid when not arbitrary or oppressive, but all such state laws and orders have no application to products shipped in interstate commerce.<sup>81</sup>

Although state health commissioners have occasionally served by appointment on milk control boards organized under these laws, health officials are concerned primarily with the public health aspects of milk control, and only secondarily with the economic features of this industry, important as these matters may be to the general welfare.

80. For a comprehensive discussion of this subject and a list of such court decisions (to 1937), see J. A. Tobey, *Federal and State Control of Milk Prices*, Chicago, International Association of Milk Dealers, 1937. For more recent decisions see 155 *American Law Reports* 1383. C. McFarland, *Milk Marketing Under Federal Control*, New York, Milk Industry Foundation, 1946.

81. See *Nebbia v. New York* (1934), 291 U.S. 502, 78 L. Ed. 563, 54 S. Ct. 505, 89 A.L.R. 1469. *U.S. v. Rock Royal Cooperative* (1938), 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446. *H. P. Hood & Sons v. U.S.* (1938), 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478. *U.S. v. Wrightwood Dairy* (1941), 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726.

### *Ice Cream*

The sanitary control of ice cream, a frozen food<sup>82</sup> containing milk, cream, sugar, flavoring, and sometimes other ingredients (such as eggs, gelatin, etc.), is a necessary public health measure, since contaminated ice cream may cause epidemics and outbreaks of disease. In order to achieve such sanitary control, the State or a municipality may properly require that all persons manufacturing ice cream for sale within their jurisdictions shall be licensed,<sup>83</sup> although it has also been held that a municipality cannot regulate and license ice cream factories situated beyond the territorial limits of the city.<sup>84</sup> A city sanitary code requiring that local dealers who purchase milk and cream from outside sources should obtain such products only from licensed dealers has been construed as not applying to a local dealer who purchased ice cream from an unlicensed producer, since ice cream was not mentioned in the law.<sup>85</sup> Where a statute required that a manufacturer of frozen desserts must be licensed, and set a fee for such licenses, it was held in a Florida case that a manufacturer who was also a retailer must pay the fee for each of his stores.<sup>86</sup>

A municipal ordinance requiring that ice cream cones and other forms of ice cream be consumed on the premises where sold has been held to be void as unreasonable.<sup>87</sup> A tax of seven cents a quart on all ice cream sold has also been declared invalid on the grounds that it was so excessive as to tend to ruin and suppress a legitimate business.<sup>88</sup>

A municipal ordinance prohibiting the sale of ice cream manufactured by any method other than one in which the ingredients flowed from the pasteurization apparatus directly into the freezing apparatus and from there directly into sterile containers, has been upheld as a valid exercise of the police power.<sup>89</sup> In this case, an injunction to

82. *Merle v. Beifeld* (1915), 194 Ill. App. 364. Ice cream is a food. See U.S. Public Health Service Frozen Desserts Ordinance and Code, 1940.

83. *Wright v. Richmond County Department of Health* (1936), 182 Ga. 651, 186 S.E. 815.

84. *City of Rockford v. Hey* (1937), 366 Ill. 526, 9 N.E. (2d) 317. *Miller v. Williams* (1935), 12 F. Supp. 236.

85. *Syracuse Ice Cream Co. v. Cortland* (1912), 138 N.Y.S. 338, 153 App. Div. 456.

86. *State ex rel. Sidebottom v. Coleman* (1936), 122 Fla. 434, 165 So. 569.

87. *Kohr Bros. v. Atlantic City* (1928), 104 N.J.L. 468, 142 A. 34.

88. *Martin v. Nocero Ice Cream Co.* (1937), 269 Ky. 151, 106 S.W. (2d) 64.

89. *Gilchrist Drug Co. v. Birmingham* (1937), 234 Ala. 204, 174 So. 609, 111 A.L.R. 103. *McKenna v. City of Galveston* (Tex. 1938), 113 S.W. (2d) 606.



prevent enforcement of the ordinance was sought by a drug store operator who had a counter freezer, a device for freezing ice cream mix prepared elsewhere, but the injunction was denied by the court. Said the court:

Complainant [the druggist] has shown extraordinary precautions in the manufacture of its ice cream, but the question for the court is whether or not the manufacture as a whole by such counter freezer methods, by various ice cream vendors in large centers of population, has a tendency for detriment to the public health. Upon that question, if men may reasonably differ in view of all the circumstances, the courts should not interfere. Has the police power of the city been manifestly transcended in this case? We cannot so declare.

On the other hand, it was held in another case that the freezing, without a permit, of a mixture of the ingredients of ice cream in a counter freezer was not a violation of a statute requiring a permit from the Commissioner of Agriculture for the manufacture of ice cream, since the law as written applied only to the place where the complete manufacture of ice cream occurs.<sup>90</sup> The court said:

We are not unmindful that the statute under review is a sanitary measure, and that its object and purpose are highly to be commended. But we must not overlook the further fact that this is a criminal prosecution wherein the defendant is entitled to the benefit of any reasonable doubt as to whether or not he has violated the law. To say the least, it is extremely doubtful whether this statute was intended to apply to the operations undertaken by him.

Although it has been held that prohibition of the sale of ice cream having less than 10 per cent butterfat is unconstitutional as having no real and substantial relation to public health,<sup>91</sup> and that a butterfat standard for frozen products such as frozen custard is invalid for the same reason,<sup>92</sup> laws imposing butterfat standards for ice cream have been sustained as constitutional by the United States Supreme Court.<sup>93</sup> Such a law was upheld by the Nebraska Supreme Court in 1938<sup>94</sup> in a case holding that a product made in a counter freezer and having

90. *Robertson v. Commonwealth* (1937), 168 Va. 752, 191 S.E. 773. See *S. H. Kress & Co. v. Dept. of Health* (1940), 283 N.Y. 55, 27 N.E. (2d) 431.

91. *Rtgers v. Atlanta* (1910), 7 Ga. App. 411, 66 S.E. 991.

92. *New Orleans v. Toca* (1917), 141 La. 555, 75 So. 238, L.R.A. 1917 E 761, Ann. Cas. 1918 B 1032.

93. *Hutchinson Ice Cream Co. v. Iowa* (1916), 242 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917 B 643. *Crowl v. Commonwealth* (1916), 243 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217; *affirm'g* (1914) 245 Pa. 554, 91 A. 922.

94. *State v. McCosh* (1938), 134 Neb. 780, 279 N.W. 775.

only 6.9 per cent butterfat, was in violation of a statute requiring that ice cream and dairy products made in the semblance of ice cream should contain not less than 14 per cent butterfat.

A regulation of a borough board of health prohibiting false labels and requiring the name and address of the manufacturer to appear on all wrappers, and providing that no license should be issued until the board was satisfied that all state laws and regulations had been complied with has been upheld in Pennsylvania.<sup>95</sup> In this case the ice cream had been labelled with a fictitious name, not the real name of the manufacturer.

### *Filled Milk*

Legal aspects of filled milk are presented in Chapter XII, on Foods, Drugs, and Cosmetics.

95. *Simco Sales Service of Peñna. v. Brackin* (1942), 344 Pa. 628, 26 A. (2d) 323.

## CHAPTER XII

### FOODS, DRUGS, AND COSMETICS

THE necessity for protecting the public health by regulating the sale of foods has been recognized from early times. At common law, the sale or offering for sale of diseased, adulterated, or unwholesome food constituted a nuisance and was an indictable offense.

The purity and wholesomeness of foods is now regulated by statutes in all the States.<sup>1</sup> In recent years this type of legislative control has also been extended to drugs, diagnostic and therapeutic devices, and cosmetics, the purity or lack of purity or the efficacy of which may affect the public health as well as the economic welfare of consumers.

The constitutionality of state laws regulating foods and food products has been upheld by the United States Supreme Court on numerous occasions,<sup>2</sup> and also by many state courts of last resort.<sup>3</sup> The constitutionality of a state law regulating cosmetics was sustained by the United States Supreme Court in 1937.<sup>4</sup>

Since many foods, drugs, and cosmetics are shipped in interstate commerce, the regulation of these products is, under the Federal

1. C. W. Dunn, *Food and Drug Laws, Federal and State*, New York, United States Corporation, 1927-28. A. D. Herrick, *Food Regulation and Compliance*, Vol. I, New York, Revere Pub. Co., 1944.

2. *Powell v. Pennsylvania* (1888), 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253. *Plumley v. Massachusetts* (1894), 155 U.S. 461, 15 S. Ct. 154, 39 L. Ed. 223. *Capital City Dairy v. Ohio* (1902), 183 U.S. 238, 46 L. Ed. 171. *Lieberman v. Van de Carr* (1905), 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305, 108 A.S.R. 781. *St. John v. New York* (1906), 201 U.S. 633, 26 S. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909. *North American Cold Storage Co. v. Chicago* (1908), 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276. *Adams v. Milwaukee* (1913), 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971. *Price v. Illinois* (1915), 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400. *Sligh v. Kirkwood* (1915), 237 U.S. 52, 35 S. Ct. 501, 59 L. Ed. 835. *Hutchinson Ice Cream Co. v. Iowa* (1916), 242 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917 B 643. *Hebe Co. v. Shaw* (1919), 248 U.S. 297, 39 S. Ct. 125, 63 L. Ed. 255.

3. See 36 C.J.S. Food, and cases cited.

4. *Bourjois v. Chapman* (1937), 301 U.S. 183, 57 S. Ct. 691, 81 L. Ed. 1027. State laws regulating barbers, beauty shops, cosmetics, and cosmeticians have been upheld in the following cases: *State v. Rollins* (1922), 152 Ga. 588, 110 S.E. 726, 20 A.L.R. 1105. *State v. Lockey* (1930), 198 N.C. 551, 152 S.E. 693. *State Board of Barber Examiners v. Blocker* (1932), 176 Ga. 125, 167 S.E. 298. *Gerard v. Smith* (Tex. 1932), 52 S.W. (2d) 347. *Luzier Special Formula Laboratories v. State Board of Hairdressing and Beauty Culture Examiners* (1933), 189 Minn. 151, 248 N.W. 664. *Mundell v. Graph* (1934), 62 S.D. 631, 256 N.W. 121.

Constitution, a matter for the Federal Government. In 1906 Congress passed the Federal Food and Drugs Act (34 Stat. 768; U.S.C. title 21, secs. 1-15), which, while amended from time to time, remained in force in virtually its original form until June 25, 1939. This law, which pertained only to adulterated and misbranded foods and drugs and did not include cosmetics or therapeutic devices, was upheld by the United States Supreme Court in a number of decisions.<sup>5</sup>

### *The Federal Food, Drug, and Cosmetic Act*

In order to overcome numerous defects in the Federal Food and Drugs Act of 1906, Congress adopted a new law in 1938 (U.S.C. title 21). This law, known as the Federal Food, Drug, and Cosmetic Act, was signed by the President on June 25, 1938, to take effect one year from that date, except that a section (Sec. 701) authorizing the Secretary of Agriculture to promulgate regulations for the efficient enforcement of the act, a section (Sec. 502j) stating that drugs which are dangerous to health when used in accordance with directions on the label shall be deemed to be misbranded, a section (Sec. 505) prohibiting the introduction of new drugs except on application to the Secretary, and a section (Sec. 601a) stating that cosmetics shall be deemed to be adulterated if they contain poisonous or deleterious substances which render them injurious under the conditions of use prescribed in the labelling, all took effect at the time of the passage of the act in 1938. In 1940 the Food and Drug Administration was transferred by the President's Reorganization Plan No. 4 from the Department of Agriculture to the Federal Security Agency, which had been established in 1939. Since that time the law has been amended in several particulars, and regulations have been issued (Title 21, Chapter 1, Code of Federal Regulations).

This federal law prohibits the introduction or delivery for introduction or the receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded and the adulteration or misbranding of any such product in interstate commerce. It also prohibits refusal to permit the Federal Security Administrator or his representative access to or copying of any record showing the

5. *Hipolite Egg Co. v. U.S.* (1911), 220 U.S. 45, 31 S. Ct. 364, 55 L. Ed. 364. *McDermott v. Wisconsin* (1913), 228 U.S. 115, 33 S. Ct. 431, 57 L. Ed. 754, Ann. Cas. 1915 D 39, 47 L.R.A. (N.S.) 984. *Weeks v. U.S.* (1918), 245 U.S. 620, 38 S. Ct. 219, 62 L. Ed. 513. See O. H. Gates, compiler, *Decisions of Courts in Cases under the Federal Food and Drugs Act*, U.S. Department of Agriculture, 1934. Also, annotations in the United States Code, Annotated, 1934 edition and supplements; and Federal Digest (Food).

movement or holding of these products in interstate commerce, and prohibits refusal to permit these officials to enter or inspect factories, warehouses, and establishments where these products are manufactured, prepared, or held for shipment in interstate commerce. The law applies to the territories of the United States as well as to interstate commerce. Penalties are provided for violations, and legal seizures of adulterated or misbranded articles are authorized.

*Adulteration.* Foods, drugs, devices, and cosmetics are deemed to be adulterated under this law if 1) they bear or contain any poisonous or deleterious substances which may render them injurious to health; 2) if they contain any added poisonous substances; 3) if they consist wholly or in part of any filthy, putrid, or decomposed substances, or are otherwise unfit for food purposes; 4) if they have been prepared, packed, or held under insanitary conditions whereby they may become contaminated with filth, or rendered injurious to health; 5) if the container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; 6) if they bear or contain coal-tar colors other than those certified by the Administrator.

Foods are likewise deemed to be adulterated if they are, wholly or in part, the product of a diseased animal or of an animal which has died otherwise than by slaughter; and if any valuable constituent has been wholly or partly omitted or abstracted, or any substance has been substituted wholly or in part therefor; if damage or inferiority has been concealed in any manner, or if any substance has been added or mixed or packed with a food so as to increase its bulk or weight, reduce its quality or strength, or make it appear better or of greater value than it is.

In addition to these provisions drugs are likewise deemed to be adulterated if they purport to be drugs whose names are recognized in an official compendium but are of different strength, or if quality and purity are inferior to the standard set forth in the compendium; or if the strength, purity, or quality of a drug falls below that which it purports or is represented to possess; or if substances have been mixed with it so as to reduce its quality or strength. The official compendia recognized by the law are the United States Pharmacopoeia, the Homeopathic Pharmacopoeia of the United States, and the National Formulary.

The law does not include soap among the cosmetics. Coal-tar hair dyes are not deemed adulterated as cosmetics when their labels bear the following legend conspicuously displayed:

**Caution:** This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness.

**Misbranding.** Foods, drugs, devices, and cosmetics are deemed to be misbranded under the law if 1) the labelling is false or misleading in any particular; 2) if in package form unless the label tells the name and place of business of the manufacturer, packer, or distributor, and bears an accurate statement of the quantity of the contents (with reasonable variations); 3) if the container is so made, formed, or filled as to be misleading; 4) if any word, statement, or other information required by or under authority of the act to appear on the label is not sufficiently prominent to be read and understood by the ordinary individual under customary conditions of purchase and use.<sup>6</sup>

A food is likewise deemed to be misbranded if offered for sale under the name of another food; or in imitation of another food, unless labelled "imitation"; if it purports to be or is represented as a food for which a definition or standard of identity has been prescribed by regulation, unless it conforms to the standard and its label gives the standard name of the food and, in so far as required by regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in the food; or if the quality of a standard food falls below the specified quality or the standard of fill of container; if it bears any artificial flavoring, artificial coloring, or chemical preservative, unless the label so states, except where exemptions have been permitted. Where no standard of identity has been prescribed, the label must bear the common or usual name of the food and its ingredients.

Foods purported or represented to be for special dietary uses are required to show on the label such information concerning vitamin, mineral, and other dietary properties as the Administrator determines by regulation to be necessary; otherwise they are misbranded.

Drugs are likewise deemed misbranded if they are for use by man and contain any quantity or chemical derivative of the narcotic and hypnotic substances alpha eucaïne, barbituric acid, beta eucaïne, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or sulphonmethane, unless the label bears the statement, "Warning—may be habit form-

6. Pamphlet material regarding a product, sent through mails, was held not to be misbranding under the act in *U.S. v. Lee* (1941), 40 F. Supp. 801. See *U.S. v. Alberty* (1946), 65 F. Supp. 945.

ing"; if not designated by name in an official compendium, unless the label bears the common or usual name of the drug, or the common or usual name of each active ingredient, including the kind and amount of alcohol, and the quantity or proportion of bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative of these substances.

Labels of drugs must also bear adequate directions for use; adequate warnings against use in pathological conditions or by children where the use would be dangerous to health; warnings against unsafe dosage or methods or duration of administration or application, so as to protect all users. Where subject to deterioration, a drug must be packaged and labelled in such manner as the Administrator requires by regulations. For failure to comply with these provisions, drugs are considered misbranded, as are also all drugs that are dangerous to health when used according to the directions on the label.

No person is permitted to introduce or deliver for introduction into interstate commerce any new drug unless an application is filed with the Administrator, giving full details, as outlined in the law. Certification by the Administrator of drugs containing insulin and of drugs containing penicillin is provided for in newer sections of the law, the first of these provisions having been necessitated by the expiration of the United States patents on insulin in 1941.

This outline of adulteration and misbranding is a summary, and is not necessarily taken verbatim from the Federal Food, Drug, and Cosmetic Act, which should be consulted in the complete original by those directly interested or concerned. A current copy, with pertinent regulations, can be obtained from the Food and Drug Administration, Federal Security Agency, Washington, D. C.

*Administration.* The Federal Food, Drug, and Cosmetic Act of 1938 is administered by the Administrator of the Federal Security Agency, who is empowered to hold hearings and promulgate regulations for the efficient enforcement of the act, such regulations to take effect ninety days after their issuance. The validity of any such order may, however, be appealed by any person adversely affected to a Circuit Court of Appeals of the United States, which may affirm the order or set it aside in whole or in part, temporarily or permanently. The judgment, while final, is subject to review by the Supreme Court of the United States.

The Administrator is authorized by the law to conduct examinations and investigations through officers and employees of the Agency,

or through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Administrator as an officer of the Agency. A sample of any food, drug, or cosmetic collected for analysis under the law must be furnished on request to the owner or his attorney or agent.

Injunctions to restrain violations of acts prohibited by this law may be issued by the District Courts of the United States, which also have jurisdiction over criminal violations of the law and over libels for seizure and condemnation of products that are adulterated or misbranded in interstate commerce. The penalty for a violation of the provisions of the act is imprisonment for not more than one year, or a fine of \$1,000, or both. If a violation occurs after a conviction has become final, or there has been intent to defraud or mislead, the guilty person is subject to imprisonment for not more than three years, or a fine of \$10,000, or both. The person who receives adulterated or misbranded goods is not subject to penalty unless he refuses to disclose the name and address of the shipper and other necessary information.

Reports of judgments, decrees, and court orders rendered under the act, and information regarding foods, drugs, devices, or cosmetics in situations involving, in the opinion of the Administrator, imminent danger to health or gross deception of the consumer, must be published from time to time by the Secretary.

While the Administrator is responsible for the administration of this act, the actual execution of the law is delegated to the Food and Drug Administration of the Federal Security Agency.

Regulations issued by the Administrator, giving standards for various foods and food products, have been upheld by the courts in a number of instances.<sup>7</sup>

### *Enriched Foods*

On May 27, 1941, the Administrator of the Federal Security Agency promulgated a standard for "enriched flour," after extensive hearings had been held on this subject during 1940. This standard required the presence in each pound of flour of 1.66 mg. of thiamine, 1.20 mg. of riboflavin, 6.0 mg. of niacin, and 6.0 mg. of available iron. In addition the producer was allowed the option of including in enriched flour calcium to the extent of not less than 500 mg. or more than 2,000 mg. per pound of flour, and Vitamin D to the extent of not less than

7. *Twin City Milk Producers Ass'n v. McNutt* (1941), 122 F. (2d) 564 (skim milk). *Columbia Cheese Co. v. McNutt* (1943), 137 F. (2d) 576 (cheese). *Land O'Lakes Creameries v. McNutt* (1943), 132 F. (2d) 653 (oleomargarine). See 158 *American Law Reports* 842.



250 U.S.P. units or more than 1,000 U.S.P. units per pound. The standard was to become effective on January 1, 1942.

At the same time a standard for enriched farina was issued, requiring or permitting the same vitamins and minerals in the same amounts. Shortly thereafter a manufacturer of farina, who had been marketing a product containing only added Vitamin D for several years, brought an action in the Federal Circuit Court of Appeals for judicial review of the order of the Administrator. In this court it was held that the regulation was void because it did not actually promote honesty and fair dealing.

On appeal to the United States Supreme Court, however, the decision of the lower court was reversed, and the regulation for enriched farina was upheld.<sup>8</sup> The court pointed out that the products of milled wheat are among the principal items of the American diet, that enriched flours and farinas with widely varying compositions had been placed on the market, and that definitions and standards for these products are necessary, in order to prevent consumer confusion.

"The judicial is not to be substituted for the legislative judgment," said the court. "It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made."

As a result of further hearings in 1943 the standards of identity of enriched flour were changed. As issued on July 1, 1943, to take effect on October 1, 1943, they were as follows:

Nutrient Requirements for Enriched Flour

	Minimum	Maximum	
Thiamine	2.0	2.5	mgs. per pound
Riboflavin	1.2	1.5	" " "
Niacin	16.0	20.0	" " "
Iron	13.0	16.5	" " "
Calcium (optional)	500	625	" " "
Vitamin D (optional)	250	1000	U.S.P. units

Action on bread enrichment standards was postponed due to the war, but such enrichment was made compulsory by War Food Administration Order No. 1 (1944, revoked October 25, 1946). In about half

8. *Federal Security Administrator v. Quaker Oats Co.* (1943), 318 U.S. 218, 63 S. Ct. 589, 87 L. Ed. 724, 153 A.L.R. 852. R. M. Wilder and R. R. Williams, *Enrichment of Flour and Bread*, Washington, National Research Council, Bulletin No. 110, November, 1944.

of the States, laws have been passed for the mandatory enrichment of bread and flour, in accordance with the federal standards.

### *False Advertising of Products in Interstate Commerce*

Congress passed and the President signed on March 21, 1938, an act (15 U.S.C. 41, 44-45, 52-58) making it unlawful for any person, partnership, or corporation to disseminate or cause to be disseminated any false advertisement by United States mails or in interstate commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, or cosmetics. This act took effect sixty days after the date of its passage. It is administered by the Federal Trade Commission, an independent establishment of the United States Government.

The term "false advertisement" is defined in this act as an advertisement, other than labeling, which is misleading in a material respect. In determining whether any advertisement is misleading, the act states that there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in such advertisement, or under such conditions as are customary or usual. Advertisements of drugs are not to be deemed false if they are disseminated only to members of the medical profession, contain no false representation of a material fact, and include or are accompanied by a truthful disclosure of the formula showing quantitatively each ingredient of the drug.

Under the law of 1914 creating the Federal Trade Commission (U.S.C. title 15), a false advertisement of a food, drug, device, or cosmetic may be proceeded against as an unfair method of competition in commerce, by the holding of a hearing and the issuance, for cause, of a cease and desist order, which may be reviewed on petition by a Circuit Court of Appeals of the United States. If such a petition is not submitted within sixty days, the Commission's order becomes final. Before issuing a cease and desist order, the Commission may issue a stipulation, which is a promise by a concern to discontinue the alleged unlawful practices.

In addition to this procedure, the act of 1938 authorizes the enjoining of the dissemination of false advertisements by District Courts of the United States, as well as criminal proceedings against those who violate the law, where the use of the commodity advertised may

be injurious to health because of reliance on the advertising. The penalty in such cases is a fine of not more than \$5,000 or imprisonment for not more than six months, or both.

No publisher, radio-broadcast licensee, or agency or medium for the dissemination of the advertising, except the manufacturer, packer, distributor, or seller of the falsely advertised commodity, is liable unless he refuses to furnish to the Commission the name and address of the person responsible for the advertisement. Advertising agencies are absolved from liability under similar conditions.

### *The Federal Meat Inspection Act*

The inspection and control of meat and meat products shipped in interstate commerce is governed by the Federal Meat Inspection Act of 1907, as amended (34 Stat. 1280; U.S.C. title 21, secs. 71-91). The constitutionality of this law has been upheld by the United States Supreme Court.<sup>9</sup>

This law empowers the Secretary of Agriculture to have examined and inspected all cattle, swine, sheep, and goats before they are allowed to enter any slaughtering, packing, canning, salting, rendering or similar establishment for preparation for shipment in interstate commerce as articles of food, and to require that any diseased animals or animals suspected of disease shall be slaughtered separately and their carcasses further examined.

Postmortem examinations of all slaughtered animals, whether diseased or not, are also made under authorization of this law. Those that are found wholesome are marked "Inspected and Passed," while those found to be unwholesome are stamped "Inspected and Condemned." A reinspection may be made at any time thereafter, with condemnation of previously approved products if the circumstances warrant such action.

Meat products are likewise subject to inspection up to the time they are sealed in the final container, which must bear a label stating that the contents have been inspected and passed.

Meats and meat products imported into the United States are subject to inspection by the Secretary of Agriculture under the terms of the Imported Meat Act of 1913 as amended in 1930 (U.S.C. title 19, sec. 1306), while similar products for export are covered by the Meat Inspection Act, which was likewise extended to include horse meat by a law passed by Congress in 1919 (41 Stat. 24, U.S.C. title 21, sec. 96).

9. *U.S. v. Lewis* (1914), 235 U.S. 282, 35 S. Ct. 44, 59 L. Ed. 229. *Pittsburgh Melting Co. v. Totten* (1918), 248 U.S. 1, 39 S. Ct. 3, 63 L. Ed. 97.

These laws are administered through the Bureau of Animal Industry of the United States Department of Agriculture. They do not, of course, apply to meat and meat products which are shipped solely in intrastate commerce. Such products are subject to local control under state legislation and municipal ordinances.

#### *Other Federal Laws on Food*<sup>10</sup>

In addition to the Federal Food, Drug, and Cosmetic Act of 1938, the Federal Trade Commission Act of 1914 as amended in 1938, and the Federal Meat Inspection Act of 1907 as amended, there are a number of other federal laws pertaining to the wholesomeness of foods shipped in interstate and foreign commerce.

The Tea Act of 1897 as amended (U.S.C. title 21, secs. 41-50) prohibits the importation into this country of tea that is inferior to standards of quality fixed by the Secretary of Agriculture. This law has been upheld by the United States Supreme Court.<sup>11</sup> Tea shipped in interstate commerce is also subject to the terms of the Federal Food, Drug, and Cosmetic Act.

Filled cheese, defined as a substance a) made of milk or skimmed milk with the admixture of butter, animal oils or fats, vegetable or other oils, or compounds foreign to such milk, and b) made in imitation of cheese, must be specially labelled when shipped in interstate commerce, and is subject to a tax at the rate of one cent per pound or fraction thereof, according to the Filled Cheese Act of 1896 (U.S.C. title 26, ch. 10).

The Filled Milk Act of 1923 (U.S.C. title 21, secs. 61-63) prohibits the shipment in interstate commerce of filled milk, defined as any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of the milk products mentioned. This law was sustained as a valid exercise of the federal power over interstate commerce in a decision handed down by the United States Supreme Court in 1938.<sup>12</sup>

In delivering the opinion of the court in this case, Mr. Justice Stone pointed out that this law was passed by Congress after extensive

10. See A. P. Blanck, *Foods and the Law*, New York, Peter Smith, 1935.

11. *Buttfield v. Stranahan* (1904), 192 U.S. 470, 24 S. Ct. 349, 48 L. Ed. 525.

12. *U.S. v. Carolene Products Co.* (1938), 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234. *Carolene Products Co. v. Evaporated Milk Ass'n* (1937), 93 F. (2d) 202.

hearings and investigation, from which the conclusion was drawn that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public. In a separate opinion, Mr. Justice Butler concurred in the result, but stated that whether the filled milk product in this case was or was not an adulterated food injurious to health tends an issue of fact to be determined upon evidence.

In 1944 the Filled Milk Act was again upheld by the United States Supreme Court in a case involving a blended milk product to which vitamins and other nutrients had been added. While the wholesomeness of the product was acknowledged, the court stated that it was still a matter for Congress to decide whether such a product should be permitted to be sold in interstate commerce.<sup>13</sup>

A number of state courts have held that state laws prohibiting filled milk are unconstitutional, because the product is not injurious to health,<sup>14</sup> but laws of this nature have been upheld in other states,<sup>15</sup> and legislation of this type is in force in thirty-five states.

The Federal Import Milk Act of 1927 (U.S.C. title 21, secs. 141-149) prohibits the importation of any milk or cream into the United States unless the shipper has a valid permit from the Federal Security Administrator, who is authorized either to have necessary inspections made or to accept duly certified statements from accredited officials of an authorized department of a foreign government that the milk or cream complies with the requirements of the law. According to this act, all milk and cream, if raw, must come from healthy, tuberculin-tested cattle; must be produced in a sanitary manner; must contain not more than 300,000 bacteria per cubic centimeter if raw milk, not more than 750,000 if raw cream, not more than 100,000 if pasteurized milk, and not more than 500,000 if pasteurized cream; and must not

13. *Carolene Products Co. v. U.S.* (1944), 323 U.S. 18, 65 S. Ct. 1, 89 L. Ed. -, 155 A.L.R. 1371.

14. *People v. Carolene Products Co.* (1931), 345 Ill. 166, 177 N.E. 698. *Carolene Products Co. v. Thompson* (1935), 276 Mich. 172, 267 N.W. 608. *Carolene Products Co. v. McLaughlin* (1936), 365 Ill. 62, 5 N.E. (2d) 477. *Carolene Products Co. v. Banning* (1936), 121 Neb. 429, 268 N.W. 313.

15. *Hebe v. Shaw* (1919), 248 U.S. 297, 39 S. Ct. 125, 63 L. Ed. 255. *Carolene Products Co. v. Harter* (1938), 329 Pa. 49, 197 A. 627, 119 A.L.R. 235. *Poole and Creber Market Co. v. Breshears* (1939), 343 Mo. 1133, 125 S.W. (2d) 23. *Carolene Products Co. v. Mohler* (1940), 152 Kan. 2, 102 P. (2d) 1044. *State ex rel. McKittrick v. Carolene Products Co.* (1940), 346 Mo. 1049, 144 S.W. (2d) 153. *Carolene Products Co. v. Hanrahan* (1941), 291 Ky. 417, 104 S.W. (2d) 597. *Sage Stores v. Kansas* (1945), 323 U.S. 32, 65 S. Ct. 9, 89 L. Ed. *Setzer v. Mayo* (1942), 150 Fla. 734, 9 So. (2d) 280.

exceed 50° F. in temperature. Under certain conditions these requirements may be waived by the Administrator, who is authorized to prescribe necessary rules and regulations for the issuance of permits.

An act of Congress of 1923 (U.S.C. title 21, sec. 6) defines butter and provides a standard therefor. Federal legislation on renovated or processed butter is contained in the Internal Revenue Code (Secs. 2320 to 2327), which not only imposes taxes on these products but requires rigid sanitary inspections to be made by the Secretary of Agriculture. In a recent case it was held by the United States Supreme Court that because of this federal regulation, there can be no state regulation of this product which conflicts with the federal.<sup>16</sup>

The Postal Laws of the United States prohibit the use of the mails for fraudulent material. Under this power, the Postmaster General may cite an offender who mails fraudulent advertising on foods and drugs, or mails the goods themselves. After a hearing, he may issue a fraud order enjoining the person, firm, or corporation sending such fraudulent material from further use of the mails. Action under the Postal Laws against fraudulent and misbranded foods and drugs sometimes has been more effective than under the Food and Drugs Act or the Federal Trade Commission Act, which also applies to the use of the mails for false advertising of foods and drugs.

### *Federal Narcotics Acts*

Federal control over narcotics is based not on the undisputed power of the Federal Government over interstate commerce, but upon the taxing power conferred upon the national government by the Federal Constitution. The so-called Harrison Narcotic Act of 1914 as amended (U.S.C. title 26, secs. 1040-1064) and the Marihuana Tax Act of 1937 (U.S.C. title 26, sec. 1399) are basically revenue measures, but they also have moral and social implications, since uniform regulation of the national traffic in dangerous narcotics is a matter of public health significance.

The Harrison Narcotic Act imposes annual taxes upon all importers, manufacturers, producers, compounders, wholesalers, and retail dealers in narcotics, and upon physicians and other practitioners who prescribe narcotics. The law requires annual registration of all persons who dispense or deal with narcotics.

The taxes imposed by this and other federal narcotics acts are collected by the Bureau of Internal Revenue of the Treasury Depart-

16. *Cloverleaf Butter Co. v. Patterson* (1942), 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754.

ment, but the enforcement of the regulatory features of these laws is entrusted to the Bureau of Narcotics of this Department. The Customs Bureau is concerned with the prevention of smuggling of narcotics into the United States. The United States Public Health Service cooperates with the Bureau of Narcotics in determining the quantities of crude opium and coca leaves that may be imported into the country for legitimate medical and other uses.

Although the constitutionality of these federal narcotic laws has been severely questioned, and similar federal taxes on the products of child labor have been held to be invalid as an attempt to regulate a state right under the guise of taxation,<sup>17</sup> the Harrison Act has been sustained as constitutional by the United States Supreme Court in a number of decisions,<sup>18</sup> although sometimes by a sharply divided court.

### *State Control of Foods and Drugs*

The existence of federal laws relating to foods and drugs shipped in interstate commerce does not inhibit or preclude the States and their political subdivisions from regulating by law the purity and wholesomeness of foods and drugs sold wholly in intrastate commerce.<sup>19</sup> Where such state laws were in effect prior to the passage of the federal laws and were not inconsistent with the federal acts, they are not rendered inoperative thereby, since the State and not the Federal Government has complete jurisdiction over articles produced and sold entirely within the State.<sup>20</sup> The production and sale of narcotics

17. *Bailey v. Drexel Furniture Co.* (1922), 259 U.S. 20, 42 S. Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432.

18. *U.S. v. Jin Fue Moy* (1916), 241 U.S. 394, 36 S. Ct. 658, 60 L. Ed. 1061. *U.S. v. Doremus* (1918), 249 U.S. 86, 39 S. Ct. 214, 63 L. Ed. 493. *Webb v. U.S.* (1919), 249 U.S. 96, 39 S. Ct. 217, 63 L. Ed. 497. *Linder v. U.S.* (1925), 268 U.S. 5, 45 S. Ct. 446, 69 L. Ed. 819, 39 A.L.R. 229. *U.S. v. Daugherty* (1926), 269 U.S. 360, 46 S. Ct. 156, 70 L. Ed. 309. *Boyd v. U.S.* (1925), 271 U.S. 104, 46 S. Ct. 442. *Alston v. U.S.* (1927), 274 U.S. 289, 47 S. Ct. 634. *Casey v. U.S.* (1928), 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed. 632. *Nigro v. U.S.* (1928), 276 U.S. 332, 48 S. Ct. 388, 72 L. Ed. 600.

19. *Armour & Co. v. City Council of Augusta* (1910), 134 Ga. 178, 67 S.E. 417, 27 L.R.A. (N.S.) 676. *Comm. v. Moore* (1913), 214 Mass. 19, 100 N.E. 1071. *Price v. Illinois* (1915), 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400. *Ex parte Arrigo* (1915), 98 Neb. 134, 152 N.W. 319. *Fougera v. City of New York* (1918), 224 N.Y. 269, 120 N.E. 642, 1 A.L.R. 1467. *Day-Bergsvall Co. v. State* (1926), 190 Wis. 8, 207 N.W. 959.

20. *Corn Products Refin. Co. v. Eddy* (1919), 249 U.S. 427, 39 S. Ct. 325, 63 L. Ed. 689; affirming (1916), 99 Kans. 63, 163 P. 615. *Hebe v. Shaw* (1919), 248 U.S. 297, 39 S. Ct. 125, 63 L. Ed. 255. *Wetgle v. Curtis Bros Co.* (1919), 248 U.S. 285, 39 S. Ct. 124, 63 L. Ed. 242.

may also be regulated by a State, so long as there is no conflict between the provisions of the state laws and the Federal Narcotics Acts.<sup>21</sup>

The established legal principles regarding state and municipal control of foods and drugs are, in general, the same as those already set forth for dairy products in Chapter XI, on Milk Control.<sup>22</sup> In order to protect the public health, the State may regulate by law, and/or authorize its political subdivisions to regulate, the sanitary conditions pertaining to the production, manufacture, distribution, handling, and sale of all foods used for human consumption or for animals, and of all drugs, devices, and cosmetics employed in the alleviation or treatment of disease, or for the actual or alleged promotion of health, beauty, or physical welfare.

The State may provide for the issuance and revocation of licenses or permits to manufacturers and dealers in foods, to restaurant and market owners, and to other purveyors of foodstuffs. Where a state license is required by law, a municipal license may likewise be required, as a rule,<sup>23</sup> unless a statute provides to the contrary.<sup>24</sup> A reasonable fee to cover necessary costs of administration may be charged for such official licenses and permits, which must operate equally and without discrimination upon all persons, although reasonable classification will be permitted.

While municipalities have the authority to enact food inspection ordinances which are designed to safeguard the public health, such ordinances cannot be unreasonable and arbitrary in their classification of foods for inspection purposes. Thus, where a city ordinance prohibited any retailer from selling uncooked or perishable foods at any time other than the hours of the day and days of the week when inspection of such foods was available by the health department, and by the terms of the ordinance various baked and frozen foods were expressly exempt, the ordinance was held to be invalid as class legisla-

21. *State Laws Relating to the Control of Narcotic Drugs and the Treatment of Drug Addiction*, Supplement No. 91 to *Pub. Health Rep.*, U.S. Public Health Service, 1931.

22. See page 181. J. A. Tobey, *Legal Aspects of Milk Sanitation*, 2d ed., Washington, Milk Industry Foundation, 1947. *Ordinance and Code Regulating Eating and Drinking Establishments*, Public Health Bulletin No. 280, U.S. Public Health Service, 1943.

23. *Kugler v. City of Milwaukee* (1932), 208 Wis. 251, 242 N.W. 481. *State v. Houston* (1941), 210 Minn. 379, 298 N.W. 358.

24. *Husting Co. v. City of Milwaukee* (1930), 200 Wis. 434, 228 N.W. 502. *Janke v. City of Milwaukee* (1930), 202 Wis. 214, 231 N.W. 261.



tion, which was discriminatory and oppressive in its effect on legitimate business.<sup>25</sup>

The summary seizure and destruction of dangerous and unwholesome foods and drugs by public health officials or other food and drug officials will be upheld when such action is necessary in the interests of the public health.<sup>26</sup>

The administration of state food, drug, and cosmetic laws may be vested in the state health department, in the state department of agriculture, or in a separate bureau especially created for that purpose. In less than half of the states the department of health is now given the responsibility for the enforcement of food and drug legislation, although the statutes frequently provide for cooperation between the health department and any other bureau primarily charged with the enforcement of milk and general food control.

Bureaus of food control, including milk and meat control, are usually organized in the health departments of the larger cities. Aside from the issuance of licenses and permits to food establishments, the regular inspection and scoring of such places, and the general supervision of their hygiene and sanitation, duties of municipal bureaus of food control often include special attention to cleanliness in public eating places<sup>27</sup> and medical examinations of foodhandlers. While the medical examination, including laboratory tests, of foodhandlers at regular intervals is valid legally as a public health measure,<sup>28</sup> many leading sanitarians are dubious as to its practical value, and the procedure has been abandoned in some cities as ineffectual from the standpoint of public health.<sup>29</sup>

The legal principles applicable to the control of food in the interests of the public health were ably set forth in a recent decision of the

25. *McCulley v. Wichita* (1940), 151 Kan. 214, 98 U. (2d) 192, 127 A.L.R. 312.

26. *North American Cold Storage Co. v. Chicago* (1908), 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276. *Adams v. Milwaukee* (1913), 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971. *Nelson v. Minneapolis* (1910), 112 Minn. 16, 127 N.W. 445, 29 L.R.A. (N.S.) 260.

27. See D. Fromson, *Regulatory Measures Concerning the Prohibition of the Common Drinking Cup and the Sterilization of Eating and Drinking Utensils in Public Places*, New York, Cup and Container Inst., 1936. An ordinance requiring sterilization of drinking glasses in public eating places was upheld in *Donahue v. City of Portland* (1940), 137 Me. 83, 15 A. (2d) 287. See *Universal Machine Co. v. Alcohol Beverage Contr.* (1938), 301 Mass. 40, 16 N.E. (2d) 53.

28. *Sekaly v. State* (1940), 138 Tex. Cr. A. 415, 136 S.W. (2d) 854. *Bauer v. State* (1941), 7 Wash. (2d) 476, 110 P. (2d) 154.

29. W. H. Best, Is routine examination and certification of food handlers worth while? *Am. J. Pub. Health*, 27:1003, October 1937.

Court of Appeals of New York, in upholding the conviction of a food company for violation of the Sanitary Code of New York City in having in its possession poultry that was concededly unwholesome.<sup>30</sup> Said the Court:

The danger to human life and health from unwholesome food is so great that the courts generally have treated food differently from most other products. It has been placed in the same category as drugs, poisons and other instrumentalities which, if they are negligently dealt with, are ordinarily certain to affect seriously the public health and safety. The good intentions of the defendant would matter very little to consumers who might consume this poultry. Food laws are designed primarily, not for the punishment of the dealer, but for the protection of the consumer. In this field of law, the obligation to beware is on the seller rather than the buyer. Lack of proof of guilty intent does not satisfy that obligation.<sup>31</sup>

In a few cities municipal abattoirs are maintained, so that local slaughtering of animals for food may be done under the immediate supervision of the city officials. Private abattoirs not shipping meat in interstate commerce are, of course, subject to inspection and supervision of the municipal authorities.

Liability for injuries due to impure or unwholesome foods is discussed in Chapter XIX.

30. *People v. Swift & Co.* (1941), 286 N.Y. 64, 35 N.E. (2d) 652.

31. See also *U.S. v. Greenbaum* (1943), 138 F. (2d) 437, 152 A.L.R. 751.

## CHAPTER XIII

### NUISANCES AND SANITATION

**N**UISANCE control and maritime quarantine were the earliest and for many years the paramount activities of public health officials in North America. Legislation against nuisances was enacted as early as 1692 in both the Province of South Carolina and the Massachusetts Bay Colony. These statutes, dealing with the keeping of swine, the cutting of noisome weeds, and the location of slaughterhouses and other unpleasant trades, apparently were intended to promote civic comfort rather than health, but in 1704 a law was adopted in South Carolina for the express purpose of preventing infections that were then thought to be (and are now known not to be) due to air polluted by the filth of garbage and slaughterhouses.<sup>1</sup>

Although nuisance control was the foundation of sanitary administration, the modern sanitarian properly regards most nuisances as factors of minor significance to the public health.<sup>2</sup> There are, of course, nuisances that are important and some that are serious as public health problems, but the great bulk of these annoyances and offenses do not appreciably affect the health of the people.

#### *The Definition of a Nuisance*

Despite the vast amount of jurisprudence that has been devoted to nuisances, real and alleged, a precise legal definition of a nuisance is difficult of formulation. Blackstone said that it was "whatsoever unlawfully annoys or does damage to another," and elsewhere he defined it as "anything that worketh hurt, inconvenience or damage."<sup>3</sup> Sir Frederick Pollock described a legal nuisance as "the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or, in some cases, in the exercise of a common right."<sup>4</sup>

Every person is entitled to a reasonable enjoyment of life and property, but he must so use his own as not to injure others: *sic uteri tuo non alienum laedas*. As ably stated by Parker and Worthington in their

1. E. C. Tandy, The regulation of nuisances in the American colonies, *Am. J. Pub. Health*, 13:810, October 1923.

2. C. V. Chapin, Nuisance prevention a hindrance to disease prevention, *Am. J. Pub. Health*, 14:1, January 1924.

3. 3 *Blackstone's Commentaries* 5, 216.

4. Quoted in Webster's Dictionary.

treatise (1892) on the law of public health and safety, in which they devote 90 pages to the subject of nuisances:

Every person is absolutely bound so to conduct himself, and so to exercise what are regarded as his natural or personal rights, as not to interfere unnecessarily or unreasonably with other persons in the exercise of rights common to all citizens. Every breach of this obligation constitutes a nuisance. Such has always been the law; the principle has been invariable.<sup>5</sup>

A nuisance, therefore, may be said to be anything which annoys, gives trouble, or causes vexation. The term extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property.<sup>6</sup>

Anything that endangers health is a nuisance, but the converse is not true. There are innumerable conditions, actions, and situations which legally are nuisances but which do not have any direct or indirect effect upon public or personal health. The jurisdiction of public health authorities over nuisances extends only to those matters that actually endanger health, although health departments usually are plagued with numerous complaints and demands for action in instances of alleged health nuisances that have no substantial relation to the public health.

Health officials are generally required by law to take suitable action in all cases of real public health nuisances, but they are not bound to deal with nuisances that are unrelated to the public health. Their powers over nuisances may, in fact, be limited by law to those that are injurious to public health.<sup>7</sup> What action, if any, should be undertaken in such instances and in borderline cases is a question of administrative procedure and of political or civic expediency, diplomacy, and strategy.

### *The Classification of Nuisances*

A nuisance may be public, private, or mixed. A public nuisance is one that affects more than one individual or family, or one that annoys or injures the people as a whole. "Common or public nuisances," wrote Blackstone, "are offenses against the public order or economical regimen of the state, being either the doing of a thing to the annoyance

5. L. Parker and R. H. Worthington, *The Law of Public Health and Safety*, Albany, Bender, 1892.

6. 20 *Ruling Case Law* 380. See article on nuisances in the *Encyclopedia of the Social Sciences*, Vol. 11, New York, Macmillan, 1933.

7. *Rowland v. N.Y. Stable Manure Co.* (1917). 88 N.J. Eq. 168, 101 A. 521.

of the king's subjects or the neglecting to do a thing which the common good requires."<sup>8</sup> An example of a public nuisance is an open privy, the contents of which are polluting the water supply used by an entire community or by a considerable portion of the community.

A private nuisance is one that affects only one person. An example is a spite fence erected by one person to shut out light and air from another. Private nuisances do not concern public health authorities, who have no jurisdiction over such offenses.

When a public nuisance also causes special and peculiar damage to an individual, it becomes a private as well as a public nuisance, and is then known as a mixed nuisance. An example would be a factory which emits harmful chemical fumes that disturb and endanger an entire neighborhood or area and which also cause particular damage to an individual householder in the immediate vicinity.

Nuisances may likewise be classified as nuisances *per se*, or *in esse*, and as nuisances *per accidens*, or *in posse*. Thus, some conditions, such as brothels, carriers of disease, and sources of pollution, are by their very nature nuisances. Other conditions, such as hospitals, pesthouses, trades and industrial works, animals, etc., are not *per se* nuisances but may become so by virtue of their location, manner of operation, and various other factors and circumstances. It has been held, for example, that a person sick with an infectious disease is not a nuisance when confined to his own home so as not to endanger others,<sup>9</sup> but such a person would become a public health nuisance if he walked the streets of a community, attended school, or was present at an assemblage where other persons might contract the disease.

A nuisance may also be classified as a nuisance *prima facie*, that is, presumed to be a nuisance but capable of being proved not to be. Thus, in many jurisdictions a slaughterhouse is *prima facie* a nuisance. Such establishments were formerly thought to be dangerous to health, but modern science would regard slaughterhouses as offenses against comfort, peace, property values, and esthetics rather than against health.

A certain condition may be a nuisance because it was a nuisance at common law, or it may be a nuisance because it has been declared to be a nuisance by legislative enactment. Smallpox was, and is, a nuisance at common law, but noise and smoke were not, whereas excessive smoke and unseemly noises<sup>10</sup> that disturb the peace have often

8. 4 *Blackstone's Commentaries* 166.

9. *Boom v. Utica* (1848), 2 Barb. (N.Y.) 104.

10. See C. P. McCord, *The Abatement of Noise*, *J.A.M.A.*, 123:476, October 23, 1943.

been made nuisances by modern legislation. The same may be said of privies in sewerred communities. Legislatures have the right to denounce certain acts and conditions as nuisances, and to exempt from this category other acts and conditions that were nuisances at common law, but all such statutory declarations must be within constitutional limitations and are subject to critical review by the courts.

The mere declaration by legislative bodies that certain conditions are or are not nuisances does not necessarily make them so. The courts will, however, be liberal in upholding such pronouncements by state legislatures, but will be more strict in adjudicating municipal ordinances and board of health regulations regarding nuisances. Where, for example, it was declared in a municipal ordinance that every hospital for the treatment of contagious and infectious diseases was a nuisance, the enforcement of this ordinance against a properly conducted private hospital for the tuberculous was enjoined by the courts on the grounds that the ordinance was unreasonable.<sup>11</sup> A hospital is not *per se* a nuisance, and cannot be declared to be one unless so conducted, or possibly so located, as to be an actual menace to the health, comfort, and welfare of the public. It has been held, however, that a venereal disease clinic, patronized by large numbers of persons of all classes, is a nuisance when located in a residential neighborhood.<sup>12</sup> In this case the Georgia Supreme Court pointed out that a nuisance may consist merely of the right thing in the wrong place, regardless of other circumstances.

#### *Determination of a Nuisance*

Administrative control over nuisances that are hazardous or injurious to the public health is usually delegated by state law to local health authorities, the state health department assuming jurisdiction only in cases where a nuisance affects the people of more than one community or is concerned with state lands or waters.

Whether a nuisance exists or not is always a question of fact, and it is a fact that should be determined by a board of health, where there is such a board, rather than by the health officer. A mere declaration by an administrative official, such as a health officer, that a thing is a nuisance does not make it so, and the assertion and the necessity

11. *San Diego Tuberculosis Ass'n v. City of East San Diego* (1921), 186 Cal. 252, 200 P. 393, 17 A.L.R. 513. *Cook v. City of Fall River* (1921), 239 Mass. 90, 131 N.E. 346, 18 A.L.R. 119. *Ayars v. Wyoming Valley Hospital* (1922), 274 Pa. 309, 118 A. 426. *City of Wilmington v. Turk* (1925), 14 Del. Ch. 392, 129 A. 512. *Jardine v. City of Pasadena* (1926), 199 Cal. 64, 248 P. 225, 48 A.L.R. 509.

12. *Benton v. Pittard* (1944), 197 Ga. 843, 31 S.E. (2d) 6, 153 A.L.R. 968.

for any ensuing action must be capable of being proved in court. "Whoever abates a nuisance," said the Court of Appeals of New York, "unless acting under court order, does so at his peril, and must prove the nuisance."<sup>13</sup>

As an administrative official subject to a higher authority, a health officer can merely execute the orders of a board of health or other governing body in coping with nuisances. He may issue warnings to citizens regarding such conditions and use persuasion to bring about their correction, but, unless the charter of the municipal corporation which he serves vests in him as health commissioner special authority, he cannot usurp the quasi-judicial and quasi-legislative functions of the board of health and issue direct orders for the declaration and abatement of nuisances or take summary measures without the sanction of the board. A health officer may, however, be given a certain amount of general authority to deal with various classes and types of nuisances that may require immediate action for the protection of the public health. Such authority may be conferred by an ordinance, regulation, resolution, or order.

When the existence of a nuisance is reported by a health officer to a board of health and the board decides to take action, the person who is maintaining the nuisance should be cited to appear at a hearing before the board and given an opportunity to defend himself.<sup>14</sup> The board may then order suitable action, which will be carried out by the health officer as its executive officer.

If the nuisance is of such a character that public health would be endangered by any delay in its abatement, then immediate action may be taken by the health officer, but the necessity for such action must be capable of proof. The property owner is still entitled to a hearing after the action, and if it appears that valuable property has been destroyed or damaged without adequate cause, he is entitled to reasonable compensation.<sup>15</sup>

Suitable action may be taken against things that are likely to become nuisances as well as against those that already are nuisances.<sup>16</sup>

13. *People ex rel. Copcutt v. Board of Health* (1893), 140 N.Y. 1, 35 N.E. 320, 23 L.R.A. 481, 37 A.S.R. 522.

14. *Board of Health v. Rulofson* (1923), 98 N.J.L. 304, 120 A. 328.

15. *Miller v. Horton* (1891), 152 Mass. 540, 26 N.E. 100, 10 L.R.A. 116, 23 A.S.R. 850. *Lowe v. Conroy* (1904), 120 Wis. 151, 97 N.W. 942, 66 L.R.A. 907, 102 A.S.R. 983, 1 Ann. Cas. 341.

16. *Board of Health v. Schmidt* (1914), 83 N.J. Eq. 35, 90 A. 239.

### *Responsibility for Nuisances*

The person who creates, maintains, continues, or permits a nuisance, either on his property or by his conduct, is responsible for it. A tenant is responsible for a nuisance on property occupied by him unless the nuisance is caused directly by an act of the owner. Sometimes more than one person may be liable for a specific nuisance, as the person who creates it and also another person who continues it. An owner or occupier of property is responsible for nuisances caused by his agents, servants, or employees while acting in the course of their employment.

When the fact of a nuisance has been established, there is no defense to it. Motive does not enter into the situation, and negligence is no excuse. Lack of pecuniary ability to correct the condition likewise fails to excuse the transgressor. No one can obtain a prescriptive right to maintain a nuisance, no matter how long the condition may have endured without complaint or abatement. Time does not sanction or extenuate a nuisance, and a nuisance continued is a fresh nuisance every day of its duration.<sup>17</sup> A license or permit to conduct a trade or business or to perform an act does not sanction the commission of a nuisance.

A municipal corporation is fully as responsible for creating or maintaining a nuisance as is an individual, but only when the nuisance arises out of a corporate or proprietary function of the municipality. Thus, a piggery established by a city in order to dispose of municipal garbage has been held by the courts to be a nuisance, the operation of which would be enjoined for the comfort of citizens living in the vicinity, which in this case was beyond the city limits.<sup>18</sup>

Garbage disposal is generally considered to be a corporate or proprietary duty of a municipality,<sup>19</sup> although in some states it has been held to be a governmental responsibility.<sup>20</sup> A municipal corporation

17. *Conestee Mills v. City of Greenville* (1931), 160 S.C. 10, 158 S.E. 113, 75 A.L.R. 519. *Kane v. Lapre* (1943), 69 R.I. 330, 33 A. (2d) 218.

18. *Trowbridge v. City of Lansing* (1929), 237 Mich. 402, 212 N.W. 73, 50 A.L.R. 1014.

19. *O'Brien v. Town of Greenburgh* (1933), 268 N.Y.S. 173, 239 App. Div. 555; affirm. in 266 N.Y. 582, 195 N.E. 210. *Lambert v. City of Port Arthur* (Tex. 1929), 22 S.W. (2d) 320.

20. *Curry v. City of Highland Park* (1928), 242 Mich. 614, 219 N.W. 745. *Jones v. City of Phoenix* (1925), 29 Ariz. 181, 239 P. 1030. *Oklahoma City v. Baldwin* (1929), 133 Okla. 289, 272 P. 453. *Ashbury v. City of Norfolk* (1929), 152 Va. 278, 147 S.E. 223. *Baumgardner v. City of Boston* (1939), 304 Mass. 100, 23 N.E. (2d) 121.



is usually not liable for a nuisance resulting from the exercise of a governmental duty, such as a procedure undertaken under its police power for the protection of the public health.

It has been held on numerous occasions that a municipality is responsible for a nuisance caused by the operation of a sewage disposal plant or the discharge of sewage into streams or on lands, since this is, in general, a corporate function.<sup>21</sup>

An officer or employee of a governmental body may be held to be individually liable for a nuisance, if the condition is caused by acts that are beyond the scope of his authority and represent malfeasance or nonfeasance, and he may be liable, of course, if he is acting in a private capacity.

Although the political agencies of the State may be responsible for nuisances under certain conditions,<sup>22</sup> the State itself as the sovereign power is not responsible to individuals for nuisances and cannot be sued by individuals without its express permission. One State may, however, bring action against another State in the United States Supreme Court for infringement of its rights or those of its citizens. Thus, actions have been brought by one State against another State, or against a city in another State, for pollution of waters with sewage or garbage.<sup>23</sup>

### *Remedies against Nuisances*

Several legal remedies are available against nuisances, including: 1) a suit at law for damages; 2) a suit in equity to enjoin or abate the nuisance; 3) summary abatement in certain cases; and 4) imposition of a penalty or revocation of a license for violation of a law or ordinance concerning nuisances.

Whenever injury is caused by a nuisance, the aggrieved party may sue for damages and, if actual damage can be proved, may recover judgment. Such suits may be brought by individuals, private corpora-

21. *Freedmen v. Borough of West Hazleton* (1929), 297 Pa. 58, 146 A. 564. *Princeton v. Pool* (Ky. 1916), 188 S.W. 758. *Mitchell Realty Co. v. West Allis* (1924), 184 Wis. 352, 199 N.W. 390, 35 L.R.A. 396. *Oklahoma City v. Eylar* (1936), 177 Okla. 616, 61 P. (2d) 649. See Chapter XVII, on Liability, page 283.

22. In *Parsons v. Town of Smithtown* (1936), 288 N.Y.S. 470, 160 Misc. 103, the state mental hygiene department was held to have no special privileges in discharging sewage into a stream in violation of a local ordinance, which was sustained as valid.

23. *Missouri v. Illinois* (1901), 180 U.S. 208, 21 S. Ct. 331, 45 L. Ed. 497. *New York v. New Jersey* (1921), 256 U.S. 296, 41 S. Ct. 492, 65 L. Ed. 937. *State of New Jersey v. City of New York* (1931), 284 U.S. 585, 51 S. Ct. 519.

tions, and municipal corporations, but an individual cannot sue for damages for a public nuisance unless it is also a private nuisance causing special harm to him. When a private nuisance is continued, a new cause of action can be maintained for each day that it is suffered to remain unabated.<sup>24</sup> The measure of damages depends, of course, upon the extent of the injury, higher awards being made in cases of permanent damage than in cases of temporary injury.

Inasmuch as damage suits are often inadequate remedies, since they may produce compensation but do not necessarily cause abatement of the nuisance, the second remedy, that of equitable injunction, may be invoked. If the existence and injurious nature of a nuisance is proven, a court of equity will issue an order enjoining its continuance and ordering its abatement. An injunction will not be granted, however, where there is an adequate remedy at law.

An individual may secure injunctive relief against a private nuisance, while the State, a municipal corporation, or a health department may take similar action through its law officers against public nuisances. It has been held, for example, that the State can enjoin the unlicensed practice of medicine as a public nuisance, where such practice is detrimental to the public welfare and dangerous to the public health.<sup>25</sup> The United States itself may bring an action to enjoin a nuisance, such as the operation of unpleasant fish factories in the immediate vicinity of a quarantine station.<sup>26</sup>

An example of the use of injunction is a case in which a State brought suit in the United States Supreme Court to enjoin an industrial plant in another State from discharging noxious fumes and gases that destroyed forests and vegetation and caused or threatened injury to the health of its inhabitants.<sup>27</sup> Although the value of the manufacturing plant was many times that of the property of the individuals affected, the relief was granted, as the nuisance was clearly proven.

An injunction may be secured against a municipality,<sup>28</sup> as well as by a municipality, in cases of nuisances, and injunctions may also be granted to prevent interference with the proper abatement of a nui-

24. *Cooley on Torts* (1907), Section 312. *Conestee Mills v. City of Greenville* (1931), 160 S.C. 10, 158 S.E. 113, 75 A.L.R. 519.

25. *State v. Compers* (1940), 44 N.M. 414, 103 P. (2d) 273.

26. *U.S. v. Luce* (Del. 1905), 141 F. 385.

27. *Georgia v. Tennessee Copper Co.* (1907), 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038. *Southampton Township v. Scott* (1920), 91 N.J. Eq. 443, 110 A. 587. *Jersey City v. Coppinger* (1927), 101 N.J. Eq. 185, 137 A. 572.

28. *Lambert v. City of Port Arthur* (Tex. 1929), 22 S.W. (2d) 320.

sance by a municipal corporation or its agents,<sup>29</sup> as well as for additional violations.<sup>30</sup>

When an injunction is issued against a nuisance, usually a reasonable time will be permitted for its abatement unless the nuisance is of such a character that immediate action is imperative.

Since time is often of the essence in the removal of dangerous and distressing nuisances, the right of summary abatement was recognized at common law in cases of nuisances *per se*. This right still prevails, since it was not surrendered by the States when the Federal Constitution was adopted. This procedure may be utilized by health officials in dealing with public health emergencies, but, as previously stressed, it must be employed with caution.

Before summary action to abate a nuisance is taken, notice must usually be given to the person responsible for it.<sup>31</sup> If, however, such notice is impossible and the public health is in jeopardy, failure to give notice may not be a fatal defect. Summary abatement by forcible entry and destruction of property is not a violation of the legal right to due process of law, if the action is justified in the interests of the public health.<sup>32</sup> The action must, nevertheless, be reasonable and performed with as little injury as possible.

Summary abatement of a nuisance does not preclude a later action for damages by the person affected by the abatement. The burden of proof is upon the officer abating the nuisance to show that his action was required in the interests of the public welfare and for the "greatest good of the greatest number" of people.

