

**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."<sup>7</sup>

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.