In ordering the abatement of a public health nuisance, a board of health cannot, as a rule, dictate that it shall be abated in a specific way, but may require only that it shall be abated in a satisfactory manner by any means that the person responsible may choose to adopt.<sup>33</sup> A court may uphold a board of health order for abatement of a nuisance but may modify its severity, permitting a less drastic action than

29. *Board of Health of Caldwell v. Shaw* (1933), 113 N.J. Eq. 507, 167 A. 869.

30. *Town of Lexington v. Miskell* (1927), 260 Mass. 544, 157 N.E. 598, 53 A.L.R. 808.

31. *Commonwealth v. Collins* (1927), 257 Mass. 580, 154 N.E. 266.

32. *Lawton v. Steele* (1894), 152 U.S. 136, 14 S. Ct. 499, 38 L. Ed. 338. *Sentell v. New Orleans R. Co.* (1897), 166 U.S. 698, 17 S. Ct. 693, 41 L. Ed. 1169.

33. *Belmont v. New England Brick Co.* (1906), 190 Mass. 442, 77 N.E. 504. *Purnell v. Maysville Water Co.* (1921), 193 Ky. 85, 234 S.W. 967, 23 A.L.R. 223. *Behnisch v. Cedarburg Dairy Co.* (1923), 180 Wis. 34, 192 N.W. 447. *State v. Strayer* (1943), 230 Ia. 1037, 299 N.W. 912.

was proposed or ordered. In cases of justifiable summary abatement, the health authorities may employ any reasonable means.

### *The Prevention of Nuisances*

The prevention of a nuisance obviously is of greater importance to the public health than is its abatement after it has occurred. Nuisances often may be prevented by means of wise legislation which prohibits the doing of acts dangerous to the public health and provides that such acts shall be punishable offenses. If there is such specific prohibition of nuisances in a statute or ordinance or in a regulation made under authority of law, the prosecution or mere threat of prosecution for violation of the statute frequently will result in prompt and effective abatement of the nuisance. It may be more effective, for example, for a State to adopt legislation prohibiting the pollution of streams than legislation merely declaring stream pollution to be a nuisance and penalizing those guilty of the offense after it has happened. Preventive legislation of this nature has been upheld as constitutional.<sup>84</sup>

### *Pollution of Waters*

The pollution of streams, lakes, and other similar waters by sewage, industrial wastes, and other filth is a public health nuisance,<sup>85</sup> which may be enjoined or may give rise to a suit at law for damages. Every riparian owner has the right to have a stream come to him in its natural state of purity, although proprietors on the upper reaches of the stream may make a reasonable use of it. Waters and watercourses are, furthermore, necessary as sources of municipal water supplies, and also for the propagation and existence of fish and shellfish, both for food supplies and as game.

While modern civilization demands that streams and other bodies of water be utilized for the reasonable disposal of municipal sewage, the discharge into these waters of raw sewage and industrial wastes is not a natural or proper use of them. Such sewage and wastes must be adequately purified or treated so that all dangers of infection and

84. *Northwestern Laundry Co. v. Des Moines* (1916), 239 U.S. 486, 36 S. Ct. 206, 60 L. Ed. 396. In *Irvine v. Commonwealth* (1919), 124 Va. 817, 97 S.E. 769, a law prohibiting common roller towels in public lavatories was upheld, but the lavatories of an office building were held not to be public lavatories.

85. *Stream Pollution, A digest of judicial decisions and a compilation of legislation relating to the subject*, Public Health Bulletin No. 87, U.S. Public Health Service, 1917. *Third Report of the Special Advisory Committee on Water Pollution in the U.S.*, Washington, National Resources Committee, 1939.

offense will be obviated and the public health will be protected. The State has a right; however, to discharge sewage into tidal waters, and may adopt legislation authorizing municipalities to do so.<sup>36</sup> Since the employment of tidal waters for this purpose is a public right, an oyster grower whose trade is damaged by city sewage in tidal waters cannot maintain an action against the city.<sup>37</sup>

Legislation to control pollution of streams and other waters within a State and to protect domestic water supplies is now in force in all States, and frequently has been upheld by the courts as a valid exercise of the police power.<sup>38</sup> State health departments, or other state agencies especially created for the purpose, are usually given the power to supervise and control municipal sewage disposal facilities and to take suitable action in cases of pollution.<sup>39</sup> A permit granted by a state board of health to a city to discharge sewage effluent into a river does not, however, authorize the city to commit a nuisance.<sup>40</sup>

The liability of municipal corporations for nuisances due to sewage is discussed at greater length in Chapter XVII, where there is also a discussion of the responsibility for diseases caused by polluted water supplies.

The State may properly require by legislation or regulation that persons who operate water supply systems shall possess certain qualifications and be licensed by the state department of health or other

36. *Cityco Realty Co. v. City of Annapolis* (1930), 159 Md. 148, 150 A. 273.

37. *Lovejoy v. City of Norwalk* (1930), 112 Conn. 199, 152 A. 210. *Darling v. Newport News* (1919), 249 U.S. 540, 39 S. Ct. 371, 63 L. Ed. 759.

38. *Sprague v. Dorr* (1904), 185 Mass. 10, 69 N.E. 344. *State v. Wheeler* (1882), 44 N.J.L. 88. *City of Durham v. Eno Cotton Mills* (1906), 41 N.C. 615, 54 S.E. 453, 7 L.R.A. (N.S.) 321. *State Board of Health v. City of Greenville* (1912), 86 Oh. St. 1, 98 N.E. 1019, Ann. Cas. 1913 D 52. *Bucyrus v. Dept. of Health* (1929), 120 Oh. St. 426, 166 N.E. 370, 2 Oh. Bar 10. *Miles City v. State Board of Health* (1909), 39 Mont. 405, 102 P. 696, 25 L.R.A. (N.S.) 589. *Salt Lake City v. Young* (1915), 45 Utah 349, 145 P. 1047. *Cooper v. State* (1944), 48 N.Y.S. (2d) 212.

39. *Board of Purification of Waters v. Town of Bristol* (1931), 51 R.I. 243, 153 A. 879. *State v. City of Van Wert* (1932), 126 Oh. St. 78, 184 N.E. 12. In *Danielley v. City of Princeton* (1933), 113 W. Va. 252, 167 S.E. 620, a law relating to a state water commission and providing for review of its findings by the circuit court was held unconstitutional as an unlawful delegation of executive power to the courts. *City of Niles v. Stream Control Comm.* (1941), 296 Mich. 650, 296 N.W. 713. *People ex rel. Stream Control Comm. v. City of Port Huron* (1943), 305 Mich. 153, 9 N.W. (2d) 41.

40. *People v. City of Reedley* (1924), 66 Cal. App. 409, 226 P. 408. *Barrington Hills Country Club v. Village of Barrington* (1934), 357 Ill. 11, 191 N.E. 239. *Dohany v. City of Birmingham* (1942), 301 Mich. 30, 2 N.W. (2d) 907.

governmental agency, but where one city obtained its water by contract from another city, it was held that the superintendent of the water supply system of the former need not be licensed.<sup>41</sup>

In order to prevent contamination of public water supplies, the State and its political subdivisions may adopt legislation or pass regulations to prohibit bathing, boating, and other activities in or on reservoirs and other sources of water supplies, whether they are on public or private lands.<sup>42</sup> Notice of such prohibition is a desirable procedure but is not essential if the law or regulation is published as required by the statutes.

It has also been held that a city may pass an ordinance prohibiting the sale within the city of ice manufactured outside the city unless it is made of distilled water, the ordinance in question having been adopted by the city of El Paso, Texas, to safeguard its citizens against any possible dangers from ice made from polluted water in Juarez, Mexico, where it was alleged that periodic examinations of the water supply were not made.<sup>43</sup> In sustaining this ordinance as a valid exercise of the police power, the state court relied upon a decision of the United States Supreme Court, which had upheld a city ordinance requiring all milk sold in the city from outside sources to be produced only from tuberculin tested cattle.<sup>44</sup> This decision of the United States Supreme Court likewise upholds the right of a city to summary action in seizing and destroying as a nuisance milk that is shipped to the city in violation of the ordinance.

Standards for the purity of drinking water and water for culinary purposes supplied by common carriers in interstate commerce have been promulgated by the United States Public Health Service. Appended to these standards is a Manual of Recommended Water Sanitation Practice, a valuable guide for anyone concerned with this important subject.<sup>45</sup>

41. *State ex rel. Department of Health v. City of Hoboken* (1942), 130 N.J. Eq. 564, 23 A. (2d) 587.

42. *State v. Quattropant* (1926), 99 Vt. 360, 133 A. 352. *Town of Cheektowaga v. Sts. Peter and Paul, etc. Church* (1924), 205 N.Y.S. 334, 123 Misc. 458. *Harvey Realty Co. v. Borough of Wallingford* (1930), 111 Conn. 352, 150 A. 60. *Bountiful City v. De Luca* (1930), 77 Utah 107, 292 P. 194. *Jersey City v. State Water Policy Comm.* (1936), 14 N.J. Misc. 10, 181 A. 873. *State v. Heller* (1937), 123 Conn. 492, 196 A. 337. *Willis v. Wilkins* (1943), 92 N.H. 400, 32 A. (2d) 321.

43. *City of El Paso v. Jackson* (Tex. 1933), 59 S.W. (2d) 822.

44. *Adams v. Milwaukee* (1913), 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971.

45. *Public Health Service Drinking Water Standards and Manual of Recommended Water Sanitation Practice, Standards Adopted by Public Health Service*, (Continued on next page.)

*Shellfish Sanitation*

Since shellfish of all kinds may be contaminated by sewage, and when eaten may cause typhoid fever and other diseases, measures for the sanitary control of the growing and handling of oysters, clams, and other shellfish have been adopted in States bordering on tidal waters where this problem occurs.<sup>46</sup> The reasonable control of shellfish by state and local health departments has been upheld by the courts as a necessary and desirable sanitary procedure.<sup>47</sup>

*Privy Sanitation*

Insanitary privies have been and are fertile sources of disease. Health departments may, therefore, take proper measures to do away with such public health nuisances. On numerous occasions the courts have upheld the reasonable regulation of privies and outhouses<sup>48</sup> and have sustained ordinances requiring that privy vaults be removed and replaced by sanitary water closets where sewer connections are available.<sup>49</sup> The power of the city to prohibit and regulate privies is not limited by a contract between the city and an individual for the cleaning of privies,<sup>50</sup> and the suppression of privy vaults by a municipal corporation is not a deprivation of property without due process of law.<sup>51</sup> An annual sanitary tax on privies has also been upheld.<sup>52</sup>

Sept. 25, 1942, for *Drinking and Culinary Water Supplied by Common Carriers in Interstate Commerce*, Reprint 2440, U.S. Public Health Service, 1943.

46. H. N. Olds, Trends in shellfish sanitation, *Pub. Health Rep.*, 53:720, May 6, 1938.

47. *Comm. v. St. John* (1928), 261 Mass. 510, 159 N.E. 599. *Meunter v. Comrs. of Shell Fisheries* (1933), 54 R.I. 12, 168 A. 907. *Lovejoy v. City of Norwalk* (1930), 112 Conn. 199, 152 A. 210. *People v. Thompson and Potter* (1942), 289 N.Y. 259, 45 N.E. (2d) 432. *De Roche v. Osborne* (1942), 37 N.Y.S. (2d) 348.

48. *Malone v. City of Quincy* (1923), 66 Fla. 52, 62 So. 922. *Cartwright v. Bd. of Health of Cohoes* (1901), 165 N.Y. 631, 59 N.E. 1120. *Comm. v. Roberts* (1892), 155 Mass. 281, 29 N.E. 522, 16 L.R.A. 400. *Lavender v. City of Tuscaloosa* (1940), 29 Ala. App. 502, 198 So. 459. *Goodall v. City of Clinton* (Okl. 1945), 161 P. (2d) 1011.

49. *Harrington v. City of Providence* (R.I. 1897), 38 A. 1. *St. Louis v. Nash* (Mo. 1924), 260 S.W. 985. *St. Louis v. Hoevel Real Estate Co.* (Mo. 1933), 59 S.W. (2d) 617. *Nourse v. City of Russellville* (1935), 257 Ky. 525, 78 S.W. (2d) 761.

50. *Bowers v. City of Little Rock* (Ark. 1935), 77 S.W. (2d) 797.

51. *Spriggs v. Garrett Park* (1899), 89 Md. 406, 43 A. 813.

52. *Town of Marion v. Baxley* (1939), 192 S.C. 112, 5 S.E. (2d) 573.

### *Plumbing*

Sanitary plumbing is of importance to the public health as a vast and necessary improvement over the old-fashioned privy and cesspool. Contrary to a former superstition, however, gases, exhalations, and odors from plumbing will not cause disease, although they may cause discomfort.<sup>53</sup> Defective plumbing may, nevertheless, give rise to disease conditions, especially when the defects are such as to cause contamination of domestic water or food supplies. A widespread epidemic of amebic dysentery occurred in 1933 and 1934 chiefly as the result of defective plumbing conditions in two hotels in Chicago, where discharges from carriers of the disease gained access to the water supply because of improper plumbing installations and cross connections.<sup>54</sup>

Plumbing is the subject of laws and regulations in the States and in most municipalities. In many instances, inspection of plumbing is made the duty of local health departments, although the function is properly one for the building department or other municipal departments.

### *Housing*

Provision for adequate, sanitary housing for all the people has been stated to be an urgent public health problem.<sup>55</sup> From the legal point of view, health officials are concerned with housing because insanitary conditions in habitations are nuisances or otherwise endanger or are likely to endanger the public health. In the interests of the public health and general welfare, state governments may appropriate or authorize the appropriation by municipalities of monies and may accept federal grants for the purpose of furnishing improved housing conditions for their citizens. States and municipalities may also regulate tenements and slum conditions, provide for zoning, and otherwise supervise the living environment of the people.

Although housing improvement and slum clearance have been the

53. *State v. Smith* (1906), 42 Wash. 237, 84 P. 851, 114 A.S.R. 114, 5 L.R.A. (N.S.) 674, 7 Ann. Cas. 577. *Replogle v. Little Rock* (1924), 166 Ark. 617, 267 S.W. 353, 36 A.L.R. 1333.

54. H. N. Bundesen, The Chicago epidemic of amoebic dysentery in 1933, *Pub. Health Rep.*, 49:1266, October 26, 1934.

55. C.-E. A. Winslow, Housing as a public health problem. *Am. J. Pub. Health*, 27:56, January 1937. See S. C. Prescott and M. P. Horwood, *Sedgwick's Principles of Sanitary Science and Public Health*, New York, Macmillan, 1935. *Basic Principles of Healthful Housing*, Report of Committee on the Hygiene of Housing, 2d ed., New York, American Public Health Association, 1941. A city ordinance requiring cleanliness and sanitation in dwellings was upheld in *Petrushansky v. State* (1943), 182 Md. 164, 32 A. (2d) 696.



concern of sociologists from early times, the first broad and comprehensive legal attack on the problem was the New York Tenement House Law of 1901, which required of all first-class cities certain minimum standards of sanitation, air, light, and other essentials in housing. In 1929 New York adopted the Multiple Dwelling Law, which was sustained as valid by the New York Court of Appeals in the same year.<sup>56</sup> In a concurring opinion in this case, it was stated by Mr. Justice Cardozo, then on the bench of this court, that:

The Multiple Dwelling Act is aimed at many evils, but most of all it is a measure to eradicate the slum. It seeks to bring about conditions whereby healthy children shall be born, and healthy men and women reared, in the dwellings of the great metropolis. . . . The end to be achieved is more than the avoidance of pestilence or contagion. The end to be achieved is the quality of men and women. . . . If the moral and physical fibre of its manhood and its womanhood is not a State concern, the question is, what is?

In 1934 Congress passed the National Housing Act (12 U.S.C. 1702), which has been amended from time to time. The law directed a Federal Housing Administration to encourage improvement in housing standards and conditions, to create a sound mortgage market, and to provide a system of mutual mortgage insurance. The United States Housing Act of 1937 (42 U.S.C. 1401) provided for financial assistance from the Federal Government to local public housing authorities in the development and administration of low-rent housing and slum clearance. This law, as administered by the Federal Public Housing Authority, was upheld by the United States Supreme Court in 1945.<sup>57</sup>

The federal agencies concerned with housing were consolidated in the National Housing Agency by the President by Executive Order of February 24, 1942. The three principal constituent units within this agency are the Federal Home Loan Bank Administration, the Federal Housing Administration, and the Federal Public Housing Administration.

A municipal ordinance regulating tourist camps, which provided that no person should remain in such a camp more than thirty days and requiring five hundred cubic feet of space for each person, has been sustained, even though a state law provided for licensing and

56. *Adler v. Deegan* (1929), 251 N.Y. 467, 167 N.E. 705. *Ademec v. Post* (1936), 273 N.Y. 250, 7 N.E. (2d) 120, 109 A.L.R. 1110. See W. Ebenstein, *The Law of Public Housing*, Madison, University of Wisconsin Press, 1940.

57. *City of Cleveland v. U.S.* (1945), 323 U.S. 328, 65 S. Ct. 280, 89 L. Ed. *New York City Housing Authority v. Muller* (1936), 270 N.Y. 233, 1 N.E. (2d) 153, affg. 279 N.Y.S. 299, 155 Misc. 681. See 130 *American Law Reports* 1069.

regulation of tourist camps and delegated the enforcement of the law to the state board of health.<sup>58</sup>

### *Insect Control*

A number of dangerous communicable diseases, including bubonic plague, typhus fever, typhoid fever, Rocky Mountain spotted fever, tularemia, malaria, dengue, filariasis, yellow fever, and hookworm, may be spread by infected insects such as fleas, lice, flies, ticks, mosquitoes, and hookworms. These insects, whether actually infected or not, are public health nuisances, against which suitable measures may be taken by public health authorities.

Ordinances requiring the screening of food in order to prevent contamination by flies have been upheld,<sup>59</sup> as have also ordinances requiring the wrapping of bread for the same purpose.<sup>60</sup> In a noteworthy decision handed down by the Supreme Court of Maine in 1920, it was held that a guest was justified in leaving a hotel when flies became so numerous as to be dangerous to health.<sup>61</sup> In the course of this interesting opinion, the court stated:

It is a matter of common knowledge that the common house fly has come to be regarded by the enlightened understanding, not only as one of the most annoying and repulsive of insects, but one of the most dangerous in its capacity to gather, carry, and disseminate the germs of disease. He is the meanest of all scavengers. He delights in reveling in all kinds of filth; the greater the putrescence the more to his taste. Of every vermin, he above all others is least able to prove an alibi when charged with having been in touch with every kind of corruption, and with having become contaminated with the germs thereof. After free indulgence in the cesspools of disease and filth, he then possesses the further obnoxious attribute of being most agile and persistent in ability to distribute the germs of almost every deadly form of contagion.

Since the most common breeding place of flies is in horse manure, this is also a public health nuisance. Manure may also be a source of tetanus bacilli. While it has been shown that flies can carry the germs of typhoid fever and other filth-borne diseases, most cases of these diseases are contracted in other ways. Flies are nuisances, but they are

58. *Sptiler v. Munster* (1938), 214 Ind. 75, 14 N.E. (2d) 579, 115 A.L.R. 1395.

59. *State v. O'Connor* (1911), 115 Minn. 339, 132 N.W. 303, 35 L.R.A. (N.S.) 1112, Ann. Cas. 1912 D 955.

60. *State v. Normand* (1913), 76 N.H. 541, 85 A. 899, Ann. Cas. 1913 E 996.

61. *Williams v. Sweet* (1920), 119 Me. 228, 110 A. 316, 10 A.L.R. 121. See dictum in *Campfield v. U.S.* (1897), 167 U.S. 518.

not as serious to the public health as are *anopheles* mosquitoes which carry the protozoa of malaria, and mosquitoes of the *aedes* species which transmit yellow fever and dengue fever.

Mosquitoes have been held by the courts to be common pests dangerous to the public health<sup>62</sup> whose breeding places may be abated as public nuisances.<sup>63</sup> Many types of common mosquitoes do not carry disease, but they may, nevertheless, be nuisances, as may be other insects and vermin such as bedbugs, cockroaches, etc.

Since disease-bearing insects may be carried by airplanes, special measures to cope with these and other health hazards due to modern transportation by air may be taken by health authorities. Where such transportation is interstate or with foreign countries, sanitary control is the function of the United States Public Health Service.<sup>64</sup>

### *Animals*

Animals affected with infectious diseases, such as dogs with rabies, rodents with plague, cows with tuberculosis or brucellosis, horses with glanders, sheep with anthrax, rabbits with tularemia, parrots with psittacosis, or hogs infested with trichina, are public health nuisances.<sup>65</sup> Dead animals are not *per se* nuisances but may become so under certain conditions. Unless dead from a disease such as anthrax or a similar dangerous malady, deceased animals are not particularly hazardous to the public health.

### *Other Nuisances*

While an enumeration of all the things that may be nuisances would be merely an extensive list of the infinite variety of ways in which a person can be annoyed or impeded in the enjoyment of his rights, the following conditions may be mentioned as having been held by the courts to be public health nuisances under certain conditions:<sup>66</sup> animals, barns and stables, buildings, cemeteries, cesspools, comfort stations, dams, diseased persons, disorderly houses, dogs, dumps, dusty

62. *Towaliga Falls Power Co. v. Sims* (1909), 6 Ga. App. 749, 65 S.E. 844. *Cohen & Co. v. Rittman* (Tex. 1911), 139 S.W. 59. *Godfrey v. Western Carolina Power Co.* (1925), 190 N.C. 24, 128 S.E. 485. *Belton v. Wateree Power Co.* (1922), 123 S.C. 291, 115 S.E. 587.

63. *Yaffe v. City of Fort Smith* (1928), 178 Ark. 406, 10 S.W. (2d) 886. *Board of Health of Caldwell v. Shaw* (1933), 113 N.J. Eq. 507, 167 A. 869.

64. *Sanitation Manual for Land and Air Conveyances Operated in Interstate Traffic*, Reprint 2444, Washington, U. S. Public Health Service, 1943.

65. *People v. Anderson* (1934), 355 Ill. 289, 189 N.E. 338.

66. See 46 *Corpus Juris* 690, and cases cited.

trades, explosives, factories, filth, flies, food when adulterated or contaminated, fumes, garbage, gases, hospitals, insects, manure, mosquitoes, noise, pigeons, piggeries, ponds, privies, rats, refuse, rodents, sewage, sewers, slaughterhouses, smoke, spitting, urinals, water when polluted, water closets, weeds, and all kinds of offensive trades.

With the exception of diseased animals and persons, disease-carrying insects, and disorderly houses, these things are not nuisances *per se*, and they have also been held not to be nuisances under certain conditions.

Odors may be disagreeable and cause discomfort, but they are not injurious to the physical health of normal persons. Odors may be nuisances, but they are seldom, if ever, public health nuisances.<sup>67</sup> Garbage and refuse are likewise of inconsequential harm to the public health.<sup>68</sup>

67. *Gardner v. Internat. Shoe Co.* (1944), 386 Ill. 418, 54 N.E. (2d) 482.

68. See E. Wright, *Control of nuisances*, *Am J. Pub. Health*, 28:579, May 1938.

## CHAPTER XIV

### VACCINATION

VACCINATION, or the introduction of vaccine virus into the human skin to cause an attack of cowpox (*vaccina*), is, when successfully carried out, a preventive of smallpox (*variola*).<sup>1</sup> Cowpox is a mild and harmless disease, whereas smallpox is a dangerous, communicable, and highly contagious disease. Before the general adoption of vaccination as a preventive measure, smallpox was widespread and often fatal, and was aptly characterized by Lord Macaulay as "the most terrible of the ministers of death." Since the adoption of vaccination, the disease has declined in prevalence and severity, although in 1937 there were nearly 12,000 cases of smallpox among unvaccinated persons in the United States. In 1940 there were about 2,800 cases, and in 1942 less than 1,000.

Because of the fact that one successful vaccination offers immunity against smallpox for at least seven years and two vaccinations usually confer permanent immunity, the routine vaccination and revaccination of young children and the immediate vaccination of all persons exposed to smallpox are advocated by physicians and public health officials. The process of vaccination, as customarily carried out with vaccines that are manufactured in establishments licensed and inspected by the Federal Government under an act of Congress passed in 1902 (32 Stat. 728, U.S.C. title 42), is almost invariably safe and harmless. The discomfort caused by the mild case of cowpox that follows a successful "take" is as nothing compared to the danger of an attack of smallpox, which may occur in either a mild or a virulent form.

Since the adoption in 1809 by the Commonwealth of Massachusetts of the first legislation in this country requiring vaccination, laws and regulations pertaining to vaccination have been promulgated in all the States.<sup>2</sup> Unlike the situation in numerous foreign countries where vaccination of the entire populace has been made compulsory for

1. The term "vaccination" is now also applied, perhaps somewhat loosely, to inoculation with any virus to prevent disease. Thus, there are vaccinations against typhoid fever, cholera, anthrax, Rocky Mountain spotted fever, and other diseases.

2. W. Fowler, *Smallpox Vaccination Laws, Regulations, and Court Decisions*, Supplement No. 60 to *Pub. Health Rep.*, U.S. Public Health Service, 1927. W. Fowler, *Principal Provisions of Smallpox Vaccination Laws and Regulations in the United States*, Reprint 2227, U.S. Public Health Service, 1941.

many years by national laws,<sup>3</sup> there is no federal statute on this subject in the United States. The quarantine regulations of the United States Public Health Service require, however, that persons arriving in this country on ships upon which smallpox has occurred or is present, or coming from infected localities, shall be vaccinated or quarantined and denied entry unless protected by a successful vaccination or a previous attack of the disease.<sup>4</sup> Officers and subordinates of the United States Public Health Service on duty at quarantine stations are also required to be vaccinated.

The value of legislation in the control of smallpox has been demonstrated in a survey conducted by the United States Public Health Service. The incidence of the disease is highest in the nine States having no important laws or regulations promoting or achieving vaccination of the population, and is even higher in the seven States having various prohibitive provisions regarding smallpox vaccination. The conclusion stated as a result of this investigation is:

The difference in the incidence of smallpox in the different areas of the United States is apparently related to the various provisions of law or regulation, especially with reference to the requirement of vaccination as a prerequisite to school attendance, the permitting of discretionary powers to local authorities, and prohibitive provisions. As was stated in a previous report, it is apparent that smallpox is lowest in those jurisdictions which have some type of universal routine vaccination requirements.<sup>5</sup>

### *The Legal Status of Vaccination*

Vaccination requirements set forth in state legislation, municipal ordinances, board of health regulations, and school board regulations have given rise to a vast amount of litigation in this country. Since the first decision on the subject in 1830, there have been reported (to 1938) nearly a hundred decisions of courts of last resort on various legal aspects of vaccination.<sup>6</sup> While there is some conflict in the deci-

3. Bavaria (1807), Denmark (1810), Sweden (1814), Prussia (1835), the United Kingdom (1853), German Empire (1874), Rumania (1874), Hungary (1876), Serbia (1881), and Austria (1886). *Encyclopedia Britannica*, 14th ed., vol. 22, page 922, 1929.

4. According to some medical authorities, a previous attack of smallpox does not necessarily prevent a second attack.

5. B. C. Hampton, *Smallpox in Relation to State Vaccination Laws and Regulations*, Reprint 2528, U.S. Public Health Service, 1944.

6. It is interesting to note that between the publication of the second and third editions of this book (1939 to 1947) there was no decision on vaccination by a court of last resort, and only two reported decisions by lower courts. The law on this subject seems to be static.

sions on certain aspects of vaccination, it is now a well-established principle of law in this country that under the police power of the States, legislatures may require vaccination of all citizens under certain conditions, and may delegate the power to require vaccination to municipal corporations and other political subdivisions of the State.

The legal rule applicable to compulsory vaccination was expressed in 1892 by Parker and Worthington in their treatise on public health and safety, as follows:

It is sometimes provided by law that persons who may have been exposed to contagion, or who came from places believed to be infected, and particularly children attending the public schools, shall submit to vaccination, under the direction of health authorities. This requirement is a constitutional exercise of the police power of the State, which can be sustained as a precautionary measure in the interest of the public health. But, as incidental to their general powers relating to the prevention of contagious diseases, the health authorities have the right to prescribe regulations with reference to vaccination, and they may require vaccination whenever, in their judgment, the interest of the public health will thereby be subserved. To this end, they are authorized, and even directed, to provide a suitable supply of fresh vaccine virus, of a quality and from sources either approved by the state board of health, or in their own judgment proper and reliable, and to furnish the means of thorough and safe vaccination to all persons who may need the same, and without charge to such persons as are unable to pay for the same. This does not mean that the health authorities must, themselves, attend to the vaccination of those who need it, but that they must provide the means of vaccination, by furnishing supplies of vaccine virus and employing competent physicians.<sup>7</sup>

In support of these legal principles, which have been cited with approval in later court decisions,<sup>8</sup> these authors refer to several of the earlier cases on vaccination.<sup>9</sup>

The prevailing medical viewpoint on vaccination has been stated by Rosenau as follows:

Vaccination affords a high degree of immunity to the individual, and a well-nigh perfect protection to the community. To remain unvaccinated is selfish in that by so doing a person steals a certain measure of protection from the community on account of the barrier of vaccinated persons around him.

7. L. Parker and R. H. Worthington, *The Law of Public Health and Safety*, Albany, Bender, 1892.

8. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 80 A.S.R. 195, 50 L.R.A. 64.

9. *Abeel v. Clark* (1890), 84 Cal. 226, 24, P. 383. *Hazen v. Strong* (1830), 2 Vt. 427. *Fort Wayne v. Rosenthal* (1881), 75 Ind. 156, 39 Am. R. 127.

Theoretically it would be ideal if all persons submitted to vaccination and revaccination voluntarily. But experience has shown that this is impractical, and, wherever tried, has failed. The best results have always been obtained where vaccination has been required, and, in my judgment, this is the only present means by which smallpox may be eliminated.<sup>10</sup>

### *Compulsory Vaccination*

The constitutionality of statutes requiring general vaccination was decisively settled by the United States Supreme Court in a notable decision handed down in 1905.<sup>11</sup> In this case there was involved an act of the Massachusetts legislature empowering boards of health to require vaccination of the general populace when considered necessary. The law also stated that children might be exempt from the requirement when in the opinion of a physician the process would be undesirable, but it made no mention of such an exemption for adults. The boards of health were likewise directed to furnish free vaccine.

Acting under this state law, a city board of health adopted a regulation declaring that smallpox was prevalent in the city and ordering that all inhabitants who had not been vaccinated should be vaccinated. A court action challenging the validity of this board of health regulation was brought by an opponent of vaccination, but the regulation was upheld by the Supreme Judicial Court of Massachusetts,<sup>12</sup> whereupon an appeal was taken to the United States Supreme Court on constitutional grounds. It was alleged, among other things, that the law contravened the Preamble of the Federal Constitution, was inconsistent with the spirit of the entire instrument, and violated the bill of rights of individual citizens.

These contentions were dismissed as fallacious by the United States Supreme Court in a brilliant opinion delivered by Mr. Justice Harlan. It was pointed out by the court that the care of the public health forms a part of the police power of the States; that it is the duty and function of the state legislature, and not of the courts, to decide in the first instance, in view of all the facts and opposing theories, whether general vaccination is or is not desirable for the protection of the public health; that the determination as to what should be done in an emergency, such as the existence of smallpox, must be made by some appropriate body, and that the board of health is the logical

10. M. J. Rosenau, *Preventive Medicine and Hygiene*, 6th ed., New York, Appleton-Century, 1935.

11. *Jacobson v. Massachusetts* (1905), 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 8 Ann. Cas. 765. See Appendix I, page 359.

12. *Comm. v. Jacobson* (1903), 183 Mass. 242, 66 N.E. 719, 67 L.R.A. 935.



agency; and that since the defendant in this case was not shown by the evidence to be other than a fit subject for vaccination, he must obey this law as a reasonable and proper exercise of the police power. Said the Court:

The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of the principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

In its opinion, the court also referred to a case which had been recently decided in New York, in which the Court of Appeals of that State had upheld the exclusion of children from school unless vaccinated, and in which the New York court had declared that, while it did not and could not decide that vaccination was a preventive of smallpox, it could and did take judicial notice of the fact that this is the common belief of the people of the State.<sup>13</sup>

Again, in 1922, the United States Supreme Court had before it a question involving the constitutionality of a city ordinance requiring vaccination, in this instance as a prerequisite for attendance at school.<sup>14</sup> The ordinance had been sustained as valid by a Texas Court of Civil Appeals,<sup>15</sup> but the decision was appealed on the grounds that the ordinance deprived the plaintiff of liberty without due process of law, in violation of the Federal Constitution.

In dismissing this appeal and upholding the constitutionality of the ordinance, Mr. Justice Brandeis stated for the United States Supreme Court that:

Long before this suit was instituted, *Jacobson v. Massachusetts*, 197 U.S. 11, had settled that it is within the police power of a State to provide for compulsory vaccination. That case and others had also

13. *Viemeister v. White* (1904), 179 N.Y. 235, 72 N.E. 97, 103 A.S.R. 859, 1 Ann. Cas. 334, 70 L.R.A. 796. In *Re Smith* (1895), 146 N.Y. 68, 40 N.E. 497, 28 L.R.A. 820, 48 A.S.R. 769, it was held that a city health officer could not order the vaccination or quarantine of persons not actually exposed to smallpox. Judicial notice of vaccination as effective immunization against smallpox was also taken in *Booth v. Board of Education* (Tex. 1934), 70 S.W. (2d) 350.

14. *Zucht v. King* (1922), 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194.

15. *Zucht v. King* (1920), 225 S.W. 267.

settled that a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative. *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358. And still others had settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law. *Lieberman v. Van de Carr*, 199 U.S. 552. A long line of decisions by this Court had also settled that in the exercise of the police power reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing. *Adams v. Milwaukee*, 228 U.S. 572, *Miller v. Wilson*, 236 U.S. 373, 384. In view of these decisions we find in the record no question as to the validity of the ordinance sufficiently substantial to support the writ of error. Unlike *Yick Wo v. Hopkins*, 118 U.S. 356, these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.

State laws authorizing political subdivisions of the State to require general vaccination when conditions warrant such action have likewise been sustained as valid by the highest courts in Georgia<sup>16</sup> and North Carolina,<sup>17</sup> and a United States District Court has refused to enjoin the operation of a state law requiring vaccination of school children, excluding from school those who were not vaccinated, and imposing a penalty for failure to attend school.<sup>18</sup>

While these decisions sanction and uphold the right of the State to make general vaccination compulsory when deemed necessary by a responsible and competent administrative board or agency, no court has ever ruled that any person may be forcibly vaccinated at any time. Such a drastic requirement would be an unreasonable interference with personal liberty. Compulsory vaccination means that all persons may be required to submit to vaccination for the common good, and that if they refuse to do so without adequate reason entitling them to legitimate exemption under the law, they may be arrested, fined, imprisoned, quarantined, isolated, or excluded from school, according to the appropriate circumstances in the particular case; but they cannot be forcibly vaccinated, desirable as such a procedure might be from the standpoint of public health protection. If there exists an alternative procedure that will be equally efficacious in protecting the public health, such as quarantine, it must be adopted in cases of recalcitrant and misguided opponents of vaccination.

16. *Morris v. City of Columbus* (1898), 102 Ga. 792, 30 S.E. 850, 42 L.R.A. 175, 66 A.S.R. 243.

17. *State v. Hay* (1900), 126 N.C. 999, 35 S.E. 459, 49 L.R.A. 588, 78 A.S.R. 691.

18. *Gillin v. Board of Education of Philadelphia* (1918), 250 F. 649.

*The Vaccination of School Children*

When a state legislature decides that vaccination shall be required as a prerequisite to attendance at school and adopts specific legislation to that effect, such a requirement is a proper exercise of the police power of the State. Legislation of this nature has been upheld as valid by the courts in California,<sup>19</sup> New Hampshire,<sup>20</sup> New York,<sup>21</sup> Pennsylvania<sup>22</sup> and Washington.<sup>23</sup>

So, too, where a state law authorizes municipalities, boards of health, or boards of education to require vaccination of school children when deemed necessary and desirable and to exclude unvaccinated children from school, such laws also represent a constitutional exercise of the police power of the State, and have been upheld by the courts in Alabama,<sup>24</sup> Connecticut,<sup>25</sup> Georgia,<sup>26</sup> Illinois,<sup>27</sup> Mississippi,<sup>28</sup> Ohio,<sup>29</sup> and Texas.<sup>30</sup>

19. *Abeel v. Clark* (1890), 84 Cal. 226, 24 P. 383. *French v. Davidson* (1904), 143 Cal. 658, 77 P. 663. *State Board of Health v. Trustees of Watsonville School District* (1910), 13 Cal. App. 514, 110 P. 137.

20. *Barber v. School Board of Rochester* (1926), 82 N.H. 426, 135 A. 159. *Cram v. School Board of Manchester* (1926), 82 N.H. 495, 136 A. 263. *Covey v. Robinson* (1930), 84 N.H. 439, 152 A. 279. *State v. Drew* (1937), — N.H. —, 192 A. 629.

21. *Re Walters* (1895), 84 Hun 457, 32 N.Y.S. 322. *Viemeister v. White* (1904), 179 N.Y. 235, 72 N.E. 97, 70 L.R.A. 796, 103 A.S.R. 859, 1 Ann. Cas. 334. *People v. Ekerold* (1914), 211 N.Y. 386, 105 N.E. 670, L.R.A. 1915 D 223, 37 Ann. Cas. 552. *Re Whitmore* (1944), 47 N.Y.S. (2d) 143. A decision of the Domestic Relations Court holding that the vaccination requirement for school children is not an interference with freedom of religion.

22. *Field v. Robinson* (1901), 198 Pa. 638, 48 A. 873. *Stull v. Reber* (1906), 215 Pa. 156, 64 A. 419, 7 Ann. Cas. 415. *Comm. ex rel. Carson v. Rowe* (1907), 218 Pa. 168, 67 A. 56. *Lee v. Marsh* (1911), 230 Pa. 351, 79 A. 564. *Marsh v. Earle* (Pa. 1938), 24 F. Supp. 385. *In re Marsh* (1940), 140 Pa. Super. 472, 14 A. (2d) 368.

23. *State ex rel. McFadden v. Shorrock* (1909), 55 Wash. 208, 104 P. 214. *State ex rel. Lehman v. Partlow* (1922), 119 Wash. 316, 205 P. 420.

24. *Herbert v. Demopolis School Board* (1916), 197 Ala. 617, 73 So. 321.

25. *Bissell v. Davtson* (1894), 65 Conn. 183, 32 A. 348, 29 L.R.A. 251.

26. *Morris v. City of Columbus* (1898), 102 Ga. 792, 30 S.E. 850, 42 L.R.A. 175, 66 A.S.R. 243.

27. *Hagler v. Lerner* (1918), 284 Ill. 547, 120 N.E. 575.

28. *Hartman v. May* (1934), 168 Miss. 477, 151 So. 737, 93 A.L.R. 1408. See 93 *American Law Reports* 1413 for a comprehensive article on vaccination of school children.

(Continued on next page.)

If such powers of local health or educational authorities may properly and reasonably be implied from general health legislation, the exclusion of unvaccinated children from school will likewise be upheld, according to decisions in Michigan,<sup>31</sup> Minnesota,<sup>32</sup> and Missouri.<sup>33</sup>

In the absence of state legislation specifically requiring the vaccination of school children, or delegating the power to require it to the political subdivisions of the State, a somewhat more difficult legal question arises. If, however, smallpox is present in a State or in a community, the decisions of the courts of last resort in this country uniformly sustain the right of public health authorities and/or educational authorities to adopt reasonable regulations for the vaccination of school children and the exclusion of the unvaccinated from school. In the presence of an emergency, such as an epidemic or threatened epidemic of smallpox, this action is justified under the general powers of health authorities to prevent and control dangerous contagious diseases, and to take all necessary measures for the protection of the public health.

In accordance with this principle, rules and regulations of state health departments making vaccination a prerequisite to school attendance when smallpox is present have been upheld as valid by the courts in Arkansas,<sup>34</sup> Indiana,<sup>35</sup> Kentucky,<sup>36</sup> and South Dakota.<sup>37</sup> Similarly, the regulations of local boards of health to this same effect, when smallpox is present, have been pronounced lawful and valid by the

29. *State ex rel. Milhoof v. Board of Education of Barberton* (1907), 76 Oh. St. 297, 81 N.E. 568, 10 Ann. Cas. 879.

30. *Zucht v. San Antonio School Board* (Tex. 1914), 170 S.W. 840. *Staffel v. San Antonio School Board* (Tex. 1918), 201 S.W. 413. *Zucht v. King* (Tex. 1920), 225 S.W. 267; affirm. in 260 U.S. 174. *City of New Braunfels v. Waldschmidt* (1918), 109 Tex. 302, 207 S.W. 303.

31. *People ex rel. Hill v. Board of Education of City of Lansing* (1923), 224 Mich. 388, 195 N.W. 95.

32. *State ex rel. Freeman v. Zimmerman* (1902), 86 Minn. 353, 90 N.W. 783, 58 L.R.A. 78, 91 A.S.R. 351. *Bright v. Beard* (1916), 132 Minn. 375, 157 N.W. 501, Ann. Cas. 1918 A. 399.

33. *Re Rebenack* (1895), 62 Mo. App. 8. *State ex rel. O'Bannon v. Cole* (1909), 220 Mo. 697, 119 S.W. 424, 22 L.R.A. (N.S.) 986.

34. *State v. Martin* (1918), 134 Ark. 420, 204 S.W. 622.

35. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 50 L.R.A. 64, 80 A.S.R. 195.

36. *Board of Trustees of Highland Park School District v. McMurtry* (1916), 169 Ky. 457, 184 S.W. 390. *Hill v. Bickers* (1916), 171 Ky. 703, 188 S.W. 766.

37. *Glover v. Board of Education of Lead* (1900), 14 S.D. 139, 84 N.W. 761.

highest courts in Arkansas,<sup>38</sup> Indiana,<sup>39</sup> Kentucky,<sup>40</sup> Michigan,<sup>41</sup> Minnesota,<sup>42</sup> and Utah;<sup>43</sup> and local school board or board of education requirements for vaccination under the same conditions (no direct statutory authority, but smallpox prevalent) have been held good by courts in Missouri,<sup>44</sup> North Carolina,<sup>45</sup> Pennsylvania,<sup>46</sup> South Dakota,<sup>47</sup> and Texas.<sup>48</sup>

The determination by a board of health that smallpox is present in sufficient prevalence to justify vaccination requirements is conclusive, in the absence of bad faith, according to an Indiana decision;<sup>49</sup> and a school child actually exposed to smallpox may be required to be vaccinated even when there is a state law prohibiting general compulsory vaccination.<sup>50</sup>

The regents of a state university have the right to require successful vaccination as a condition precedent to entrance to the university even in the absence of direct statutory authority to this effect, according to two decisions of the District Court of Appeals of California.<sup>51</sup>

38. *Auten v. School Board of Little Rock* (1907), 83 Ark. 431, 104 S.W. 130.

39. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 50 L.R.A. 64, 80 A.S.R. 195. *State ex rel. Horne v. Bell* (1901), 157 Ind. 25, 60 N.E. 672.

40. *Highland Park v. McMurtry* (1916), 169 Ky. 457, 184 S.W. 390. *Hill v. Bickers* (1916), 171 Ky. 703, 188 S.W. 766.

41. *People ex rel. Hill v. Board of Education of City of Lansing* (1923), 224 Mich. 388, 195 N.W. 95.

42. *State ex rel. Freeman v. Zimmerman* (1902), 86 Minn. 353, 90 N.W. 783, 58 L.R.A. 78, 91 A.S.R. 351.

43. *State ex rel. Cox v. Board of Education of Salt Lake City* (1900), 21 Utah 401, 60 P. 1013.

44. *Re Rebenack* (1895), 62 Mo. App. 8. *State ex rel. O'Bannon v. Cole* (1909), 220 Mo. 697, 119 S.W. 424, 22 L.R.A. (N.S.) 986.

45. *Hutchins v. School Committee of Town of Durham* (1904), 137 N.C. 68, 49 S.E. 46. *Morgan v. Stewart* (1907), 144 N.C. 424, 57 S.E. 149.

46. *Duffield v. Williamsport School District* (1894), 162 Pa. 476, 29 A. 742, 25 L.R.A. 152. *Comm. ex rel. Schaffer v. Wilkins* (1922), 271 Pa. 523, 115 A. 887.

47. *Glover v. Board of Education of Lead* (1900), 14 S.D. 139, 84 N.W. 761.

48. *McSween v. School Trustees of City of Fort Worth* (1910), 60 Tex. C.A. 270, 129 S.W. 206. *Staffel v. San Antonio School Board* (Tex. 1918), 201 S.W. 413. *Johnson v. Dallas* (Tex. 1927), 291 S.W. 972. *Christman v. Tompkins* (Tex. 1928), 5 S.W. (2d) 257.

49. *Vonnegut v. Baun* (1934), 206 Ind. 172, 188 N.E. 677.

50. *Bright v. Beard* (1916), 132 Minn. 375, 157 N.W. 501, Ann. Cas. 1918 A 399.

51. *Williams v. Wheeler* (1913), 23 Cal. App. 619, 138 P. 937. *Wallace v. Regents of University of California* (1925), 75 Cal. App. 274, 242 P. 892.

In a comprehensive and able discussion of the power of local health departments to require vaccination of school children or their exclusion from school when smallpox is present, the Supreme Court of Indiana pointed out in a leading case<sup>52</sup> that, while there was no express statute in the State making vaccination compulsory, boards of health were properly vested with the power of making rules and regulations under legislative authority. Said the court:

This being true, and an emergency on the account of danger from smallpox having arisen, and the board believing, as we may assume, that the disease would spread through the public schools, and further believing that it would be prevented, or its bad effects lessened, by the means of vaccination, and thereby afford protection to the pupils of such schools and the community in general, it would certainly have the right, under the authority with which it was invested by the State, to require, during the continuance of such danger, that no unvaccinated child be allowed to attend the public schools; or the board might, under the circumstances, in its discretion, direct that the schools be temporarily closed during such emergency, regardless of whether or no the pupils thereof refused to be vaccinated. If vaccination was the most effective means of preventing the spread of the disease through the public schools,—and this the local board seems to have determined,—it then became, not only the right, but the duty, of the board to require that the pupils of such schools be vaccinated, as a sanitary condition imposed upon their privilege of attending the schools during the period of the threatened epidemic of smallpox.

This court pointed out, moreover, that the local board of health did not attempt, by its order, to compel the appellant's son to be vaccinated, but gave him the option or choice of either being vaccinated or remaining out of school until the danger had passed. "Surely," declared the court, "there can be no substantial agreement advanced adverse to the reasonableness of a rule or order of health officials which is intended and calculated to protect, in a time of danger, all school children, and the families of which they form a part, from smallpox or other infectious diseases."

State laws requiring vaccination of school children or of the general populace, or authorizing local boards of health or education to make such requirements, form a valid exercise of the police power of the State, regardless of whether smallpox is actually present or not.

When no cases of smallpox are present in a community and no imminent danger of the disease exists, and there is no state law directly or impliedly authorizing compulsory vaccination, local boards of health

52. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 50 L.R.A. 64, 80 A.S.R. 195.

may, nevertheless, adopt and enforce reasonable vaccination requirements for school children, according to the decisions in some States. In the absence of specific legislation, or the presence of an emergency, this power has been denied in other States. Only on this aspect of vaccination are the decisions of the courts at variance and in conflict.

Thus, in a number of early cases in Illinois,<sup>53</sup> Kansas,<sup>54</sup> Michigan,<sup>55</sup> and Wisconsin,<sup>56</sup> it was held that in the absence of statutory authority vaccination could not be required by state or local authorities when no cases of smallpox were present in the schools or in the community. To the same effect is a somewhat later decision in North Dakota.<sup>57</sup> The Illinois courts have also held invalid, as unreasonable, orders of a city health commissioner declaring smallpox to be epidemic in a certain district and requiring vaccination of all school children before admission to school.<sup>58</sup> In Iowa, a city ordinance making it unlawful to admit unvaccinated pupils to school was held invalid, but only on the technical ground that its subject was not clearly expressed in its title as required by law.<sup>59</sup> In Georgia, it has been held that an order by a school attendance officer for vaccination of pupils was void because such an order was beyond the scope of his authority.<sup>60</sup>

Contrary to the decisions holding that vaccination cannot be required by local authorities when no smallpox exists are a number of cases in other States, notably Arkansas<sup>61</sup> and Mississippi,<sup>62</sup> in which

53. *Potts v. Breen* (1897), 167 Ill. 67, 47 N.E. 81, 39 L.R.A. 152, 59 A.S.R. 262. *People ex rel. Lawbaugh v. Board of Education* (1899), 177 Ill. 572, 52 N.E. 850.

54. *Osborn v. Russell* (1902), 64 Kan. 507, 68 P. 60.

55. *Mathews v. Kalamazoo Board of Education* (1901), 127 Mich. 530, 86 N.W. 1036, 54 L.R.A. 736.

56. *State v. Burdge* (1897), 95 Wis. 390, 70 N.W. 347, 37 L.R.A. 157, 60 A.S.R. 123.

57. *Rhea v. Board of Education of Devils Lake* (1919), 41 N.D. 449, 171 N.W. 103. See *Clowes v. Edmonton School Board* (1915), 9 Alb. L.R. 106, 25 D.L.R. 449.

58. *People ex rel. Jenkins v. Board of Education of City of Chicago* (1908), 234 Ill. 422, 84 N.E. 1046, 17 L.R.A. (N.S.) 709, 14 Ann. Cas. 943. *Burroughs v. Mortensen* (1924), 312 Ill. 163, 143 N.E. 457.

59. *Tones v. Independent School District of Des Moines* (1920), 190 Ia. 244, 180 N.W. 157. The Supreme Court of Iowa refused to enjoin the exclusion of an unvaccinated child from school in *Baehne v. School District of Manly* (1926), 201 Ia. 625, 207 N.W. 755.

60. *Sherman v. Board of Education* (1928), 165 Ga. 889, 142 S.E. 152.

61. *State v. Martin* (1918), 134 Ark. 420, 204 S.W. 622.

62. *Hartman v. May* (1934), 168 Miss. 477, 151 So. 737, 93 A.L.R. 1408.

it has been held that ordinances requiring vaccination as a prerequisite to attendance at school are reasonable even when no smallpox is present and there is no specific legislation on this subject.

### *Methods of Vaccination*

Since compulsory vaccination is a legitimate exercise of the police power of the State in the interests of the public health, it logically follows that the proper methods of vaccination may be prescribed by health authorities. Thus, when the regulations called for introduction of the bovine virus into the skin by scarification, it has been held in decisions in Arkansas,<sup>63</sup> Pennsylvania,<sup>64</sup> and Texas<sup>65</sup> that the homeopathic method of administering vaccine, by giving it internally, was not a compliance with the vaccination requirement.

The term "successful vaccination" has been construed by the Supreme Court of Washington to mean a case in which the customary reaction has been obtained by the operation, or when three operations have been performed without obtaining the reaction.<sup>66</sup>

Requirements that the vaccination be performed by a licensed physician are also valid,<sup>67</sup> but where a certificate of unfitness for vaccination was required from a registered physician practicing in the town in which the child resides, such a certificate issued by a licensed physician who resided in a neighboring community but conducted a practice in the town where the child resided would usually be satisfactory, although the determination as to the validity of the certificate is the proper function of the health authorities.<sup>68</sup>

In some States, it has been ruled by the attorney general or other administrative officers that osteopaths and chiropractors are not authorized under the laws to perform vaccinations or administer antitoxin and similar biological products. An unvaccinated drugless healer, licensed to practice his profession, is not exempt from vaccination and if exposed to smallpox must either be vaccinated or submit to quarantine, according to a leading decision of the Supreme Court of Washington.<sup>69</sup>

63. *Brazil v. State* (1918), 83 Ark. 431, 104 S.W. 130. *Allen v. Ingalls* (1931), 182 Ark. 991, 33 S.W. (2d) 1099.

64. *Lee v. Marsh* (1911), 230 Pa. 351, 79 A. 564.

65. *Abney v. Fox* (Tex. 1923), 250 S.W. 10.

66. *State ex rel. McFadden v. Shorrock* (1909), 55 Wash. 208, 104 P. 214.

67. *Vonnegut v. Baun* (1934), 206 Ind. 172, 188 N.E. 677.

68. *Covey v. Robinson* (1930), 84 N.H. 439, 152 A. 279.

69. *City of Seattle v. Cottin* (1927), 144 Wash. 572, 258 P. 520.



*Vaccination Certificates*

Certificates showing that a child or other person has been successfully vaccinated or is an unfit subject for vaccination may be required from licensed physicians by the health authorities.<sup>70</sup> A child having a certificate of unfitness for vaccination may, nevertheless, be excluded from school in times of emergency, such as an outbreak of smallpox.<sup>71</sup> New certificates may also be required routinely or whenever in the opinion of the health or school authorities these are desirable.<sup>72</sup>

*Expenses of Vaccination*

Many States have laws providing that vaccine shall be furnished free and vaccinations performed at public expense, although the classes of persons allowed this service vary in different jurisdictions. Thus, in the earliest of the cases on vaccination, decided in Vermont in 1830,<sup>73</sup> it was held that the selectmen of a town had the power to employ a physician to vaccinate exposed inhabitants of the town; and in another early case, decided in New Hampshire in 1853,<sup>74</sup> town authorities were upheld in their employment of a physician to administer vaccination, even though in this particular case the family was not indigent. The duty of a city, rather than a county, to pay for free vaccinations given to approximately 10,000 school children, teachers, and janitors under authorization of a state law, has also been upheld in Michigan.<sup>75</sup>

A county medical society and certain individual physicians were denied an injunction by the Alabama Supreme Court to enjoin the payment of fees to a physician by the county commissioners, for services rendered on a contract between the physician and the county whereby he vaccinated persons to prevent the spread of smallpox in the county.<sup>76</sup>

70. *Lee v. Marsh* (1911), 230 Pa. 351, 79 A. 564.

71. *Hammond v. Town of Hyde Park* (1907), 195 Mass. 29, 80 N.E. 650.

72. *Spofford v. Carlton* (1921), 238 Mass. 528, 131 N.E. 314. *Barber v. School Board* (1926), 82 N.H. 426, 135 A. 159. *Commonwealth v. Childs* (1938), 299 Mass. 367, 12 N.E. (2d) 814.

73. *Hazen v. Strong* (1830), 2 Vt. 427.

74. *Wilkinson v. Albany* (1853), 28 N.H. 9. *McIntire v. Pembroke* (1873), 53 N.H. 462.

75. *Keho v. Board of Auditors of Bay County* (1926), 235 Mich. 163, 209 N.W. 163. See *Thomas v. Mason* (1894), 39 W. Va. 526, 20 S.E. 580, 26 L.R.A. 727, holding that a town must pay for medical treatment of smallpox.

76. *Commissioners' Court of Perry County v. Medical Society of Perry County* (1900), 128 Ala. 257, 29 So. 536.

In Maryland<sup>77</sup> and South Carolina,<sup>78</sup> counties have been held liable for payment of fees to physicians for vaccinations performed under state laws authorizing counties to provide such free services, but in Georgia a decision has been handed down to the effect that counties have no power to purchase vaccine<sup>79</sup> and that they are without authority to pay for vaccinations or for the treatment of smallpox patients.<sup>80</sup>

Where a city board of health employs one of its own members to vaccinate indigent pupils, the city has no liability to pay for such services by one of its own officials, according to an early decision in Indiana.<sup>81</sup> Under existing statutes in many States, however, a board of health may authorize the health officer, when he is a licensed physician, to perform vaccinations for reasonable compensation, provided that the board considers such services to be extraordinary.

### *Conflicts with Compulsory Education Laws*

Since all children of school age are entitled to an education and usually are required to attend school up to a certain age, but may be excluded from school for failure to be vaccinated, the question arises as to whether such exclusion is a proper defense against prosecution under compulsory education laws.

In a New York case the Court of Appeals has decided that exclusion of a child from school for refusal to comply with a law requiring vaccination is no defense to a prosecution of a parent for failure to cause attendance of the child at school.<sup>82</sup> But in Ohio a lower court has held that a parent, who is willing to send his child to school but cannot because the child is excluded for failure to comply with a rule of the board of education requiring vaccination, may not be convicted under the compulsory education act.<sup>83</sup> On the other hand, another lower court in Ohio, while upholding this same principle, nevertheless ruled that a child deprived of schooling because of failure to be vaccinated thereby becomes a dependent, for which the person responsible, such as the parent, may be prosecuted.<sup>84</sup>

77. *County Commissioners v. McClintock* (1883), 60 Md. 559.

78. *Mathias v. Lexington County* (1908), 79 S.C. 402, 60 S.E. 970.

79. *Daniel v. Putnam County* (1901), 113 Ga. 570, 38 S.E. 980, 54 L.R.A. 292.

80. *Barksdale v. Hayes* (1910), 134 Ga. 348, 67 S.E. 852.

81. *Fort Wayne v. Rosenthal* (1881), 75 Ind. 156, 39 Am. R. 127.

82. *People v. Ekerold* (1914), 211 N.Y. 386, 105 N.E. 670, L.R.A. 1915 D 223, 37 Ann. Cas. 552. *People v. McIlwain* (1915), 151 N.Y.S. 366. See *Comm. v. Green* (1929), 268 Mass. 585, 168 N.E. 101.

83. *State v. Turney* (1909), 12 Oh. C.C. (N.S.) 33, 31 Oh. C.C. 222.

84. *In re Hargy* (1920), 23 Oh. N.P. (N.S.) 129.

*Injuries Caused by Vaccination*

Although millions of persons have been successfully vaccinated without injury, the operation may occasionally result in injury since the wound is subject to the same possibilities of infection that may occur in any wound which is negligently or improperly cared for.

Thus, it has been held in Ohio that an infection following vaccination of a worker by a company physician is such an unusual occurrence that it will be compensable as an accident under workmen's compensation laws,<sup>85</sup> and there have been decisions to similar effect in Michigan<sup>86</sup> and Texas.<sup>87</sup> Where, however, an industrial concern offered to have its employees vaccinated without charge in the company hospital, pursuant to a recommendation of a city board of health, and injury resulted in one instance, it was held by the Connecticut Supreme Court of Errors that since the vaccination was optional and voluntary the injury was not compensable under the workmen's compensation act of that State.<sup>88</sup>

A minor, aged seventeen, who was employed by a railroad company and was vaccinated by the company physician, suffered an injury. It was held by the Mississippi Supreme Court that, although he was employed without parental consent, he could not sue under a statute making employment unlawful, since it was shown by the evidence that he had sufficient intelligence to understand and appreciate the consequences of vaccination, and since his parents, knowing of his employment, interposed no objections to the vaccination.<sup>89</sup> A steamship company has likewise been held not liable for vaccination of a passenger by a ship's surgeon, where such vaccination was necessary and desirable.<sup>90</sup>

A municipal corporation is not liable for negligence in enforcing a compulsory vaccination ordinance even when a person who is vaccinated is injured by impure vaccine, since the municipality is acting

85. *Spicer Mfg. Co. v. Tucker* (1934), 127 Oh. St. 421, 188 N.E. 870.

86. *Neudeck v. Ford Motor Co.* (1930), 249 Mich. 690, 229 N.W. 438. *Krout v. J. L. Hudson Co.* (1918), 200 Mich. 287, 166 N.W. 848, L.R.A. 1918 F 860.

87. *Texas Employers Insur. Ass'n v. Mitchell* (Tex. 1930), 27 S.W. (2d) 600.

88. *Smith v. Seamless Rubber Co.* (1930), 111 Conn. 365, 150 A. 110, 69 A.L.R. 856. *Jefferson Printing Co. v. Ind. Comm.* (1924), 312 Ill. 575, 144 N.E. 356.

89. *Gulf & S.I.R. Co. v. Sullivan* (1928), 155 Miss. 1, 119 So. 501. *McAuliffe v. State* (1919), 176 N.Y.S. 679, 107 Misc. 553.

90. *O'Brien v. Cunard S.S. Co.* (1891), 154 Mass. 272, 28 N.E. 266, 13 L.R.A. 329.

*Injuries Caused by Vaccination*

Although millions of persons have been successfully vaccinated without injury, the operation may occasionally result in injury since the wound is subject to the same possibilities of infection that may occur in any wound which is negligently or improperly cared for.

Thus, it has been held in Ohio that an infection following vaccination of a worker by a company physician is such an unusual occurrence that it will be compensable as an accident under workmen's compensation laws,<sup>85</sup> and there have been decisions to similar effect in Michigan<sup>86</sup> and Texas.<sup>87</sup> Where, however, an industrial concern offered to have its employees vaccinated without charge in the company hospital, pursuant to a recommendation of a city board of health, and injury resulted in one instance, it was held by the Connecticut Supreme Court of Errors that since the vaccination was optional and voluntary the injury was not compensable under the workmen's compensation act of that State.<sup>88</sup>

A minor, aged seventeen, who was employed by a railroad company and was vaccinated by the company physician, suffered an injury. It was held by the Mississippi Supreme Court that, although he was employed without parental consent, he could not sue under a statute making employment unlawful, since it was shown by the evidence that he had sufficient intelligence to understand and appreciate the consequences of vaccination, and since his parents, knowing of his employment, interposed no objections to the vaccination.<sup>89</sup> A steamship company has likewise been held not liable for vaccination of a passenger by a ship's surgeon, where such vaccination was necessary and desirable.<sup>90</sup>

A municipal corporation is not liable for negligence in enforcing a compulsory vaccination ordinance even when a person who is vaccinated is injured by impure vaccine, since the municipality is acting

85. *Spicer Mfg. Co. v. Tucker* (1934), 127 Oh. St. 421, 188 N.E. 870.

86. *Neudeck v. Ford Motor Co.* (1930), 249 Mich. 690, 229 N.W. 438. *Krout v. J. L. Hudson Co.* (1918), 200 Mich. 287, 166 N.W. 848, L.R.A. 1918 F 860.

87. *Texas Employers Insur. Ass'n v. Mitchell* (Tex. 1930), 27 S.W. (2d) 600.

88. *Smith v. Seamless Rubber Co.* (1930), 111 Conn. 365, 150 A. 110, 69 A.L.R. 856. *Jefferson Printing Co. v. Ind. Comm.* (1924), 312 Ill. 575, 144 N.E. 356.

89. *Gulf & S.I.R. Co. v. Sullivan* (1928), 155 Miss. 1, 119 So. 501. *McAuliffe v. State* (1919), 176 N.Y.S. 679, 107 Misc. 553.

90. *O'Brien v. Cunard S.S. Co.* (1891), 154 Mass. 272, 28 N.E. 266, 13 L.R.A. 329.

250 POWERS AND DUTIES OF HEALTH DEPARTMENTS

in a governmental capacity, according to decisions in Georgia,<sup>91</sup> Pennsylvania,<sup>92</sup> and South Carolina.<sup>93</sup>

91. *Wyatt v. City of Rome* (1898), 105 Ga. 312, 31 S.E. 188, 42 L.R.A. 180, 70 A.S.R. 41.

92. *Howard v. City of Philadelphia* (1915), 250 Pa. 184, 95 A. 388, L.R.A. 1916 B 917.

93. *Sandell v. South Carolina* (1922), 104 S.C. 567, 119 S.E. 776. See Chapter XVII, on Liability of Municipal Corporations.



## CHAPTER XV

### SCHOOL HYGIENE

**S**CHOOL health activities have been acknowledged for many years as a legitimate part of the educational system in this country. Reasonable efforts by public health and public school authorities to prevent communicable diseases among school children and to promote the general health of pupils by means of physical education, health teaching, proper nutrition, and other scientific procedures are recognized as forming a proper and valid exercise of the police power of the State in the interests of the public health and general welfare.

To obtain an education is both a constitutional privilege and a legal duty. State constitutions provide for the establishment and maintenance of free common schools for all children, and state laws generally require that schooling shall be compulsory for all children up to a certain age, usually about sixteen years. Age must be shown by official birth certificates.

The Federal Government has no jurisdiction over schools, except government institutions such as the schools for noncitizen Indians and Eskimos, the United States Military and Naval Academies, and the public schools of the Territories and the District of Columbia. Under the terms of the Smith-Hughes Act of 1917 (20 U.S.C. 11-28) and subsequent acts, the Federal Government does, however, make grants to the States for vocational education and rehabilitation, allotting more than \$7,000,000 annually for this purpose. These laws are administered by the vocational division of the United States Office of Education of the Federal Security Agency, which cooperates with state boards of vocational education. There is also an Office of Vocational Rehabilitation in the Federal Security Agency.

Administration of public schools is generally delegated by state legislatures to local school districts under the direction of boards of education as duly constituted by law.<sup>1</sup> The local school authorities are also subject to supervision by state departments of education or public instruction.

As in the case of local boards of health, boards of education may be authorized to adopt rules and regulations<sup>2</sup> to carry out the purposes

1. N. Edwards, *The Courts and the Public Schools*, Chicago, University of Chicago Press, 1933.

2. *Allentown v. Wagner* (1906), 214 Pa. St. 210, 63 A. 697. *Nether Providence School Dist. v. Montgomery* (1916), 227 Pa. St. 370, 76 A. 75.

of educational legislation. These rules and regulations have the force and effect of law and may include health regulations.

### *School Health Activities*

In addition to the powers of boards of education which are derived, under the state constitutions, from legislation and charters, school authorities as political agents of the State may also exercise the police power of the State for the protection of the health of teachers, pupils, and all other persons coming within their jurisdiction.

This power may, however, be limited by legislative enactment. An example of such a limitation would be a law passed by a state legislature prohibiting the exclusion from school of any pupil for failure to be vaccinated. In the presence of an emergency due to the existence of an epidemic of smallpox, the exclusion of unvaccinated children from school as a necessary public measure would, nevertheless, be upheld regardless of such legislation.<sup>3</sup>

The school health activities now advocated by leading authorities in this field are concerned with both health protection and positive health promotion. They include such essential and desirable procedures as: 1) sanitation of the schoolhouse and its environment, including proper ventilation, lighting, seating, and adequate toilet, washing, and other sanitary facilities; 2) medical, nursing, dental, and psychological services for pupils, including periodic physical examinations, routine inspections to detect communicable diseases and physical defects, voluntary (or mandatory) immunization against diseases (smallpox, diphtheria, etc.), and quarantine or isolation where necessary; 3) health education of pupils; and, 4) physical education or training of pupils. Among other health activities recommended are nutritional services, mental hygiene, and special classes for the physically handicapped.<sup>4</sup>

School health services of this general nature have received legislative sanction since 1880, when every State adopted a law requiring the teaching of the physiological effects of alcohol and narcotics along with general hygiene.<sup>5</sup> After 1892, when Ohio made physical training a part of the school curriculum, laws were generally adopted requiring

3. Such laws have been adopted in a few States. See Chapter XIV, on Vaccination.

4. *Suggested School Health Policies*, American Medical Association, revised, 1945.

5. J. F. Rogers, *State-wide Trends in School Hygiene and Physical Education*, Pamphlet No. 5, U.S. Office of Education, (revised) 1941.



calisthenics, gymnastics, or physical education in the public schools. Medical inspection was first provided by law in Connecticut in 1899, although this statute called merely for eye examinations. After 1906, when Massachusetts adopted a law making general medical inspection of school children mandatory in all cities and towns, most of the States passed similar legislation or enacted permissive legislation on this subject.

### *Administration*

Legal provisions with regard to the administration of school health activities vary in the different States. Sometimes the administration of this work is vested by law solely in the school authorities, and sometimes it is given over entirely to the public health authorities. Occasionally, the laws provide for a division of authority between these two executive branches of the government, as where health departments are responsible for medical inspection of pupils and boards of education are responsible for physical training and health education of pupils.

There is some conflict of scientific opinion as to whether school health work should be controlled by educational authorities or public health officials, leaders in each field claiming the prerogative for their own profession.<sup>6</sup> The Committee on Administrative Practice of the American Public Health Association suggests a special division in health departments of cities of 100,000 population for the health supervision of school children, but makes the following recommendations:

The administration of this program may be vested wholly in the department of education, with its own separate staff of physicians, dentists, and nurses as well as health and physical education teachers. There are some advantages in this unity of service with a closer tie between the different branches; in the smaller cities particularly the department of education with its larger budget is often better organized to absorb this work than is the department of health. The argument is especially strong if the physical examination is regarded as an educational procedure. However, if the school department carries the complete responsibility it is important that the school health program be closely integrated with other health programs of the community, for no school health program can stand alone.

On the other hand, there are distinct advantages in separating the program into two parts. Classroom instruction and physical education may remain with the department of education, while the health service functions are carried out by the department of health. Under this ar-

6. W. G. Smillie, *Public Health Administration in the United States*, 2d ed., New York, Macmillan, 1940. White House Conference on Child Health and Protection: 1930, *The School Health Program*, New York, Century, 1932.

rangement the school health service becomes an integral part of the community health program with medical, dental, and generalized nursing service focused on health in its broader family aspects. This obviates the creation of two distinct medical, dental, and nursing administrations with the possibility of confusion in the approach to families. Also, if the service is under the health department it can be extended to parochial schools whereas otherwise separate services are usually necessary, one for the public schools under the department of education and one for the parochial schools under the health department. Furthermore, in counties with full-time health units, it is more practical to have the school health service administered by the department of health.

However school health services may be primarily administered, a joint conference committee on school health, with representation from both the department of education and the department of health (and including if possible the fields of sanitation, mental hygiene, health service, health instruction, and physical education), will prove helpful. Sometimes the chief school physician is appointed a deputy health officer.<sup>7</sup>

Where administration of school health activities is imposed by statute on local boards of education, the general public health laws and regulations of the community apply to the conduct of schools. If an actual or apparent conflict occurs, the public health laws must prevail, for health is more important to the general welfare than is education, although both are important.

In times of emergency, such as the occurrence of epidemics, all or some of the schools may be closed for the protection of the public health on order of the public health authorities,<sup>8</sup> unless the statutes have limited this power of health officials over schools.<sup>9</sup>

It is within the constitutional power of a State to provide by law for regulation of the manner of erection of school buildings in the interests of the public health,<sup>10</sup> and the legislature may also require that a site selected for a schoolhouse must be approved by both the county health officer and the county superintendent of schools.<sup>11</sup> When school buildings become a menace to health, they may be condemned

7. I. V. Hiscock, editor, *Community Health Organization*, 3d ed., New York, Commonwealth Fund, 1939.

8. *Globe School District v. Globe Board of Health* (1919), 20 Ariz. 208, 179 P. 55.

9. *Crane v. School District* (1920), 95 Ore. 644, 188 P. 712. See 140 *American Law Reports* 1048.

10. *Pasadena School District v. City of Pasadena* (1913), 166 Cal. 7, 134 P. 985, 47 L.R.A. (N.S.) 892, Ann. Cas. 1915 B 1039.

11. *State ex rel. Wildin v. Eickoff* (1929), 84 Mont. 539, 276 P. 954.

or ordered vacated by public health officials, although such orders may be appealed.<sup>12</sup>

In carrying out his legal duties, a local health officer has the right to enter the schools at any time for the purpose of investigating cases or suspected cases of communicable diseases, nuisances, or any other conditions that are or may be dangerous to the public health. A school board is responsible for public or private nuisances in the same manner that an individual or a municipal corporation is liable for such nuisances.<sup>13</sup>

### *Organization of School Health Work*

Statutes authorizing boards of education to expend monies in the interests of the public schools have been held by the courts to authorize the creation of health departments or health education services in the schools and the employment of medical inspectors, nurses, dietitians, and teachers of health and physical education.<sup>14</sup> Since the school authorities have the right and power to exercise sound discretion and judgment in performing and carrying out the duties and powers delegated to them by law, the maintenance of a system of medical inspection and health service is a valid and reasonable exercise of that discretion. The mere fact that primary responsibility for public health activities in a community is delegated to the board of health does not preclude a board of education from undertaking school health work unless such duties are forbidden by the statutes.

There is, however, a limit beyond which the school authorities cannot go in the maintenance of school health services. According to a decision of the Washington Supreme Court, a school board may conduct proper health activities, but under the law it cannot maintain clinics and purchase equipment in excess of that necessary for legitimate preventive medical and dental services and health education.<sup>15</sup> The function of school health work is to detect communicable diseases and physical defects so as to safeguard the health of all pupils, but it

12. *State Board of Health v. Ort* (1926), 84 Ind. App. 260, 151 N.E. 31.

13. See Chapter XIII, on Nuisances and Sanitation.

14. *State v. Brown* (1910), 112 Minn. 370, 128 N.W. 294. *Hallett v. Post Printing and Publishing Co.* (1920), 68 Colo. 573, 192 P. 658, 12 A.L.R. 919. *Mosely v. City of Dallas* (1929), 118 Tex. 461, 17 S.W. (2d) 36. *Board of Education of Bowling Green v. Simmons* (1932), 245 Ky. 493, 53 S.W. (2d) 940.

15. *McGilvra v. Seattle School District No. 1* (1921), 113 Wash. 619, 194 P. 817, 12 A.L.R. 913. *Prevey v. School District* (1933), 263 Mich. 622, 249 N.W. 15. *Board of Education of Cleveland v. School Dist.* (1941), 68 Oh. App. 514, 39 N.E. (2d) 196.

is not the function of the school to offer or give medical or dental treatment. Children needing medical, dental, or hospital care must be referred to private physicians and dentists or to appropriate public welfare officials, except, of course, in cases of emergency where temporary first aid measures may be necessary.

A physician engaged or appointed as a school medical inspector by a board of education or by a board of health is an employee and not a public officer. If, therefore, a medical inspector has a contract of employment for a stated period, he can recover the salary or compensation contracted for if he is dismissed without notice or cause before his contract expires.<sup>16</sup>

It is contrary to public policy for a board of education to appoint one of its own members as medical inspector of the schools over which he has jurisdiction as a board member.<sup>17</sup> The principle is the same as that which debar a board of health from appointing one of its own members as a quarantine physician,<sup>18</sup> and is predicated upon the established rule that no member of a municipal government may be interested directly or indirectly in a contract made by the municipality.

An osteopathic physician is not eligible to appointment as a medical inspector of schools, according to a New Jersey decision in which it was pointed out that a state law requiring boards of education to employ competent physicians as medical inspectors clearly was intended to mean licensed physicians having the degree of M.D.<sup>19</sup> The school law in question was adopted prior to the passage by the legislature of an osteopathy act, and its context was said by the court to indicate that the intention of the legislature was that only medical practitioners should be appointed to this position.

On the other hand, licensed osteopaths have been held by the District Court of Appeals in California to be entitled to be granted health and development certificates, which qualify the holders to perform certain health services in the schools.<sup>20</sup>

16. *Kosek v. Wilkes-Barre Tp. School District* (1933), 110 Pa. Super. 295, 168 A. 518, affirm. (1934) in 314 Pa. 18, 170 A. 279. See *Skladzien v. Bd. of Ed. of City of Bayonne* (1934), 115 N.J.L. 203, 178 A. 793.

17. *Barrett v. City of Medford* (1926), 254 Mass. 384, 150 N.E. 159.

18. *Gaw v. Ashley* (1907), 195 Mass. 173, 80 N.E. 790, 122 A.S.R. 229. See pages 92, 113.

19. *Chastney v. State Board of Education* (1929), 7 N.J. Misc. 385, 145 A. 730. See page 105.

20. *Jordt v. California State Board of Education* (1939), 35 Cal. App. 591, 96 P. (2d) 809.

*Physical Examinations of Pupils*

State legislatures may require or authorize boards of education to require physical examinations of all pupils by competent persons, at such times and in such places as are deemed necessary. Thus, physical examinations may be made prior to admission to school, at the beginning of the school year, before permitting the participation of pupils in athletics, and for readmission of pupils to school after absence because of communicable disease. In some instances, state laws of this nature provide that pupils whose parents object may be exempt from certain of these physical examinations.

In the absence of statutory authority, however, it has been held that a board of education may properly adopt a resolution requiring that at the beginning of each school year all children must obtain and furnish a certificate from a licensed physician reporting on their physical condition.<sup>21</sup> In this case, the required physical record could be secured either from a private physician at the parent's expense or without charge from the school physician. The announced purpose of the record was to protect the community and the pupils against the spread of contagious and infectious diseases.

In sustaining such an order of the board of education in a case brought by a parent who felt that the examination might cause some mental suggestion of disease which would be harmful, the Supreme Court of South Dakota stated that:

Under the regulation complained of, no person is excluded from school, except upon his own volition. Respondents [the board of education] merely seek to learn those things, concerning the mental and physical condition of the pupil, which they think useful and needful in the proper discharge of the functions of the school, and especially in the proper handling of the individual pupil. The report asked for would lead to the exclusion of the pupil only when it showed that the child was not of school age, that it was not a resident of the district, or, if the respondents so ordered, when it showed that the child was then suffering from some disease rendering it a menace to its associates.<sup>22</sup>

*Exclusion of Children from School*

School authorities, either acting on their own volition or on order of the public health authorities, may exclude from school any child who is suffering from a communicable disease, a suspected disease, or

21. *Streich v. Board of Education* (1914), 34 S.D. 169, 147 N.W. 779, L.R.A. 1915 A 632, Ann. Cas. 1917 A 760.

22. *Streich v. Board of Education*, *op. cit.*

any other mental or physical condition that causes the child to be dangerous or offensive to others.<sup>23</sup>

Where two children from one family were excluded from school on order of a county board of health because they were afflicted with trachoma, a dangerous communicable disease of the eyes, a writ of mandamus to compel their admission to school was refused even though evidence was presented to show that the children did not have trachoma.<sup>24</sup> The exclusion of children from school for venereal disease,<sup>25</sup> and also for pediculosis or head lice,<sup>26</sup> has likewise been upheld.

Where a child was excluded from school because of a sore throat and was refused readmission until she had furnished a negative report from a throat culture submitted to the division of public health of the city, and in addition was required to present a certificate from a physician as to the condition of her throat or submit to an examination by the school physician, this procedure was upheld by the Supreme Court of Minnesota as not unfair, arbitrary, or unreasonable.<sup>27</sup>

In this case the refusal of the child to comply with the rules of the board of education was stated by the court in its decision to be based upon conscientious objections incident to being a Christian Scientist. The court held, however, that the board had the power to make the rule, and that even though matters of health were delegated by the city charter to the board of public welfare, this power was not denied to the board of education. In the course of its opinion, the court pointed out that:

This controversy arises from a sore throat. The teacher could not be expected to determine if it was ordinary or streptococcic or the early stage of some other contagious or infectious children's disease. We must recognize that one child may quickly spread a disease among the many children it comes in contact with in school. It seems more reasonable to us to have the rules applicable in preventing as well as in controlling an epidemic. The court should not attempt to substitute its judgment as to what the rules should be, when operative, or the period of operation. In fact, these rules do not really exclude any one except by his own volition. The record in this case merely placed before plaintiff a condition to his child's admission to school. The condition required is a certificate of a physician, and in case of sore throat

23. *Hallett v. Post Printing and Publishing Co.* (1920), 68 Colo. 573, 192 P. 658, 12 A.L.R. 919.

24. *Martin v. Craig* (1919), 42 N.D. 213, 173 N.W. 787.

25. *Kenney v. Gurley* (1923), 208 Ala. 623, 95 So. 34, 26 A.L.R. 813.

26. *Carr v. Inhabitants of Town of Dighton* (1917), 229 Mass. 304, 118 N.E. 525.

27. *Stone v. Probst* (1925), 165 Minn. 361, 206 N.W. 642.

or suspected diphtheria, a negative report from a culture submitted to the division of public health. The school furnishes facilities for acquiring the necessary information if the child will submit to medical examination by the school authorities. Many of us have to subordinate our own ideas or views to governmental authority, and the requirement calls for cooperation without requiring any one to surrender his own views or conscientious objection thereto. The child is required to remain away if he will not submit to the rule. The board asks only for such information as it deems necessary in the proper administration of the schools. This information would result in exclusion only in the event that the child himself was a menace to his associates. The board provides a way for the child to qualify for admission without any cost or expense. The matter is entirely in his own hands.

Exclusion of children from school for failure to be vaccinated is discussed at length in Chapter XIV, on Vaccination.

### *Teachers*

Since the health of teachers is significant not only to themselves but also to their pupils, state legislatures may prohibit the employment of teachers suffering from maladies such as tuberculosis or any other communicable disease, and to this end may require or authorize school boards to require that every teacher shall furnish a health certificate from a licensed physician showing that the teacher is free from contagious and infectious disease during the term of employment.<sup>28</sup> A teacher may also be denied employment or a license to teach because of some mental or physical defect, but such action by a board of education may be appealed to the courts. If a teacher becomes diseased during her period of employment so that she endangers the health of the pupils, she may be dismissed, or suspended.

A regulation of the board of health of New York City providing that all educational authorities should require biennially of all teachers and other employees who work in schools and come in contact with the children, a certificate from a physician showing them to be free from active tuberculosis was upheld by the New York Supreme Court in 1945.<sup>29</sup> The court held that the board of health had the power to adopt the regulation, that it was necessary for the protection of the public health of the people of the city, that there was no prohibition against such reasonable classification, and that there was no invasion of the constitutional rights and privileges of the teacher or employee, which must yield to the common good.

28. *Tate v. School District* (1929), 324 Mo. 477, 23 S.W. (2d) 1013. *Coleman v. District of Columbia* (1922), 279 F. 990, 51 App. D.C. 352.

29. *Conlon v. Marshall* (1945), 59 N.Y.S. (2d) 52, 185 Misc. 638.

The establishment of a system of health service for city employees and teachers has likewise been upheld in a recent California decision.<sup>30</sup>

During school hours, the teacher, subject to the supervision of the principal and the school board, stands in the place of the parent and has complete control of the health, morals, discipline, and surroundings of the child. Thus, it has been held that a school may forbid pupils to leave the school grounds during luncheon periods except in cases of children who go home to lunch, the object of the regulation being to require patronage of the school cafeteria rather than nearby public eating places maintained as private enterprises.<sup>31</sup>

When a school is closed on order of the public health authorities because of the existence of an epidemic, a teacher is entitled to her customary compensation,<sup>32</sup> unless there is statutory authority to the contrary<sup>33</sup> or a special proviso in the contract of employment.<sup>34</sup> In the same situation a person who has an arrangement or contract to transport pupils to school can recover in some jurisdictions<sup>35</sup> but not in others.<sup>36</sup> An epidemic is not, as a rule, a circumstance that voids a contract, although the exact wording of the agreement between the parties would, of course, govern any particular situation.

### *School Lunches*

The National School Lunch Act, passed by Congress and approved on June 4, 1946, provides for federal grants-in-aid to the States for nonprofit school lunch programs. Unlike similar legislation which had been in effect during World War II, this act requires the States to

30. *Butterworth v. Boyd* (1938), 12 Cal. (2d) 140, 82 P. (2d) 434, 126 A.L.R. 838.

31. *Richardson v. Braham* (1933), 125 Neb. 142, 249 N.W. 557.

32. *Dewey v. Union School District* (1880), 43 Mich. 480, 5 N.W. 646, 38 Am. R. 206. *Carthage v. Gray* (1894), 10 Ind. App. 428, 37 N.E. 1059. *Randolph v. Sanders* (1899), 22 Tex. Civ. App. 331, 54 S.W. 621. *McKay v. Barnett* (1900), 21 Utah 239, 60 P. 1100, 50 L.R.A. 371. *Libby v. Douglas* (1900), 175 Mass. 128, 55 N.E. 808. *Smith v. School District* (1913), 89 Kan. 225, 131 P. 557, Ann. Cas. 1914 D 139. *Board of Education v. Couch* (1917), 63 Okla. 65, 162 P. 485, 6 A.L.R. 740. *School District v. Gardner* (1920), 142 Ark. 557, 219 S.W. 11. *Phelps v. School District* (1922), 302 Ill. 193, 134 N.E. 312, 21 A.L.R. 737.

33. *School District v. Howard* (1904), 5 Neb. 340, 98 N.W. 666.

34. *Gregg School Tp. v. Hinshaw* (1921), 76 Ind. App. 503, 132 N.E. 586.

35. *Crane v. School District* (1920), 95 Ore. 644, 188 P. 712. *Montgomery v. Board of Education* (1921), 102 Oh. St. 189, 131 N.E. 497, 15 A.L.R. 715.

36. *Sandry v. Brooklyn School District* (1921), 47 N.D. 444, 182 N.W. 689, 15 A.L.R. 719.



match the federal funds allotted for the purchase of agricultural commodities for this purpose, but the sum of \$10,000,000 is apportioned directly to the States for nonfood assistance, including equipment used on school premises in storing, preparing, or serving food for school children. The law requires that the lunches served shall meet minimum nutritional requirements prescribed by the Secretary of Agriculture, who enforces the act. It applies not only to public schools but also to nonprofit private schools.

*Private Schools*

Private and parochial schools are not under the jurisdiction of local public school authorities, but they are subject to all public health laws, ordinances, and regulations. The health services and activities in such schools may be inspected and supervised by municipal (or county) health departments, which likewise have complete authority to enforce all necessary health and quarantine measures in private schools and other institutions. Statutes sometimes provide that local health departments shall furnish medical inspection for parochial and other private schools, although any form of state or municipal aid to sectarian schools is forbidden by the constitutions of some of the States.



## CHAPTER XVI

# INDUSTRIAL HYGIENE AND THE CONTROL OF OCCUPATIONAL DISEASES

**I**NDUSTRIAL hygiene has been defined as the science of the preservation of the health of workers.<sup>1</sup> Included in its scope are such important activities and functions as the prevention of industrial accidents and the promotion of industrial safety; the prevention and control of occupational diseases; the general promotion of the personal hygiene and environmental sanitation of the workers; and the provision for adequate medical, surgical, hospital, nursing, nutritional, and first aid services for industrial employees.

These objectives of industrial hygiene are accomplished by scientific attention to such matters as physical examinations of workers, proper control of plant sanitation and industrial health hazards, education of employees in personal hygiene and safety, and the organization of industrial hygiene services consisting of physicians, nurses, engineers, and chemists under the supervision or stimulation of state and local public health and industrial officials. These objectives are accomplished, furthermore, by means of mandatory or permissive legislation enforced by responsible public authorities.

### *The Need for Industrial Hygiene*

The need for industrial hygiene is shown by the fact that there are estimated to be in the United States some 52,000,000 persons who are gainfully occupied. Of this number, nearly one-half are said to be entitled to medical service for injuries, accidents, and diseases under federal and state workmen's compensation laws.<sup>2</sup> Of these 52,000,000 workers, about 15,000,000 are employed in manufacturing, mining, and mechanical industries, while approximately 10,000,000 are employed in agriculture, 4,000,000 in transportation and communication, and the remainder in miscellaneous industrial pursuits. Of the 52,000,000 employed persons, normally about one-fifth (or more) are women.

In 1935 in the United States, accidents ranked fifth as a cause of

1. R. R. Sayers and J. J. Bloomfield, Public health aspects of industrial hygiene, *J.A.M.A.*, 111:679, August 20, 1938. C. O. Sappington, *Essentials of Industrial Health*, Philadelphia, Lippincott, 1943. B. J. Stern, *Medicine in Industry*, New York, Commonwealth Fund, 1946.

2. M. N. Newquist, *Medical Service in Industry and Workmen's Compensation Laws*, Chicago, American College of Surgeons, 1938.

death but were in second place as the cause of death of males. About one-third of the 110,000 accidental deaths occurring annually in this country are caused by accidents in the home, an equal number are due to motor vehicle accidents, some 20,000 are attributed to other public causes, while 18,000 to 19,000 have their origin in industry.<sup>3</sup> In addition to this high mortality, nearly 11,000,000 disabling injuries are estimated to occur annually in American industry, with an average loss in absenteeism of about half a day per employee per year. Approximately ten days are lost by the average employee every year from illness, and at least 2 per cent of all workers are incapacitated all of the time on account of sickness, although such illnesses are generally due to non-industrial causes.

Occupational diseases, or diseases arising out of and in the course of general employment or diseases which are peculiar to and characteristic of a particular occupation, apparently account for about 2 per cent of the total disabilities arising from industrial causes. The most prevalent of the occupational diseases is dermatitis, or inflammation of the skin, but tenosynovitis (inflammation of a tendon and its sheath), lead poisoning, chrome ulceration, and bursitis (inflammation of a sac between movable parts of the body) are also common. In some parts of the country, silicosis, a lung disease due to inhalation of finely divided silica particles, is a serious occupational problem.

### *Organization of Industrial Hygiene*

Provision for adequate industrial hygiene services is in the first instance the moral and commercial responsibility of industry itself. State laws generally require certain safeguards and precautions in dangerous occupations, and workmen's compensation laws in force in practically all of the States impose liability upon employers for accidents and injuries to employees, but laws do not, as a rule, make mandatory a complete industrial hygiene program in private industries, except that certain types of activities may be necessary as incidental to proper compliance with existing legislation.

In most of the larger industrial companies, however, provision has been made for industrial hygiene and programs of employee health. Many of the labor organizations also have health services. Industrial health activities are less extensive in the smaller industrial companies, which generally need the guidance of public health authorities.

3. *Accident Facts*, Chicago, National Safety Council, issued annually. *Industrial Injuries in the United States During 1936* (by Max D. Kossoris and Swen Kjaer), Serial No. R. 775, U.S. Bureau of Labor Statistics, 1938 (reprinted from *Monthly Labor Review*, July 1938).

Where a physician is employed by an industrial concern to make physical examinations of workmen and the employees to be examined are aware of this service, the physician does not violate the confidential relationship of physician and patient by making a report to the employer, and is, in fact, legally bound to do so. Such an industrial medical record is retained by the employer who may utilize it for purposes of classifying the worker, for defense against claims arising out of the employment, or for other legitimate matters concerned with the employment relationship. Such a record may also be made available to the worker at his request, but it cannot be made available to private parties, since such a revelation would be an infringement of the worker's right of privacy. The record must, however, be produced on demand of an official administrative agency having a proper interest in it, or in response to a subpoena of a court.

Although a Division of Industrial Hygiene and Sanitation was established in the United States Public Health Service as early as 1915, the growth of administrative interest in this subject was slow until the time of the passage of the Social Security Act of 1935. In 1915 only two States had organized divisions of industrial hygiene, and in 1935 there were only five such divisions. Since that time, practically all of the States and many of the larger cities have established divisions or bureaus of industrial hygiene, which operate in close cooperation with the Division of Industrial Hygiene of the National Institute of Health of the Public Health Service. In a number of States these divisions are connected with the departments of labor or labor and industry, but in most States they are under the jurisdiction of the health department.

The Federal Government is concerned with the administration of industrial hygiene through laws affecting federal employees, through grants-in-aid to the States, and through laws which empower the inspection and investigation of mines and other establishments, the products of which are produced for or are transported in interstate commerce.

Since 1882 provision has been made by acts of Congress for compensation for disability of certain federal employees, although a general law covering all civil employees was not passed until 1916, when the Employees Compensation Act was adopted (39 Stat. 742, 5 U.S.C. 751). This law, which was amended in 1941 and 1942, is administered by the United States Employees' Compensation Commission, formerly an independent establishment of the national government, which became a part of the Federal Security Agency in 1946.

An act of Congress of 1927 (44 Stat. 1424, 33 U.S.C. 901-50) pro-

vides for workmen's compensation to longshoremen and harbor workers in private enterprise while engaged in maritime employment upon the navigable waters of the United States, and in 1928 the provisions of this law were extended to private employments in the District of Columbia.

By the terms of the Social Security Act of 1935, funds have been allotted to the States for industrial hygiene and sanitation. In 1936 Congress passed the Public Contracts Act (49 Stat. 2036, 41 U.S.C. 35-45), by the terms of which provision was made for safety and health, as well as for wages and hours, in industrial plant operations in the States where persons are employed on work involving government contracts. The act also prohibits child labor in such plants. This law, popularly known as the Walsh-Healey Act, is enforced by the Wage and Hour and Public Contracts Division of the United States Department of Labor. It has been upheld as valid by the United States Supreme Court.<sup>4</sup>

Since its organization in 1910 (36 Stat. 369, 30 U.S.C. 1), the Bureau of Mines of the United States Department of the Interior (in the Department of Commerce from 1925 to 1934) has investigated and endeavored to prevent mine accidents, and has conducted health studies, particularly with reference to atmospheric contaminants in mines and smelters. The Coal Mine Inspection Act of 1941 (55 Stat. 177, 30 U.S.C. 4f) authorizes and empowers this bureau to make or cause to be made inspections and investigations in certain types of coal mines in the States, in order to reduce accidents and ill health among the employees.

A National Bituminous Wage Agreement was executed on May 29, 1946, at the White House in Washington. This agreement, made between the Federal Government as administrator of the coal mines and the United Mine Workers of America, provides for a mine safety program including the development of a Federal Mine Safety Code, a mine safety committee, coverage of employees with the protection of workmen's compensation and occupational disease laws, a health and welfare program including a medical and hospital fund, and various other welfare facilities.

In addition to the Public Health Service, the Bureau of Mines, and the Public Contracts Division, other federal bureaus concerned in some way with industrial hygiene include the Bureau of Labor Statistics, the Women's Bureau, and the Child Labor Division, all of the

4. *Perkins v. Lukens Steel Co.* (1940), 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108.

United States Department of Labor; the National Bureau of Standards of the Department of Commerce; and the War, Navy, and Post Office Departments.

*State Workmen's Compensation Laws*<sup>5</sup>

Under the rules of the common law applying to master and servant, an employer was liable to an employee for injuries arising out of the course of his employment. This simple rule was so modified by court decisions of a century or so ago, however, that recovery could be obtained only if it were shown that the employer had been negligent, that the employee was free from contributory negligence, and that the injury was not due to the act of a fellow servant. Because of the difficulties in proving his case under the burden of these legal technicalities, the employee or his heir rarely recovered at common law for an injury.

The harsh rules of the common law, which had evolved in an era of small and scattered industry and were not adapted to the industrial progress of modern times, have been superseded wholly or in part by our modern workmen's compensation laws. In 1897 the Parliament of Great Britain passed an act imposing the liability upon employers in certain dangerous trades to pay compensation to an injured employee, or in case of death to his dependents, regardless of the existence of any negligent act by the employer or his employees. This law was amplified in 1906.

In the United States, the first comprehensive law providing for workmen's compensation was passed in New York in 1910, and was promptly declared unconstitutional by the courts,<sup>6</sup> whereupon the state constitution was amended and another act was passed in 1914. This law was upheld as constitutional by the United States Supreme Court,<sup>7</sup> which has also sustained<sup>8</sup> the workmen's compensation laws

5. W. F. Dodd, *Administration of Workmen's Compensation*, New York, Commonwealth Fund, 1936. C. F. Sharkey, *Principal Features of Workmen's Compensation Laws*, Serial No. R. 1090, U.S. Bureau of Labor Statistics, 1940.

6. *Ives v. South Buffalo R. Co.* (1911), 201 N.Y. 271, 94 N.E. 431. See *State ex rel. Davis-Smith Co. v. Clausen* (1911), 65 Wash. 156.

7. *N.Y. Central R. Co. v. White* (1916), 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L.R.A. 1917 D 1, Ann. Cas. 1917 D 629.

8. *Hawkins v. Bleakly* (1a. 1916), 243 U.S. 210, 37 S. Ct. 255, 61 L. Ed. 678. *Mountain Timber Co. v. Washington* (1916), 243 U.S. 219, 37 S. Ct. 250, 61 L. Ed. 685, Ann. Cas. 1917 D 642, 13 N.C.C.A. 927. *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 205. *Middleton v. Texas Power and Light Co.* (1918), 249 U.S. 152. *Arizona Employees Liability Cases* (1919), 250 U.S. 400, 39 S. Ct. 553, 63 L. Ed. 1058, 6 A.L.R. 1537.

of other states. The State of Washington enacted a workmen's compensation law in 1911, and since that time similar laws have been adopted in virtually all the States.

While all these laws provide for compensation to employees who are injured or suffer accidents in the course of their employment, there is little uniformity in their provisions. In some States, the law is mandatory upon all employers or employers in certain types of industries, but in many States the employer may elect to accept the benefits and responsibilities of workmen's compensation. In cases where he definitely rejects, the law often declares that the rules of common law liability in favor of the employer shall be abrogated. In some of the States there are state funds for insuring payments, but in most States there may be self-insurance or insurance by private companies under state supervision. Under self-insurance, the employer produces evidence of solvency that is satisfactory to the state authorities, although sometimes a bond is required of such employers.

The workmen's compensation laws are administered by state industrial commissions, boards, or departments. These agencies are quasi-judicial in character, since they make decisions as to the amount of disability, based on medical reports.<sup>9</sup> From these administrative decisions an appeal may be taken to the courts, although the courts will usually uphold findings of fact by the commissions.

Innumerable legal questions of a highly technical nature have arisen under workmen's compensation laws. Where, for instance, an employee has worked for several employers and develops a disease such as silicosis which is due to prolonged exposure to injurious dust, which of the employers is liable for compensation? As a rule, the last employer is responsible, unless there was no hazard from silica dust in his plant.

Despite the existence of workmen's compensation laws, an employee may have an action at law against his employer for injuries or accidents due to working conditions. Such actions must, however, be brought within a certain time, otherwise they may be barred by statutes of limitations. The time when statutes of limitations begin to run is sometimes a difficult problem, but in general it has been held that a cause of action arises and the statute of limitations begins to operate on the date of the negligent act of the employer and not when the disability or injury becomes apparent. Statutes of limitations may be

9. *Medical Relations Under Workmen's Compensation*, Chicago, American Medical Association, 1938. H. H. Kessler, *Accidental Injuries: The Medico-Legal Aspects of Workmen's Compensation and Public Liability*, Philadelphia, Lea & Febiger, 1941.



for three or five years, at the expiration of which time no legal action can be brought.

Where both parties, the employer and the employee, have accepted a workmen's compensation act, suits for damages are generally forbidden. If the employer accepts the act but an employee rejects it, the employee may sue, but the employer is entitled to the common law defenses. If the employer fails to secure payment of compensation or fails to provide the insurance required by the act or fails to pay the premiums, the laws generally provide that the employee may sue for damages. Most of these laws are also extraterritorial in operation, applying to accidents occurring outside the jurisdiction.

### *Occupational Diseases*<sup>10</sup>

Occupational diseases were unknown to the common law, but in some of the early American cases the doctrine was laid down by the courts that an employee can recover from his employer for a disease incurred in the course of his employment where the employer was negligent<sup>11</sup> and that failure of the employer to furnish a safe place in which to work may be considered negligence.<sup>12</sup> On the other hand, this right of action has been denied in some States,<sup>13</sup> while in others it has been held that it is the duty of the employer to warn the worker of unusual hazards, and if he fails to do so he will be liable for the

10. R. W. Goldberg, *Occupational Diseases*, New York, Columbia University Press, 1931. C. O. Sappington, *Medicolegal Phases of Occupational Diseases*, Chicago, Industrial Health Book Co., 1939.

11. *Span v. Ely* (1876), 8 Hun (N.Y.) 255. *Klegel v. Attken* (1896), 94 Wis. 432, 69 N.W. 67, 35 L.R.A. 249, 59 A.S.R. 901. *Nickel v. Columbia Paper Stock Co.* (1902), 95 Mo. App. 226, 68 S.W. 955. *Hewett v. Womans Hospital Aid Ass'n* (1906), 73 N.H. 556, 64 A. 190, 7 L.R.A. (N.S.) 496. *Pigeon v. W. P. Fuller Co.* (1909), 156 Cal. 691, 105 P. 976. *Hurle's Case* (1914), 217 Mass. 223, 104 N.E. 336, L.R.A. 1916 A 279, Ann. Cas. 1915 C 919, 4 N.C.C.A. 527. *Madden's Case* (1916), 272 Mass. 487, 111 N.E. 379, L.R.A. 1916 D 1000. *Wiseman v. Carter White Lead Co.* (1916), 100 Neb. 584, 160 N.W. 985, 13 N.C.C.A. 1083. *Jellico Coal Co. v. Adkins* (1923), 197 Ky. 684, 247 S.W. 972. *Donnelly v. Minneapolis Mfg. Co.* (1924), 161 Minn. 240, 201 N.W. 305. *Midland Coal Co. v. Rucker* (1925), 211 Ky. 582, 277 S.W. 838. *Jones v. Rinehart & Dennis Co.* (1933), 113 W. Va. 414, 168 S.E. 482. *General Printing Corp. v. Umbach* (1935), 100 Ind. App. 285, 195 N.E. 281. *Allen Gravel Co. v. Curtiss* (1935), 173 Miss. 416, 161 So. 670. See 105 *American Law Reports* 80.

12. *Wolf v. Mallinckrodt Chemical Works* (1934), 336 Mo. 746, 81 S.W. (2d) 323.

13. *Adams v. Acme White Lead & Color Works* (1914), 182 Mich. 157, 148 N.W. 485, L.R.A. 1916 A 283, Ann. Cas. 1916 D 689.

disease contracted by the employee.<sup>14</sup> If an employer fails to comply with a public health law or other statute, negligence will be presumed if disease occurs in a worker.<sup>15</sup>

None of the early workmen's compensation laws provided for benefits for occupational diseases. In a number of instances the courts ruled, however, that certain diseases contracted as a result of working conditions were "accidents," for which compensation was allowed in the statutes. Thus, phosphorus poisoning was held to be an accident under the Maryland law,<sup>16</sup> and typhoid fever contracted from drinking water furnished by the employer,<sup>17</sup> tuberculosis contracted under certain conditions,<sup>18</sup> and various other diseases have been held to be accidents. Where the law has used the term "injury" instead of accident, occupational diseases have been quite generally, although not invariably, construed to be injuries.

Occupational diseases are recognized by law in about two-thirds of the States and in the federal compensation acts.<sup>19</sup> In some of these laws, all occupational diseases are included by general reference, while in others various occupational diseases covered by the law are enumerated in the workmen's compensation acts. In some cases the term "injury" has been defined to include occupational diseases and infections. The inclusion in these laws of diseases proximately caused by employment has been upheld by the courts on a number of occasions.<sup>20</sup> Occupational diseases are likewise included in the workmen's compensation laws of the Canadian provinces.

14. *Wagner v. H. W. Jojne Co.* (1892), 147 Pa. 475, 23 A. 772, 30 A.S.R. 745. *O'Keefe v. Nat. Folding Box and Paper Co.* (1895), 66 Conn. 38, 33 A. 587. *Fritz v. Elk Tanning Co.* (1917), 258 Pa. 180, 101 A. 958, 15 N.C.C.A. 698. *Atlantic Coast Line R. Co. v. Wheeler* (1926), 147 Va. 1, 132 S.E. 517, 136 S.E. 570. *Feola v. Nat. Brass Mfg. Co.* (1935), 284 N.Y.S. 242, 246 App. Div. 678. *Brown v. Tenn. Consolidated Coal Co.* (1935), 19 Tenn. App. 123, 83 S.W. (2d) 568. *Davis v. N.J. Zinc Co.* (1936), 116 N.J.L. 103, 182 A. 850.

15. *Thayer v. Kitchen* (1911), 145 Ky. 554, 140 S.W. 1052. *Gay v. Hocking Coal Co.* (1918), 184 Ia. 949, 169 N.W. 360.

16. *Victory Sparkler and Specialty Co. v. Francks* (1925), 147 Md. 368, 128 A. 635, 44 A.L.R. 363.

17. See page 270.

18. See Chapter IX, on Tuberculosis, pages 158-160.

19. *Occupational Disease Legislation*, New York, American Public Health Association, 1931. M. N. Newquist, *Medical Service in Industry and Workmen's Compensation Laws*, Chicago, American College of Surgeons, 1938. W. Fowler, *The Reportable Diseases; Diseases and Conditions Required to be Reported in the Several States*, Reprint No. 2544, U.S. Public Health Service, 1944.

20. *Industrial Commission v. Roth* (1918), 98 Oh. St. 34, 120 N.E. 172, 6 A.L.R. (Continued on next page.)

Occupational diseases scheduled in the various compensation acts include some or all of the following:

Lead poisoning	Asbestosis
Mercury poisoning	Anthrax
Phosphorus poisoning	Glanders
Arsenic poisoning	Compressed air sickness
Carbon bisulphide poisoning	Radium necrosis
Wood alcohol poisoning	Dermatitis venenata
Carbon dioxide poisoning	Hookworm disease (mining)
Brass and zinc poisoning	Silicosis
Benzol, nitro, and amido compounds	Pneumoconiosis
Gasoline and petroleum poisoning	Epithelioma
Chrome ulceration	Cataract (glass workers)
	Various miners' diseases

Other diseases such as poisoning by nitrous fumes, nickel carbonyl, dope (tetrachlor-methane), formaldehyde, methyl chloride, carbon monoxide, and other chemicals, are often included in the laws, which also generally state that the sequelae of such poisonings are compensable.

#### *Typhoid Fever as an Accident*

Since 1915 the question as to whether typhoid fever contracted by a worker from a water supply furnished by an employer is an accident or injury entitling the worker to compensation has been before the courts in numerous instances. With few exceptions, the courts have ruled that disease incurred in this manner is an accident.<sup>21</sup> To the

1463, 17 N.C.C.A. 342. *Schaefer v. Industrial Commission* (1924), 185 Wis. 317, 201 N.W. 396. *Employees Mutual Liability Insur. Co. v. McCormick* (1928), 195 Wis. 410, 217 N.W. 738. *Boll v. Condit-Bray Glass and Paint Co.* (1928), 321 Mo. 92, 11 S.W. (2d) 48. *Seattle Can Co. v. Dept. Labor and Industry* (1928), 147 Wash. 303, 265 P. 739. *Dillingham's Case* (1928), 127 Me. 245, 142 A. 865. *First Nat. Bank of Ottawa v. Wedron Silica Co.* (1933), 351 Ill. 560, 184 N.E. 897. *Bishop v. Comer and Pollock* (1937), 297 N.Y.S. 946, 251 App. Div. 492.

21. *Vennen v. New Dells Lumber Co.* (1915), 161 Wis. 370, 154 N.W. 640, L.R.A. 1916 A 273, Ann. Cas. 1918 B 293, 10 N.C.C.A. 729. *Ætna Insur. Co. v. Portland Gas Co.* (1916), 229 F. 552, 144 C.C.A. 12, L.R.A. 1917 D 1027. *Wasmuth-Endicott v. Karst* (1922), 77 Ind. App. 279, 133 N.E. 609. *Frankamp v. Fordney Hotel* (1923), 222 Mich. 525, 193 N.W. 204. *Ames v. Lake Independence Lumber Co.* (1924), 226 Mich. 83, 197 N.W. 499, 23 N.C.C.A. 778. *Christ v. Pac. Mut. Life Insur. Co.* (1924), 312 Ill. 525, 144 N.E. 161. *Brodin's Case* (1924), 124 Me. 162, 126 A. 829. *Scott Lumber Co. v. Industrial Commission* (1924), 184 Wis.

(Continued on next page.)

contrary have been decisions in Kentucky,<sup>22</sup> Ohio,<sup>23</sup> Oregon,<sup>24</sup> and Texas,<sup>25</sup> sometimes on the rather specious grounds that the disease, while contracted during employment, did not arise out of it. Where the typhoid fever has not been definitely proven to have been caused by an industrial condition, as where a workman contracted the disease a year after he had suffered a traumatic injury, the claim for compensation has been denied.<sup>26</sup> Compensation for typhoid was refused in Minnesota because it was not covered in the existing legal definition of an accident.<sup>27</sup>

In one case an injury to a workman resulting from the injection of antityphoid serum by a company nurse was held to be an accident under the workmen's compensation law of Louisiana.<sup>28</sup>

### *Other Diseases as Accidents*

Interpretations by the courts as to what is an accident or injury under the terms of workmen's compensation laws have been as lacking in uniformity as the laws themselves. On the whole, however, communicable diseases and other maladies contracted as a direct and indisputable result of employment have been held to be accidents or injuries, for which compensation will be granted.

*Amebic Dysentery.* An award for amebic dysentery, contracted by an employee from water furnished on the job by his employer, has been upheld, and an increase of 50 per cent in the compensation al-

278, 199 N.W. 160. *Rissman & Son v. Industrial Commission* (1926), 223 Ill. 459, 154 N.E. 203, 26 N.C.C.A. 1. *Fidelity and Casualty Co. v. Industrial Accid. Comm.* (1927), 84 Cal. App. 506, 258 P. 698. *State v. Smith* (1931), 93 Ind. App. 83, 175 N.E. 146. *Chase v. Industrial Commission* (1932), 81 Utah 141, 17 P. (2d) 205. *Bobertz v. Township of Hillside* (1940), 125 N.J.L. 321, 15 A. (2d) 796. *Permanent Const. Co. v. Industrial Comm.* (1942), 380 Ill. 47, 43 N.E. (2d) 557.

22. *Mills v. Columbia Gas Const. Co.* (1932), 246 Ky. 464, 55 S.W. (2d) 394.

23. *Industrial Commission v. Cross* (1922), 104 Oh. St. 561, 136 N.E. 283.

24. *Blair v. State Ind. Accid. Comm.* (1930), 133 Ore. 450, 288 P. 204.

25. *Buchanan v. Md. Casualty Co.* (Tex. 1926), 288 S.W. 116.

26. *Texas Empl. Insur. Ass'n v. Burnett* (Tex. 1935), 77 S.W. (2d) 742; rev. in 105 S.W. (2d) 200. *McDonald v. Belle Terre Lodge* (1935), 279 N.Y.S. 752, 244 App. Div. 855; rev. in 268 N.Y. 663, 198 N.E. 546. *Pattiani v. Indus. Accid. Comm.* (1926), 199 Cal. 596, 250 P. 864, 49 A.L.R. 446. *Loudan v. H. W. Shaull & Sons* (1940), 140 Pa. Super. 106, 13 A. (2d) 129. *Hoffman v. Consumers Water Co.* (1940), 61 Id. 226, 99 P. (2d) 919.

27. *State ex rel. Faribault Woolen Mills Co. v. District Court* (1917), 138 Minn. 210, 164 N.W. 810, L.R.A. 1918 F 855, 15 N.C.C.A. 520.

28. *Smith v. Brown Paper Mill Co.* (La. App. 1934), 152 So. 700.

lowed according to law, because the disability was due to the serious and wilful misconduct of the employer.<sup>29</sup>

*Anthrax.* While anthrax is now generally included among the occupational diseases in the States whose laws cover occupational diseases, it is not mentioned in all of the workmen's compensation laws. In several such instances, anthrax occurring in tannery workers has been held by the courts to be an accident arising out of employment.<sup>30</sup>

*Botulism.* The death of a worker from botulism caused by ingestion of a meal served by his employer, where he received wages and board in payment of his services, has been held to be compensable.<sup>31</sup>

*Cancer.* The compensability of cancer alleged to be due to trauma is discussed in Chapter XIX (page 321).

*Cerebrospinal meningitis.* Where a steamship from the Orient had on board a number of Filipino steerage passengers afflicted with cerebrospinal meningitis, which was subsequently contracted by a pipe fitter working on the vessel, this was held to be an accident under the Federal Longshoremen's and Harbor Workers' Act (33 U.S.C. 901-50).<sup>32</sup>

*Glanders.* Infection of a stableman with glanders, contracted from a diseased horse, has been ruled compensable in Massachusetts<sup>33</sup> but not in New York.<sup>34</sup>

*Gonorrhoeal ophthalmia.* Compensation for an eye malady alleged to have been due to an infection with gonorrhoea from a toilet in a workshop has been denied on the grounds that the source of infection was not proven.<sup>35</sup>

*Kerato-conjunctivitis.* Awards of compensation to shipyard workers who contracted the eye disease, kerato-conjunctivitis, were upheld by the Supreme Court of California on the grounds that the disease arose directly out of the course of employment.<sup>36</sup>

29. *Parkhurst v. Indus. Accid. Comm.* (1942), 20 Cal. (2d) 826, 129 P. (2d) 113.

30. *Heters v. Hull & Co.* (1917), 164 N.Y.S. 767, 178 App. Div. 350. *Chicago Rawhide Mfg. Co. v. Industrial Commission* (1920), 291 Ill. 616, 126 N.E. 616. *Houston Packing Co. v. Mason* (Tex. 1926), 236 S.W. 862.

31. *Meyer v. Roettele* (1935), 64 S.D. 36, 264 N.W. 191. See *New York Life Ins. Co. v. Mariano* (1938), 102 Colo. 18, 76 P. (2d) 417.

32. *Todd Dry Docks v. Marshall* (1931), 49 F. (2d) 621.

33. *H. P. Hood & Sons v. Md. Casualty Co.* (1910), 206 Mass. 223, 92 N.E. 329.

34. *Richardson v. Greenberg* (1919), 176 N.Y.S. 651, 188 App. Div. 248.

35. *Standard Accid. Insur. Co. v. Ritchie* (Tex. 1935), 89 S.W. (2d) 498.

36. *Bethlehem Steel Co. v. Indus. Accid. Comm.* (1943), 21 Cal. (2d) 742, 135 P. (2d) 153.

*Pneumonia.* Pneumonia resulting from working conditions has usually been held to be compensable where there has been sufficient evidence to prove the connection between the disease and the nature of employment.<sup>37</sup>

*Rocky Mountain spotted fever.* In the case of a lumberman who was bitten by a tick with resulting death from Rocky Mountain spotted fever, this disease was held to be an accident due to employment.<sup>38</sup>

*Scarlet fever.* An employee in a hospital cafeteria who contracted scarlet fever from a student nurse was denied compensation on the grounds that a contagious disease is not an industrial accident.<sup>39</sup>

*Tuberculosis.* The status of tuberculosis as a compensable disease is discussed in Chapter IX, on tuberculosis.<sup>40</sup>

*Tularemia.* Persons whose occupations have required them to handle and dress rabbits, and who contract tularemia as a result of this work, have been granted compensation in several cases.<sup>41</sup>

*Undulant fever.* A dairy employee who contracted undulant fever while working with cows has been held to have suffered an accident and to have been entitled to compensation.<sup>42</sup>

### *Industrial Sanitation*

State laws frequently require employers to install, operate, and maintain proper sanitary facilities in industrial plants and to provide suitable methods, devices, and means to promote safety and prevent occupational diseases. Such a state law, requiring "approved and adequate" means to prevent disease, was sustained by the Supreme Court of Missouri in a decision in which it was held that the words "approved and adequate" were not so vague as to be ineffective and meaningless, but were intended to mean those measures generally recognized by

37. *Galuzzo v. State* (1930), 111 Conn. 188, 149 A. 778. *Brown v. Moss* (1936), 120 Pa. Super. 336, 182 A. 777.

38. *Reinoehl v. Hammacher Pole and Lumber Co.* (1931), 51 Id. 359, 6 P. (2d) 860. *Salt Lake County v. Indus. Comm.* (1941), 101 Utah 167, 120 P. (2d) 321.

39. *Basil v. Butterworth* (1936), 272 Mich. 439, 262 N.W. 281. *Connelly v. Hunt Furniture Co.* (1925), 240 N.Y. 83, 147 N.E. 366.

40. See page 158. M. G. Mack, *Medical and Legal Aspects of Tuberculosis as an Occupational Disease and as an Accidental Injury*, New York, National Tuberculosis Association, 1938.

41. *Metropolitan Casualty Insur. Co. v. Crenshaw* (1931), 44 Ga. App. 354, 161 S.E. 649. *Great A. & P. Tea Co. v. Sexton* (1932), 242 Ky. 266, 46 S.W. (2d) 87. *Great A. & P. Tea Co. v. Wilson* (1933), 48 Ga. App. 34, 171 S.E. 827.

42. *Crowley v. Idaho Training School* (1933), 53 Id. 606, 26 P. (2d) 180.

the public as suitable.<sup>43</sup> An Illinois statute requiring employers to provide reasonable and approved devices and methods to prevent industrial diseases was, however, held to be invalid for failure to set up an intelligent standard of conditions, and also as an improper delegation of legislative power to an administrative officer.<sup>44</sup> On the other hand, the power of a director of a state department of labor and industry to declare, after a hearing, that certain occupations or work are extra-hazardous has been upheld as a constitutional delegation of the police power of the State.<sup>45</sup>

State laws requiring employers to provide washing facilities in certain industries, such as coal mines, foundries, steel mills, and machine shops, where smoke, dust, grime, and grease are so prevalent that lack of facilities for cleanliness would endanger health and cause a nuisance, have been upheld by a number of courts of last resort.<sup>46</sup> The first statute of this type to come before the courts was held unconstitutional by the Supreme Court of Illinois because it applied only to owners of coal mines,<sup>47</sup> but later legislation which included other industries in the State was sustained as valid.<sup>48</sup>

The constitutionality of a state law requiring mine owners to furnish washing facilities on petition of twenty or more employees was upheld by the Supreme Court of Indiana<sup>49</sup> and on appeal was sustained by the United States Supreme Court.<sup>50</sup> Such a classification was declared not to deny equal protection of the laws, but to be a valid exercise of the police power in the interests of the public health and comfort. Similar laws have been pronounced valid in Kansas<sup>51</sup> and

43. *Boll v. Condie-Bray Glass and Paint Co.* (1928), 321 Mo. 92, 11 S.W. (2d) 48. *People v. Smith* (1896), 108 Mich. 527, 66 N.W. 382, 32 L.R.A. 853, 62 A.S.R. 715.

44. *Vallat v. Radium Dial Co.* (1935), 360 Ill. 407, 196 N.E. 485, 99 A.L.R. 607.

45. *State v. Bayles* (1922), 121 Wash. 215, 209 P. 20. See *Schaezlin v. Cabantss* (1902), 135 Cal. 466.

46. J. A. Tobey, Industrial cleanliness and the courts, *Am. J. Pub. Health*, 19:1119, October 1929.

47. *Starne v. People* (1906), 222 Ill. 189, 78 N.E. 61, 113 A.S.R. 389.

48. *People v. Soloman* (1914), 265 Ill. 28, 106 N.E. 458.

49. *Booth v. State* (1913), 179 Ind. 405, 100 N.E. 563, L.R.A. 1915 B 420, Ann. Cas. 1915 D 987.

50. *Booth v. Indiana* (1915), 237 U.S. 391, 35 S. Ct. 617, 59 L. Ed. 1011. See *Consolidated Coal Co. v. Illinois* (1902), 185 U.S. 203, 22 S. Ct. 616, 46 L. Ed. 872.

51. *State v. Reaser* (1915), 93 Kan. 628, 145 P. 838.

Tennessee,<sup>52</sup> but in Kentucky the Court of Appeals concluded that a statute making mandatory the installation of washing facilities in various dirty industries upon request of 30 per cent of the employees was inconsistent with a provision of the state constitution, prohibiting the enactment of a law to take effect upon approval by authority other than the legislature.<sup>53</sup>

State laws requiring owners of mercantile establishments, factories, and other places of employment to provide proper toilet facilities,<sup>54</sup> adequate lighting<sup>55</sup> and ventilation,<sup>56</sup> sanitary drinking facilities,<sup>57</sup> and various other equipment and appurtenances necessary for the health, safety, and comfort of workers, are in general force. Such laws represent a legitimate exercise of the police power of the State for the common welfare.

State laws requiring employers to provide adequate ventilation in their factories, so as to prevent the air from becoming injurious to the health of the employees, or requiring that respirators and gas masks be furnished, have been upheld in a number of recent decisions.<sup>58</sup> In an action for lead poisoning brought by a worker in a casket factory, the court in awarding damages stated that a master must warn a servant of conditions under which he is employed which may engender disease, that the master is chargeable with knowledge of the fact that the fumes given off in the processes are poisonous, and that the servant will not be held as a matter of law to have known that inhalation of fumes, dust, and particles of lead will cause an incurable disease, so that he can be charged with the assumption of risk.<sup>59</sup>

State laws imposing restrictions or limitations upon the number of hours that industrial employees may work in certain trades are now

52. *Sun Coal Co. v. State* (1928), 157 Tenn. 522, 11 S.W. (2d) 893.

53. *Commonwealth v. Beaver Dam Coal Co.* (1922), 194 Ky. 34, 237 S.W. 1086.

54. *The Installation and Maintenance of Toilet Facilities in Places of Employment*, Bulletin No. 99, U.S. Women's Bureau, 1933.

55. Marie Correll, *State Requirements for Industrial Lighting*, Bulletin No. 94, U.S. Women's Bureau, 1932.

56. State laws relating to heating and ventilating industrial buildings, *Heating and Ventilating*, 28:76, March 1931.

57. *Sanitary Drinking Facilities*, Bulletin No. 87, U.S. Women's Bureau, 1931.

58. *Illinois Steel Co. v. Fuller* (1939), 216 Ind. 180, 23 N.E. (2d) 259. *Blittschau v. Am. Car and Foundry Co.* (1940), — Mo. —, 144 S.W. (2d) 196. *Holliston Mills v. McGuffin* (1940), 177 Tenn. 1, 145 S.W. (2d) 1.

59. *Middlebrooks v. Atlanta Metallic Casket Co.* (1940), 63 Ga. App. 620. 11 S.E. (2d) 682.



generally recognized as a constitutional exercise of the police power, whether such laws are applicable only to women and minors or to both men and women of various ages, and whether they apply to dangerous occupations such as mining or to all occupations where the health of the workers will be promoted and protected by these limitations.<sup>60</sup> Maximum hours of work for employees engaged in the production and transportation of goods in interstate commerce are also set in the Federal Fair Labor Standards Act of 1938. The constitutionality of minimum wage laws as health measures is discussed in Chapter III.

60. See page 54 and cases cited. *In re Boyce* (1904), 27 Nev. 299, 75 P. 1. Legal restrictions on hours of labor of men in the United States, as of January 1, 1933, *Monthly Labor Review* (U.S. Bureau of Labor Statistics), 36:1, January, 1933. J. Goldmark, *Fatigue and Efficiency*, New York, Russell Sage Foundation, 1917.



**PART III**  
**LIABILITY**



## CHAPTER XVII

### LIABILITY OF MUNICIPAL CORPORATIONS

**I**T is a well-established principle of law that the State, as the sovereign power, cannot be sued without its consent for wrongs done to individuals. Since such wrongs often occur in the course of the corporate activities of the State, the consent is readily given, and may be expressed in a constitution or by legislative enactment with provision for a suitable tribunal to hear all just claims.

A municipal corporation may be sued without its consent, but it cannot be held to be liable for certain types of wrongs. Municipal corporations, which include cities and incorporated towns and villages, are public corporations created by the State for governmental purposes. Their exact powers and duties are limited to those set forth in a charter granted by the State, and those that are expressed or may be reasonably implied from state legislation.

But municipal corporations have a dual character. Not only are they organized for the benefit of the State, but they are also created for the purpose of undertaking functions which are for the benefit of the community. When the activities of municipal corporations are performed for the welfare of the State, they are known as *governmental* functions; when they are for the benefit of the local inhabitants, they are known as *corporate* or *proprietary* functions. In other words, a municipal corporation may be said to be both a governmental and a business organization.

When acting in its governmental capacity, a municipal corporation is not liable for wrongs or injuries done to individuals by its officers or employees. When acting in its corporate or proprietary capacity, however, a municipal corporation will or may be liable for torts, or wrongs, resulting from the actions of its officers or employees.

This rule of law is definite, but its application sometimes presents difficulties, especially in determining whether a particular act is of a governmental or proprietary character. Governmental functions include all matters pertaining directly to the public health and safety and all matters affecting the general welfare. Thus, in maintaining police departments, fire departments, public schools, hospitals, and health departments, municipal corporations are acting in a governmental capacity, and cannot be held liable for the torts or negligence of their agents engaged in duties connected with these (and some other) departments.

Counties, townships, school districts, and sanitary districts are public corporations, but they usually are not strictly municipal corporations, although these political agencies are sometimes called quasi-municipal corporations. In a few States, boards of health have been incorporated as public corporations. None of these official bodies can be held to be liable for negligence in the exercise of their governmental powers, or for the wrongful acts of their officers and employees in carrying out such powers, unless made so by state legislation.

### *Public Health as a Governmental Function*

Municipal corporations, such as cities, towns, and villages, and quasi-municipal corporations, such as counties, townships, and school boards, are never liable for the acts of their officers and employees in enforcing or executing public health laws, ordinances, and regulations, no matter how careless, negligent, arbitrary, capricious, unreasonable, or harmful such actions may be. For every legal wrong, however, there must be a right, so that the health officers or employees may be personally liable for negligence or improper acts, especially when such actions are beyond the scope of their authority, or *ultra vires*.<sup>1</sup> In the absence of specific legislation imposing the liability, a municipal corporation is not responsible to individuals for carrying out its public health duties, which are obligations of the State.

Injuries caused by improper diagnosis of infectious disease and mistakes in enforcing quarantine and isolation are typical instances of cases in which municipal corporations are free from liability.<sup>2</sup> A city is not liable for the malicious arrest of a person, the forcible testing of his blood, and his commitment to jail,<sup>3</sup> or for the arrest of a person who has been, or is alleged wrongfully to have been, in contact with communicable disease.<sup>4</sup>

If a person who has been arrested and placed in a city jail contracts a venereal disease from a fellow prisoner as a result of the negligence of the keeper of the jail, the city will be held liable, according

1. See Chapter XVIII.

2. *Bates v. Houston* (1896), 14 Tex. C.A. 287, 37 S.W. 383. *White v. City of San Antonio* (1901), 94 Tex. 313, 60 S.W. 427. *Valentine v. Englewood* (1908), 76 N.J.L. 509, 71 A. 344, 19 L.R.A. (N.S.) 262, 16 Ann. Cas. 731. *Butler v. Kansas City* (1916), 97 Kan. 239, 155 P. 12, L.R.A. 1916 D 626, Ann. Cas. 1918 D 801. *City of Shawnee v. Jeter* (1924), 96 Okla. 216, 221 P. 758.

3. *Franklin v. Seattle* (1920), 112 Wash. 671, 192 P. 1015, 12 A.L.R. 247.

4. *Pritchard v. Morganton* (1900), 126 N.C. 908, 36 S.E. 353, 78 A.S.R. 679. *Levin v. Burlington* (1901), 129 N.C. 184, 39 S.E. 822, 55 L.R.A. 396.

to a decision of the Supreme Court of Florida.<sup>5</sup> In this case, there was a state law making it unlawful for any person infected with a contagious venereal disease to expose another to the infection, and the court ruled that the city must be held to be responsible for injuries due to the negligent violation of an express statute.

Where, however, a person is injured by impure vaccine administered by a municipal officer who is enforcing a valid ordinance requiring vaccination of citizens, the municipal corporation will not be liable, since under the law it is exercising a governmental function.<sup>6</sup> Similarly, a schoolteacher who contracted tuberculosis through the negligence of a school district was unable to recover from the school authorities, because the school district as a quasi-public corporation was exercising governmental functions in furnishing educational facilities.<sup>7</sup>

Municipal corporations are not liable for injuries resulting from the maintenance of public hospitals,<sup>8</sup> but it has been held by the Maine Supreme Judicial Court that a city is liable for the premature removal of a patient with scarlet fever from a city isolation hospital, where the patient had been paying for hospital care.<sup>9</sup> Whenever a municipal corporation derives revenue from its activities, those activities are usually considered to be proprietary or corporate functions. A reasonable fee charged by a city for a license or permit is not regarded as revenue, but as a necessary charge to cover costs of inspection and administration.<sup>10</sup>

In a number of early cases it was held that a city is not liable for the death of a city employee who contracted smallpox while tearing

5. *Lewis v. City of Miami* (1937), 127 Fla. 426, 173 So. 150. In *Hunt v. Rowton* (1930), 143 Okla. 181, 288 P. 342, a sheriff was held personally liable for negligence in permitting a prisoner to contract smallpox in the county jail.

6. *Wyatt v. Rome* (1898), 105 Ga. 312, 31 S.E. 188, 42 L.R.A. 180, 70 A.S.R. 41. *Howard v. City of Philadelphia* (1915), 250 Pa. 184, 95 A. 388, L.R.A. 1916 B 917.

7. *Bang v. Independent School Dist.* (1929), 177 Minn. 454, 225 N.W. 449. *Washington Suburban Sanitary District v. Magruder* (1926), 56 App. D.C. 297, 12 F. (2d) 832. *Lynch v. North Yakima* (1905), 37 Wash. 657, 80 P. 79. For tort liability of schools, see 160 *American Law Reports* 7.

8. *City of Lexington v. Batson's Admr.* (1904), 118 Ky. 489, 81 S.W. 264, 26 Ky. L. 363.

9. *Anderson v. City of Portland* (1931), 130 Me. 214, 154 A. 572.

10. See page 90.

down a pesthouse, nor for the death of a patient who was placed in an overcrowded pesthouse.<sup>11</sup>

While a municipal corporation is not liable to individuals for damages to persons or property resulting from its governmental functions, it may be responsible to the State for negligence in carrying out those governmental duties.

### *Proprietary Functions of Municipal Corporations*

The corporate, proprietary, private, or business functions of municipal corporations include all kinds of public works, such as the care and maintenance of streets and sidewalks, bridges, street lighting, water works and water supplies, sewers and sewage disposal, garbage disposal, dumps, parks and playgrounds, tourist camps, gas and electric works, markets, piers, and all other public works of the type usually undertaken by business corporations. Public buildings belong in the category of corporate functions when they are used for business purposes, but they are governmental when employed for that purpose, as in the cases of city halls, jails, firehouses, police headquarters, and hospitals.

There is some conflict of legal authority as to the proper status of certain of the duties enumerated above. Thus, in some jurisdictions the conduct of parks is held to be a governmental function, and many state courts have also ruled that garbage and refuse disposal and sometimes street cleaning are governmental functions. The courts have shown a tendency in recent years to broaden the scope of municipal governmental functions to include the performance of all public services which are legal duties, and from which the municipality obtains no revenue or other special benefit in its corporate capacity.

### *Garbage and Refuse Disposal*

The collection, removal, and disposal of garbage and refuse has been held to be a governmental function by courts in a number of States,<sup>12</sup> but in other States torts committed by officers or employees

11. *Nicholson v. Detroit* (1902), 129 Mich. 246, 88 N.W. 695, 56 L.R.A. 601. *Twyman v. Frankfort* (1904), 117 Ky. 518, 78 S.W. 446, 64 L.R.A. 572, 4 Ann. Cas. 622. *Evans v. Kankakee* (1907), 231 Ill. 223, 83 N.E. 223, 13 L.R.A. (N.S.) 1190.

12. *Harris v. D.C.* (1921), 256 U.S. 650, 41 S. Ct. 610, 65 L. Ed. 1146, 14 A.L.R. 1471. *Love v. Atlanta* (1894), 95 Ga. 129, 22 S.E. 29, 51 A.S.R. 64. *Louisville v. Carter* (1911), 142 Ky. 443, 134 S.W. 468, 32 L.R.A. (N.S.) 637. *City of Harlan v. Peavely* (1928), 224 Ky. 338, 6 S.W. (2d) 270. *Manguno v.*

(Continued on next page.)



of municipal corporations while engaged in the removal, disposal, or incineration of garbage, or the operation of dumps, have been held to entitle individuals to recover damages from the municipality, on the theory that these are proprietary functions.<sup>13</sup>

It is no infringement of the rights of individuals when a city prohibits by ordinance the removal of garbage by any person except the duly authorized employees of the city, or when the city makes an exclusive contract with an individual for the collection and removal of garbage within the municipality.<sup>14</sup>

### *Sewage Disposal*

Although the proper and safe disposal of sewage is recognized as an important public health measure, it is a well-established rule of law in this country that a municipal corporation is liable to individuals for nuisances caused by the disposal of its sewage, since this is a corporate and not a governmental duty.<sup>15</sup>

*New Orleans* (La. 1934), 155 So. 41. *Haley v. Boston* (1906), 191 Mass. 291, 77 N.E. 888, 5 L.R.A. (N.S.) 1005. *James v. Charlotte* (1922), 183 N.C. 630, 112 S.E. 423. *Scales v. City of Winston-Salem* (1925), 189 N.C. 469, 127 S.E. 543. *Condict v. Jersey City* (1884), 46 N.J.L. 157. *Oklahoma City v. Baldwin* (1929), 133 Okla. 289, 272 P. 453. *Scibilla v. Philadelphia* (1924), 279 Pa. 549, 124 A. 273, 32 A.L.R. 981. *Bandos v. Philadelphia* (1931), 304 Pa. 191, 155 A. 279. *Ashbury v. City of Norfolk* (1929), 152 Va. 278, 147 S.E. 223. *City of Brunswick v. Volptan* (1942), 87 Ga. App. 654, 21 S.E. (2d) 442. *Hayes v. Town of Cedar Grove* (1944), — W. Va. —, 30 S.E. (2d) 726, 156 A.L.R. 702. *Baumgardner v. City of Boston* (1939), 304 Mass. 100, 23 N.E. (2d) 121.

13. *Chardkoff Junk Co. v. City of Tampa* (1931), 102 Fla. 501, 135 So. 457. *City of Newcastle v. Harvey* (1913), 54 Ind. App. 243, 102 N.E. 878. *State ex rel. Hog Haven Farms v. Percy* (1931), 328 Mo. 560, 41 S.W. (2d) 403. *Missano v. The Mayor* (1899), 160 N.Y. 123, 54 N.E. 744. *Nicoll v. Village of Ossining* (1927), 220 N.Y.S. 345, 128 Misc. 848. *Kneece v. City of Columbia* (1924), 128 S.C. 375, 123 S.E. 100. *City of Longview v. Stewart* (Tex. 1933), 86 S.W. (2d) 450.

14. *City of Canton v. Van Voorhts* (1939), 61 Oh. App. 419, 22 N.E. (2d) 651. *City Sanitary Service v. Rausch* (1941), 10 Wash. (2d) 446, 117 P. (2d) 225. *Contra*, See *City of Malden v. Flynn* (1945), 318 Mass. 276, 61 N.E. (2d) 107.

15. *City of Harrisonville v. Dickey Clay Co.* (1933), 289 U.S. 334, 53 S. Ct. 602, 77 L. Ed. 1208. *Donnelly Brick Co. v. City of New Britain* (1927), 106 Conn. 67, 137 A. 745. *So. N.E. Ice Co. v. Town of West Hartford* (1932), 114 Conn. 496, 159 A. 470. *City of Barnesville v. Parham* (1931), 44 Ga. App. 151, 160 S.E. 879. *Barrington Hills Country Club v. Village of Barrington* (1934), 357 Ill. 11, 191 N.E. 239. *City of Frankfort v. Slipher* (1928), 88 Ind. App. 356, 162 N.E. 241. *Duncansen v. City of Fort Dodge* (1943), 233 Ia. 1325, 11 N.W. (2d) 583. *City of Harrodsburg v. Brewer* (1932), 243 Ky. 378, 48 S.W. (2d) 817. *City of*

(Continued on next page.)

An exception to this rule is in the case of the discharge of sewage into tidal waters. The State and municipal corporations each have the right to dispose of sewage, either treated or untreated, in this way, and a city cannot be held liable for damages to growers of shellfish or others injured by this practice.<sup>16</sup> The State may, however, regulate the pollution of shellfish and the sale of shellfish from polluted waters.

Where private parties drain sewage and industrial waste into a public sewer or sewerage system owned and operated by a municipal corporation, they are, in general, not liable for damages caused by improper disposal of the sewage effluent,<sup>17</sup> and a city maintaining such a nuisance cannot offer as a defense the fact that the plaintiff in the case made personal use of the public sewers.<sup>18</sup> Where, however, a city and a private industrial concern each discharge sewage and wastes into a creek, each may be held independently but not jointly liable for the nuisance.<sup>19</sup>

*Ludlow v. Comm.* (1933), 247 Ky. 166, 56 S.W. (2d) 958. *Gundy v. Village of Merrill* (1930), 250 Mich. 416, 230 N.W. 163. *Johnson v. City of Fairmont* (1933), 188 Minn. 451, 247 N.W. 572. *Hodges v. Town of Drew* (1935), 172 Miss. 668, 159 So. 298. *Windle v. City of Springfield* (1928), 320 Mo. 459, 8 S.W. (2d) 61. *Newman v. City of Marceline* (1928), 222 Mo. App. 980, 6 S.W. (2d) 659. *Carpenter v. City of Versailles* (Mo. 1934), 65 S.W. (2d) 957. *Gray v. City of High Point* (1933), 203 N.C. 756, 166 S.E. 911. *Lightner v. City of Raleigh* (1934), 206 N.C. 496, 174 S.E. 272. *Town of Smithfield v. City of Raleigh* (1935), 207 N.C. 597, 178 S.E. 114. *Clinard v. Town of Kernersville* (1939), 215 N.C. 745, 3 S.E. (2d) 267. *City of Lawton v. Wilson* (1927), 127 Okla. 40, 259 P. 650. *City of Sayre v. Rice* (1929), 132 Okla. 95, 269 P. 361. *Oklahoma City v. West* (1931), 155 Okla. 63, 7 P. (2d) 888. *City of Edmond v. Billen* (1935), 171 Okla. 37, 38 P. (2d) 564. *Oklahoma City v. Eylar* (1936), 177 Okla. 616, 61 P. (2d) 649. *Conestee Mills v. City of Greenville* (1931), 160 S.C. 10, 158 S.E. 113, 75 A.L.R. 519. *Gotwals v. City of Westington Springs* (1932), 60 S.D. 428, 244 N.W. 649. *Town of Merkel v. Patterson* (Tex. 1933), 56 S.W. (2d) 941. *City of Tyler v. House* (Tex. 1933), 64 S.W. (2d) 1007. *Chandler v. City of Olney* (1935), 126 Tex. 230, 87 S.W. (2d) 250. *Boyer v. City of Tacoma* (1930), 156 Wash. 280, 286 P. 659. *Bales v. City of Tacoma* (1933), 172 Wash. 494, 20 P. (2d) 860. *Snavelly v. City of Goldendale* (1941), 10 Wash. (2d) 453, 117 P. (2d) 221, 11 N.C.C.A. (N.S.) 674. *Mitchell Realty Co. v. West Allis* (1924), 184 Wis. 352, 199 N.W. 390, 35 A.L.R. 396. *Hasslinger v. Village of Hartland* (1940), 234 Wis. 201, 290 N.W. 647. For numerous earlier cases, see *Stream Pollution, A digest of judicial decisions and a compilation of legislation relating to the subject*, Public Health Bulletin No. 87, U.S. Public Health Service, 1917.

16. *Lovejoy v. City of Norwalk* (1930), 112 Conn. 199, 152 A. 210. *Darling v. Newport News* (1919), 249 U.S. 540, 39 S. Ct. 371, 63 L. Ed. 759.

17. *Hampton v. Spindale* (1936), 210 N.C. 546, 787 S.E. 775, 107 A.L.R. 1188.

18. *Zabst v. City of Angola* (1934), 99 Ind. App. 111, 190 N.E. 891.

19. *Johnson v. City of Fairmont* (1933), 188 Minn. 451, 247 N.W. 572.

It has been held in Texas that a city is not liable for injuries to a city employee while working in one of the pipes of the city's established sewer lines, since sanitation for the public health is a governmental function.<sup>20</sup> By the weight of legal authority, nevertheless, the construction and institution of a municipal sewer system is a governmental function, but its operation and upkeep is a proprietary function.<sup>21</sup>

### *Liability for Water-Borne Disease*

Although pure water is as necessary to life as is food, and an adequate supply of water is likewise required for proper fire protection in a community, a municipal corporation that undertakes to furnish water to its citizens, either for convenience or for profit, stands in exactly the same position with respect to liability for water-borne diseases as does any private purveyor of water. The collection, treatment, storage, and distribution of a public water supply by a municipality is a proprietary and not a governmental function. There have been no exceptions to this rule in American jurisprudence.<sup>22</sup>

When water is furnished to a consumer by either a public or a private corporation, a contractual relationship is established between the seller or distributor and the consumer. Unlike the usual legal situation when food is sold, however, there is no implied warranty that the water is pure.<sup>23</sup> In other words, the municipal corporation or a private water company is not a guarantor of the purity of the water, but it must use all reasonable precautions to prevent dangerous contamination of the water, and if it knowingly supplies impure or polluted water to a consumer who is unaware of the hazard the corporation will be liable for damages for fraudulent breach of the contract.<sup>24</sup>

There is, however, another effective remedy in cases of injuries caused by impure water. If disease or other injuries are caused by

20. *Ballard v. City of Fort Worth* (Tex. 1933), 62 S.W. (2d) 594.

21. *City of Portsmouth v. Mitchell Mfg. Co.* (1925), 113 Oh. St. 250, 148 N.E. 846, 43 A.L.R. 961.

22. J. A. Tobey, Liability for water-borne typhoid, *Public Works*, 59:148, April 1928. *Manual of Water Works Practice*, New York, American Water Works Association, 1925. A. Wolman and A. E. Gorman, *Significance of Waterborne Typhoid Fever Outbreaks, 1920-1930*, Baltimore, Williams & Wilkins, 1931. See pages 309-312 *infra* for a discussion of liability of private water companies.

23. *Canavan v. City of Mechanicsville* (1920), 229 N.Y. 473, 128 N.E. 882, 13 A.L.R. 1123.

24. *Green v. Ashland Water Co.* (1898), 101 Wis. 258, 77 N.W. 722, 43 L.R.A. 117, 70 A.S.R. 911.

negligence on the part of the distributor of the water, this condition is a tort, or legal wrong, for which there is a remedy at law. In order to maintain a successful action for negligence, however, it must be shown that there has been no contributory negligence on the part of the person injured or afflicted.

Since 1910 the courts have awarded damages against municipal corporations in numerous instances in which typhoid fever has been contracted by individuals as a result of negligence by cities in the operation and maintenance of public water supplies. In the first of these cases, decided by the Supreme Court of Minnesota in 1910, an award of \$5,000 was granted for a death caused by typhoid fever due to pollution of the city water supply with sewage.<sup>25</sup> In the course of this notable decision, the court stated:

It is obvious that a sound public policy holds a city to a high degree of faithfulness in providing an adequate supply of pure water. Nor does it appear why the citizens should be deprived of the stimulating effects of the fear of liability on the energy and care of its officials; nor why a city should be exempt from liability while a private corporation under the same circumstances should be held responsible for its conduct and made to contribute to the innocent persons it may have damaged.

In order to be entitled to damages for typhoid fever contracted from a municipal water supply, an individual must not only prove negligence on the part of the municipality, but he must also show beyond reasonable doubt that the water was the actual cause of his illness. In a case decided by the Court of Appeals of New York it was held, however, that this fact may be shown "with reasonable certainty," despite a rule of law that where there are several possible causes of injury, the plaintiff must prove that his injury was sustained by a cause for which the defendant is responsible.<sup>26</sup>

In this case, evidence was presented to show that the city water supply was badly contaminated, and that there was an increase of typhoid fever cases during this period; there was also medical testimony to the effect that the plaintiff's attack of the disease was due to drinking the city water. These facts were held to be sufficient for a jury determination as to whether the disease was contracted from this or some other source.

25. *Keever v. City of Mankato* (1910), 113 Minn. 55, 129 N.W. 158, 33 L.R.A. (N.S.) 339, Ann. Cas. 1912 A 216.

26. *Stubbs v. City of Rochester* (1919), 226 N.Y. 516, 124 N.E. 137, 5 A.L.R. 1396. *Safransky v. City of Helena* (1935), 98 Mont. 456, 39 P. (2d) 644. *Stoker v. Ogden City* (1936), 88 Utah 389, 54 P. (2d) 849.

The rules of evidence, as well as the doctrine of negligence, in this decision were followed in a subsequent case, in which the Appellate Division of the New York Supreme Court upheld, and the Court of Appeals affirmed, an award of \$2,000 to a minor and \$1,000 to his father for typhoid fever contracted by the child from a city water supply which had become polluted with sewage from an old canal.<sup>27</sup>

Despite these unfortunate experiences with typhoid fever in cities in New York State, an epidemic of typhoid occurred in 1928 in Olean, N. Y., which was traced to the city water supply and resulted in the payment of claims against the city amounting to more than \$400,000.<sup>28</sup> These claims were not the result of litigation in court, but were voluntarily paid by the city in order to avoid lawsuits. The city was authorized by the state legislature to issue bonds to pay the cost of this disastrous outbreak of disease, for which it was admittedly responsible.

A judgment for \$6,000 damages for a death from typhoid fever contracted from a polluted city water supply was upheld by the Supreme Court of Washington in 1925.<sup>29</sup> In a companion case,<sup>30</sup> the court pointed out that it was a question of fact for the jury to determine in the light of all the evidence whether the city was negligent in permitting polluted material to gain access to the city water, and whether it was negligent in failing to remedy the situation after becoming aware of it. Where, however, claims against the city were required to be submitted within a certain time, it was held in a third case in the series due to this epidemic that failure to submit a claim within the prescribed period would debar recovery.<sup>31</sup>

Damages amounting to \$47,000 for typhoid fever and dysentery caused by a city water supply were sustained by the California Supreme Court in nineteen cases brought before it in 1928.<sup>32</sup> In this instance, the city had permitted a chlorination plant, which was necessary for the purification of its polluted water supply, to become inoperative for about twelve hours, with the result that an epidemic occurred.

Where a city and a railroad company each maintained water sup-

27. *Wiesner v. City of Albany* (1928), 229 N.Y.S. 622, 224 App. Div. 239; affirm. 250 N.Y. 551, 166 N.E. 320.

28. A. S. Dean, The Olean City epidemic of typhoid fever in 1928, *Am. J. Pub. Health*, 21:390, April 1931.

29. *Aronson v. City of Everett* (1925), 136 Wash. 312, 239 P. 1011.

30. *Roscoe v. City of Everett* (1925), 136 Wash. 295, 239 P. 831.

31. *Scheer v. City of Everett* (1925), 134 Wash. 385, 235 P. 789.

32. *Ritterbusch et al v. City of Pittsburgh* (1928), 205 Cal. 84, 269 P. 930, 61 A.L.R. 448.

plies, which were connected, and typhoid fever resulted from contaminated water entering the city's water system from the railroad's supply, both the city and the railroad were held liable in damages for negligence.<sup>83</sup>

A city has likewise been held liable for typhoid fever caused by the act of its health officer in blocking a sewer so that sewage backed up and contaminated the city water supply.<sup>84</sup> Since the operation or maintenance of a sewer and the distribution of water are both corporate or proprietary functions, the city is liable for the negligent acts of its officers and employees in dealing with these matters, even though the officer responsible for the injuries may have thought that he was acting in the interests of the public health.

State laws creating state, county, and city boards of health do not take the control of water systems out of the hands of a city so as to relieve it of its duty to maintain a pure water supply, according to a decision of the Supreme Court of Montana in 1932,<sup>85</sup> in which it was also held that it is not necessary for the injured person to give notice to the city as a condition precedent to maintaining an action for damages due to typhoid fever resulting from the city water supply.

In a subsequent case, decided in 1935,<sup>86</sup> this same court upheld an award of \$1,500 to a person who contracted typhoid fever in the same epidemic, which had occurred in 1929. In discussing the admissibility of evidence to prove the negligence of the city, the court ruled that circumstantial evidence that the city water contained typhoid bacilli was sufficient, and that evidence showing the presence of *B. coli* (*Esch. coli*) in the water could be admitted in view of the fact that this organism is an indication of pollution with fecal material and is often an accompaniment of the *B. typhosus*, which is itself difficult to detect by laboratory methods.

Where, however, the legal representatives of persons deceased from typhoid fever which was alleged to have been contracted from a city water supply failed to show by a preponderance of evidence that the city water was the actual source of the disease, a finding by a jury in favor of the city was upheld by the Supreme Court of Utah in 1936.<sup>87</sup>

83. *Penn. R. Co. v. Lincoln Trust Co.* (1929), 91 Ind. App. 28, 167 N.E. 721, 170 N.E. 92.

84. *City of Salem v. Harding* (1929), 121 Oh. St. 412, 169 N.E. 457.

85. *Campbell v. City of Helena* (1932), 92 Mont. 366, 16 P. (2d) 1.

86. *Safransky v. City of Helena* (1935), 98 Mont. 456, 39 P. (2d) 644.

87. *Stoker v. Ogden City* (1936), 88 Utah 389, 54 P. (2d) 849. *Chase v. Industrial Commission* (1932), 81 Utah 141, 17 P. (2d) 205. *Williams v. Standard Examiner Pub. Co.* (1933), 83 Utah 31, 27 P. (2d) 1.

In this case, expert witnesses for the plaintiffs testified that the city water showed the presence of colon bacilli, indicating contamination, and that the water was responsible for an epidemic of fifteen known cases of typhoid, but experts for the city testified that the water could be excluded because most of the persons having the disease had been in contact with other definite sources of infection, such as proven typhoid carriers, and, furthermore, that there were comparatively few cases of the disease in a population of 40,000 all of whom used the city water.

Proof that contaminated river water was admitted to a city water supply through a valve negligently left open, and that this water was the probable cause of a fatal case of typhoid fever, resulted in a judgment for damages against the city, which was sustained late in 1936 by the Supreme Court of Vermont.<sup>38</sup> In this case, it was shown that milk, fruit, or shellfish could not have caused the disease, and that at least seven other cases of typhoid fever in the city at the same time could have been attributed to drinking this polluted water supply.

As stated elsewhere,<sup>39</sup> a city may adopt and enforce reasonable legislation to protect its public water supplies. In carrying out such necessary public health measures, a municipal corporation will not be liable for injuries to persons or property. Where, for example, dairy cattle were driven from a city watershed by a city employee who used ordinary care in doing so, the city was held not to be liable for damages to the cattle.<sup>40</sup> The maintenance and operation of a water supply and the distribution of water for domestic consumption is a proprietary function of a municipality, but the protection of the water supply in the interests of the public health is a governmental function.

In the operation of a water works a city, as an employer of labor, must obey any statutes requiring the adoption of measures to prevent occupational diseases, and for failure to do so will be liable for injuries caused by such negligence.<sup>41</sup>

Typhoid fever and the intestinal diseases are not the only wrongs due to municipal water supplies that have given rise to actions for damages. Recovery against a town has been allowed on breach of warranty and negligence for lead poisoning contracted from the town water supply.<sup>42</sup>

38. *Boguski v. City of Winooski* (1936), 108 Vt. 380, 187 A. 808.

39. See page 226.

40. *Phillips v. City of Golden* (1932), 91 Colo. 331, 14 P. (2d) 1013.

41. *Lockhart v. Kansas City* (1943), 351 Mo. 1218, 175 S.W. (2d) 814.

42. *Horton v. North Attleboro* (1939), 302 Mass. 137, 19 N.E. (2d) 15.

## LIABILITY

*Nuisances*

A municipal corporation is liable for the creation and maintenance of nuisances arising out of the exercise of its corporate or proprietary functions, and such liability will occur whether or not there has been negligence on the part of its officers and employees.<sup>43</sup>

While it is the duty of municipal corporations, acting through their health authorities, to order or bring about the prompt and effective abatement of nuisances that are dangerous to the public health, a municipal corporation cannot be held liable for damages for failure to cause the abatement of a nuisance on private property which was not authorized by it and to the maintenance of which the municipal corporation did not in any way contribute.<sup>44</sup> Legal redress in such instances must be obtained from the person responsible for the nuisance, and not from the municipality.

*Liability for Contracts*

In order to aid in the carrying out of its governmental or corporate functions, a municipal corporation may enter into contracts with individuals, partnerships, and corporations, although the scope, purposes, and even the terms of such contracts may be governed wholly or in part by the charter of the municipal corporation and by state and municipal legislation. When such contracts or agreements are lawfully entered into, the municipal corporation is liable for payment for the services rendered or for performance of the terms of the contract.

Boards of health are usually empowered to make contracts for certain purposes, and they too will be liable for payments on all lawful contracts. Thus, boards of health may be authorized to arrange for free medical services and supplies to indigent residents while suffering from contagious or infectious diseases which require quarantine or isolation; or they may be authorized by law to arrange for the administration of free vaccinations to indigents or to the entire resident populace regardless of indigency. Boards of health may also contract for the purchase of necessary supplies and equipment, for labor, and for such other matters as are necessary to their activities.

A board of health may not, as a rule, make a valid contract with one of its own members or with the health officer, since these public officers act in a fiduciary capacity for the benefit of the municipality,

43. *Hoffman v. City of Bristol* (1931), 113 Conn. 386, 155 A. 499, 75 A.L.R. 1191.

44. *City and County of Denver v. Ristau* (1934), 95 Colo. 118, 33 P. (2d) 387.



and such contracts are contrary to public policy.<sup>45</sup> The rule that no member of a municipal government shall be interested directly or indirectly in any contract entered into by the municipality while he is a member thereof is well established, and is often expressed in legislation.

While contracts made between a board of health and one of its members are not binding, compensation for services by a board member, which are arranged for in good faith and are satisfactorily undertaken, may be recovered under certain circumstances.<sup>46</sup> So, too, a board of health may justifiably arrange to pay extra compensation to a health officer for services which in the opinion of the board are extraordinary,<sup>47</sup> as where a physician who is a part-time local health officer is paid reasonable fees for vaccinations performed on his own time at the request of the board of health. Whether such arrangements may be considered legal depends in many instances upon the precise wording of applicable statutes and their interpretation by courts, attorney generals, or city solicitors. As a general rule, a board of health may not contract with a health officer for special compensation for services that are within the regular scope of his duties.<sup>48</sup>

A health officer can make contracts on behalf of a board of health only when he is authorized, either by action of the board or by statute, to do so. Where a physician reported a case of diphtheria to a local health officer, and was directed by him to treat other members of the family and did so, it was held by the New Hampshire Supreme Court that the physician could not recover from the town for medical

45. *Fort Wayne v. Rosenthal* (1881), 75 Ind. 156, 39 Am. R. 127. *Bjelland v. Mankato* (1910), 112 Minn. 24, 127 N.W. 397, 140 A.S.R. 460. *Gaw v. Ashley* (1907), 195 Mass. 173, 80 N.E. 790, 122 A.S.R. 229. *Eden v. Southwest Harbor* (1911), 108 Me. 489, 81 A. 1003. *Lesteur v. Inhabitants of Rumford* (1915), 113 Me. 317, 93 A. 838.

46. *Spearman v. Texarkana* (1894), 58 Ark. 348, 24 S.W. 883, 22 L.R.A. 855.

47. *Selma v. Mullen* (1871), 46 Ala. 411. *Schmidt v. Stearns County* (1885), 34 Minn. 112, 24 N.W. 358. *St. Johns v. Clinton County* (1897), 111 Mich. 609, 70 N.W. 131. *Hudgins v. Carter County* (1903), 115 Ky. 133, 72 S.W. 730, 24 Ky. L. 1980. *Cedar Creek Township v. Wexford County* (1903), 135 Mich. 124, 97 N.W. 409. *Buffalo Lake Board of Health v. Renville County* (1903), 89 Minn. 402, 95 N.W. 221. *Dewitt v. Mills County* (1904), 126 Ia. 169, 101 N.W. 766. *Plumb v. York County* (1914), 95 Neb. 655, 146 N.W. 938, Ann. Cas. 1915 D 1195.

48. *Reynolds v. Mt. Vernon* (1898), 50 N.Y.S. 473, 26 App. Div. 581, affirm. (1900) in 164 N.Y. 592, 58 N.E. 1091. *Sloan v. Peoria* (1902), 106 Ill. App. 151. *Cochran v. Vermillion County* (1903), 113 Ill. App. 140. *Yandell v. Madison County* (1902), 81 Miss. 288, 32 So. 918. *Congdon v. Nashua* (1904), 72 N.H. 468, 57 A. 686.

services and supplies, since the health officer lacked authority to contract for such medical services and there was no implied promise to pay.<sup>49</sup> On the other hand, where a board of health official requested a town physician to investigate the case of a child bitten by a dog suffering from rabies and the physician administered necessary antirabic treatment, it was held by the Supreme Judicial Court of Massachusetts that the physician could not recover for his services from the family, but if he rendered services outside the terms of his employment as town physician, he could recover from the town, since rabies was legally defined as a disease dangerous to the public health.<sup>50</sup> The town also had a remedy against the family if they were able to pay.

49. *Sweeney v. Town of Peterborough* (1929), 84 N.H. 155, 147 A. 412. *Pue v. Lewis and Clark County* (1926), 75 Mont. 207, 243 P. 573.

50. *Bryant v. Nolin* (1927), 261 Mass. 358, 158 N.E. 791.

## CHAPTER XVIII

### PERSONAL LIABILITY OF HEALTH OFFICERS

**N**O health officer in the United States or Canada is immune to civil actions for injuries and damages arising out of the performance of his duties. He must, therefore, be thoroughly familiar with the legal limitations upon his powers and duties, and also with the legal rights and privileges of the individual citizen, so that costly private litigation may be prevented, or, if not avoided, so that his own rights may be adequately defended and protected in court actions.

Health officers are vested with wide but not unlimited authority. As administrative and ministerial officials, who are officers of the State (whether they are state or local officials), it is their primary function to enforce impartially and equitably all laws, regulations, and orders for the protection and legitimate promotion of the public health, and to take all necessary and reasonable measures to accomplish this purpose.

So long as they do this, and so long as their efforts are reasonably calculated to preserve the public health, health officials will not be personally liable for causing injuries or damages to individuals or to private property.

If, however, the acts of a health officer or of those serving under his direction are beyond the scope of his authority, are arbitrary, oppressive, corrupt, malicious, or capricious, he may be personally liable for any resulting damages. In other words, if the health officer is guilty of malfeasance, misfeasance, and sometimes nonfeasance in his duties, he may be liable in a civil case and possibly even in a criminal action properly brought against him.

On numerous occasions aggrieved citizens have invoked the aid of the courts to invalidate the actions of health officers or to secure judgments for actual or alleged wrongs to their persons or property. The courts, in exercising their jurisdiction in such matters, will allow every intendment in favor of health laws and the mode of their enforcement, but the judiciary will also determine whether the constitutional rights of the individual have been infringed and whether the measures undertaken by the health officer have been appropriate and reasonable.

In the great majority of instances in which the proceedings of health officers have been challenged in the courts, they have been upheld as valid and personal liability has been denied. In a considerable number of cases, however, certain actions of health officials have been declared

void or invalid, and in numerous instances actual money damages have been awarded against individual health officers because of their improper, illegal, and injurious performances.

### *Errors of Judgment*

In the absence of malice or corruption or a statutory provision imposing the liability, health officers generally are not liable for errors or mistakes in judgment in the performance of acts within the scope of their authority where they are empowered to exercise judgment and discretion.<sup>1</sup>

An example of such an error of judgment is an honest mistake in bringing about the quarantine or isolation of an individual. Where a person was quarantined under the belief that he was suffering from smallpox, a dangerous contagious disease, but as a matter of fact he did not have this malady or any other that endangered the public health, the members of a local board of health in Iowa who were responsible for this action were held not to be personally liable for the mistake.<sup>2</sup>

A similar situation arose in New Jersey where a city physician reported to a local board of health that a child had scarlet fever. Acting on this report and in accordance with the procedure outlined in a city ordinance, the residence was quarantined and a placard announcing a case of scarlet fever placed upon it. Although two consulting physicians employed by the family stated that the disease was not scarlet fever, four others to whom the symptoms were described confirmed the diagnosis of the city physician. In a suit brought against the board for trespass, false imprisonment, and libel, the court held that the members of a board of health acting in the performance of a public duty under a valid law are not personally liable for damages arising out of quarantine, even if the disease does not actually exist.<sup>3</sup>

Although these cases were decided many years ago (in 1906 and 1908, respectively), the same principle has been affirmed in later decisions. Thus, where a physician reported to a health department that a child was afflicted with smallpox, and the chief diagnostician of the department confirmed the diagnosis and committed the patient

1. 1 *Dillon's Municipal Corporations* 771.

2. *Beeks v. Dickenson County* (1906), 131 Ia. 444, 108 N.W. 311, 6 L.R.A. (N.S.) 831, 9 Ann. Cas. 812.

3. *Valentine v. Englewood* (1908), 76 N.J.L. 509, 71 A. 344, 19 L.R.A. (N.S.) 262, 16 Ann. Cas. 731. *Forbes v. Board of Health* (1891), 28 Fla. 26, 9 So. 862, 13 L.R.A. 549.

to a quarantine hospital from which she was discharged in a few days as free from the disease, the chief diagnostician was held not to be liable when the child shortly thereafter came down with true smallpox, undoubtedly contracted while in the hospital.<sup>4</sup> The physician who reported this case was likewise held not to be liable. The court declared in this decision:

The public health is of the greatest concern to all. By law its keeping rests with the attending physicians, householders, and health officers. Public policy favors the discovery and confinement of persons afflicted with contagious diseases, and we think it is not only the privilege, but the duty, of any citizen acting in good faith and on reasonable grounds to report all suspected cases that examination may be made by experts and the public health thereby protected. We hold that this may be done without being subjected for liability for damages. To hold otherwise would not only invite indifference at the expense of society, but the fear of liability would well-nigh destroy the efforts of officials to protect the public health.

Other court decisions have held that there has been no liability on the part of a health official for failure to remove a smallpox patient from a private house when in his judgment he should remain there;<sup>5</sup> for quarantine of a vessel because of the prevalence of disease at the port;<sup>6</sup> for failure to provide a nurse as required by law;<sup>7</sup> for exclusion of an unvaccinated child from school;<sup>8</sup> and for fumigating a millinery shop after a case of contagious disease had been discovered there.<sup>9</sup>

In an early (1874) decision in Maine, the court held that an owner of a house could not recover from a health officer who had compelled him to remove the wallpaper from a room where a smallpox patient had been confined, even though considerable evidence was introduced to prove that such removal of the paper was unnecessary.<sup>10</sup> In the light of modern scientific knowledge, which emphasizes the role of persons and living things rather than inanimate objects in the spread of most diseases, such a requirement might not now be regarded as a

4. *McGuire v. Amyx* (1927), 317 Mo. 1061, 297 S.W. 968, 54 A.L.R. 644.

5. *Whidden v. Cheever* (1897), 69 N.H. 142, 44 A. 908, 76 A.S.R. 154.

6. *Compagnie Française de Navigation à Vapeur v. Louisiana State Board of Health* (1902), 51 La. Ann. 645, 25 So. 591, 56 L.R.A. 795, 72 A.S.R. 458; affirm. in 186 U.S. 380, 22 S. Ct. 811, 46 L. Ed. 1209.

7. *Rohn v. Osmun* (1906), 143 Mich. 68, 106 N.W. 697, 5 L.R.A. (N.S.) 635.

8. *Zucht v. King* (Tex.), 225 S.W. 267, affirm. (1922), 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194.

9. *Allison v. Cash* (1911), 143 Ky. 679, 137 S.W. 245.

10. *Seavey v. Preble* (1874), 64 Me. 120.

reasonable one, although the general principle of law remains the same.

This principle of law was ably set forth in a leading decision of the New York Court of Appeals, holding that the quarantine of a woman living in a house adjoining premises where a case of smallpox had occurred was valid under the terms of a legally adopted city ordinance, and that the health officer could not be held liable for damages.<sup>11</sup> Said the court. (page 503):

The general authority of the health officer to absolutely quarantine in cases of the designated diseases "wherever he deems necessary" was not intended to and does not confer upon him unlimited power and right to control persons and property at his discretion. His action in such regard cannot be arbitrary, unreasonable or oppressive. . . . As a preliminary to his action the health officer must *deem* the action *necessary*. He must adjudge his conclusion, that is, his conclusion must rest upon his knowledge of the facts and of the correct rules for their interpretation and application acquired through a reasonable and fair investigation and consideration at such sources as a person of ordinary perception and intelligence, charged with the responsibilities of the office, would regard as authentic and trustworthy. The conclusion thus reached must be that the action he orders is essential to public health. Conditions must exist which render, within reason and fair apprehension, his action essential for the preservation of the health of the public. For a mere error of judgment the officer cannot be held liable. Unreasonable and arbitrary action or malicious or partial action, or action in excess of his authority, causing injuries, supports his liability.

In a recent case which came before a Federal Circuit Court of Appeals, it was pointed out that the duty laid on a health officer is a public duty, a duty to protect the general public, but the office does not charge the incumbent with any individual duty to a particular person.<sup>12</sup> This case arose out of a disastrous typhoid fever epidemic which occurred at the Manteno State Hospital in Illinois in 1939, and which caused sixty-three deaths. A number of construction workers who suffered from the disease, which was alleged to have been contracted from the water supply of the hospital, sued the bondsmen of the directors of the state departments of welfare and of health, and also the bondsmen of the managing director of the hospital. The court held, however, that there was no liability on the part of these officials. Said the court:

11. *Crayton v. Larabee* (1917), 220 N.Y. 493, 116 N.E. 355, L.R.A. 1918 E. 432.

12. *People for use of Trust Co. of Chicago v. Maryland Casualty Co.* (1942), 132 F. (2d) 850.

In such a situation, the law seems to be clear that if the duty discharged is a public duty and not a duty which the individuals owe to any particular person, then for their negligence or wanton or wilful omission in the performance of this public duty, the officers are not liable, except to the State.

The state welfare director was indicted and tried in the state courts for this omission of duty, but a jury was unable to agree on a verdict in the case. He was convicted later by a judge sitting without a jury, and ordered removed from office and fined \$1,000, but the decision was set aside by the Illinois Supreme Court on the grounds that the State had failed to prove that the epidemic was actually caused by the water supply.<sup>13</sup>

### *Culpable Errors*

Errors of judgment by health officials may in some cases lead to justifiable actions for damages. Members of a local board of health in Texas were adjudged personally liable for causing the removal of a boy afflicted with smallpox and his mother from their own home to an unheated tent, the removal having taken place during cold, wet weather.<sup>14</sup> Probably as a result of their exposure, both of the quarantined patients died. The board members were held guilty of gross negligence, which was inexcusable even if they acted, as claimed, under the terms of a city ordinance.

A similar case arose in Kansas, where a local health officer transferred a smallpox patient from her home to a dirty cabin lacking in sanitary conveniences.<sup>15</sup> For this mistake in judgment, damages and costs amounting to about \$3,000 were awarded against the health officer. The court in granting this judgment pointed out that "A health officer, while required to obey his lawful orders and perform his official duty, is never excused for wanton conduct and inhumane treatment to patients suffering from serious illness. . . ."

Where a board of health in South Carolina compelled the isolation of an elderly, refined white woman in a pesthouse which had been used for Negroes suffering from smallpox, this action was held to be unreasonable and invalid.<sup>16</sup> The patient in this case had anesthetic leprosy, which was shown to be non-contagious or only mildly dan-

13. *People v. Bowen* (1941), 376 Ill. 317, 33 N.E. (2d) 587.

14. *Aaron v. Broiles* (1885), 64 Tex. 316, 53 Am. Rep. 764.

15. *Moody v. Wickersham* (1922), 111 Kan. 770, 207 P. 847, 24 A.L.R. 794.

16. *Kirk v. Aiken Board of Health* (1909), 83 S.C. 372, 65 S.E. 387, 23 L.R.A. (N.S.) 1138. *White v. City of Charleston* (S.C. 1842), 2 Hill 576.

gerous to others through close, intimate contact. The action of the board in quarantining the lady was enjoined by the court, but the members of the board were absolved from personal liability since they had performed in good faith what they had considered to be their duty.

"Personal liability," said the court in this case, "depends on proof of bad faith. True, bad faith may be shown by evidence that the official action was so arbitrary and unreasonable that it could not have been taken in good faith; but there is no showing in this case."

### *Illegal Actions*

Where a law specifically sets forth the procedure to be followed in controlling communicable diseases, in abating nuisances, or in undertaking other measures to protect the public health, the health officer must comply with that procedure, unless summary action is essential to the public welfare and its necessity can be proved.

In an early case, a health officer in Massachusetts, who had quarantined a smallpox patient in a boarding house and had seized and destroyed a quantity of furniture and other property without obtaining a warrant as required by law, was held to have been personally liable for his acts.<sup>17</sup> Even if all he did was done honestly, as the court pointed out, the health officer must act only within the authority conferred upon him by the statutes. In a similar case, a judgment was awarded against the members of a board of health for seizing a house and using it as a smallpox hospital without securing the necessary warrant for that purpose.<sup>18</sup>

When a local board of health properly hired a building for a smallpox isolation hospital but maintained it in such a negligent and careless manner that damage was done to an adjoining property owner, the members of the board were held personally liable on the grounds that they were guilty of misfeasance, or wrongful action.<sup>19</sup> They would not have been liable for nonfeasance, or failure to act, according to this decision.

If the action of a health official is inspired by improper motives, such as collusion with an individual to promote his personal welfare, the health official may be liable for damages. Thus, the secretary of a state board of health was adjudged personally liable for causing the

17. *Brown v. Murdock* (1885), 140 Mass. 314, 3 N.E. 208.

18. *Hersey v. Chapin* (1894), 162 Mass. 176, 38 N.E. 442.

19. *Barry v. Smith* (1906), 191 Mass. 78, 77 N.E. 1099, 5 L.R.A. (N.S.) 1028, 6 Ann. Cas. 817.



outlet of waters from a lake to be obstructed so that a nuisance was created, especially since the evidence showed that his order was due to collusion and was a mere pretense.<sup>20</sup> A state dairy commissioner who connived in the sale of impure milk to a local dealer was held, in an early Washington decision, to be liable because of a corrupt act.<sup>21</sup>

### *Destruction of Property*

In the course of his official duties, a health officer may be required to destroy or injure private property. If such action is justified by the exigencies of the occasion and is actually necessary for the preservation of the public health, there is no liability, but the health officer may be called upon in court to prove that his action was a reasonable one.

When a health officer deliberately destroys property under the belief that it is dangerous to health, but as a matter of fact it is not and could not be so considered by any reasonable, prudent person, he will be liable for damages. Thus, the president of a board of health was held personally liable for arbitrarily ordering the fumigation of a vessel, although it had not come from an infected port and it carried a clean bill of health.<sup>22</sup>

Said the court in an early New York case:

Whoever abates an alleged nuisance and thus destroys or injures private property or interferes with private rights, whether he be a public officer or a private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril, and when the act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy and is founded upon fundamental constitutional principles.<sup>23</sup>

In this case it was held, however, that under existing laws the members of a board of health were not liable for ordering the removal of certain river dams as nuisances. But where a board of health ordered the destruction of certain horses on the supposition that they had glanders, a dangerous disease, and they did not have this malady, the

20. *Overmyer v. Barnett* (1919), 70 Ind. A. 569, 123 N.E. 654.

21. *McKenzie v. Royal Dairy* (1904), 35 Wash. 390, 77 P. 680.

22. *Beers v. Board of Health* (1883), 25 La. Ann. 1132, 48 Am. R. 256. *Jarvis v. Pinckney* (1836), 3 Hill 123, Riley 123 (S.C.)

23. *People ex rel. Copcutt v. Board of Health* (1893), 140 N.Y. 1, 35 N.E. 320, 23 L.R.A. 481, 37 A.S.R. 522. *Raymond v. Fish* (1883), 50 Conn. 80, 50 Am. R. 3.

board members were held liable for the wrongful act.<sup>24</sup> Livestock officials also have been held liable for the destruction of cattle thought to be but not actually afflicted with disease.<sup>25</sup>

### *Seizure and Examination of Persons*

The liberty of persons actually known to be suffering from communicable diseases, or reasonably suspected of having such diseases, may properly be restrained by health officials in the interests of the public health. Such restraints must, however, be based upon facts susceptible of proof in court, and carried out in accordance with procedures authorized by law. Otherwise, liability may result, as was shown by an interesting case in Michigan.

During the first world war, an eighteen-year-old girl living near an army camp was persuaded by a deputy sheriff to go to the office of the city health officer. Here she was subjected to a physical examination, made, according to her testimony, against her will. Since the examination revealed that she had gonorrhoea, she was sent to a hospital, where a laboratory test showed that she also had syphilis. After twelve weeks of treatment, she sued the health officer for damages, on the grounds of assault and false imprisonment.<sup>26</sup>

Since no testimony had been introduced to prove that the health officer had reasonable grounds for suspecting the existence of venereal disease in this person and hence had acted in an arbitrary manner in seizing and examining her, a judgment was awarded against him. The fact that subsequently the patient was shown to have venereal disease did not excuse the lack of legitimate cause for the initial examination. Said the court:

It would be an intolerable interference by way of officious meddling for health officers to assert and then assume the power of making physical examination of girls at will for venereal disease. If the health officer had power at all to examine plaintiff, he had no right to exercise it without reasonable cause; such cause to precede examination and in no way depend upon the result of the examination. In any event defendant had no right to suspect and examine plaintiff so long as she had no accuser.

24. *Miller v. Horton* (1891), 152 Mass. 540, 26 N.E. 100, 10 L.R.A. 116, 23 A.S.R. 850.

25. *Pearson v. Zehr* (1891), 138 Ill. 48, 29 N.E. 854, 32 A.S.R. 113. *Lowe v. Conroy* (1904), 120 Wis. 151, 97 N.W. 942, 66 L.R.A. 907, 102 A.S.R. 983, 1 Ann. Cas. 341.

26. *Rock v. Carney* (1921), 216 Mich. 280, 185 N.W. 798, 22 A.L.R. 1178. See *Wong Hoy Woon v. Duncan* (1894), 3 B.C. 318.

Whether this case in all its aspects is good law today is a question, especially since many statutes authorizing examination of prostitutes and others likely to be carriers of venereal disease are now in force.<sup>27</sup> The case indicates, however, the necessity for health officials to use due care in interfering with individual rights and strictly to follow procedures authorized by law.

### *Libel and Slander*

Libellous statements by health officers may occasionally result in lawsuits against them and may give rise to judgments. Libel is defined as malicious publication, expressed either in writing or by signs and pictures, tending to discredit the memory of the dead or the reputation of the living and expose a person to public hatred, contempt, or ridicule. Slander is the same, but is oral or spoken instead of written.<sup>28</sup>

Defamatory words may be either actionable *per se*, as the false imputation that a person has venereal disease or any other loathsome affliction, or they may be not injurious on their face, but actionable by innuendo. The truth is a proper defense in most cases of alleged libel or slander.

Certain kinds of communications are privileged and will not support a libel suit. Thus, reports and comments by a health officer in the proper discharge of his official duties are absolutely privileged, and all communications between physician and patient are privileged. Thus, if a school medical director informs the parents of a girl that she has venereal disease, such a statement is not libellous but conditionally privileged.<sup>29</sup>

Health officials should, however, refrain from abusive, intemperate, and malicious statements about individuals, either for use in the public press or when made directly to persons, in correspondence, or in other ways.

### *The Effects of Statutes on Liability*

Statutory provisions in modern public health laws frequently exempt health officers for personal liability for acts done in the course of their official duties. An excellent example of such a law is a section in the

27. See Chapter X, on Venereal Disease, pages 168-171.

28. See J. A. Tobey, Libel and public health, *Am. J. Pub. Health*, 16:1174, November 1926. See also page 316 *infra*.

29. *Kenney v. Gurley* (1923), 208 Ala. 623, 95 So. 34, 26 A.L.R. 813. See *Valentine v. Englewood* (1908), 76 N.J.L. 509, 71 A. 344, 19 L.R.A. (N.S.) 262, 18 Ann. Cas. 731. *Hubbard v. Allyn* (1908), 200 Mass. 166, 86 N.E. 356.

New York Public Health Law (# 21-b), adopted in 1913, which reads as follows:

No health officer, inspector, public health nurse, or other representative of a public health officer, and no person or persons other than the city, village or town by which such health officer or representative thereof is employed shall be sued or held to liability for any act done or omitted by any such health officer or representative of a health officer in good faith and with ordinary discretion on behalf or under the direction of such city, village, or town or pursuant to its regulations or ordinances, or the sanitary code, or the public health law. Any person whose property may have been unjustly or illegally destroyed or injured pursuant to any order, regulation or ordinance, or action of any board of health or health officer, for which no personal liability may exist as aforesaid, may maintain a proper action against the city, village or town for the recovery of proper compensation or damages. Every such suit must be brought within six months after the cause of action arose and the recovery shall be limited to the damages suffered.

While this law and similar laws prevent the bringing of lawsuits against health officials acting in good faith in the performance of their duties, it offers no protection against court actions brought against health officers as individuals for damages due to acts beyond the scope of their authority or for acts that are arbitrary, oppressive, malicious, or unreasonable.<sup>30</sup> Such statutes afford a partial protection, but do not alter the legal principles of the health officer's liability that have been set forth in this chapter.<sup>31</sup>

30. See 24 *American Law Reports* 798.

31. 35 St. Rept. (N.Y.) 126 (Opinion of Attorney General).

## CHAPTER XIX

### LIABILITY OF INDIVIDUALS AND CORPORATIONS IN MATTERS AFFECTING THE PUBLIC HEALTH

**E**VERYONE is entitled by law to the reasonable enjoyment of life, liberty, and property, and to the security of his person, his family, and his possessions. Government recognizes these rights and protects them, although the sovereign power may properly impose certain desirable restraints upon individual rights for the benefit of the common good. The State may always regulate life, liberty, and property in the interests of the public health and the general welfare.

Whenever a personal right created and sanctioned by law is violated, the resulting wrong to the individual is known as a tort. Among the numerous kinds and classes of torts are many that involve hazards to human life and injuries to personal health. Although these are private wrongs, they may also affect the public health, either directly or indirectly. The maintenance of a nuisance is a tort giving rise to liability, but it may likewise be a public offense under certain conditions.<sup>1</sup> So, too, disease caused by contaminated food or milk or by polluted water is a tort which obviously has serious public health implications.

Another branch of private law, that of contracts, may involve matters of direct interest to the public health. Breaches of contract, causing liability in cases of express or implied warranties of the purity and safety of domestic water supplies, food supplies, drugs and biological products, medical and nursing services, therapeutic devices and cosmetics, and other commodities and services, may be of direct significance to the public health.

The existence of these various liabilities under the law of torts and the law of contracts often has a salutary effect upon natural persons and corporations who are or may be potential violators of the principles and the rules of public health procedure. The jurisprudence of public health is, however, concerned mainly with constitutional, administrative, municipal, and public law, rather than with private law.

Where a statute, municipal ordinance, or a valid regulation having the force and effect of law imposes upon any person or corporation a duty for the protection of others, or in the performance of which the public is involved, a person injured by the violation or neglect of such

1. See Chapter XIII, on Nuisances and Sanitation.

a law has the right of private action against the transgressor for the damages sustained.<sup>2</sup> The violation of a public health law or regulation which results in personal injury automatically raises the presumption of actionable negligence in a tort case or of breach of contract. In some States it has been held, however, that violation of a statute is negligence *per se* but violation of an ordinance or regulation is merely evidence of negligence.

Many types and classes of persons may be involved in liabilities which pertain in this manner to the broad domain of public health protection. A private corporation is liable under substantially the same rules as a natural person.

The responsibility of persons and corporations to the State in public health matters is discussed at length in other parts of the book.

### *Physicians and Other Professions*

Any person who offers his services in a professional capacity, whether as a physician or other healer, dentist, veterinarian, or nurse, contracts with his employer, patient, or client that he possesses that reasonable degree of learning, skill, and experience usually possessed by members of his profession at the time and in the same locality, or in similar localities, where he practices; and he contracts further that he will employ reasonable and ordinary care and diligence in the exercise of that skill and knowledge, according to his best judgment.<sup>3</sup> Injuries resulting from failure to do these things will make the practitioner liable.<sup>4</sup>

A physician in attendance upon a case of communicable disease must follow all legal requirements and must take all necessary precautions to prevent the spread of the disease to others. If he does not do so and the disease is communicated to others, he will be civilly as well as criminally liable for the injuries caused.<sup>5</sup> Thus, where a physician fails to report a case of contagious or infectious disease as required by law, and as a consequence of his neglect of this duty other persons are infected, the physician will be liable for damages to the

2. *Cooley on Torts*.

3. E. D. Brothers, *Medical Jurisprudence*, 3d ed., St. Louis, Mosby, 1930.

4. See W. C. Woodward, *Medicolegal Cases, Abstracts of court decisions of medicolegal interest, 1926-1930 and 1931-1935*, Chicago, American Medical Association, 1932 and 1936.

5. *Helland v. Bridenstine* (1909), 55 Wash. 470, 104 P. 626. *Skillings v. Allen* (1921), 148 Minn. 88, 180 N.W. 916. *People v. Clobridge* (1930), 249 Mich. 376, 228 N.W. 692.

person or persons who contract the disease,<sup>6</sup> but only when his negligence can be definitely proven to the proximate cause of the disease.<sup>7</sup>

Where, for example, typhoid fever was spread in a family from a single case, the attending physician was absolved from liability since he had reported the case and, under existing law, he was not bound to enforce the rules of the state board of health, which was the duty of the local health officer.<sup>7</sup> The physician was, of course, bound not to do any act that would tend to spread the disease. Public health laws and regulations usually require that physicians in attendance upon cases of communicable disease shall take certain specific and general precautions. For compliance with these requirements, there can be no liability on the part of a practicing physician, but injuries resulting from their direct violation will invariably cause liability.

A physician will not be liable for a mistaken report of a suspected disease if he acts in good faith and in accordance with his best judgment.<sup>8</sup> Nor does the reporting of actual or suspected disease, as required by law, violate the confidential relationship between the physician and his patient.<sup>9</sup>

In a malpractice action brought against a physician for alleged negligent care of the eyes of an infant at birth, resulting in the loss of one eye, it was brought out that the statutes required that any inflammation, swelling, redness, or unnatural discharge of the eyes occurring within two weeks after birth was required to be reported to the local health officer within six hours. For failure to do this, the physician was held to have been guilty of negligence *per se*, although for other reasons a new trial was ordered.<sup>10</sup>

Where good medical practice dictates the prompt administration of biological products in the treatment of communicable diseases, such as antitoxin for diphtheria or tetanus, a physician who fails to use these methods, or is tardy in their use, will be liable to the patient or his heirs for resulting injury or death.<sup>11</sup>

6. *Jones v. Stanko* (1927), 118 Oh. St. 147, 160 N.E. 456.

7. *Davis v. Rodman* (1921), 147 Ark. 385, 227 S.W. 612, 13 A.L.R. 1459.

8. *McGuire v. Amyx* (1927), 317 Mo. 1061, 297 S.W. 968, 54 A.L.R. 644.

9. *Simonsen v. Swenson* (1920), 104 Neb. 224, 177 N.W. 831, 9 A.L.R. 1250.

10. *Dietsch v. Mayberry* (1942), 70 Oh. App. 527, 47 N.E. (2d) 404. *Medlin v. Bloom* (1918), 230 Mass. 201, 119 N.E. 773. In *Walden v. Jones* (1942), 289 Ky. 395, 158 S.W. (2d) 609, a physician was held liable for failure to use silver nitrate in an infant's eyes at birth.

11. *People v. Clobridge* (1930), 249 Mich. 376, 228 N.W. 692. *Thompson v. Anderson* (1934), 217 Ia. 1186, 252 N.W. 117. *Janssen v. Mulder* (1925), 232 Mich. 183, 205 N.W. 159 (chiropractor). *Hodgson v. Bigelow* (1939), 335 Pa. 497, 7 A. (2d) 338 (failure of physician to administer antitetanus serum).

A private hospital operated for gain is subject to the same general liability for personal injuries as is a physician, but a charitable hospital usually is not liable for injuries to charity patients.<sup>12</sup> Where, for example, a newborn infant of a paying patient contracted tuberculosis from a nurse in a private hospital as a result of the negligence of the nurse and the negligence of the hospital authorities in permitting a nurse with tuberculosis to come in contact with patients, the hospital was held liable.<sup>13</sup>

A nurse who is acting under the direction of a physician or hospital, or who gives reasonable emergency treatment, is not liable for injuries, but she may be liable for injuries resulting from independent practice, for negligence, or for acts that are beyond the scope of her work or are inconsistent with the orders or directions given to her. Physicians and hospitals are responsible for injuries caused by nurses acting under their direction.

Physicians, nurses, and hospitals are liable for the creation and maintenance of public or private nuisances in the same manner and to the same extent that other persons are responsible for such conditions.<sup>14</sup> Hospitals and professional practices of all kinds are not *per se* nuisances, but they may become nuisances under certain conditions.

The owner or operator of a private laboratory is liable for injuries resulting from negligent, erroneous, or fraudulent reports made by himself or by laboratory technicians selected and employed by him and acting under his direction, but he is not liable for mistakes or errors that may be made by a prudent person in a similar position, who is exercising ordinary care and reasonable skill. Where laboratory technicians are licensed in accordance with law, injuries resulting from the report or action of an unlicensed technician would usually be negligence *per se*.

### *Manufacturers and Sellers of Food*

Despite the legal rule known as *caveat emptor*, under which the buyer purchases at his own risk in the absence of a warranty or of fraud, there is always an implied warranty that food sold for human consumption is wholesome. This rule was recognized by the common law<sup>15</sup> but did not receive sanction in the later English and American

12. E. Hayt and L. R. Hayt, *Legal Guide for American Hospitals*, New York, Hospital Textbook Co., 1940.

13. *Taaje v. St. Olaf Hospital* (1937), 199 Minn. 113, 271 N.W. 109.

14. See Chapter XIII, on Nuisances and Sanitation.

15. 3 *Blackstone's Commentaries* 166.



law. As a consequence, there has been some conflict in the earlier court decisions on the subject, but the principle of implied warranty seems now, with few exceptions, to be well established in American jurisprudence.

An implied warranty, like an express warranty, of the wholesomeness of food is a contractual relationship between the buyer and the seller, and is based on a privity of contract between them, regardless of any intent or negligence on the part of either the vendor (seller) or the vendee (buyer). Thus, a druggist who sells ice cream to a customer is liable for illness caused by toxic properties of the ice cream,<sup>16</sup> and a milk dealer who delivers milk that causes undulant fever will be liable on an implied warranty.<sup>17</sup>

"The consequences to the consumer resulting from the consumption of articles of food sold for immediate use," said the New York Court of Appeals in the ice cream case,<sup>18</sup> "may be so disastrous that an obligation is placed on the seller to see to it, at his peril, that the articles sold are fit for the purpose for which they are intended. The rule is an onerous one, but public policy as well as the public health demand such obligation should be imposed."

A manufacturer of food warrants its wholesomeness to the retailer to whom he sells it, since there is privity of contract between them, but in the absence of a statute imposing this liability, there is no implied warranty between the manufacturer and the ultimate consumer, where a retailer or other middleman is interposed between them.<sup>19</sup> A retailer may, however, be liable on an implied warranty to a buyer to whom he sells food in a sealed package, bottle, or can furnished by the manufacturer.<sup>20</sup>

16. *Race v. Krum* (1918), 222 N.Y. 410, 118 N.E. 853, L.R.A. 1918 F 1172. *Temple v. Keeler* (1924), 238 N.Y. 344, 144 N.E. 635. *Minutilla v. Providence Ice Cream Co.* (1929), 50 R.I. 43, 144 A. 884, 63 A.L.R. 334, 28 N.C.C.A. 428. *Kress & Co. v. Ferguson* (Tex. 1933), 60 S.W. (2d) 817. *Woolworth v. Wilson* (Tex. 1935), 74 F. (2d) 439, 98 A.L.R. 681.

17. *Colonna v. Rosedale Dairy* (1936), 166 Va. 314, 186 S.E. 94. *Nelson v. West Coast Dairy Co.* (1940), 5 Wash. (2d) 284, 105 P. (2d) 76, 130 A.L.R. 606.

18. *Race v. Krum* (1918), 222 N.Y. 410, 118 N.E. 853, L.R.A. 1918 F 1172. *Greco v. S. S. Kresge Co.* (1938), 277 N.Y. 26, 12 N.E. (2d) 557, 115 A.L.R. 1020. *Steinberg v. Bloom* (1938), 5 N.Y.S. (2d) 774.

19. *Mazetti v. Armour* (1913), 75 Wash. 122, 135 P. 633, 48 L.R.A. (N.S.) 213, Ann. Cas. 1915 C 140. *Chysky v. Drake* (1923), 235 N.Y. 468, 139 N.E. 576, 27 A.L.R. 1533. *Carlson v. Turner Center System* (1928), 263 Mass. 339, 161 N.E. 245.

20. *Bowman v. Woodway Stores* (1930), 258 Ill. App. 307. *Lieberman v. Sheffield Farms* (1921), 117 Misc. 531, 191 N.Y.S. 593. *Aron v. Sills* (1924), 240 N.Y. 588, 148 N.E. 717. See 12 N.C.C.A. (N.S.) 714.

In addition to actions under the doctrine of implied warranty on a contractual basis for injuries due to unwholesome food, there is another remedy at law. This is an action of tort for negligence, which may be brought by an injured buyer against the retailer, distributor, wholesaler, or manufacturer of the offending food. The buyer must, however, be free from contributory negligence. As a rule, the aggrieved person may bring action for both negligence and breach of warranty at one and the same time. In the absence of a statute to the contrary, the tort action abates with the death of the wrongdoer.

Whenever the manufacturer or purveyor of a food has violated a pure food law or a public health statute, negligence on his part can be presumed,<sup>21</sup> although it may, of course, also be shown in other ways. In cases of violation of pure food or other laws, it is not essential to a recovery that the defendant should be shown to have had knowledge of the impurity of the food, or to have been wanting in ordinary care.<sup>22</sup>

In a number of instances where buyers of pork or of sausage have contracted trichinosis, it has been held that liability for negligence will not be imposed on the wholesale dealer or packer who sold the pork to the retailer<sup>23</sup> or on a retail dealer who sold these products to a customer,<sup>24</sup> since it is commonly known that pork and pork products must be thoroughly cooked in order to prevent trichinosis. The pure food laws usually do not define pork as adulterated or diseased merely because it contains the trichinae, which cannot be detected by ordinary methods of inspection and which can be destroyed by thorough cooking before this food is eaten. On the other hand, damages for trichinosis due to eating pork have been allowed under existing law in Ohio,<sup>25</sup> and in New York under the doctrine of implied warranty.<sup>26</sup>

21. *Meshbesh v. Channellene Oil Co.* (1909), 107 Minn. 104, 119 N.W. 428, 131 A.S.R. 441. *Taugher v. Ling* (1933), 127 Oh. St. 142, 187 N.E. 19.

22. *Donaldson v. Great A. & P. Tea Co.* (1938), 186 Ga. 870, 199 S.E. 213, 128 A.L.R. 456. See also 143 *American Law Reports* 1421.

23. *Chell v. Cudahy Bros. Co.* (1934), 267 Mich. 690, 255 N.W. 414. *Stebert v. Bose* (1935), 243 App. Div. 692. *Dressler v. Merkel, Inc.* (1936), 247 App. Div. 300, 284 N.Y.S. 697. *Tavani v. Swift & Co.* (1918), 262 Pa. 184, 105 A. 55. *Ketterer v. Armour & Co.* (1917), 247 F. 921, L.R.A. 1918 D 798, 160 C.C.A. 111. *Kierstetn v. Cudahy* (1934), 80 F. (2d) 518. *Karger v. Armour & Co.* (1938), 17 F. Supp. 484.

24. *Zorger v. Hellman's* (1936), 287 Ill. App. 357, 4 N.E. (2d) 900. *Wiedeman v. Keller* (1897), 171 Ill. 93, 49 N.E. 210. *Feinstein v. Daniel Reeves, Inc.* (N.Y. 1936), 14 F. Supp. 167. *Vaccarino v. Cozzuba* (1943), 181 Md. 614, 31 A. (2d) 316.

25. *Great A. & P. Tea Co. v. Hughes* (1936), 131 Oh. St. 501, 3 N.E. (2d) 415. *West v. Katsafanos* (1932), 107 Pa. Super. 118, 162 A. 685. *Kniss v. Armour*

(Continued on next page.)

Where the proprietor of a provision market advertised rabbits for sale in his market, and a purchaser bought them from a counter which the proprietor had leased to a third person, but the purchaser believed he was buying from the proprietor, it has been held that the third person who leased the counter was an agent by estoppel of the proprietor and that the proprietor was liable for tularemia contracted by the purchaser of the rabbits.<sup>27</sup>

Negligence in cases of injuries caused by foods must always be proven beyond a reasonable doubt. Conjecture and supposition will not uphold such an action. Where, for example, it was alleged that amebic dysentery was contracted from a soft drink containing an infected fly, the mere facts that a fly was found in the bottle and that flies are said to carry the organism causing amebic dysentery are not satisfactory proof that the drink was contaminated, especially when laboratory tests failed to show the presence of amebae in it.<sup>28</sup>

In an action brought to recover damages for illness due to eating cream puffs which had been infected with paratyphoid B bacilli, it was held by the Massachusetts Supreme Judicial Court that there was no liability on the part of the owner of the bakery which had sold the goods, because it had not been shown that the defendant had violated any statute or had failed to take proper precautions in the conduct of the business.<sup>29</sup> In this case, the infected cream puffs had been purchased on April 1, and on April 29 a physician from the state health department reported that one of the employees of the bakery was a carrier of paratyphoid fever. It was shown that the ingredients used in the goods were wholesome, and that there had been no reason to suspect the healthy employee of being a disease carrier.

### *Private Water Companies*

Since the position of a private water company supplying water for domestic consumption is analogous to that of a vendor of food, there

(1938), 134 Oh. St. 432, 17 N.E. (2d) 734. *Trotto v. Hammond* (Ohio 1940), 110 F. (2d) 135. *Kurth v. Krumme* (1944), 143 Oh. St. 638, 56 N.E. (2d) 227. *Leonard v. Habermann* (1944), 143 Oh. St. 623, 56 N.E. (2d) 232.

26. *Rinaldi v. Mohican Co.* (1916), 225 N.Y. 70, 121 N.E. 471. *McSpedon v. Kunz* (1935), 245 App. Div. 824, 281 N.Y.S. 147, affirm. (1936) in 271 N.Y. 131, 2 N.E. (2d) 513, 105 A.L.R. 1497. *Eisenbach v. Gimbel* (1939), 281 N.Y. 474, 24 N.E. (2d) 131. *Catalanello v. Cudahy* (1942), 84 N.Y.S. (2d) 37, 264 App. Div. 723. *Greco v. S. S. Kresge* (1938), 277 N.Y. 26, 12 N.E. (2d) 557, 115 A.L.R. 1020.

27. *Rubbo v. Hughes Provisions Co.* (1941), 138 Oh. St. 178, 34 N.E. (2d) 202.

28. *Coca Cola Co. v. Bell* (1937), 194 Ark. 671, 109 S.W. (2d) 115.

29. *Johnson v. Stoddard* (1941), 310 Mass. 232, 37 N.E. (2d) 505, 140 A.L.R. 186.

would seem to be no logical reason why a water company should not be liable on an implied warranty for injuries or illness due to impure or contaminated water furnished by it to its customers.<sup>30</sup> Adjudications of this matter in the past have, however, developed the legal principle that private and municipal corporations<sup>31</sup> are not guarantors or insurers of the purity of domestic water supplies, and are not liable on an implied warranty. The water company must, however, use all reasonable care to ascertain the sanitary condition of its water supply, and must promptly take all necessary measures to safeguard the health of users of the water and to protect the community which it serves.<sup>32</sup> For failure to perform these duties the water company will be liable for illness or injuries caused by the water supply.

In early cases involving typhoid fever due to contaminated water, the courts held that where no negligence on the part of the water company was shown,<sup>33</sup> or where the existence of the contamination had been so generally known and realized by the public and by the individual concerned that his use of raw and untreated water amounted to contributory negligence,<sup>34</sup> no recovery would be allowed against the water company.

This rather harsh rule of law has been modified to some extent in the later decisions, in which it has been held that it is no part of the duty of the consumer to investigate the water supply or to ascertain possible sources of pollution, but that this duty rests upon the water company, which must take such positive action as is necessary to determine the condition of the water supply, and must exercise due care for the protection of the health of its customers.<sup>35</sup> Whether these

30. In *Jones v. Mt. Holly Water Co.* (1915), 87 N.J.L. 106, 96 A. 860, it was stated that, "Water is a necessity of life, and one who undertakes to trade in it and supply customers stands in no different position to those with whom he deals than does a dealer in foodstuffs."

31. The liability of municipal corporations for diseases caused by contaminated public water supplies is discussed on pages 285-289.

32. *Hayes v. Torrington Water Co.* (1914), 88 Conn. 394, 92 A. 406.

33. *Buckingham v. Plymouth Water Co.* (1891), 142 Pa. 221, 21 A. 824. *Gosser v. Ohio Valley Water Co.* (1914), 244 Pa. 59. In *Brymer v. Butler* (1896), 172 Pa. 489, it was held that a water company supplying impure water can be enjoined from collecting water rents.

34. *Green v. Ashland Water Co.* (1898), 101 Wis. 258, 77 N.W. 722, 43 L.R.A. 117, 70 A.S.R. 911.

35. *Kohlmeyer v. Ohio Valley Water Co.* (1914), 58 Pa. Super. 63. *Jones v. Mt. Holly Water Co.* (1915), 87 N.J.L. 106, 96 A. 860. *Hamilton v. Madison Water Co.* (1917), 116 Me. 157, 100 A. 659, Ann. Cas. 1918 D 853. *Penn. R. Co. v. Lincoln Trust Co.* (1929), 91 Ind. App. 28, 167 N.E. 721, 170 N.E. 92.

duties have been fulfilled by the water company is a question of fact for a jury to decide in the light of all the evidence. It may be shown that the water was the probable cause of the typhoid fever or other disease, excluding the probability of other causes, but where such proof is lacking the company will be absolved from liability.<sup>36</sup>

A water company will not be exonerated or freed from liability to consumers by posting notices or giving publicity to the fact that the water is impure or dangerous, since the company has a duty to use diligent effort to provide water that is safe and potable. Nor will a private water company be free from liability if a health department or other official agency fails to warn it of any dangerous condition of the water; and the issuance of such an official warning will not be conclusive evidence that the water is so polluted as to establish liability, although the fact of the notice would be admissible evidence in a court action as tending to show negligence on the part of the company.

A restaurant which supplies its customers with water for drinking purposes from its own well impliedly warrants the reasonable fitness of the water for drinking, and will be liable for illness caused by it, according to a decision of the Supreme Court of Ohio.<sup>37</sup> The court held that the water furnished with the meal was a part of the meal, that it was a sale, and that the water was adulterated contrary to the state laws, since it was contaminated with sewage.

The liability of industrial concerns for furnishing impure water to their employees is set forth on pages 270-271 in Chapter XVI on Industrial Hygiene.

The presence of fluorine in public water supplies may be detrimental to the health of children, since a concentration in excess of one part per million of fluorine in water used for drinking and cooking will cause mottled enamel of the teeth of most children who consume such water. Legally, this situation is different from a case in which a public water supply becomes contaminated through negligence of a water company. In many instances, the condition cannot be satisfactorily controlled by the water company, although engineers and chemists are endeavoring to work out methods for its correction. Where the

36. *Webber v. Pacific Power and Light Co.* (1925), 137 Wash. 560, 242 P. 1104.

37. *Yochem v. Gloria* (1938), 134 Oh. St. 427, 17 N.E. (2d) 731. For liability of restaurant keepers for unwholesome food, see 18 N.C.C.A. (N.S.) 573. In *Cady Lumber Co. v. Fatn* (Ariz. 1933), 65 F. (2d) 644, an award of \$27,500 damages for typhoid fever alleged to have been caused by water furnished by the company to an employee was reversed on technical grounds of evidence. The error was admission of testimony relating to an analysis of milk, although no analysis for typhoid had been made of the milk.

water company has used every means in its power to remove or reduce fluorine in the available water supply, and also issues general public warnings that the water is unfit for consumption by children, it is unlikely that the water company could be held liable for injuries from this cause.

Discontinuance of water service to an individual customer sometimes creates a health problem which results in complaints to the health department. The water company is acting within its rights, however, when it shuts off water for failure or refusal of payment of water bills properly incurred, or for necessary repairs, although the company must usually continue to supply water pending the settlement of a legitimate dispute as to the proper amount of a bill for water consumed. Any health hazard or nuisance resulting from the lawful discontinuance of water service is, therefore, usually the responsibility of the householder and not of the water company. The health department may order abatement of the nuisance or removal of the health hazard by the person who is responsible for it.

#### *Manufacturers and Sellers of Drugs and Biological Products*

A manufacturer of a drug, chemical, medicine, or a biological product, such as a vaccine, serum, or antitoxin, is bound to use due care in its preparation and distribution, so that the health of those using the product will be safeguarded. The mere fact that an injury or death results from the application or use of one of these products does not, however, constitute proof, under the legal doctrine of *res ipsa loquitur*, that the preparation was at fault. It must be shown by competent evidence that the injury or death was due to the product of the manufacturer, that it was inherently dangerous and/or poisonous, and that the manufacturer was negligent in putting upon the market such a product.<sup>88</sup>

Where a veterinarian who had been bitten by a dog administered to himself by hypodermic methods thirteen injections of an antirabic vaccine according to the manufacturer's directions, and died some months later of inflammation of the spinal cord, his widow was unable to recover from the manufacturer, since no evidence was adduced to show that the serum was negligently prepared or was inherently dangerous.<sup>89</sup> But where an eyelash preparation caused severe injuries to a user who relied on statements on the label, and it was shown that

88. *Karr v. Inecto* (1928), 247 N.Y. 360, 160 N.E. 398.

89. *Tremaine v. H. K. Mulford Co.* (1935), 317 Pa. 97, 176 A. 212., *Hruska v. Parke Davis Co.* (1925), 6 F. (2d) 536.

the preparation contained harmful chemicals, an award of \$2,000 damages against the manufacturer was upheld.<sup>40</sup> In the same case, an action against the beauty shop in which the preparation was applied was dismissed.

In a case where a child died of phosphorus poisoning due to having eaten fireworks which contained yellow phosphorus, the manufacturer was held not to be liable on the grounds that fireworks were not intended for human consumption, and it could not be foreseen that anyone, even a child, would be likely to eat them.<sup>41</sup>

There is no implied warranty on the part of a manufacturer of biological products, such as vaccines, that their use will protect man or animals<sup>42</sup> against the diseases for which they are intended as immunizing agents. Nor will the manufacturer be liable for injuries due to the negligent, careless, or improper administration of these products by physicians and others,<sup>43</sup> but the person directly responsible for the injury will be liable.

A retailer, such as a druggist, who sells drugs, patent medicines, and biological products is not liable for injuries due to preparations sold in a manufacturer's sealed package, unless he expressly warrants them or is negligent in the way that he handles them. A druggist or pharmacist will be liable for negligence due to improper filling of a prescription, or for including a substance which he knows to be dangerous, or for the use of a preparation of his own that causes preventable injury.<sup>44</sup>

The same general rules of law apply to the liability of manufacturers and sellers of diagnostic and therapeutic devices.

### *Individuals Who Spread Diseases*

Any person who wilfully or negligently spreads or causes or permits the spreading of a dangerous communicable disease will be civilly liable for damages to the person who contracts the disease, as well as being criminally liable for his misdemeanor in accordance with the terms of existing public health statutes, ordinances, or board of

40. *Bundy v. Ey-Teb, Inc.* (1935), 289 N.Y.S. 905, 160 Misc. 325; affirm. in 248 App. Div. 596.

41. *Victory Sparkler Co. v. Price* (1927), 146 Miss. 192, 111 So. 437, 50 A.L.R. 1454.

42. *Balhorn v. Moore* (Ia. 1924), 200 N.W. 601, 39 A.L.R. 397.

43. *Baundenbach v. Schwerdfeger* (1928), 230 N.Y.S. 640, 222 App. Div. 314. *Carmen v. Eli Lilly & Co.* (1941), 109 Ind. App. 76, 32 N.E. (2d) 729.

44. *Howard v. Jacobs Pharmacy* (1937), 55 Ga. App. 163, 189 S.E. 373.

health regulations.<sup>45</sup> One who exposes another to a dangerous disease, even if no disease is contracted, may be civilly liable and usually will also be criminally liable.

Knowledge of the existence of the disease is necessary to prove liability in such cases,<sup>46</sup> but it does not matter whether the person who negligently causes the spread of disease does so by having it himself, or, being healthy, negligently permits someone else to cause the infection. Thus, a landlord or innkeeper will be liable for disease if he rents without proper precautions a room which he knows has been recently occupied by a person with a dangerous communicable disease, or if he puts a healthy person in a room with a sick one.<sup>47</sup> An innkeeper is not liable for refusing to accept as a guest a person afflicted with a communicable disease.

Barbers, hairdressers, cosmeticians, and "beauticians" will be liable for diseases or injuries to their customers which are due to negligence on their part.<sup>48</sup> The same legal rule applies to persons who operate commercial baths, swimming pools, and similar establishments.

Owners and keepers of animals that cause disease or injury in man or other animals may be liable for negligence. Thus, where a dog having rabies was permitted to run at large in violation of a municipal ordinance, an award of \$750 for damages to a child bitten by the dog was upheld.<sup>49</sup> Although the owner was not aware of the dog's affliction, the mere fact of violation of the ordinance, the validity of which was sustained by the court, was held to constitute negligence sufficient to entitle the injured person to a recovery which, under the circumstances, did not exist at common law.

Jailers, sheriffs, and other persons having custody of prisoners, wit-

45. *Smith v. Baker* (1884), 20 F. 709. *Kliegel v. Aitken* (1896), 94 Wis. 432, 69 N.W. 67, 35 L.R.A. 249, 59 A.S.R. 901. *Edwards v. Lamb* (1899), 69 N.H. 599, 45 A. 480, 50 L.R.A. 160. *M. K. & T. R. Co. v. Wood* (1902), 95 Tex. 223, 66 S.W. 449, 56 L.R.A. 592, 93 A.S.R. 834. *Franklin v. Butcher* (1910), 144 Mo. App. 660, 129 S.W. 431.

46. *Long v. Chicago R. Co.* (1892), 48 Kan. 28, 30 A.S.R. 271.

47. *Minor v. Sharon* (1873), 112 Mass. 477, 17 Am. R. 122. *Cesar v. Karutz* (1875), 60 N.Y. 229, 19 Am. R. 164. *Gilbert v. Hoffman* (1885), 66 Ia. 205, 55 Am. R. 263. *Cutter v. Hamlin* (1888), 147 Mass. 471.

48. *Barnett v. Roberts* (1922), 243 Mass. 233, 137 N.E. 353, 22 N.C.C.A. 841. *Sweeten v. Friedman* (1928), 9 La. App. 44, 118 So. 787. *Marsteller v. Kann* (1929), 32 F. (2d) 419. *Reed v. Rosenthal* (1929), 129 Ore. 203, 276 P. 684, 63 A.L.R. 1071. *Cowhig v. Cafarelli* (1945), — Mass. —, 63 N. E. (2d) 347.

49. *Pettus v. Weyel* (Tex. 1920), 225 S.W. 191.



nesses, or detained individuals will be personally liable for negligence in permitting their charges to contract disease.<sup>50</sup>

A teacher is not personally liable for a disease spread from one child to another in her classroom where ordinary and reasonable care in the supervision of the pupils is exercised. A teacher would, however, be liable for negligently causing disease in a pupil, as in an instance where a teacher suffering from tuberculosis knowingly accepted employment in violation of a law prohibiting such employment, and subsequently transmitted the disease to a pupil.

An award of \$3,000 in damages to a woman who contracted gastroenteritis from a city water supply, which had been polluted by the negligence of a private corporation engaged in road building, was upheld by the Supreme Court of Mississippi.<sup>51</sup> The corporation had a water line connected with the city's supply, but as the work proceeded, it extended its line into a bayou which received most of the city's sewage. Because of failure to install a safety valve, the water from the polluted bayou was allowed to enter the city's supply, with the result that an epidemic occurred among the users in a certain locality.

#### *Industrial Employees*

Before the advent of state workmen's compensation laws making compulsory or elective suitable compensation and medical care for workmen injured by accident or disease in the course of their employment, the liability of the employer was governed by the somewhat complex principles of the law of master and servant.

Under these legal principles, all individuals and corporations who employ workmen or servants must furnish them with reasonably safe places in which to work; must provide suitable, sufficient, and reasonably safe tools, appliances, and machinery; must exercise due care in the selection of competent workmen; and must so conduct their businesses that their employees will not be exposed to unreasonable hazards. For negligence in carrying out these duties, the employer will be liable for injuries and for diseases that arise directly out of employment.

The employee, on the other hand, assumes certain risks of employment, including the risk of all patent or apparent dangers and the risk of negligent acts by his fellow employees. Wherever there is contributory negligence on the part of the worker, due to these reasons or others, the employer is not liable for injuries, accidents, or diseases.

50. *Hunt v. Rowton* (1930), 143 Okla. 181, 288 P. 342. *Lewis v. City of Miami* (1937), 127 Fla. 426, 173 So. 150.

51. *Carey-Reed Co. v. Farmer* (1939), 187 Miss. 12, 192 So. 48.

The difficulties inherent in establishing liability of an employer for negligence under these principles are illustrated by a case in which a worker became infected with gonorrhea after using water and a towel which his gang foreman had used in one of the company's section houses. He sued the company for damages, but the court held that while the foreman may have violated a moral duty owed to the plaintiff when he permitted him to use the contaminated towel, he had violated no legal duty that the company, or he as the company's representative, owed to the plaintiff.<sup>52</sup>

The ways in which the common law rules of employer liability have been modified or supplanted by modern workmen's compensation laws, as interpreted by the courts, are discussed at length in Chapter XVI, on Industrial Hygiene and Occupational Diseases.

Industrial employers are liable to outsiders as well as to their own employees for injuries or diseases caused by their negligence or by the negligence of their employees while acting in the course of their employment. Where the supervision of employees suffering from communicable diseases is removed from the jurisdiction of the employer to that of the health department, as in the case of railroad boarding cars used for the quarantine of railroad employees with smallpox, the company is not liable for the subsequent spread of the disease from this source.<sup>53</sup>

### *Libel and Slander*

Among the legal rights of an individual is the right to be secure in his reputation. When false statements that are calculated to bring him into disrepute are uttered or published, so that they come to the attention of third persons, this right is violated.

Defamatory statements of this nature that are spoken constitute slander; those that are published by means of writing, printing, pictures, images, or in any other way constitute libel. Slander and libel are torts which entitle the wronged person to a civil action. Under certain conditions, as expressed in statutes, libel and slander may also be criminal offenses.

Certain types of published statements may be actionable *per se*, requiring no proof of actual injury. In this class are false imputations of criminal offenses involving moral turpitude; false imputations of infections with loathsome diseases; and false charges of unfitness to perform the duties of an office, trade or business, or profession.

52. *Gulf, C. & S. F. Ry. Co. v. Boss* (Tex. 1926), 285 S.W. 939.

53. *Mason v. Ill. Cent. R. Co.* (1903), 25 Ky. L.R. 1214, 77 S.W. 375.

Since words which impute that a person is suffering from a contagious or infectious disease will tend to exclude him from society, such words are always actionable if false. Nowadays, however, actionable imputations of this kind are generally limited to false charges of the presence of venereal diseases,<sup>54</sup> although it has been held that false allegations of leprosy<sup>55</sup> and imputations of tuberculosis<sup>56</sup> are likewise actionable *per se*. As a rule, false imputations of tuberculosis or consumption are actionable only if they cause special damage.<sup>57</sup>

Among words which may prejudice an individual in the exercise of an occupation are false statements that a vendor of food is selling diseased, contaminated, or poisonous products; or the false statement that a physician is a quack or is dishonest or incompetent.

The truth is a defense to a civil action for statements alleged to be libellous or slanderous. Some statements that appear to be libel or slander are, further, either absolutely or conditionally privileged. Thus, there usually can be no libel or slander in the report of an official proceeding, such as that of a court, legislative body, or administrative board or officer. A board of health or public health officer cannot be held liable for the torts of libel and slander for statements made in good faith in official reports or otherwise in the exercise of their official duties. Nor is a physician liable for libel or slander when he reports a contagious disease such as a venereal disease as required by law, or in accordance with his duties, as in the cases of a private school physician,<sup>58</sup> a ship's doctor,<sup>59</sup> or a physician employed by an attorney to examine a litigant.<sup>60</sup>

54. *Monks v. Monks* (1889), 118 Ind. 238, 20 N.E. 744. *Swindell v. Harper* (1902), 51 W. Va. 381, 41 S.E. 117. *McDonald v. Nugent* (1904), 122 Ia. 651, 98 N.W. 506. *Hamilton v. Nance* (1912), 159 N.C. 56, 74 S.E. 627, Ann. Cas. 1914 A 1253. *King v. Pillsbury* (1917), 115 Me. 528, 99 A. 513. *Mann v. Bulgtn* (1921), 34 Id. 714, 203 P. 463. *French v. Smith* (1922), 53 Ont. L.R. 28; (1923), 3 D.L.R. 902. *Deese v. Collins* (1926), 191 N.C. 749, 133 S.E. 92. *Walker v. Tucker* (1927), 220 Ky. 363, 295 S.W. 138, 53 A.L.R. 547. *Sally v. Brown* (1927), 220 Ky. 576, 295 S.W. 890. *Connor v. Taylor* (1930), 233 Ky. 706, 26 S.W. (2d) 561. *Goldsmith v. Unity Ind. Life Insur. Co.* (1930), 13 La. App. 448, 128 So. 182.

55. *Simpson v. Press Pub. Co.* (1900), 67 N.Y.S. 401, 33 Misc. 228. *Lewis v. Hayes* (1913), 165 Cal. 527, 132 P. 1022, Ann. Cas. 1914 D 148.

56. *Kirby v. Smith* (1929), 54 S.D. 608, 224 N.W. 230.

57. *Rade v. Press Pub. Co.* (1902), 75 N.Y.S. 298, 37 Misc. 254. *Kassovitz v. Sentinel Co.* (1938), 226 Wis. 468, 277 N.W. 177.

58. *Kennedy v. Gurley* (1923), 208 Ala. 623, 95 So. 34, 26 A.L.R. 813. *Thornburg v. Long* (1919), 178 N.C. 589, 101 S.E. 99.

59. *New York & Porto Rico S.S. Co. v. Garcia* (1926), 16 F. (2d) 734.

60. *Oakes v. Walther* (1934), 179 La. 365, 154 So. 26.

A letter written by a person not in public employment to a state board of health reflecting on the character and qualifications of a candidate for appointment to the position of state food commissioner has been held to be privileged and not libellous, where there was no malice or desire to injure anyone, and the purpose of the communication was to secure the appointment of a person better qualified.<sup>61</sup> A report by the authorities of a Christian Science institution for mental diseases regarding an individual, which was sent to the commissioner of the state department of institutions and agencies, was also held to have been privileged.<sup>62</sup> The patient in this case claimed that he had been forcibly restrained, and otherwise badly and improperly treated.

Since freedom of the press is generally recognized as a constitutional right, reports and comments in newspapers and magazines are usually considered as qualifiedly privileged. Fair comment on matters of public interest is allowable, but indecent, blasphemous, and malicious statements, or improper defamations of personal character, are actionable. Discussions of public health matters, based on facts, usually come within the definition of fair comment, as where a newspaper criticized the sanitation of housing conditions in a large number of dwellings owned by a coal company.<sup>63</sup>

Where, however, a newspaper in reporting a typhoid fever epidemic stated falsely that a certain person working at a dairy was an "importer" of the germs, and it was shown by the testimony of the health officer that he was not in any way involved as a cause of the epidemic, the newspaper was held to be guilty of a statement that was libellous *per se*.<sup>64</sup> The offended dairyman received an award of \$600, and the newspaper henceforth ceased to print any news whatever on public health topics. A magazine that published an article stating as a fact that vaccines manufactured and sold by a certain physician were dangerous and had been known to cause death was held to be libellous, since the statements, not being opinions or judgments but allegations of fact imputing disgraceful and discreditable conduct, were not fair comment.<sup>65</sup>

61. *Irian v. Knapp* (1913), 132 La. 60, 60 So. 719, 43 L.R.A. (N.S.) 940, 31 Am. Banker R. 891.

62. *Prevtn v. Tenacre* (1933), 70 F. (2d) 389.

63. *South Hetton Coal Co. v. N.E. News Ass'n* (1894), 1 Q.B. 133.

64. *Miles v. Record Publishing Co.* (1926), 134 S.C. 462, 133 S.E. 99, 45 A.L.R. 1112. *Watkins v. Record Publishing Co.* (1926), 134 S.C. 470, 133 S.E. 100. See *Hartmann v. Sun Printing Co.* (1902), 77 N.Y.S. 538, 74 App. Div. 282.

65. *Sherman v. International Publications* (1925), 212 N.Y.S. 478, 214 App. Div. 437. See *Brinkley v. Fishbein* (1932), 134 Kan. 833, 8 P. (2d) 318.

A leading case of libel having a direct public health interest is one decided by the Supreme Court of Utah in 1933.<sup>66</sup> Following an outbreak of typhoid fever in Ogden City, which was investigated by the state health department and attributed to negligent contamination of the city water supply, a local newspaper published news and editorials severely criticizing the local commissioner of waterworks. The newspaper demanded the removal of this allegedly "incompetent" official, charging him with manslaughter because of the deaths of one or more persons from water-borne typhoid, which were stated to be due to the official's failure to comply with definite orders and recommendations of the public health authorities.

In deciding that the statements published in the newspaper were conditionally privileged and that no malicious intent sufficient to support a charge of libel had been found, the court stated:

The publication here in question clearly falls within that class of communications which are qualifiedly or conditionally privileged. When the publication was made, two residents of Ogden City had died from typhoid fever and others were seriously sick with that disease. There was grave danger that the disease would spread. That appellant [the newspaper] and the residents of Ogden City had a common interest in the threatened typhoid epidemic, in its source, and in the prevention of its spread, is not open to question. It is equally clear that appellant and the inhabitants of Ogden had a common interest in fixing, if possible, the responsibility for the outbreak of the disease, and in taking such steps as might be necessary to check its spread and prevent its recurrence. Information concerning the manner in which plaintiff as city commissioner in charge of the waterworks department of the city had been and was handling the city culinary water supply was likewise of common interest to appellant and the citizens of Ogden. . . . Appellant by informing its readers upon such matters was performing a duty which falls within that class mentioned in the rule as "of moral or social character of imperfect obligation."

And later in its opinion this court declared that:

To conclude from the facts disclosed by this record that the one responsible for the turning of Wheeler creek water into the Ogden City water system was guilty of manslaughter, as defined in the trial court's instruction to the jury, may not be said to be unreasonable. That respondent was derelict in his duties if he failed to take measures to see that Wheeler creek water was not turned into the water system during 1929 unless it was chlorinated is not open to question.

In an article entitled, "Modern Medical Charlatans," published in *Hygeia*, the health magazine of the American Medical Association,

66. *Williams v. Standard-Examiner Pub. Co.* (1933), 83 Utah 31, 27 P. (2d) 1.

the editor characterized one John R. Brinkley as the "apotheosis of quackery." Dr. Brinkley thereupon brought suit for libel in the United States District Court in Texas. The defendant pleaded the truth of the allegations and proceeded to prove them, with the result that a verdict was rendered for him. On appeal to the Circuit Court of Appeals, this verdict was sustained.<sup>67</sup> After defining a quack as an ignorant or fraudulent pretender to medical skill, the court stated that there was no doubt that the plaintiff by his methods had violated accepted standards of medical ethics, and that the facts were sufficient to support a reasonable and honest opinion that he was a quack in the ordinary, well-understood meaning of those words.

On the other hand, damages were awarded against a magazine which had invaded the privacy of an individual by publishing her picture and an article which described her as an abnormal eater.<sup>68</sup> The court pointed out that if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition, other than a contagious disease, without personal publicity. For this error on the part of the magazine, the award of \$1,500 damages was upheld, but an additional \$1,500 in punitive damages was disallowed, mainly because no malice had been shown.

Where the personal character of a public health official is falsely and maliciously assailed by a newspaper or by an individual, he may have a valid action for libel or slander.

### Copyright

When materials such as articles, books, paintings, music, motion pictures, and other published literary or artistic works are copyrighted, they cannot be reproduced or reprinted without the permission of the copyright owner or owners. Such material is copyrighted by depositing two copies with the U.S. Register of Copyrights in the Library of Congress, Washington, D.C., and paying a fee. When a copyright is issued by the Federal Government, it remains in force for twenty-eight years, with privilege of renewal by the owner or his heirs for a similar period.

Infringement of copyright is a legal wrong, for which an action may be brought in a United States District Court. Articles and books

67. *Brinkley v. Fishbein* (1940), 110 F. (2d) 62, cert. denied by U.S. Supreme Court.

68. *Barber v. Time* (1942), 348 Mo. 1199, 159 S.W. (2d) 291. See *Gershwit v. Ethical Pub. Co.* (1938), 1 N.Y.S. (2d) 904, 166 Misc. 89.

on medical and public health subjects may, of course, be copyrighted.<sup>69</sup> The unauthorized use of the exact order of words of the writer constitutes an infringement, but ideas, opinions, theories, and subjects, no matter how original, are not and cannot be copyrighted. Fair quotation from a published work, with due acknowledgment to the source, is usually not regarded as infringement of copyright.

### *Voluntary Health Associations*

Voluntary health associations are liable for acts of their officers or employees causing injuries or damages to individuals through negligence, breach of contract, or by any other condition giving rise to civil liability. If the health association is incorporated, the corporation will be liable as such. If it is not incorporated, some or all of its officers and members may be jointly or severally liable.

As in the case of a charitable hospital, a health association conducting a service not for profit, such as a free clinic, hospital, camp, or other eleemosynary activity, will not be liable for injuries to persons who are the recipients of its charity. Such an association may, however, be liable for injuries to persons who do business with the association for gain.<sup>70</sup>

### *Liability for Cancer*

Injuries which are alleged to have caused cancer have given rise to numerous court actions. Although there is little, if any, scientific evidence to prove conclusively that malignant growths such as carcinoma, sarcoma, and other forms of cancer are ever caused by single blows, wounds, injuries, or other forms of trauma,<sup>71</sup> the courts have awarded damages in a number of instances to persons who have developed cancers following single injuries.<sup>72</sup> These awards have been granted as a result of medical testimony tending to show that the cancer, usually a sarcoma, was the direct result of the trauma.

69. *Schellberg v. Empringham* (1929), 36 F. (2d) 991. *Henry Holt & Co. to use of Felderman v. Liggett & Myers Tobacco Co.* (1940), 23 F. Supp. 302.

70. *Wright v. Salvation Army* (1933), 125 Neb. 216, 249 N.W. 549.

71. J. A. Tobey, *Cancer, What everyone should know about it*, New York, Knopf, 1932. R. J. Behan, *Relation of Trauma to New Growths: Medico-Legal Aspects*, Baltimore, Williams & Wilkins, 1939.

72. *Sellon v. Great Lakes Transit Corp.* (1937), 87 F. (2d) 703. *Vitale v. Duerbeck* (1936), 338 Mo. 536, 92 S.W. (2d) 691.

Compensation has also been awarded under workmen's compensation laws for cancers which have been attributed to trauma.<sup>73</sup>

Improper treatment of cancer by unqualified persons has likewise stimulated a number of court actions. A layman who operated a hospital for the treatment of cancer and other diseases, where a secret liquid preparation was administered to cancer patients, was permanently enjoined from practicing medicine,<sup>74</sup> and in a subsequent case was held guilty of contempt of court for having violated the injunction.<sup>75</sup> An injection treatment for cancer given by a chiropractor has been held to be illegal,<sup>76</sup> and a sanipractor who treated and then operated upon a patient with cancer, who died, was convicted of the illegal practice of medicine and surgery.<sup>77</sup> Where a cancer patient was treated unsuccessfully in a hospital by a lay person of his own choice, the hospital was held to be liable for the failure of the treatment permitted to be given in the institution.<sup>78</sup> A licensed physician who cooperated with a layman who operated a so-called cancer hospital in applying a secret paste or escharotic to a patient having cancer was convicted of practicing medicine without a license,<sup>79</sup> while a verdict of malpractice was sustained in the case of a patient who was treated with an escharotic mixture of butter of antimony and zinc chloride.<sup>80</sup>

73. *Canon Reliance Coal Co. v. Indus. Comm.* (1923), 72 Colo. 477, 211 P. 867. *Hertz v. Watab Paper Co.* (1930), 180 Minn. 177, 230 N.W. 481; 184 Minn. 1, 237 N.W. 610. *Royal Indemnity Co. v. Land* (1932), 45 Ga. App. 293, 164 S.E. 492. *Stone v. Thomson Co.* (1930), 124 Neb. 181, 245 N.W. 600. *Parker v. Farmers Union Mut. Ins. Co.* (1937), 146 Kan. 832, 73 P. (2d) 1032. *Smith v. Primrose Tapestry Co.* (1926), 285 Pa. 145, 131 A. 703. *Winchester Milling Co. v. Sencindiver* (1927), 148 Va. 388, 138 S.E. 479. *Baker v. State Indus. Accid. Comm.* (1929), 128 Ore. 369, 274 P. 905. *Boal v. Electric Storage Battery Co.* (1939), 98 F. (2d) 815. *Wayne County v. Lessman* (1940), 136 Neb. 311, 285 N.W. 579. *Macon County Coal Co. v. Indus. Comm.* (1940), 374 Ill. 219, 29 N.E. (2d) 87. Contra, see *McBrayer v. Dixie Mercertizing Co.* (1941), 178 Tenn. 135, 156 S.W. 408.

74. *State v. Baker* (1931), 212 Ia. 571, 235 N.W. 313.

75. *State v. Baker* (1936), 222 Ia. 903, 270 N.W. 359. See *Baker v. U.S.* (1940), 115 F. (2d) 533; cert. denied by U.S. Supreme Court.

76. *In re Hartman* (Cal. 1935), 51 P. (2d) 1104. *State v. Cooper* (1938), 147 Kan. 710, 78 P. (2d) 884.

77. *State v. Lydon* (1933), 170 Wash. 354, 16 P. (2d) 848.

78. *Hendrickson v. Hodkin* (1937), 294 N.Y.S. 982, 250 App. Div. 619; rev. in 276 N.Y. 252, 11 N.E. (2d) 899.

79. *Needham and Bray v. State* (1934), 55 Okl. Cr. 430, 32 P. (2d) 92.

80. *Gates v. Dr. Nichols Sanatorium* (1933), 34 S.W. (2d) 196; rev. in 331 Mo. 754, 55 S.W. (2d) 424.



Authorities on cancer are agreed that this condition can usually be successfully treated only by means of surgery, or in some cases by radium or x-rays.<sup>81</sup> The application or use of chemicals, salves, drugs, or similar materials has never been efficacious in the treatment and cure of cancer.

81. F. C. Wood, *Cancer*, New York, Funk & Wagnalls, 1937.



**PART IV**  
**LEGISLATION AND LAW ENFORCEMENT**



## CHAPTER XX

### THE PREPARATION AND ADOPTION OF HEALTH LEGISLATION

ONE of the requisites for successful public health effort is the existence of valid, adequate, practical, and enforceable public health legislation. In order that such legislation may be truly adequate and practical, as well as scientific and reasonable, it must always be prepared by an expert, or experts, familiar not only with public health policies but with the technique of bill drafting. The preparation of sound laws on any topic is, in fact, an intricate, elaborate, intellectual, and forensic task, which seldom can be accomplished satisfactorily by anyone not an expert.

Statutes and ordinances that are regulative and impose more or less drastic restraints upon persons and property require especial care in their preparation. Since most public health legislation is in this category, it is apparent that if such laws are to stand the test of court analysis and are to advance the cause of public health, they must be written by informed persons and not by amateurs or dilettantes, as seems unfortunately to have been the case too often in the past.

"It will be of little avail to the people," wrote Alexander Hamilton in *The Federalist* in 1788, "that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today can guess what it will be tomorrow."

#### *The Function of the Legislature*

The legislature is the sole lawmaking branch of our tripartite system of government. Its function is to ascertain, by means of thorough investigation and discussion, what laws are needed and then to promulgate them. When a law has been passed, it is the duty of the executive branch of government to enforce it, and of the judiciary to see that justice is applied under it, a duty which may involve the interpretation of the statute and a decision as to its constitutionality.

The legislature may decide as a matter of fact that vaccination is a preventive of smallpox and conclude that the interests of the public health demand that children in the State shall be required to be vaccinated before being admitted to schools, and accordingly pass a law

to this effect. If such legislation infringes no constitutional rights of citizens, it will be upheld by the courts, who will not question the fact as that is for the legislature to determine.<sup>1</sup>

While the power to legislate can be exercised only by the legislature and cannot be delegated to the executive or judicial branches of the government, the legislature may properly authorize a suitable administrative board or agency to make rules and regulations to carry out the purposes of a law in which general policies and broad principles of legislation have been set forth. An example is where the legislature enacts a law for the control of communicable diseases in the State, setting forth general requirements for the reporting of communicable diseases by physicians and others, requirements for investigations and quarantine by health officials, and other necessary measures, and then delegates to the state board of health the power to make rules and regulations or to adopt a sanitary code, designating the diseases to be reported and the manner of reporting, the nature and extent of quarantine for particular diseases, and all other necessary procedures. Such regulations, when reasonable and properly adopted,<sup>2</sup> will have the force and effect of law. The courts will interfere with this power only when there has been a palpable abuse of the discretion conferred,<sup>3</sup> as where a regulation is clearly unreasonable<sup>4</sup> or is unquestionably beyond the power of the board to adopt.<sup>5</sup>

Under the authority of the police power state legislatures have adopted numerous public health laws, although with very little regard for uniformity. Despite this abundance of public health legislation, new laws on health matters are constantly needed, either to cope with novel situations or to replace legislation that is outmoded, insufficient, improper, or inadequate.<sup>6</sup>

Most of the state legislatures meet biennially, although a dozen or so meet annually. One, that in Alabama, meets only once in four years.

1. *Viemester v. White* (1904), 179 N.Y. 235, 72 N.E. 97, 103 A.S.R. 859, 1 Ann. Cas. 334, 70 L.R.A. 796. *Jacobson v. Massachusetts* (1905), 197 U.S. 11, 49 L. Ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765.

2. *Wheeler v. River Falls Power Co.* (1927), 215 Ala. 655, 111 So. 907, holding that a quorum of a board must be present when regulations are adopted.

3. *Naccari v. Rappelet* (1907), 119 La. 272, 44 So. 13, 13 L.R.A. (N.S.) 640. *State v. Withnell* (1912), 91 Neb. 101, 135 N.W. 376, 40 L.R.A. (N.S.) 898.

4. *State v. Holcombe* (1886), 68 Ia. 107, 26 N.W. 33, 56 Am. R. 853.

5. *State v. Goss* (1932), 79 Utah 559, 11 P. (2d) 340. See Chapter IV, pages 63-65, *infra*.

6. J. A. Tobey, Public health legislation, *Am. J. Pub. Health*, 27:786, August 1937.

In many States the duration of the session is fixed by law, as for sixty or ninety days or some other period, but in eighteen States there is no limit. About forty legislatures assemble in the odd-numbered years, while about a dozen meet during the even-numbered years. Special meetings may generally be called when necessity arises. When the forty or more legislatures have been in session, some seventy-five thousand bills on all subjects will have been introduced in all these States, according to the experience of recent years. Of this number perhaps fifteen hundred, more or less, will be concerned with the public health. Not all of the vast number of bills submitted become laws, of course, but many new ones are added annually to the statute books.

In commenting upon the expansion of statutes in this country, Justice Harlan F. Stone stated in 1925 when he was Attorney General, "We make a prodigious number of laws. In enacting them we disregard the principles of draftsmanship and leave in uncertainty their true meaning and effect. . . . We disregard the principle that there is a point beyond which restraints of positive law cannot be carried without placing too great a strain on the machinery and the agencies of law enforcement."<sup>7</sup>

#### *Ascertaining the Need for Health Laws*

When new or better health legislation is contemplated, obviously the first step to take is to ascertain what is the existing statute law on the subject. Too often enthusiastic persons decide that a measure should be presented, whereas the subject is already adequately covered or may be completely taken care of by implied powers in general legislation. If the former is the case, the law may easily be found; while in the latter, recourse may perhaps be had to court decisions to clarify the point. A legislature may, of course, alter by legislation a principle laid down by a court, provided, of course, that no constitutional question is involved. Thus, for instance, a court may decide that existing health laws do not authorize exclusion by local health departments of unvaccinated children from schools in the absence of an emergency, whereupon the legislature may pass a law providing for just such exclusion.

The best place to find the written law is in the official codes, compiled statutes, or general statutes of the State. Since these are compiled as of a certain date, it is further necessary to consult the official printed volume of session laws or the supplements which have been

7. Quoted in the *New York Times*, January 11, 1925.

issued since the code or compiled statutes was published. All these volumes are on file at the State Capitol and are usually in the larger public libraries and law libraries throughout the State. They are often in the possession of health officials, who should be certain, however, that they have a complete set, giving all laws and amendments to date. The attorney general of the State will usually give information to local officials regarding laws. Many state health departments have issued pamphlet compilations of the health laws of the State. While some of these are excellent, being accurate and reissued frequently, many of them are not kept up to date and often are incomplete or contain serious mistakes. These pamphlets are valuable for reference but should not be taken as final authority, and use should be made of the official volumes of compiled statutes.

The next step is to decide whether to 1) repeal existing law, 2) amend existing law, or 3) write a new law. As a general proposition, the amendment is the best procedure if it is possible to use it. This prevents the confusion attendant upon the enactment of independent statutes on subjects already covered by general legislation and simplifies codes, but all amendments must be properly coordinated with all laws which they affect.

#### *Technical Assistance Necessary*

Since the drafting of good legislation is a highly technical task, expert assistance is generally necessary. As John Stuart Mill wrote, "There is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of law-making." Today most of the States have legislative drafting services at their Capitols. Sometimes these are connected with state libraries, a useful arrangement, for often much research is desirable. Anyone can prepare a bill, of course, and usually a legislator can be induced to introduce it, but not many persons know how to write laws which are clear, legal, scientific, and generally foolproof.

The attorney general's office will usually render an opinion on a proposed bill or regulation and many local health departments make it a custom to submit all proposed ordinances to this officer for criticism and correction, either directly or through the state health department. A lawyer familiar with legislative drafting in the State may also be consulted, but not all attorneys are experts in this branch of work. Theoretically, better legislation would result if all new bills were written first by a person familiar with the technical aspects of the subject involved, then gone over by a professor of English com-



position, finally reviewed by a competent lawyer, and then rewritten by all three in conference with an expert on bill drafting. If destructive amendments could then be avoided on the part of the legislature during debate on the bill, this system would produce the best results.

Imitation of the laws in another State, apparently often indulged in, is not as a general rule a good procedure. Because a law is on the statute books of one State, it does not necessarily follow that it is either a good law or will apply to other States. If, however, a health law of one State has been tested in the courts and upheld as legal and constitutional, this fact shows that it probably is a good law, and much assistance may be gleaned from its provisions. Even then it may not always be wise to use it verbatim, although the adoption of such a law carries with it the court's interpretation of it. The use of model legislation prepared by national health agencies may be worth while.<sup>8</sup>

### *The Actual Drafting of Legislation<sup>9</sup>*

Many state constitutions or statutes impose definite requirements regarding form, substance, and other matters relating to legislation.<sup>10</sup> It will, naturally, be helpful if the writer of legislation is familiar with these provisions.

The essential features of a satisfactory bill were outlined by a committee of the American Bar Association a few years ago, as follows:

8. See, for example, *Manual of Tuberculosis Legislation*, New York, National Tuberculosis Association, 1928; and, *Forms and Principles of State Social Hygiene Laws*, New York, American Social Hygiene Association, 1944.

9. E. Freund, *Legislative Regulation*, New York, Commonwealth Fund, 1932. *Notes on Bill Drafting in Illinois*, Springfield, Illinois, Legislative Reference Bureau, 1920. *Legislation in North Carolina*, Chapel Hill, Duke University Press, 1932. S. Johnson, Statute law making with suggestions to draftsmen, *Quarterly Journal of the University of North Dakota*, 5:93, January 1915. C. Ilbert, *The Mechanics of Law Making*, New York, Columbia University Press, 1914.

10. As an example may be cited Article IV, Section VII, of the Constitution of the State of New Jersey, which reads as follows: "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title. No law shall be revived or amended by reference to its title only, but the act revived, or the section or sections amended, shall be inserted at length. No general law shall embrace any provision of a private, special, or local character. No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of the act, or which shall enact that any existing law or any part thereof, shall be applicable, except by inserting it in such act. The laws of this State shall begin in the following style: 'Be it enacted by the Senate and General Assembly of the State of New Jersey.'"

1. Conformity to constitutional requirements.
2. Adequacy of the provisions of the law to its purpose.
3. Coordination with existing law.
4. The utmost simplicity of form consistent with certainty.<sup>11</sup>

Every bill consists of several parts, including: preamble (sometimes), title, enacting clause, body of bill, partial invalidity clause, penalty (sometimes), date of beginning operation, and repealing clause (sometimes). Preambles are best omitted. The body of the bill if properly drawn will tell exactly what it is all about without wasting space and time with several "whereas's."

The title should, as a rule, be fitted to the bill after it has been written and should actually express the contents and subject of the bill. It should be brief and well worded, but long enough to do justice to the material contained. No bill should ever embrace more than one subject and this should be expressed in the title. Many States have constitutional or statutory provisions to this effect, but whether they do or do not, it is a good principle to follow. Examples of proper titles are: "(A Bill for) An Act to Provide for the Regulation of Milk and Milk Products." "An Act to Amend an Act Entitled 'An Act to Provide for the Reporting of Certain Communicable Diseases,' approved March 7, 1917, in force July 1, 1917."

The enacting clause must often follow a prescribed form, as "Be it enacted by the People of the State of Illinois, represented in the General Assembly," or "Be it enacted by the legislature of the State of ———." The proper form can be easily ascertained and followed. The enacting clause is not a part of the body of the bill and is a mere matter of form.

In practically all States the passage of private legislation is forbidden. The legislature cannot, for example, pass a law granting a divorce to an individual, but it may adopt legislation regulating divorces generally throughout the State. Similarly, the legislature may not, as a rule, pass local or special legislation with respect to matters already covered by general legislation, such as the creation of a health department in a particular county where the statutes provide for the establishment or mode of establishment of county boards of health or health departments throughout the State.<sup>12</sup>

11. *Final Report of the Special Committee on Legislative Drafting*, Chicago, American Bar Association, 1921. This whole report is of inestimable value to anyone interested in this subject.

12. *Sams v. Board of County Commrs.* (1940), 217 N.C. 284, 7 S.E. (2d) 540. *Hood v. Burson* (1942), 194 Ga. 30, 20 S.E. (2d) 755.

*The Subject Matter*

The body of the bill, or the actual subject matter, is the most important part. The bill must be complete either by giving everything itself or by specific reference to other existing legislation. For instance, a bill may state: "On and after January 1, 1926, all persons who sell bottled water for human consumption shall secure licenses. Such licenses shall be issued in the same manner and under the same conditions as those provided for in Chapter 61 of the Acts of 1918 (Compiled Statutes of 1919, Article VI, Number 1181)." In some States it is necessary to repeat the act referred to. No act can be revived or amended merely by reference to its title, but only by changing the wording, adding sections, or by repealing sections.

The primary consideration in drafting the body of a bill is to make it as short, direct, and precise as possible. For many years legislation, like medicine, has been surrounded by a mysticism which has tried to superimpose upon it a vocabulary of its own. It is unnecessary, however, to use anything except exceedingly plain and straightforward rhetoric. If it is desired that syphilis be made a reportable disease, it can be so declared in about a dozen words: "Syphilis shall hereafter be reported to the state health department by all physicians." Further provisions regarding methods, time, penalty, etc., can be added. It is not necessary to write it like this: "That one of the venereal diseases commonly known and designated by the name of syphilis, a dangerous contagious and infectious disease, being a menace to health in this State, shall hereafter and henceforth be reported by all physicians of the State directly to the state department of health in order that proper and adequate measures may be taken by said department for the complete suppression, prevention, and eradication of such disease." This last effusion, which is not at all overdrawn, not only actually says no more than the shorter draft but mumbles something about taking measures, without in the least indicating or implying what they might be or who shall take them. As Elihu Root once said, "There is a useless lawsuit in every useless word of a statute and every loose, sloppy phrase plays the part of the typhoid carrier," an apt simile for a discussion on health legislation.

Affirmative language in legislation is generally considered preferable to negative language. Whether a law should be mandatory or permissive depends, of course, upon the conditions which it is desired to correct or regulate. Certain acts or conditions may, furthermore, often be regulated but cannot be prohibited. Thus, in some States the

courts have held that the sale of various foods and food products, such as oleomargarine, can be regulated but not prohibited.<sup>13</sup>

In writing mandatory legislation, the word "shall" is generally used, while the word "may" is usually employed for permissive legislation. If the context of the law so indicates, however, the word "may" can be construed to mean "shall." Sometimes "shall" is used to denote futurity, a use (or misuse) of the word which may raise a question as to its exact meaning. All legislation should, as a rule, be written in the present rather than the future tense. It is better to say, "Whoever grows, possesses, sells, or distributes marihuana is guilty of a misdemeanor and shall be punishable . . .," rather than the following, "Any individual, firm, partnership, association, trust, or corporation who shall grow, have in his possession, sell or offer for sale, or distribute in any manner whatsoever by himself, his agent or representative, any of the plant Cannabis, known as marihuana, its seeds or any part or products thereof, shall be deemed to be guilty of a misdemeanor and for conviction thereof shall be punished. . . ."

This sounds impressive, but the sixty words are no better law than the sixteen in the first sentence illustrated. In fact, they are not as good, because they are discursive, redundant, and involved. "Whoever," for example, covers every person enumerated in the more lengthy illustration.

Arrangement of subject matter of legislation is also important. Above all things, it should be logical and orderly, and distinguished by the well-known rhetorical rules of unity, coherence, and emphasis. For instance, suppose a bill purports to outline the duties of a local health officer. After the preliminary part, the remainder could be written something like this:

. . . His duties shall be:

1. To act as secretary of the board of health.
2. To act as registrar of vital statistics.
3. To execute and enforce all regulations and orders of the board of health.
4. To investigate immediately the cause of all cases of communicable diseases and to take all necessary steps to prevent their spread, in accordance with the regulations of the board of health.

This illustration is intended to show form rather than substance. By listing each of the health officer's duties separately in a numbered paragraph, and restricting each subject to one periodic sentence, clarity and efficiency are obtained and understanding is fostered. The whole might

13. See Chapter XII, on Foods, Drugs, and Cosmetics.

have been mixed and jumbled in one long unwieldy sentence. Numbered sentences or phrases may, if desired, be called sections. A long, complex bill may have a table of contents and numerous titles or chapters, sections and subsections, appropriately numbered and designated. In such a measure, definitions of the more important terms used should be given at the beginning.

A so-called "model" health code for cities, prepared by a prominent state health department and a state conference of mayors, contained the provision that when no physician is in attendance in the case of a disease presumably communicable, it shall be the duty of householders and certain other enumerated persons "to report immediately the name and address of any person under his charge affected with any disease presumably communicable to the health officer." In other words, this proposed law says that the only diseases that must be reported are those "presumably communicable to the health officer." If the health officer has had smallpox, or has been vaccinated several times so that he is immune to this disease and it could not be communicated to him, smallpox would not be reportable, at least by a strict interpretation of this law as written. What is meant, of course, is that any person named shall "report immediately to the health officer the name and address of any person under his charge who is affected with a disease that is presumably communicable." Model laws are not always as model as they might be.

### *Faults to Avoid*

Obscurity, vagueness, ambiguity, and equivocation are among the faults to be avoided in the drafting of health legislation. If a law merely stated that, "In every school room there shall be provided a sufficient amount of fresh air," it would be vague and unenforceable. Who is to provide the fresh air, the teacher, the janitor, the school nurse? What is "a sufficient amount"? What, in fact, is "fresh air"? If there had been added to this law the words, "in accordance with regulations adopted by the board of education [or health]," the law would at least be workable.

When a law mentions a scientific process, such as the pasteurization of milk, but fails to define it, the term employed will be given the meaning which is accepted by the consensus of scientific opinion. In order to interpret the law, however, a court action may be necessary, with the usual quota of conflicting testimony. All unusual technical terms should, therefore, be clearly defined.

Redundancy and repetition are common faults of legislation. It is not necessary, for example, to say "every person, partnership, firm,

agent, association, corporation," when the single word "whoever" or the word "person," properly defined, will include them all. It is not necessary to say "each and every," or "in force and effect" when all that is meant is "each" or "in force."

Provisos have always been popular in legislation, but they are usually unnecessarily complicating. To outline what may or may not be done legally and then qualify it by numerous "provided thats" is merely confusing. Here is a horrible example: "Any physician who fails to report any of the diseases mentioned shall be subject to a fine in the discretion of the court, provided that no such fine shall exceed \$100; and provided further that if such disease occur in a hospital it shall be the duty of the superintendent, whether a physician or otherwise, to report such disease under penalty of the aforesaid fine." The limitation of the fine after an unlimited one had been specified is confusing; also, the second proviso should have been incorporated in the main part of the law. This law should have been written: "Any physician or superintendent of a hospital who fails to report any of the diseases mentioned shall be subject to a fine not to exceed \$100." How much more simple and clear!

Common sense and preciseness are worthy attributes of all legislation. A western State is asserted to have this gem on its statute books, "when two trains approach a crossing at the same time, both shall stop and neither shall proceed until the other has passed by." In Massachusetts, according to one writer,<sup>14</sup> there is a municipal ordinance stating that: "Any person who owns or occupies property abutting on a public sewer shall be connected with the same under penalty for neglect so to do of a fine not to exceed one hundred dollars." Punctuation is relatively unimportant when laws are construed, but the ordinary accepted rules of grammar should, nevertheless, be employed. A misplaced or missing comma has been known to wreak havoc in a well-meant piece of legislation, and a semicolon once nearly ruined a whole State. Lucidity and rationality are also much to be coveted in legislation.

Ample and definite provisions for enforcement should be contained in legislation. Definite requirements regarding vaccination may be given in a law, but if absolutely no mention is made of any penalty for failure to follow them or of any action which can be taken, the act would obviously be a dead letter, for nothing could be done about it if it were violated. As much discretion as possible should always be given to administrative or ministerial officers to carry out the terms of any

14. A. C. York, How to draw up public health laws and regulations, *Massachusetts Commonhealth*, April-May-June 1924.

health legislation. A health official cannot, under the theory of the separation of powers, be given legislative or judicial authority, but he may be given quasi-judicial powers as, for instance, in the determination of nuisances. All laws should provide for uniformity of operation, that is, have the same effect in all places under the same circumstances and conditions.

A repealing clause stating that "all laws inconsistent with this act are hereby repealed" is fashionable, but, like a preamble, is sometimes a waste of space, since all such previous inconsistent laws are automatically repealed. It may, however, be wise to denominate some particular act which it is intended to repeal. For instance, it could be stated, "Chapter 4 of the Acts of 1913 is hereby repealed," or "Sections 1, 3, 4, 7, and 14 of Chapter 8 of an act approved March 16, 1917 (Comp. Stat., 1936 ed., secs. 401, 403, 404, 407, and 414), are hereby repealed." Sometimes it is a moot point whether new legislation repeals old or not and eventually the courts may have to decide that point.

The date when a law goes into effect should be stated in the law; for failure to do this, it may be invalid.<sup>15</sup>

Finally, and most important of all, the subject matter must be reasonable and within the scope of authority of the lawmaking body. The chief criterion of all valid health legislation is its reasonableness. Every state law must also be consistent with the Federal Constitution, all Congressional enactments and federal treaties, and with the state constitution. Whether a law fulfills these requirements is a matter generally to be determined by competent legal authority. An opinion on the meaning and validity of a state law may be rendered by a state attorney general. Such an opinion is binding on all administrative officials until a court of record has ruled on the constitutionality of the law and has interpreted its meaning. In a few States the highest court may be requested by the Governor or legislature to give an opinion on legislation, but usually a decision is rendered by a court only in an action brought before it, in which the validity of a law is questioned.

The United States Supreme Court has said, "Every intendment is to be made in favor of the lawfulness of the exercise of municipal power in making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community."<sup>16</sup>

15. *State v. Bunner* (1943), 126 W. Va. 280, 27 S.E. (2d) 823.

16. *Sullivan v. Shreveport* (1919), 251 U.S. 169, 40 S. Ct. 102, 64 L. Ed. 205. See also *Schulte v. Fitch* (1925), 162 Mich. 184, 202 N.W. 719.

Examples of well-drafted legislation are the standard or uniform laws prepared by the National Conference of Commissioners on Uniform State Laws. The New York Public Health Law is one of the best on this subject, and the Federal Food, Drug, and Cosmetic Act of 1938 is another example of well-drafted legislation.

### *Construing Statutes*

A brief outline of some of the considerations which influence the courts in their interpretation of statutes may be of value in helping to point the way toward valid health legislation. The principal rule of construction is that the exact intention of the legislature must be ascertained, a task which is sometimes anything but simple. The language is carefully considered and its natural import taken. Words are given their ordinary popular meaning, but technical terms are interpreted according to their meaning in the science to which they apply. The court unfortunately cannot supply deficiencies in the language or make material changes to expand the meaning. If a law is capable of two interpretations, one absurd and the other reasonable, the latter will be presumed to have been intended, even if it was not.

A statute will always be considered as a whole, so as to harmonize all its provisions. Words and phrases<sup>17</sup> may, therefore, be interpreted with a view to the entire context. The title and preamble may assist in interpreting the object and meaning of the act, but otherwise carry no weight, unless the language is particularly ambiguous. Courts generally disregard faulty punctuation and grammatical construction. Where there have been other statutes of a similar nature or dealing with parallel or similar subjects, the construction previously placed on these will be considered. All statutes are, moreover, to be interpreted in the light of the unwritten law—the common law. Health laws will generally be liberally construed unless they seem to contravene individual constitutional rights, when they will be more strictly construed. Penal statutes are more strictly constructed than nonpenal. If, after all the rules of construction have been applied to a statute, no sense can be made out of it, it is void. Likewise, if improperly passed, it is void.

It has been held in one case<sup>18</sup> that, in determining whether a statute

17. See *Words and Phrases Covering Judicial Constructions and Definitions from the Opinions of the State and Federal Courts*. Five series, 1904-1939. St. Paul, West (first four series have titles *Words and Phrases Judicially Defined* and *Judicial and Statutory Definitions of Words and Phrases*).

18. *Benz v. Kremer* (1910), 125 N.W. 99, 142 Wis. 1, 26 L.R.A. (N.S.) 842. In *State Board of Health v. Willman* (1932), 241 Ky. 835, 45 S.W. (2d) 458,

(Continued on next page.)



is valid as a health regulation under the police power, the criterion is whether the public health in general will be promoted by the regulation and not whether it is required to promote the public health in isolated cases.

Theoretically, at least, it is not the function of any court to legislate, or to impose or inflict its own philosophy on legislation which is before it for interpretation and adjudication. Some of the most vigorous and able dissenting opinions of the United States Supreme Court have expressed the view of the dissenters that the Court was doing just that, especially with reference to some of the more recent federal legislation of a sociological character. Thus, Mr. Justice Frankfurter, in concurring in a dissent of the late Chief Justice Stone, in a case holding that the Federal Government and not a state government had jurisdiction over renovated butter, stated in no uncertain terms:

If ever there was an intrusion by this Court into a field that belongs to Congress and which it has not seen fit to enter, this is it. And what is worse, the decision is purely destructive legislation . . . the Court takes power away from the States but is of course unable to transfer it to the federal government.<sup>19</sup>

#### *After a Bill Has Been Drafted*

After legislation has been properly and scientifically prepared, the next step, of course, is to get it through the legislature. A measure before the legislature is called a "bill"; after it has been passed and enacted, it is an "act." Every bill must go through a certain routine procedure before becoming a law. This varies in the different States, but there is a more or less general method patterned after the procedure in Congress.

Congress is established by Article I of the Federal Constitution and its powers are enumerated therein. The framers of our government intended that the Senate should represent the States and the House of Representatives the people, but they gave to each branch equal powers of legislation, and no bill can become a law without the assent of both the House and the Senate. Bills may originate in either branch, except that measures for raising revenue must have their origin in the House. Frequently, identical bills are introduced simultaneously in both houses. Sometimes a bill is suggested or drafted by a citizen and given to a member of Congress to present. Any member may introduce a

several sections of state law on plumbing were held void because they were not covered by the title of the act.

19. *Cloverleaf Butter Co. v. Patterson* (1941), 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754.

bill in his own name. Both houses have legislative drafting services which prepare bills in accepted legislative phraseology.

### *In the Senate and the House*

The Senate consists of ninety-six members, two from each State. A senator who desires to introduce a bill must rise, be recognized by the Vice President, who presides over the Senate, and announce that he wishes to introduce a bill. It is then deposited beside the Vice President's desk, later read by a clerk and referred to the proper committee. The bill is considered by the committee, which may hold public hearings on it. The committee may then do one of four things: 1) report the bill favorably as it stands, 2) report it favorably with amendments, 3) report it unfavorably, 4) take no action at all. The number of bills introduced in Congress is legion. In one Congress from 2,000 to 20,000 bills and resolutions may be presented, depending, of course, upon the length of the sessions. Many of these bills never get out of committee. Usually this means that the bill has no chance of passage, but once in a while a motion is made that a committee be discharged from consideration of the bill, with the result that the bill is brought directly before the Senate.

When a bill is reported, it then goes upon the calendar. Under certain conditions, as where a bill is of especial importance, it may be called up out of order, but this is rare. When the measure comes up, it is open to debate. There is ordinarily, and sometimes unfortunately, no time limit on debate in the Senate. Amendments may be offered on the floor. After debate, the amendments and then the bill are voted on by calling for the ayes and nays, or by viva voce vote. If the bill passes, it is sent to the House for concurrence.

There are 435 members of the House of Representatives. The procedure in dealing with bills originally brought up in the House is, in general, similar to that of the Senate, but there are a few differences. The member introducing the bill simply drops it in a basket beside the Speaker's desk. It is referred to one of the numerous House Committees, and goes through the same course as in the Senate. There are three calendars in the House, the Union Calendar, relating to revenue, appropriations, and public property; the House Calendar, carrying other public bills; and the Private Calendar, consisting of private bills.<sup>20</sup> When the bill comes up, the House forms the Committee of the Whole

<sup>20</sup> Dealing with claims, pensions, acceptance of foreign honors by individuals, and similar private matters. Unlike state legislatures, Congress may pass private legislation.

House. Time for debate is limited. Amendments may be offered from the floor. The amendments and the bill are finally voted on by viva voce vote, rising vote, taking the vote by tellers, or recording the ayes and nays, according to the demand of the House. If the bill is passed it goes to the Senate for concurrence.

When a bill which has already passed one branch of Congress is laid before the other, it may be passed as it is, amended and passed, left in committee, or rejected. If passed, it goes to the President. If amended, it goes back to the original branch for concurrence in the amendments, which may be done at once. If there is disagreement, each chamber appoints three members to form a conference committee to meet and settle the differences. The report is laid before each house, which may adopt it or disagree. Conferences are again held and this process is continued until both Senate and House have agreed on the measure. It then goes to the President, as an enrolled bill.

#### *Before the Executive*

The President has ten days, exclusive of Sundays and holidays, in which to take action. If he signs the bill, or fails to sign it within that period, the bill becomes a law and is known as an act. The act is sent to the Secretary of State to be numbered and filed as the original copy of the law. He, in turn, forwards a copy to the Public Printer to be printed for public use. The President may veto the bill, in which case it goes back to Congress with a written statement of his objections. Congress may, however, pass the bill over his veto by a two-thirds majority in each branch.

The exact method in use in each State can usually be ascertained without great difficulty.<sup>21</sup>

#### *Municipal Ordinances and Regulations*

Municipal legislation and quasi-legislation relating to the public health may be of two types: that passed by the municipal authorities themselves, such as the council, board of aldermen, etc.; or that adopted by the board of health. The respective powers of these governing bodies are usually set forth in the municipal charter or in the state laws. It is sometimes a matter of expediency as to which shall legislate or regulate, such items as the amount of allowable penalty being a factor. While boards of health have wide authority, they may not, as a general rule, pass any regulation contrary to one passed by the governing body of the municipality or one that is inconsistent with a state

21. See R. Luce, *Legislative Procedure*, Boston, Houghton Mifflin, 1922.

law or a regulation adopted by the state health department, as authorized by law. Usually, however, a municipal ordinance may be more strict in its terms than a state law, provided it does not contravene the terms of the law. Thus, if the state law says that the minimum allowable butterfat content of market milk shall be 3 per cent, but confers on local boards of health the power to regulate milk supplies, a board of health regulation setting a minimum standard of 3.25 per cent butterfat for local milk supplies would be valid. If, however, the state law declared that no milk dealer in the State shall be required to have more than 3.25 per cent butterfat in milk sold by him for human consumption, and a municipal ordinance or board of health regulation attempted to set a minimum standard of 3.50 per cent, the ordinance or regulation would be invalid as contrary to the state law.

Ordinances or regulations of boards of health must be passed in strict conformity to the requirements for their promulgation as laid down by state law. It is customary, of course, that they should be passed only at a duly called meeting of the board, at which a quorum is present. As a rule, several readings are required, usually three, with intervals between them. Publication of the proposed ordinance in a local newspaper is usually required and the public is entitled to be present at the board meeting to discuss the ordinance before it is passed. Local ordinances should be as carefully framed as state laws, in fact, even more carefully, for they may be more rigidly construed by the courts.

Only matters which it is intended to enforce should be placed in a local sanitary code and then these should be enforced and not be permitted to become decorative only.

## CHAPTER XXI

### LAW ENFORCEMENT AND COURT PROCEDURE

THE material so far in this book has been concerned largely with the application of substantive law to public health. The substantive law, as distinguished from adjective law, is that which deals with the powers and rights of the State as a sovereignty, and with the duties, obligations, rights, and privileges of individual members of society. The adjective law is that which deals with the remedies to be applied when a legal right has been violated, and also with the methods of procedure by which these remedies are administered. As one author has pertinently expressed it, using an analogy between law and medicine, "the remedies of the law are the materials which are designed to heal the wounded rights of individuals."<sup>1</sup>

Law enforcement is to a considerable degree a matter for the courts, though, as has been shown, health officials who are administrative officers have a wide latitude of authority and may often legitimately act in a summary manner. The action of an officer of the executive branch of government is practically never final, however, and there always remains an appeal to the courts. This does not mean that the court will necessarily reverse the act of an executive official, but it does mean that everyone is entitled to his day in court, and that he may bring suit in order to obtain what he considers to be justice for an infringement of his legal rights. This is due process of law.

#### *Courts in General<sup>2</sup>*

A court, according to Blackstone, is a place where justice is judicially administered. It may be a court of record, where formal records are kept for perpetual testimony and are entitled to be received as authoritative evidence by other courts; or it may be a court not of record, generally an inferior one. The court may have general or special jurisdiction. There are, for instance, certain courts whose sole jurisdiction is over minors, as the juvenile courts, or domestic relations, or wills, or some other special phase of law or class of persons or things. When all the special problems have been parcelled out, however, there always must remain at least one court of general jurisdiction.

1. W. L. Clark, *Outlines for Review*, Brooklyn, American Law Book Co., 1923.

2. C. N. Callender, *American Courts, Their organization and procedure*, New York, McGraw-Hill, 1927.

The jurisdiction of a court may be original or appellate. The former is for the hearing of the facts in all controversies as they arise, while the latter is for review of the decisions of lower courts on matters of law. The right of reasonable appeal to higher tribunals is well recognized in this country. A court may, finally, have either exclusive or concurrent jurisdiction. Exclusive jurisdiction means that a particular controversy can be tried in the first instance only in that court, as, for instance, a matter of sex delinquency might be tried only in a Morals Court or Domestic Relations Court in a particular State where such a court had been established by statute. Concurrent jurisdiction means that two or more courts have power to hear and determine the same cause of action. When this is the case, the plaintiff may elect which to choose. The party beginning a suit or action is called the plaintiff in civil cases and the prosecution in criminal cases, while his opponent is the defendant.

#### *State Courts*

The judiciary system in the States was inherited from England, although there have been many changes in the organization and procedures in our courts since the time of the American Revolution. Today, there is considerable variety in the court systems in the forty-eight States, but in general the judicial branch of the state government consists of one supreme court or court of appeals, established in all States except New Hampshire by the state constitutions; one or more intermediate courts of appeals; local courts of original jurisdiction over civil cases, equity matters, crimes, and probate; and the minor judiciary, consisting of magistrates, justices of the peace, coroners, police courts, etc.

Infractions of municipal health ordinances and violations of local board of health regulations usually come before justices of the peace, magistrates, or judges of police courts. These are courts not of record; they have jurisdiction over minor criminal matters or misdemeanors, such as violations of traffic laws and the like. Sometimes these courts also have jurisdiction over civil matters, such as contracts involving relatively small sums. The judge may not be required to be a lawyer, and cases are generally tried without a jury. The parties appearing in these summary courts may, however, be represented by lawyers, although the rules of evidence and the procedure are seldom as strict or rigid as in the courts of record.

The magistrates' courts are also used for preliminary hearings in more serious criminal cases, the magistrate or justice of the peace merely conducting a hearing to determine whether the accused shall

be held for action by a grand jury or other indicting agency. The ultimate guilt of the person is not decided, as that is left for a proceeding in a higher court having criminal jurisdiction.

The coroner is a magistrate whose function it is to inquire into the causes of all deaths occurring within his district by violence or by unnatural or unknown causes. He is usually a county officer, and may impanel a special jury to conduct an inquest, the results of which may lead to an indictment or information for a crime. The coroner is elected and may be a physician, a lawyer, or a layman. Where necessary, he performs autopsies or has them performed.

When a physician refuses to sign a death certificate, the coroner usually is required to make an investigation. If a child dies of diphtheria because of wilful neglect or refusal of the parents to use or permit the use of antitoxin, the case would usually be one for the coroner. In many of the larger cities and in some States, the office of coroner has been supplemented by that of medical examiner, a qualified physician who investigates homicides and violent deaths, performs autopsies, and renders reports to district attorneys, coroners, and grand juries. He is not a judicial officer, but he may summon witnesses and hold hearings.

In bringing or instigating an action before a minor court, a health official should make certain that he has a sound case, one in which sufficient evidence exists to justify the action and secure a conviction. The health officer generally needs the assistance of the city solicitor or town attorney, although if he is sufficiently experienced in the procedures followed and is familiar with the personality of the magistrate, he may be able properly to conduct a case in these somewhat informal hearings.

Ordinarily, an appeal by the defendant is allowed from the decision of a justice of the peace, magistrate, or police court, to the next highest of the state courts. This is a trial court of original and more or less general jurisdiction, which may be known as the district court, county court, court of common pleas, circuit court, superior court, or, in the larger cities, municipal or city court.

Violations of state health laws, sanitary codes, or regulations of the state board of health are generally brought in the first instance in one of these local state courts of general jurisdiction. The court must, however, have jurisdiction over the person and the subject matter involved. If an individual living just across the state line in Connecticut maintains a nuisance which jeopardizes the health of a resident of New York, a private action would have to be brought in the appropriate court in Connecticut, unless the maintainer of the nuisance happened

to come across to the New York jurisdiction, where he could be served with a summons. If this nuisance were of sufficient magnitude and importance, an action could be brought in a Federal District Court, since it involved a controversy between citizens of different States.<sup>3</sup>

In many of the States, particularly the larger and more populous commonwealths, there are intermediate courts of appeals, to which appeals on matters of law can be taken from the trial courts.<sup>4</sup> Matters of fact are determined by juries in the trial courts, after listening to evidence offered by witnesses and presentations by the attorneys. There is no appeal on matters of fact, although the admissibility of certain evidence as ruled upon by the presiding judge may be appealed as a matter of law, as may also the charge to the jury made by the judge, and other matters.

These intermediate courts of appeals are known by a variety of names, such as the Appellate Division of the Supreme Court in New York, the Court of Criminal Appeals in Oklahoma and Texas, the Superior Court in Pennsylvania, the Supreme Court in New Jersey, the Appellate Court in Illinois and Indiana, and the Court of Appeals in Missouri. In some instances the decisions of these courts are final, but usually there is a further right of appeal to the highest court or court of last resort of the State.

In all States except New Hampshire, the court of final appeal is established by the state constitution. These courts are most frequently known as the Supreme Court of the State, but sometimes are called the Court of Appeals (as in Kentucky, Maryland, and New York), or the Court of Errors and Appeals (as in New Jersey). These courts interpret the state and Federal Constitutions, state legislation, and acts of Congress, and they consider appeals from the decisions of the lower state courts of record. In matters affecting the state constitution and state legislation they are the final authority, unless a federal question is involved or a right under the Federal Constitution is infringed or alleged to have been infringed, when there may be a further and final appeal to the Supreme Court of the United States.

Since the decisions of courts of last resort, both federal and state, are part of the great body of the law, citations and references to court decisions in text books such as this are almost invariably those of the courts of higher appellate jurisdiction.

In addition to the trial and appellate courts in the States, there are

3. See pages 347-349.

4. In a criminal case the defendant can appeal, but the people or State cannot appeal from the decision of a trial court.



usually special courts, such as probate, orphans, or surrogates courts, which are concerned with wills and the estates of decedents; juvenile courts,<sup>5</sup> concerned with misdemeanors of children under sixteen years of age; family or domestic relations courts; land courts; and others.

The principles of equity jurisprudence, as exercised by the state courts, are explained in Chapter I, on Public Health and the Law.

### *Federal Courts*

The highest tribunal in this country is the United States Supreme Court, which is established by the Federal Constitution. The Supreme Court has original jurisdiction over certain controversies, for example, those arising between the States. Its principal jurisdiction, however, is appellate, as it may review cases coming from inferior federal courts and from the highest courts of the States when any matter involving the Federal Constitution is concerned. Thus, if one State believes that a stream between it and an adjoining State is so badly polluted by the latter as to endanger the health of its citizens an original suit could be brought in the United States Supreme Court, as has actually been done in a number of instances.<sup>6</sup> If, in a controversy between a health department and an individual, the latter believes that a right guaranteed by the Federal Constitution has been violated and, the case having gone through several state courts, the highest court in his State decides against him, he may appeal to the United States Supreme Court, usually on a writ of certiorari. This Court may, however, deny the writ and refuse to review the case, either because a federal question is not involved or because the lower court has satisfactorily ruled on the matter or for some other reason. In such instances the decision of the lower court becomes *stare decisis*, and part of the law of the land.

Of more than 35,000 cases which have been adjudicated by this court, it is estimated that more than one hundred have dealt directly with the public health. A vast number of others have, of course, had a direct or indirect influence on this subject.

The Supreme Court of the United States consists of a Chief Justice and eight Associate Justices, who are appointed for life by the Presi-

5. See B. Flexner, *et al.*, *The Child, the Family, and the Court*, Publication No. 193, U.S. Children's Bureau, rev. ed., 1933.

6. *Louisiana v. Texas* (1900), 176 U.S. 1, 44 L. Ed. 347, 20 S. Ct. 251. *Missouri v. Illinois* (1901), 180 U.S. 208, 45 L. Ed. 497, 21 S. Ct. 331. *Kansas v. Colorado* (1901), 185 U.S. 125, 46 L. Ed. 838. *Missouri v. Illinois* (1905), 200 U.S. 496, 50 L. Ed. 572.

dent with the consent of the Senate. It meets in the Supreme Court Building in Washington, beginning its term in October.

The Constitution empowers Congress to establish inferior federal courts. By the Judiciary Act of 1789, which has since been modified and amended, this has been done. The country has been divided into eleven circuits, each having a Circuit Court of Appeals; each circuit is divided into districts having a United States District Court, of which there are now more than ninety. The Circuit Courts of Appeals review cases coming from the District Courts. These District Courts have jurisdiction over all controversies arising under the Federal Constitution, acts of Congress, and treaties; over controversies between citizens of different States where the amount involved exceeds \$3,000; over crimes, offenses, and other matters arising under federal laws, such as the Food, Drug, and Cosmetic Act, narcotic laws, patent laws, copyright laws, postal laws, quarantine laws, internal revenue laws, Meat Inspection Act, etc.; over admiralty and maritime matters; over cases in which the United States is a party; over proceedings in bankruptcy; and over various other classes of cases.

There is at least one United States District Court in each State, and in the larger States there are several; in New York there are four, known as the Eastern, Western, Northern, and Southern Districts of New York. Cases in these courts may be heard by a judge and jury or merely by a judge, although in criminal cases the accused must be tried before a jury of the district in which the crime was committed. The federal courts cannot try penal cases under state laws but only under federal laws, although they use the court procedures and rules of the courts of the State in which they are situated.

Appeals from the decisions of the United States District Courts are taken to the Circuit Courts of Appeals, from which they may be appealed under certain conditions to the United States Supreme Court. This court not only has original jurisdiction in legal controversies between the States but also in cases affecting ambassadors, public ministers, and consuls. Where the validity of a law or treaty of the United States has been ruled against by the highest court of a State, or where the validity of a state law which is alleged to contravene the Federal Constitution has been upheld by a state court of last resort, there may be an appeal to the United States Supreme Court.

In addition to the District Courts, Circuit Courts of Appeals, and the Supreme Court, other federal courts include a Court of Claims, a Customs Court, a Court of Customs and Patent Appeals, an Emergency Court of Appeals, a Tax Court, and the courts of the District of

Columbia. The United States Court of Appeals for the District of Columbia is one of the eleven Circuit Courts of Appeals.

Rules of civil and criminal procedure to be followed in the lower federal courts are prescribed by the United States Supreme Court in accordance with authority granted by Congress.

Public health matters coming before the federal courts usually include matters under various federal laws affecting the public health, cases under state health laws which are appealed on constitutional questions, and cases between citizens of different States, between a State and citizens or persons of another State, and between the States. Under the Eleventh Amendment to the Federal Constitution, a citizen of one State cannot sue another State, but a State can bring an action in a federal court against a citizen or corporation in another State.

### *Court Procedure*

Health officers seldom have occasion to appear in the federal courts, but it may be necessary for them to act as complainants, aid in the preparation of cases, and testify in local inferior courts and in the state trial courts. A health officer who is constantly involved in court actions, either as plaintiff or prosecutor or as defendant, would hardly be classed as an efficient public officer, since he should be able to administer the public health of his community or State and enforce the public health laws in the great majority of cases by means of persuasion and education and by suitable action before the board of health. There are occasions, however, when court action must be taken as a last resort. In such instances, the health officer must know how best to undertake his part in the proceedings, although the legal aspects of the case should usually be handled by a competent licensed attorney.

When a local ordinance has been violated and it becomes necessary to bring the offender into court, assuming that all other methods of dealing with him have failed, the first step is to bring charges against him. The violation of health laws or regulations usually constitutes a misdemeanor, though in some instances it might be a more serious crime. In any event the action is a criminal one and is brought before a criminal court, usually an inferior one, as a police court or magistrate. The municipal attorney, or sometimes the health officer himself, fills out a complaint form, often called an information, and turns it over to the magistrate. The information or other complaint must be precise and complete and where an order has been violated must give its terms or substance.<sup>7</sup> The magistrate issues a summons, which a

7. *State v. Tyrell* (1924), 100 Conn. 101, 122 A. 924.

constable or officer serves on the accused person, who is ordered by it to appear in court on a certain day and hour. At the stated time a hearing is held, usually without a jury, and the issue is decided after both parties and their witnesses have been heard. The accused may, of course, be represented by an attorney.

Under some state laws a local board of health itself may issue a warrant for an offender against the health ordinances or regulations and summon him to appear before the board for a hearing. It may even sometimes impose a fine upon him, if he is found guilty; but if he refuses to pay, he must be sued for the amount of the fine before a local magistrate or justice or in a state court. Imprisonment cannot be imposed by municipal boards such as boards of health, unless there is very clear authority, which is exceptional. The power of local boards to fix penalties may arise by implication from the terms of a statute,<sup>8</sup> or health authorities sometimes may be allowed to prescribe penalties not to exceed a certain amount.<sup>9</sup> If the state law gives the exact sum of the penalty to be imposed, it must be followed. If no penalty is provided for in an ordinance, one cannot be set following a violation to apply retroactively to that particular act. Permission illegally given by one in authority is no excuse for the violation of an ordinance<sup>10</sup> and the intention or lack of it in such violation is no defense.<sup>11</sup>

Many state laws require or imply that before court action is taken the accused should be accorded a hearing by the board of health. It is, in fact, always wise to hold such a hearing, not only in justice to the defendant, but also because it brings out his defense, which it is sometimes useful to know in advance. The desirability of a hearing does not, of course, preclude summary action without it if the protection of the public health demands such a procedure.

The essential fact to remember in taking offenders to court is to have a thoroughly prepared case. It is necessary, in order to be successful, to be able to prove the case conclusively. This means that all the facts must be capable of support by creditable witnesses. In a criminal trial the defendant is entitled to the benefit of the doubt and his guilt must be established beyond a reasonable doubt.<sup>12</sup> A health officer should hesitate, therefore, before going into court with a case

8. *New Orleans v. Stein* (1915), 137 La. 652, 69 So. 43.

9. *Carthage v. Colligan* (1915), 216 N.Y. 217, 110 N.E. 439.

10. *New York Health Department v. Hamm* (1893), 24 N.Y.S. 730.

11. *New York Health Department v. Sulzberger* (1912), 78 Misc. 134, 137 N.Y.S. 998.

12. *State v. Raczkowski* (1913), 86 Conn. 677, 86 A. 606, 45 L.R.A. (N.S.) 580, Ann. Cas. 1914 B 410.

unless he has good evidence to support it. Magistrates and judges of inferior municipal courts are not always great sticklers for technical points of law, but they generally insist upon having the facts proving guilt clearly demonstrated.

Suppose, for instance, that a local ordinance prohibited the sale within the city of X of milk from any dairy not approved by the local health authorities, the ordinance being consistent with state law. A milk dealer is suspected of procuring milk from a particularly filthy place and selling it within the city. The health officer instructs two sanitary inspectors to get the evidence. In an automobile they trail the dealer to the forbidden farm, see him load his truck with a number of cans of milk, and, satisfied that they have the necessary facts, return home. When the case comes up in court, the milk dealer admits that he went as the inspectors have testified and got the dirty milk, but swears that he did not sell it but fed it to his pigs. Or he may swear that he did not sell this particular milk within the city of X but in some other locality. His attorney may even introduce witnesses to support these contentions. Who is to prove that he is wrong? For lack of definite proof that he has sold the milk as charged, he would be acquitted or discharged.

If the inspectors had trailed the dealer back to his plant and had seen him transfer the milk into bottles and had caught him in the act of selling this same milk within the city limits, they would have had a good case, as far as the evidence was concerned. Losing a court action always lowers the prestige of the health department.

It is frequently difficult to prove that a physician has failed to report a birth, death, or case of communicable disease according to law, because he can always swear that he deposited his report in the mail within the time limit required. If he actually did so, he has complied with the law, since mailing a letter is a delivery of it. Who is to prove that he did not mail it? It is, of course, not difficult to prove tardiness in reporting, but this is hardly a serious enough matter for court action, except possibly in the case of a chronic, persistent, or deliberate offender. In prosecuting a physician for failure to report a case of communicable disease, evidence showing the existence of previous cases in the same vicinity may be admitted by a court as tending to raise the inference that the physician recognized the case.<sup>13</sup>

### *Evidence and Witnesses*

Evidence is that which is legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged fact under investi-

13. *State v. Pierce* (1913), 87 Vt. 144, 88 A. 740.

gation before it. Proof is the effect of evidence. Testimony is the statement of a witness. Testimony must be concerned with actual facts which have been apparent to the senses of the witness, and cannot include opinions or hearsay. There is, of course, some evidence which borders on opinion, as a statement that a person appeared sick or intoxicated, was suffering pain, or seemed insane. The weight of any testimony depends upon the subject matter, the way it is presented by the witness, and his apparent intelligence and good faith. Every witness must take an oath to tell the truth before testifying. A witness first testifies on direct examination, under interrogation by the attorney who has called him as a witness, and then is cross-examined by the opposing counsel. He may be recalled for redirect examination on matters raised in the cross-examination.

The best witness is one who is frank, honest, calm, composed, intelligent, and concise in his answers. He replies to all questions candidly but simply, and does not volunteer unrequested information. When his attorney rises to object to a question on cross-examination, as is his right, the witness stops and waits until the judge rules on the objection. He tells the facts as he knows them without embellishment or evasion. He does not get flustered, irate, or unbalanced under a grueling, apparently insulting, or poisonously suave cross-examination. Such a witness makes a good impression and helps to win a case. Health officers who are called as witnesses should keep these attributes in mind.

Anyone can be called as a witness by means of a subpoena issued by a court, and when called is required to attend the court and testify. A person who is compelled to testify against his will and over his strenuous objection does not, however, always make a satisfactory witness. Considerable diplomacy is often necessary in dealing with witnesses. The defendant in a criminal case cannot be required to testify on matters that would tend to incriminate him.

In the trial courts, rules of evidence are precise and well established. Compliance with these rules and procedures is, of course, the business of the attorneys who conduct a case. Although an outline of rules of evidence is beyond the scope of this treatise, an example will make clear the necessity for rigid adherence to the requirements. In a case brought against an individual for violation of an ordinance which provided that it shall be unlawful for any person to refuse, fail, or neglect to obey any legal order of the health officer, the written order of the health officer was not produced in court and an attempt was made to prove its existence by oral testimony. Since the rules of evidence require that a written instrument must be proved by submitting it,

unless there is an unusually good reason for not being able to do so, this case was remanded for this reason (among others) for a new trial by the Supreme Court of Washington, to which an appeal had been taken by the alleged violator of the health officer's order.<sup>14</sup>

The propriety of the use of health department records in private litigation is discussed on pages 136 and 152.

### *Expert Witnesses*

An expert witness is "one who has made the subject upon which he gives his opinion, a matter of particular study, practice or observation, and who has a particular knowledge on the subject which must be recognized in law as a distinct department of human knowledge and endeavor."<sup>15</sup> Health officers, sanitarians, and physicians are often called upon to give expert testimony. Unlike ordinary testimony, which must deal with facts, expert evidence is made up of opinions based on facts. The expert must first be qualified as such by preliminary questioning and must show that he is really expert upon the question in issue. His opinion may be founded on information based on his own examination of persons or things involved, or it may be developed by hearing the testimony in court, or it may be in reply to a hypothetical question. The last is a question propounded by counsel setting forth certain facts which are assumed to be true and upon which an opinion is asked. For instance, a sanitarian, testifying as an expert might be asked, "If ten cases of smallpox developed in three days in a city of 10,000 population, where no cases of this disease had appeared for eight years immediately preceding, would this be an epidemic or an emergency?" The answer, which obviously would be yes, would be an expert opinion. Counsel for the other side would, of course, have an opportunity to cross-examine the witness. A person who attempts to testify as an expert should, of course, have a thorough knowledge of his subject and also an understanding with the attorney for whom he is appearing as to the nature of his testimony. Such an understanding is proper and may be readily admitted. A physician may testify as to matters connected with medical science, even if he has not made a special study of the matter in question.

One mistake often made by expert witnesses, however, is that they try to be too expert on too many topics. The more circumscribed they keep their expertness, the better for them and for the case. If a physician is called to the stand to testify as an expert on a case arising out

14. *City of Roslyn v. Pavlinovitch* (1920), 112 Wash. 306, 192 P. 885.

15. E. D. Brothers, *Medical Jurisprudence*, 3d ed., St. Louis, Mosby, 1930.

of a disease caused by an industrial condition, he should qualify as an expert only in that particular disease, or perhaps in industrial hygiene, not in the whole field of medicine or public health.

Expert witnesses are engaged by the attorneys representing a case, or by their clients, and are entitled to reasonable fees for their testimony in private litigation. A health officer who testifies as an expert in an action brought by or against the health department would not, as a rule, be entitled to special compensation. If he testified as an expert in a case between two private parties, he would merit a substantial fee. He should, of course, make certain that the time involved and the nature of his testimony in such private causes do not conflict with his official duties.

### *Legal Remedies*

The court actions brought against persons who violate health laws and regulations usually are criminal actions, although there are other legal remedies that may be invoked to safeguard the public health. One of these is the equitable remedy of injunction, the purpose of which is to require by court action that a particular duty or obligation shall be performed, or that an improper act shall not be done. The injunction may, therefore, either be mandatory or preventive. Failure to obey an injunction granted by a court of equity constitutes contempt of court and is punishable by fine or imprisonment or both. An injunction will be issued only when an adequate remedy at law is lacking.

An example of the use of the injunction in public health work is in the abatement or prevention of nuisances.<sup>16</sup> In many States, health departments are authorized to enjoin by court order an act or acts by an individual that menace the public health, even before actual injury has occurred.<sup>17</sup> The courts will not, of course, issue an injunction unless it is clearly proven that the act complained of or the duty sought to be required are matters of real public health import. The courts will not, for example, enjoin the erection of a hospital merely on the supposition that it will eventually become a nuisance.<sup>18</sup>

### *Remedies against Health Authorities*

Just as there are proper legal remedies against those who wilfully transgress the public health laws, so too there are remedies which may

16. See Chapter XIII, on Nuisances and Sanitation.

17. *Ex parte Gounis* (1924), 304 Mo. 428, 263 S.W. 988.

18. See page 156.



be invoked by individuals or public authorities against health officials who are oppressive, unreasonable, negligent, unconstitutional in their actions, or who are improperly holding the office, acting under invalid laws, or otherwise performing their duties in an illegal manner. These remedies are often set forth in state laws and must be undertaken in the manner provided in the statutes.

When a person has been arrested or deprived of his liberty by quarantine, isolation, or commitment to a hospital, jail, or institution, he is entitled to have the legality of his detention passed upon by a court of record. This he may do by means of a writ of habeas corpus, a command by the court to produce or "have the body" of the person in court at a specified time.

The writ of habeas corpus has been employed in numerous instances of quarantined persons and of individuals detained for examination for suspected venereal disease,<sup>19</sup> but in the great majority of cases the detention by the health authorities has been upheld as a valid procedure.<sup>20</sup> Occasionally, however, an individual has been released when it did not appear to the satisfaction of the court that the detention was justified, or because the detention was unreasonable.<sup>21</sup> Habeas corpus is sometimes used to secure a quick review by a higher court of the action of a magistrate or police judge in the preliminary part of a criminal action. The writ itself is always issued as a matter of right, but a release does not necessarily follow.

When health authorities do not perform duties which they should, the writ of mandamus may be utilized. This is a command in the name of the State directed by a court of record to some tribunal, corporation, public board or officer, requiring such board or person to do some act therein specified which it was, in the opinion of the court, the duty of the board or person to perform. Thus, a board of health may refuse to issue a license and the person claiming it may seek to compel the board by mandamus to issue it. Mandamus may be used to compel payment of legitimate expenses by a board, or to enforce observance of ministerial duties by an officer.

In certain cases where a health officer has done an act regarded as unlawful, a writ of certiorari may be asked against him from a court of record. Certiorari is the writ generally employed to review and determine the validity of a judicial or quasi-judicial proceeding, and may

19. See Chapter X, on Venereal Disease, pages 168-171.

20. *Barmore v. Robertson* (1922), 302 Ill. 422, 134 N.E. 815, 22 A.L.R. 835.

21. *Wragg v. Griffin* (1919), 175 Ia. 243, 170 N.W. 400, 2 A.L.R. 1327.

be issued by a court superior to the court or administrative board which is responsible for the act or decision in question.

To determine proper title to an office, such as that of health officer, the writ of quo warranto is usually employed.<sup>22</sup>

The equitable remedy of injunction may be employed against health officers, as well as by them. Where it is alleged that a law, ordinance, board of health regulation, or order of a health officer is unconstitutional and invalid, an attempt to enjoin its operation and enforcement is frequently made. In order to determine whether an injunction should issue, the court usually must pass upon the constitutionality of the law or action.

Courts are usually hesitant in attempting to restrain the actions of health authorities by means of injunctions, and in most cases these writs have been denied, since the protection of the public health might suffer. Where the acts of a health officer are fraudulent, oppressive, or contrary to the public interest, an injunction may, however, be granted.<sup>23</sup>

Health officers may be sued for personal damages in private actions brought against them for injuries caused or alleged to have been caused by the improper discharge of their duties. Unless they have been guilty of misfeasance, malfeasance, or nonfeasance in office, they will not, as a rule, be liable.<sup>24</sup> Health officers should, however, so conduct themselves as to minimize the possibility of court actions against them, without, of course, reducing vigor and force when these characteristics are necessary to their official work.

22. *Clay v. Civil Service Commission* (1916), 89 N.J.L. 194, 98 A. 312.

23. *Chase v. Middleton* (1900), 123 Mich. 647, 82 N.W. 612. *Farmers Dairy League v. City and County of Denver* (Colo. 1944), 149 P. (2d) 370.

24. See Chapter XVIII, on Personal Liability of Health Officials.

## APPENDIX I

### THE DECISION OF THE UNITED STATES SUPREME COURT IN THE CASE OF *JACOBSON v.* *MASSACHUSETTS*

This famous decision is reproduced here in its entirety, not only because it illustrates the manner and form of a leading court decision, but also because it is a noteworthy statement of the constitutional principles underlying public health administration.

This decision is reprinted from 25 Supreme Court Reporter, page 358, with the consent of the copyright owner, West Publishing Co., St. Paul, Minnesota.

(197 U.S. 11)

HENNING JACOBSON, *Plff. in Err.*,

v.

COMMONWEALTH OF MASSACHUSETTS

*Constitutional law—Compulsory vaccination—personal liberty—equal protection of the laws—evidence—judicial notice.*

1. The spirit of the Federal Constitution or its preamble cannot be invoked, apart from the words of that instrument, to invalidate a state statute.\*
2. The scope and meaning of a state statute, as indicated by the exclusion of evidence on the ground of its incompetency or immateriality under that statute, are conclusive on the Federal Supreme Court in determining, on writ of error to the state court, the question of the validity of the statute under the Federal Constitution.
3. The personal liberty secured by U.S. Const., 14th Amend., against state deprivation, is not infringed by Mass. Rev. Laws, chap. 75, §137, authorizing compulsory vaccination by local boards of health when deemed necessary for the public health or safety, under which, as construed by the highest state court, vaccination may be required of all the inhabitants of a city where smallpox is prevalent and increasing.
4. Lack of any exception in favor of adults certified by a registered physician to be unfit subjects for vaccination does not render invalid Mass. Rev. Laws, chap. 75, §137, authorizing compulsory vaccination by local boards of health, as denying the equal protection

\* Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §38.

of the laws, although an exception in favor of children in like condition is made by §139 of that act, since the statute is equally applicable to all adults.

5. Judicial notice will be taken that vaccination is commonly believed to be a safe and valuable means of preventing the spread of smallpox, and that this belief is supported by high medical authority.
6. A state legislature, in enacting a statute purporting to be for the protection of local communities against the spread of smallpox, is entitled to choose between the theory of those of the medical profession who think vaccination worthless for this purpose, and believe its effect to be injurious and dangerous, and the opposite theory, which is in accord with common belief, and is maintained by high medical authority; and is not compelled to commit a matter of this character, involving the public health and safety, to the final decision of a court or jury.
7. An adult cannot claim to have been deprived of the liberty secured by U.S. Const., 14th Amend., against state deprivation, by the enforcement against him of a compulsory vaccination law,—at least, where he does not show, with reasonable certainty, that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, will seriously impair his health, or possibly cause his death.

[No. 70.]

*Argued December 6, 1904. Decided February 20, 1905.*

In error to the Superior Court of the State of Massachusetts for the County of Middlesex to review a judgment entered on a verdict of guilty in a prosecution under the compulsory vaccination law of that State, after defendant's exceptions were overruled by the Massachusetts Supreme Judicial Court. *Affirmed.*

See same case below, 183 Mass. 242, 66 N.E. 719.

The facts are stated in the opinion.

Messrs. *George Fred Williams* and James A. Halloran for plaintiff in error.

Messrs. *Frederick H. Nash* and Herbert Parker for defendant in error.

Mr. Justice *Harlan* delivered the opinion of the court:

This case involves the validity, under the Constitution of the United States, of certain provisions in the statutes of Massachusetts relating to vaccination.

The Revised Laws of that commonwealth, chap. 75, §137, provide that "the board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants thereof, and shall provide them with the means of free vaccination. Whoever, being over

twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirements shall forfeit \$5."

An exception is made in favor of "children who present a certificate, signed by a registered physician, that they are unfit subjects for vaccination." §139.

Proceeding under the above statutes, the board of health of the city of Cambridge, Massachusetts, on the 27th day of February, 1902, adopted the following regulation: "Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1st, 1897, be vaccinated or revaccinated."

Subsequently, the board adopted an additional regulation empowering a named physician to enforce the vaccination of persons as directed by the board at its special meeting of February 27th.

The above regulations being in force, the plaintiff in error, Jacobson, was proceeded against by a criminal complaint in one of the inferior courts, of Massachusetts. The complaint charged that on the 17th day of July, 1902, the board of health of Cambridge, being of the opinion that it was necessary for the public health and safety, required the vaccination and revaccination of all the inhabitants thereof who had not been successfully vaccinated since the 1st day of March, 1897, and provided them with the means of free vaccination; and that the defendant, being over twenty-one years of age and not under guardianship, refused and neglected to comply with such requirement.

The defendant, having been arraigned, pleaded not guilty. The government put in evidence the above regulations adopted by the board of health, and made proof tending to show that its chairman informed the defendant that, by refusing to be vaccinated, he would incur the penalty provided by the statute, and would be prosecuted therefor; that he offered to vaccinate the defendant without expense to him; and that the offer was declined, and defendant refused to be vaccinated.

The prosecution having introduced no other evidence, the defendant made numerous offers of proof. But the trial court ruled that each and all of the facts offered to be proved by the defendant were immaterial, and excluded all proof of them.

The defendant, standing upon his offers of proof, and introducing no evidence, asked numerous instructions to the jury, among which were the following:

That §137 of chapter 75 of the Revised Laws of Massachusetts was

in derogation of the rights secured to the defendant by the preamble to the Constitution of the United States, and tended to subvert and defeat the purposes of the Constitution as declared in its preamble;

That the section referred to was in derogation of the rights secured to the defendant by the 14th Amendment of the Constitution of the United States, and especially of the clauses of that amendment providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws; and

That said section was opposed to the spirit of the Constitution.

Each of the defendant's prayers for instructions was rejected, and he duly excepted. The defendant requested the court, but the court refused, to instruct the jury to return a verdict of not guilty. And the court instructed the jury, in substance, that, if they believed the evidence introduced by the commonwealth, and were satisfied beyond a reasonable doubt that the defendant was guilty of the offense charged in the complaint, they would be warranted in finding a verdict of guilty. A verdict of guilty was thereupon returned.

The case was then continued for the opinion of the supreme judicial court of Massachusetts. That court overruled all the defendant's exceptions, sustained the action of the trial court, and thereafter, pursuant to the verdict of the jury, he was sentenced by the court to pay a fine of \$5. And the court ordered that he stand committed until the fine was paid.

We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (§137, chap. 75) is in derogation of rights secured by the preamble of the Constitution of the United States. Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom. I Story, Const. §462.

We also pass without discussion the suggestion that the above section of the statute is opposed to the spirit of the Constitution. Undoubtedly, as observed by Chief Justice Marshall, speaking for the court in

*Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L. ed. 529, 550, "the spirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from its words." We have no need in this case to go beyond the plain, obvious meaning of the words in those provisions of the Constitution which, it is contended, must control our decision.

What, according to the judgment of the state court, are the scope and effect of the statute? What results were intended to be accomplished by it? These questions must be answered.

The supreme judicial court of Massachusetts said in the present case: "Let us consider the offer of evidence which was made by the defendant Jacobson. The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial. The thirteenth and fourteenth involved matters depending upon his personal opinion, which could not be taken as correct, or given effect, merely because he made it a ground of refusal to comply with the requirement. Moreover, his views could not affect the validity of the statute, nor entitle him to be excepted from its provisions *Com. v. Connolly*, 163 Mass. 539, 40 N.E. 862; *Com. v. Has*, 122 Mass. 40; *Reynolds v. United States*, 98 U.S. 145, 25 L. ed. 244; *Reg. v. Downes*, 13 Cox, C. C. 111. The other eleven propositions all relate to alleged injurious or dangerous effects of vaccination. The defendant offered to prove and show by competent evidence these so-called facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only 'competent evidence' that could be presented to the court to prove these propositions was the testimony of experts, giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in *Com. v. Anthes*, 5 Gray 185, to instruct the jury as to whether or not the statute is constitutional, he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the constitutionality of a statute. He would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox; that, while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the

medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands." *Com. v. Jacobson*, 183 Mass. 242, 66 N.E. 719.

While the mere rejection of defendant's offers of proof does not strictly present a Federal question, we may properly regard the exclusion of evidence upon the ground of its incompetency or immateriality under the statute as showing what, in the opinion of the state court, are the scope and meaning of the statute. Taking the above observations of the state court as indicating the scope of the statute,—and such is our duty. *Leffingwell v. Warren*, 2 Black 599, 603, 17 L. ed. 261, 262; *Morley v. Lake Shore & M. S. R. Co.*, 146 U.S. 162, 167, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54; *Tullis v. Lake Erie & W. R. Co.*, 175 U.S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *W. W. Cargill Co. v. Minnesota*, 180 U.S. 452, 466, 45 L. ed. 619, 625, 21 Sup. Ct. Rep. 423,—we assume, for the purposes of the present inquiry, that its provisions require, at least as a general rule, that adults not under the guardianship and remaining within the limits of the city of Cambridge must submit to the regulation adopted by the board of health. Is the statute, so construed, therefore, inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the state?

The authority of the state to enact this statute is to be referred to what is commonly called the police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and "health laws of every description"; indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. ed. 23, 71; *Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, 470, 24 L. ed. 527, 530; *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 24 L. ed. 989; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U.S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; *Lawton v. Steele*, 152 U.S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499. It is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some ap-



appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the state, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247; *Missouri, K. & T. R. Co. v. Haber*, 169 U.S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488.

We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." *Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, 471, 24 L. ed. 527, 530; *Missouri, K. & T. R. Co. v. Haber*, 169 U.S. 613, 628, 629, 42 L. ed. 878-883, 18 Sup. Ct. Rep. 488; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 148, 62 Am. Dec. 625. In *Crowley v. Christensen*, 137 U.S. 86, 89, 34

L. ed. 620, 621, 11 Sup. Ct. Rep. 13, we said: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law." In the Constitution of Massachusetts adopted in 1780 it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for "the common good," and that government is instituted "for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interests of any one man, family, or class of men." The good and welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts. *Com. v. Alger*, 7 Cush. 84.

Applying these principles to the present case, it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted smallpox, according to the recitals in the regulation adopted by the board of health, was prevalent to some extent in the city of Cambridge, and the disease was increasing. If such was the situation,—and nothing is asserted or appears in the record to the contrary,—if we are to attach any value whatever to the knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction

of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U.S. 287, 301, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; 1 Dill. Mun. Corp. 4th ed. §§319-325, and authorities in notes; Freund, *Police Power*, §§ 63 *et seq.* In *Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, 471-473, 24 L. ed. 527, 530, 531, this court recognized the right of a state to pass sanitary laws, laws for the protection of life, liberty, health, or property within its limits, laws to prevent persons and animals suffering under contagious or infectious diseases, or convicts, from coming within its borders. But, as the laws there involved went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid. If the mode adopted by the commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some,—if nothing more could be reasonably affirmed of the statute in question,—the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, he, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the 14th Amendment, this court has said, consists, in part, in the right of a person “to live

and work where he will" (*Allgeyer v. Louisiana*, 165 U.S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427); and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public collectively against such danger.

It is said, however, that the statute, as interpreted by the state court, although making an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, makes no exception in case of adults in like condition. But this cannot be deemed a denial of the equal protection of the laws to adults; for the statute is applicable equally to all in like condition, and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years.

Looking at the propositions embodied in the defendant's rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in

respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *Mugler v. Kansas*, 123 U.S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U.S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U.S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox.† And the principle of vaccination as a means to prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools. *Blue v. Beach*, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N.E. 89; *Morris v. Columbus*, 102 Ga. 792, 42 L.R.A. 175, 66 Am. St. Rep. 243, 30 S.E. 850; *State v. Hay*, 126 N.C. 999, 49 L.R.A. 588, 78 Am. St. Rep. 691, 35 S.E. 459; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Bissell v. Davison*, 65 Conn. 183, 29 L.R.A. 251, 32 Atl. 348; *Hazen v. Strong*, 2 Vt. 427; *Duffield v. Williamsport School District*, 162 Pa. 476, 25 L.R.A. 152, 29 Atl. 742.

† "State-supported facilities for vaccination began in England in 1808 with the National Vaccine Establishment. In 1840 vaccination fees were made payable out of the rates. The first compulsory act was passed in 1853, the guardians of the poor being intrusted with the carrying out of the law; in 1854 the public vaccinations under one year of age were 408,824 as against an average of 180,960 for several years before. In 1867 a new act was passed, rather to remove some technical difficulties than to enlarge the scope of the former act; and in 1871 the act was passed which compelled the boards of guardians to appoint vaccination officers. The guardians also appoint a public vaccinator, who must be duly qualified to practice medicine, and whose duty it is to vaccinate (for a fee of one shilling and sixpence) any child resident within his district brought to him for that purpose, to examine the same a week after, to give a certificate, and to certify to the vaccination officer the fact of vaccination or of insusceptibility. . . . Vaccination was made compulsory in Bavaria in 1807, and subsequently in the following countries: Denmark (1810), Sweden (1814), Württemberg, Hesse, and other German states (1818), Prussia (1835), Roumania (1874), Hungary (1876), and Servia (1881). It is compulsory by cantonal law in 10 out of the 22 Swiss cantons; an attempt to

The latest case upon the subject of which we are aware is *Viemester v. White*, decided very recently by the court of appeals of New York. That case involved the validity of a statute excluding from the public schools all children who had not been vaccinated. One contention was that the statute and the regulation adopted in exercise of its provisions was inconsistent with the rights, privileges, and liberties of the citizen. The contention was overruled, the court saying, among other things: "Smallpox is known to all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated. The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good. It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease, and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of people, as well as by most members of the medical profession. It has been general in our state, and in most civilized nations for generations. It is generally ac-

pass a Federal compulsory law was defeated by a plebiscite in 1881. In the following countries there is no compulsory law, but governmental facilities and compulsion on various classes more or less directly under governmental control, such as soldiers, state employees, apprentices, school pupils, etc.: France, Italy, Spain, Portugal, Belgium, Norway, Austria, Turkey. . . . Vaccination has been compulsory in South Australia since 1872, in Victoria since 1874, and in Western Australia since 1878. In Tasmania a compulsory act was passed in 1882. In New South Wales there is no compulsion, but free facilities for vaccination. Compulsion was adopted at Calcutta in 1880, and since then at 80 other towns of Bengal, at Madras in 1884, and at Bombay and elsewhere in the presidency a few years earlier. Revaccination was made compulsory in Denmark in 1871, and in Roumania in 1874; in Holland it was enacted for all school pupils in 1872. The various laws and administrative orders which had been for many years in force as to vaccination and revaccination in the several German states were consolidated in an imperial statute of 1874." 24 Encyclopædia Britannica (1894), *Vaccination*.

"In 1857 the British Parliament received answers from 552 physicians to questions which were asked them in reference to the utility of vaccination, and only two of these spoke against it. Nothing proves this utility more clearly than the statistics obtained. Especially instructive are those which Flinzer compiled respecting the epidemic in Chemnitz which prevailed in 1870-71. At this time in the town there were 64,255 inhabitants, of whom 53,891, or 83.87 per cent, were vaccinated, 5,712, or 8.89 per cent were unvaccinated, and 4,652, or 7.24 per cent, had had the smallpox before. Of those vaccinated 953, or 1.77 per cent, became affected with smallpox, and of the uninoculated 2,643, or 46.3 per cent, had the disease. In the vaccinated the mortality from the disease was 0.73 per cent, and in the unprotected it was 9.16 per cent. In general, the danger of in-

cepted in theory, and generally applied in practice, both by the voluntary action of the people, and in obedience to the command of law. Nearly every state in the Union has statutes to encourage, or directly or indirectly to require, vaccination; and this is true of most nations of Europe. . . . A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. . . . The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government. While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common

fection is six times as great, and the mortality 68 times as great, in the unvaccinated, as in the vaccinated. Statistics derived from the civil population are in general not so instructive as those derived from armies, where vaccination is usually more carefully performed, and where statistics can be more accurately collected. During the Franco-German war (1870-71) there was in France a widespread epidemic of smallpox, but the German army lost during the campaign only 450 cases, or 58 men to the 100,000; in the French army, however, where vaccination was not carefully carried out, the number of deaths from smallpox was 28,400." 8 Johnson's Universal Cyclopædia (1897), *Vaccination*.

"The degree of protection afforded by vaccination thus became a question of great interest. Its extreme value was easily demonstrated by statistical researches. In England, in the last half of the eighteenth century, out of every 1,000 deaths, 96 occurred from smallpox; in the first half of the present century, out of every 1,000 deaths, but 35 were caused by that disease. The amount of mortality in a country by smallpox seems to bear a fixed relation to the extent to which vaccination is carried out. In all England and Wales, for some years previous to 1853, the proportional mortality by smallpox was 21.9 to 1,000 deaths from all causes; in London it was but 16 to 1,000; in Ireland, where vaccination was much less general, it was 49 to 1,000 while in Connaught it was 60 to 1,000. On the other hand, in a number of European countries where vaccination was more or less compulsory, the proportionate number of deaths from smallpox about the same time varied from 2 per 1,000 of all causes in Bohemia, Lombardy, Venice, and Sweden, to 8.33 per 1,000 in Saxony. Although in many instances persons who had been vaccinated were attacked with smallpox in a more or less modified form, it was noticed that the persons so attacked had been commonly vaccinated many years previously. 16 American Cyclopaedia, *Vaccination* (1883).

belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." 179 N.Y. 235, 72 N.E. 97.

Since, then, vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps, or possibly—not the best either for children or adults.

Did the offers of proof made by the defendant present a case which entitled him, while remaining in Cambridge, to claim exemption from the operation of the statute and of the regulation adopted by the board of health? We have already said that his rejected offers, in the main, only set forth the theory of those who had no faith in vaccination as a means of preventing the spread of smallpox, or who thought that vaccination, without benefitting the public, put in peril the health of the person vaccinated. But there were some offers which it is contended embodied distinct facts that might properly have been considered. Let us see how this is.

The defendant offered to prove that vaccination "quite often" caused serious and permanent injury to the health of the person vaccinated;

"Dr. Buchanan, the medical officer of the London Government Board, reported [1881] as the result of statistics that the smallpox death rate among adult persons vaccinated was 90 to a million; whereas among those unvaccinated it was 3,350 to a million; whereas among vaccinated children under five years of age, 42½ per million; whereas among unvaccinated children of the same age it was 5,950 per million." Hardway, *Essentials of Vaccination* (1882). The same author reports that, among other conclusions reached by the Académie de Médecine of France, was one that, "without vaccination, hygienic measures (isolation, disinfection, etc.) are of themselves insufficient for preservation from smallpox." *Ibid.*

The Belgian Academy of Medicine appointed a committee to make an exhaustive examination of the whole subject, and among the conclusions reported by them were: 1. "Without vaccination, hygienic measures and means, whether public or private, are powerless in preserving mankind from smallpox. . . . 3. Vaccination is always an inoffensive operation when practiced with proper care on healthy subjects. . . . 4. It is highly desirable, in the interests of the health and lives of our countrymen, that vaccination should be rendered compulsory." Edwards, *Vaccination* (1882.)

The English Royal Commission, appointed with Lord Herschell, the Lord Chancellor of England, at its head, to inquire, among other things, as to the effect of vaccination in reducing the prevalence of, and mortality from, smallpox, reported, after several years of investigation: "We think that it diminishes the liability to be attacked by the disease; that it modifies the character of the disease and renders it less fatal,—of a milder and less severe type; that the protection it affords against attacks of the disease is greatest during the years immediately succeeding the operation of vaccination."



that the operation "occasionally" resulted in death; that it was "impossible" to tell "in any particular case" what the results of vaccination would be, or whether it would injure the health or result in death; that "quite often" one's blood is in a certain condition of impurity when it is not prudent or safe to vaccinate him; that there is no practical test by which to determine "with any degree of certainty" whether one's blood is in such condition of impurity as to render vaccination necessarily unsafe or dangerous; that vaccine matter is "quite often" impure and dangerous to be used, but whether impure or not cannot be ascertained by any known practical test; that the defendant refused to submit to vaccination for the reason that he had, "when a child," been caused great and extreme suffering for a long period by a disease produced by vaccination; and that he had witnessed a similar result of vaccination, not only in the case of his son, but in the cases of others.

These offers, in effect, invited the court and jury to go over the whole ground gone over by the legislature when it enacted the statute in question. The legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of vaccination; and it is suggested—and we will not say without reason—that such is the case with some adults. But the defendant did not offer to prove that, by reason of his then condition, he was in fact not a fit subject of vaccination at the time he was informed of the requirement of the regulation adopted by the board of health. It is entirely consistent with his offer of proof that, after reaching full age, he had become, so far as medical skill could discover, and when informed of the regulation of the board of health was, a fit subject of vaccination, and that the vaccine matter to be used in his case was such as any medical practitioner of good standing would regard as proper to be used. The matured opinions of medical men everywhere, and the experience of mankind, as all must know, negative the suggestion that it is not possible in any case to determine whether vaccination is safe. Was defendant exempted from the operation of the statute simply because of his dread of the same evil results experienced by him when a child, and which he had observed in the cases of his son and other children? Could he reasonably claim such an exemption because "quite often," or "occasionally," injury had resulted from vaccination, or because it was impossible, in the opinion of some, by any practical test, to determine with absolute certainty whether a particular person could be safely vaccinated?

It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease. Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal

was the belief of the community and of its medical advisers that a system of general vaccination was vital to the safety of all.

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority, then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state. While this court should guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the supreme law of the land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take; and we do not perceive that this legislation has invaded any right secured by the Federal Constitution.

Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. "All laws," this court has said, "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or

an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *Lau Ow Bew v. United States*, 144 U.S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517. Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death. No such case is here presented. It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.

We now decide only that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.

*The judgment of the court below must be affirmed.*

It is so ordered.

Mr. Justice *Brewer* and Mr. Justice *Peckham* dissent.



## APPENDIX II

### USE OF THE REFERENCES

Limitations of space in a book of this nature do not permit of a complete exposition of every point involved in public health law. There are, accordingly, many references to authorities where more complete information on particular subjects may be obtained. These references are of considerable value and should be freely consulted by readers who desire to study more intensively any of the various phases of the legal side of sanitary science. An endeavor has been made to select these references carefully and with due regard to accuracy, authenticity, reliability, and modernity. They may be said, in fact, to be one of the features of the book.

#### *Legal References in General*

Legal references may be divided into two classes: those of primary authority, and those of secondary authority. In the former division are constitutions, statutes, and the decisions of courts of final appeal, these latter forming, as explained in Chapter I, a part of the unwritten or common law. References of secondary influence include textbooks, encyclopedias, articles, and the obiter dicta, or collateral and not material opinions of judges. Sometimes a textbook written by a great lawyer, a work which has stood the test of time and has been frequently cited by the courts, may be included among the references of primary authority, though such instances are rare. Examples are the *Commentaries* of Blackstone and of Kent and such books as Dillon's great work on *Municipal Corporations*. Textbooks and encyclopedias are, generally speaking, restatements of the law as deduced from the opinions of the court, with an occasional discussion of certain points by the author of the book.

#### *Court Decisions*

Decisions of courts of appeal are of primary importance in that they lay down the broad principles of law which are applicable to a given set of facts. By the doctrine of *stare decisis*<sup>1</sup> (literally, "let the decision stand") a court decision becomes a precedent and will, as a general proposition, be followed by subsequent decisions of the courts of the same State. Thus, an early case decided in Illinois in 1897 held that

1. "A solemn decision upon a point of law, arising in any given case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it be shown that the law was misunderstood or misapplied in that particular case." *Kent's Commentaries*, p. 475.

vaccination could not be required as a condition precedent to attendance at school except in emergencies, and three subsequent cases, decided in 1899, 1908, and 1924 have followed this same rule. Since there are forty-eight state courts of last resort, as well as federal and territorial courts of appeals, it is natural that there should be some conflict in the decisions on various matters, for each State is sovereign unto itself within the limitations of the Federal Constitution. This divergence of viewpoints is exemplified to some extent in the decisions on vaccination, as outlined and listed in Chapter XIV. The opinions of a particular court of last resort are binding only upon the courts in the State in which they are delivered, but they may have some weight in other States and may be followed if no similar situation has arisen resulting in a different adjudication in the other State.

In this book over 1,200 court decisions are cited, practically all from the courts of last resort of the several States and the Federal Government. A decision of a court of intermediate appeal may also be of value, especially if it has not been carried beyond that court or if it has been affirmed by a higher one. All the court decisions in this volume have been consulted and are cited because they apply to the point under discussion. A reader who is interested in a particular proposition and who wishes to utilize the information given and the cases referred to should always read the decision in full, however, and not take it for granted that it applies exactly as stated.

References to the reports in which the court decisions may be found have been made as complete as possible, in most instances several citations being given. Thus, if a health officer or attorney has access to one set of law reports and not to another, by having references to both he may consult readily that which he does have at hand. For instance:

*Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, 80 A.S.R. 195, 50 L.R.A. 64.

means that this case, decided in 1900 by the Indiana Supreme Court, may be found in volume 155 of the Indiana State Reports at page 121, in volume 56 of the Northeastern Reporter at page 89, in volume 80 of the American State Reports at page 195, and in volume 50 of the Lawyers Reports Annotated at page 64. Every State has its official volume of court decisions in which practically all its court decisions are given. In addition, there is the National Reporter system, which covers the entire country with a series of reporters known as the Atlantic, Pacific, Northeastern, Northwestern, Southern, Southeastern, Southwestern, and Federal. Prior to 1919 there were also a number of other independent state reports, but these have now been consolidated in the American Law Reports Annotated, which give selected ruling cases, with notes and valuable discussions. As will be noted in

the references, the various reporters are cited by their initials, as 10 A.L.R. 40, etc. If only one reference is given with a court decision, it means either that it may be found in only that one reporter or that the author, for various reasons, was unable to locate other citations.

The dates of all cases are given for convenience. This is useful information, but it should be remembered that age is not necessarily a criterion of the value or weight of a court decision. A principle of law decided in 1847 may be just as sound today as it was then and may still be followed as the authority. On the other hand, a decision in 1874,<sup>2</sup> to the effect that an order by a health officer requiring the removal of the wall paper from a room occupied by a smallpox patient was a reasonable exercise of authority, might be seriously questioned today in the light of the modern conception of the unimportance of possibility from fomites-borne infections. Later cases are sometimes especially valuable in that they summarize and discuss all the previous decisions and deduce the modern line of reasoning to be followed. This is particularly true, perhaps, of court decisions pertaining to public health. Courts have sometimes been accused by laymen of not keeping abreast of modern scientific developments. This may be so to some degree, but it can be stated as a general proposition that the courts give cognizance to recognized progress in scientific attainment and social advancement and modify their principles and precedents to fit modern conditions.

The court decisions cited in this book are, therefore, of great value as reference and source material. Some of them are excellent essays on public health procedure. Unfortunately, it has not been possible to cite every case applicable to public health law and there are probably about three times as many in the aggregate as it has been feasible to mention. It will be noted that there occasionally occur in this book references to places where additional cases may be found cited, as, for instance:

12 *Ruling Case Law* 1271, and cases cited

or

12 *Corpus Juris* 904, and cases cited.

Such references are to encyclopedias of law, legal digests, annotated reporters, textbooks, or articles, where other pertinent cases may be found listed. In connection with the volumes of state reporters there is usually a digest, arranged according to subjects. By consulting this digest under appropriate headings, such as "Health," "Food," "Municipal Corporations" and the like, all the cases applicable, to the date of publication of the digest, may, as a rule, be found. Of national scope in a similar capacity is the American Digest system, which attempts to list and abstract all the American court decisions under appropriate

2. *Seavey v. Preble* (1874), 64 Me. 10.

subjects. There is a section on "Health" and there are also many other sections where decisions applicable to some aspect of public health may be found.

One final point should be remembered with regard to court decisions as references. Sometimes a later case may overrule an earlier one, though this is by no means a usual occurrence. The legislature may also upset a principle of law laid down by a court by passing a statute directly contrary to it. This may be done by the legislature provided no constitutional question is involved. Thus, a court may hold that under existing law health authorities have exceeded their powers by requiring, let us say as a hypothetical case, purification of water supplies for human consumption. The legislature may then determine as a matter of fact that such purification is essential to the public health and may therefore by statute specifically empower health officers to deal with the situation.

The court decisions cited in this volume were, so far as we know, all of good authority at the time of going to press. A complete index of cases is given on page 387.

### *Books and Articles*

Since public health is an extensive subject, many references are given to books, pamphlets, and articles in which more comprehensive information may be found on specific topics. The leading modern texts, in the opinion of the author, have been listed in the Selected Bibliography in Appendix III. These references will be of practical value to health officers and attorneys who desire a more complete exposition of some aspects of public health than it is possible to present within the limits of space of this volume.

### *Key to Abbreviations*

Citations given for various court decisions are abbreviated as follows:

A.	Atlantic Reporter (1885 to date)
A.L.R.	American Law Reports (1919 to date)
Am. Dec.	American Decisions (1760-1869)
Am. R.	American Reports (1870-1887)
Ann. Cas.	American Annotated Cases (1912-1918)
A.S.R.	American State Reports (1887-1911)
Ct. Cl.	Court of Claims (U.S.)
F.	Federal Reporter (U.S.) (1880 to date)
F. Supp.	Federal Reporter Supplement
L. Ed.	Lawyers Edition, U.S. Supreme Court Reports (1790 to date)
L.R.A.	Lawyers Reports Annotated (1888-1905)



L.R.A. (N.S.)	Lawyers Reports Annotated, New Series (1906-1914)
N.C.C.A.	Negligence and Compensation Cases Annotated (1912 to date)
N.E.	Northeastern Reporter (1885 to date)
N.W.	Northwestern Reporter (1879 to date)
N.Y.S.	New York Supplement (1888 to date)
P.	Pacific Reporter (1883 to date)
S. Ct.	Supreme Court Reporter (U.S.) (from 106 U.S. to date)
S.E.	Southeastern Reporter (1887 to date)
So.	Southern Reporter (1886 to date)
U.S.	U.S. Supreme Court Reports (1875 to date)

The volume of reported decisions has grown so great that most of the National Reporter series have been issued in a second series. These are indicated by the symbols: A. (2d), F. (2d), N.W. (2d), S.E. (2d), etc. There are also second series of a number of the state reports.

The state reports are listed according to the usual abbreviation of the respective states. Where the citation is Mo. App., Ga. App., Ind. App., La. App., etc., it means that the case was decided by an intermediate appellate court. Pa. Super. means that the case was decided by the Pennsylvania Superior Court, a court of intermediate appellate jurisdiction. App. Div. means the Appellate Division of the Supreme Court of New York, which is also a court of intermediate appellate jurisdiction. Misc. means the Miscellaneous Reports of New York State.



### APPENDIX III

#### SELECTED BIBLIOGRAPHY

Since one of the purposes of this book is to serve as a guide to reliable and authoritative sources of current information on all matters pertaining directly or indirectly to the law of public health, there is appended herewith a selected bibliography of books on public health administration, and on various legal aspects of public health. There are, of course, many other books of value on these subjects, but those included are regarded by the author as particularly useful for reference by public health workers, physicians, and attorneys.<sup>1</sup> Most of these books, and many other books and articles, are mentioned in the footnotes throughout this volume.

##### 1. *Public Health Administration*

- American Public Health Association. *Basic Principles of Healthful Housing*. New York, the Association, 1939.
- American Public Health Association. *Annual Year Books, 1930-1931 to date*.
- American Public Health Association. *The Control of Communicable Diseases*. New York, the Association, 1945.
- Chadwick, H. D., and Pope, A. S. *The Modern Attack on Tuberculosis*. New York, Commonwealth Fund, 1946.
- Emerson, H., and Luginbuhl, M. *Local Health Units for the Nation*. New York, Commonwealth Fund, 1945.
- Gardner, M. S. *Public Health Nursing*. 3d ed. rev. New York, Macmillan, 1936.
- Hiscock, I. V., editor. *Community Health Organization*. New York, Commonwealth Fund, 1939.
- Long, W. B., and Goldberg, J. A. *Handbook of Social Hygiene*. Philadelphia, Lea & Febiger, 1938.
- Mustard, H. S. *Government in Public Health*. New York, Commonwealth Fund, 1945.
- Mustard, H. S. *Rural Health Practice*. New York, Commonwealth Fund, 1936.
- New York Academy of Medicine. *Preventive Medicine in Modern Practice*. New York, Hoeber, 1942.
- Prescott, S. C., and Horwood, M. P. *Sedgwick's Principles of Sanitary Science and Public Health*. New York, Macmillan, 1935.

1. For a more complete bibliography of standard books on public health, see the *Bibliography* issued by the Book Service, American Public Health Association, 1790 Broadway, New York 19, N.Y.

- Rosenau, M. J. *Preventive Medicine and Hygiene*. 6th ed. New York, Appleton-Century, 1935.
- Sappington, C. O. *Essentials of Industrial Health*. Philadelphia, Lippincott, 1943.
- Sherman, H. C. *Chemistry of Food and Nutrition*. 7th ed. New York, Macmillan, 1946.
- Shrader, J. H. *Food Control; Its Public Health Aspects*. New York, Wiley, 1939.
- Smillie, W. G. *Public Health Administration in the United States*. 2d ed. New York, Macmillan, 1940.
- Smillie, W. G. *Preventive Medicine and the Public Health*. New York, Macmillan, 1946.
- Stern, B. J. *Medicine in Industry*. New York, Commonwealth Fund, 1946.
- Tobey, J. A. *The National Government and Public Health*. Baltimore, Johns Hopkins Press, 1926.
- United States Public Health Service. *Distribution of Health Services in the Structure of State Government*. Public Health Bulletin No. 184, 1943.

## *2. Legal Aspects of Public Health*

American Jurisprudence.

American Law Reports Annotated.

American Public Health Association. *Occupational Disease Legislation*. New York, the Association, 1931.

Brothers, E. D. *Medical Jurisprudence*. 3d ed. St. Louis, Mosby, 1930.

Callender, C. N. *American Courts, Their Organization and Procedure*. New York, McGraw-Hill, 1927.

Cooley on Torts.

Corpus Juris, and Corpus Juris Secundum.

Dillon on Municipal Corporations.

Dodd, W. F. *Administration of Workmen's Compensation*, New York, Commonwealth Fund, 1936.

Dunn, C. W. *Food and Drug Laws, Federal and State*. New York, United States Corporation, 1927-1928.

Ebenstein, W. *The Law of Public Housing*. Madison, University of Wisconsin Press, 1940.

Edwards, N. *The Courts and the Public Schools*. Chicago, University of Chicago Press, 1933.

Freund, E. *Legislative Regulation*. New York, Commonwealth Fund, 1932.

Freund, E. *The Police Power*. Chicago, Callaghan, 1904.

Heminway, H. B. *Legal Principles of Public Health Administration*. Chicago, Flood, 1914.

SELECTED BIBLIOGRAPHY

383

- Mack, M. G. *Medical and Legal Aspects of Tuberculosis as an Occupational Disease and as an Accidental Injury*. New York, National Tuberculosis Association, 1938.
- McFarland, C. *Milk Marketing under Federal Control*. New York, Milk Industry Foundation, 1946.
- Parker, L., and Worthington, R. H. *The Law of Public Health and Safety*. Albany, Bender, 1892.
- Ruling Case Law.
- Tobey, J. A. *Federal and State Control of Milk Prices*. Chicago, International Association of Milk Dealers, 1937.
- Tobey, J. A. *Legal Aspects of Milk Sanitation*. 2d ed. Washington, Milk Industry Foundation, 1947.
- Tobey, J. A. *A Manual of Tuberculosis Legislation*. New York, National Tuberculosis Association, 1928.
- United States Public Health Service. *Milk Ordinance and Code: 1939 Public Health Bulletin No. 220*, 1939 edition.
- Woodward, W. C. *Medicolegal Cases, Abstracts of Court Decisions of Medicolegal Interest, 1926-1930 and 1931-1935*. Chicago, American Medical Association, 1932 and 1936. 2 vols.



## INDEX OF CASES

- Aaron v. Broiles, 141, 297  
Abeel v. Clark, 237, 241  
Abel v. State, 87  
Abney v. Fox, 246  
Adams v. Acme White Lead & Color Works, 268  
Adams v. Milwaukee, 86, 183, 188, 191, 201, 215, 228, 240  
Adams County v. Aikman, 108  
Ademec v. Post, 231  
Adkins v. Children's Hospital, 28, 54  
Adler v. Deegan, 6, 231  
Advisory Opinion to the Governor, In re, 101  
Aerated Prod. Co. v. Godfrey, 185  
Aerated Prod. v. Dept. of Health, 185  
Aetna Insurance Co. v. Portland Gas Co., 270  
Affonso Bros. v. Brock, 191  
African Prince, The, 131  
Agular and Bellow v. Brock, 191  
Aitken v. John Hancock Mut. Life Ins. Co., 127  
Alden v. State, 144  
Allen v. De Kalb County, 109  
Allen v. Ingalls, 246  
Allen Gravel Co. v. Curtis, 159, 268  
Allentown v. Wagner, 251  
Allison v. Cash, 90, 145, 295  
Alston v. Charleston Board of Health, 144, 188  
Alston v. U.S., 213  
Ambruster v. Mellon, 64  
American Bakeries Co. v. Louisiana, 64  
American School of Magnetic Healing v. McAnulty, 27  
Ames v. Lake Independence Lumber Co., 270  
Anable v. Montgomery County, 88  
Anderson v. City of Portland, 281  
Anderson v. Russell, 191  
Anderson v. Tampa, 185  
Anzine v. U.S., 178  
Applequist v. Oliver Iron Mining Co., 159  
Arata, Ex parte, 168  
Arden Farms Co. v. City of Seattle, 185  
Arizona Employees Liability Cases, 55, 266  
Armour & Co. v. City Council of Augusta, 213  
Armstrong v. Board, 155  
Aron v. Sills, 307  
Aronson v. City of Everett, 287  
Arrigo, Ex parte, 213  
Asbell v. Kansas, 46  
Ashbury v. City of Norfolk, 222, 283  
Asher v. Stacy, 125  
Asheville v. Nettles, 189  
Associated Dairies v. Fletcher, 196  
Atkin v. Kansas, 54  
Atlantic Coast Line R. Co. v. Wheeler, 269  
Attorney General v. McCabe, 79  
Attorney General v. Stratton, 115  
Auer v. Sinclair Refining Co., 127  
Austin v. State, 177  
Auten v. School Board of Little Rock, 243  
Ayars v. Wyoming Valley Hospital, 220  
Baccus v. Louisiana, 51  
Baehne v. School District of Manly, 245  
Bailey v. Drexel Furniture Co., 25, 213  
Baker v. Arkansas, 35  
Baker v. Hill, 155  
Baker v. Ind. Accid. Board, 158  
Baker v. State Indus. Accid. Comm., 322  
Baker v. U.S., 27, 35, 322  
Bales v. City of Tacoma, 284  
Balhorn v. Moore, 313  
Ballard v. City of Fort Worth, 285  
Bandos v. Philadelphia, 283  
Bang v. Independent School District, 158, 281  
Bank of Picher v. Morris, 155  
Barber v. School Board of Rochester, 241, 247

- Barber v. Time, 320  
Barbier v. Connolly, 48  
Barksdale v. Hayes, 248  
Barmore v. Robertson, 6, 142, 355  
Barnett v. Roberts, 314  
Barresi v. State Commissioner of Health, 71  
Barrett v. City of Medford, 256  
Barrett v. Rieta, 87  
Barrington Hills Country Club v. Village of Barrington, 227, 283  
Barron v. Texas Empl., Ins. Co., 158  
Barry v. Smith, 298  
Bartlett v. Lockwood, 131  
Basil v. Butterworth, 273  
Bates v. Houston, 280  
Bauer v. State, 215  
Baumgardner v. City of Boston, 222, 283  
Baundenbach v. Schwerdfeger, 313  
Beck v. Shawnee County, 155  
Beeks v. Dickinson County, 139, 294  
Beers v. Board of Health, 299  
Beglin v. Insurance Co., 127  
Behnisch v. Cedarburg Dairy Co., 225  
Bellows v. Bd. of Supvrs. of Seneca County, 143  
Bellows v. Rayner 188  
Belmont v. New England Brick Co., 64, 225  
Belton v. Wateree Power Co., 233  
Benton v. Pittard, 220  
Benson v. Walker, 144  
Benz v. Kremer, 338  
Bethlehem Steel Co. v. Ind. Accid. Comm., 272  
Birchard v. Board of Health, 85, 141  
Bishop v. Comer and Pollock, 270  
Bishop v. Wilson, 165  
Bissell v. Davison, 241  
Bjelland v. Mankato, 113, 291  
Black v. Powell, 196  
Blair v. State Ind. Accid. Comm., 271  
Blittschau v. Am. Car & Foundry Co., 275  
Blue v. Beach, 63, 79, 85, 88, 131, 237, 242, 243, 244  
Boal v. Electric Storage Battery Co., 322  
Board of Comrs. of Colfax County v. Dept. of Pub. Health, 115  
Board of Education of Bowling Green v. Simmons, 255  
Board of Education of Cleveland v. Ferguson, 154, 255  
Board of Education v. Couch, 260  
Board of Health of Buncombe County v. Lewis, 81  
Board of Health of Caldwell v. Shaw, 225, 233  
Board of Health of City of Canton v. O'Wesney, 114  
Board of Health of City of Canton v. State, 59  
Board of Health v. Copcut, 82  
Board of Health v. Rulofson, 221  
Board of Health v. Schmidt, 221  
Board of Purification of Waters v. Town of Bristol, 227  
Bobertz v. Township of Hillside, 271  
Boguski v. City of Winooski, 289  
Boll v. Condie-Bray Glass & Paint Co., 270, 274  
Boom v. Utica, 141, 219  
Booth v. Board of Education, 239  
Booth v. Indiana, 274  
Booth v. State, 274  
Borden v. Montclair, 88, 191  
Borough of Florham Park v. Department of Health, 64  
Borough of Yeadon v. Galen, 122  
Bosley v. McLaughlin, 54  
Bountiful City v. De Luca, 228  
Bourjois v. Chapman, 51, 201  
Bourke v. Sanitary District of Chicago, 109  
Bowers v. City of Little Rock, 229  
Bowman v. Bowman, 177  
Bowman v. Woodway Stores, 307  
Boyce, In re, 276  
Boyd v. U.S., 213  
Boyer v. City of Tacoma, 284  
Boysen v. Boysen, 176  
Bozicevitch v. Kenilworth Mercantile Co., 127  
Braman v. New London, 101  
Brash v. State Tuberculosis Board, 151  
Brazil v. State, 246  
Breault v. Town of Auburn, 116  
Brewer v. Valk, 56



INDEX

389

- Brielman v. Munroe, 192  
 Bright v. Beard, 242, 243  
 Brim v. Home Accid. Ins. Co., 158  
 Brink v. Shephard, 157  
 Brinkley v. Fishbein, 318  
 Brinkley v. Fishbein (Fed), 320  
 Brinkley v. Hassig, 35  
 Brissell v. State, 155  
 Brodin's Case, 270  
 Brodman v. Rade, 100  
 Brooks, Ex parte, 173  
 Brotherhood of Painters v. Barton, 136  
 Brown, Ex parte, 177  
 Brown v. City of Seattle, 91  
 Brown v. Livingston County, 109  
 Brown v. Manning, 170  
 Brown v. Maryland, 42  
 Brown v. Moss, 273  
 Brown v. Murdock, 131, 139, 140, 298  
 Brown v. Purdy, 133  
 Brown v. Tenn. Consolidated Coal Co., 269  
 Bryant and Chapman Co. v. Lowell, 187  
 Bryant v. City of St. Paul, 79  
 Bryant v. Nolin, 143, 292  
 Brymer v. Butler, 310  
 Buchanan v. Md. Casualty Co., 271  
 Buck v. Bell, 49, 56  
 Buckingham v. Plymouth Water Co., 310  
 Buckley v. Laidlaw, 115  
 Bucyrus v. Dept. of Health, 227  
 Buffalo Lake Bd. of Health v. Renville County, 112, 291  
 Bundy v. Ey-Teb, Inc., 313  
 Bunting v. Oregon, 54  
 Burgess v. Johnson County, 125  
 Burroughs v. Mortensen, 245  
 Butera v. Ayotte, 79  
 Butler v. Kansas City, 280  
 Butler County v. Gardner, 109  
 Buttfield v. Stranahan, 210  
 Butterworth v. Boyd, 54, 260  
 Byrne v. St. Paul, 115  
 California Reduction Co. v. Sanitary Reduction Works, xi, 45, 63, 86  
 Cambridge Mfg. Co. v. Johnson, 158  
 Camfield v. U.S., 232  
 Campbell v. City of Helena, 288  
 Campbell v. Ind. Comm., 159  
 Canavan v. City of Mechanicsville, 285  
 Canon Reliance Coal Co. v. Indus. Comm., 322  
 Capital City Dairy v. Ohio, 201  
 Carey-Reed Co. v. Farmer, 315  
 Carlson v. Turner Center System, 307  
 Carmen v. Eli Lilly, 313  
 Carolene Products Co. v. Banning, 211  
 Carolene Products Co. v. Evaporated Milk Ass'n, 210  
 Carolene Products Co. v. Hanrahan, 211  
 Carolene Products Co. v. Harter, 211  
 Carolene Products Co. v. McLaughlin, 211  
 Carolene Products Co. v. Mohler, 211  
 Carolene Products Co. v. Thompson, 211  
 Carolene Products Co. v. U.S., 211  
 Carpenter v. City of Versailles, 284  
 Carr v. Inhabitants of Town of Dighton, 258  
 Carter v. U.S., 148  
 Carthage v. Colligan, 350  
 Carthage v. Gray, 260  
 Cartwright v. Board of Health of Co-hoes, 64, 229  
 Caselli, Ex parte, 172  
 Casey v. U.S., 213  
 Catalanello v. Cudahy, 309  
 Cedar Creek Twp. v. Wexford County, 112, 291  
 Cesar v. Karutz, 314  
 Chalfin v. Am. Soc. Prev. Cruelty to Animals, 147  
 Champion v. Vance County Bd. of Health, 80  
 Chandler v. City of Olney, 284  
 Chapman v. Muskegon County, 112  
 Chardkoff Junk Co. v. City of Tampa, 283  
 C— v. C—, 176  
 Cady Lumber Co. v. Fain, 311

- Chase v. Industrial Commission, 271, 288
- Chase v. Middleton, 356
- Chastney v. State Board of Education, 106, 256
- Cheli v. Cudahy Bros. Co., 308
- Cherry v. Williams, 157
- Chicago v. Bowman Dairy Co., 195
- Chicago v. C. & N.W. Ry. Co., 188
- Chicago v. Craig, 184
- Chicago v. Union Ice Cream Mfg. Co., 88
- Chicago Rawhide Mfg. Co. v. Industrial Commission, 272
- Christ v. Pac. Mut. Life Insur. Co., 270
- Christman v. Tompkins, 243
- Chysky v. Drake, 307
- City and County of Denver v. Gibson, 193
- City and County of Denver v. Ristau, 290
- City and County of San Francisco v. Boyle, 155
- Cityco Realty Co. v. City of Annapolis, 227
- City Council of N.Y.C. v. Goldwater, Matter of, 137
- City of Albany v. Newhof, 87
- City of Bardstown v. Nelson County, 81
- City of Barnesville v. Parham, 283
- City of Birmingham v. West, 146
- City of Brunswick v. Volpian, 283
- City of Canton v. Van Voorhis, 283
- City of Chicago v. Fieldcrest Dairies, 196
- City of Cleveland v. U.S., 231
- City of Dayton v. Jacobs, 91
- City of Durham v. Eno Cotton Mills, 227
- City of Edmond v. Billen, 284
- City of El Paso v. Jackson, 228
- City of Fort Smith v. Roberts, 74
- City of Frankfort v. Slipher, 283
- City of Harlan v. Peavely, 282
- City of Harrisonville v. Dickey Clay Co., 283
- City of Harrodsburg v. Brewer, 283
- City of Huron v. Munson, 92
- City of Jackson v. Ferguson, 81, 89
- City of Jackson v. Mitchell, 168
- City of Lawton v. Wilson, 284
- City of Lexington v. Batson's Admr., 281
- City of Little Rock v. Smith, 170, 172
- City of Longview v. Stewart, 283
- City of Louisville v. Kuhn, 92
- City of Ludlow v. Commonwealth, 283
- City of Malden v. Flynn, 283
- City of Milwaukee v. Childs, 195
- City of New Braunfels v. Waldschmid, 242
- City of Newcastle v. Harvey, 283
- City of Newport v. Hiland Dairy, 189
- City of New York v. Miln, 41
- City of Niles v. Stream Contr. Comm., 227
- City of Northfield v. Atlantic County, 158
- City of Phoenix v. Breuninger, 88, 184, 192
- City of Portsmouth v. Mitchell Mfg. Co., 285
- City of Rockford v. Hey, 87, 90, 188, 195, 198
- City of Roslyn v. Pavlinovitch, 353
- City of Sacramento v. Simmons, 125
- City of Salem v. Harding, 288
- City of Sayre v. Rice, 284
- City of Seattle v. Cottin, 86, 139, 246
- City of Shawnee v. Jeter, 280
- City of Tucson v. Arizona Mortuary, 89
- City of Tyler v. House, 284
- City of Wilmington v. Turk, 220
- City Sanitary Serv. v. Rausch, 283
- Clay v. Browne, 115
- Clay v. Civil Service Commission, 109, 356
- Clayton, In re, 56
- Clemente, Ex parte, 169
- Clinard v. Town of Kernersville, 284
- Clinchfield Carbocoal Corp. v. Kiser, 159
- Clowes v. Edmonton School Board, 245
- Cloverleaf Butter Co. v. Patterson, 47, 212, 339
- Coates v. Mayor and Aldermen of New York City, 13

- Coblentz v. Sparks, 75.  
 Coca Cola Co. v. Bell, 309  
 Cochran v. Vermillion County, 112,  
     291  
 Cohen & Co. v. Rittman, 233  
 Coleman v. Little Rock, 50, 189, 193  
 Coleman v. Nat. Life & Accid. Ins.  
     Co., 162  
 Collier v. Scott, 112  
 Collins v. Texas, 51  
 Colonna v. Rosedale Dairy, 307  
 Columbia Cheese Co. v. McNutt, 206  
 Commission v. Ackerman, 158  
 Commissioners' Court of Perry County  
     v. Medical Society of Perry County,  
     247  
 Commonwealth v. Alger, 41  
 Commonwealth v. Beaver Dam Coal  
     Co., 275  
 Commonwealth v. Boston Transcript  
     Co., 52  
 Commonwealth v. Childs, 247  
 Commonwealth v. Collins, 110, 225  
 Commonwealth v. Evans, 135  
 Commonwealth v. Farren, 182  
 Commonwealth v. Flannelly, 182  
 Commonwealth v. Gardner, 179  
 Commonwealth v. Green, 248  
 Commonwealth v. Jacobson, 238, 360  
 Commonwealth v. McConnell, 121  
 Commonwealth v. Moore, 213  
 Commonwealth v. Roberts, 229  
 Commonwealth v. St. John, 229  
 Commonwealth v. Staples, 64  
 Commonwealth v. Swasey, 79  
 Commonwealth v. Woodring, 155  
 Commonwealth ex rel. Carson v.  
     Rowe, 241  
 Commonwealth ex rel. Schaffer v.  
     Wilkins, 243  
 Community Chautauquas v. Caverly,  
     64, 144  
 Compagnie Française de Navigation à  
     Vapeur v. Louisiana State Board of  
     Health, 46, 131, 295  
 Company, Ex parte, 172  
 Condict v. Jersey City, 283  
 Conestee Mills v. City of Greenville,  
     222, 224, 284  
 Congdon v. Nashua, 112, 291  
 Conlon v. Marshall, 154, 259  
 Connelly v. Hunt Furniture Co., 273  
 Connor v. Taylor, 317  
 Conolly v. Craft, 114  
 Consolidated Coal Co. v. Illinois, 274  
 Continental Casualty Co. v. Nashville  
     & American Trust Co., 126  
 Cook v. City of Fall River, 158, 220  
 Cook v. St. Francis County, 115  
 Cooper v. State, 227  
 Corn Products Refining Co. v. Eddy,  
     213  
 County Commissioners v. Mayor, 155  
 County Commissioners v. McClintock,  
     248  
 Covey v. Robinson, 241, 246  
 Covington v. Kollman, 85, 195  
 Covington v. Wyatt, 165  
 Cowhig v. Cafarelli, 314  
 Cram v. School Board of Manchester,  
     241  
 Crane v. Johnson, 51  
 Crane v. School District, 254, 260  
 Crayton v. Larabee, 79, 87, 139, 296  
 Creek County v. Robinson, 107, 108  
 Crowell v. Crowell, 177  
 Crowl v. Commonwealth, 199  
 Crowley v. Idaho Traning School, 273  
 Culver, Ex parte, 140, 142  
 Curry v. City of Highland Park, 222  
 Cutter v. Hamlin, 314  
  
 Dago, The, 131  
 Daniel v. Putnam County, 139, 248  
 Danielley v. City of Princeton, 227  
 Danielly v. Danielly, 176  
 Darling v. Newport News, 227, 284  
 Darnaby v. Furlong, 123, 125  
 Daviess County Board of Health v.  
     McFarland, 81  
 Davis v. Davis, 160  
 Davis v. N. J. Zinc Co., 269  
 Davis v. Rodman, 136, 305  
 Davis v. State, 178  
 Davis v. Supreme Lodge, Knights of  
     Honor, 127  
 Davis v. Walton, 56  
 Davock v. Moore, 84, 101  
 Dawe v. Board of Health, 93  
 Day-Bergsvall Co. v. State, 213  
 Dayton, Ex parte, 169

- Dean v. Dalton, 159  
 Dean Milk Co. v. City of Chicago, 196  
 Deborah Jewish Consumptive Relief Soc. v. State Board of Health, 65, 156  
 Deese v. Collins, 317  
 Delano v. Goodwin, 93  
 Dent v. West Virginia, 51  
 Department of Health v. Dunn, 122  
 Department of Health v. Owen, 124  
 Depre v. Pacific Coast Forge Co., 159  
 De Roche v. Osborne, 229  
 Detroit Civil Service Comm. v. Engil, 84  
 Dettlinger v. Ocean Township, 114  
 Dewey v. Union School District, 260  
 Dewitt v. Mills County, 112, 291  
 Dietsch v. Mayberry, 165, 305  
 Dillingham's Case, 270  
 Dillon, *Ex parte*, 168  
 District Board v. Bradley, 155  
 District Board, etc. v. City of Lexington, 155, 156  
 Dobbins v. Los Angeles, 52  
 Doben v. Board of Health of Paterson, 91  
 Dodd v. Independent Stove and Furnace Co., 158  
 Dodge County v. Diers, 143  
 Doe v. Doe, 177  
 Dohany v. City of Birmingham, 227  
 Donahue v. City of Portland, 215  
 Donaldson v. Gt. A. & P. Tea Co., 308  
 Donnelly v. Minneapolis Mfg. Co., 268  
 Donnelly Brick Co. v. City of New Britain, 283  
 Donoghue v. Smith, 127  
 Dorough v. Carter County, 108  
 Dorsoom v. City of Atchison, 191  
 Dowling v. Harden, 143, 171  
 Draxton v. Fitch, 89  
 Dressler v. Merkel, Inc., 308  
 Drysdale v. Prudden, 74  
 Duffield v. Williamsport School District, 243  
 Dunbar v. Augusta, 43  
 Duncan v. Lexington, 172  
 Duncanson v. City of Fort Dodge, 283  
 Dunwoody v. U.S., 18  
 Economy Dairy v. Kerner, 195  
 Eden v. Southwest Harbor, 291  
 Edwards v. Lamb, 314  
 Eisenbach v. Gimbel, 309  
 Ellestad v. Swayze, 51  
 Elliot v. Kalkaska, 93  
 Employees Mutual Liability Insur. Co. v. McCormick, 270  
 Epps v. State, 177  
 Ernesti v. City of Grand Island, 92  
 Ernst, *Ex parte*, 90  
 Essex County v. City of Newburyport, 155  
 Evans v. Kankatee, 282  
 Everett v. Paschall, 157  
*Ex parte*. *See under name of case*  
 Farmers Dairy League v. City and County of Denver, 356  
 Federal Security Admr. v. Quaker Oats, 207  
 Feinstein v. Daniel Reeves, Inc., 308  
 Feola v. Nat. Brass Mfg. Co., 159, 269  
 Fevold v. Board, 190  
 Fidelity and Casualty Co. v. Industrial Accid. Comm. 271  
 Field v. Robinson, 241  
 First Nat. Bank of Ottawa v. Wedron Silica Co., 159, 270  
 First National Stores v. Lewis, 192  
 Fischer v. St. Louis, 51  
 Fisher, *Ex parte*, 173  
 Fisher v. City of Paducah, 107  
 Fisher v. Kelly, 83, 110  
 Fisher v. Sweet & McClain, 176  
 Forbes v. Board of Health, 82, 131, 294  
 Ford Motor Co. v. Brady, 159  
 Fort Wayne v. Rosenthal, 93, 113, 237, 248, 291  
 Fougera v. City of New York, 88, 213  
 Fournier v. Zinn, 127  
 Fox v. City of Monroe, 125  
 Frankamp v. Fordney Hotel, 270  
 Frankfort v. Irvin, 93  
 Franklin v. Butcher, 314  
 Franklin v. Seattle, 280  
 Fraze v. McClelland Co., 158

INDEX

393

- Fredericks v. West Hoboken Bd. of Health, 107  
 Freedmen v. Borough of West Hazelton, 223  
 French v. Davidson, 241  
 French v. Smith, 317  
 Fritz v. Elk Tanning Co., 269  
  
 Galuzzo v. State, 273  
 Ganley v. Claeys, 92  
 Gardner v. Int. Shoe Co., 234  
 Gardner v. Michigan, 86  
 Gardner v. People, 45  
 Garrett v. State, 92  
 Gartner v. Gartner, 176  
 Gates v. Dr. Nichols Sanatorium, 322  
 Gaw v. Ashley, 256, 291  
 Gay v. Hocking Coal Co., 269  
 General Printing Corp. v. Umback, 268  
 Georgia v. Tennessee Copper Co., 57, 224  
 Gerard v. Smith, 92, 201  
 Gershwin v. Ethical Pub. Co., 320  
 Gibbons v. Ogden, 13, 42  
 Gilbert, Ex parte, 173  
 Gilbert v. Hoffman, 314  
 Gilchrist Drug Co. v. Birmingham, 198  
 Gilliland v. Ash Grove Lime, etc., Co., 159  
 Gillin v. Board of Education of Philadelphia, 240  
 Globe School District v. Globe Board of Health, 144, 254  
 Glover v. Board of Education of Lead, 242, 243  
 Godfrey v. Wateree Power Co., 233  
 Goldsmith v. Unity Ind. Life Insur. Co., 317  
 Goodal v. City of Clinton, 229  
 Gordon v. Montgomery County, 81, 89  
 Gosser v. Ohio Valley Water Co., 310  
 Gotwals v. City of Wessington Springs, 284  
 Goux v. Smith, 115  
 Gould v. Keller, 141  
 Gounis, Ex parte, 354  
 Governor, In re Advisory Opinion to the, 101  
 Governor, In re Interrogatories of the, 19  
 Grain Handling Co. v. Sweeney, 158  
 Grandview Dairy v. Baldwin, 190  
 Grant v. Leavell, 187, 194  
 Graves v. City of Paducah, 109  
 Graves v. Minnesota, 51  
 Gray v. City of High Point, 284  
 Great A. & P. Tea Co. v. Hughes, 308  
 Great A. & P. Tea Co. v. Sexton, 273  
 Great A. & P. Tea Co. v. Wilson, 273  
 Greco v. S. S. Kresge Co., 307, 309  
 Green v. Ashland Water Co., 285, 310  
 Gregg School Tp. v. Hinshaw, 260  
 Grover v. Zook, 160  
 Gulf, C. & S. F. Ry. Co. v. Boss, 316  
 Gulf & S.I.R. Co. v. Sullivan, 249  
 Gundling v. Chicago, 91  
 Gundy v. Village of Merrill, 284  
 Guptil v. Kelsey, 75  
  
 Hagler v. Larner, 241  
 Haley v. Boston, 283  
 Halford v. Senter, 108  
 Hallett v. Post Printing and Publishing Co., 255, 258  
 Hamilton v. Madison Water Co., 310  
 Hamilton v. Nance, 317  
 Hammer v. Dagenhart, 23  
 Hammond v. Town of Hyde Park, 247  
 Hampton v. Spindale, 284  
 Hanzel v. San Antonio, 91  
 Hard v. State ex rel. Baker, 62, 107  
 Hardcastle, Ex parte, 143, 172  
 Hargy, In re, 248  
 Harrington v. City of Providence, 229  
 Harris v. D.C., 282  
 Hartman, In re, 322  
 Hartman v. May, 241, 245  
 Hartmann v. Sun Printing Co., 318  
 Harvey Realty Co. v. Borough of Wallingford, 228  
 Hasslinger v. Vill. of Hartland, 284  
 Havery v. Bass, 131, 139  
 Hawker v. New York, 51  
 Hawkins v. Bleakly, 55, 266  
 Hawkins v. Hoye, 63  
 Hayes v. Torrington Water Co., 310  
 Hayes v. Town of Cedar Grove, 283

- Hayman v. City of Galveston, 51  
 Hayt v. Brewster, 168  
 Hazen v. Strong, 237, 247  
 Healey's Case, 158  
 Hebe Co. v. Shaw, 201, 211, 213  
 Hecker v. Gunderson, 106  
 Heiers v. Hull & Co., 272  
 Heilman Brewing Co. v. Schultz, 158  
 Helland v. Bridenstine, 304  
 Helvering v. Davis, 26  
 Henderson County Board of Health v. Ward, 81  
 Hendrickson, In re, 56  
 Hendrickson v. Hodkin, 322  
 Hengehold v. Covington, 79, 131, 141  
 Hennessey, Ex parte, 87  
 Henry Holt & Co. v. Liggett & Myers Tob. Co., 321  
 Herbert v. Demopolis School Board, 241  
 Herkimer v. Potter, 195  
 Hersey v. Chapin, 298  
 Hertz v. Watab Paper Co., 322  
 Hewett v. Womans Hospital Aid Ass'n, 268  
 Highland Park v. McMurtry, 131, 144, 242, 243  
 Highland Park v. Schulte, 140, 144  
 Hill v. Bickers, 242, 243  
 Hipolite Egg Co. v. U.S., 202  
 Hoar v. Lancaster, 188  
 Hodges v. Town of Drew, 284  
 Hodgson v. Bigelow, 305  
 Hoffman v. City of Bristol, 290  
 Hoffman v. Consumers Water Co., 271  
 Hoke v. U.S., 23  
 Holden v. Hardy, 5, 54  
 Holliston Mills v. McGuffin, 275  
 Hood v. Burson, 81, 332  
 H. P. Hood & Sons v. Md. Casualty Co., 272  
 H. P. Hood & Sons v. U.S., 197  
 Horn v. State, 63  
 Horton v. North Attleboro, 289  
 Houghton v. U.S., 36  
 Houston Packing Co. v. Mason, 272  
 Howard v. City of Philadelphia, 250, 281  
 Howard v. Jacobs Pharmacy, 313  
 Howe v. State, 167, 177  
 Hruska v. Parke Davis Co., 312  
 Hubbard v. Allyn, 301  
 Hudgins v. Carter County, 112, 291  
 Huffman v. D.C., 168, 170  
 Hughes v. State Med. Examrs., 178  
 Hunt v. Rowton, 141, 281, 315  
 Hunter v. City of Louisville, 155  
 Hunter v. Derby Foods, 127  
 Hurle's Case, 268  
 Hurst v. Warner, 63, 88, 131, 145  
 Husting Co. v. City of Milwaukee, 214  
 Hutchins v. School Committee of Town of Durham, 243  
 Hutchinson v. Valdosta, 48, 86  
 Hutchinson Ice Cream Co. v. Iowa, 184, 199, 201  
 Idol v. Hanes, 75  
 Ill. Antivivisection Soc. v. City of Chicago, 90  
 Illinois Steel Co. v. Fuller, 275  
 In re. *See under name of case*  
 Industrial Commission v. Ackerman, 158  
 Industrial Commission v. Cross, 271  
 Industrial Commission v. Roth, 269  
 Industrial Commission of Ohio v. Hofsafros, 166  
 Inhabitants of Swansea v. Pivo, 85  
 Interrogatories of the Governor, In re, 19  
 Irby, Ex parte, 174  
 Iron v. Knapp, 318  
 Irvine v. Commonwealth, 226  
 Isenhour v. State, 63  
 Istan v. Naar, 79  
 Ives v. South Buffalo R. Co., 266  
 Jackson v. State, 51  
 Jacobson v. Massachusetts, 21, 49, 79, 86, 238, 239, 328, 359-375  
 James, Ex parte, 173  
 James v. Charlotte, 283  
 Janke v. City of Milwaukee, 214  
 Janssen v. Mulder, 146, 305  
 Jardine v. City of Pasadena, 88, 220  
 Jarvis v. Pinckney, 299

INDEX

395

- Jefferson County v. Jefferson County Fiscal Court, 79, 81  
 Jefferson Printing Co. v. Indus. Comm., 249  
 Jellico Coal Co. v. Adkins, 268  
 Jersey City v. Coppinger, 224  
 Jersey City v. State Water Policy Comm., 228  
 Jew Ho v. Williamson, 139, 140  
 Jewish Consumptive Relief Soc. v. Town of Woodbury, 156  
 Johnson, Ex parte, 169, 172  
 Johnson v. City of Fairmont, 284  
 Johnson v. Concrete Materials Co., 159  
 Johnson v. Dallas, 243  
 Johnson v. D.C., 134  
 Johnson v. Stoddard, 309  
 Jones v. City of Phoenix, 222  
 Jones v. Mt. Holly Water Co., 310  
 Jones v. Rinehart & Dennis Co., 268  
 Jones v. Stanko, 136, 305  
 Jordt v. Calif. State Bd. Educ., 106, 256  
 Judge v. Berman, 74  
  
 Kane v. Lapre, 222  
 Kansas v. Colorado, 347  
 Kansas City v. Baird, 134  
 Kansas City v. Henre, 88, 184  
 Karger v. Armour & Co., 308  
 Karr v. Inecto, 312  
 Kassovitz v. Sentinel Co., 317  
 Keefe v. Union, 59, 79, 101, 140  
 Keeny, In re, 88  
 Keever v. City of Mankato, 286  
 Keho v. Board of Auditors of Bay County, 247  
 Keiningham v. Blake, 123  
 Kellerman v. City of Philadelphia, 92  
 Kilbane, Ex parte, 170  
 Kelly v. Board of Health of Peabody, 88  
 Kelly v. Watson Coal Co., 158  
 Kennedy v. State Bd. of Registration, 178  
 Kenney v. Gurley, 167, 258, 301, 317  
 Ketterer v. Armour & Co., 308  
 Key v. Cosmopolitan Life, Health & Accid. Ins. Co., 127  
  
 KFKB Broadcasting Ass'n v. Federal Radio Commission, 35  
 Kierstein v. Cudahy, 308  
 King, Ex parte, 173  
 King v. Pillsbury, 317  
 Kirby v. Harker, 139  
 Kirby v. Smith, 167, 317  
 Kirk v. Aiken Board of Health, 139, 141, 297  
 Kliegel v. Aitken, 268, 314  
 Kneece v. City of Columbia, 283  
 Kniess v. Armour, 308  
 Knight v. Johns, 92  
 Koeffler v. State, 59  
 Kohlmeyer v. Ohio Valley Water Co., 310  
 Kohn v. City of Philadelphia, 114  
 Kohr Bros. v. Atlantic City, 198  
 Korth v. Portland, 189  
 Kosek v. Wilkes-Barre Tp. School District, 256  
 Kovaliski v. Collins Co., 158  
 Koy v. Chicago, 192  
 Kress & Co. v. Ferguson, 307  
 Kress & Co. v. Johnson, 19  
 S. H. Kress & Co. v. Dept. of Health, 187, 199  
 Kroplin v. Truax, 191  
 Krout v. J. L. Hudson Co., 249  
 Kugler v. City of Milwaukee, 214  
 Kunhardt, Matter of, 124  
 Kurinsky v. Bd. of Health of Lakewood, 87  
 Kurth v. Krumme, 309  
  
 Labofish v. Berman, 126  
 La Forge v. State Bd. of Health, 63  
 La Franchi v. City of Santa Rosa, 194  
 Lambert v. City of Port Arthur, 222, 224  
 Lambert v. Yellowley, 51  
 Lambrie v. Manchester, 93  
 Land-O-Lakes Creameries v. McNutt, 206  
 Lang's Creamery v. Niagara Falls, 194  
 Lanteen Labs. v. Clark, 179  
 La Porta v. Board of Health of Hoboken, 92

- Larkey v. City of Bayonne, 115  
 Laurel Hill Cemetery v. San Francisco, 48, 86, 240  
 Lavender v. City of Tuscaloosa, 229  
 Law v. City of Spartanburg, 155, 156, 157  
 Lawrence v. Briry, 63  
 Lawton v. Steele, 42, 43, 49, 225  
 Leach v. Carlisle, 27  
 Leach v. Coleman, 189  
 Le Bourgeois v. City of New Orleans, 157  
 Lee v. Marsh, 63, 241, 246, 247  
 Leisy v. Hardin, 40  
 Leonardi v. Habermann, 309  
 Leontas v. Savannah, 188  
 Lesieur v. Inhabitants of Rumford, 113, 143, 291  
 Levin v. Burlington, 280  
 Lewicki, Re, 176  
 Lewis, Ex parte, 171, 172, 173  
 Lewis v. City of Miami, 174, 281, 315  
 Lewis v. Hayes, 317  
 Liang Buck Chew, Ex parte, 129  
 Libby v. Douglas, 260  
 License Cases, 42  
 Lieberman v. Sheffield Farms, 307  
 Lieberman v. Van de Carr, 51, 201, 240  
 Lightner v. City of Raleigh, 284  
 Linder v. U.S., 213  
 Littlefield v. State, 189  
 Lockhardt v. Kansas City, 289  
 Lockner v. New York, 54  
 Logan v. Alfieri, 196  
 Long v. Chicago R. Co., 314  
 Louden v. H. W. Shaull & Sons, 271  
 Louisiana v. Texas, 46, 57, 347  
 Louisville v. Carter, 282  
 Lovejoy v. City of Norwalk, 227, 229, 284  
 Love v. Atlanta, 282  
 Lowe v. Conroy, 221, 300  
 Luzier Special Formula Laboratories v. State Board of Hairdressing and Beauty Culture Examiners, 201  
 Lyannes v. Lyannes, 175  
 Lynch v. North Yakima, 281  
 Lyons v. Joseph, 127  
 McAnaly v. Goodier, 110  
 McAuliffe v. State, 249  
 McBrayer v. Dixie Mercerizing Co., 322  
 McClenny v. U.S., 131  
 McConnell v. City of Knoxville, 90  
 McConnell v. Knoxville, 179  
 McCray v. U.S., 25  
 McCreery v. Libby-Owens-Ford Glass Co., 159  
 McCullers v. Wake County, 84, 101  
 McCulley v. Wichita, 215  
 McDermott v. Wisconsin, 202  
 McDonald v. Belle Terre Lodge, 271  
 McDonald v. Nugent, 317  
 McFarland v. Mass. Bonding & Insurance Co., 165  
 McGee, Ex parte, 171, 173  
 McGilvra v. Seattle School District No. 1, 255  
 McGowan v. Metropolitan Life Insurance Co., 136, 152  
 McGuire v. Amyx, 135, 295, 305  
 McIntire v. Pembroke, 247  
 McKay v. Barnett, 260  
 McKenna v. City of Galveston, 198  
 McKenzie v. Royal Dairy, 299  
 McSpedon v. Kunz, 309  
 McSween v. School Trustees of City of Fort Worth, 243  
 Macon County Coal Co. v. Indus. Comm., 322  
 MacRae v. Unempl. Compen. Comm., 158  
 Madden's Case, 268  
 Madeo v. I. Dibner & Bro., 158  
 Madore v. New Departure Mfg. Co., 158  
 Magee v. Town of Osyka, 113  
 Mahoney v. City of Biddeford, 109  
 Main, In re, 56  
 Malone v. City of Quincy, 229  
 Manguino v. New Orleans, 282  
 Mann v. Bulgin, 169, 317  
 Manning v. Frogmiller, 107  
 Mannix v. Frost, 195  
 Markendorf v. Friedman, 179  
 Marks, In re, 136, 153, 168  
 Marsh v. Earle, 241  
 Marsh, Re, 241  
 Marsteller v. Kann, 314



INDEX

397

- Martin v. Craig, 258  
 Martin v. Sheely, 192  
 Martin v. Nocero Ice Cream Co., 198  
 Marx v. Maybury, 92  
 Mason v. Ill. Cent. R. Co., 316  
 Massachusetts v. Mellon, 26  
 Mass. Mutual Life Insurance Co. v. Bush, 127  
 Mathews v. Kalamazoo Board of Education, 245  
 Mathias v. Lexington County, 248  
 Mattson v. Dept. Lab. and Ind., 158  
 Maupin v. American Cigar Co., 159  
 Mayor and City Council of Baltimore v. State, 127  
 Mazetti v. Armour, 307  
 Meany v. Staehle, 102  
 Medlin v. Bloom, 305  
 Memphis v. Smythe, 140  
 Meridian v. Sippy, 186, 187  
 Merle v. Beifeld, 198  
 Meshbesh v. Channellene Oil Co., 308  
 Metropolitan Casualty Insur. Co. v. Crenshaw, 273  
 Metzger v. Swift, 85  
 Meunier v. Comrs. of Shell Fisheries, 229  
 Meyer v. Roettele, 272  
 Middlebrooks v. Atlantic Metallic Casket Co., 275  
 Middleton v. Texas Power and Light Co., 55, 266  
 Midland Coal Co. v. Rucker, 268  
 Miles v. Record Publishing Co., 318  
 Miles City v. State Board of Health, 85, 227  
 Milk Contr. Bd. v. Phend, 189  
 Miller v. Horton, 221, 300  
 Miller v. Johnson, 63  
 Miller v. New York, 160  
 Miller v. Tucker, 81, 110  
 Miller v. Williams, 188, 198  
 Miller v. Wilson, 54, 240  
 Mills v. Columbia Gas Const. Co., 271  
 Mills v. Vancouver, 139  
 Milwaukee County v. Indus. Comm., 158  
 Minnehaha County v. Foster, 125  
 Minnesota v. Barber, 46  
 Minor v. Sharon, 314  
 Mintz v. Baldwin, 46, 65, 190, 191  
 Minutilla v. Providence Ice Cream Co., 307  
 Missano v. The Mayor, 283  
 Mississippi State Board of Health v. Matthews, 81, 115  
 Missouri v. Illinois, 57, 223, 347  
 Mitchell v. Deisch, 157  
 Mitchell Realty Co. v. West Allis, 223, 284  
 M. K. & T. R. Co. v. Wood, 314  
 Mobile v. Orr, 49, 88  
 Moler v. Whisman, 92  
 Moll v. Lockport, 192  
 Monks v. Monks, 317  
 Montgomery v. Board of Education, 260  
 Moody v. Wickersham, 141, 297  
 Moore v. U.S. Cremation Co., 89  
 Moorehouse v. Hammond, 88, 135  
 Morehead v. New York ex rel. Tiplado, 55  
 Morgan v. Stewart, 243  
 Morgan v. U.S., 65  
 Morgan's S.S. Co. v. Louisiana State Board of Health, 131  
 Morris v. City of Columbus, 240, 241  
 Mosley v. City of Dallas, 255  
 Mountain Timber Co. v. Washington, 55, 266  
 Moy v. City of Chicago, 112  
 Mugler v. Kansas, 44  
 Muller v. Oregon, 54  
 Mundell v. Graph, 92, 201  
 Munk v. Frink, 59  
 Munzer v. State, 135  
 Murphy v. Cooper, 114  
 Naccari v. Rappelet, 85, 328  
 Natural Milk Prod. Assn. v. City and County of San Francisco, 193  
 Nay v. Underhill, 103  
 Nebbia v. New York, 51, 181, 197  
 Needham and Bray v. State, 322  
 Nelson v. Minneapolis, 188, 215  
 Nelson v. West Coast Dairy, 192, 307  
 Nether Providence School Dist. v. Montgomery, 251  
 Neudeck v. Ford Motor Co., 249

- New Haven Water Co., In re, 43  
 New Jersey v. City of New York, 57, 223  
 New Orleans v. Ernst, 88  
 New Orleans v. Stein, 88, 350  
 New Orleans v. Toca, 199  
 New York City Housing Auth. v. Muller, 231  
 New York v. New Jersey, 57, 223  
 New York & Porto Rico S.S. Co. v. Garcia, 167, 317  
 New York Central R. Co. v. White, 55, 266  
 New York Health Department v. Hamm, 350  
 New York Health Department v. Sulzberger, 350  
 New York Life Ins. Co. v. Mariano, 272  
 New York Tenement House Dept. v. Moeschen, 48  
 Newman v. City of Laramie, 92  
 Newman v. City of Marceline, 284  
 Nicchia v. New York, 147  
 Nicholson v. Detroit, 282  
 Nickel v. Columbia Paper Stock Co., 268  
 Nicoll v. Village of Ossining, 283  
 Nigro v. U.S., 213  
 Noble v. Carlton, 189  
 Norfolk v. Flynn, 187  
 Norman v. Radio Station KRMD, 35  
 North American Cold Storage Co. v. Chicago, 86, 201, 215  
 Northwestern Fertilizing Co. v. Hyde Park, 40, 52  
 Northwestern Laundry Co. v. Des Moines, 48, 86, 226  
 Nourse v. City of Russellville, 229  
 Nyberg v. Board of Commissioners, 173  
 Nyelassey v. City of New York, 160
- Oakes v. Walther, 317  
 O'Brien v. Cunard S.S. Co., 249  
 O'Brien v. Town of Greenburgh, 222  
 Oceanic Steam Navig. Co. v. Stranahan, 131  
 O'Connor v. Pillsbury Flour Mills, 158
- O'Keefe v. Nat. Folding Box and Paper Co., 269  
 Oklahoma Aid Ass'n v. Thomas, 127  
 Oklahoma City v. Baldwin, 222, 283  
 Oklahoma City v. Eylar, 223, 284  
 Oklahoma City v. West, 284  
 Opinion of the Justices, In re (Ala.), 56  
 Opinion of the Justices, In re (R.I.), 123  
 Opp Cotton Mills v. Admr. Wage and Hour Div., 23  
 Osborn v. Russell, 245  
 Overmyer v. Barnett, 299  
 Owensboro v. Evans, 186
- Pacific Coast Dairy v. Police Court, 196  
 Paine v. Gamble Stores, 127  
 Parke v. Bradley, 61  
 Parker v. Farmers Union Mut. Ins. Co., 322  
 Parkhurst v. Indus. Accid. Comm., 272  
 Parsons v. Town of Smithtown, 223  
 Pasadena School District v. City of Pasadena, 254  
 Passenger Cases, 44  
 Patrick v. Riley, 191  
 Pattiani v. Indus. Accid. Comm., 271  
 Patton v. Board of Health, 114  
 Patton v. City of Bellingham, 92  
 Pearson v. Zehr, 300  
 Peete v. Morgan, 131  
 Pemberton v. City of Greensboro, 87  
 Penick v. Abercrombie, 123  
 Penley v. Teague & Harlow Co., 127  
 Penn. R. Co. v. Lincoln Trust Co., 288, 310  
 People v. Adorjan, 147  
 People v. Anderson, 191, 233  
 People v. Bergin, 74  
 People v. Biesecke, 184  
 People v. Biggs, 155  
 People v. Blanchard, 64, 87  
 People v. Blood, 108  
 People v. Bowen, 297  
 People v. Brady, 134  
 People v. Butler, 184  
 People v. Cannon, 196  
 People v. Carolene Products Co., 211

- People v. Chenango County, 155  
 People v. Cipperly, 184  
 People v. City of Reedley, 227  
 People v. Clobridge, 185, 304, 305  
 People v. Cole, 53  
 People v. Cramer, 122, 123  
 People v. Dept. of Health, 82  
 People v. Ekerold, 241, 248  
 People v. Fox, 168  
 People v. Frudenberg, 188, 195  
 People v. Hamilton, 111  
 People v. Hamilton, 155  
 People v. Heckard, 123  
 People v. Hines, 155  
 People v. Illinois Central Ry. Co.,  
     155  
 People v. Kennedy, 178  
 People v. McGowan, 192  
 People v. McIlwain, 248  
 People v. Nelson, 74  
 People v. Pierson, 146  
 People v. Powell, 189  
 People v. Ryan, 196  
 People v. Sanger, 179  
 People v. Shurley, 135, 152  
 People v. Sipple, 108  
 People v. Smith, 274  
 People v. Soiefer Farms, 188  
 People v. Solomon, 274  
 People v. Swift, 216  
 People v. Tait, 131, 140  
 People v. Teuscher, 191  
 People v. Thompson and Potter, 229  
 People v. Vogelsang, 53  
 People v. Wilson, 65  
 People ex rel. Baker v. Strautz, 170  
 People ex rel. Copcutt v. Board of  
     Health, 221, 299  
 People ex rel. Gage v. Simian, 123  
 People ex rel. Goldstein v. Eichen,  
     188  
 People ex rel. Graff v. Wabash Ry.  
     Co., 155  
 People ex rel. Hershey v. McNichols,  
     123, 125  
 People ex rel. Hill v. Board of Edu-  
     cation of City of Lansing, 242, 243  
 People ex rel. Jenkins v. Board of  
     Education of City of Chicago, 245  
 People ex rel. Krohn v. Thomas, 168  
 People ex rel. Lawbaugh v. Board of  
     Education, 245  
 People ex rel. Lodes v. Department  
     of Health of New York, 92  
 People ex rel. State Med. Exams. v.  
     Pacific Health Corp., 54  
 People ex rel. Stream Contr. Comm.  
     v. City of Port Huron, 227  
 People ex rel. Walton v. Hicks, 102  
 People ex rel. Wangelin v. Penna. R.  
     Co., 82  
 People for use of Trust Co. of Chi-  
     cago v. Maryland Casualty Co., 296  
 Perkins v. Hughes, 101  
 Perkins v. Lukens Steel Co., 265  
 Perkins v. Panola, 107  
 Permanent Constr. Co. v. Indus.  
     Comm., 271  
 Peterson v. Widule, 53, 175  
 Petrushansky v. State, 230  
 Pettus v. Weyel, 314  
 Pfeffer v. City of Milwaukee, 192  
 Phelps v. School District, 260  
 Philips v. City of Golden, 289  
 Philips v. City of Siloam Springs, 91  
 Pierce v. Doolittle, 64  
 Pigeon v. W. P. Fuller Co., 268  
 Pittsburgh Melting Co. v. Totten, 209  
 Plumb v. York County, 112, 291  
 Plumley v. Massachusetts, 35, 201  
 Plymouth Township v. Klug, 140  
 Polhemus v. Am. Med. Assn., 51  
 Polinsky v. People, 64  
 Poole and Creber Market Co. v. Bre-  
     shears, 211  
 Portsmouth Stove and Range Co. v.  
     Baltimore, 90  
 Potts v. Breen, 245  
 Powell v. Pennsylvania, 3, 5, 25, 201  
 Prescott v. City of Borger, 86, 195  
 Preudhomme v. Stebbins, 147  
 Prevey v. School District, 255  
 Previn v. Tenacre, 318  
 Price v. Illinois, 201, 213  
 Price v. New Castle Refractories Co.,  
     159  
 Princeton v. Pool, 223  
 Pritchard v. Morganton, 280  
 Protest of Chicago, R. I. & P. Ry. Co.,  
     156  
 Provincial Bd. of Health, Re, 39

- Prudential Insurance Co. v. Calvin, 126
- Pue v. Lewis and Clark County, 113, 292
- Pulaski County v. Somerset, 143
- Purnell v. Maysville Water Co., 225
- Quacci v. City of Union City, 89
- Quebec Board of Health v. Cateau Landing, 131
- Race v. Krum, 307
- Rade v. Press Pub. Co., 317
- Radice v. New York, 54
- Railroad Co. v. Husen, 46
- Randolph v. Sanders, 260
- Ransone v. Craft, 92
- Rasmussen v. Idaho, 46
- Raymond v. Fish, 299
- Read v. Graham, 49
- Rebel v. Stan. Sanitary Mfg. Co., 159
- Rebenack, Re, 242, 243
- Reck Milk Co. v. Humphreys, 189
- Reed v. Ellis, 159
- Reed v. Rosenthal, 314
- Reetz v. Michigan, 51
- Reid v. Colorado, 46, 190
- Reinoehl v. Hammacher Pole and Lumber Co., 273
- Reno, In re, 167
- Replogle v. Little Rock, 91, 230
- Retmier v. Cruse, 158
- Reynolds v. Mt. Vernon, 109, 112, 291
- Reynolds v. State, 177
- Rhea v. Board of Education of Devils Lake, 245
- Richardson v. Braham, 260
- Richardson v. Greenberg, 272
- Rigbers v. Atlanta, 184, 199
- Riley v. Massachusetts, 54
- Rinaldi v. Mohican Co., 309
- Rissman & Son v. Industrial Commission, 271
- Ritterbusch et al. v. City of Pittsburgh, 287
- Robertson v. Commonwealth, 199
- Robinson v. Hamilton, 121
- Rock v. Carney, 79, 88, 168, 300
- Rohn v. Osmun, 295
- Roman, Ex parte, 172, 174
- Roschen v. Ward, 51
- Roscoe v. City of Everett, 287
- Roslyn v. Pavlinovich, 144
- Rothrock, Ex parte, 173
- Rousu v. Collins Co., 159
- Rowland v. N.Y. Stable Manure Co., 218
- Royal Indemnity Co. v. Land, 322
- Rubbo v. Hughes, 309
- Runkle v. U.S., 160
- Saccone v. City of Scranton, 92
- Sacramento County v. Chambers, 151, 155, 156
- Safransky v. City of Helena, 114, 286, 288
- Sage Stores v. Kansas City, 211
- St. John v. Board of Supervisors, 93
- St. John v. New York, 50, 184, 201
- St. Johns v. Clinton County, 112, 291
- St. Louis v. Hoevel Real Estate Co., 229
- St. Louis v. Liessing, 184
- St. Louis v. McCoy, 139
- St. Louis v. Nash, 229
- St. Louis-San Francisco Ry. Co. v. Morris, 155, 156
- Salem v. Eastern R. Co., 79
- Salloum, Re, 56
- Sally v. Brown, 317
- Salt Lake City v. Indus. Comm., 273
- Salt Lake City v. Young, 227
- Sams v. Bd. County Commrs., 81, 332
- San Diego Tuberculosis Ass'n v. City of East San Diego, 157, 220
- Sanatorium v. State Treasurer, 155
- Sandell v. South Carolina, 250
- Sandry v. Brooklyn School District, 260
- Sanitary District of Chicago v. U.S., 57
- Sawyer v. State Board of Health, 59
- Sawyer v. Wepello County, 112
- Scales v. City of Winston-Salem, 283
- Schafer v. Industrial Commission, 270
- Schaezlin v. Cabaniss, 274
- Scheer v. City of Everett, 287
- Schellberg v. Empringham, 321

INDEX

401

- Schmidinger v. Chicago, 51, 86  
 Schmidt v. Stearns County, 112, 291  
 Schollenberger v. Pennsylvania, 25, 46  
 School District v. Gardner, 260  
 School District v. Howard, 260  
 Schulte v. Fitch, 190, 337  
 Scibilia v. Philadelphia, 283  
 Scofield v. Strain, 100, 114  
 Scott v. Culpepper, 126  
 Scott Lumber Co. v. Industrial Commission, 270  
 Seattle Can Co. v. Dept. Labor and Industry, 270  
 Seavey v. Preble, 295  
 Sekaly v. State, 215  
 Sellon v. Great Lakes Transit Corp., 321  
 Selma v. Mullen, 112, 291  
 Semler v. Ore. State Bd. Dental Exam., 51  
 Sentell v. New Orleans R. Co., 48, 225  
 Setzer v. Mayo, 211  
 Seung v. Mikkelson, 124  
 Sheffield Farms v. Seaman, 683, 190  
 Shelby v. Cleveland Mill, 59  
 Shelton v. City of Shelton, 193  
 Shephard, Ex parte, 168  
 Sherman v. Board of Education, 245  
 Sherman v. International Publications, 318  
 Shilkett v. State, 63  
 Siebert v. Bose, 308  
 Simco Sales Serv. Co. v. Brackin, 200  
 Simmons v. Stuckey, 155  
 Simon v. City of Cleveland Heights, 87, 88  
 Simonsen v. Swenson, 167, 305  
 Simpson v. Press Pub. Co., 317  
 Skelly Oil Co. v. Rose, 158  
 Skillings v. Allen, 304  
 Skinner v. Oklahoma, 56  
 Skladzien v. Bd. of Ed. of City of Bayonne, 256  
 Slaughter House Cases, 52  
 Sligh v. Kirkwood, 201  
 Sloan v. Peoria, 109, 112, 291  
 Smith, Re, 131, 139, 172, 239  
 Smith v. Baker, 314  
 Smith v. Brown Paper Mill Co., 271  
 Smith v. Command, 56  
 Smith v. Primrose Tapestry Co., 322  
 Smith v. St. Louis R. Co., 46, 88  
 Smith v. School District, 260  
 Smith v. Seamless Rubber Co., 249  
 Smith v. Smith, 155  
 Smith v. State, 125  
 Smith's Case, 159  
 Smythe v. State, 134  
 Snavelly v. City of Goldendale, 284  
 Sobol v. Sobol, 160  
 South v. Fish, 151  
 Southampton Township v. Scott, 224  
 South Hetton Coal Co. v. N.E. News Ass'n, 318  
 So. N.E. Ice Co. v. Town of West Hartford, 283  
 Southern Pacific Co. v. Jensen, 266  
 Span v. Ely, 268  
 Spearman v. Texarkana, 93, 113, 291  
 Spicer Mfg. Co. v. Tucker, 249  
 Spittler v. Munster, 87, 232  
 Spofford v. Carlton, 249  
 Sprague v. Dorr, 227  
 Spriggs v. Garrett Park, 229  
 Spring v. Hyde Park, 131, 139  
 Squanto, The, 131  
 Staffel v. San Antonio School Board, 242, 243  
 Standard Accid. Ins. Co. v. Ritchie, 272  
 Stanislaus County Dairymen's Prot. Ass'n v. Stanislaus County, 81, 191  
 Starne v. People, 274  
 State v. Baker, 322  
 State v. Bayles, 274  
 State v. Beacham, 63  
 State v. Boone, 121  
 State v. Brockwell, 196  
 State v. Brown, 255  
 State v. Bunner, 189, 337  
 State v. Burdge, 63, 88, 245  
 State v. City of Minneapolis, 194, 195  
 State v. City of Van Wert, 63, 65, 227  
 State v. Compere, 224  
 State v. Cooper, 322  
 State v. Davis, 188  
 State v. Drew, 241  
 State v. Edwards (Conn.), 192

- State v. Edwards (N.C.), 192  
 State v. Fahey, 123  
 State v. Goss, 64, 328  
 State v. Hay, 240  
 State v. Hecht, 127  
 State v. Height, 169  
 State v. Heller, 228  
 State v. Holcombe, 328  
 State v. Hollinshead, 178  
 State v. Houston, 214  
 State v. Hutchinson, 173  
 State v. King County Superior Court,  
     59, 65, 143, 171, 172  
 State v. Kinsey, 193  
 State v. Kirby, 139  
 State v. Lockey, 201  
 State v. Lydon, 322  
 State v. McCosh, 199  
 State v. Martin, 87, 242, 245  
 State v. Matassarini, 62  
 State v. Milwaukee, 189  
 State v. Moher, 89  
 State v. Morse, 59, 63, 88  
 State v. Nelson (Conn.), 179  
 State v. Nelson (Minn.), 183, 187,  
     190  
 State v. Normand, 59, 64, 232  
 State v. Norvell, 122  
 State v. O'Connor, 232  
 State v. Pierce, 135, 351  
 State v. Quattropani, 65, 228  
 State v. Raczkowski, 139, 350  
 State v. Reaser, 274  
 State v. Reynolds, 186  
 State v. Robb, 88  
 State v. Rollins, 201  
 State v. Rose, 125  
 State v. Seavey, 79, 102  
 State v. Sharpless, 92  
 State v. Smith (Ind.), 271  
 State v. Smith (Wash.), 230  
 State v. Snyder, 63, 64  
 State v. Speyer, 139  
 State v. Strayer, 225  
 State v. Swanson Theatre Circuit,  
     144  
 State v. Taft, 85  
 State v. Temple, 88, 90  
 State v. Trask, 89  
 State v. Troutman, 56  
 State v. Turney, 248  
 State v. Tyrell, 349  
 State v. Verbon, 53  
 State v. Waldo, 80  
 State v. Waller, 89, 194  
 State v. Wheeler, 227  
 State v. Withnell, 85, 328  
 State v. Wood, 63, 87  
 State v. Worden (Conn.), 133  
 State v. Worden (Mo.), 127  
 State v. Zangerle, 74  
 State v. Zimmerman, 79  
 State Board of Barber Examiners v.  
     Blocker, 201  
 State Board of Health v. City of  
     Greenville, 59, 227  
 State Board of Health v. Ort, 255  
 State Board of Health v. St. Johns-  
     bury, 59  
 State Board of Health v. Suslin, 64  
 State Board of Health v. Trustees of  
     Watsonville School District, 241  
 State Board of Health v. Willman,  
     338  
 State Board of Health v. Wilson, 106  
 State Department of Health v. San  
     Miguel County, 81, 101  
 State ex rel. Blue v. Waldo, 101  
 State ex rel. Churchman v. Hall, 115  
 State ex rel. Cox v. Board of Educa-  
     tion of Salt Lake City, 243  
 State ex rel. Davis-Smith Co. v. Clau-  
     sen, 266  
 State ex rel. Dept. of Health v. City  
     of Hoboken, 228  
 State ex rel. Eaton v. Gmelich, 155  
 State ex rel. Faribault Woolen Mills  
     Co. v. District Court, 271  
 State ex rel. Freeman v. Zimmerman,  
     242, 243  
 State ex rel. Hog Haven Farms v.  
     Pearcy, 283  
 State ex rel. Horne v. Bell, 243  
 State ex rel. Horton v. Clark, 85, 87  
 State ex rel. Hurwitz v. North, 51  
 State ex rel. Kennedy v. Head, 141,  
     172  
 State ex rel. Lehman v. Partlow, 241  
 State ex rel. McFadden v. Shorrock,  
     241, 246  
 State ex rel. McKittrick v. Carolene  
     Prod. Co., 211

INDEX

403

- State ex rel. McKittrick v. Langston, 123
- State ex rel. Milhoof v. Board of Education of Barberton, 242
- State ex rel. Nowotny v. Milwaukee, 110
- State ex rel. O'Bannon v. Cole, 242
- State ex rel. Parish Board of Health v. Police Jury of Calcasieu, 81
- State ex rel. Roe v. Seattle, 114
- State ex rel. Saint v. Dowling, 62, 115
- State ex rel. Sholl v. Duncan, 138
- State ex rel. Sidebottom v. Coleman, 198
- State ex rel. Smith v. Schaffer, 56
- State ex rel. West v. Feyler, 115
- State ex rel. Wildin v. Eickoff, 254
- State ex rel. Woolworth v. State Bd. of Health, 49
- Steinberg v. Bloom, 307
- Steinberg v. Stebbins, 147
- Stephens v. Oklahoma, 50, 189, 193
- Stettler v. O'Hara, 54
- Steward Mach. Co. v. Davis, 26
- Stickney v. Givens, 191
- Stoker v. Ogden City, 286, 288
- Stoll v. Zeno, 92
- Stone v. Mississippi, 52
- Stone v. Probst, 53, 258
- Stone v. Thomson Co., 322
- Stracquadano v. Dept. of Health of N. Y. City, 189
- Streich v. Board of Education, 53, 257
- Stubbs v. City of Rochester, 286
- Stuckenbruck v. San Joaquin County, 75
- Stull v. Reber, 241
- Stumpf v. San Luis Obispo County, 75
- Suess v. Arrowhead Steel Prod. Co., 159
- Sullivan v. Shreveport, 337
- Sullivan's Case, 159
- Sun Coal Co. v. State, 275
- Svenson v. Svenson, 177
- Sweeney v. Town of Peterborough, 113, 143, 292
- Sweeten v. Friedman, 314
- Swindell v. Harper, 317
- Syracuse Ice Cream Co. v. Cortland, 198
- Taaje v. St. Olaf Hospital, 306
- Tabor v. Board of Supervisors of Berrien County, 109
- Tate v. School District, 259
- Taugher v. Ling, 308
- Tavani v. Swift & Co., 308
- Taylor v. Philadelphia Board of Health, 84
- Temple v. Keeler, 307
- Texas Employers Insurance Ass'n v. Burnett, 271
- Texas Employers Insurance Ass'n v. Mitchell, 249
- Thayer v. Kitchen, 269
- Thomas v. Mason, 247
- Thomas v. Morris, 136, 152, 168
- Thomas v. State Board of Health, 88
- Thompson v. Anderson, 305
- Thornburg v. Long, 317
- Tinsley v. Wash. Nat. Insur. Co., 136, 153
- Todd Dry Docks v. Marshall, 272
- Tones v. Independent School District of Des Moines, 245
- Towaliga Falls Power Co. v. Sims, 233
- Town of Cheektowaga v. Sts. Peter and Paul Church, 228
- Town of Lexington v. Miskell, 225
- Town of Marion v. Baxley, 229
- Town of Merkel v. Patterson, 284
- Town of Smithfield v. City of Raleigh, 284
- Trabue v. Todd County, 109, 140
- Train v. Boston Disinfecting Co., 131, 139, 145
- Trattner, In re, 160
- Travers, Ex parte, 169
- Tremaine v. H. K. Mulford Co., 312
- Trotto v. Hammond, 309
- Trowbridge v. City of Lansing, 222
- Turitto v. St. Mary's Hospital, 165
- Turner v. Baltzell, 69
- Turner v. Bennett, 92
- Twin City Milk Prod. Assn. v. McNutt, 206
- Twyman v. Frankfort, 282

- Unit Enterprises v. Dubey, 92  
 Universal Mach. Co. v. Alcohol Bever.  
 Contr., 215  
 Urban v. Taylor, 190  
 U.S. v. Alberty, 204  
 U.S. v. Baker, 35  
 U.S. v. Butler, 26  
 U.S. v. Carolene Products Co., 210  
 U.S. v. Darby, 23  
 U.S. v. Daugherty, 213  
 U.S. v. Dennett, 178  
 U.S. v. Doremus, 213  
 U.S. v. Greenbaum, 216  
 U.S. v. Jin Fue Moy, 213  
 U.S. v. Lee, 204  
 U.S. v. Lewis, 209  
 U.S. v. Luce, 224  
 U.S. v. Middleton, 160  
 U.S. v. Nicholas, 178  
 U.S. v. Rock Royal Coop., 197  
 U.S. v. Wrightwood Dairy, 24, 197  
 U.S. v. 17 Bottles of B. & M., 160
- Vaccarino v. Cozzuba, 308  
 Valentine v. Englewood, 280, 294,  
 301  
 Vallat v. Radium Dial Co., 274  
 Valle v. Shaffer, 81, 101  
 Vandenberg v. Town Board of Co-  
 lonie, 109  
 Van Gammeren v. City of Fresno, 195  
 Vanore v. Mary Immaculate Hosp.,  
 160  
 Varholy v. Sweat, 140, 172  
 Vaughan, In re, 139, 140  
 Venable, Ex parte, 144  
 Venn v. New Dells Lumber Co.,  
 270  
 Ventnor City v. Home, 158  
 Victory Sparkler Co. v. Price, 313  
 Victory Sparkler and Specialty Co. v.  
 Francks, 269  
 Viemeister v. White, 239, 241, 328,  
 370-372  
 Vitale v. Duerbeck, 321  
 Vonnegut v. Baun, 243, 246
- Wager v. White Star Candy Co., 158  
 Wagner v. H. W. Joyne Co., 269
- Walden v. Jones, 165, 305  
 Walker v. Dean, 105  
 Walker v. Jameson, 87  
 Walker v. Tucker, 317  
 Wallace v. Regents of University of  
 California, 243  
 Wallor v. Wood, 79, 107  
 Walters, Re, 241  
 Ware v. State, 81, 115  
 Washington Fidelity National Life Ins.  
 Co. v. Anderson, 127  
 Washington Suburban Sanitary Dis-  
 trict v. Magruder, 281  
 Wasmuth-Endicott v. Karst, 270  
 Watkins v. Record Publishing Co.,  
 318  
 Watson v. Maryland, 51  
 Watson v. Watson, 176  
 Watts v. Princeton, 84, 107  
 Wayne County v. Lessman, 322  
 Webb v. U.S., 213  
 Webber v. Pacific Power and Light  
 Co., 311  
 Weeks v. U.S., 202  
 Weigle v. Curtis Bros. Co., 213  
 Wenrich v. Warning, 159  
 Werner, In re, 74  
 West v. Katsafanos, 308  
 West Coast Hotel Co. v. Parrish, 29,  
 55  
 Wheeler v. River Falls Power Co., 64,  
 328  
 Whidden v. Cheever, 295  
 White v. City of Charleston, 297  
 White v. City of San Antonio, 100,  
 280  
 Whitmore, Re, 241  
 Whitney v. Watson, 187, 190  
 Wichita Natural Milk Producers v.  
 Capp, 196  
 Wiedeman v. Keller, 308  
 Wiesner v. City of Albany, 287  
 Wilkins v. Moore, 74  
 Wilkinson v. Albany, 247  
 Williams v. Indianapolis, 84  
 Williams v. Standard-Examiner Pub.  
 Co., 288, 319  
 Williams v. Sweet, 232  
 Williams v. Wheeler, 146, 243  
 Willis v. Wilkins, 228  
 Wilson v. Ala., Ga., S. Ry. Co., 139



INDEX

405

- Wilson v. Chicago Sanitary District,  
59, 74
- Wilson v. New, 54
- Winchester Milling Co. v. Sencindiver,  
322
- Windle v. City of Springfield, 284
- Wiseman v. Carter White Lead Co.,  
268
- Witt v. Klimm, 194
- Wolf v. Mallinckrodt Chemical Works,  
268
- Wong Hoy Woon v. Duncan, 300
- Wong Wai v. Williamson, 50, 146
- Woodmen of World v. Guyton, 136,  
153
- Woodvale v. Fruitvale Sanitary Dis-  
trict, 74
- Woolworth v. Wilson, 307
- Wragg v. Griffin, 169, 355
- Wright v. Richmond County Dept. of  
Health, 187, 198
- Wright v. Salvation Army, 321
- Wyatt v. City of Rome, 250, 281
- Wyeth v. Cambridge Board of Health,  
91
- Yaffe v. City of Fort Smith, 233
- Yandell v. Madison County, 81, 108,  
112, 291
- Yazoo & M. V. Ry. Co. v. Boliver  
County, 82
- Yick Wo v. Hopkins, 49, 240
- Yochem v. Gloria, 311
- Yoder v. Givens, 191
- Young v. Blackhawk County, 113
- Young v. City of Ashland, 101, 114
- Young v. Huff, 115
- Zabst v. City of Angola, 284
- Zorger v. Hellman's, 308
- Zucht v. King, 49, 87, 239, 242, 295
- Zucht v. San Antonio School Board,  
242



## GENERAL INDEX

- Abatement of nuisance, 220, 223-225, 290, 299
- Abattoirs. *See* Slaughterhouses
- Abortions, 27
- Accidents, 262, 263, 268, 270-273
- Adoption, 123
- Adulteration:  
of food and drugs, 203-204  
of milk, 183, 184
- Advertising:  
false, 208-209  
obscene, 178
- Agglutination test, 191
- Agricultural Adjustment Act, 197
- Agricultural Marketing Agreement Act, 197
- Airplane sanitation, 233
- Alabama, 12, 60, 328
- Alaska, 60
- Aliens, medical inspection of, 22, 131
- American Association of Medical Milk Commissions, 89, 193
- American Public Health Association, 67, 76, 77, 84, 96, 99, 101, 108, 114, 129, 253
- American Red Cross, 32
- American Social Hygiene Association, 174, 179
- Animals:  
as nuisances, 219, 233, 234  
diseased, 22, 147, 190, 292  
federal inspection previous to slaughter, 209  
federal laws regulating entry of, 22  
in interstate commerce, 45, 190  
liability for wrongful destruction, 299  
quarantine of, 138, 139  
vaccination of, 146
- Antepartum blood test for syphilis, 177
- Anthrax, 129, 191, 233, 235, 270, 272
- Antirabic vaccine, liability for death from, 312
- Antitoxin:  
administration of, 145-146, 246, 305  
control of, in interstate commerce, 22  
manufacturers of, 312  
payment for administration of, 143
- Appointment of health officer, 100-102
- Appropriations of local health departments, 92
- Aristotle on health officers, 10
- Asbestosis, 159, 270
- Audits of health department expenditures, 93
- Autopsies performed by coroner, 345
- Autopsy report as evidence of communicable disease, 135
- Bacteria in milk, 182, 211
- Bail, 140
- Baltimore, 11, 73, 77, 90, 95
- Bang's disease, 47, 69, 191. *See also* Undulant fever
- Barbers, 92, 314
- BCG, for tuberculosis, 150
- Bibliography, 381-383
- Bills, legislative, 331-338. *See also* Legislation
- Bills, payment of, by health department, 93
- Biometrics defined, 121
- Birth certificates, 121, 127
- Birth registration area, 120
- Birth reports, 119, 123, 351
- Blindness, 72
- Blood donors, 90
- Blood test:  
of those suspected of having venereal disease, 168-171, 280  
premarital and antepartum, 174-177
- Board of education, 241, 243, 251, 254
- Board of health:  
county, 79  
local, 11, 77, 83-85, 87-90, 99  
multi-county, 82  
state, 12, 37, 53, 60
- Boarding homes, 156
- Boston, 11
- Botulism, 272
- Bread, enriched, 70, 206
- Brinkley, J. R., 320

- Broadcasting, 34-35, 209
- Brothels:  
 as nuisances, 219, 233  
 examination of inmates, 168, 178
- Brucellosis, 182, 191, 233. *See also*  
 Undulant fever
- Budgets of health departments, 92
- Burial permit, 124
- Bursitis, 263
- Butter, 212  
 renovated, 47
- California, 12
- Camps, supervision of, 156, 231, 282
- Canada:  
 first board of health, 11  
 health activities, 37, 58  
 liability of health officer, 293  
 milk-borne epidemics, 182  
 occupational disease covered by  
 workmen's compensation laws,  
 269  
 system of law, 7
- Cancer:  
 control, as function of state health  
 department, 72  
 liability for, 272, 321-323  
 non-medical treatment, 53, 321  
 postal laws regarding cures, 27  
 research on, duty of Public Health  
 Service, 30
- Cardozo, B. N., quoted, 20
- Carnivals, closing of, 144
- Carriers of disease, 136, 138, 141,  
 289
- Caveat emptor*, 306
- Cease and desist order, 208
- Cemeteries, 89
- Certiorari, 355
- Chadwick, Edwin, 10, 11
- Chancellor, 8
- Chancery, 8
- Chancroid, 162, 166
- Chapin, C. V., quoted 3, 12, 61
- Charter, municipal, 15, 73, 78, 279
- Cheese, 50  
 filled, 25, 210
- Chicago, 230
- Child hygiene, 31, 70; 94. *See also*  
 School hygiene
- Child labor, attempts to regulate, 23,  
 25
- Children:  
 crippled, 31, 72  
 medical care of, 146  
 vaccination of, 241-246
- Chinese, 49, 50, 146
- Chiropody, regulation of, 50
- Chiropractic, regulation of, 50
- Chiropractor:  
 and cancer, 322  
 and vaccination, 246  
 as health officer, 106  
 reporting births and deaths, 123
- Chlorination, 287
- Cholera:  
 epidemic of 1892, 14  
 reportable, 129, 134  
 vaccination, 235
- Christian Science, 53, 134, 258, 318
- Chrome ulceration, 263, 270
- Churches, closing of, 144
- Civil Service, 75, 102, 114
- Class legislation, 49
- Clerk of board of health, 85
- Clerk, town, 119, 123
- Coal Mine Inspection Act, 265
- Cockroaches, as nuisance, 233
- Code:  
 of Hammurabi, 9  
 official state, 329  
 sanitary, 63, 87-90, 328
- Coffin makers, 124
- Collusion, 298
- Colon bacillus, 288, 289
- Colorado, 19
- Commerce:  
 defined, 23  
 foreign, 22, 181  
 interstate, 22-24
- Commissioner of Health. *See* Health  
 officer
- Common law, 7, 8, 16
- Communicable disease control, 128-  
 148  
 as health department activity, 66,  
 68-69  
 carriers, 141  
 disinfection, 145  
 hospitalization, 140-141  
 immunization, 145

- isolation and quarantine, 138-143
- laboratory service, 137
- methods, 130-131
- reporting, 133-136, 304. *See also*  
Communicable diseases
- Communicable diseases:
  - epidemics, 144
  - milk-borne, 182
  - reportable, 129-130
  - water-borne, 285-289, 309-312. *See also* Communicable disease control
- Communications Commission, Federal  
34, 35
- Compensation. *See* Salary of health officer; Workmen's compensation
- Condoms, 179
- Congress of the United States, 17, 20, 339-341
- Conjunctivitis, 71, 129, 131, 164-166, 272
- Connecticut:
  - county health officers, 80
  - early quarantine laws, 11
  - medical inspection in schools, 253
  - premarital examination, 174
  - state board of health, 60
  - vital statistics laws, 119
- Constitution:
  - Federal, 15, 16, 20-29, 239
  - state, 15, 17, 36, 331
- Consumption. *See* Tuberculosis
- Contraceptives, 26, 90, 178
- Contract, freedom of, 51, 52
- Contract, law of, 303
- Contracts:
  - liability for, 290-292
  - of health department, 92-93, 112
- Copyright, 35, 320
- Coroner, 125, 345
- Cosmeticians:
  - liability for negligence, 313, 314
  - regulation of, 92
- Cosmetics, control of, 201, 206
- Council, public health, 59, 84
- Counter freezers, 198
- County health department, 78-82
- County tuberculosis hospitals, 154-156
- Court defined, 343
- Court functions, 19, 20
- Court procedure, 349-351
- Courts:
  - appellate, 344
  - coroner's, 125, 345
  - federal, 347-349
  - juvenile, 347
  - magistrate's, 344-345
  - morals, 344
  - police, 344
  - state, 20, 344-347
  - supreme, 346
  - United States District, 19, 347-349
  - United States Supreme, 19, 20, 347, 359
- Cowpox, 235
- Cream, 185, 188, 198
- Cream puffs, infected, 309
- Dairies, 90, 188, 189. *See also* Milk
- Damages, 219, 223, 286-289
- Damnum absque injuria*, 44
- Death certificates, 121, 124
- Death of health officer, 114
- Death registration area, 119
- Death reports, 121, 124
- Degrees, public health, 104
- Demography, 121. *See also* Vital statistics
- Demosthenes, a health officer, 10
- Dengue, 129, 232
- Dental hygiene, 50, 72
  - in schools, 252, 256
- Dentists:
  - as health officers, 106
  - liability of, 304
  - on state board of health, 60
  - regulation of, 51
- Deputy, 113
- Derbv, Earl of, quoted, 3
- Dermatitis, 261, 270
- Desserts, frozen, 186, 198, 307
- Diabetes, 27, 36, 128
- Diagnosis, mistaken, 280, 294, 305
- Diarrhea, 129, 182
- Diphtheria:
  - immunization against, 145, 146, 305, 345
  - milk-borne epidemic of, 182
  - quarantine of carriers, 142, 143
  - reportable, 129, 133, 134, 135
  - school health activities against, 252

- Disease:  
 classification, 128  
 communicable. *See* Communicable disease control; Communicable diseases  
 occupational. *See* Industrial hygiene  
 venereal. *See* Venereal disease  
*See also name of disease*
- Disinfection, 36, 132, 145, 295  
 Disinfestation, 145  
 Disraeli, B., quoted, 14  
 District:  
     health, 73  
     sanitary, 74  
 District of Columbia, 19, 22, 28, 120, 251, 265  
 Divorce, 119, 160, 176  
 Doctor. *See* Physician  
 Doctor of Public Health, 103, 104  
 Dogs:  
     as nuisances, 90, 233  
     vaccination, 146  
     with rabies, 147, 233, 292  
 Dominican Republic, 146  
 Drinking cups, 162, 215  
 Drugs, control of, 202-206, 208, 312  
     administration of federal act, 201-206  
     adulteration, 203  
     false advertising, 208  
     misbranding, 204-205  
 Due process of law, 48, 51, 343  
 Dysentery:  
     amebic, 129, 230, 271, 309  
     bacillary, 129, 182, 287
- Education:  
     compulsory, 248, 251  
     physical, 252, 253  
     public health, 30, 63, 72  
     school health, 252  
 Edward III, King, 10  
 El Paso, 228  
 Embalming. *See* Undertakers  
 Embargo, 188. *See also* Quarantine  
 Eminent domain, 43  
 Employees:  
     industrial, 262, 315-316. *See also* Industrial hygiene; Workmen's compensation  
     of health department, 100, 113-114  
     Engineering, public health, 50, 69  
     England, constitution of, 15  
     Enriched foods, 70, 206  
     Epaminondas, a health officer, 10  
 Epidemics:  
     and schools, 254, 260  
     control of, as health department responsibility, 68, 182, 144  
     milk-borne, 182  
     water-borne, 285-289, 309-312  
 Equity, 8, 223  
 Eskimos, 28, 31, 251  
 Evaluation form, for public health, 97  
 Evidence, 136, 286, 351-354  
     vital statistics as, 126, 127  
 Examination of witnesses in court, 352-353  
 Examination, physical:  
     antepartum, 177  
     for venereal disease, 168-171, 173, 300  
     of food handlers, 215  
     of industrial workers, 264  
     of school children, 53, 252, 257  
     premarital, 174  
 Executive branch of government, functions of, 18-19, 341  
 Expenditures of health boards, 92-93  
 Eyes:  
     gonorrhoeal infection of, 165-166  
     liability for injury from eyelash preparation, 312
- Fair Labor Standards Act, Federal, 23, 25, 276  
 Faith healing, 27, 53. *See also* Christian Science  
 Farrand, L., 58  
 Federal Register, 16  
 Federal Security Agency, 18, 29, 32, 205, 251  
 Federal Trade Commission, 18, 31, 34, 208-209  
 Feebleminded, sterilization of, 55  
 Fees:  
     as taxes, 44, 91  
     for vaccination, 247

- License, 189, 281
  - vital statistics, 125
- Filariasis, 130, 232
- Fleas, 232
- Flies, 232, 309
- Flour, enriched, 70, 206
- Fluorine, 311
- Food and Drug Administration, United States, 30, 31, 70, 202
- Food and Nutrition Board, 33, 70
- Food control, 24, 69-70, 201-216
  - federal administration, 31, 202-206
  - state, 69-70, 218
- Food, Drug, and Cosmetic Act, Federal, 27, 31, 202-206, 338
- Food handlers, 69, 154, 215
- Food handling establishments:
  - inspection of, 24, 69, 215
  - liability, 306-309
  - licensing, 214
- Foot and mouth disease, 191
- Fourteenth Amendment, 48
- France, 146
- Frankfurter, F., quoted, 339
- Fraud order, postal, 27
- Frozen desserts. *See* Ice Cream
- Fumigation, 36, 130, 145, 299
  
- Garbage:
  - as nuisance, 222, 234
  - disposal of, as duty of government, 222, 282
- Garnishment, 109
- Gas, as nuisance, 52, 224, 230
- Gastro-enteritis, 182, 315
- Gifts, to health department, 73
- Glanders, 129, 233, 270, 272, 299
- Goitre, 128
- Gonorrhoea, 162, 164
  - as accident, 272
  - examination for, 168, 300
  - reportable, 129
  - See also* Venereal disease
- Granuloma, 130, 162, 166
- Great Britain, 15, 266
  
- Habeas corpus, 168-172, 355
  - in quarantine, 142-143
- Hairdressers, regulation of, 92
- Hair dyes, 203
  
- Hamilton, A., quoted, 327
- Hammurabi, Code of, 9
- Hawaii, 12, 145
- Health associations, 321
- Health, defined, 6.
- Health department, county, 79-82
- Health department employees, 100, 113-114
- Health department, local, 77-98
  - duties and functions, 97-98, 132, 253
  - expenditures and contracts, 92-94
  - jurisdiction, 90
  - licenses and permits, 90-92
  - municipal, 82-83
  - organization of, 77-78, 83, 94, 95
- Health department, state:
  - duties and functions, 66-73, 132
  - organization, 58-60
  - powers, 62-66
  - recognition by Federal Government, 62
  - supervision of local health administration, 73
- Health district, 73-75
- Health officer, 99-116
  - and nuisances, 220-221
  - appointment of, 100-102
  - as employee, 99
  - compensation of, 106-110
  - county, 80-81
  - de facto*, 102
  - defined, 99
  - district, 73
  - duties and powers of, 110-112, 132
  - liability of, 293-302
  - local, 82, 83, 99
  - qualifications of, 102-105
  - state, 61
  - termination of office, 114-116
  - testimony of, 167, 352
- Health organization, federal, 29-33
- Health service, for city employees, 260
- Hearings, 65, 88, 350
- Homeopathy, 246
- Homogenization, 185
- Hookworm, 69, 129, 232, 270
- Hospitalization:
  - compulsory, 154
  - for communicable disease, 140-141
  - See also* Isolation; Quarantine

- Hospitals:**  
 as nuisances, 141, 156-158, 219, 306  
 establishment and maintenance of,  
 as health department function,  
 140, 154, 281  
 liability for injuries in, 281  
 liability of, 306  
 permits for, 154, 156
- Hotels, 167, 230, 314**
- Hours of labor, 54, 275**
- House of Representatives, 17, 339**
- Housing, 72, 230-232**
- Hygeia, 319**
- Hygiene:**  
 adult, 72  
 child, 31, 70, 94. *See also* School  
 hygiene  
 dental, 50, 72, 252  
 industrial. *See* Industrial hygiene  
 maternal and infant, 26, 31, 70, 97  
 mental, 72, 98, 252  
 personal, 4  
 public, 4  
 school. *See* School hygiene  
 social, 179
- Hypnotics, 204**
- Injury, compensable, 267, 268. *See*  
*also* Liability; Workmen's com-  
 pensation**
- Insane, commitment of, 98**
- Insects, 128, 232-233**
- Inspectors, sanitary, 105, 113**
- Insulin, 36, 205**
- Interns, and tuberculosis, 159**
- Interstate commerce, 22-24, 45-47**
- Isolation, 138-140, 153**  
 compulsory, 154  
 expenses of, 143  
 of school children, 252.  
*See also* Hospitalization; Quarantine
- Isolation hospital:**  
 as nuisance, 156, 220  
 removal to, 140-141, 154
- John II, King, 10**
- Judiciary, function of, 19, 343**
- Jurisdiction of health department, 90**
- Jurisprudence:**  
 defined, 7  
 medical, 9
- Jury, 144, 344, 346, 348**
- Kahn test, 163**
- Kentucky, 79**
- Kerato-conjunctivitis, 272**
- Kline test, 163**
- Labels:**  
 for foods and drugs, 204-206  
 for milk, 195, 200
- Labor, hours of, 54, 275**
- Laboratories, 66, 69, 97, 137, 173**  
 liability of, 306  
 private, 138  
 regulation of, 50, 138
- Laboratory reports as evidence, 137**
- Lanham Act, 32**
- Laundries, 49**
- Law:**  
 adjective, 343  
 civil, 7  
 common, 7, 8, 16  
 defined, 6  
 private, 7
- Ice, 228**
- Ice cream, 184, 186, 187, 198, 307**
- Idaho, 60**
- Illegitimacy, 126**
- Illinois, 60, 174**
- Immigrants, medical inspection of, 22,  
 131**
- Immunization, 145-147. *See also* Vac-  
 cination**
- Incubation period, 130, 138**
- Indians, 28, 31, 251**
- Indigence, 143, 247, 290**
- Industrial hygiene, 71, 262-276**  
 liability of employers, 315  
 occupational diseases, 158-160, 268-  
 270  
 organization, 263-266  
 sanitation, 273-276  
*See also* Workmen's compensation
- Infant hygiene, 26, 31, 70, 97**
- Infantile paralysis, 129, 144, 182**
- Injunction, 157, 206, 223, 354, 356**



- public, 7
- public health, 9
- Roman, 7
- statutory, 16
- substantive, 343
- See also* Legislation
- Law enforcement, 343-356
- Law, violations of, 349
- Lead poisoning, 263, 270, 289
- Legislation:
  - class, 49
  - construing, 338-339
  - early health, 10-11
  - mandatory, 333
  - model, 338
  - municipal, 15, 341-342
  - preparation of, 327-338
  - repeal of, 337
  - state, 15, 327
  - See also* Law; Ordinances; Regulations
- Legislature:
  - functions of, 17, 59, 327-329
  - meetings of, 328
- Leprosarium, national, 148
- Leprosy, 30, 129, 148, 297, 317
- Liability:
  - copyright, 320
  - for animals, 314
  - for spreading disease, 313-315
  - libel and slander, 316-320
  - of barber, 314
  - of druggist, 313
  - of healer, 304
  - of hospital, 306
  - of industrial employer, 315-316. *See also* Workmen's compensation
  - of landlord, 314
  - of manufacturer or seller of drugs and biological products, 312
  - of manufacturer or seller of food, 306-309
  - of newspaper, 318
  - of nurse, 306
  - of owner of private laboratory, 306
  - of physician, 304-306
  - of state government, 279
  - of water company, 309-312
  - See also* Liability of health officers; Liability of municipal corporations
- Liability of health officers, 293-302
  - culpable errors, 297-298
  - destruction of property, 299-300
  - errors of judgment, 294-297
  - forcible examination of persons, 300-301
  - illegal actions, 298-299
  - libel and slander, 301
- Liability of municipal corporations, 279-292
  - for contracts, 290-292
  - for garbage disposal, 282
  - for nuisances, 290
  - for sewage disposal, 283-285
  - for water-borne disease, 285-289
- Libel and slander, 294, 301, 316-320
- Lice, 232, 258
- Licenses, 51, 71, 90-92, 222
  - for dogs, 147
  - for food, 214
  - for hospitals, 156
  - for ice cream, 198
  - for milk, 189-190
- Longshoremen, 265
- Louisiana, 12, 70, 80
- Lunches, school, 260
- Lupus, 150
- Lymphogranuloma, 129, 166
- Macaulay, Lord, 235
- Mails, use of, 26-28, 212
- Maine, 60
- Malaria, 129, 233
- Malfeasance, 223, 293
- Mandamus, 109, 258, 355
- Manicurists, 92
- Mann Act, 23
- Mantoux test, 150
- Manure, 232
- Marihuana, 204, 212
- Marine Hospital Service, 29, 62
- Marriage:
  - tuberculosis and, 160
  - venereal disease and, 174-177
- Marriage statistics, collection of, 117
- Maryland, 12
- Massachusetts:
  - cancer law, 72
  - contest over Sheppard-Towner law, 27

- early health legislation, 10-12
- in original death registration area, 120
- local board of health, 93
- medical inspection in schools, 253
- milk control, 182
- morbidity reporting, 132
- nuisance control, 217
- state board of health, 58, 60
- state health department, 60, 68
- tuberculosis sanatoria, 149, 155
- vaccination laws, 235
- vital statistics laws, 68, 117, 120
- Massachusetts Sanitary Commission, 11, 12
- Master and servant, 266
- Maternal hygiene, 26, 31, 70, 97
- Mayors, United States Conference of, 103
- Meat, 46, 209-210
- Medical examination of persons suspected of having venereal disease, 168-171
- Medical inspection of immigrants, 22, 131
- Medical jurisprudence, 9
- Medical practice. *See* Physician
- Medical records, industrial, 264
- Medical society, 60
- Medicine:
  - defined, 9
  - regulation of, 50
  - See also* Physician
- Medicines, patent, 35, 160
- Meningitis, 129, 272
- Mental Health Act, 30
- Mental hygiene, 30, 72, 98, 252
- Merit system, 75
- Metropolitan Health Law, New York, 13
- Mexico, 34, 228
- Michigan, 12, 133, 149, 174
- Midwives:
  - birth reports by, 123
  - licensing, 71, 72
  - regulation of, 50, 70, 165
  - stillbirth reports by, 124
- Milk, 181-197
  - administrative control, 185
  - adulteration of, 183, 184, 211
  - bacteria in, 182, 184
  - butterfat content of, 184
  - certified, 50, 182, 192, 194
  - chocolate, 184
  - containers, 195-196
  - defined, 181, 185
  - diseases due to, 182
  - filled, 210-211
  - imported, 211
  - inspection, 187-188
  - loose, 195
  - pasteurized, 150, 192-195
  - prices, 197
  - sanitation, 187-188
  - standards, 183-185
  - temperature, 188
  - tuberculin testing of cattle, 190-211
  - tuberculosis and, 150
  - vitamin D, 36
- Milk dealers, 49, 183, 187
  - licenses for 189-190
- Mill, John Stuart, quoted, 330
- Mining, 54, 262, 265, 270, 274
- Minnesota, 12, 69, 106
- Misbranding of foods and drugs, 27, 204-206
- Misdemeanor, 349
- Misfeasance, 113, 293
- Mississippi, 145
- Montreal, 182
- Morbidity. *See* Disease
- Mortality tables, 127
- Moses, Code of, 9
- Mosquitoes, 233
- Multiple Dwellings Law, New York, 6, 231
- Municipal corporations:
  - governmental functions of, 280-282
  - liability of, 279-292
  - powers and duties of, 78, 279
  - proprietary functions of, 279, 282
- Narcotic addicts, 30
- Narcotics, federal control of, 24, 31, 204, 212-213
- National Board of Health, 18
- National Health Officers Qualifying Board, 103
- National Housing Act, 231
- National Leprosarium, 148
- National Research Council, 33, 70

- National School Lunch Act, 31, 260
- Naturopaths, 106
- Nebraska, 17, 60
- Negligence:
  - of agents of municipal corporations, 280
  - of drug manufacturers, 312
  - of employers, 266-268, 315
  - of food vendors, 308
  - of health officials, 293
  - of municipal corporations, 279
- Negroes, 163, 164, 297
- Newburyport, 11
- Newfoundland, 39
- New Hampshire, 174, 344
- New Jersey, 8, 106, 120, 145, 174
- New York:
  - cancer law, 72
  - first bureau of child health, 70
  - health districts, 74
  - local government, 78
  - milk control, 181
  - premarital and antepartum examination, 174, 175
  - public health council, 60
  - tuberculosis sanatoria, 155
  - workmen's compensation laws, 266
- New York City, 13, 73, 82
- Newspapers, liability of, 318
- Noise, 219, 234
- Nonfeasance, 113, 223, 293
- North Carolina, 79, 145
- North Dakota, 60, 174
- Nuisances, 217-234
  - abatement of, 221, 222-225, 290
  - animals as, 233
  - classification of, 218-220
  - defined, 217-218
  - determination of, 220-221
  - early legislation regarding, 11, 217
  - hospitals as, 141, 156-158, 219, 306
  - industrial wastes as, 226, 284
  - insects as, 232-233
  - list of, 233
  - prevention of, 226
  - privies as, 220, 229
  - remedies, 223-226
  - responsibility for, 222-223, 290
  - water pollution as, 226-228
- Nurse:
  - as health officer, 106
  - contracting tuberculosis, 159
  - liability of, 304, 306
- Nursing:
  - public health, 71, 73, 113
  - regulation of, 50
  - school, 252
- Nutrition:
  - as health department function, 70
  - diseases of, 128
- Nutritional services in schools, 252, 260
- Oath of office, 102
- Occupational disease. *See* Industrial hygiene
- Occupational therapy, 161
- Occupations, regulation of, 50, 91
- Odors, 234
- Office of Defense Health and Welfare, 32
- Office of Inter-American Affairs, 32
- Officer:
  - de facto*, 102
  - de jure*, 102
  - distinguished from employee, 99-100
- Officer, health. *See* Health officer
- Ogden City, 319
- Ohio, 60, 94, 252
- Oklahoma, 60
- Olean, N. Y., 287
- Oleomargarine, 24, 25
- Ophthalmia neonatorum, 71, 129, 165-166, 305
- Opium, 204
- Optics, regulation of, 50
- Optometry, regulation of, 50
- Ordinances:
  - municipal, 86-87, 341-342
  - violations of, 344
  - See also* Regulations
- Oregon, 174
- Orthopedics, 72
- Osler, W., quoted, 163
- Osteopaths:
  - and vaccination, 246
  - as health officers, 105-106

INDEX

415

- as members of state board of health, 60
- as school physicians, 106, 256
- reporting births and deaths, 123
- Osteopathy, regulation of, 50
  
- Paper milk containers, 196
- Paresis, 163
- Pasteur treatment, 146
- Pasteurization, 150, 182, 192-195
- Patent medicines, 35, 160, 313
- Patents, 35, 36
- Pediculosis, 232, 258
- Pellagra, 69, 128
- Penalty, 64, 336, 350
- Penicillin, 163
- Pennsylvania, 60, 78
- Permits. *See* Licenses
- Personal hygiene defined, 4
- Personnel, of health departments, 75, 96
- Pest house. *See* Isolation hospital
- Pharmacist, 60, 106, 307, 313
- Pharmacy, regulation of, 50
- Philadelphia, 11, 77
- Phosphorus, 25, 269, 313
- Phthisis. *See* Tuberculosis
- Physical examination. *See* Examination, physical
- Physician:
  - and communicable disease, 133-136, 140, 153, 166-168, 301
  - as health officer, 61, 102-104
  - industrial, 264
  - liability of, 304-306
  - payment for services, 107, 112, 125, 143, 290-292
  - regulation of, 35, 50, 71
  - reports of births, 123
  - reports of communicable disease, 133-136, 145, 151, 166
  - reports of deaths, 124
  - school, 252, 255
- Physiotherapy, regulation of, 50
- Piggery, 222, 226
- Placarding, 140
- Plague, 50, 129, 143, 233
- Plato, 10
- Plumbing, regulation of, 50, 91, 230
  
- Plutarch, a health officer, 10
- Pneumokoniosis, 159, 270
- Podiatry, regulation of, 50
- Poisoning, industrial, 270
- Police power:
  - limitations on, 44
  - nature of, 40
  - scope of, 40, 41, 42, 238
- Poliomyelitis, 129, 144, 182
- Pork, 308
- Porto Rico, 12
- Postal laws, 26, 131, 212
- Premarital examination, 163, 174-177
- President, functions and duties of, 18, 341
- Privacy, right of, 320
- Privies, 220, 229. *See also* Toilets
- Production and Marketing Administration, 31
- Professions, regulation of, 50
- Proof, 350
- Property:
  - destruction of, 299
  - seizure of, 41, 188
  - use of private, 43, 299
- Prophylactic devices, 173
- Proprietary functions of cities, 279, 282
- Prostitutes, 167, 168, 169, 170, 171, 300
- Psittacosis, 129, 233
- Public, the, defined, 189
- Public health defined, 4, 5, 6, 12
- Public health law:
  - defined, 9
  - history of, 9-13
- Public health nursing, 71
- Public Health Service Act, 29
- Public Health Service Milk Ordinance, 89, 185, 194
- Public Health Service. *See* United States Public Health Service
- Public works, 32, 282
- Punishment, cruel, 55
  
- Quarantine, 138-140, 294-297
  - and habeas corpus, 142-143, 168-172
  - as power of Federal Government, 22, 62, 66

- as power of state, 45-46, 66
- expenses of, 143
- of carriers, 141-142
- of school children, 252
- origin of term, 10
- See also* Hospitalization; Isolation
- Quasi-judicial power, 63, 65, 84
- Quebec, 11
- Quo warranto, 115, 356
- Quorum, 85, 88
  
- Rabies, 129, 146, 147, 233, 292, 312, 314
- Radio, 34-35, 209
- Records, public, 126, 136
- References, use of 376-380
- Refuse. *See* Garbage
- Registrar of vital statistics, 123, 125
- Regulations, 15, 63-65, 341
  - board of health, 87-90
  - municipal, 15, 341
  - school, 43, 257
  - vital statistics, 123
  - See also* Ordinances
- Religion, freedom of, 44, 52, 146
- Remedies, legal, 354
- Removal of health officer, 114
- Reports:
  - birth, 119, 123, 351
  - communicable disease, 133-136, 309
  - death, 121, 124
  - laboratory, 137
  - morbidity, 133-136
  - stillbirth, 119, 124, 177
  - tuberculosis, 134, 137, 151-152
  - venereal disease, 166-168
  - See also* Vital statistics
- Research, 73
- Reservoirs, 228. *See also* Water
- Resignation of health officer, 114
- Rhode Island, 60, 69, 174
- Rockefeller Foundation, 80
- Rocky Mountain spotted fever, 129, 232, 235, 273
- Roosevelt, F. D., quoted, 58
- Root, Elihu, quoted, 333
- Rosenau, M. J., quoted, 237
- Rules. *See* Regulations
  
- Safety, 273
- Salary of health officer, 106-110, 114
- Sale, to public, 189
- Salvarsan, 163
- Samples, 188
- Sanatoria. *See* Hospitals
- San Francisco, 193
- Sanipractor, 106, 192, 322
- Sanitarian, 99
- Sanitary districts, 74
- Sanitation, 217-234
  - defined, 4
  - housing, 72, 230-232
  - industrial, 273-276
  - of streams, 226-228
  - plumbing, 50, 91, 230
  - privies, 229
  - school, 252, 254
  - shellfish, 69, 229, 284
- Sarcoma. *See* Cancer
- Scarlet fever:
  - as accident, 273
  - liability for, 281, 294
  - milk-borne, 182
  - reportable, 129, 134
  - serum, 36
- School buildings, 232, 254
- School hygiene, 70, 97, 251-261
  - administration, 253-255
  - communicable disease control, 252, 257
  - lunches, 260
  - organization, 255-256
  - physical examination of children, 252, 257
  - private and parochial schools, 146, 254, 261
  - teachers, 259-260
  - vaccination. *See* Vaccination
- School physician, 255-256
- Scrofula, 150
- Self-insurance, 267
- Senate, 17, 340
- Septic sore throat, 129, 182
- Serological test, 163, 164, 174, 175, 180
- Serum, 132, 145, 146, 271, 312
- Sewage:
  - as nuisance, 220, 223, 226-228
  - liability for, 281, 283-285

- Sewage disposal, as function of municipality, 283
- Sex hygiene, 178
- Shattuck, L., 11, 12
- Shellfish sanitation, 69, 229, 284
- Sheppard-Towner Law, 26, 70
- Silicosis, 159, 263, 267, 270
- Silver nitrate, 131, 165
- Slander, 301, 316-320
- Slaughterhouses, 52, 209, 216, 219, 234
- Smallpox:  
 as nuisance, 219  
 early American legislation, 11  
 immunization. *See* Vaccination  
 liability, 249, 281, 295, 297, 298  
 reportable, 129, 134, 136, 137
- Smith-Hughes Act, 251
- Smoke, 219, 274
- Soap, 203
- Social hygiene, 179
- Social Security Act, Federal, 26, 33, 70, 264
- South Carolina, 11, 60, 70, 217
- Spitting, 160
- Sputum, 150, 153, 161
- State board of health, 12, 60, 61
- State constitutions, 15, 36, 331
- State disease control, 132
- State health department, 58
- State health officer, 61
- State versus state, 57, 347
- Statute of limitations, 267
- Statutes, 329  
*See also* Law; Legislation
- Sterilization, eugenical, 49, 55-57
- Stillbirths, 119, 124, 177
- Stone, H. F., quoted, 329
- Stream pollution, 226-228
- Subpoena, 152, 153, 352
- Sulpha drugs, 164
- Summons, 349
- Supreme Court, United States, 19, 20, 347, 359
- Suspected diseases, 135
- Swimming pools, 69, 314
- Syphilis, 162-164  
 examination for, 300  
 reportable, 129  
*See also* Venereal disease
- Taxing power:  
 of Congress, 24, 212  
 of counties, 81  
 of health departments, 91  
 of state, 44, 198
- Tea, 210
- Teachers, 154, 158, 259-260, 273, 309
- Teeth, 311,
- Tennessee, 60
- Tenosynovitis, 263
- Territories, federal, 28
- Testimony, 352
- Tetanus, 129, 146, 232, 305
- Texas, 12, 34, 117
- Theatres, closing of, 144
- Toilets, 162, 229, 252, 275. *See also* Privies
- Toronto, 11
- Tort, 279, 303, 308
- Town clerk, 119, 123
- Towns, 78
- Toxin-antitoxin, 146
- Toxoid, 146
- Trachoma, 129, 258
- Trauma, 271, 321
- Treaties, 22, 28
- Trichinosis, 129, 147, 233, 308
- Tuberculin test, 150-151
- Tuberculin testing of cattle, 190, 211, 228
- Tuberculosis, 27, 149-161  
 administrative control, 151  
 bovine, 150, 160, 182, 190  
 bureaus of, 151  
 contacts and carriers, 153-154  
 hospitals, 154-158, 220  
 industrial aspects, 158-160, 269  
 libel and, 317  
 marriage and, 160  
 records, 152-153  
 reportable, 134, 137, 151-152  
 spitting, 160-161  
 teachers and, 158, 259, 281  
 treatment, 161
- Tularemia, 129, 147, 233, 273, 309
- Typhoid fever:  
 as accident, 269, 270-271  
 carriers, 136, 142  
 from insects, 232  
 from shellfish, 229

- immunization, 145, 235
- liability for, 286-289, 296, 305
- libel, 319
- milk-borne, 182
- reportable, 129, 135
- water-borne, 285-289, 309-312
- Typhoid Mary, 142
- Typhus fever, 129, 232
  
- Undertakers, 50, 71, 124
- Undulant fever, 129, 182, 191, 273, 307
- United States Bureau of Animal Industry, 22, 31, 209
- United States Bureau of the Census, 120
- United States Bureau of Dairy Industry, 31
- United States Bureau of Home Economics, 31
- United States Bureau of Labor Statistics, 32, 265
- United States Bureau of Mines, 31, 265
- United States Bureau of Narcotics, 31, 213
- United States Children's Bureau, 30, 31, 75, 265
- United States Conference of Mayors, 103
- United States Food and Drug Administration, 22, 30, 202
- United States Marine Hospital Service, 29, 62
- United States Office of Education, 32, 251
- United States Office of Indian Affairs, 31, 151
- United States Pharmacopoeia, 89, 203
- United States Public Health Service, 22, 29, 33, 62, 75, 79, 129, 163, 228, 236, 264
- United States Supreme Court, 19, 20, 347
- United States Veterans Administration, 32
- United States Women's Bureau, 32, 265
- UNRRA, 32
  
- Vaccination, 235-250
  - certificate, 247
  - compulsory, 49, 57, 86, 233-240
  - expenses of, 247-248
  - free, 247
  - injures from, 249
  - judicial notice of, 239
  - legal status of, 236-240
  - liability for impure vaccine, 281
  - methods of, 146, 246
  - of school children, 86, 241-246
- Vagrancy, 173
- Venereal disease, 27, 162-180
  - examination for, 168-171, 172, 174, 300
  - exclusion of children from school, 258
  - exposure to, 177, 289
  - laboratory test, 173
  - libel and slander, 317
  - quarantine, 171-173
  - reporting, 135, 137, 166-168
- Venice, quarantine in, 10
- Ventilation, 252, 275
- Veterans Administration, United States, 18, 32
- Veterinarians, 191, 304, 312
  - as local health officers, 106
  - regulation of, 50
- Virgin Islands, 60
- Virginia, 12, 117
- Viruses, 22, 238
- Vital statistics, 117-127
  - collection of, as government function, 66, 67, 68, 97, 117
  - value to individuals, 121, 127
- Vitamins, 35, 204, 206, 208
- Vocational education, 251
- Vouchers, 93
- Vulvovaginitis, 164
  
- Wage and Hour Law, 23, 25, 276
- Wages, minimum, 28, 54
- Walsh-Healey Act, 265
- Warranty, 306
- Washing facilities, 252, 274-275
- Washington State, 79, 105, 117, 119, 174, 267
- Wassermann test, 163, 176

INDEX

419

Wastes, industrial, 226, 284

Water:

disease due to, 263, 285-289, 309-312

pollution of, 226-228

shutting off, 312

state control of, 66

tidal, 227, 284

Water supply as function of municipality, 280

Weeds, as nuisance, 217, 234

Welch, W. H., quoted, 10

Welfare, general, 21, 26

West Virginia, 60, 106, 145

Wilson, Woodrow, quoted, 6

Winslow, C.-E. A., quoted, 4

Wisconsin, 174

Witness, 351-354

expert, 353

summoned by state boards of health, 65

to contract made by health officer, 112

Women:

health of employed, 29, 54

hours of labor, 54, 276

on boards of health, 60, 83, 102

Women's Bureau, United States, 32, 265

Workers, health of, 262

Workmen's compensation:

cancer and, 321

liability under, 266, 315

occupational diseases and, 268-270

state laws on, 266-270

tuberculosis and, 158-160

upheld by Supreme Court, 55

vaccination and, 249

World Health Organization, 82

X-ray, 150

Yellow fever, 10, 77, 129, 232

Zoning, 52, 230